Hearing Date: July 28, 2006
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ITEM 8

TEST CLAIM
FINAL STAFF ANALYSIS

Penal Code Section 2966
Statutes 1985, Chapter 1419
Statutes 1986, Chapter 858
Statutes 1987, Chapter 687
Statutes 1988, Chapter 658
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Mentally Disordered Offenders:
Treatment as a Condition of Parole

(00-TC-28, 05-TC-06)

County of San Bernardino, Claimant

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Mentally Disordered Offenders:
Treatment as a Condition of Parole

(00-TC-28, 05-TC-06)

County of San Bernardino, Claimant

EXECUTIVE SUMMARY

Background

This test claim addresses the Mentally Disordered Offender law, codified in Penal Code sections 2960 et seq., which establishes continued mental health treatment and civil commitment procedures for persons with severe mental disorders, following termination of their sentence or parole.

Penal Code section 2966 sets forth procedures for civil court hearings that are initiated by a prisoner or parolee who wishes to contest a finding, made at the time of parole or upon termination of parole, that he or she meets the mentally disordered offender criteria, as defined. If the person requests it, the court shall conduct such a hearing; the district attorney is required to represent the people and the public defender is required to represent the person if he or she is indigent.

The test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose "costs mandated by the state" within the meaning of article XIII B, section 6 and Government Code section 17514?

[1] The test claim was amended on March 2, 2006 to add this statute. The amendment was accepted based on provisions of Government Code section 17557, subdivision (c), that were in effect on the date of the filing of the original test claim.

Staff Analysis

The test claim legislation mandates an activity on local agencies because it requires the district attorney to represent the people and the public defender to represent the prisoner or parolee, when he or she is indigent, at the subject court hearings. Further, since such representation is a peculiarly governmental function administered by a local agency – the county district attorney's office and the county public defender's office – as a service to the public, and imposes unique requirements upon counties that do not apply generally to all residents and entities in the state, it constitutes a "program."

Moreover, the test claim legislation imposes a "new program or higher level of service" because the requirements are new in comparison to the preexisting scheme and they provide an enhanced service to the public by protecting the public from severely mentally disordered persons while ensuring a fair hearing for the prisoner or parolee.

Finally, the test claim legislation imposes "costs mandated by the state" and none of the statutory exemptions are applicable to deny the claim.

Conclusion

Staff finds that Penal Code section 2966 imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities resulting from such hearings:

- district attorney services to represent the people; and
- public defender services to represent indigent prisoners or parolees.

Recommendation

Staff recommends that the Commission adopt this analysis, which finds district attorney and public defender services for Penal Code section 2966 hearings are reimbursable.

STAFF ANALYSIS

Claimant

County of San Bernardino

Chronology

07/05/01	County of San Bernardino filed test claim with Commission (00-TC-28)
08/03/01	The Department of Corrections submitted comments
08/09/01	The Department of Finance submitted comments
09/05/01	County of San Bernardino requested an extension of time through October 25, 2001 to respond to comments
09/07/01	Request for extension to respond to comments on or before October 25, 2001 was granted
11/08/01	County of San Bernardino requested an extension of time until December 3, 2001 to respond to comments
11/09/01	Request for extension to respond to comments on or before December 3, 2001 was granted
02/05/02	County of San Bernardino requested an extension of time until February 22, 2002 to respond to comments
02/06/02	Request for extension to respond to comments was granted; comments due on or before March 8, 2002
02/27/02	County of San Bernardino filed reply to Department of Finance comments
01/19/06	Commission staff issued draft staff analysis
02/03/06	County of San Bernardino filed comments on draft staff analysis
03/02/06	County of San Bernardino filed amendment to test claim (05-TC-06)
05/26/06	Department of Finance waived its comment period on the amendment
05/26/06	Commission staff issued draft staff analysis based on amended test claim
06/23/06	County of San Bernardino filed comments on amended draft staff analysis
07/11/06	Commission staff issued final staff analysis

Background

This test claim addresses the Mentally Disordered Offender law, codified in Penal Code sections 2960 et seq., which establishes continued mental health treatment and civil commitment procedures for persons with severe mental disorders, following termination of their sentence or parole.

Overview of Mentally Disordered Offender Program

Since 1969, the Mentally Disordered Offender law has required certain offenders who have been convicted of specified violent crimes to receive treatment by the Department

of Mental Health as a condition of parole.[2] Penal Code section 2960 establishes the Legislature's intent to protect the public by requiring those prisoners who received a determinate sentence and who have a treatable, severe mental disorder at the time of their parole, or upon termination of parole, to receive mental health treatment until the disorder is in remission and can be kept in remission. Section 2960 further states that "the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community."

To impose mental health treatment as a condition of parole, the prospective parolee must have: 1) a severe mental disorder that is not in remission or cannot be kept in remission without treatment, and the disorder was one of the causes of or was an aggravating factor in the commission of the crime for which the prisoner was sentenced to prison; 2) been in treatment for 90 days or more within the year prior to his or her parole or release; and 3) been certified by designated mental health professionals as meeting conditions 1 and 2 above, in addition to representing a substantial danger of physical harm to others by reason of the severe mental disorder.[3]

Prior to release on parole or prior to termination of parole, such a person must be evaluated and certified by mental health professionals as to whether he or she meets the mentally disordered offender criteria set forth in Penal Code section 2962.[4] The person has the right to a hearing before the Board of Prison Terms to contest such a finding that he or she meets the mentally disordered offender criteria.[5] If the person is dissatisfied with the results of the Board of Prison Terms hearing, the person may petition the superior court for a civil hearing to determine whether he or she meets the mentally disordered offender criteria.[6]

The evaluation must also be submitted to the district attorney of the county in which the person is being treated, incarcerated or committed not later than 180 days prior to termination of parole or release from parole.[7] The district attorney may then file a petition in superior court for continued involuntary treatment for one year and the court shall conduct a civil hearing on the matter.[8]

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[2] Penal Code section 2962, subdivisions (a) through (f).

[3] Penal Code section 2962, subdivisions (a) through (d).

[4] Penal Code section 2962, subdivision (d).

[5] Penal Code section 2966, subdivision (a).

[6] Penal Code section 2966, subdivision (b).

[7] Penal Code section 2970.

[8] Penal Code sections 2970 and 2972, subdivision (a).

If the person's severe mental disorder is put into remission during the parole period, and can be kept in remission during the parole period, the Department of Mental Health must discontinue treatment.[9]

Major legislation affecting the mentally disordered offender program came forward in 1985. That year, the Legislature enacted Statutes 1985, chapter 1418 (Senate Bill No. (SB) 1054) and Statutes 1985, chapter 1419 (SB 1296), which were double-joined. Chapter 1418 added Penal Code section 2970, to set forth procedures for the *local district attorney* to petition the court for a hearing when a mentally disordered offender is scheduled to be released from prison or parole. Penal Code section 2970 hearings were addressed in a prior test claim (98-TC-09).

Chapter 1419 amended Penal Code section 2960, adding subdivision (d) text to set forth procedures for allowing a *prisoner or parolee* to petition the court for a hearing to contest a Board of Prison Terms determination that he or she meets the mentally disordered offender criteria. Although chapter 1419 was not pled in the original test claim, the test claim was amended on March 2, 2006 to add it.

The two types of hearing and the statutes affecting them are further described below.

Prior Test Claim -- District Attorney-Initiated Court Hearings (Pen. Code, §§ 2970, 2972 and 2972.1)

District Attorney-initiated court hearings under the Mentally Disordered Offender law, established by Statutes 1985, chapter 1418, were the subject of a prior test claim[10] in which the Commission on State Mandates found a reimbursable state-mandated program was imposed on local agencies. That prior test claim addressed Penal Code sections 2970, 2972 and 2972.1, which established court procedures initiated by the local district attorney to extend for one year the involuntary treatment of a mentally disordered offender. The district attorney may extend involuntary treatment if the offender's severe mental disorder is not in remission or cannot be kept in remission without treatment.

Not later than 180 days prior to the termination of parole, the professionals treating the prisoner or parolee are required to submit a written evaluation to the district attorney in the county of treatment or commitment. The district attorney reviews the evaluation and files a Penal Code section 2970 petition in the superior court for continued involuntary treatment for one year and the court conducts a civil hearing on the matter.

For that test claim, the following activities were determined to be reimbursable:

1. review the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970);
2. prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, § 2970);

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[9] Penal Code section 2968.

[10] *Mentally Disordered Offenders' Extended Commitment Proceedings*, Test Claim number 98-TC-09.

3. represent the state and the indigent offender in civil hearings on the petition and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972, 2972.1);
4. retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions for recommitment;
5. travel to and from state hospitals where detailed medical records and case files are maintained; and
6. provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County Sheriff's Department.

Prisoner- or Parolee-Initiated Court Hearings [Pen. Code, § 2960, subdivision (d), & Pen. Code § 2966]

Prisoner- or parolee-initiated court hearings under the Mentally Disordered Offender law, established by Statutes 1985, chapter 1419, are the subject of this test claim. Codified originally in Penal Code section 2960, subdivision (d), the provisions for these court hearings are currently set forth in Penal Code section 2966. Such hearings are initiated by a prisoner or parolee who wishes to contest a finding, made at the time of parole or upon termination of parole, that he or she meets the mentally disordered offender criteria. Section 2960, subdivision (d), as it was originally enacted, provided that:

- A prisoner or parolee may request a hearing before the Board of Prison Terms, and the Board shall conduct a hearing if so requested, for the purpose of the prisoner proving that he or she does not meet the mentally disordered offender criteria.
- At the hearing the burden of proof shall be on the person or agency who certified the prisoner or parolee as meeting the mentally disordered offender criteria.
- If the prisoner or parolee, or any person appearing on his or her behalf at the hearing requests it, the Board of Prison Terms shall appoint two independent professionals for further evaluation.
- The prisoner or parolee shall be informed at the Board of Prison Terms hearing of his or her right to file a petition in the superior court for a trial on whether he or she meets the mentally disordered offender criteria. The Board of Prison Terms shall provide a prisoner or parolee who requests a trial a petition form and instructions for filing the petition.
- A prisoner or parolee who disagrees with the determination of the Board of Prison Terms that he or she meets the mentally disordered offender criteria may file a petition for a hearing in the superior court of the county in which he or she is incarcerated or is being treated.
- The court shall conduct a hearing on the petition within sixty calendar days after the petition is filed, unless either: 1) time is waived by the petitioner or his counsel; or 2) good cause is shown to delay the hearing.

- The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings.
- The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial.
- The attorney for the petitioner shall be given a copy of the petition, and any supporting documents.
- The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable.
- The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the petitioner and the district attorney.
- The hearing procedures are applicable to a continuation of a parole pursuant to Penal Code section 3001, which provides for discharge from parole unless the Department of Corrections recommends to the Board of Prison Terms that the person be retained on parole, and the Board, for good cause, determines that the person will be retained.

These basic provisions were subsequently modified as follows:

1. Statutes 1986, Chapter 858, Section 4 (SB 1845) – This statute renumbered the existing provisions of section 2960, and in so doing created section 2966.

2. Statutes 1987, Chapter 687, Section 8 (SB 425) – This statute modified the provisions to specify the time frame for examining the person's mental state.

3. Statutes 1988, Chapter 658, Section 1 (SB 538) – This statute clarified the scope of the Penal Code section 2966 hearing.

4. Statutes 1989, Chapter 228, Section 2 (SB 1625) – This statute enacted an additional requirement for finding a severe mental disorder, i.e., that the prisoner or parolee represents a substantial danger of physical harm to others, as a result of *People v. Gibson* (1988) 204 Cal.App.3d 1425. The *Gibson* court found that the mentally disordered offender legislation violated the equal protection clause of the United States and California Constitutions by not requiring current proof of dangerousness as required of other adult persons involuntarily committed for mental health treatment.

5. Statutes 1994, Chapter 706, Section 1 (SB 1918) – This statute modified Penal Code section 2966 regarding admissible evidence, and to provide that, if the court reverses the Board's decision, the court shall stay execution of decision for five working days to allow for orderly release of the prisoner.

Claimant's Position

The County of San Bernardino contends that the test claim statutes constitute a reimbursable state-mandated local program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The County is seeking reimbursement for the following activities:

- District Attorney services to represent the people, and Public Defender services to represent indigent petitioners, both of which are specialized to deal with complex psychiatric issues, including travel time for these personnel.
- Forensic expert witness and investigator services.
- Sheriff's department services for transporting inmates between prison or the state hospital and court house, care and custody associated with confinement awaiting, during and after the court proceeding.

Claimant filed comments in response to Department of Finance, rejecting the Department's assertions that costs to implement the test claim legislation are related to enforcement of a changed penalty for a crime, and therefore must be denied under Government Code section 17556, subdivision (g). This is addressed in Issue 3 of the following analysis.

Claimant filed an amendment to the test claim to include the original legislation (Stats. 1985, ch. 1419) which established the provisions allowing the prisoner or parolee to initiate a hearing contesting a finding that he or she meets the mentally disordered offender criteria.

In response to the subsequent draft staff analysis that was issued, claimant commented that the analysis "did not acknowledge in the conclusion, nor discuss within the document body, the fact that both [district attorney and public defender] services are specialized to deal with complex psychiatric issues." Claimant further asserted:

> MDO commitment trials pursuant to Penal Code §2966, address the diagnosis of a mental disorder, its remission status, and an assessment of risk stemming from the diagnosed mental disorder. These are precisely the issues addressed in MDO commitment trials pursuant to Penal Code §2970 and 2972, for which the above referenced 'activities' have been found to be reimbursable. MDO adjudications, whether pursuant to 2966 or 2970/2972, are by definition, expert driven. Representation without the assistance of expert witnesses would constitute ineffective assistance of counsel.

Claimant then asserted that the term 'activities' as referenced regarding district attorney and public defender services "is a broader term and encompasses more than the District Attorney 'services' and Public Defender 'services' as listed in the conclusion of the draft staff analysis." As a result, claimant stated it is "interpreting the 'Activities' as referenced above to include expert witnesses, investigators, and sheriff's department and custodial services, based on Footnote 25" of the draft staff analysis. These comments are addressed in Issue 1 of the following analysis.

Position of Department of Corrections

The Department of Corrections filed comments on August 3, 2001, citing additional workload and subpoenas for mental health professionals at the Department resulting from mentally disordered offender evaluations. Hearings are particularly increasing in San Bernardino County as a result of mentally disordered offenders being placed in Patton State Hospital, which is located within that county. The Department stated that it had received approximately 20 such subpoenas in the last year, and "[i]t is evident that

county resources are impacted by the necessity of conducting these hearings as well." The comments further noted that "[t]he Department of Mental Health has indicated that increasing numbers of [mentally disordered offender] cases will be placed at [Patton State Hospital], at least over the next year or so."

The Department stated that it "appears the County's claim for reimbursement does have merit."

Position of Department of Finance

The Department of Finance filed comments on August 9, 2001, stating that the test claim legislation should not be considered a reimbursable mandate because "the costs claimed for reimbursement are related to enforcement of a changed penalty for a crime or infraction, as specified in Government Code section 17556(g)."

The basis for the Department's argument is that when a petitioner is requesting a hearing to contest a condition of parole, in effect he or she is petitioning to change the penalty for a crime. The county is responsible to provide a sentencing hearing, which determines the penalty for a crime. In this case, the hearing requested by the inmate is a "continuation of the pre-incarceration hearing that is the responsibility of the county." Therefore the costs should not be reimbursable under article XIII B, section 6 of the California Constitution.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[11] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[12] "Its purpose 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."[13] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[14] In addition, the required activity or task must be

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[11] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected/ (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[12] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

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

[14] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[15]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state."[16] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[17] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[18]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[19]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[20] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[21]

This test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a "new program" or "higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

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[15] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); Lucia Mar Unified School District v. Honig (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[16] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.).

[17] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[18] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

[19] *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 (*County of Sonoma*); Government Code sections 17514 and 17556.

[20] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[21] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

- Does the test claim legislation impose "costs mandated by the state" within the meaning of article XIII B, section 6 and Government Code section 17514?

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

In order for a test claim statute to impose a reimbursable state mandated program under article XIII B, section 6, the statutory language must mandate an activity or task upon local governmental agencies. If the statutory language does not mandate or require local agencies to perform a task, then article XIII B, section 6, is not triggered.

Here, claimant is seeking reimbursement for services of the district attorney to represent the people, services of the public defender to represent indigent prisoners or parolees, forensic expert witness and investigative services, and sheriff's department services for transportation and custodial matters. The Penal Code provides that, when a prisoner or parolee initiates a court hearing under the mentally disordered offender program, the "court shall conduct a hearing on the petition...,"[22] the "court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial"[23] and "the trial shall be by jury unless waived by both the person and the district attorney."[24]

Thus, once the prisoner or parolee petitions the court for a Penal Code section 2966 hearing, the court shall conduct it. The test claim legislation requires the district attorney to represent the people in any such hearing. Because the statute also gives the prisoner or parolee "the right to be represented by an attorney," the public defender is required to represent the prisoner or parolee when he or she is indigent. Therefore, staff finds that activities of the district attorney, representing the people, and public defender, representing indigent offenders, are mandated by the test claim legislation.

Claimant asserts that, based on the statements in footnote number 25 of the draft staff analysis, it is more broadly interpreting the 'activities' of the district attorney and public defender to include expert witnesses, investigators, and sheriff's department transportation and custodial services. In the draft staff analysis, the text of footnote number 25 read:

> The Commission can consider claimant's request for reimbursement for expert witnesses, investigators, and sheriff's department transportation and custodial services at the parameters and guidelines stage to determine whether these services are needed as a reasonable method of complying with the mandate pursuant to California Code of Regulations, title 2, section 1183.1, subdivision (a)(4).

California Code of Regulations, title 2, section 1183.1 states that parameters and guidelines shall describe the claimable reimbursable costs and include a "description of the specific costs and types of costs that are reimbursable, ... and a description of the most reasonable methods of complying with the mandate." Section 1183.1,

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[22] Penal Code section 2966, subdivision (b).

[23] *Ibid.*

[24] *Ibid.*

subdivision (a)(4), defines "the most reasonable methods of complying with the mandate" as "those methods not specified in statute or executive order that are necessary to carry out the mandated program." Government Code section 17557 requires successful test claimants to submit proposed parameters and guidelines within 30 days of adoption of a statement of decision on a test claim.

Although the expert witness, investigator, and sheriff's department transportation and custodial services may in fact be reasonably necessary to comply with the mandate, the plain meaning of the test claim statute is limited to the district attorney and public defender services. The statute *does not* include expert witnesses, investigators, or sheriff's department services. Therefore, these activities can *only* be considered for reimbursement, when claimant proposes them, at the parameters and guidelines stage.

The test claim legislation must also constitute a "program" in order to be subject to article XIII B, section 6 of the California Constitution. Commission staff finds representation by the district attorney and public defender at the subject hearings does constitute a program for the reasons stated below.

The relevant tests regarding whether test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 are set forth in case law. The California Supreme Court, in the case of *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[25]

Here, the district attorney represents the people at the subject hearings, and the public defender represents the prisoner or parolee. Such representation is a peculiarly governmental function administered by a local agency – the county district attorney's office and the county public defender's office – as a service to the public. Moreover, the test claim legislation imposes unique requirements upon counties that do not apply generally to all residents and entities in the state.

Accordingly, staff finds that the test claim legislation mandates an activity or task upon local agencies and constitutes a "program." Therefore, the test claim legislation is subject to article XIII B, section 6 of the California Constitution.

