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May 8, 2023

Via Drop Box

Ms. Heather Halsey
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Commission on State Mandates
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Sacramento, CA 95814

Dear Ms. Halsey:

**RESPONSE TO THE COMMISSION ON STATE MANDATES'
PROPOSED DRAFT DECISION ON THE COUNTY'S SEX OFFENDERS
REGISTRATION: PETITIONS FOR TERMINATION TEST CLAIM**

The County of Los Angeles ("Claimant") submits the attached Comments in response to the Commission on State Mandates' Proposed Draft Decision on our *Sex Offenders Registration: Petitions for Termination, 21-TC-03* Test Claim.

If you have any questions please call me, or your staff may contact Fernando Lemus at (213) 974-0324 or via e-mail at flemus@auditor.lacounty.gov.

Very truly yours,

Oscar Valdez
Interim Auditor-Controller

OV:CY:RA:RC:FL

Attachment

**RESPONSE TO THE COMMISSION ON STATE MANDATES'
DRAFT PROPOSED DECISION ON THE COUNTY'S SEX OFFENDERS
REGISTRATION: PETITIONS FOR TERMINATION TEST CLAIM**

I. Senate Bill 384 Did Not Eliminate A Crime and Therefore No Bar Exists to Reimbursement

Senate Bill (SB) 384 did not eliminate a crime and, therefore, Government Code (GC) § 17556(g) does not bar reimbursement.

In its Proposed Decision, the Commission on State Mandates (Commission) finds that although the test claim statute imposes State-mandated activities on county law enforcement agencies and the District Attorneys, the County of Los Angeles (County or Claimant) is exempt from reimbursement under GC § 17556(g) because the statute “eliminated a crime or infraction.” The Commission relied on two decisions, *Accomplice Liability for Felony Murder*, 19-TC-02 and *Sex Offenders: Disclosure by Law Enforcement Officers*, 97-TC-15, as support for denying Claimant’s test claim. The test claim *Sex Offenders: Disclosure by Law Enforcement Officers*, 97-TC-15, added crimes to the list of registerable offenses, which meant if a person convicted of these crimes failed to register, they would be guilty of a felony or misdemeanor.

SB 384 did not add or remove crimes. It created a process by which convicted sex offenders *may* petition the court to be removed from the sex offender registry. The District Attorney may oppose the petition and request a hearing, and the court ultimately decides whether the duty to register is terminated. Accordingly, SB 384 did not explicitly remove registration requirements from convicted sex offenders, but rather created a procedure for the courts and the District Attorney to consider whether factors warranted termination or continued registration. Conversely, in 97-TC-15, the Legislature affirmatively included additional crimes that warranted registration, which potentially triggered the crime of failure to register.

In *Accomplice Liability for Felony Murder*, 19-TC-02, the Commission held that a crime was eliminated because SB 1437 eliminated the felony murder rule and natural probable consequences doctrine from being utilized in murder convictions. Here, SB 384 did not eliminate the crime of failing to register. A sex offender may still be found guilty of the crime of failing to register. Further, SB 384 did not remove crimes from being considered registerable offenses. If the Legislature’s intent was to remove crimes from being considered registerable offenses, it would have so stated. The duty to register is impacted only if a person files a petition and it is unopposed by the District Attorney and approved by the court. SB 384 does not automatically by operation of law remove offenses from registration requirements, unlike in 97-TC-15, which affirmatively added crimes, or 19-TC-02, which limited the felony murder rule and natural-and-probable-consequences doctrine from being used in murder cases.

