

California Department of Justice OFFICE OF THE ATTORNEY GENERAL 	<i>Legal Alert</i>	
<i>Subject:</i> Penal Code 187 and “the unlawful killing of . . . a fetus”	<i>No.</i> OAG-2021-01 <i>Date:</i> January 6, 2022	<i>Contact for information:</i> Legalalerts@doj.ca.gov

TO: All California District Attorneys, Police Chiefs, and Sheriffs

Notice of statutory construction: Penal Code 187 and “the unlawful killing of . . . a fetus”

The Attorney General has construed Penal Code section 187 as it relates to the actions or inactions of a person carrying a fetus that are alleged to have caused the death of that fetus. The Attorney General’s construction is contained in court documents filed in multiple cases, including the attached amicus brief filed in *In re Perez*, Case No. 21W-0033A, Kings Co. Sup. Court (June 25, 2021).

Penal Code section 187 does not impose criminal liability on a person carrying a fetus for allegedly causing the miscarriage or stillbirth of that fetus.

Summary of analysis: This reading of section 187 is compelled by the law’s text and purpose.

Text: Penal Code section 187, subdivision (a) defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.” The statute excludes lawful abortions or acts by a physician to save the life of “the mother of the fetus.” (Pen. Code, § 187, subd. (b)(1) and (b)(2).) It also expressly excludes any act that “was solicited, aided, abetted, or consented to by the mother of the fetus.” (Pen. Code, § 187, subd. (b)(3).) Because persons necessarily consent to their own voluntary actions, the exclusion in subdivision (b) means that persons cannot be criminally liable for their own actions or inactions that are alleged to have caused the death of their fetus.

Purpose: The Legislature broadened the scope of section 187 to include the unlawful killing of a fetus in specific response to the California Supreme Court’s decision in *Keeler v. Superior Court* (1970) 2 Cal.3d 619. In that case, the defendant was charged with murder after he attacked his pregnant ex-wife, intentionally causing the death of her fetus. The *Keeler* Court held that the unlawful “killing of a ‘human being’” did not encompass the killing of a fetus. In amending section 187, the Legislature intended to criminalize only third-party violence against pregnant persons resulting in fetal death. There is no evidence of legislative intent to extend criminal liability to pregnant persons.

Please refer to the attached amicus brief for the Attorney General’s full legal analysis.

1 ROB BONTA
Attorney General of California
2 RENU R. GEORGE
Senior Assistant Attorney General
3 KARLI EISENBERG
Supervising Deputy Attorney General
4 MARTINE N. D'AGOSTINO
Deputy Attorney General
5 State Bar No. 256777
1515 Clay Street, 20th Floor
6 P.O. Box 70550
Oakland, CA 94612-0550
7 Telephone: (510) 879-0292
Fax: (510) 622-2270
8 E-mail: Martine.DAgostino@doj.ca.gov

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COUNTY OF KINGS
DEPUTY

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF KINGS
11 CENTRAL DIVISION
12

13
14 In re Application of
15 ADORA PEREZ,
16
Petitioner,
17 On Habeas Corpus.

Case No. 21W-0033A

Related Kings County Superior Court Case
No.: 18CM-0021

AMICUS CURIAE BRIEF IN SUPPORT
OF ISSUANCE OF AN ORDER TO
SHOW CAUSE

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INTEREST OF AMICUS CURIAE

This petition for writ of habeas corpus challenges, among other things, the interpretation and application of California Penal Code section 187. The Attorney General is the “chief law officer of the State” (Cal. Const., art. 5, § 13) who “has charge . . . of all legal matters in which the State is interested” (Gov. Code, § 12511), including ensuring that the California Penal Code is properly interpreted and applied. In the Attorney General’s view, the district attorney’s interpretation of section 187 was plainly incorrect. This amicus curiae brief explains the reasons for the Attorney General’s view, and is intended to assist the Court in deciding this matter. (See Cal. Rules of Court, rule 8.200(c)(2).)