Issue 2: Does the test claim legislation impose a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

The courts have held that legislation imposes a "new program" or "higher level of service" when: a) the requirements are new in comparison with the preexisting scheme; and b) the requirements were intended to provide an enhanced service to the public.[26] To

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

[26] *San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

make this determination, the test claim legislation must initially be compared with the legal requirements in effect immediately prior to its enactment.[27]

The test claim statutes require counties to provide district attorney and public defender services — for indigent persons — when a prisoner or parolee requests a court hearing to contest a finding that he or she meets the mentally disordered offender criteria. The law in effect immediately prior to the test claim statutes allowed for commitment of inmates or parolees to a state hospital under the Welfare and Institutions Code, but did not require any of the activities or procedures set forth in the test claim legislation. Therefore, staff finds that the requirements of the test claim legislation are new in comparison with the preexisting scheme.

Staff further finds that the requirements in the test claim legislation were intended to provide an enhanced service to the public by protecting the public from severely mentally disordered persons while ensuring a fair hearing for the prisoner or parolee.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of article XIII B, section 6 and Government Code section 17514?

For the mandated activities to impose a reimbursable, state-mandated program under article XIII B, section 6, two additional elements must be satisfied. First, the activities must impose costs mandated by the state pursuant to Government Code section 17514. Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The test claim alleged costs of $110,000 for a district attorney, $130,000 for a public defender, and $50,000 for sheriff's office services for a complete fiscal year of 2000/2001. Thus, there is evidence in the record, signed under penalty of perjury, that there are increased costs as a result of the test claim legislation.

Government Code section 17556 lists several exceptions which preclude the Commission from finding costs mandated by the state. For the reasons stated below, staff finds that none of the exceptions apply to deny this test claim.

Government Code section 17556, subdivision (b), requires the Commission to deny the test claim where the test claim statute "affirmed for the state a mandate that had been declared existing law or regulation by action of the courts." In *People v. Gibson* (1988) 204 Cal.App.3d 1425, the court found that the test claim legislation violated the equal protection clause of the United States and California Constitutions by not requiring current proof of dangerousness as required of other adult persons involuntarily committed for mental health treatment.[28] In response to *Gibson,* Penal Code section 2966, subdivision (c), was modified to add another condition that must be met in order to

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[27] *Ibid.*

[28] *Gibson, supra,* 204 Cal.App.3d 1425, 1437.

continue involuntary mental health treatment.[29] The condition is whether, by reason of his or her severe mental disorder, the prisoner or parolee represents a substantial danger of physical harm to others.

Although this new provision expands the scope of the Penal Code section 2966 hearing by requiring proof of an additional element, i.e., current proof of dangerousness, staff finds that the first test claim statute actually created the mandate for district attorney and public defender services. This additional element cannot feasibly be considered a separate, mandated activity, but instead is "part and parcel" to the original mandated hearing activities.[30] Therefore, Government Code section 17556, subdivision (b), is inapplicable to deny the test claim.

Government Code section 17556, subdivision (c), requires the Commission to deny the test claim where the test claim statute "imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute ... mandates costs that exceed the mandate in that federal law or regulation."

Here, the hearing can result in involuntary commitment and treatment of the prisoner or parolee beyond the parole termination date. Although the Mentally Disordered Offender legislation is located in the Penal Code, the California Appellate Court has held that the statutory scheme is civil rather than penal.[31] The U.S. Supreme Court has repeatedly found that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,[32] and some courts have determined that the assistance of counsel under those circumstances is required to meet federal due process standards.[33] Moreover, California courts recognize that legal services for indigent persons at public expense are mandated in civil proceedings relating to mental health matters where restraint of liberty is possible.[34]

Thus, the question is whether public defender services for indigent prisoners or parolees results in costs mandated by the federal government — in the form of constitutional rights to counsel under the Sixth Amendment and rights to due process under the Fourteenth Amendment. Staff finds the public defender services do not result in costs mandated by the federal government for the reasons stated below.

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[29] Statutes 1989, chapter 228; Senate Bill 1625 (as amended April 27, 1989), Senate Committee on Judiciary Analysis (1989-90 Regular Session), May 2, 1989, pages 1-2.

[30] Cf. *San Diego Unified School Dist. v. Commission on State Mandates, supra,* 33 Cal.4th 859, 881-882.

[31] *People v. Robinson* (1998) 63 Cal.App.4th 348, 352 *(Robinson)*; *People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826 *(Myers)*.

[32] *Addington v. Texas* (1979) 441 U.S. 418.

[33] *Heryford v. Parker* (10th Cir. 1968) 396 F.2d 393, where the court held that a civil proceeding resulting in involuntary treatment commands observance of the constitutional safeguards of due process, including the right to counsel.

[34] *Phillips v. Seely* (1974) 43 Cal.App.3d 104, 113; *Waltz v. Zumwalt* (1985) 167 Cal.App.3d 835, 838.

The California Supreme Court in *San Diego Unified School Dist.*[35] addressed the issue of costs mandated by the federal government in the context of school expulsion due process hearings. There, the relevant test claim statute compelled suspension and mandated a recommendation of expulsion for certain offenses, which then triggered a mandatory expulsion hearing.[36] It was not disputed that the resulting expulsion hearing was required to "comply with basic federal due process requirements, such as notice of charges, a right to representation by counsel, an explanation of the evidence supporting the charges, and an opportunity to call and cross-examine witnesses and to present evidence."[37]

The court stated that in the absence of the mandatory provision, a school district would not automatically incur the due process hearing costs that are mandated under federal law.[38] Further, the mandatory expulsion provision did not implement a federal law or regulation, since the federal law did not at the time mandate an expulsion recommendation or expulsion for the cited offenses.[39] Even the provisions setting forth expulsion hearing *procedures* did not in themselves require the school district to incur any costs, since neither those provisions nor federal law required that any such expulsion recommendation be made in the first place.[40] The court concluded:

> Because it is state law [the mandatory expulsion provision], and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows ... that we cannot characterize *any* of the hearing costs incurred by the District, triggered by the mandatory [state] provision ..., as constituting a federal mandate (and hence being nonreimbursable). We conclude that under the statutes existing at the time of the test claim in this case ..., *all* such hearing costs—those designed to satisfy the minimum requirements of federal due process, and those that may exceed those requirements—are, with respect to the mandatory expulsion provision ..., state mandated costs, fully reimbursable by the state. (Emphasis in original.)[41]

Like the test claim legislation in the *San Diego Unified School Dist.* case, there is no pre-existing federal statutory scheme requiring the states to implement civil commitment proceedings for mentally disordered offenders. Rather, the civil proceedings set forth in the test claim statute constitute a new state program, and counties would not otherwise be compelled to provide defense services to indigent persons wishing to contest involuntary treatment or commitment if the new program had not first been created by the state.

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[35] *San Diego Unified School Dist., supra,* 33 Cal.4th 859.

[36] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 879.

[37] *Ibid.*

[38] *Id.* at 880.

[39] *Id.* at 881.

[40] *Ibid.*

[41] *Id.* at 881-882.

Therefore, Government Code section 17556, subdivision (c), is inapplicable to deny the test claim.

Government Code section 17556, subdivision (e), requires the Commission to deny the test claim if the "statute ... or an appropriation in the Budget Act or other bill provides for offsetting savings to local agencies ... that result in no net costs to the local agencies ..., or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." Welfare and Institutions Code section 4117 allows reimbursement to local agencies for certain mental health trials or hearings involving inmates of state mental hospitals. Section 4117 specifically allows for reimbursement of costs incurred by counties for hearings conducted as a result of district attorney-initiated petitions to continue involuntary treatment as a continuation of parole, pursuant to Penal Code section 2972.

Neither section 4117, nor any other statutory or Budget Act provisions, provide for reimbursement for costs incurred by counties for hearings conducted pursuant to Penal Code section 2966. Therefore, Government Code section 17556, subdivision (e), is inapplicable to deny the test claim.

Government Code section 17556, subdivision (g), requires the Commission to deny the test claim if 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." The Department of Finance, in its comments of August 9, 2001, asserted that the test claim legislation should not be considered a reimbursable mandate because "the costs claimed for reimbursement are related to enforcement of a changed penalty for a crime or infraction, as specified in Government Code section 17556 (g)."

However, as noted above, the test claim statute itself identifies the subject hearings as "civil hearings,"[42] and California courts have reaffirmed that the Mentally Disordered Offender legislation is civil rather than penal.[43] In the *Robinson* case, the Second District Court of Appeal overruled its previous determination that the Mentally Disordered Offender law was penal in nature. Citing an earlier case, it stated that the Mentally Disordered Offender scheme is "concerned with two objectives, neither of which is penal: protection of the public, and providing mental heath treatment for certain offenders who are dangerous and suffering from severe mental illnesses."[44] Based on the case law interpreting the Mentally Disordered Offender law, Government Code section 17556, subdivision (g), is inapplicable to deny the test claim.

Conclusion

Based on the foregoing, staff finds that Penal Code section 2966 imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6

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[42] Penal Code section 2966, subdivision (b).

[43] *People v. Robinson, supra,* 63 Cal.App.4th 348; *People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826.

[44] *People v. Robinson, supra,* 63 Cal.App.4th 348, 352.

of the California Constitution and Government Code section 17514 for the following activities resulting from such hearings:

- district attorney services to represent the people; and
- public defender services to represent indigent prisoners or parolees.

Recommendation

Staff recommends that the Commission adopt this analysis, which finds district attorney and public defender services for Penal Code section 2966 hearings are reimbursable.

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State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2/91)

TEST CLAIM FORM

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Claim No. 01-TC-28

Local Agency or School District Submitting Claim

County of San Bernardino

Contact Person

John Logger

Telephone No.

(909) 386-8850
FAX (909)386-8830

Address

Office of the Auditor/Controller-Recorder
222 W. Hospitality Lane, San Bernardino, CA 92415-0018

Representative Organization to be Notified

California State Association of Counties (CSAC)

This test claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.
Statutes of 1986, Chapter 858 (Section 4); Statutes of 1987, Chapter 687 (Section 8);
Statutes of 1988, Chapter 658 (Section 1); Statutes of 1989, Chapter 228 (Sections 2); and
Statutes of 1994, Chapter 706 (Section 1).
Penal Code Section 2966

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative

Aly Saleh
Chief Deputy Auditor

Telephone No.

(909) 386-8821

Signature of Authorized Representative

Aly Saleh

Date

July 2, 2001

COUNTY OF SAN BERNARDINO
TEST CLAIM

Penal Code Section 2966
Statutes of 1986, Chapter 858
Statutes of 1987, Chapter 687
Statutes of 1988, Chapter 658
Statutes of 1989, Chapter 228
Statutes of 1994, Chapter 706

MENTALLY DISORDERED OFFENDERS: TREATMENT AS A CONDITION OF PAROLE

TEST CLAIM NARRATIVE:

The statutes cited above that are the subject of this test claim added and amended Section 2966 of the California Penal Code. Section 2966 allows a prisoner or parolee to file a petition in superior court to challenge the State's determination that the prisoner/parolee is a mentally disordered offender (MDO) and subject to Penal Code Section 2962 which requires continued mental health treatment as a condition of parole.

Section 2962 defines the criteria under which the State can require an MDO be treated for a severe mental disorder by the State Department of Mental Health. The criteria includes:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment.
(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.
(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.
(d) Psychiatric professionals of the State Department of Mental Health and the Department of Corrections have certified to the Board of Prison Terms that the prisoner has a severe mental disorder.
(e) The prisoner received a determinate sentence and the prison sentence was imposed for specified crimes such as voluntary manslaughter, kidnapping, robbery with a dangerous weapon, and rape.

Section 2966 allows the prisoner or parolee to request a hearing before the State Board of Prison Terms to appeal the determination that Section 2962 applies to them. If the MDO continues to disagree with the Section 2962 determination of the Board of Prison Terms he or she may appeal that decision to the superior court of the county in which they are incarcerated or being treated.

The superior court is then required to conduct a civil hearing on the petition within 60 calendar days. The MDO is entitled to representation by a public defender (or a county-

provided indigent defense attorney) and has the right to a jury trial requiring a unanimous verdict of the jury to uphold the state's position. The district attorney is required to represent the state's determination of the applicability of Section 2962 in these proceedings.

It should be noted that the determination and the defense of an MDO involves complex psychiatric issues such as whether the offender has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others. Therefore, the County of San Bernardino has had to provide specialized attorney, expert, investigator, paralegal, and secretarial services in order to perform these mandated duties.

Upon the filing of an appeal pursuant to Penal Code Section 2966, each MDO's criminal and treatment case information must be carefully reviewed by the district attorney and the public defender. Reviewing attorneys may need travel to and from state hospitals where detailed MDO medical records and other case file information is maintained. Forensic expert witnesses are appointed by the court at the request of indigent defense counsel. Such experts are regularly consulted in preparing the case for trial.

Once an MDO appeal proceeding is scheduled, MDOs are transported from their State hospitals or prison to county facilities (and returned if required) by the county sheriff's department. The sheriff's department is also responsible for MDO care and custody associated with confinement awaiting, during, and (if necessary) after their court proceeding.

Therefore, under the subject law, the county has had to provide specialized legal services in selecting, filing, adjudicating MDO defendants as well as transporting and housing such defendants during the pendency of their appeals.

The State's MDO population is primarily housed at Patton and Atascadero State Hospitals. Because Section 2966 hearings must take place in the superior court of the county in which the hospital is located, San Bernardino County and San Luis Obispo County (respectively) are subject to the majority of the costs for this mandate.

SIMILAR SERVICES HAVE BEEN FOUND TO BE REIMBURSABLE

The types of 'costs mandated by the state', as defined in Government Code Section 17514 and claimed herein are all reimbursable to the County under comparable programs, like the 'not guilty by reason of insanity' (NGI), 'sexually violent predator' (SVP), and the 'mentally disordered offender' (MDO) extended commitment programs.

These activities include:

- Review of the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment;
- Prepare and file responses with the superior court to the prisoner's petition to appeal the Board of Prison Terms decision;

- Represent the State and the indigent prisoner in civil hearing on the petition and any subsequent petitions or hearings regarding the applicability of Penal Code Section 2962;
- Retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions;
- Travel to and from state hospitals where detailed medical records and case files are maintained;
- Travel to and from state hospitals by the defense counsel in order to meet with the prisoner client;
- Provide transportation and custody by the county sheriff's department of each potential mentally disordered offender before, during, and after the civil proceedings.

WIC 4117 PROVIDES LIMITED REIMBURSEMENT FOR MDO APPEALS

It should be noted that WIC 4117 provides very limited reimbursement for MDO appeals. For example, no reimbursement for indirect costs is provided. Further WIC 4117 is not a reliable funding source. Even reimbursement for a small percentage of a claimant's costs may not be available because the appropriation is exhausted and no deficiency is authorized. Therefore, in order to ensure the uniform and reliable performance of MDO appeal proceedings throughout the State it is imperative that dependable and comprehensive reimbursement for all counties' MDO "costs mandated by the State" be provided.

MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by these statutes clearly meets both tests that the Supreme Court in the *County of Los Angeles v. State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on state Mandates relies upon to determine if a reimbursable mandate exists, are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate Is Unique to Local Government

The statutory scheme set forth above imposes a unique requirement on local government. Only the county district attorney and public defender (or County provided defense attorney) may appear and represent the respective parties in these court proceedings. Where transportation and housing cannot be provided by the State institution, the county sheriff's department must perform these functions. This mandate applies only to local government.

Mandate Carries Out a State Policy

The mandate clearly carries out state policy. In Penal Code Section 2960, the Legislature finds that if the severe mental disorders of these prisoners are not in remission or cannot be kept in remission at the time of their parole or upon

termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public by requiring these prisoners to continue to receive treatment for these disorders.

GOVERNMENT CODE SECTION 17556 DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code Section 17556 which would prohibit a finding of costs mandated by the state. The letter in parenthesis represents the pertinent subsection of 17556.

(a) San Bernardino County did not request the legislation imposing the mandate.

(b) The statutes do not affirm for the state that which had been declared existing law or regulation by action of the courts.

(c) The statutes do not implement a federal law or regulation.

(d) The statutes do not provide fee authority sufficient to pay for the mandated program

(e) The statutes do not provide for offsetting savings resulting which result in no net costs to local agencies or school districts, nor do they include additional revenue specifically intended to sufficiently fund the costs of the state mandate.

(f) The statutes do not impose duties expressly included in a ballot measure approved by the voters in a statewide election.

(g) The costs claimed for reimbursement are not related to the enforcement of a new crime or infraction.

Therefore, the above seven disclaimers do not prohibit a finding for state reimbursement for the costs mandated by the state as contained in these test claim statutes.

COSTS MANDATED BY THE STATE:

Government Code Section 17514 defines "costs mandated by the state" as:

> "Any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

The activities required by Penal Code Section 2966 as added and/or amended by the statutes of this test claim, result in increased costs which local agencies are required to incur after July 1, 1980, as a result of a statute enacted on or after January 1, 1975.

Therefore, based on the foregoing, the County of San Bernardino respectfully requests that the Commission on State Mandates determine that these test claim statutes impose reimbursable state-mandated costs pursuant to Section 6 of Article XIII B of the California Constitution.

EFFECTIVE DATES FOR REIMBURSEMENT

Due to the filing date of this test claim, July 2, 2001 (note: June 30, 2001 falls on a Saturday), local agencies are entitled to reimbursement for this program from July 1, 1999. All subject test claim statutes were chaptered and effective prior to July 1, 1999.

ESTIMATED COSTS

The following are estimated costs for a complete fiscal year (2000/01):

District Attorney	$110,000
Public Defender	130,000
Sheriff	50,000
TOTAL	$290,000

DECLARATION of CLAIMANT:

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 2nd day of July, 2001, at San Bernardino, California, by:

Aly Saleh
Chief Deputy Auditor

SCHEDULE OF EXHIBITS

Exhibit A: Penal Code Section 2966

Exhibit B: Penal Code Section 2962

Exhibit C: Statutes of 1986, Chapter 858

Exhibit D: Statutes of 1987, Chapter 687

Exhibit E: Statutes of 1988, Chapter 658

Exhibit F: Statutes of 1989, Chapter 228

Exhibit G: Statutes of 1994, Chapter 706

force to property in a manner
persons in the area. People v
Dist) 68 Cal App 4th 1120, 80
1124.

unarmed second-degree rob-
y any actual display of force
t, and resulting in no bodily
t constitute a crime of "force
nal C § 2962. Accordingly,
ve been adjudged a mentally
DO), and his commitment was
alone (1999) 19 Cal 4th 1074,
2d 315, 969 P2d 160.

Penal C § 2962(e)(2)(P) is
include the implied threat of
ry defendant's disclosure that
the Legislature had intended
force was sufficient to sustain
dered offender) commitment,
provided, as it did in several
ons (e.g., §§ 136.1(c)(1) [in-
y force or by an express or
r violence"], 190.3 [permit-
al cases of defendant's other
ng the "express or implied
violence"], 261(b) [defining
as meaning "direct or im-
lence, etc.]). People v Anza-
1074, 1080, 81 Cal Rptr 2d

e intent underlying Penal C
treatment of defendants as
ered offenders) only in cer-
namely where, because of
oner inflicted serious bodily
forcible or violent crimes as
kidnapping, rape, or robbery
use. Given the aggravated
es specified in § 2962(e)(2),
ion of robberies involving
y or dangerous weapon in
is quite unlikely that the
ake every robbery attempt a
Anzalone (1999) 19 Cal 4th
2d 315, 969 P2d 160.

for arson of property, defen-
ommitted as a mentally dis-
under Penal C § 2962. De-
ne to set fire to his wife's
she filed for divorce. At the
mitted as an MDO, arson
ry under Penal C § 451(a)
nerated MDO offense, but
. Subsequently, the Legisla-
slation defining an MDO of-
in violation of any provision
f § 455 where the act posed
hysical harm to others. It is
of the amendment that it ap-
committed under § 2962.
are part of a civil scheme
the rule against ex post facto
arson offense posed a sub-
upants of nearby structures,
(2)(L). People v Macauley
pp 4th 704, 86 Cal Rptr 2d

Defendant, convicted of stalking, was properly committed as a mentally disordered offender (MDO) under Penal C § 2962, even though his offense did not involve "force or violence." While serving his prison sentence, defendant had been diagnosed as suffering from a bipolar disorder. The amendment to § 2962 was designed to prevent the release of MDO's on the sole ground that their crimes involved the threat of force rather than actual force. Because the MDO statutes are part of a civil scheme which does not implicate the rule against ex post facto laws, the amendment may be applied retroactively. Defendant's stalking offense under Penal C § 646.9(e)(2)(Q) met the criteria in that he followed his victim and threatened to kill her and members of her family. These threats were made in such a manner that a reasonable person would believe and expect that the force or violence would be used. People v Butler (1999, 2nd Dist) 74 Cal App 4th 557, 88 Cal Rptr 2d 210.

