



June 26, 2020

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

Ms. Hasmik Yaghobyan
County of Los Angeles
500 West Temple Street, Room 603
Los Angeles, CA 90012

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

Re: Draft Proposed Decision, Schedule for Comments, and Notice of Hearing
Accomplice Liability for Felony Murder, 19-TC-02
Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)
County of Los Angeles, Claimant

Dear Ms. Li and Ms. Yaghobyan:

The Draft Proposed Decision for the above-captioned matter is enclosed for your review and comment.

Written Comments

Written comments may be filed on the Draft Proposed Decision by **July 17, 2020**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.¹

You are advised that comments filed with the Commission on State Mandates (Commission) are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Refer to http://www.csm.ca.gov/dropbox_procedures.php on the Commission's website for electronic filing instructions. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

Hearing

This matter is set for hearing on **Friday, September 25, 2020** at 10:00 a.m. via Zoom. The Proposed Decision will be issued on or about September 11, 2020.

¹ Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

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Please notify Commission staff not later than the Wednesday prior to the hearing that you or a witness you are bringing plan to testify and please specify the names of the people who will be speaking for inclusion on the witness list and so that detailed instructions regarding how to participate as a witness in this meeting on Zoom can be provided to them. When calling or emailing, please identify the item you want to testify on and the entity you represent. The Commission Chairperson reserves the right to impose time limits on presentations as may be necessary to complete the agenda.

If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,

A handwritten signature in blue ink, appearing to read "Heather Halsey", with a long horizontal flourish extending to the right.

Heather Halsey
Executive Director

ITEM ____

TEST CLAIM

DRAFT PROPOSED DECISION

Penal Code Sections 188, 189, and 1170.95 as added or amended by
Statutes 2018, Chapter 1015 (SB 1437)

Accomplice Liability for Felony Murder

19-TC-02

County of Los Angeles, Claimant

EXECUTIVE SUMMARY

Overview

This Test Claim filed by the County of Los Angeles (claimant) addresses Statutes 2018, Chapter 1015, which added Penal Code sections 188 and 189 and amended 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 certain other felony offences, 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 application of the felony-murder rule and the natural and probable consequences doctrine to only 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

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.

those 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.

Staff finds, however, that the test claim statute, and the costs and activities alleged by the claimant, do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 because the test claim statute eliminated a crime within the meaning of Government Code section 17556(g). Staff recommends that the Commission on State Mandates (Commission) deny this Test Claim.

Procedural History

Statutes 2018, chapter 1015, was enacted on September 30, 2018, and became effective on January 1, 2019. The claimant filed the Test Claim on December 31, 2019. The Department of Finance (Finance) filed comments on the Test Claim on June 19, 2020. Commission staff issued the Draft Proposed Decision on June 26, 2020.⁴

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with 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 and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”⁵

Claims

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

Issue	Description	Staff Recommendation
Was the Test Claim 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	<i>Timely filed</i> – The test claim statute became effective on January 1, 2019. The claimant filed this Test Claim on December 31, 2019, within 12

⁴ Exhibit D, Draft Proposed Decision.

⁵ *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue	Description	Staff Recommendation
	<p>order, or within 12 months of incurring costs as a result of a statute or executive order, whichever is later.”</p> <p>Section 1183.1(c) of the Commission’s regulations, effective April 1, 2018, defines “12 months” as 365 days.⁶</p>	<p>months of the effective date of the test claim statute.</p>
<p>Does the test claim statute impose a reimbursable state-mandated program on local agencies under article XIII B, section 6 of the California Constitution?</p>	<p>The test claim statute amended Penal Code sections 188 and 189, which define murder and malice, 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 crime and acted with reckless indifference to human life.</p> <p>The test claim statute added section 1170.95 to the Penal Code which sets forth a petition process requiring county district attorneys and public defenders, when appointed, to participate in hearings to vacate convictions under the felony-murder rule or the natural and probable causes doctrine and to resentencing petitioners solely on their other crimes. To be eligible for a hearing, the person convicted of murder had to have been convicted of murder under the felony-murder rule or the natural and probable causes doctrine and could not have been convicted under Penal Code Sections 188 and 189 as amended by the test claim</p>	<p><i>Deny</i> – Sections 188 and 189 of the Penal Code do not impose any requirements on local government and, thus, they do not impose a state-mandated program.</p> <p>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.</p> <p>The test claim statute eliminated the crime of murder under the felony-murder rule and the natural and probable consequences doctrine unless the defendant’s intent to kill is proved beyond a reasonable doubt or the defendant was a major participant acting with reckless indifference to human life. In so doing, the test claim statute eliminated a crime within the meaning of Government Code section 17556(g) and therefore, the Commission cannot find costs mandated by the state.</p>

