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August 10, 2020

Ms. Keely Bosler, Chairperson
Commission on State Mandates
980 9th St., Ste. 300
Sacramento, CA

RECEIVED
August 10, 2020
Commission on
State Mandates
LATE FILING

RE: Accomplice Liability for Felony Murder, 19-TC-02 - Support

Dear Ms. Bosler:

On behalf of the California Public Defenders Association, the largest statewide organization of criminal defense practitioners, with a membership in excess of 4000 individuals, this letter is being submitted to express our support of the test claim submitted by Los Angeles County, which is scheduled for hearing on September 25, 2020, and to explain the basis for our collective disagreement with the analysis and conclusion of the Department of Finance’s staff, as set forth in its draft proposed decision regarding 19-TC-02 – at least as far as Penal Code section 1170.95 is concerned.

In its draft decision, DOF staff acknowledges that, by enacting Penal Code section 1170.95, Senate Bill 1437 does impose additional requirements on county district attorneys and appointed counsel for indigent petitioners, which did not previously exist; however staff concludes that these new costs are not reimbursable under article XIII B, section 6 of the California Constitution, because, in addition to enacting Penal Code section 1170.95, Senate Bill 1437 also amended Penal Code sections 188 and 189, thereby eliminating a crime, within the meaning of Government Code section 17556(g). (Draft Proposed Decision, p. 3.) This reasoning is flawed for two reasons: (1) No crime was eliminated by SB 1437’s amendments to section 188 and 189; these amendments merely modified the elements of an existing crime, the crime of Murder, and (2) Even if SB 1437 could be viewed as eliminating a crime (by virtue of its amendments to sections 188 and 189), Penal Code section 1170.95, the resentencing provision of SB 1147, does not relate directly to the enforcement of the crime or infraction.

I. SUBDIVISION (g) OF GOVERNMENT CODE SECTION 17556 HAS NO APPLICATION TO SB 1437, BECAUSE IT NEITHER ELIMINATED A CRIME NOR CHANGED THE PENALTY FOR A CRIME

Government Code section 17556 prohibits the commission from finding costs mandated by the state to be reimbursable, if, after a hearing, the commission finds that ¶“(g) The statute 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 relating directly to the enforcement of the crime or infraction.” (Gov. Code, § 17556 (g).)



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SB 1437 did not create a new crime, eliminate a crime, or change the penalty for a crime. As far back as 1872, the crime of Murder, codified in California’s Penal Code, at section 187, has been defined as “the unlawful killing of a human being, or a fetus, with malice aforethought.” Also, since 1872, “Malice” has been defined by Section 188 of the Penal Code, as “express” [“when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature”] and “implied” [“when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart”].

With the enactment of SB 1437, the definition of malice was clarified by the Legislature, to provide that “malice shall not be imputed to a person based solely on his or her participation in a crime.” (2018 Cal. Legis. Serv. Ch. 1015 (S.B. 1437), § 2.) With this change, the Legislature did not eliminate the crime of murder or change its penalty – it amended the definition of “malice”.

Senate Bill 1437 also amended Penal Code section 189, which, since 1872, has described the two degrees of Murder – murder in the first degree and murder in the second degree. It did not eliminate either crime; nor, did it change the penalty for either crime. The pertinent amendments to section 189 clarified the circumstances under which a perpetrator or attempted perpetrator of a predicate felony offense, in which death occurs, is criminally liable for murder, restricting those circumstances to require that: (1) the person be the actual killer, or (2) the person, intending to kill, aided and abetted the commission of a first degree murder, or (3) the person was a major participant in the underlying felony and acted with reckless indifference to human life. (2018 Cal. Legis. Serv. Ch. 1015 (S.B. 1437), § 3.) These amendments neither eliminated the crime of Murder, nor did it change the penalty for conduct punishable as murder.

II. EVEN IF THE AMENDMENTS TO PENAL CODE SECTION 189 COULD BE VIEWED AS ELIMINATING A CRIME, PENAL CODE SECTION 1170.95, THE RESENTENCING PROVISION OF SB 1437, DOES NOT DIRECTLY RELATE TO THE “ENFORCEMENT” OF ANY CRIME

DOF’s proposed decision quotes, but then entirely ignores, the limiting language in subdivision (g) of Government Code section 17556, “but only for that portion of the statute *relating directly to the enforcement* of the crime or infraction.” Thus, its flawed conclusion.



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Assuming, arguendo, that SB 1437, in part, eliminated a class of conduct formerly punishable as murder (death resulting from certain felonious acts committed by a person acting as an aider or abettor to the principal, who was not the killer, did not intend to kill another person, was not a major participant, and did not display reckless indifference to human life), the resentencing statute enacted by SB 1437, Penal Code section 1170.95, does *not* relate directly to the *enforcement* of any crime.

The common understanding of “enforce the law” is “to make sure that people obey the law.”¹ Nothing about the proceedings now authorized by Penal Code section 1170.95 could reasonably construed as “relating directly to the enforcement of the crime” of Murder. Such an interpretation makes no sense. Resentencing proceedings aren’t law enforcement – they are a type of “justice enforcement.” They come into existence when the lawmakers decide that prior treatment of specified acts was unjust, modify the treatment of those who commit those acts, and provide relief to those who, at some point in the past, committed those acts. They exist to effectuate fair and just treatment of individuals under the laws. When it enacted SB 1437, the California Legislature concluded that it was unjust to punish certain felonious acts resulting in unintended deaths as Murder, and so, in addition to amending Penal Code sections 188 and 189, it enacted Penal Code section 1170.95, to restore justice to those eligible individuals who were convicted and sentenced for the crime of Murder based on felonious acts they committed in the past, but who could not be convicted of murder today. This cannot reasonably come within the meaning of “law enforcement.”

CONCLUSION

The considerable financial burden SB 1436 has placed on local government, specifically those reasonable and necessary expenses incurred by the counties in providing legal services to handle these complex postconviction proceedings, are reimbursable. The 4000 members of the California Public Defenders Association support the test claim and urge the honorable members of the Commission to reject the proposed decision and grant the test claim.

Respectfully submitted,

s/LAURA ARNOLD/

LAURA ARNOLD
First Vice President & Amicus Chair
California Public Defenders Association

¹ <https://www.merriam-webster.com/dictionary/enforce%20the%20law#:~:text=%3A%20to%20make%20sure%20that%20people,is%20to%20enforce%20the%20law>.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano 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 11, 2020, I served the:

- **California Public Defenders Association's (CPDA's) Late Comments on the Draft Proposed Decision filed August 10, 2020**

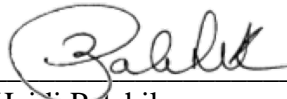
Accomplice Liability for Felony Murder, 19-TC-02

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 August 11, 2020 at Sacramento, California.



Heidi Palchik

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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/4/20

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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