Defendant was convicted and imprisoned for making terrorist threats. He had said to his father's girlfriend, among other things, "I'm going to get my friends out here to kill you." For purposes of determining whether defendant was a mentally disordered offender (MDO), his conviction of Penal C § 422 involved a threat of immediate force or violence likely to produce substantial physical harm, as required by Penal C § 2962(e)(2)(Q). Although defendant argued that his threats concerned only future violence, the immediacy element of defendant's threat was adjudicated by his guilty plea and conviction. People v Lopez (1999, 2nd Dist) 74 Cal App 4th 675, 679, 88 Cal Rptr 2d 252.

§ 2966. Administrative hearing regarding eligibility for treatment; Superior court hearing; Continuation of treatment

(a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing, the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. *Evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the Board of Prison Terms hearing shall not be considered.* The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. *The court may, upon stipulation of both parties, receive in evidence the affidavit or declaration of any psychiatrist, psychologist, or other professional person who was involved in the certification and hearing process, or any professional person involved in the evaluation or treatment of the petitioner during the certification process. The court may allow the affidavit or declaration to be read and the content thereof considered in the rendering of a decision or verdict in any proceeding held pursuant to subdivision (b) or (c), or subdivision (a) of Section 2972. If the court or jury reverses the determination of the Board of Prison Terms, the*

court shall stay the execution of the decision for five working days to allow fo an orderly release of the prisoner.

(c) If the Board of Prison Terms continues a parolee's mental health treatmer under Section 2962 when it continues the parolee's parole under Section 3001 the procedures of this section shall only be applicable for the purpose c determining if the parolee has a severe mental disorder, whether the parolee' severe mental disorder is not in remission or cannot be kept in remission withou treatment, and whether by reason of his or her severe mental disorder, the parole represents a substantial danger of physical harm to others.

Amended Stats 1994 ch 706 § 1 (SB 1918).

Amendments:

1994 Amendment: Amended subd (b) by (1) adding the third sentence; and (2) the tenth, eleventh, and twelfi sentences.

Editor's Notes—For legislative intent, see the 1989 Note following Pen C § 2962.

NOTES OF DECISIONS

Principles of double jeopardy, res judicata, and collateral estoppel did not preclude the filing of another mentally disordered offender certification petition (Pen. Code, § 2960 et seq.) after defendant had successfully petitioned for outpatient treatment without having committed a new felony offense involving force or violence. Since the successful petition, there had been a change of circumstances in that while on outpatient parole defendant's mental health deteriorated, he was hearing voices, he cut his wrists, and he "cried out for help" by going to an outpatient clinic. A proceeding to determine mentally disordered offender status is not civil in nature even though the Legislature has so declared it in Pen. Code, § 2966, subd. (b). Where the mental health aspect of such a defendant has changed after reincarceration on parole for the same underlying offense, the People are not foreclosed from seeking a mentally disordered offender determination when parole is again imminent. People v Coronado (1994, 2nd Dist) 28 Cal App 4th 1402, 33 Cal Rptr 2d 835.

In a trial court hearing held at defendant's request after the Board of Prison Terms extended his commitment as a mentally disordered offender, the trial court committed harmless error in failing to instruct the jury sua sponte that it had to determine whether, as of the date of the board hearing, defendant had a severe mental disorder that was not in remission and represented a substantial danger to others. At both a hearing challenging a parolee's initial commitment and at an annual review hearing continuing that commitment, the trier of fact is required to determine that the parolee met the mentally disordered offender criteria on the date of the most recent board hearing. Nevertheless, defendant was not prejudiced by the error, since it was not reasonably probable that, even if the jury had been instructed properly, it would have found that defendant did not meet the mentally disordered offender criteria as of the proper date. People Bell (1994, 2nd Dist) 30 Cal App 4th 1705, 36 C Rptr 2d 746.

The trial court properly found defendant to be mentally disordered offender (MDO) pursuant to Pe C § 2962 et seq., where the date of the underlyin offenses occurred during the period after the MD statutory scheme was declared unconstitutional by th Court of Appeal and before the Legislature amende the statutes to comply with the decision. The retroac tive application of a nonpenal statute does not viola ex post facto laws. The MDO scheme is a nonpun tive, civil law in view of the Legislature's expre declaration that the MDO law provides prisoners wi a "civil hearing" to determine whether they meet th criteria of the MDO scheme (Pen C §§ 2966(b 2972(a)), despite the scheme's placement in the Pen Code. People v Robinson (1998, 2nd Dist) 63 C App 4th 348, 74 Cal Rptr 2d 52.

In a court trial, defendant was adjudged to be mentally disordered offender (MDO) as provided b Penal C § 2960 et seq. Counsel had waived a jur trial over defendant's objection. Although defenda did not dispute that an MDO proceeding is a civ rather than criminal matter, he relied on § 2966 whic provides for a jury trial unless waived by both th person and the district attorney. § 2966 concern persons who have been found by the Board of Pris Terms to be mentally disordered. The Legislatu must have contemplated that many persons, such defendant, might not be sufficiently competent determine their own best interests. There is no reas to believe the Legislature intended to leave the dec sion as to whether trial should be before the court a jury in the hands of such a person. People v Ol (1999, 2nd Dist) 70 Cal App 4th 1174, 1176, 83 C Rptr 2d 326.

§ 2970. Petition for continued involuntary treatment

Editor's Notes—For legislative intent, see the 1989 Note following Pen C § 2962.

NOTES OF DECISIONS

The trial court had jurisdiction to recommit a mentally disordered inmate, who was otherwise almost eligible for unconditional release, for "conti ued involuntary treatment" pursuant to Pen. Cod

iosity, narcissism, and hallucinations. He was also n abuser of cocaine, and had attempted suicide, reatened hospital staff members, exposed himself, nd claimed to have magical powers and to be Jesus hrist. It could not be said as a matter of law that efendant suffered only from a "personality or adjustent disorder" (Pen. Code, § 3962, subd. (a)), or that s acts were the result of substance abuse or unflagng religious beliefs. These were inferences that uld have been drawn by the jury, but were not, and e reviewing court does not reweigh or reinterpret e evidence on appeal. People v Pace (1994, 2nd st) 27 Cal App 4th 795.

A parole revocation was an act in excess of the ard of Prison Term's statutory authority, where an mate had served a determinate prison term, and er his initial parole release date passed, but before was released into the community, his parole was voked twice, based solely on Cal Code Reg § 16(a)(7). Although the Legislature has vested the ard with broad power both to impose conditions of role and to revoke parole, it has also decreed that Board has no discretion to withhold parole to a soner who has served a determinate term. The gislature has directly addressed the public safety and treatment concerns such individuals present by supplementing the Lanterman-Petris-Short Act (W & I C § 5000 et seq.) with the mentally disordered offender law (Pen C § 2960 et seq.) and the Sexually Violent Predators Act (W & I C § 6600 et seq.). Each of those acts applies to a precisely defined category of individuals, prescribes a detailed sequence of evaluations and procedures that must be followed, and affords the affected individuals mandatory procedural safeguards, including the right to a jury trial, before civil commitment can occur. When considered together with Pen C § 3000, subd. (b)(1), the mandatory parole release provision of the determinate sentencing law, these statutes impliedly reflect a legislative choice to require the Department of Corrections and the Board to utilize one of these acts when confronted with the problem of the potentially dangerous mentally disordered inmate. Because the Legislature has so fully occupied the subject matter, the Board's utilization of the expedient of parole revocation under Cal Code Reg § 2616(a)(7) instead of civil commitment for the mentally disordered inmate who is about to released into the community on parole was unauthorized. Terhune v Superior Court (1998, 1st Dist) 65 Cal App 4th 864, 76 Cal Rptr 2d 841.

2962. Treatment as condition of parole; Criteria; Proof of substantial anger of physical harm

s a condition of parole, a prisoner who meets the following criteria shall be quired to be treated by the State Department of Mental Health, and the State epartment of Mental Health shall provide the necessary treatment:

) The prisoner has a severe mental disorder that is not in remission or cannot e kept in remission without treatment.

he term "severe mental disorder" means an illness or disease or condition that ubstantially impairs the person's thought, perception of reality, emotional rocess, or judgment; or which grossly impairs behavior; or that demonstrates vidence of an acute brain syndrome for which prompt remission, in the absence f treatment, is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental tardation or other developmental disabilities, or addiction to or abuse of toxicating substances.

he term "remission" means a finding that the overt signs and symptoms of the evere mental disorder are controlled either by psychotropic medication or sychosocial support. A person "cannot be kept in remission without treatment" during the year prior to the question being before the Board of Prison Terms r a trial court, he or she has been in remission and he or she has been physially violent, except in self-defense, or he or she has made a serious threat of ubstantial physical harm upon the person of another so as to cause the target of he threat to reasonably fear for his or her safety or the safety of his or her imediate family, or he or she has intentionally caused property damage, or he or he has not voluntarily followed the treatment plan. In determining if a person as voluntarily followed the treatment plan, the standard shall be whether the erson has acted as a reasonable person would in following the treatment plan.

). The severe mental disorder was one of the causes of or was an aggravating ctor in the commission of a crime for which the prisoner was sentenced to rison.

). The prisoner has been in treatment for the severe mental disorder for 90 days r more within the year prior to the prisoner's parole or release.

PENAL CODE

(d)(1) Prior to release on parol a practicing psychiatrist or ps Health have evaluated the pris and a chief psychiatrist c Board of Prison Terms tha disorder is not in remission, c that the severe mental disord factor in the prisoner's crimina for the severe mental disorder or her parole release day, and the prisoner represents a sul prisoners being treated by th Section 2684, the certification of Corrections, and the evalua at the state hospital in charge or psychologist from the Dep

(2) If the professionals doing concur that (A) the prisoner is not in remission or cannot the severe mental disorder wa behavior, and a chief psychia Terms pursuant to this parag further examination by two in 2978.

(3) Only if both independent paragraph (2) concur wi described in paragraph (The professionals appointed that the purpose of their ex prisoner meets certain criteri offender. It is not required information.

(e) The crime referred to in s

(1) The defendant received the crime.

(2) The crime is one of the

(A) Voluntary manslaughter.

(B) Mayhem.

(C) Kidnapping in violation

(D) Any robbery wherein it ally used a deadly or dange tion 12022, in the commissi

(E) Carjacking, as defined i proved that the defendant provided in subdivision (b) ing.

(F) Rape, as defined in para paragraph (1) or (4) of

(G) Sodomy by force, viole ful bodily injury on the vic

(d)(1) Prior to release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

(2) If the professionals doing the evaluation pursuant to paragraph (1) do not concur that (A) the prisoner has a severe mental disorder, (B) that the disorder is not in remission or cannot be kept in remission without treatment, or (C) that the severe mental disorder was a cause of, or aggravated, the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978.

(3) Only if both independent professionals who evaluate the prisoner pursuant to paragraph (2) concur with the chief psychiatrist's certification of the issues described in paragraph (2), shall this subdivision be applicable to the prisoner. The professionals appointed pursuant to Section 2978 shall inform the prisoner that the purpose of their examination is not treatment but to determine if the prisoner meets certain criteria to be involuntarily treated as a mentally disordered offender. It is not required that the prisoner appreciate or understand that information.

(e) The crime referred to in subdivision (b) meets both of the following criteria:

(1) The defendant received a determinate sentence pursuant to Section 1170 for the crime.

(2) The crime is one of the following:

(A) Voluntary manslaughter.

(B) Mayhem.

(C) Kidnapping in violation of Section 207.

(D) Any robbery wherein it was charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery.

(E) Carjacking, as defined in subdivision (a) of Section 215, if it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of the carjacking.

(F) Rape, as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.

(G) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

Beginning in 1992,

(H) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(I) Lewd acts on a child under the age of 14 years in violation of Section 288.

(J) Continuous sexual abuse in violation of Section 288.5.

(K) The offense described in subdivision (a) of Section 289 where the act was accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(*L*) Arson in violation of subdivision (a) of Section 451, or arson in violation of any other provision of Section 451 or in violation of Section 455 where the act posed a substantial danger of physical harm to others.

(M) Any felony in which the defendant used a firearm which use was charged and proved as provided in Section 12022.5, 12022.53, or 12022.55.

(N) A violation of Section 12308.

(O) Attempted murder.

(P) A crime not enumerated in ***subparagraphs*** (A) to (O), inclusive, in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (4) of subdivision (f) of Section 243.

(Q) A crime in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used. For purposes of this subparagraph, substantial physical harm shall not require proof that the threatened act was likely to cause great or serious bodily injury.

(f) As used in this chapter, "substantial danger of physical harm" does not require proof of a recent overt act.

Amended Stats 1995 ch 761 § 1 (SB 34); Stats 1998 ch 936 § 16 (AB 105), effective September 28, 1998; Stats 1999 ch 16 § 1 (SB 279), effective April 22, 1999. Amended Stats 2000 ch 135 § 137 (AB 2539).

Amendments:

1995 Amendment: (1) Deleted "that the prisoner used force or violence or caused serious bodily injury in committing the crime referred to in subdivision (b)," before "and that by" in the first sentence of subd (d)(1); (2) substituted "(i)", "(ii)", and "(iii)" for "(1)", "(2)", and "(3)" in subd (d)(2); and (3) substituted subd (e) for former subd (e) which read: "(e) The crime referred in subdivision (b) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (f) of Section 243."

1998 Amendment: (1) Redesignated former subds (d)(2)(i)–(d)(2)(iii) to be subds (d)(2)(A)–(d)(2)(C); (2) substituted "Section 12022.5, 12022.53, or 12022.55" for "Section 12022.5 or 12022.55" in subd (e)(2)(M); and (3) substituted "paragraph (4)" for "paragraph (5)" in subd (e)(2)(P).

1999 Amendment: Amended subd (e)(2) by adding (1) ", or arson in violation of any other provision of Section 451 or in violation of Section 455 where the act posed a substantial danger of physical harm to others" in subd (e)(2)(L); and (2) subd (e)(2)(Q).

Note—Stats 1989 ch 228 provides:

SEC. 6. It is not the intent of the Legislature to directly or indirectly imply by this act that courts may not use the standard of evidence accepted by the court in People v. Beard, 173, Cal. App. 3d 1113, in cases arising under Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The Court of Appeal in People v. Gibson (204 Cal. App. 3d 1425) declared part of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code in violation of the equal protection clause of the United States Constitution because it does not require proof the person represents a substantial danger of physical harm to others by reason of his or her severe mental disorder. In order to keep the mentally disordered offender program in effect for those persons who committed their crimes on or after January 1, 1986, it is necessary that this act take effect immediately.

Note—Stats 1999 ch 16 provides:

SEC. 2. The provisions of this act sh with Section 2960) of Chapter 7 of T

The trial court properly fo crime involved "force or violence." dant was a mentally disordered offen § 2962), even though his offense i false imprisonment involved a threa than application of physical power primary purpose of § 2962 is to prote and defendant's conduct in pretendi posed a danger to the victims. The ment of § 2962 was satisfied, since d power over the victims and overcame to escape. People v Pretzer (1992, App 4th 1078, 11 Cal Rptr 2d 860.

In a proceeding to determine wh met the mentally disordered offender of Pen. Code, § 2962, the trial cou erred in instructing the jury with CAL which is the definition of force or purpose of battery, and under which lence are synonymous. Force and viol Pen. Code, § 2962, subds. (b) and (e) ing defendant for treatment as MDO). mous. The words "force" and "viol of ordinary meaning and require no fi People v Collins (1992, 2nd Dist) 690, 12 Cal Rptr 2d 768.

In a proceeding in which defenda be a mentally disordered offender (M § 2960 et seq.), a doctor who dant's MDO status properly re report in concluding that defendant's fense involved "force or violence" w ing of Pen. Code, § 2962, subd. (e). ence did not violate the hearsay ru § 1200 et seq.) In the context of an M a qualified mental health profession and consider the underlying probati pressing an opinion that the prisoner includes reference to the criterion or underlying offense is one involving lence." A probation report, albeit h sonably be relied on by an exper opinion on the subject to which his relates, within the meaning of Evid Since a probation report is sufficient to permit the imposition of a state pr portion, it is sufficiently reliable so mental health professional to rely on MDO opinion. In any event, defe object to the testimony on this bas entitled to raise the issue for the firs People v Miller (1994, 2nd Dist) 25 31 Cal Rptr 2d 423.

In mentally disordered certificat (Pen. Code, § 2960 et seq.), in whi fense against a custodial officer wa "controlling offense," and sex offen trolling," the trial court properly to introduce evidence of both the sex offenses. The psychiatri into account the prisoner's entire his

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CHAPTER 858

An act to amend Sections 2960 and 2970 of, and to add Sections 2962, 2964, 2966, 2968, 2972, 2974, 2976, 2978, and 2980 to, the Penal Code, relating to mentally disordered offenders.

[Approved by Governor September 16, 1986. Filed with Secretary of State September 17, 1986.]

The people of the State of California do enact as follows:

SECTION 1. Section 2960 of the Penal Code is amended to read:

2960. The Legislature finds that there are prisoners who have a treatable, severe mental disorder that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated. Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public. Thirdly, the Legislature finds that in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission.

The Legislature further finds and declares the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community.

SEC. 2. Section 2962 is added to the Penal Code, to read:

2962. As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment. The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission in the absence of treatment is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances. The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or

psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan."

(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(d) Prior to release on parole the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, and that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

If the professionals doing the evaluation do not concur that (1) the prisoner has a severe mental disorder, or (2) that the disorder is not in remission or cannot be kept in remission without treatment, or (3) that the severe mental disorder was a cause of, or aggravated the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978. Only if both independent professionals concur with the chief psychiatrist's certification, shall the provisions of this subdivision be applicable to the prisoner.

(e) The crime referred to in subdivision (b) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

SEC. 3. Section 2964 is added to the Penal Code, to read:

2964. (a) The treatment required by Section 2962 shall be

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inpatient unless the State Department of Mental Health certifies to the Board of Prison Terms that there is reasonable cause to believe the parolee can be safely and effectively treated on an outpatient basis, in which case the Board of Prison Terms shall permit the State Department of Mental Health to place the parolee in an outpatient treatment program specified by the State Department of Mental Health. Any prisoner who is to be required to accept treatment pursuant to Section 2962 shall be informed in writing of his or her right to request a hearing pursuant to Section 2966. Prior to placing a parolee in a local outpatient program, the State Department of Mental Health shall consult with the local outpatient program as to the appropriate treatment plan. Notwithstanding any other provision of law, a parolee ordered to have outpatient treatment pursuant to this section may be placed in an outpatient treatment program used to provide outpatient treatment under Title 15 (commencing with Section 1600) of Part 2, but the procedural provisions of Title 15 shall not apply. The director of an outpatient program used to provide treatment under Title 15 in which a parolee is placed may place the parolee in a secure mental health facility if the parolee can no longer be safely or effectively treated in the outpatient program, and until the parolee can be safely and effectively treated in the program. Within 15 days after placement in a secure facility the State Department of Mental Health shall conduct a hearing on whether the parolee can be safely and effectively treated in the program. Before deciding to seek revocation of the parole of a parolee receiving mental health treatment pursuant to Section 2962, and return him or her to prison, the parole officer shall consult with the director of the parolee's outpatient program.