⁶ California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

Issue	Description	Staff Recommendation
	<p>statute, because the petitioner’s intent to kill was not proven beyond a reasonable doubt and the petitioner was not a major participant in the crime acting with reckless indifference to human life.</p> <p>Government Code section 17556 provides in relevant part: “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 any one of the following:</p> <p>¶ . . . ¶</p> <p>(g) The statute . . . eliminated a crime or infraction . . .”</p>	

Staff Analysis

A. This 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.⁷

The test claim statute became effective on January 1, 2019.⁸ The claimant filed this Test Claim on December 31, 2019.⁹ Since the deadline to file the Test Claim was by January 1, 2020, this Test Claim, filed on December 31, 2019, was timely filed within 12 months of the effective date of the test claim statute.

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

The test claim statute amended sections 188 and 189 of the Penal Code, which defined murder and malice, to limit the definition of murder to be applicable only to the actual killer, someone

⁷ California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

⁸ Statutes 2018, chapter 1015.

⁹ Exhibit A, Test Claim, page 1.

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. Accordingly, staff finds that Penal Code sections 188 and 189 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.

The test claim statute added section 1170.95 to the Penal Code which sets forth a petition and hearing process. To be eligible for a hearing, a person convicted of first- or second-degree murder under the felony-murder rule or the natural and probable causes doctrine and could not have been convicted under Penal Code Sections 188 and 189 as amended by the test claim statute, because the petitioner’s intent to kill was not proved beyond a reasonable doubt or the petitioner was not a major participant in the crime acting with reckless indifference to human life. The burden is on the person convicted of murder to file and serve a petition requesting resentencing.¹⁰ Although the statute states that the “person convicted of felony murder or murder under a natural and probable consequences theory” will file the petition, the more likely scenario is that the person’s defense counsel will write, file, and serve the petition. After the petition is filed, the court reviews the petition for sufficiency. If requested in the petition, the court shall also appoint counsel to the petitioner.¹¹

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 petition is served.¹² 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

¹⁰ Penal Code section 1170.95 (a) and (b)(1).

¹¹ Penal Code section 1170.95(c).

¹² Penal Code section 1170.95(c).

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.¹³

The petitioners have a constitutional right to assistance of counsel.¹⁴ The right to counsel “applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake,”¹⁵ which includes a right to counsel during these petition proceedings. In California, indigent defendants in criminal proceedings are represented by the county public defender’s office and the state is represented by the county district attorney’s office. Therefore, Penal Code section 1170.95 imposes new requirements on county district attorneys and public defenders to represent their clients during the petition proceedings under Penal Code section 1170.95.

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).

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).

Conclusion

Based on the forgoing analysis, staff finds that the test claim statute does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution.

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Decision to deny the Test Claim and authorize staff to make any technical, non-substantive changes to the Proposed Decision following the hearing.

¹³ Penal Code section 1170.95(d).

¹⁴ *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 815 citing *Gideon v. Wainwright* (1963) 372 U.S. 335.

¹⁵ *Mempa v. Rhay* (1967) 389 U.S. 128, 134; and Government Code section 27706.