GC § 17556 (g) states that costs are not mandated by the State if the statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime of infraction, *but only for that portion of the statute relating to the enforcement of the crime or infraction* (emphasis added). The latter portion to GC § 17556 (g) clearly demonstrates that the use of this exemption should not be broadly interpreted. In *CA School Board Association v. State of California*, 171 Cal.App. 4th 1183, 1215, the court noted that GC § 17556 (f), as it was formerly written, was too broad when it stated, “The statute or executive order imposes duties that are ‘reasonably within the scope of’ a ballot measure approved by the voters in a statewide or local election ...” The court found that the “reasonably within the scope of” language was impermissibly broad and that it allowed for the denial of reimbursement when reimbursement is constitutionally required. Similarly, the Commission’s application of GC § 17556 (g) is overbroad. SB 384 did not modify or amend Penal Code (PC) § 290.018 with regards to the enforcement of the crime of failure to register. It restates that all sex offenders shall register upon being discharged or paroled “unless the duty to register is terminated pursuant to Section 290.5.” See PC § 290.018. The fact that SB 384 inserted this language in PC § 290.018 does not create a bar to reimbursement because SB 384 did not eliminate the crime of failure to register. SB 384 created a tiered registration process pursuant to PC § 290.5 and the insertion of this language in PC § 290.018 is collateral to the test claim statute and, therefore, the exemption should not apply.

II. SB 384 Imposes Duties on Public Defenders

Although there is no federal right to counsel in post-conviction matters, there are situations that trigger the due process clause under State law and require that counsel be appointed. For example, courts have held that “if a [habeas] petition attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns.” (*In re Clark* (1993) 5 Cal.4th 750, 780, 21 Cal.Rptr.2d 509, 855 P.2d 729.) When “an indigent petitioner has stated facts sufficient to satisfy the court that a hearing is required, his claim can no longer be treated as frivolous and he is entitled to have counsel appointed to represent him.” (*Shipman*, at p. 232, 42 Cal.Rptr. 1, 397 P.2d 993; see also *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 980-981, 248 Cal.Rptr.3d 39 [due process requires appointment of counsel when defendant establishes prima facie case for postconviction relief under PC § 1473.7]; *People v. Rouse* (2016) 245 Cal.App.4th 292, 299, 199 Cal.Rptr.3d 360 [due process right to counsel at a Proposition 47 resentencing hearing arose *after* the “[d]efendant passed the eligibility stage”].)

Similarly, a petitioner under SB 384 must first comply with the sex offender registration time requirements, provide proof of current registration, and then serve the petition on the court, the prosecutor, and the relevant policing agencies (see PC § 290.5(a)(1) and (2).) Once the petitioner makes a prima facie showing that he is entitled to relief, the District Attorney still can request a hearing “on the petition if the petitioner has not fulfilled the requirement described in subdivision(e) of Section 290... or if community safety would be

significantly enhanced by the person's continued registration." "If no hearing is requested, the petition for termination shall be granted by the court." [PC § 290.5(a)(2)]

Petitioners who cannot afford counsel must be appointed counsel for these contested hearings in accordance with due process principles. At the hearing, a judge can consider the following: the nature and facts of the registerable offense; the age and number of victims; whether any victim was a stranger at the time of offense; criminal and non-criminal behavior before and after the conviction for the registerable offense; the time period during which the person has not reoffended; successful treatment of a sex offender treatment program and the person's risk of sexual or violent re-offense, including risk levels based on risk assessment tools; or any other evidence submitted by the parties, which is reliable, material and relevant.¹ These evidentiary factors to be considered by the court are presented by both the District Attorney and the petitioner. Permitting a petitioner who is not familiar with cross examination, subpoenaing witnesses or documents, hiring experts, and the rules of evidence would cause a breakdown in the process of meaningful adversarial testing that is central to our system of justice. Due process would be violated if counsel is not appointed in the adversarial process created by SB 384 that allows the District Attorney to present evidence. Therefore, since SB 384 created a process that compels the court to appoint counsel if a hearing takes place, the Public Defender costs should be reimbursable.

¹ Penal Code § 290.5(a)(3)

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.

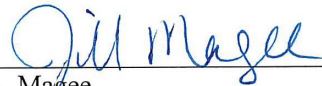
On May 8, 2023, I served the:

- **Claimant's Comments on the Draft Proposed Decision filed May 8, 2023**

Sex Offenders Registration: Petitions for Termination, 21-TC-03
Statutes 2017, Chapter 541, Section 12 (SB 384), effective January 1, 2018,
operative July 1, 2021
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 May 8, 2023 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/5/23

Claim Number: 21-TC-03

Matter: Sex Offenders Registration: Petitions for Termination

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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