(b) If the State Department of Mental Health has not placed a parolee on outpatient treatment within 60 days after receiving custody of the parolee or after parole is continued pursuant to Section 3001, the parolee may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing to determine whether the prisoner shall be treated as an inpatient or an outpatient. At the hearing, the burden shall be on the State Department of Mental Health to establish that the prisoner requires inpatient treatment as described in this subdivision. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978.

SEC. 4. Section 2966 is added to the Penal Code, to read:

2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two

independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she meets the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole under Section 3001, this section shall be applicable for the purpose of determining whether the parolee meets the criteria of Section 2962.

SEC. 5. Section 2968 is added to the Penal Code, to read:

2968. If the prisoner's severe mental disorder is put into remission during the parole period, and can be kept in remission, the Director of Mental Health shall notify the Board of Prison Terms and the State Department of Mental Health shall discontinue treating the parolee.

SEC. 6. Section 2970 of the Penal Code is amended to read:

2970. Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison or in a state mental hospital the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits. The

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district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall state the reasons necessitating the continued treatment, with accompanying affidavits specifying the conditions in Section 2962 and that treatment during the parole period, if any, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify why the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued.

SEC. 7. Section 2972 is added to the Penal Code, to read:

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. The need for continued treatment shall be proven beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(c) If the court or jury finds that the patient is a person described in Section 2962, and his or her severe mental disorder is not in remission or cannot be kept in remission without treatment, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970.

(d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient remains a person described in Section 2962 whose severe

mental disorder is not in remission or cannot be kept in remission without treatment. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date.

SEC. 8. Section 2974 is added to the Penal Code, to read:

2974. Before releasing any inmate or terminating supervision of any parolee who is a danger to self or others, or gravely disabled as a result of mental disorder, and who does not come within the provisions of Section 2962, the Director of Corrections may, upon probable cause, place, or cause to be placed, the person in a state hospital pursuant to the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code.

SEC. 9. Section 2976 is added to the Penal Code, to read:

2976. (a) The cost of inpatient or outpatient treatment under this article shall be a state expense while the person is under the jurisdiction of the Department of Corrections.

(b) Any person placed outside of a facility of the Department of Corrections for the purposes of inpatient treatment under this article shall not be deemed to be released from imprisonment or from the custody of the Department of Corrections prior to the expiration of the maximum term of imprisonment of the person.

SEC. 10. Section 2978 is added to the Penal Code, to read:

2978. (a) Any independent professionals appointed by the Board of Prison Terms for purposes of this article shall not be state government employees; shall have at least five years of experience in the diagnosis and treatment of mental disorders; and shall include psychiatrists, and licensed psychologists who have a doctoral degree in psyschology.

(b) On July 1 of each year the Department of Corrections and the State Department of Mental Health shall submit to the Board of Prison Terms a list of 20 or more independent professionals on which both departments concur. The professionals shall not be state government employees and shall have at least five years of experience in the diagnosis and treatment of mental disorders and shall include psychiatrists and licensed psychologists who have a

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doctoral degree in psychology. For purposes of this article, when the Board of Prison Terms receives the list, they shall only appoint independent professionals from the list. The list shall not be binding on the Board of Prison Terms until they have received it, and shall not be binding after June 30 following receipt of the list.

SEC. 11. Section 2980 is added to the Penal Code, to read:

2980. This article applies to persons incarcerated before, as well as after, January 1, 1986.

CHAPTER 859

An act to amend Section 40000.7 of, and to add Section 4463.5 to, the Vehicle Code, relating to vehicles.

[Approved by Governor September 16, 1986. Filed with Secretary of State September 17, 1986.]

The people of the State of California do enact as follows:

SECTION 1. Section 4463.5 is added to the Vehicle Code, to read:

4463.5. (a) No person shall manufacture or sell a decorative or facsimile license plate of a size substantially similar to the license plate issued by the department.

(b) Notwithstanding subdivision (a), the director may authorize the manufacture and sale of decorative or facsimile license plates for special events or media productions.

(c) A violation of this section is a misdemeanor punishable by a fine of not less than five hundred dollars ($500).

SEC. 2. Section 40000.7 of the Vehicle Code is amended to read:

40000.7. A violation of any of the following provisions is a misdemeanor, and not an infraction:

(a) Section 2416, relating to regulations for emergency vehicles.

(b) Section 2800, relating to failure to obey an officer's lawful order or submit to a lawful inspection.

(c) Section 2800.1, relating to fleeing from a peace officer.

(d) Section 2801, relating to failure to obey a fireman's lawful order.

(e) Section 2803, relating to unlawful vehicle or load.

(f) Section 2813, relating to stopping for inspection.

(g) Subdivision (b) of Section 4461 and subdivisions (b) and (c) of Section 4463, relating to disabled person placards.

(h) Section 4463.5, relating to deceptive or facsimile license plates.

(i) Section 5500, relating to the surrender of registration documents and license plates before dismantling may begin.

(j) Section 5753, relating to delivery of certificates of ownership and registration when committed by a dealer or any person while a dealer within the preceding 12 months.

act is in accordance with the request of a local agency which desired legislative authority to carry out the program specified in this act. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to provide for the continuation of the prohibition against requiring prior authorization from the State Department of Health Services for the provision of portable X-ray services provided in skilled nursing or intermediate care facilities under the Medi-Cal program, and in order to apply the provisions of this act to the special commission in San Mateo County prior to the end of the 1987 calendar year, it is necessary that this act go into immediate effect.

CHAPTER 687

An act to amend Section 1017 of the Evidence Code, and to amend Sections 1615, 1617, 1618, 1619, 1620, 2962, 2966, 2972, and 2978 of, and to add Section 2981 to, the Penal Code, relating to mentally disordered offenders.

[Approved by Governor September 16, 1987. Filed with Secretary of State September 17, 1987.]

The people of the State of California do enact as follows:

SECTION 1. Section 1017 of the Evidence Code is amended to read:

1017. (a) There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition.

(b) There is no privilege under this article if the psychotherapist is appointed by the Board of Prison Terms to examine a patient pursuant to the provisions of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

SEC. 2. Section 1615 of the Penal Code is amended to read:

1615. Pursuant to Section 5709.8 of the Welfare and Institutions Code, the State Department of Mental Health shall be responsible for the community treatment and supervision of judicially committed patients. These services shall be available on a county or regional basis. The department may provide these services directly or through contract with private providers or counties. The program

or programs through which these services are provided shall be known as the Mental Health Conditional Release Program.

The department shall contact all county mental health programs by January 1, 1986, to determine their interest in providing an appropriate level of supervision and treatment of judicially committed patients at reasonable cost. County mental health agencies may agree or refuse to operate such a program.

The State Department of Mental Health shall ensure consistent data gathering and program standards for use statewide by the Mental Health Conditional Release Program.

SEC. 3. Section 1617 of the Penal Code is amended to read:

1617. The State Department of Mental Health shall research the demographic profiles and other related information pertaining to persons receiving supervision and treatment in the Mental Health Conditional Release Program. An evaluation of the program shall determine its effectiveness in successfully reintegrating these persons into society after release from state institutions. This evaluation of program effectiveness shall include, but not be limited to, a determination of the rates of reoffense while these persons are served by the program and after their discharge. This evaluation shall also address the effectiveness of the various treatment components of the program and their intensity.

The State Department of Mental Health may contract with an independent research agency to perform this research and evaluation project. Any independent research agency conducting this research shall consult with the Forensic Mental Health Association concerning the development of the research and evaluation design.

SEC. 4. Section 1618 of the Penal Code is amended to read:

1618. The administrators and the supervision and treatment staff of the Mental Health Conditional Release Program shall not be held criminally or civilly liable for any criminal acts committed by the persons on parole or judicial commitment status who receive supervision or treatment. This waiver of liability shall apply to employees of the State Department of Mental Health and the agencies or persons under contract to this department to provide supervision or treatment to mentally ill parolees or persons under judicial commitment.

SEC. 5. Section 1619 of the Penal Code is amended to read:

1619. The Department of Justice shall automate the criminal histories of all persons treated in the Mental Health Conditional Release Program, as well as all persons committed as not guilty by reason of insanity pursuant to Section 1026, incompetent to stand trial pursuant to Section 1370 or 1370.2, any person currently under commitment as a mentally disordered sex offender, and persons treated pursuant to Section 1364 or 2684 or Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3.

SEC. 6. Section 1620 of the Penal Code is amended to read:

1620. The Department of Justice shall provide mental health

agencies providing treatment to patients pursuant to Sections 1600 to 1610, inclusive, or pursuant to Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3, with access to criminal histories of those mentally ill offenders who are receiving treatment and supervision. Treatment and supervision staff who have access to these criminal histories shall maintain the confidentiality of the information and shall sign a statement to be developed by the Department of Justice which informs them of this obligation.

SEC. 7. Section 2962 of the Penal Code is amended to read:

2962. As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment. The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission in the absence of treatment is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances. The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(d) Prior to release on parole the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison

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If the professionals doing the evaluation do not concur that (1) the prisoner has a severe mental disorder, or (2) that the disorder is not in remission or cannot be kept in remission without treatment, or (3) that the severe mental disorder was a cause of, or aggravated the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978. Only if both independent professionals concur with the chief psychiatrist's certification, shall the provisions of this subdivision be applicable to the prisoner. The professionals appointed pursuant to Section 2978 shall inform the prisoner that the purpose of their examination is not treatment but to determine if the prisoner meets the criteria to be involuntarily treated as a mentally disordered offender. It is not required that the prisoner appreciate or understand such information.

(e) The crime referred to in subdivision (b) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

SEC. 8. Section 2966 of the Penal Code is amended to read:

2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is

incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole under Section 3001, this section shall be applicable for the purpose of determining whether the parolee meets the criteria of Section 2962.

SEC. 9. Section 2972 of the Penal Code is amended to read:

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. The need for continued treatment shall be proven beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(c) If the court or jury finds that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970.

(d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that

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the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date.

SEC. 10. Section 2978 of the Penal Code is amended to read:

2978. (a) Any independent professionals appointed by the Board of Prison Terms for purposes of this article shall not be state government employees; shall have at least five years of experience in the diagnosis and treatment of mental disorders; and shall include psychiatrists, and licensed psychologists who have a doctoral degree in psychology.

(b) On July 1 of each year the Department of Corrections and the State Department of Mental Health shall submit to the Board of Prison Terms a list of 20 or more independent professionals on which both departments concur. The professionals shall not be state government employees and shall have at least five years of experience in the diagnosis and treatment of mental disorders and shall include psychiatrists and licensed psychologists who have a doctoral degree in psychology. For purposes of this article, when the Board of Prison Terms receives the list, they shall only appoint independent professionals from the list. The list shall not be binding on the Board of Prison Terms until they have received it, and shall not be binding after June 30 following receipt of the list.

SEC. 11. Section 2981 is added to the Penal Code, to read:

2981. For the purpose of proving the fact that a prisoner has received 90 days or more of treatment within the year prior to the prisoner's parole or release, the records or copies of records of any

state penitentiary, county jail, federal penitentiary, or state hospital in which that person has been confined, when the records or copies thereof have been certified by the official custodian of those records, may be admitted as evidence.

CHAPTER 688

An act to amend Sections 6140, 6140.1, and 6140.3 of, and to add Section 6032 to, the Business and Professions Code, relating to the State Bar of California.

[Approved by Governor September 16, 1987. Filed with Secretary of State September 17, 1987.]

The people of the State of California do enact as follows:

SECTION 1. Section 6032 is added to the Business and Professions Code, to read:

6032. Subject to the approval of the Committees on Judiciary of each house of the Legislature, the board shall contract with an independent expert for the purpose of conducting a comprehensive study of the State Bar's affirmative action program with regard to its employees. A final report shall be submitted to each of the Committees on Judiciary no later than September 1, 1988. The amount expended pursuant to the contract shall not exceed twenty-five thousand dollars ($25,000).

SEC. 2. Section 6140 of the Business and Professions Code is amended to read:

6140. (a) The board shall fix the annual membership fee for 1988 as follows:

(1) For active members who have been admitted to the practice of law in this state for three years or longer preceding the first day of February of the year for which the fee is payable, at the sum of two hundred fifteen dollars ($215).

(2) For active members who have been admitted to the practice of law in this state for less than three years but more than one year preceding the first day of February of the year for which the fee is payable, at the sum of one hundred forty-seven dollars ($147).

(3) For active members who have been admitted to the practice of law in this state during, or for less than one year preceding the first day of February of, the year for which the fee is payable, at a sum not exceeding one hundred sixteen dollars ($116).

(b) The annual membership fee for active members is payable on or before the first day of February of each year.

This section shall remain in effect only until January 1, 1989, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1989, deletes or extends that date.

SEC. 3. Section 6140.1 of the Business and Professions Code is

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CHAPTER 658

(Senate Bill No. 538)

An act to amend Sections 2966 and 2970 of the Penal Code, relating to mentally disordered offenders.

[Approved by Governor August 27, 1988.]

LEGISLATIVE COUNSEL'S DIGEST

SB 538, McCorquodale. Mentally disordered offenders.

Existing law authorizes a prisoner to request a hearing before the Board of Prison Terms for purposes of proving that the prisoner meets specified criteria for treatment by the State Department of Mental Health as a condition of parole. Existing law provides that if the prisoner disagrees with the determination of the board, he or she may file a petition for a hearing in the superior court, as specified, on whether the prisoner, as of the date of the Board of Prison Terms hearing, has met the prescribed criteria for treatment by the State Department of Mental Health. If the Board of Prison Terms continues a parolee's mental health treatment when it continues his or her parole under specified provisions, existing law provides that these provisions shall be applicable for the purpose of determining whether the parolee meets the criteria for continued treatment as a condition of parole.

This bill would provide instead that, if the Board of Prison Terms continues a parolee's mental health treatment under those specified provisions, the above procedures shall only be applicable for the purpose of determining if the parolee has a severe mental disorder and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment.

Existing law, as specified above, provides for the required treatment of certain convicted felons with a severe mental disorder as a condition of parole, and for their continued treatment upon termination of parole or release from prison. Existing law also provides that if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the director of the mental health facility or the Director of Corrections shall submit his or her evaluation on remission to the district attorney. The district attorney may file a petition for the continued treatment of the person for a period of one year, as specified. The petition shall state the reasons necessitating the continued treatment and be accompanied by affidavits stating specified conditions and that treatment during the parole period, if any, has continuously been provided by the State Department of Mental Health, as specified.

This bill would delete the requirement that the petition state the reasons necessitating the continued treatment of the person. It would require the petition be accompanied by an affidavit specifying certain conditions including a statement that the treatment was provided by the State Department of Mental Health, as specified.

The people of the State of California do enact as follows:

SECTION 1. Section 2966 of the Penal Code is amended to read:

§ 2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing the burden of

proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment.

SEC. 2. Section 2970 of the Penal Code is amended to read:

§ 2970. Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment or for those in prison or in a state mental hospital the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits. The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify whether the prisoner has a severe mental disorder and why the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued.

EXPLANATORY NOTES SENATE BILL 538:

Pen C § 2966. Amended subd (c) by substituting (1) "the procedures of this section shall only" for "this section shall" after "Section 3001,"; and (2) "if the parolee has a severe mental disorder, and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment" for "whether the parolee meets the criteria of Section 2962".

Pen C § 2970. (1) Deleted the comma after "outpatient treatment" in the first sentence; (2) substituted "be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole" for "state the reasons necessitating the continued treatment, with accompanying affidavits specifying the conditions in Section 2962 and that treatment during the parole period, if any" in the fourth sentence; and (3) added "whether the prisoner has a severe mental disorder and" in the last sentence.

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CHAPTER 228

An act to amend Sections 2962, 2966, 2970, 2972, and 2980 of the Penal Code, relating to prisoners, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 27, 1989. Filed with Secretary of State July 27, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 2962 of the Penal Code is amended to read:

2962. As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment.

The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances.

The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(d) (1) Prior to release on parole, the person in charge of treating

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the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, that the prisoner used force or violence or caused serious bodily injury in committing the crime referred to in subdivision (b), and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

(2) If the professionals doing the evaluation pursuant to paragraph (1) do not concur that (1) the prisoner has a severe mental disorder, or (2) that the disorder is not in remission or cannot be kept in remission without treatment, or (3) that the severe mental disorder was a cause of, or aggravated the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978.

(3) Only if both independent professionals who evaluate the prisoner pursuant to paragraph (2) concur with the chief psychiatrist's certification of the issues described in paragraph (2), shall the provisions of this subdivision be applicable to the prisoner. The professionals appointed pursuant to Section 2978 shall inform the prisoner that the purpose of their examination is not treatment but to determine if the prisoner meets certain criteria to be involuntarily treated as a mentally disordered offender. It is not required that the prisoner appreciate or understand that information.

(e) The crime referred to in subdivision (b) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

(f) As used in this chapter, "substantial danger of physical harm" does not require proof of a recent overt act.

SEC. 2. Section 2966 of the Penal Code is amended to read:

2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing, the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d)

of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when it continues the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the parolee represents a substantial danger of physical harm to others.

SEC. 3. Section 2970 of the Penal Code is amended to read:

2970. Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections, shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison or in a state mental hospital, the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written

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evaluation shall be accompanied by supporting affidavits.

The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others.

SEC. 4. Section 2972 of the Penal Code is amended to read:

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable.

The standard of proof under this section shall be proof beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(c) If the court or jury finds that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970.

(d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be

that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date.

SEC. 5. Section 2980 of the Penal Code is amended to read:

2980. This article applies to persons who committed their crimes on and after January 1, 1986.

SEC. 6. It is not the intent of the Legislature to directly or indirectly imply by this act that courts may not use the standard of evidence accepted by the court in People v. Beard, 173, Cal. App. 3d 1113, in cases arising under Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

SEC. 7. (a) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall submit a report to the Legislature on or before September 30, 1990, on the following:

(1) A description of the disposition of cases of patients released from treatment under the mentally disordered offender program following the invalidation of that program by the Court of Appeal in People v. Gibson (204 Cal. App. 3d 1425), including discussion regarding any subsequent acts recorded by the Department of Justice, the State Department of Mental Health, and the Department of Corrections, to the extent resources are available.

(2) A description of the criteria used to select which prisoners are personally evaluated for possible treatment under the mentally disordered offender program, and the criteria used to determine which of those prisoners are to be treated under the program.

(b) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall submit an annual report to the Legislature on the status of the

mentally disordered offender program on or before December 31, 1991, and on or before December 31 each year thereafter through 1996, which shall include all of the following:

(1) The following information on persons committed to the mentally disordered offender program on or after July 1, 1989, who have exhausted their rights under Section 2966 of the Penal Code.

(A) The duration of treatment for those patients selected for the mentally disordered program, including both inpatient and outpatient treatment.

(B) The number of mentally disordered offender patients returned to custody or to a hospital due to the commission of a new crime, to the extent this information is available from the Department of Justice, or due to parole revocation.

(C) The number of parole revocations of persons who have been treated previously under the mentally disordered offender program and the reasons for the revocations.

(D) The number of parole revocations for all parolees whose parole was revoked based upon psychiatric reasons pursuant to Section 2646 of Title 15 of the California Code of Regulations.

(E) Information regarding recidivism rates for criminal conduct by persons previously treated under the mentally disordered offender program to the extent this information is available from the Department of Justice.