BEFORE THE
 COMMISSION ON STATE MANDATES
 STATE OF CALIFORNIA

<p>IN RE TEST CLAIM</p> <p>Penal Code sections 188, 189, and 1170.95 Statutes 2018, Chapter 1015 (SB 1437) Filed on December 31, 2019 County of Los Angeles, Claimant</p>	<p>Case No.: 19-TC-02</p> <p><i>Accomplice Liability for Felony Murder</i></p> <p>DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.</p> <p><i>(Adopted September 25, 2020)</i></p>
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DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 25, 2020. [Witness list will be included in the adopted Decision.]

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/modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote will be included in the adopted Decision], as follows:

Member	Vote
Lee Adams, County Supervisor	
Mark Hariri, Representative of the State Treasurer, Vice-Chairperson	
Jeannie Lee, Representative of the Director of the Office of Planning and Research	
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	
Sarah Olsen, Public Member	
Carmen Ramirez, City Council Member	
Jacqueline Wong-Hernandez, Representative of the State Controller	

Summary of the Findings

This Test Claim filed by the County of Los Angeles (claimant) addresses Statutes 2018, Chapter 1015, which added Penal Code sections 188 and 189 and amended 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.¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹

¹⁶ Penal Code sections 187, 188.

¹⁷ *People v. Dillon* (1983) 34 Cal.3d 441, 467-468; Penal Code section 189, as last amended by Statutes 2010, chapter 178.

¹⁸ *People v. Chiu* (2014) 59 Cal.4th 155, 158.

¹⁹ 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. ²⁰
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. ²¹
06/26/2020	Commission staff issued the Draft Proposed Decision. ²²

²⁰ Exhibit A, Test Claim.

²¹ Exhibit B, Finance’s Comments on the Test Claim.

²² Exhibit D, Draft Proposed Decision.

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.²³ 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 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.

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.²⁴

The felony-murder rule derives from English law.²⁵ In 1850, the California Legislature codified the felony-murder rule.²⁶ In 1872, the Legislature enacted the Penal Code with the inclusion of

²³ 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.”

²⁴ *People v. Dillon* (1983) 34 Cal.3d 441, 476-477 citing Penal Code section 190 et seq.

²⁵ Exhibit X, 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).

²⁶ Statutes 1850, chapter 99, page 229; *People v. Dillon* (1983) 34 Cal.3d 441, 465.

the felony-murder rule codified at Penal Code section 189.²⁷ 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 entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof."²⁸

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."²⁹

The application of the felony-murder rule has been strongly criticized.³⁰ Three states have abolished it and several others have tempered its impact by lessening the degree of murder or homicide that can be charged.³¹ The California Supreme Court has characterized the felony-murder rule as a "'barbaric' concept that has been discarded in the place of its origin"³² and "a 'highly artificial concept' which 'deserves no extension beyond its required application'"³³ 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.'"³⁴

²⁷ *People v. Dillon* (1983) 34 Cal.3d 441, 467-468.

²⁸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197.

²⁹ *People v. Ford* (1964) 60 Cal.2d 772, 795.

³⁰ *People v. Dillon* (1983) 34 Cal.3d 441.

³¹ Exhibit X, 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).

³² *People v. Dillon* (1983) 34 Cal.3d 441, 463 citing *People v. Phillips* (1966) 64 Cal.2d 574, 583, footnote 6.

³³ *People v. Dillon* (1983) 34 Cal.3d 441, 463 citing *People v. Phillips* (1966) 64 Cal.2d 574, 582.

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

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*.³⁵ 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.³⁶ 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.³⁷ 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.³⁸ 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 this case and reduced the defendant’s sentence from first-degree murder to second-degree murder.³⁹

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.⁴⁰

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].’”⁴¹

The nontarget offense is a natural and probable consequence if it was foreseeable by an objective, reasonable person.⁴² Like the felony-murder rule, the natural and probable

³⁵ *People v. Dillon* (1983) 34 Cal.3d 441, 465.