INTRODUCTION

Half a century ago, the Legislature amended the State’s murder statute, Penal Code section 187, to include the “unlawful killing” of a “fetus.” The text, purpose, and legislative history of that amendment demonstrate that the Legislature intended only to ensure that a third party who unlawfully kills a fetus does not escape punishment. The amendment was the Legislature’s targeted response to a 1970 California Supreme Court decision that refused to extend the statute beyond its text, which then addressed only the killing of a “human being.” In amending section 187, the Legislature was careful to exclude several categories of actions, including those related to legal abortions (Pen. Code, § 187, subds. (b)(1)-(2)) and, in addition, any “act” that was “aided, abetted, or consented to by the mother of the fetus” (Pen. Code, § 187, subd. (b)(3)). A woman necessarily consents to an act that she herself voluntarily undertakes, free of fraud, duress, or mistake. The acts in question in this case—Perez’s alleged drug use during her pregnancy—fall squarely within the subdivision (b)(3) exclusion. This Court should issue an order to show cause.

STATEMENT OF FACTS

On December 30, 2017, Perez, 37 weeks pregnant, went to Adventist Health Hanford and suffered a stillbirth. (Petn. for Writ of Habeas Corpus, p. 10.)¹ The Hanford Police Department

¹ Under California Rule of Court 4.551, “the court takes [Perez’s] factual allegations as true and makes a preliminary assessment regarding whether [Perez] would be entitled to relief if.

1 was dispatched to Adventist Health Hanford. (*Ibid.*) Perez's doctor informed the police that he
2 attributed the stillbirth to methamphetamine use during pregnancy. (*Ibid.*)

3 The district attorney subsequently charged Perez with murder under Penal Code section
4 187, alleging that the stillbirth was caused by Perez's alleged drug use. (*Id.* at p. 10, citing Ex. C,
5 Complaint and First Amended Complaint, p. 130.) Perez's court-appointed counsel did not
6 challenge whether section 187 applied. Perez pleaded "no contest" to an amended complaint
7 alleging a violation of Penal Code section 192, subdivision (a), voluntary manslaughter.² (*Id.* at
8 p. 13, citing Ex. A, Reporter's Transcript of Proceedings, at pp. 59-60.) Perez accepted the plea
9 because her counsel and the court advised her that she was facing a life sentence on the murder
10 charge. (*Id.*, citing Ex. A at pp. 51-52.) Perez confirmed on the record that "the reason for [the
11 plea]" and her acceptance of a manslaughter conviction was "to avoid the possibility of getting
12 the life sentence on the murder case." Perez's counsel also confirmed that Perez entered the
13 voluntary manslaughter plea to avoid the murder conviction. (*Id.* at p. 13, citing Ex. A at p. 61.)
14 The trial court recognized that Perez could not "factually . . . be" guilty of voluntary manslaughter
15 and confirmed that Perez "enter[ed] into that plea to avoid [a] conviction" for murder under
16 section 187. (Ex. A at p. 68.)³

17 In that same plea hearing, the prosecutor explained what facts would have been proven
18 "had this matter proceeded to trial." (Ex. A at p. 68.) According to the prosecutor, the facts
19 would have shown that Perez was "pregnant with an unborn child." (*Ibid.*) "When the child was
20 eventually delivered, the child was stillborn." (*Ibid.*) The "primary contributing factors" to the
21 fetus's death was "asphyxiation from a placental detachment and a toxic level of
22 methamphetamine within the fetus." (*Ibid.*) The court found a "factual basis" for the murder
23 charge and concluded that the plea "falls within the meaning of *People v. West*." (*Id.* at pp. 68-
24 69.)

25 _____
26 . . . her factual allegations were proved." Thus, citations are to Perez's Petition for a Writ of
Habeas Corpus, where applicable.

27 ² Perez's counsel explained that she agreed to this plea under *People v. West* (1970) 3
Cal.3d 595.