(F) Any other information that would be useful to the Legislature in evaluating the performance of the mentally disordered offender program.

(2) A summary description of the number and disposition of cases of all prisoners who are personally clinically evaluated on and after July 1, 1989, by the Department of Corrections and the State Department of Mental Health for possible treatment under the mentally disordered offender program, including disposition of any hearing or court proceedings. The report also shall contain a brief explanation, as the departments deem appropriate, to explain the data.

(c) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall provide a preliminary report to the Legislature on or before December 31, 1990, describing the report protocol they intend to use for the report required under subdivision (b) and any problems which they anticipate.

(d) The reports required under this section shall be submitted to the Assembly Committee on Public Safety and to the Senate Judiciary Committee.

(e) Notwithstanding any other provision of law, the Department of Justice, the Department of Corrections, the State Department of Mental Health, and the Board of Prison Terms shall make available any information required for purposes of this section. Any confidential information obtained pursuant to this subdivision may be used for purposes of preparing the reports required by this

section, but the information shall not be used in any way that discloses confidential information, nor shall that confidential information be used for any other purpose.

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The Court of Appeal in People v. Gibson (204 Cal. App. 3d 1425) declared part of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code in violation of the equal protection clause of the United States Constitution because it does not require proof the person represents a substantial danger of physical harm to others by reason of his or her severe mental disorder. In order to keep the mentally disordered offender program in effect for those persons who committed their crimes on or after January 1, 1986, it is necessary that this act take effect immediately.

CHAPTER 229

An act to amend Sections 5651, 5661, and 5681 of the Business and Professions Code, relating to landscape architecture, and making an appropriation therefor.

[Approved by Governor July 27, 1989. Filed with Secretary of State July 28, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 5651 of the Business and Professions Code is amended to read:

5651. (a) The board shall by means of examination, ascertain the professional qualifications of all applicants for licenses to practice landscape architecture in this state and shall issue a license to every person whom it finds to be qualified on payment of the initial license fee prescribed by this chapter.

(b) The examination shall consist of a written examination. The written examination may be waived by the board if the applicant (1) is licensed in a state and demonstrates to the board that he or she has passed the Uniform National Examination for Landscape Architects or is certified by the Council of Landscape Architects Registration Boards and has submitted proof of job experience equivalent to that which is required of California candidates and (2) has taken a written examination equivalent in scope and subject matter to the written examination last given in California as determined by the board, and has achieved a score on the out-of-state examination at least equal to the score required to pass the California written examination. The written examination shall include testing of the applicants knowledge of California plants and environmental conditions,

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CHAPTER 706

(Senate Bill No. 1918)

An act to amend Section 2966 of the Penal Code, relating to prisoners.

[Approved by Governor September 20, 1994.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1918, Campbell. Prisoners: severe mental disorders.

Under existing law, a prisoner who disagrees with the determination of the Board of Prison Terms that he or she has a severe mental disorder that is not in remission or cannot be kept in remission without treatment, as defined, may file a petition in the superior court of the county in which he or she is incarcerated or is being treated for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of having a severe mental disorder that is not in remission or cannot be kept in remission without treatment. The court is required to conduct a hearing on the petition, as specified. The standard of proof is beyond a reasonable doubt, and if the trial is by jury, the jury is required to be unanimous in its verdict.

This bill would prohibit the court's consideration, at the hearing on the petition, of evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the Board of Prison Terms hearing.

This bill would also provide that the court may, upon stipulation of the parties, receive in evidence the affidavit or declaration of any psychiatrist, psychologist, or other professional person who was involved in the certification and hearing process, or any professional person involved in the evaluation or treatment of the petitioner during the certification process, as specified.

This bill would also provide that if the court or jury reverses the determination of the Board of Prison Terms, the court shall stay the execution of the decision for 5 working days to allow for an orderly release of the prisoner.

The people of the State of California do enact as follows:

SECTION 1. Section 2966 of the Penal Code is amended to read:

§ 2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing, the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60

calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. *Evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the Board of Prison Terms hearing shall not be considered.* The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. *The court may, upon stipulation of both parties, receive in evidence the affidavit or declaration of any psychiatrist, psychologist, or other professional person who was involved in the certification and hearing process, or any professional person involved in the evaluation or treatment of the petitioner during the certification process. The court may allow the affidavit or declaration to be read and the contents thereof considered in the rendering of a decision or verdict in any proceeding held pursuant to subdivision (b) or (c), or subdivision (a) of Section 2972. If the court or jury reverses the determination of the Board of Prison Terms, the court shall stay the execution of the decision for five working days to allow for an orderly release of the prisoner.*

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when it continues the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the parolee represents a substantial danger of physical harm to others.

EXPLANATORY NOTES SENATE BILL 1918:

Pen C § 2966. Added the third and tenth through twelfth sentences of subd (b).

STATE OF CALIFORNIA—YOUTH AND ADULT CORRECTIONAL AGENCY

DEPARTMENT OF CORRECTIONS
1515 S Street, 95814
P.O. Box 942883
Sacramento, CA 94283-0001

August 1, 2001

Ms. Shirley Opie
Assistant Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Mentally Disordered Offenders: Treatment as a Condition of Parole – 00-TC-28

Dear Ms. Opie:

This is in response to your July 10, 2001, letter to Mr. John Logger, SB-90 Coordinator for the County of San Bernardino, requesting comments from affected state agencies regarding the County's test claim submittal.

The Health Care Services Division (HCSD) of the California Department of Corrections has established a unit of full-time psychologists to conduct mental health evaluations of potential mentally disordered offenders (MDO), as described in Penal Code Section 2962. As a part of the overall process, these evaluators are routinely subpoenaed to attend court hearings on inmate appeals of their MDO placement. Increasingly, these hearings are being conducted in the San Bernardino Superior Court, due to many MDO placements now being transferred to Patton State Hospital (PSH), located within the county. During the past year, we have received approximately 20 such subpoenas. It is evident that county resources are impacted by the necessity of conducting these hearings as well. The Department of Mental Health has indicated that increasing numbers of MDO cases will be placed at PSH, at least over the next year or so.

In view of the above factors, it appears the County's claim for reimbursement does have merit. If you have further questions, please contact Susan O'Madden, Associate Governmental Program Analyst, MDO Unit, HCSD, at 916-324-7480.

SUSANN J. STEINBERG, M.D.
Deputy Director
Health Care Services Division

Enclosures

cc: Eileen Baumgardner, Chief (A), Mental Health Services, HCSD
Ron Metz, Facility Captain and Program Administrator, MDO Unit, HCSD

STATE OF CALIFORNIA
GRAY DAVIS, *Governor*

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

July 10, 2001

Mr. John Logger
SB-90 Coordinator
County of San Bernardino
222 West Hospitality Lane, 4th Floor
San Bernardino, CA 92415-0018

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

Re: *Mentally Disordered Offenders: Treatment as a Condition of Parole* - 00-TC-28
County of San Bernardino, Claimant
Statutes of 1994, Chapter 706
Statutes of 1989, Chapter 228
Statues of 1988, Chapter 658
Statutes of 1987, Chapter 687
Statutes of 1986, Chapter 858
Penal Code Section 2966

Dear Mr. Logger:

The Commission on State Mandates determined that the subject test claim submittal is complete. The test claim initiates the process for the Commission to consider whether the provisions listed above impose a reimbursable state-mandated program upon local entities. State agencies and interested parties are receiving a copy of this test claim because they may have an interest in the Commission's determination.

The key issues before the Commission are:

- Do the provisions listed above impose a new program or higher level of service within an existing program upon local entities within the meaning of section 6, article XIII B of the California Constitution and costs mandated by the state pursuant to section 17514 of the Government Code?

- Does Government Code section 17556 preclude the Commission from finding that any of the test claim provisions impose costs mandated by the state?

The Commission requests your participation in the following activities concerning this test claim:

- **Informal Conference.** An informal conference may be scheduled if requested by any interested party. See Title 2, California Code of Regulations, section 1183.04 (the regulations).

- **State Agency Review of Test Claim.** State agencies receiving this letter are requested to analyze the merits of the enclosed test claim and to file written comments on the key issues before the Commission. Alternatively, if a state agency chooses not to respond to this request, please submit a written statement of non-response to the Commission. Requests for extensions of time may be filed in accordance with sections 1183.01 (c) and 1181.1 (g) of the regulations. State agency comments are due 30 days from the date of this letter.

- **Claimant Rebuttal.** The claimant and interested parties may file rebuttals to state agencies' comments under section 1183.02 of the regulations. The rebuttal is due 30 days from the service date of written comments.

- **Hearing and Staff Analysis.** A hearing on the test claim will be set when the record closes. Pursuant to section 1183.07 of the Commission's regulations, at least eight weeks before the hearing is conducted, a draft staff analysis will be issued to parties, interested parties, and interested persons for comment. Comments are due 30 days following receipt of the analysis. Following receipt of any comments, and before the hearing, a final staff analysis will be issued.

- **Mailing Lists.** Under section 1181.2 of the Commission's regulations, the Commission will promulgate a mailing list of parties, interested parties, and interested persons for each test claim and provide the list to those included on the list, and to anyone who requests a copy. Any written material filed on that claim with the Commission shall be simultaneously served on the other parties listed on the claim.

- **Dismissal of Test Claims.** Under section 1183.09 of the Commission's regulations, test claims filed after May 5, 2001, may be dismissed if postponed or placed on inactive status by the claimant for more than one year. Prior to dismissing a test claim, the Commission will provide 150 days notice and opportunity for other parties to take over the claim.

Claim Number 00-TC-28 **Claimant** County of San Bernardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Mr. James Lombard, Principal Analyst (A-15)
Department of Finance

915 L Street
Sacramento CA 95814

Tel: (916) 445-8913
FAX: (916) 327-0225

State Agency

Mr. Stephen Mayberg, Director
Department of Mental Health

1600 9th Street
Sacramento CA 95814

Tel: (916) 654-3565
FAX: (916) 654-3198

State Agency

Mr. Manuel Medeiros, Asst. Attorney General (D-8)
Department of Justice
Government Law Section
1300 I Street 17th Floor
Sacramento CA 95814

Tel: (916) 324-5475
FAX: (916) 324-8835

State Agency

Mr. Ron Metz, Facility Captain - MDO Program
Department of Corrections

P O Box 942883
Sacramento CA 94283-0001

Tel: (916) 324-4771
FAX: (916) 000-0000

State Agency

Mr. Paul Minney,
Spector, Middleton, Young & Minney, LLP

7 Park Center Drive
Sacramento Ca 95825

Tel: (916) 646-1400
FAX: (916) 646-1300

Interested Person

Ms. Marianne O'Malley, Principal Fiscal & Policy Analyst (B-29)
Legislative Analysts' Office

925 L Street Suite 1000
Sacramento CA 95814

Tel: (916) 445-6442
FAX: (916) 324-4281

Interested Person

Claim Number 00-TC-28 **Claimant** County of San Bernardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Mr. Keith B. Petersen, President
Sixten & Associates

5252 Balboa Avenue Suite 807
San Diego CA 92117

Tel: (858) 514-8605
FAX: (858) 514-8645

Interested Person

Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.

2275 Watt Avenue Suite C
Sacramento CA 95825

Tel: (916) 487-4435
FAX: (916) 487-9662

Interested Person

Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518 P.O. Box 942850
Sacramento CA 95814

Tel: (916) 323-5849
FAX: (916) 324-7223

State Agency

Ms. Pam Stone, Legal Counsel
DMG-MAXIMUS

4320 Auburn Blvd. Suite 2000
Sacramento CA 95841

Tel: (916) 485-8102
FAX: (916) 485-0111

Interested Person

Mr. David Wellhouse,
Wellhouse & Associates

9175 Kiefer Blvd Suite 121
Sacramento CA 95826

Tel: (916) 368-9244
FAX: (916) 368-5723

Interested Person

Mr. Gary Winsom, President
California Public Defenders Association

3273 Ramos Circle, Suite 100
Sacramento CA 95827

Tel: (916) 362-1686
FAX: (916) 362-5498

Interested Person

If the Commission determines that a reimbursable state mandate exists, the claimant is responsible for submitting proposed parameters and guidelines for reimbursing all eligible local entities. All interested parties and affected state agencies will be given an opportunity to comment on the claimant's proposal before consideration and adoption by the Commission.

Finally, the Commission is required to adopt a statewide cost estimate of the reimbursable state-mandated program within 12 months of receipt of an amended test claim. This deadline may be extended for up to six months upon the request of either the claimant or the Commission.

Please contact Nancy Patton at (916) 323-8217 if you have any questions.

Sincerely,

Shirley Opie

SHIRLEY OPIE
Assistant Executive Director

Enclosures: Mailing List and Test Claim

f:/mandates/2000/tc/00tc27/completeltr

List Date: 07/10/2001 Mailing Information

Mailing List

Claim Number 00-TC-28 **Claimant** County of San Bernardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Harmeet Barkschat,
Mandate Resource Services

8254 Heath Peak Place
Antelope CA 95843

Tel: (916) 727-1350
FAX: (916) 727-1734

Interested Person

Mr. Louie DiNinni, Executive Officer
Board of Prison Terms

1515 K Street, Suite 600
Sacramento CA 95814-4053

Tel: (916) 445-1539
FAX: (916) 445-5242

State Agency

Mr. Glenn Haas, Bureau Chief (B-8)
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500
Sacramento CA 95816

Tel: (916) 445-8756
FAX: (916) 323-4807

State Agency

Mr. Steve Keil,
California State Association of Counties

1100 K Street Suite 101
Sacramento CA 95814-3941

Tel: (916) 327-7523
FAX: (916) 441-5507

Interested Person

Mr. John Logger, SB-90 Coordinator
Auditor-Controller's Office

222 West Hospitality Lane
San Bernardino CA 92415-0018

Tel: (909) 386-8850
FAX: (909) 386-8830

Claimant

DEPARTMENT OF FINANCE
OFFICE OF THE DIRECTOR

GRAY DAVIS, GOVERNOR
STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

August 9, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of July 10, 2001 the Department of Finance has reviewed the test claim submitted by the San Bernardino County (claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 706, Statutes of 1994 (SB 1918), Chapter No. 228, Statutes of 1989 (SB 1625), Chapter No. 658, Statutes of 1988 (SB 538), Chapter No. 658, Statutes of 1987 (SB 425), Chapter No. 858, Statutes of 1986 (SB 1845), and Penal Code Section 2966, are reimbursable state mandated costs (Claim No. CSM-00-TC-28 "Mentally Disordered Offenders: Treatment as a Condition of Parole"). Commencing with page two, of the test claim, claimant has identified the following new duties, which it asserts are reimbursable state mandates:

- Review of the written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment.
- Prepare and file responses with the superior court to the prisoner's petition to appeal the Board of Prison Terms decision.
- Represent the State and the prisoner in a civil hearing on the petition regarding the applicability of Penal Code Section 2962.
- Retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions.
- Travel to and from state hospitals where detailed medical records and case files are maintained.
- Travel to and from state hospitals by the defense counsel in order to meet with the prisoner client.
- Provide transportation and custody by the county sheriff's department of each potential mentally disordered offender before, during, and after the civil proceedings.

As the result of our review, we have concluded that under Section 17556(g) of the Government Code, the Commission on State Mandates shall not find a reimbursable mandate in such legislation or in legislation which eliminated a crime or changed the penalty for a crime. Therefore, any local government costs resulting from the mandate in Chapter No. 706, Statutes of 1994 (SB 1918), Chapter No. 228, Statutes of 1989,(SB 1625), Chapter No. 658, Statutes of 1988 (SB 538), Chapter No. 658, Statutes of 1987 (SB 425), Chapter No. 858, Statutes of 1986 (SB 1845), and Penal Code Section 2966 would not be state-reimbursable, because the mandate only involves the definition of a crime or the penalty for conviction of a crime.

The claimant asserts that the costs claimed for reimbursement are not related to the enforcement of a new crime or infraction. This statement is correct, however, the costs claimed for reimbursement *are* related to enforcement of a changed penalty for a crime or infraction, as specified in Government Code Section 17556(g).

After a person is found guilty of a crime, the county is responsible to provide a sentencing hearing which determines the penalty for a crime. The penalty assessed could be imprisonment, followed by parole, with mental health treatment as a condition of parole. If the inmate disagrees with the need for mental health treatment as a condition of parole, the inmate may request a hearing to challenge this parole condition. In effect, the offender is petitioning to change the penalty for a crime. The hearing requested by the inmate, not the State, is a continuation of the pre-incarceration hearing that is the responsibility of the county. Since the hearing is in effect, a continuation of the penalty phase of the original trial, the costs would not be reimbursable under Section 6, Article XIII B of the California Constitution.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your July 10, 2001 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Zlatko Theodorovic, Principal Program Budget Analyst at (916) 445-8913 or Jim Lombard, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Nona Martinez for

S. Calvin Smith
Program Budget Manager

Attachments

Attachment A

DECLARATION OF ZLATKO THEODOROVIC
DEPARTMENT OF FINANCE
CLAIM NO. CSM-00-TC-28

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

8-9-01
August 9, 2001 at Sacramento, CA

Zlatko Theodorovic

PROOF OF SERVICE

Test Claim Name: "Mentally Disordered Offenders: Treatment as a Condition of Parole"
Test Claim Number: CSM-00-TC-28

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8th Floor, Sacramento, CA 95814.

On August 9, 2001, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-29
Ms. Marianne O'Malley
Legislative Analyst's Office
925 L Street, Suite 1000
Sacramento, CA 95814

David Wellhouse
Wellhouse and Associates
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

Mr. Louie DiNinni, Executive Officer
Board of Prison Terms
1515 K Street, Suite 600
Sacramento, CA 95814 - 4053

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814 – 3941

B-8
Jim Spano
State Controller's Office
Division of Audits
P.O. Box 942850
Sacramento, CA 95814

Harmeet Barkschat
Mandate Resource Services
8254 Heath Peak Place
Antelope, CA 95843

Mr. Glenn Haas, Bureau Chief
State Controllers Office
Division of Accounting and Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Mr. John Logger, SB-90 Coordinator
Auditor-Controller's Office
222 West Hospitality Lane
San Bernardino, CA 92415 – 0018

Mr. Manuel Medeiros, Asst. Attorney General
Department of Justice
Government Law Section
1300 I Street, 17th Floor
Sacramento, CA 95814

Mr. Stephen Mayberg, Director
Department of Mental Health
1600 9th Street
Sacramento, CA 95814

Mr. Ron Metz
Department of Corrections
P.O. Box 942883
Sacramento, CA 94283 – 0001

Mr. Keith B. Peterson, President
Sixten & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Mr. Gary Winsom, President
California Public Defenders Association
3273 Ramos Circle, Suite 100
Sacramento, CA 95827

Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.
2275 Watt Avenue, Suite C
Sacramento, CA 95825

Ms. Pam Stone, Legal Counsel
DMG-MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

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 9, 2001 at Sacramento, California.

Mary Latorre

EXHIBIT D

AUDITOR/CONTROLLER-RECORDER
COUNTY CLERK

COUNTY OF SAN BERNARDINO

AUDITOR/CONTROLLER • 222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415-0018 • (909) 387-8322 • Fax (909) 386-8830
RECORDER • COUNTY CLERK • 222 West Hospitality Lane, First Floor
San Bernardino, CA 92415-0022 • (909) 387-8306 • Fax (909) 386-8940

LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

February 22, 2002

PAULA HIGASHI, EXECUTIVE DIRECTOR
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

RE: CSM-00-TC-28 MENTALLY DISORDERED OFFENDERS: TREATMENT AS A CONDITION OF PAROLE

Dear Ms. Higashi;

The County of San Bernardino has reviewed the letter filed by the Department of Finance on August 9, 2001 regarding the test claim for *Mentally Disordered Offenders: Treatment as a Condition of Parole*. In that letter, the Department of Finance argues that Government Code Section 17566(g) applies to this test claim; and claims that the costs associated with the civil proceedings that allow a prisoner to challenge the State's requirement of mental health treatment as a condition of parole are the ***costs of a changed penalty for a crime or infraction***.

