



ALAMEDA COUNTY
PUBLIC DEFENDERS

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August 10, 2020

RECEIVED
August 17, 2020
**Commission on
State Mandates**

LATE FILING

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

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

Dear Ms. Bosler:

I submit these comments in support of test claim 19-TC-02 on behalf of the Alameda County Public Defenders Office. Alameda County is the seventh largest county in the state. In 2019 alone, our office was appointed to represent 86 habeas corpus petitioners who were seeking relief under Penal Code section 1170.95. One full time and two part time attorneys were assigned to handle these cases. They worked more than 3300 hours and, by year's end, had resolved 56 of them.

A.

The "draft proposed decision" prepared by the Commission's staff recommends denying the test claim because "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." (*Draft Proposed Decision*, p. 3; italics added.)

This description does not square with the conclusion that Senate Bill [SB] 1437 *eliminated* the crime of felony murder or murder based upon a natural and probable consequences theory. It acknowledges that that these two doctrines still apply if the defendant harbors either the intent to kill or a "reckless indifference to human life." (See Penal Code § 189(e).)

The truth is that SB 1437 simply modified the scope of "malice aforethought." This change is reflected in the language of Penal Code section 188 which now

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reads: “Except as stated in subdivision (e) of Section 189, 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.*”

Further evidence that SB 1437 did not intend to eliminate “murder under the felony murder rule” can be found in Penal Code section 189(f), a provision the Commission staff apparently overlooked. That section further narrows the scope of the new law by stipulating that when a defendant kills a peace officer during the commission of an enumerated felony, s/he is guilty of felony murder regardless of his/her intent.

Thus, while it may be true that the amendments to sections 188 and 189 modified the *scope* of murder under the felony-murder or natural and probable consequences *theories*, they did not eliminate a single crime and did not even eliminate these two theories as sources of murder liability.

The case law generated by Penal Code section 1170.95 confirms this interpretation and belies the suggestion that Senate Bill 1437 “eliminated the crime of murder under the felony murder rule and the natural and probable consequences doctrine.”

For example, *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, explained that the only thing that Senate Bill 1437 did was “*amend[] the mens rea requirements for the offense of murder.*” (*Id.* at pp. 281, 287; see also *People v. Lamoureux* (2019) 42 Cal.App.5th 241, 246.)

People v. Solis (2020) 46 Cal.App.5th 762 likewise pointed out that “[t]he intent of the legislation was to limit application of the felony murder rule and murder based on the natural and probable consequences doctrine by *modifying the mens rea element* of those crimes.” (*Id.* at p. 768–769[.] And in *People v. Cervantes* (2020) 46 Cal.App.5th 213, the court pointed out that “SB 1437 *modified* California’s felony murder rule and natural and probable consequences doctrine to ensure murder liability is not imposed on someone unless they were the actual killer, acted with the intent to kill, or acted as a major participant in the underlying felony and with reckless indifference to human life.” (*Id.* at p. 220; see also *People v. Martinez* (2019) 31 Cal.App.5th 719, 722 [“Senate Bill 1437 made statutory changes altering the definitions of malice and first and second degree murder”].)

Of the nearly two dozen published cases interpreting SB 1437, not a single one has said that it *eliminated* a crime. In *People v. Gentile* [*Review Granted*; formerly 35 Cal.App.5th 932], the Court of Appeal explicitly rejected the notion that SB 1437 eliminated murder liability under the natural and probable consequences theory:

. . . defendant argues that the amendment to section 189, “has now eliminated all murder liability, including second degree murder liability, based on the natural and probable consequences doctrine.” *We disagree*. This argument proposes a construction of section 189, subdivision (e), which is contrary to the plain language of the statute, misconstrues the holding in *Chiu*, and would lead to absurd results. Contrary to defendant's interpretation, section 189, subdivision (e) does not eliminate all murder liability for aiders and abettors. To the contrary, the amendment expressly provides for both first and second degree murder convictions under appropriate circumstances. (*Id.* at pp. 943-944; italics added.)

B.

Government Code section 17556(g) also prohibits the commission from finding reimbursable costs if the test claim statute “*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.*” A host of recent cases have explicitly ruled that “Senate Bill 1437 did not address. . . punishment at all. Instead, it amended the mental state requirements for murder.” (*People v. Superior Court (Gooden)*, *supra*, 42 Cal.App.5th at p. 282; *People v. Superior Court (Gooden)*, *supra*, 42 Cal.App.5th 270, *People v. Lamoureux*, *supra*, 42 Cal.App.5th 241 and *People v. Solis*, *supra*, 46 Cal.App.5th 762; *People v. Cruz* (2020) 46 Cal.App.5th 740, 755 have all.)

C.

The Commission staff's proposed decision does not appear to analyze whether the test claim statute - Penal Code section 1170.95 - “*relat[ed] directly to the enforcement of the crime or infraction*” as required by Government Code § 17556(g)

Although the 30 or so cases that have invoked section 17556 have never defined the word “enforcement, Black's Law Dictionary defines “enforce” as “to compel obedience to.” (*Black's Law Dictionary* (11th ed. 2019)) and Webster's defines it “to

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compel observance of a law, etc.” (*Webster’s New World Dictionary* (College Edition), p. 480.)

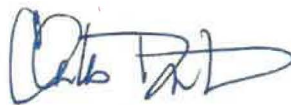
Penal Code. Section 1170.95 clearly does not relate to the police or prosecutor’s authority to “compel obedience” to or “observance of” the law that makes it a crime to murder. It does not apply at all to the arrest or prosecution of murder cases. It is simply a resentencing statute that permits a person who has already been convicted of felony murder or murder under a natural and probable consequences theory, and who meets certain criteria, to petition the court to apply for a reduction of his/her sentence. Thus, even if we agreed that the changes to Penal Code section 188 and 189 eliminated a crime, section 1170.95 still does not “relat[e] directly to the enforcement of the crime” of murder defined in those statutes.

D.

Penal Code section 1170.95 petitions involve complex legal issues that require experienced counsel and substantial amounts of legal research, writing and courtroom litigation. It has placed a considerable burden on our office’s staff as well as our budget. For this reason, and because we strongly believe that the expenses incurred under section 1170.95 are legally reimbursable, I strongly urge the honorable members of the Commission to reject the proposed decision and grant the test claim.

Respectfully submitted,

ALAMEDA COUNTY PUBLIC DEFENDER



Charles M. Denton
Assistant Public Defender
Supervisor, Law & Motions Division

CMD/kr

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 19, 2020, I served the:

- **Alameda County Public Defenders Office's Late Comments on the Draft Proposed Decision filed August 17, 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 19, 2020 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/19/20

Claim Number: 19-TC-02

Matter: Accomplice Liability for Felony Murder

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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