28 ³ The killing of a fetus does not constitute manslaughter. (See page 9, *post.*)

1 After the plea, Perez retained private counsel to move to withdraw the plea on the basis of
2 ineffective assistance of trial counsel. (*People v. Perez*, No. 18-CM- 0021 (Kings Co. Sup. Ct.),
3 Notice of Motion; Motion to Withdraw Plea of Guilty, May 29, 2018.) Perez’s new attorney
4 argued that prior counsel had failed to investigate whether some factor other than the drug use
5 had caused fetal death. (*Ibid.*) The court denied the motion. (Petn. for Writ of Habeas Corpus, p.
6 14, citing Ex. A at pp. 92-93.) In June 2018, the court sentenced Perez to the maximum term of
7 11 years. (*Id.*, citing Ex. A at pp. 109-110.)

8 Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 438, on direct appeal, Perez’s counsel
9 filed a brief stating that there were no arguable issues to assert. After its independent review, the
10 Court of Appeal reached the same conclusion and affirmed the judgment on March 26, 2019.
11 (*People v. Perez*, March 26, 2019, F077851 [nonpub. opn.])

12 In October 2020, Perez filed an application to recall the remittitur in the Court of Appeal on
13 the ground that appellate counsel had rendered ineffective assistance of counsel for failing to
14 challenge the scope of Penal Code section 187. (*People v. Perez*, Oct. 21, 2020, F077851
15 [nonpub.opn.]) The Attorney General filed a non-opposition to the application. (*Ibid.*) On
16 March 29, 2021, the Court of Appeal denied the application to recall the remittitur, stating that the
17 claims would be “more appropriately raised by way of a petition for writ of habeas corpus in the
18 superior court.” (*Ibid.*) The court reasoned that Perez would “have the option to present
19 additional evidence relevant to [her] claims and develop a more complete record” in habeas
20 proceedings. (*Ibid.*) Perez petitioned for review of the denial in the California Supreme Court.
21 (*People v. Perez*, No. S268092.) In response to an order from the Court requesting a response to
22 the petition, on June 11, 2021, the Attorney General filed an Answer in support of the petition.
23 (*Ibid.*) That petition remains pending.

24 LEGAL BACKGROUND

25 Perez was charged with murder under Penal Code section 187. It provides that “[m]urder is
26 the unlawful killing of a human being, or a fetus, with malice aforethought.” (Pen. Code, § 187,
27 subd. (a)). Section 187 contains important limitations. Specifically, section 187:

28 ///

1 ...shall not apply to any person who commits an act that results in the death of a fetus
2 if any of the following apply:

3 (1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with
4 Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety
Code.

5 (2) The act was committed by a holder of a physician's and surgeon's certificate, as
6 defined in the Business and Professions Code, in a case where, to a medical certainty,
7 the result of childbirth would be death of the mother of the fetus or where her death
8 from childbirth, although not medically certain, would be substantially certain or
more likely than not.

9 (3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

10 (Pen. Code, § 187, subd. (b).)

11 Penal Code section 192, subdivision (a)—to which Perez pleaded guilty—provides in
12 relevant part that “[m]anslaughter is the unlawful killing of a human being without malice ...
13 upon a sudden quarrel or heat of passion.” It is well established that the killing of an unborn fetus
14 cannot constitute manslaughter, because a fetus is not a “human being” as defined in that statute.
15 (*People v. Dennis* (1998) 17 Cal.4th 468, 506.) As this Court observed in *Dennis*, while, “[a]fter
16 *Keeler*, the Legislature amended section 187 specifically to include as murder ‘the unlawful
17 killing of . . . a fetus’” it “made no similar amendment to section 192’s definition of
18 manslaughter as ‘the unlawful killing of a human being without malice.’” (*Ibid.*) “There is no
19 crime in California of manslaughter of a fetus.” (*Ibid.*)

20 ARGUMENT

21 This Court should issue an order to show cause because Perez has made a prima
22 facie showing that she is entitled to relief.⁴ (Cal. Rules of Court, rule 4.551(c)(1).) It is