The Department of Finance's assertion is in error. Attached is a letter provided by Ms. Pamela King, lead defense attorney for San Bernardino County Public Defender's Mentally Disordered Offenders (MDO) program. Ms. King discusses and cites the statutory provisions pertinent to the Department of Finance's argument that mental health treatment as a condition of parole is a change in the penalty for a crime or infraction. Also included in this discussion are statutory provisions relative to parole in general.

The County of San Bernardino's assertion that ***these costs have nothing to do with the penalty for a crime or infraction*** is supported by this discussion. The County requests that the Commission on State Mandates reject the Department of Finance's argument.

On another note, a paragraph in San Bernardino County's original test claim stated that Welfare and Institutions Code (WIC) section 4117 provided limited reimbursement for this MDO population. However, we have subsequently been advised that, because WIC 4117 only lists the proceedings under Penal Code section 2970, the State Controller's Office will not provide reimbursement for those MDO proceedings that result from petitions filed under Penal Code section 2966. PC 2970 applies only to the extended commitment proceedings that were approved for reimbursement by the Commission on State Mandates in the County of Los Angeles test claim. At this time, there is ***no*** reimbursement available for costs for the MDO population that is the subject of this test claim

because the court proceedings for that population are filed pursuant to Penal Code section 2966.

The County of San Bernardino therefore requests that the Commission on State Mandates determine that Penal Code section 2966, as added and modified by the test claim chapters, compelling the County to incur costs pursuant to Penal Code sections 2962, 2970, and 2972.1, constitutes a reimbursable state mandated program within the meaning of Section 6, Article XIII B of the California State Constitution.

Sincerely,

Larry Walker
Auditor/Controller-Recorder

By: Barbara K Redding
Barbara K. Redding
Reimbursable Projects Section Manager

Attachment

cc: Interested parties on the Commission's mailing list, with attachment.

LW:BR:sr rps/Barbara/letters/MDO Condition of Parole - Rebuttal.doc

INTEROFFICE MEMO

Law Offices of the Public Defender
398 West Fourth Street
San Bernardino, CA 92415-0008

DATE: February 25, 2002 **PHONE:** (909) 383-2411

TO: BARBARA REDDING

FROM: PAMELA P. KING

The State Department of Finance asserts:

"IN EFFECT, THE OFFENDER IS PETITIONING TO CHANGE THE PENALTY FOR A CRIME. THE HEARING REQUESTED BY THE INMATE ... IS A CONTINUATION OF THE PRE-INCARCERATION HEARING THAT IS THE RESPONSIBILITY OF THE COUNTY. SINCE THE HEARING IS IN EFFECT, A CONTINUATION OF THE PENALTY PHASE OF THE ORIGINAL TRIAL, THE COSTS WOULD NOT BE REIMBURSABLE..." under SB 90, pursuant to the provisions of Government Code, § 17556(g).

I.

Involuntary mental health treatment imposed pursuant to PC § 2962 is not a penalty imposed as a consequence of a crime; therefore, a challenge to the parole condition does not constitute a change in the penalty.

The "condition of parole" [PC § 2962], requiring involuntary mental health treatment, is a reflection of the present mental state of the parolee; it is not a direct consequence or penalty for having committed a crime, for which a determinate sentence pursuant to PC § 1170 was received [PC § 2962(e)(1)].

The basis for the involuntary mental health treatment is a severe mental disorder, which is either not in remission or cannot be kept in remission without treatment, and by reason of which, the parolee represents a substantial danger of physical harm to others [PC § 2962]. The prior conviction, although necessarily a condition precedent to the

ordering of this parole condition, is not the operative condition upon which the involuntary treatment term is imposed. Just as the prior finding of guilt and insanity in a not guilty by reason of insanity criminal commitment is not the basis upon which an extension of a commitment petition is filed, and for which SB 90 funds are made available, here the current mental status is the basis for commitment and for reimbursement of costs.

II.

The party responsible for pronouncing the penalty for a crime is the sentencing judge in the county where the crime was committed; whereas, the entity responsible for the imposition of conditions of parole is the State Board of Prison Terms.

A. The pre-incarceration, sentencing hearing, is indeed the responsibility of the county; however, the county (sentencing judge) loses statutory authority to change a penalty, 120 days after commitment to state prison pursuant to PC § 1170. [PC § 1170(d).]

Therefore, at the time the challenged condition of parole (involuntary mental health treatment) is imposed on the parolee, the county no longer has any authority to effect a change in penalty. Indeed, the sentencing judge's entire involvement with parole is by way of advisement that he or she will serve a period of parole [PC § 1170(a)]. The sentencing court does not set the conditions of parole or affect retention or release on parole. This is totally a state function that is in no way controlled by the county court.

B. The terms and conditions of parole are exclusively within the power and responsibility of the Board of Prison Terms, not the sentencing court.

"At the expiration of a term of imprisonment ... the inmate shall be released on parole ... unless ... the parole authority for good cause waives parole and discharges the inmate ..." PC § 3000(b)(1)

"[T]he Board of Prison Terms to execute its duties with respect to parole functions for which the board is responsible." PC § 3000(a)(2)

"The Board of Prison Terms upon granting any parole to any prisoner may also impose on the parole any conditions that it may deem proper." PC § 3053(a)

"The Board of Prison Terms shall have the power to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole ..." PC § 3052

III.

The characteristics of a hearing requested by the inmate to challenge the imposition of involuntary mental health treatment as a condition of parole, are inconsistent with the hearing being a "continuation of the penalty phase of the original trial."

A. The imposition of a penalty as a sentence for a crime is clearly a penal proceeding, whereas, a PC §2966 hearing is a civil proceeding by statute.

"The hearing shall be a civil hearing ..." PC § 2972(a)

B. A sentencing hearing is conducted in the county, from which an inmate is sentenced to state prison; whereas, a PC § 2966 hearing is conducted in the county where the parolee is in residence, receiving treatment by the Department of Mental Health.

"A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962."

Consequently, most PC §2966 hearings are held in either San Bernardino County or San Luis Obispo County, the respective locations of Patton State Hospital and Atascadero State Hospital. Said hearings are not dispersed throughout the state consistent with the locations of the courts from which the parolees were sentenced to state prison.

Conclusion

For all of the foregoing reasons, it is ***inconsistent*** with statutory provisions relative to PC § 2966 proceedings to conclude that the mandate falls within the provisions of Government Code, § 17556(g) and affects the penalty for a crime.

List Date: 07/10/2001 Mailing Information Extension Request

Mailing List

Claim Number 00-TC-28 **Claimant** County of San Bernardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Ms. Harmeet Barkschat,
Mandate Resource Services

5325 Elkhorn Blvd. #307
Sacramento CA 95842

Tel: (916) 727-1350
FAX: (916) 727-1734

Interested Person

Mr. Robert Brooks, Staff Analyst II
Riverside Co. Sheriffs Acct. and Finance Bureau

4095 Lemon Street P O Box 512
Riverside Ca 92502

Tel: (909) 955-2709
FAX: (909) 955-2720

Interested Person

Mr. Michael E. Cantrall, Executive Director
California Public Defenders Association

3273 Ramos Circle, Suite 100
Sacramento CA 95827

Tel: (916) 362-1686
FAX: (916) 362-5498

Interested Person

Office of the County Counsel,
County of San Luis Obispo

County Government Center Room 386
San Luis Obispo CA 93408

Tel: (805) 781-5400
FAX: (805) 781-4221

Ms. Susan Geanacou, Senior Staff Attorney
Department of Finance

915 L Street, 11th Floor Suite 1190
Sacramento CA 95814

Tel: (916) 445-3274
FAX: (916) 327-0220

State Agency

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed by the County of San Bernardino, State of California. My business address is 222 W. Hospitality Lane, San Bernardino, CA 92415. I am 18 years of age or older.

On February 25, 2002 and February 26, 2002, I faxed the letter dated February 21, 2002 to the Commission on State Mandates requesting an extension of time for submitting responses to state agency comments on three test claims. I faxed it also to the other parties listed on this 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 February 26, 2002 at San Bernardino, California.

Shar Robinson

SHAR ROBINSON

Claim Number 00-TC-28 Claimant County of San Bernardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Mr. Glenn Haas, Bureau Chief (B-8)
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500
Sacramento CA 95816

Tel: (916) 445-8757
FAX: (916) 323-4807

State Agency

Mr. Steve Keil,
California State Association of Counties

1100 K Street Suite 101
Sacramento CA 95814-3941

Tel: (916) 327-7523
FAX: (916) 441-5507

Interested Person

Ms. Tom Lutzenberger, Principal Analyst (A-15)
Department of Finance

915 L Street, 6th Floor
Sacramento CA 95814

Tel: (916) 445-8913
FAX: (916) 327-0225

State Agency

Mr. Rick Mandella, Chief (E-18)
Offenders Screening Unit
Board of Prison Terms
1515 K Street, Suite 600
Sacramento CA 95814-4053

Tel: (916) 323-0949
FAX: (916) 323-4804

Mr. Ron Metz, Facility Captain - MDO Program
Department of Corrections

P.O. Box 942883
Sacramento CA 94283-0001

Tel: (916) 324-4771
FAX: (916) 000-0000

State Agency

Mr. Paul Minney,
Spector, Middleton, Young & Minney, LLP

7 Park Center Drive
Sacramento Ca 95825

Tel: (916) 646-1400
FAX: (916) 646-1300

Interested Person

Claim Number 00-TC-28 Claimant County of San Bernardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Ms. Marianne O'Malley, Principal Fiscal & Policy Analyst (B-29)
Legislative Analysts' Office

925 L Street Suite 1000 *Tel:* (916) 319-8315
Sacramento CA 95814 *FAX:* (916) 324-4281

State Agency

Mr. Keith B. Petersen, President
Sixten & Associates

5252 Balboa Avenue Suite 807 *Tel:* (858) 514-8605
San Diego CA 92117 *FAX:* (858) 514-8645

Interested Person

Ms. Linda Powell (A-31), Deputy Director
Department of Mental Health

1600 9th Street Room 150 *Tel:* (916) 654-2378
Sacramento CA 95814 *FAX:* (916) 654-2440

State Agency

Ms. Barbara K. Redding, RPS manager
Auditor-Controller-Recorder
County of San Bernardino
222 West Hospitality Lane *Tel:* (909) 386-8850
San Bernardino CA 92415 *FAX:* (909) 386-8830

Claimant

Mr. Steve Shields,
Shields Consulting Group, Inc.

1536 36th Street *Tel:* (916) 454-7310
Sacramento CA 95816 *FAX:* (916) 454-7312

Interested Person

Dale Mangram
Mr. ~~Mark Sigman~~, SB 90 Coordinator
Riverside County
Auditor-Controller
4080 Lemon St. 3rd Floor *Tel:* (909) 955-6283
Riverside CA 92501 *FAX:* (909) 955-~~2426~~ 3802

Interested Person

00-TC-28 **Claimant** County of San Bernardino

Subject

Issue Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Mentally Disordered Offenders: Treatment as a Condition of Parole

Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.

2275 Watt Avenue
Sacramento CA 95825

Tel: (916) 487-4435
FAX: (916) 487-9662

Interested Person

Mr. Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518
Sacramento CA 95814

Tel: (916) 323-5849
FAX: (916) 327-0832

State Agency

Ms. Pam Stone, Legal Counsel
MAXIMUS

4320 Auburn Blvd. Suite 2000
Sacramento CA 95841

Tel: (916) 485-8102
FAX: (916) 485-0111

Interested Person

Mr. David Wellhouse,
David Wellhouse & Associates, Inc.

9175 Kiefer Blvd Suite 121
Sacramento CA 95826

Tel: (916) 368-9244
FAX: (916) 368-5723

Interested Person

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

January 12, 2006

Mr. John Logger
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 W. Hospitality Lane
San Bernardino, CA 92415-0018

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis and Hearing Date
Mentally Disordered Offenders: Treatment as a Condition of Parole (00-TC-28)
County of San Bernardino, Claimant
Statutes 1986, chapter 858, Statutes 1987, chapter 687; Statutes 1988, chapter 658; Statutes 1989, chapter 228; Statutes 1994, chapter 706
Penal Code section 2966

Dear Mr. Logger:

The draft staff analysis of this test claim is enclosed for your review and comment.

Written Comments
Any party or interested person may file written comments on the draft staff analysis by Friday, **February 3, 2006**. You are advised that comments filed with the 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. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing
This test claim is set for hearing on **Thursday, March 30, 2006** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about March 16, 2006. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Deborah Borzelleri at (916) 322-2430 with any questions regarding the above.

Sincerely,

PAULA HIGASHI
Executive Director

Enc. Draft Staff Analysis

MAILED: FAXED:
DATE: 11/14/94 INITIAL: LD
CHRON: FILE:
WORKING BINDER:

ITEM ____

TEST CLAIM
DRAFT STAFF ANALYSIS

Penal Code Section 2966
Statutes 1986, Chapter 858
Statutes 1987, Chapter 687
Statutes 1988, Chapter 658
Statutes 1989, Chapter 228
Statutes 1994, Chapter 706

Mentally Disordered Offenders:

Treatment as a Condition of Parole (00-TC-28)

County of San Bernardino, Claimant

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS.

STAFF ANALYSIS

Claimant

County of San Bernardino

Chronology

07/05/01	County of San Bernardino filed test claim with Commission (00-TC-28)
08/03/01	The Department of Corrections submitted comments
08/09/01	The Department of Finance submitted comments
09/05/01	County of San Bernardino requested an extension of time through October 25, 2001 to respond to comments
09/07/01	Request for extension to respond to comments on or before October 25, 2001 was granted
11/08/01	County of San Bernardino requested an extension of time until December 3, 2001 to respond to comments
11/09/01	Request for extension to respond to comments on or before December 3, 2001 was granted
02/05/02	County of San Bernardino requested an extension of time until February 22, 2002 to respond to comments
02/06/02	Request for extension to respond to comments is granted; comments are due on or before March 8, 2002
02/27/02	County of San Bernardino files reply to Department of Finance comments
01/19/06	Commission staff issues draft staff analysis

Background

This test claim addresses amendments to Mentally Disordered Offender legislation, codified in Penal Code sections 2960 et seq., which establishes continued mental health treatment and civil commitment procedures for persons with severe mental disorders, following termination of their sentence or parole.

Overview of Mentally Disordered Offender Program

Since 1969, the Mentally Disordered Offender legislation has required certain offenders who have been convicted of specified violent crimes to receive treatment by the Department of Mental Health as a condition of parole.[1] Penal Code section 2960 establishes the Legislature's intent to protect the public by requiring those prisoners who received a determinate sentence and who have a treatable, severe mental disorder at the time of their parole, or upon termination of parole, to receive mental health treatment until the disorder is in remission and can be kept in remission. Section 2960 further states that "the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely

[1] Penal Code section 2962, subdivisions (a) through (f).

mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community."

To impose mental health treatment as a condition of parole, the prospective parolee must have: 1) a severe mental disorder that is not in remission or cannot be kept in remission without treatment, and the disorder was one of the causes of or was an aggravating factor in the commission of the crime for which the prisoner was sentenced to prison; 2) been in treatment for 90 days or more within the year prior to his or her parole or release; and 3) been certified by designated mental health professionals as meeting conditions 1 and 2 above, in addition to representing a substantial danger of physical harm to others by reason of the severe mental disorder.[2]

Procedurally, prior to release on parole or prior to termination of parole, such a prisoner must be evaluated and certified by mental health professionals as to whether he or she meets the conditions set forth in Penal Code section 2962.[3] A prisoner has the right to a hearing before the Board of Prison Terms to contest such a finding that he or she has a severe mental disorder.[4] If the prisoner is dissatisfied with the results of the Board of Prison Terms hearing, he or she may petition the superior court for a civil hearing to determine if he or she meets the criteria of a mentally disordered offender.[5]

The evaluation must also be submitted to the district attorney of the county in which the person is being treated, incarcerated or committed not later than 180 days prior to termination of parole or release from parole.[6] The district attorney may then file a petition in superior court for continued involuntary treatment for one year and the court shall conduct a civil hearing on the matter[7]

If the prisoner's severe mental disorder is put into remission during the parole period, and can be kept in remission during the parole period, the Department of Mental Health must discontinue treatment.[8]

Major legislation affecting the mentally disordered offender program came forward in 1985. That year, the Legislature enacted Statutes 1985, chapter 1418 (Senate Bill No. (SB) 1054) and Statutes 1985, chapter 1419 (SB 1296), which were double-joined. Chapter 1418 added Penal Code section 2970, to set forth procedures for the *local district attorney* to petition the court for a hearing when a mentally disordered offender is scheduled to be released from prison or parole. Penal Code section 2970 hearings were addressed in a prior test claim (98-TC-09).

---

[2] Penal Code section 2962, subdivisions (a) through (d).

[3] Penal Code section 2962, subdivision (d).

[4] Penal Code section 2966, subdivision (a).

[5] Penal Code section 2966, subdivision (b).

[6] Penal Code section 2970.

[7] Penal Code sections 2970 and 2972, subdivision (a).

[8] Penal Code section 2968.

Chapter 1419 amended Penal Code section 2960, adding text in subdivision (d) to set forth procedures for allowing a *prisoner or parolee* to petition the court for a hearing to contest a Board of Prison Terms determination that he or she meets the mentally disordered offender criteria. The current test claim did not plead chapter 1419, but does address subsequent amendments to the procedures for prisoner- or parolee-initiated court hearings under the mentally disordered offender program.

Prior Test Claim Regarding District Attorney-Initiated Court Hearings (Pen. Code, §§ 2970, 2972 and 2972.1)

Chapter 1418 was the subject of a prior test claim (98-TC-09) in which the Commission on State Mandates found a reimbursable state-mandated program was imposed on local agencies. That prior test claim addressed Penal Code sections 2970, 2972 and 2972.1, which established court procedures initiated by the local district attorney to extend the involuntary treatment of a mentally disordered offender for one year beyond the offender's parole termination date – or release from prison if the prisoner refused treatment as a condition of parole – if the offender's severe mental disorder is not in remission at the end of the parole period or cannot be kept in remission without treatment.

Not later than 180 days prior to the termination of parole, the professionals treating the prisoner or parolee are required to submit a written evaluation to the district attorney in the county of treatment or commitment. The district attorney reviews the evaluation and files a Penal Code section 2970 petition in the superior court for continued involuntary treatment for one year and the court conducts a civil hearing on the matter.

For that test claim, the following activities were determined to be reimbursable:

1. review the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970);
2. prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, § 2970);
3. represent the state and the indigent offender in civil hearings on the petition and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972, 2972.1);
4. retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions for recommitment;
5. travel to and from state hospitals where detailed medical records and case files are maintained; and
6. provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County Sheriff's Department.

Prior Law Regarding Prisoner- or Parolee-Initiated Court Hearings [Pen. Code, § 2960, subdivision (d)]

Chapter 1419 established the appeal process for a prisoner or parolee, which was enacted into Penal Code section 2960, subdivision (d).

Subdivision (d) as it was originally enacted in the 1985 legislation stated:

> (1) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner does not meet the criteria in subdivision (b). At the hearing the burden of proof shall be on the person or agency who certified the prisoner under paragraph (4) of subdivision (b). If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in paragraph (4) of subdivision (b). The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to paragraph (2) of this subdivision. The Board of Prison Terms shall provide a prisoner who requests a trial a petition form and instructions for filing the petition.
>
> (2) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of subdivision (b) may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she meets the criteria of subdivision (b). The court shall conduct a hearing on the petition within sixty calendar days after the petition is filed, unless either time is waived by the petitioner or his counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.
>
> (3) The provisions of this subdivision shall be applicable to a continuation of a parole pursuant to Section 3001.