³⁶ *People v. Dillon* (1983) 34 Cal.3d 441, 450.

³⁷ *People v. Dillon* (1983) 34 Cal.3d 441, 451-452.

³⁸ *People v. Dillon* (1983) 34 Cal.3d 441, 482.

³⁹ *People v. Dillon* (1983) 34 Cal.3d 441, 488-489.

⁴⁰ Exhibit X, Goldstick, *Accidental Vitiating: 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).

⁴¹ *People v. Chiu* (2014) 59 Cal.4th 155, 158 citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1117. Internal citations omitted in original.

⁴² *People v. Chiu* (2014) 59 Cal.4th 155, 161-162.

consequences doctrine has been strongly criticized by legal scholars.⁴³ Indeed, the majority of states do not adhere to it and the Model Penal Code does not include it.⁴⁴

The California Supreme Court took another step toward reestablishing the relationship between criminal liability and culpability in *People v. Chiu*.⁴⁵ In that case, high school students were gathered after school. The defendant made a remark to a young woman. Her friends engaged in a verbal exchange with 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.⁴⁶ The defendant was convicted of first-degree premeditated murder.⁴⁷ 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.⁴⁸ 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...."⁴⁹ The court held that the natural and probable consequences doctrine cannot support a conviction of first-degree premeditated murder.⁵⁰

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 of 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*⁵¹ (hereinafter *Enmund*), presented a constitutional challenge under the Eighth Amendment ban against cruel and unusual

⁴³ Exhibit X, 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 Vitiatio: 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).

⁴⁴ Exhibit X, 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).

⁴⁵ *People v. Chiu* (2014) 59 Cal.4th 155.

⁴⁶ *People v. Chiu* (2014) 59 Cal.4th 155, 159-160.

⁴⁷ *People v. Chiu* (2014) 59 Cal.4th 155, 158.

⁴⁸ *People v. Chiu* (2014) 59 Cal.4th 155, 164-165.

⁴⁹ *People v. Chiu* (2014) 59 Cal.4th 155, 166.

⁵⁰ *People v. Chiu* (2014) 59 Cal.4th 155, 166-167.

⁵¹ *Enmund v. Florida* (1982) 458 U.S. 782.

punishment.⁵² 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.⁵³ Even though Enmund did not kill, attempt to kill, or intend to kill, he was convicted of first-degree murder and sentenced to death.⁵⁴ 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.⁵⁵

In *Tison v Arizona*⁵⁶ (hereinafter *Tison*) the issue was whether the rule in *Enmund* had been properly applied in the state court.⁵⁷ 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 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.⁵⁸ Applying the felony-murder rule, the brothers were convicted of four counts of murder and sentenced to death.⁵⁹ 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.⁶⁰ 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.⁶¹ 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.'" ⁶² The court held that engaging in criminal acts that present a grave risk of death

⁵² *Enmund v. Florida* (1982) 458 U.S. 782, 787.

⁵³ *Enmund v. Florida* (1982) 458 U.S. 782, 783-784.

⁵⁴ *Enmund v. Florida* (1982) 458 U.S. 782, 785 and 787.

⁵⁵ *Enmund v. Florida* (1982) 458 U.S. 782, 800-801.

⁵⁶ *Tison v Arizona* (1987) 481 U.S. 137.

⁵⁷ *Tison v Arizona* (1987) 481 U.S. 137, 145-146.

⁵⁸ *Tison v Arizona* (1987) 481 U.S. 137, 139-141.

⁵⁹ *Tison v Arizona* (1987) 481 U.S. 137, 141-143.

⁶⁰ *Tison v Arizona* (1987) 481 U.S. 137, 150-152.

⁶¹ *Tison v Arizona* (1987) 481 U.S. 137, 156-157 [noting as examples the defenses of self-defense and provocation].

⁶² *Tison v Arizona* (1987) 481 U.S. 137, 157.