23 ⁴ Habeas relief may be available if a court imposes a judgment “in excess of jurisdiction.”
24 (*People v. Mutch* (1971) 4 Cal.3d 389, 396; see also *People v. Richardson* (June 10, 2021, No.
25 A157529) __ Cal. App. 5th __ [2021 WL 2373548] [granting “jurisdictional challenge” and
26 vacating negotiated plea to a charge of “human trafficking of a minor for a sex act” when it was
27 “abundantly clear on the record that the victim” was “‘27’ years old (an adult and not a minor)’”].
28 It is undisputed that the factual basis presented by the district attorney to support the murder
charge against Perez alleged that her actions caused the stillbirth of her own fetus. And it is
settled that the killing of a fetus cannot constitute manslaughter. Because a woman’s actions or
inactions that result in the miscarriage or stillbirth of her own fetus cannot constitute murder, *see*
infra at pp. 8-11, Perez was charged with, and convicted of, conduct that is not—and was not—a

1 undisputed that Perez was charged with murder (Pen. Code, § 187) for allegedly killing her own
2 fetus through drug use, and she pleaded guilty to manslaughter (Pen. Code, § 192) for the same.
3 Perez contends—and the Attorney General agrees, as outlined below—that a woman’s actions or
4 inactions that lead to the demise of a fetus while still in the womb do not constitute a crime. It is
5 already well settled that manslaughter lies only for the killing of a “human being,” and not a fetus.
6 And as outlined below, it seems equally clear that a woman cannot commit the crime of murder
7 of her own fetus, as actions to which a pregnant woman consents are expressly outside the
8 statute’s scope.

9 The Attorney General agrees with Perez that the text, purpose, and legislative history of
10 California Penal Code section 187 demonstrate that a woman cannot be prosecuted for murder as
11 a result of her own omissions or actions that might result in pregnancy loss.

12 Statutory construction is an exercise in discerning legislative intent, and courts start with
13 the language of the statute as the “most reliable indicator.” (*Tuolumne Jobs & Small Business*
14 *Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.) Here, several aspects of the text show
15 that a woman cannot be held liable in the circumstances of this case.

16 To start, the statute states that section 187 “shall not apply to *any* person” who engages in
17 the behavior described within the three exceptions set out subdivision (b). (Italics added.) The
18 term “any” is extremely broad. (See *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [“the
19 word ‘any’ means without limit and no matter what kind”].) It should be read to include not only
20 third parties whose actions result in the death of a fetus, but also the woman carrying the fetus.

21 Further, subdivision (b)(3) of section 187 is an independent, stand-alone exception that, by
22 its terms, reaches beyond the medical abortion exceptions described in subdivisions (b)(1) and
23 (b)(2). Again, subdivision (b)(3) exempts from prosecution the “killing of . . . a fetus” when
24 “[t]he act was . . . aided, abetted, or consented to by the mother of the fetus. . . .” The word
25 “consent” in common use means “to permit, approve, or agree; comply or yield.”⁵ In this sense,
26 _____
crime.

27 ⁵ See <https://www.dictionary.com/browse/consent> [as of June 9, 2021];
28 <https://www.merriam-webster.com/dictionary/consent> [“to give assent or approval”] (as of June

1 one necessarily consents to one's own voluntary actions that are not undertaken through fraud,
2 duress, or mistake. Because a person "consents" to her own voluntary actions and behaviors,
3 when the mother of a fetus "consent[s]" to the "act" (i.e. the act that allegedly leads to the demise
4 of the fetus), her conduct is necessarily exempted under subdivision (b)(3).