Test Claim Legislation Regarding Prisoner- or Parolee-Initiated Court Hearings (Pen. Code, § 2966)

As noted above, chapter 1419 was the *first* legislation to establish the appeal process for a prisoner or parolee under the mentally disordered offender provisions; the process was enacted into Penal Code section 2960, subdivision (d). However, *chapter 1419 was not pled in this current test claim and has never been pled in a test claim.*

The test claim legislation that *was* pled addresses minor changes to the prisoner or parolee appeal procedures, which now exist under Penal Code section 2966. The test claim legislation involves five statutes, one that added and four that amended Penal Code section 2966. Each of the five test claim statutes is listed below with a summary of the relevant provisions.

1. Statutes 1986, Chapter 858, Section 4 (SB 1845) – This legislation did not make substantive changes to the original Penal Code section 2960, subdivision (d) provisions. Instead, it renumbered the existing provisions of 2960, and in so doing created section 2966.

2. Statutes 1987, Chapter 687, Section 8 (SB 425) – This legislation modified the first sentence of section 2966, subdivision (b), replacing the text that originally read: "A prisoner ... may file ... a petition for a hearing on whether he or she meets the [mentally disordered offender] criteria ..." The modified text reads: "A prisoner ... may file ... a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the [mentally disordered offender] criteria..." This change provides more detail and narrows the subject of the Penal Code section 2966 hearing.

3. Statutes 1988, Chapter 658, Section 1 (SB 538) – This legislation narrowed the scope of the Penal Code section 2966 hearing when the parolee is *retained* on parole because of severe mental disorder. It replaced the text of subdivision (c), which at the time read: "If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole ..., this section shall be applicable for the purpose of determining whether the parolee meets the criteria of Section 2962." Section 2962 at that time had established four criteria for determining whether the prisoner or parolee must continue treatment as a condition of parole: 1) the prisoner had a severe mental disorder that was not in remission or could not be kept in remission without treatment; 2) the severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison; 3) the crime was a violent crime; and 4) the prisoner had been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

The text was modified to read: "If the Board of Prison Terms continues a parolee's mental health treatment under section 2962 when it continues the parolee's parole ..., the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment."

4. Statutes 1989, Chapter 228, Section 2 (SB 1625) – This legislation enacted an additional requirement for finding a severe mental disorder, i.e., that the prisoner or parolee represents a substantial danger of physical harm to others, as a result of *People v. Gibson* (1988) 204 Cal.App.3d 1425. The *Gibson* court addressed whether the mentally disordered offender legislation violated the equal protection clause of the United States and California Constitutions by not requiring current proof of dangerousness as required of other adult persons involuntarily committed for mental health treatment.

5. Statutes 1994, Chapter 706, Section 1 (SB 1918) – This legislation modified Penal Code section 2966 by: 1) prohibiting the court's consideration of evidence of petitioner's behavior or mental status subsequent to Board of Prison Terms hearing; 2) allowing the court to consider, upon stipulation of the parties, an affidavit or declaration of any psychiatrist, psychologist, or other professional person involved in the evaluation or treatment of the petitioner during the certification process; and 3) providing that, if the court reverses Board's decision, the court shall stay execution of decision for five working days to allow for orderly release of the prisoner.

Claimant's Position

Claimant contends that the test claim statutes constitute a reimbursable state-mandated local program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The County of San Bernardino, according to its test claim, is seeking reimbursement for the following activities:

- District Attorney services to represent the people, and Public Defender services to represent indigent petitioners, both of which are specialized to deal with complex psychiatric issues, including travel time for this personnel
- Forensic expert witness and investigator services
- Sheriff's department services for transporting inmates between prison or state hospital and court house, care and custody associated with confinement awaiting, during and after the court proceeding

Position of Department of Corrections

The Department of Corrections filed comments on August 3, 2001, citing additional workload and subpoenas for mental health professionals at the Department resulting from mentally disordered offender evaluations. Hearings are particularly increasing in San Bernardino County as a result of mentally disordered offenders being placed in Patton State Hospital, which is located within that county. The Department stated that it had received approximately 20 such subpoenas in the last year, and "[i]t is evident that county resources are impacted by the necessity of conducting these hearings as well." The comments further noted that "[t]he Department of Mental Health has indicated that increasing numbers of [mentally disordered offender] cases will be placed at [Patton State Hospital], at least over the next year or so."

The Department stated that it "appears the County's claim for reimbursement does have merit."

Position of Department of Finance

The Department of Finance filed comments on August 9, 2001, stating that the test claim legislation should not be considered a reimbursable mandate because "the costs claimed for reimbursement are related to enforcement of a changed penalty for a crime or infraction, as specified in Government Code section 17556(g)."

The basis for the Department's argument is that when a petitioner is requesting a hearing to contest a condition of parole, in effect he or she is petitioning to change the penalty for a crime. The county is responsible to provide a sentencing hearing, which determines the penalty for a crime. In this case, the hearing requested by the inmate is a "continuation of the pre-incarceration hearing that is the responsibility of the county." Therefore the costs should not be reimbursable under article XIII B, section 6 of the California Constitution.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[9] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[10] "Its purpose 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."[11] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[12] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[13]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state."[14] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[15] A "higher level of service" occurs

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[9] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected/ (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[10] *Department of Finance v. Commission on State Mandates* (Kern High School Dist.) (2003) 30 Cal.4th 727, 735.

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

[12] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[13] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (San Diego Unified School Dist.); Lucia Mar Unified School District v. Honig (1988) 44 Cal.3d 830, 835-836 (Lucia Mar).

[14] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.).

[15] *San Diego Unified School Dist., supra,* 33 Cal.4th 859; 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

when the new "requirements were intended to provide an enhanced service to the public."[16]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[17]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[18] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[19]

The fact that claimant did not plead the original legislation establishing prisoner- or parolee-initiated court hearings under the mentally disordered offender program limits the issues raised in this test claim. In fact, the only issue presented is whether the test claim statutes, which make minor modifications to the program, are subject to article XIII B, section 6 of the California Constitution. That issue is analyzed below.

Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

In order for a test claim statute to impose a reimbursable state mandated program under article XIII B, section 6, the statutory language must mandate an activity or task upon local governmental agencies. If the statutory language does not mandate or require local agencies to perform a task, then article XIII B, section 6, is not triggered. In such a case, compliance with the test claim statute is within the discretion of the local agency.

The determination as to whether the statute mandates an activity is a question of law.[20] In order to interpret the law, a "fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute."[21] In so doing, the first step is to give the words of the statute their usual and ordinary meaning. "If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs."[22]

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[16] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

[17] *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 (*County of Sonoma*); Government Code sections 17514 and 17556.

[18] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[19] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[20] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 171.

[21] *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.

[22] *Ibid.*

Furthermore, the interpretation may not disregard or enlarge the plain provisions of a statute, nor may it go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the interpretation cannot write into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[23] Consistent with this principle, the courts have strictly construed the meaning and effect of statutes analyzed under article XIII B, section 6, and have not applied section 6 as an equitable remedy:

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to include matters not covered by the language used." [Citations omitted.]["Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation."] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies.[24]

In this test claim, claimant is seeking blanket reimbursement for services of the district attorney, public defender and sheriff's office relating to any prisoner- or parolee-initiated court hearings under the mentally disordered offender program. However, the original legislation establishing those court hearings – Statutes 1985, Chapter 1419 – was not pled. The test claim statutes that were pled modify to some extent the original 1985 provisions. Each test claim statute that was pled is reviewed and analyzed below as to whether any mandate is created by the plain meaning of the language, and therefore subject to article XIII B, section 6 of the California Constitution.

Statutes 1986, Chapter 858, Section 4 (SB 1845) – Chapter 858 did not create a mandate and is therefore not subject to article XIII B, section 6. This legislation did not make substantive changes to the original Penal Code section 2960, subdivision (d) provisions. Instead, it renumbered the existing relevant provisions by breaking down section 2960, subdivisions (a) through (e) into sections 2960, 2962, 2964, 2966 and 2968.

Statutes 1987, Chapter 687, Section 8 (SB 425) – Chapter 687 did not create a mandate and is therefore not subject to article XIII B, section 6.

This legislation modified the first sentence of section 2966, subdivision (b), replacing the text that originally read: "A prisoner … may file … a petition for a hearing on whether he or she meets the [mentally disordered offender] criteria…" The modified text reads: "A prisoner … may file … a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the [mentally disordered offender] criteria…" Thus, it provides more detail and narrows the subject of the Penal Code section 2966 hearing, but does not create a mandate.

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[23] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

[24] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

Statutes 1988, Chapter 658, Section 1 (SB 538) – Chapter 658 did not create a mandate and is therefore not subject to article XIII B, section 6.

This legislation addressed the scope of the Penal Code section 2966 hearing when the parolee is *retained* on parole because of severe mental disorder. It replaced the text of subdivision (c), which at the time read: "If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole ..., this section shall be applicable for the purpose of determining whether the parolee meets the criteria of Section 2962." Section 2962 at that time had established four criteria for determining whether the prisoner or parolee must continue treatment as a condition of parole: 1) the prisoner had a severe mental disorder that was not in remission or could not be kept in remission without treatment; 2) the severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison; 3) the crime was a violent crime; and 4) the prisoner had been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

The text was modified to read: "If the Board of Prison Terms continues a parolee's mental health treatment under section 2962 when it continues the parolee's parole ..., the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment."

Penal Code section 2966 hearings may be conducted at the time a prisoner is being released from prison on parole, or at the time the parolee is scheduled to be released from parole. It is possible that several such hearings could be conducted over time. The Senate Third Reading analysis of the bill stated that according to the author, the Board of Prison Terms requested the changes "to remove redundant aspects of annual renewal of commitment."[25] Thus the scope of the hearing is narrowed, but no mandate is created.

Statutes 1989, Chapter 228, Section 2 (SB 1625) – Chapter 228 did not create a mandate and is not subject to article XIII B, section 6.

As a result of *People v. Gibson* (1988) 204 Cal.App.3d 1425, the Legislature enacted an additional requirement for a finding of severe mental disorder, i.e., that the prisoner or parolee represents a substantial danger of physical harm to others. The *Gibson* court found that the mentally disordered offender legislation violated the equal protection clause of the United States and California Constitutions by not requiring current proof of dangerousness as required of other adult persons involuntarily committed for mental health treatment.[26]

Penal Code section 2966, subdivision (c) was modified to add another condition that must be met in order to continue involuntary mental health treatment in response to *Gibson*.[27]

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[25] Senate Bill 538 (as amended June 9, 1988), Senate Third Reading Analysis (1987-88 Regular Session), August 4, 1988, page 2.

[26] *Gibson* at 1437.

[27] Senate Bill 1625 (as amended April 27, 1989), Senate Committee on Judiciary Analysis (1989-90 Regular Session), May 2, 1989, pages 1-2.

The condition is whether, by reason of his or her severe mental disorder, the prisoner or parolee represents a substantial danger of physical harm to others.

This provision expands the scope of the Penal Code section 2966 hearing by requiring proof of an additional matter, but does not mandate any activity on the district attorney, public defender or sheriff. According to the rules of statutory construction, this interpretation cannot "write into the statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute."[28] Furthermore, there is nothing in the record to support a finding that adding this condition creates a mandate.

Statutes 1994, Chapter 706, Section 1(SB 1918) – Chapter 706 did not create a mandate and is not subject to article XIII B, section 6.

This legislation modified Penal Code section 2966 by: 1) prohibiting the court's consideration of evidence of petitioner's behavior or mental status subsequent to Board of Prison Terms hearing; 2) allowing the court to consider, upon stipulation of the parties, an affidavit or declaration of any psychiatrist, psychologist, or other professional person involved in the evaluation or treatment of the petitioner during the certification process; and 3) providing that, if the court reverses the Board's decision, the court shall stay execution of decision for five working days to allow for orderly release of prisoner.

The first modification appears to clarify the intent of the 1987 statute, which narrowed the scope of the hearing to establishing the prisoner's or parolee's condition at a particular point in time, i.e., as of the date of the Board of Prison Terms hearing. The first modification did not create a mandate.

The second modification allows specified evidence into the hearing upon stipulation of the parties. The Senate Third Reading analysis states the author's comment that "[t]he use of affidavits or declarations in place of personal appearances would be more efficient, less expensive and allow for continuity between the BPT and the court hearing."[29] However, since there was no previous provision that excluded such evidence, this provision clarifies existing law because evidence that is stipulated to by both parties will generally be allowed into any trial. The second modification did not create a mandate.

The third modification requires that, in the event the court reverses the Board of Prison Terms decision, which would result in releasing the prisoner, execution of that decision must be stayed for five working days. According to the Assembly Committee on Public Safety bill analysis, the author commented that this provision was needed because parolees have been ordered released by courts "'forthwith' which prevents the Department [of Corrections] from developing the necessary release supervision and program arrangements which may be fairly extensive given the nature of the parolee's crimes and the concerns of previous victims, local law enforcement and others."[30]

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[28] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

[29] Senate Bill 1918 (as amended August 22, 1994), Senate Third Reading Bill Analysis (1993-94 Regular Session), August 26, 1994, page 2.

[30] SB 1918 (as introduced February 25, 1994), Assembly Committee on Public Safety Bill Analysis (1993-94 Regular Session), June 28, 1994, page 3.

This modification directs the court to stay execution of its decision, but does not mandate any other activity on the district attorney, public defender or sheriff's office. According to the rules of statutory construction, this interpretation cannot "write into the statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute."[31] Furthermore, there is nothing in the record to support a finding that staying execution of the decision creates a mandate.

Conclusion

Staff finds that the test claim statutes do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends that the Commission adopt this analysis to deny the test claim.

[31] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

WHITCOMB HOTEL, INC. (a Corporation) et al., Petitioners,
v.
CALIFORNIA EMPLOYMENT COMMISSION et al., Respondents; FERNANDO R. NIDOY et al., Interveners and Respondents.
S. F. No. 16854.

Supreme Court of California

Aug. 18, 1944.

HEADNOTES

(1) Statutes § 180(2)--Construction--Executive or Departmental Construction.
The construction of a statute by the officials charged with its administration must be given great weight, for their substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in drafting the statute.

See 23 **Cal.Jur.** 776; 15 **Am.Jur.** 309.

(2) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment.

(3) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change.

(4) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
The disqualification imposed on a claimant by Unemployment Insurance Act, § 56(b) (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), for refusing without good cause to accept suitable employment when offered to him, or failing to apply for such employment when notified by the district public employment office, is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment.

See 11 **Cal.Jur. Ten-year Supp.** (Pocket Part) "Unemployment Reserves and Social Security."

(5) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within the Unemployment Insurance Act. *754

(6) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
Employment Commission Rule 56.1, which attempts to create a limitation as to the time a person may be disqualified for refusing to accept suitable employment, conflicts with Unemployment Insurance Act, § 56(b), and is void.

(7) Unemployment Relief--Powers of Employment Commission--Adoption of Rules.
The power given the Employment Commission by the Unemployment Insurance Act, § 90, to adopt rules and regulations is not a grant of legislative power, and in promulgating such rules the commission may not alter or amend the statute or enlarge or impair its scope.

(8) Unemployment Relief--Remedies of Employer--Mandamus.
Inasmuch as the Unemployment Insurance Act, § 67, provides that in certain cases payment of benefits shall be made irrespective of a subsequent appeal, the fact that such payment has been made does not deprive an employer of the issuance of a writ of mandamus to compel the vacation of an award of benefits when he is entitled to such relief.

SUMMARY

PROCEEDING in mandamus to compel the California Employment Commission to vacate an award of unemployment benefits and to refrain from charging petitioners' accounts with benefits paid. Writ granted.

COUNSEL

Brobeck, Phleger & Harrison, Gregory A. Harrison and Richard Ernst for Petitioners.

Robert W. Kenny, Attorney General, John J. Dailey, Deputy Attorney General, Forrest M. Hill, Gladstein, Grossman, Margolis & Sawyer, Ben Margolis, William Murrish, Gladstein, Grossman, Sawyer & Edises, Aubrey Grossman and Richard Gladstein for Respondents.

Clarence E. Todd and Charles P. Scully as Amici Curiae on behalf of Respondents.

TRAYNOR, J.

In this proceeding the operators of the Whitcomb Hotel and of the St. Francis Hotel in San Francisco seek a writ of mandamus to compel the California Employment Commission to set aside its order granting unemployment insurance benefits to two of their former employees, Fernando R. Nidoy and Betty Anderson, corespondents in this action, and to restrain the commission from charging petitioners' accounts with benefits paid pursuant to *755 that order. Nidoy had been employed as a dishwasher at the Whitcomb Hotel, and Betty Anderson as a maid at the St. Francis Hotel. Both lost their employment but were subsequently offered reemployment in their usual occupations at the Whitcomb Hotel. These offers were made through the district public employment office and were in keeping with a policy adopted by the members of the Hotel Employers' Association of San Francisco, to which this hotel belonged, of offering available work to any former employees who recently lost their work in the member hotels. The object of this policy was to stabilize employment, improve working conditions, and minimize the members' unemployment insurance contributions. Both claimants refused to accept the proffered employment, whereupon the claims deputy of the commission ruled that they were disqualified for benefits under section 56(b) of the California Unemployment Insurance Act (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), on the ground that they had refused to accept offers of suitable employment, but limited their disqualification to four weeks in accord with the commission's Rule 56.1. These decisions were affirmed by the Appeals Bureau of the commission. The commission, however, reversed the rulings and awarded claimants benefits for the full period of unemployment on the ground that under the collective bargaining contract in effect between the hotels and the unions, offers of employment could be made only through the union.

In its return to the writ, the commission concedes that it misinterpreted the collective bargaining contract, that the agreement did not require all offers of employment to be made through the union, and that the claimants are therefore subject to disqualification for refusing an offer of suitable employment without good cause. It alleges, however, that the maximum penalty for such refusal under the provisions of Rule 56.1, then in effect, was a four-week disqualification, and contends that it has on its own motion removed all charges against the employers for such period.

The sole issue on the merits of the case involves the validity of Rule 56.1, which limits to a specific period the disqualification imposed by section 56(b) of the act. Section 56 of the act, under which the claimants herein were admittedly disqualified, *756 provides that: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: ... (b) If without good cause he has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the District Public Employment Office." Rule 56.1, as adopted by the commission and in effect at the time here in question, restated the statute and in addition provided that: "In pursuance of its authority to promulgate rules and regulations for the administration of the Act, the Commission hereby provides that an individual shall be disqualified from receiving benefits if it finds that he has failed or refused, without good cause, either to apply for available, suitable work when so directed by a public employment office of the Department of Employment or to accept suitable work when offered by any employing unit or by any public employment office of said Department. Such disqualification shall continue for the week in which such failure or refusal occurred, and for not more than three weeks which immediately follow such week as determined by the Commission according to the circumstances in each case." The validity of this rule depends upon whether the commission was empowered to adopt it, and if so, whether the rule is reasonable.

The commission contends that in adopting Rule 56.1 it exercised the power given it by section 90 of the act to adopt "rules and regulations which to it seem necessary and suitable to carry out the provisions of this act" (2 Deering's Gen. Laws, 1937, Act 8780d, § 90(a)). In its view section 56(b) is ambiguous because it fails to specify a definite period of

disqualification. The commission contends that a fixed period is essential to proper administration of the act and that its construction of the section should be given great weight by the court. It contends that in any event its interpretation of the act as embodied in Rule 56.1 received the approval of the Legislature in 1939 by the reenactment of section 56(b) without change after Rule 56.1 was already in effect.