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.⁶³

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*⁶⁴ considered the felony-murder special circumstances conviction of a getaway driver who was sentenced to life imprisonment without parole.⁶⁵ At issue was Proposition 115⁶⁶ 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.⁶⁷ The court had never reviewed a case involving death penalty eligibility for aiders and abettors.⁶⁸ 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.⁶⁹ The court reversed the sentence of life imprisonment without parole.⁷⁰

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.

⁶³ *Tison v Arizona* (1987) 481 U.S. 137, 157-158.

⁶⁴ *People v. Banks* (2015) 61 Cal.4th 788.

⁶⁵ *People v. Banks* (2015) 61 Cal.4th 788, 794-795.

⁶⁶ Proposition 115, Primary Election (June 5, 1990).

⁶⁷ *People v. Banks* (2015) 61 Cal.4th 788, 798.

⁶⁸ *People v. Banks* (2015) 61 Cal.4th 788, 800-801.

⁶⁹ *People v. Banks* (2015) 61 Cal.4th 788, 800-805.

⁷⁰ *People v. Banks* (2015) 61 Cal.4th 788, 812.

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.”⁷¹

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.⁷²

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:

(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

⁷¹ Exhibit X, Senate Concurrent Resolution 48 (2017-2018 Reg. Sess.), resolution chapter 175.

⁷² Statutes 2018, chapter 1015, section 1(f).

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 been 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.⁷³ 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.⁷⁴ The Senate Appropriations Committee also noted the downstream savings on incarceration costs.⁷⁵ 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."⁷⁶

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

⁷³ Exhibit X, 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.

⁷⁴ Exhibit X, 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.

⁷⁵ Exhibit X, Senate Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), May 14, 2018, page 1.

⁷⁶ *People v. Munoz* (2019) 39 Cal.App.5th 738, 763.

convictions vacated under Penal Code section 1170.95.⁷⁷ The People moved to dismiss the petitions on the ground that the test claim statute, which the voters did not approve, invalidly amended Propositions 7⁷⁸ and 115⁷⁹, which increased the punishments for murder and augmented the list of predicate offenses for first-degree felony murder liability under Penal Code section 189.⁸⁰ 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.⁸¹ The Legislature may also amend statutes enacted by the voters if the initiative neither authorizes nor prohibits such action.⁸² 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 away from, the initiatives and, therefore, the test claim statute was constitutional in that respect.⁸³

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.⁸⁴ 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 murder⁸⁵ and the punishment for murder.⁸⁶ 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

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

⁷⁸ Proposition 7, General Election (Nov. 7, 1978).

⁷⁹ Proposition 115, Primary Election (June 5, 1990).

⁸⁰ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 274.

⁸¹ California Constitution, article II, section 10, subdivision (c), *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 279.

⁸² 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.

⁸³ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 275.

⁸⁴ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 280-281.

⁸⁵ “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.)

⁸⁶ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 281.

amended the mental state requirements for murder.”⁸⁷ The court held that the test claim statute did not amend Proposition 7.⁸⁸

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 115.⁸⁹ The court held that the test claim statute did not deprive the voters from what they enacted under either initiative.⁹⁰

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.⁹¹

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 1170.95.⁹² 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

⁸⁷ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 282.

⁸⁸ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 286.

⁸⁹ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 287, footnote omitted.

⁹⁰ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 289.

⁹¹ *People v. Lopez*, California Supreme Court, Case No. S258175, review granted November 13, 2019, on the following question:

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?

⁹² Exhibit A, Test Claim, page 5.

malice, unless he or she personally committed the homicidal act.”⁹³ 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));
- 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.⁹⁴ [¶] . . . [¶]

[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

⁹³ Exhibit A, Test Claim, Section 5, page 2.

⁹⁴ Exhibit A, Test Claim, Section 5, pages 6-7. 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.