5 The Legislature's purpose in adding the killing of a fetus to Penal Code section 187 was not
6 to punish women who do not—or cannot, because of addiction or resources—follow best
7 practices for prenatal health. Nor did it intend to punish women who might in desperation seek to
8 end their pregnancies outside normal medical channels.⁶ Rather, this addition was a focused
9 response to *Keeler v. Superior Court* (1970) 2 Cal.3d 619, holding that the unlawful "killing of a
10 human being" did not encompass a fetus. (See Assem. Com. on Crim. Procedure's Dig., Assem.
11 Bill No. 816 (1970 Reg. Sess.) (July 15, 1970); Review of Selected 1970 California Legislation,
12 Crimes (1971) 2 Pacific L. J. 275, 362-363 [amendment to section 187 "was enacted in response
13 to a June 1970 decision of the California Supreme Court (*Keeler v. Superior Court*, 2 Cal.3d
14 619)"].) Keeler was charged with the murder of a fetus after he attacked his pregnant ex-wife,
15 intentionally causing a stillbirth. The court ordered that Keeler's prosecution for murder was
16 barred under Section 187 as it was then written. (*Id.* at pp. 628, 631.)

17 In amending Section 187, the Legislature intended to target only the intentional conduct of
18 third parties that causes the death of a fetus. There is no evidence of legislative intent to extend
19 criminal liability to pregnant women. To the contrary—the legislature explicitly excluded
20 abortion from the definition of murder, and broadly excluded conduct "solicited, aided, abetted,

21
22 9, 2021); see also Pen. Code, § 261.6 [defining consent as the "positive cooperation in act or
23 attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have
24 knowledge of the nature of the act or transaction involved"]; Schwing, 2 Cal. Affirmative Def.
(2d ed. 2017) § 32:1 ["Consent means a capable, deliberate and voluntary assent . . . in some act
or purpose, reflecting mental and physical power and free action"].)

25 ⁶ Indeed, in 2000, the California Legislature repealed a statute, Penal Code section 275,
26 that allowed for the "punishment of a pregnant woman who solicits an abortion outside the"
27 confines of what is permitted by law. (Webb, *Is the Intentional Killing of an Unborn Child*
28 *Homicide—California's Law to Punish the Willful Killing of a Fetus* (1971) 2 Pacific L.J. 170,
182, citing Pen. Code, § 276; see also Sen. Floor Analysis, Sen. Bill No. 370 (1999-2000 Reg.
Sess.) (Aug. 30, 2000), <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml> [explaining
that this provision is "outdated" and has largely been ruled unconstitutional]; footnote 6, *post.*)

1 or consented to by the mother of the fetus.” (Pen. Code, § 187, subd. (b)(3)). This reading is also
2 consistent with the legislative history. As noted, among other things, the amendment was a direct
3 response to the California Supreme Court’s decision in *Keeler*. (See *People v. Davis* (1994) 7
4 Cal.4th 797, 802-803.)⁷ The specific impetus for the amendment further evidences the
5 Legislature’s intent to criminalize only third-party violence against women resulting in fetal
6 death. There is simply no indication that the Legislature, in amending section 187, desired to do
7 more than close the disturbing loophole noted in *Keeler*.⁸

8 A contrary interpretation would lead to absurd—and constitutionally questionable— results.
9 (See *John v. Superior Court* (2016) 63 Cal.4th 91, 96 [court construes the statute’s words in
10 context “to avoid absurd results”]; *People v. Engram* (2010) 50 Cal.4th 1131, 1161 [“a statute
11 must be construed, if reasonably possible, in a manner that avoids a serious constitutional
12 question”].) It would subject all women who suffer a pregnancy loss to the threat of criminal
13 investigation and possible prosecution for murder. Whether a stillbirth or a miscarriage was due
14 to drug use or some other reason, there is nothing in the statute that would constrain a district
15 attorney’s ability to investigate the most intimate aspects of the circumstances of a woman’s
16 pregnancy and to bring murder charges against that woman who suffered a pregnancy loss. (See
17 *Kilmon v. State* (2006) 394 Md. 168, 177-178 [if “the statute is read to apply to the effect of a
18 pregnant woman’s conduct on the child she is carrying, it could well be construed to include not
19 just the ingestion of unlawful controlled substances but a whole host of intentional and
20 conceivably reckless activity. . . , [including but not limited] to smoking, to not maintaining a
21 proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to

22 ⁷ At the time of the 1970 amendment, Penal Code section 275 provided that a woman who
23 solicited a drug and took it with the intent to procure a miscarriage, except as provided in the
24 Therapeutic Abortion Act, was guilty of a felony. As noted above, section 275 was repealed in
2000. (Stats. 2000, ch. 692 (S.B. 370), § 2.)

25 ⁸ While not directly relevant to the interpretation of Penal Code section 187, the Attorney
26 General notes that the Legislature has repeatedly declined to extend punishment to encompass a
27 pregnant woman who experiences a pregnancy loss. (See Sen. Bill No. 1465 (1989-1990 Reg.
28 Sess.) [proposed bill that would have expanded manslaughter to include substance abuse during
pregnancy]; Assem. Bill No. 650 (1990-1991 Reg. Sess.) [proposed bill that would have made
substance abuse during pregnancy a misdemeanor]; see also Health & Saf. Code, § 123462 [the
“state shall not deny or interfere with a woman’s fundamental right to choose to bear a child or to
choose to obtain an abortion”].)

1 wear a seat belt while driving, . . . to exercising too much or too little, indeed to engaging in
2 virtually any injury-prone activity. . . .”].)

3 The courts should not assume that the Legislature intended such a sweeping and invasive
4 change to the criminal law affecting women’s lives without clear evidence of that intent. And
5 such evidence is absent here.

6 As discussed, it is settled that the killing of a fetus cannot constitute manslaughter. And, as
7 noted, there are compelling arguments that a woman’s actions or inactions that result in the
8 miscarriage or stillbirth of her own fetus cannot constitute murder. It therefore appears that Perez
9 was charged with, and convicted of, conduct that is not—and was not—a crime. Such
10 circumstances warrant the issuing of an order to show cause. (See *In re Harris* (1989) 49 Cal.3d
11 131, 134, fn. 2, quoting *In re Huffman* (1986) 42 Cal.3d 552, 555 [“Habeas corpus will lie when
12 the trial court ‘exceeded its jurisdiction by sentencing a defendant ‘to a term in excess of the
13 maximum provided by law’ [citation], or to correct a misinterpretation of [a] statute resulting in
14 confinement ‘in excess of the time allowed by law’ [citation]. . . .”].)

15 CONCLUSION

16 The Court should issue an order to show cause. (Cal. Rules of Court, rule 4.551(c)(1).)

17 Dated: June 24, 2021

Respectfully Submitted,

18 ROB BONTA
19 Attorney General of California
20 RENU R. GEORGE
21 Senior Assistant Attorney General
22 KARLI EISENBERG
23 Supervising Deputy Attorney General

24 
25 MARTINE N. D'AGOSTINO
26 Deputy Attorney General
27
28

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: In re Application of Adora Perez
Case No.: Kings County Superior Court, Case No. 21W-0033A

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1515 Clay Street, 20th Floor, P. O. Box 70550, Oakland, California 94612-0550.

On June 24, 2021, I served the attached **AMICUS CURIAE BRIEF IN SUPPORT OF ISSUANCE OF AN ORDER TO SHOW CAUSE** by placing a true copy thereof enclosed in a sealed envelope with the **General Logistics Systems US, Inc. ("GLS")** addressed as follows:

Matthew Missakian
Law Office of C. Matthew Missakian, Inc.
5150 E. Pacific Coast Highway
Suite 200
Long Beach, California 90804

Mary McNamara
Audrey Barron
Swanson & McNamara LLP
300 Montgomery St. Suite 1100
San Francisco, CA 94104

Kings County District Attorney's Office
1400 West Lacey Boulevard
Hanford, CA 93230

Court of Appeal of the State of California
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

Criminal Appeals Clerk
Kings County Superior Court
Clerk of the Court
1640 Kings County Drive
Hanford, CA 93230-5997

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on June 24, 2021, at Sacramento, California.

Debra Baldwin

Declarant



Signature