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.⁹⁵

The claimant had the following costs 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	\$1,767,447⁹⁶

Relying on the statistics provided to the Senate Committee on Appropriations by the California Department of Corrections and Rehabilitation, the claimant's statewide cost estimate is about \$18,153,459.⁹⁷

The claimant alleges that there are no funding sources to cover these costs.⁹⁸ 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."⁹⁹

⁹⁵ Exhibit A, Test Claim, Section 5, pages 7-8. 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.

⁹⁶ Exhibit A, Test Claim, Section 5, page 8; see also Section 6, Declaration of Sung Lee, Departmental Finance Manager, Los Angeles County Public Defender's Office and Declaration of Ping Yu, Accounting Officer, County of Los Angeles District Attorney's Office.

⁹⁷ Exhibit A, Test Claim, Section 5, pages 9-10; see also Senate Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.) May 14, 2018, page 3.

⁹⁸ Exhibit A, Test Claim, Section 5, pages 10.

⁹⁹ Exhibit A, Test Claim, Section 5, page 13.

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.”¹⁰⁰

IV. Discussion

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

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.”¹⁰¹ Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government]”¹⁰²

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.¹⁰³
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.¹⁰⁴
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.¹⁰⁵
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

¹⁰⁰ Exhibit B, Finance’s Comments on the Test Claim, at p. 2.

¹⁰¹ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

¹⁰² *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

¹⁰³ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

¹⁰⁴ *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].

¹⁰⁵ *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.

reimbursable if an exception identified in Government Code section 17556 applies to the activity.¹⁰⁶

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.¹⁰⁷ The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.¹⁰⁸ 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.”¹⁰⁹

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.¹¹⁰

The test claim statute became effective on January 1, 2019,¹¹¹ 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.¹¹² 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.

¹⁰⁶ *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.

¹⁰⁷ *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

¹⁰⁸ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

¹⁰⁹ *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.

¹¹⁰ California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

¹¹¹ Statutes 2018, chapter 1015.

¹¹² Exhibit A, Test Claim, page 1.

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 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 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.¹¹³

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.¹¹⁴ Although the statute states that the person convicted will file the petition, the more likely scenario, as alleged by the claimant, is that the petitioner’s defense counsel will write, file, and serve the petition. After the petition is filed, the court will review the petition for sufficiency. If requested in the petition, the court shall also appoint counsel to the petitioner.¹¹⁵

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 petition is served.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ 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

¹¹³ Penal Code section 1170.95(a).

¹¹⁴ Penal Code section 1170.95(a) and (b)(1).

¹¹⁵ Penal Code section 1170.95(c).

¹¹⁶ Penal Code section 1170.95(c).

¹¹⁷ Penal Code section 1170.95(d)(2).

¹¹⁸ Penal Code section 1170.95(d)(3).

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.¹¹⁹

The petitioners have a constitutional right to assistance of counsel.¹²⁰ The right to counsel “applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake,”¹²¹ which includes a right to counsel during petition proceedings under section 1170.95. 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 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,¹²² 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.” 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.

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.¹²³ 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.”¹²⁴ 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

¹¹⁹ Penal Code section 1170.95(d)(3).

¹²⁰ *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 815 citing *Gideon v. Wainwright* (1963) 372 U.S. 335.

¹²¹ *Mempa v. Rhay* (1967) 389 U.S. 128, 134; Government Code section 27706.

¹²² California Constitution, article III, section 3.5.

¹²³ 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.

¹²⁴ Statutes 2018, chapter 1015, section 1(e).

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.¹²⁵ 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.

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.

¹²⁵ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 282.

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 June 26, 2020, I served the:

- **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing issued June 26, 2020**

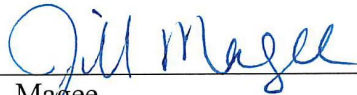
Accomplice Liability for Felony Murder, 19-TC-02

Penal Code Sections 188, 189, and 1170.95; 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 June 26, 2020 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

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Mailing List

Last Updated: 4/22/20

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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