(1) The construction of a statute by the officials charged with its administration must be given great weight, for their "substantially contemporaneous expressions of opinion are *757 highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute." (*White v. Winchester Country Club*, 315 U.S. 32, 41 [62 S.Ct. 425, 86 L.Ed. 619]; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 [51 S.Ct. 144, 75 L.Ed. 397]; *Riley v. Thompson*, 193 Cal. 773, 778 [227 P. 772]; *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 643 [122 P.2d 526]; *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; see, Griswold, *A Summary of the Regulations Problem*, 54 Harv.L.Rev. 398, 405; 27 Cal.L.Rev. 578; 23 Cal.Jur. 776.) When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation. (*Helvering v. Griffiths*, 318 U.S. 371, 403 [63 S.Ct. 636, 87 L.Ed. 843]; *United States v. Hill*, 120 U.S. 169, 182 [7 S.Ct. 510, 30 L.Ed. 627]; see *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; *Hoyt v. Board of Civil Service Commissioners*, 21 Cal.2d 399, 402 [132 P.2d 804].) Whatever the force of administrative construction, however, final responsibility for the interpretation of the law rests with the courts. "At most administrative practice is a weight in the scale, to be considered but not to be inevitably followed. ... While we are of course bound to weigh seriously such rulings, they are never conclusive." (*F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976.) (2) An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment. (*California Drive-In Restaurant Assn. v. Clark*, 22 Cal.2d 287, 294 [140 P.2d 657, 147 A.L.R. 1028]; *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935]; *Boone v. Kingsbury*, 206 Cal. 148, 161 [273 P. 797]; *Bank of Italy v. Johnson*, 200 Cal. 1, 21 [251 P. 784]; *Hodge v. McCall*, 185 Cal. 330, 334 [197 P. 86]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev.*, 297 U.S. 129 [56 S.Ct. 397, 80 L.Ed. 528]; *Montgomery v. Board of Administration*, 34 Cal.App.2d 514, 521 [93 P.2d 1046, 94 A.L.R. 610].) (3) Moreover, an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted *758 without change. (*Biddle v. Commissioner of Internal Revenue*, 302 U.S. 573, 582 [58 S.Ct. 379, 82 L.Ed. 431]; *Houghton v. Payne*, 194 U.S. 88 [24 S.Ct. 590, 48 L.Ed. 888]; *Iselin v. United States*, 270 U.S. 245, 251 [46 S.Ct. 248, 70 L.Ed. 566]; *Louisville & N. R. Co. v. United States*, 282 U.S. 740, 757 [51 S.Ct. 297, 75 L.Ed. 672]; *F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976; *Pacific Greyhound Lines v. Johnson*, 54 Cal.App.2d 297, 303 [129 P.2d 32]; see *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 [60 S.Ct. 18, 84 L.Ed. 101]; *Helvering v. Hallock*, 309 U.S. 106, 119 [60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368]; *Federal Comm. Com. v. Columbia Broadcasting System*, 311 U.S. 132, 137 [61 S.Ct. 152, 85 L.Ed. 87]; Feller, *Addendum to the Regulations Problem*, 54 Harv.L.Rev. 1311, and articles there cited.)

In the present case Rule 56.1 was first adopted by the commission in 1938. It was amended twice to make minor changes in language, and again in 1942 to extend the maximum period of disqualification to six weeks. The commission's construction of section 56(b) has thus been neither uniform nor of long standing. Moreover, the section is not ambiguous, nor does it fail to indicate the extent of the disqualification. (4) The disqualification imposed upon a claimant who without good cause "has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the district public employment office" is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment. (Accord: 5 C.C.H. Unemployment Insurance Service 35,100, par. 1965.04 [N.Y.App.Bd.Dec. 830-39, 5/27/39].) The Unemployment Insurance Act was expressly intended to establish a system of unemployment insurance to provide benefits for "persons unemployed through no fault of their own, and to reduce involuntary unemployment. ..." (Stats. 1939, ch. 564, § 2; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 1.) The public policy of the State as thus declared by the Legislature was intended as a guide to the interpretation and application of the act. (*Ibid.*) (5) One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his

own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within *759 the provisions of the statute. (See 1 C.C.H. Unemployment Insurance Service 869, par. 1963.) Section 56(b) in excluding absolutely from benefits those who without good cause have demonstrated an unwillingness to work at suitable employment stands out in contrast to other sections of the act that impose limited disqualifications. Thus, section 56(a) disqualifies a person who leaves his work because of a trade dispute for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed; and other sections at the time in question disqualified for a fixed number of weeks persons discharged for misconduct, persons who left their work voluntarily, and those who made wilful misstatements. (2 Deering's Gen. Laws, 1937, Act 8780(d), § § 56(a), 55, 58(e); see, also, Stats. 1939, ch. 674, § 14; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 58.) Had the Legislature intended the disqualification imposed by section 56(b) to be similarly limited, it would have expressly so provided. (6) Rule 56.1, which attempts to create such a limitation by an administrative ruling, conflicts with the statute and is void. (*Hodge v. McCall, supra;* Manhattan General Equipment Co. v. Commissioner of Int. Rev., 297 U.S. 129, 134 [56 S.Ct. 397, 80 L.Ed. 528]; see Bodinson Mfg. Co. v. California Employment Com., 17 Cal.2d 321, 326 [109 P.2d 935].) Even if the failure to limit the disqualification were an oversight on the part of the Legislature, the commission would have no power to remedy the omission. (7) The power given it to adopt rules and regulations (§ 90) is not a grant of legislative power (see 40 Columb. L. Rev. 252; cf. Deering's Gen. Laws, 1939 Supp., Act 8780(d), § 58(b)) and in promulgating such rules it may not alter or amend the statute or enlarge or impair its scope. (*Hodge v. McCall, supra;* Bank of Italy v. Johnson, 200 Cal. 1, 21 [251 P. 784]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev., supra;* Koshland v. Helvering, 298 U.S. 441 [56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756]; *Iselin v. United States, supra.*) Since the commission was without power to adopt Rule 56.1, it is unnecessary to consider whether, if given such power, the provisions of the rule were reasonable.

The commission contends, however, that petitioners are not entitled to the writ because they have failed to exhaust *760 their administrative remedies under section 41.1. This contention was decided adversely in *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]. It contends further that since all the benefits herein involved have been paid, the only question is whether the charges made to the employers' accounts should be removed, and that since the employers will have the opportunity to protest these charges in other proceedings, they have an adequate remedy and there is therefore no need for the issuance of the writ in the present case. The propriety of the payment of benefits, however, is properly challenged by an employer in proceedings under section 67 and by a petition for a writ of mandamus from the determination of the commission in such proceedings. (See *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]; *W. R. Grace & Co. v. California Employment Com., ante,* p. 720 [151 P.2d 215].) An employer's remedy thereunder is distinct from that afforded by section 45.10 and 41.1, and the commission may not deprive him of it by the expedient of paying the benefits before the writ is obtained. (8) The statute itself provides that in certain cases payment shall be made irrespective of a subsequent appeal (§ 67) and such payment does not preclude issuance of the writ. (See *Bodinson Mfg. Co. v. California Emp. Com., supra,* at pp. 330-331; *Matson Terminals, Inc. v. California Emp. Com., supra.*)

Let a peremptory writ of mandamus issue ordering the California Employment Commission to set aside its order granting unemployment insurance benefits to the corespondents, and to refrain from charging petitioners' accounts with any benefits paid pursuant to that award.

Gibson, C. J., Shenk, J., Curtis, J., and Edmonds, J., concurred.

CARTER, J.

I concur in the conclusion reached in the majority opinion for the reason stated in my concurring opinion in *Mark Hopkins, Inc. v. California Emp. Co.,* this day filed, *ante,* p. 752 [151 P.2d 233].

Schauer, J., concurred.

Intervener's petition for a rehearing was denied September 13, 1944. Carter, J., and Schauer, J., voted for a rehearing. *761

Cal.,1944.

Whitcomb Hotel v. California Employment Commission

END OF DOCUMENT

Date of Printing: JAN 12,2006

KEYCITE

Whitcomb Hotel v. California Employment Commission, 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405 (Cal., Aug 18, 1944) (NO. S.F. 16854)

History
Direct History

=> 1 Whitcomb Hotel v. California Employment Commission, 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405 (Cal. Aug 18, 1944) (NO. S.F. 16854)

Negative Citing References (U.S.A.)

Distinguished by

2 Hanerfeld v. City of Berkeley Rent Stabilization Bd., 2004 WL 2030255 (Cal.App. 1 Dist. Sep 13, 2004) (NO. A103412), unpublished/noncitable ** HN: 4,6,7 (P.2d)

THE PEOPLE, Plaintiff and Respondent,
v.
ANDREW FRASER GIBSON, Defendant and Appellant
No. B025616.

Court of Appeal, Second District, California.

Oct 6, 1988.

SUMMARY

Defendant was convicted of forcible rape in violation of Pen. Code, § 261, subd. (2), and was sentenced to six years in the state prison. Instead of being released on parole on his due date, he was required to accept inpatient treatment through the Department of Health under Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of future dangerousness. After trial he was found to be a severely mentally disordered offender subject to involuntary confinement and treatment under Pen. Code, § 2962, and he appealed. (Superior Court of San Luis Obispo County, No. PC4, Harry E. Woolpert, Judge.)

The Court of Appeal reversed, holding defendant was entitled to parole on terms without reference to the requirements of Pen. Code, § 2962 et seq. The court held the retroactive application of the mandatory provisions violated the ex post facto clauses of the United States and California Constitutions as applied to a defendant whose crimes which resulted in imprisonment were committed prior to the enactment of the legislation. It further held the provisions violated the equal protection clauses of the United States and California Constitutions, as it was unreasonable and arbitrary to exempt persons such as defendant from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment, and no compelling governmental interest justified the exception. (Opinion by Abbe, J., with Stone (S. J.), P. J., and Gilbert, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Criminal Law § 7.2--Ex Post Facto Laws--Mental Treatment as Condition of Parole.
Legislation (Pen. Code, § § 2962-2980) requiring *1426 certain mentally ill persons about to be paroled to accept inpatient mental treatment violates the ex post facto clauses of U.S. Const., art. I, § 9, cl. 3, and Cal. Const., art. 1, § 9, as applied to a prisoner whose crime, which resulted in imprisonment and a determinate sentence, was committed prior to the enactment of the legislation. The provisions are applicable only to persons who were convicted for certain crimes and who were still serving their terms of imprisonment on the operative date of the legislation, and mandate a potentially onerous change in the terms of parole which is part of the sentence for a criminal conviction; the result could potentially be custody for life in a state hospital setting without proof that the person was either gravely disabled or demonstrably dangerous as the result of mental illness.

[See Cal.Jur.3d (Rev), Criminal Law, § 9; Am.Jur.2d, Constitutional Law, § 654.]

(2) Criminal Law § 7--Ex Post Facto Laws.
Two critical elements must be present for a statute to violate the ex post facto clause: (1) it must be a criminal or penal law which applies to events occurring prior to its effective date and (2) it must substantially disadvantage the offender affected by it. A law constitutes an ex post facto violation when it retrospectively imposes criminal liability for conduct which was innocent when it occurred, or increases the punishment prescribed for a crime, or by necessary operation alters the situation of the accused to his disadvantage. In order to determine whether retrospective laws are disadvantageous, courts must look to the effect of the present system of laws compared to those in place at the time the offense was committed.

(3) Criminal Law § 7--Ex Post Facto Laws--Penal or Therapeutic Laws.
Pen. Code, § § 2962-2980, requiring certain mentally ill prisoners about to be paroled to accept inpatient mental treatment without a determination of future dangerousness, must be characterized as penal, rather than therapeutic, for determining whether it violates the ex post facto clause when applied retrospectively. The primary purpose of the legislation is to protect the public, and the fact the

person is treated while confined involuntarily does not ipso facto make the confinement nonpenal. Failure to follow the treatment plan during the period of parole can result in a return to prison on parole revocation and it may therefore extend indirectly the incarceration of the person as a result of his criminal conduct.

(4a, 4b, 4c, 4d) Constitutional Law § 101--Equal Protection--Basis of Classification--Criminal Conviction or Acquittal--Involuntary Mental *1427 Treatment of Parolees.

Legislation (Pen. Code, § § 2962-2980) requiring certain mentally ill prisoners about to be paroled to accept inpatient mental treatment without a determination of dangerousness violates the equal protection clause of the United States Constitution, since it is unreasonable and arbitrary to exempt such persons from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment. Although parole status is a distinctive characteristic for disparate treatment under certain circumstances, it is irrelevant to the purpose of the statute's involuntary commitment or treatment.

(5) Constitutional Law § 76--Nature and Scope of Equal Protection--United States Constitution.

The equal protection clause of the United States Constitution requires at a minimum that persons standing in the same relation to a challenged government action will be uniformly treated. --Traditionally, social and economic legislation is upheld if the classification drawn is rationally related to legitimate state interests. When the classification touches on a fundamental right, it must be judicially determined under the strictest standard whether it is necessary to promote a compelling government interest. Whether a right is fundamental depends on whether it is implicitly or explicitly granted by the federal Constitution. An equal protection challenge requires a determination whether the groups which are differently treated are similarly situated for purposes of the law. If they are not, no equal protection claim is applicable.

(6) Penal and Correctional Institutions § 22--Nature of Parole.

Parole in California is different than the traditional concept of parole, under which it is a release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the term. In California, determinately sentenced prisoners serve the complete term specified under Pen. Code, § 1170, less any applicable credits for work performed under Pen. Code, § § 2931 or 2933, and are then placed on parole for three years regardless of the length of the term served. Under Pen. Code, § 3000, this parole period is an essential part of the actual sentence and is not dependent on early release.

(7) Constitutional Law § 84--Equal Protection--Classification--Judicial Review--Deference to Legislature--Dangerousness--Class.

Under equal protection analysis, although great deference is due a legislative determination that a certain class of persons endangers public safety and that involuntary commitment of persons in that class is necessary to protect the public, the determination of which individuals belong to *1428 that class is a judicial, not legislative, function. Thus, Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of dangerousness establishes an invalid classification, since it would permit a permanent conclusive presumption of dangerousness from proof of mental illness so long as it had once been proved the illness was causally related to or an aggravating factor in the commission of a criminal offense. Such conclusive presumption would violate due process since dangerousness is not universally and necessarily coexistent with mental illness, and a finding that a mental illness was once a contributing cause or aggravating factor in criminality does not change the fact that all former felons suffering mental illness are not dangerous or violent.

(8) Constitutional Law § 101--Equal Protection--Basis of Classification-- Criminal Conviction or Acquittal--Parolees--Mental Illness.

Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of dangerousness, is subject to close scrutiny under the California Constitution (Cal. Const., art. I, § 7) in an equal protection analysis, since the statutory scheme deprives persons of their liberty. The law can withstand constitutional attack as discriminatory among similarly situated persons only if the government can demonstrate a compelling interest which justifies the law and that the distinction drawn by the statute is necessary to further that purpose. Because there is no demonstrable compelling interest in the continued confinement of mentally ill former prisoners simply because their mental illness continues, or that exclusion of a requisite finding of dangerousness is necessary to serve any legitimate government interest, the statutes violate equal protection. The difficulty of proof of dangerousness

does not constitute necessity for its complete elimination.

COUNSEL

Rowan W. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Morris Lenk, Karl S. Mayer and Bruce M. Slavin, Deputy Attorneys General, for Plaintiff and Respondent. *1429

ABBE, J.

Legislation, [FN1] effective July 1, 1986, requiring a person who had been sentenced to a determinate sentence prior to that date to be confined in a mental hospital as a condition of parole, violates constitutional ex post facto clauses. The legislation also violates equal protection because it mandates involuntary confinement and treatment of former prisoners who are mentally ill without proof of dangerousness.

FN1 Statutes 1985, chapter 1419, section 3. The provisions were originally found in Penal Code section 2960. They were amended and recodified without substantive change by Statutes 1986, chapter 858, to have separate section numbers (Pen. Code, § § 2962-2980). For easy reference, all sections are referred to by their present section numbers.

Appellant was convicted of forcible rape in violation of Penal Code [FN2] section 261, subdivision (2) and on June 29, 1983, was sentenced to six years in the state prison. With applicable credits he was to be released from custody on parole on September 10, 1986. Instead of being released, he was required to accept inpatient treatment through the Department of Mental Health under the statutory scheme under consideration. After trial in the superior court, he was found to be a severely mentally disordered offender subject to involuntary confinement and treatment under section 2962.

FN2 All further statutory references are to this code unless otherwise specified.

The confinement then ordered for appellant expired one year from the date he should have been released on parole. This appeal is therefore technically moot. However, since appellant is subject to repetition of this process, the issues are of recurring importance and time constraints make it likely any annual commitment will evade appellate review, we address the merits. [FN3] (See *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 167, fn. 2 [167 Cal.Rptr. 854, 616 P.2d 836].)

FN3 Appellant has been continued on parole for another year under section 2962 and is continuing to be confined for treatment as an inpatient at Atascadero State Hospital.

In 1983, when appellant was committed to prison, section 2960 (now § 2974 as amended) provided discretion to seek civil commitment of prisoners under the Lanterman-Petris-Short (hereafter LPS) Act, which was incorporated in part by reference in the Penal Code as an alternative to their release. Involuntary commitment under the LPS Act is applicable to all persons regardless of their former penal status who are proved to be gravely disabled or demonstrably dangerous to themselves or others. (See Welf. & Inst. Code, § § 5150, 5200, 5250, subd. (a), 5300, subds. (a)-(c).) If such confinement was not both sought and imposed, appellant would have been entitled to be released from confinement into the community. *1430

Section 2962 now mandates treatment for any person who meets all the following criteria: (1) Is about to be released on parole, [FN4] (2) has a severe mental disorder, as defined, (3) the mental disorder is not in remission or cannot be kept in remission without treatment, as defined, (4) whose severe mental disorder was one of the causes of or was an aggravating factor [FN5] in the commission of a crime for which the person was sentenced to prison, (5) whose crime was one in which the person used force or violence or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of section 243, and (6) who has been in treatment for the severe mental disorder for 90 days or more within the year prior to parole or release. [FN6]

FN4 Section 2970 also permits the same standards be applied for recommitment of persons who would otherwise be released without parole or whose parole has expired. Appellant is not such a person.

FN5 Ironically, mental disorders which do not constitute a defense under California insanity provisions (§ 25) are mitigating factors for purposes of sentencing. (See Cal.

Rules of Court, rules 416(e), 423(b)(2) and 425(b).) Consequently a mental illness which is causally related to criminal conduct may at the same time reduce the term of imprisonment and then result in custodial confinement for life.

FN6 The procedural provisions for commitment are not challenged. They are complex and need not be considered here.

The treatment mandated is inpatient (§ 2964) unless the patient can be safely and effectively treated on an outpatient basis, but if not released to outpatient status within 60 days the person may request a hearing before the Board of Prison Terms (BPT) where the Department of Mental Health must establish that inpatient treatment is necessary. (§ 2964, subd. (b).) This treatment can be continued under the same provisions so long as parole is continued and, as a condition thereof, treatment is mandated pursuant to section 2962. (§ 2964, subd. (c).)

These provisions apply to all persons affected who were incarcerated before as well as after January 1, 1986. (§ 2980.) It is therefore expressly retroactive to persons whose crimes which resulted in imprisonment were committed prior to the enactment of the Legislature so long as they had not earlier been released on parole. [FN7]

FN7 The provisions apply to all persons whether sentenced to a determinate term under section 1170 or to an indeterminate term either prior to the enactment of section 1170 or under section 1168. As appellant was a determinately sentenced prisoner we confine our consideration only to persons released on parole after serving a determinate term imposed pursuant to section 1170.

Ex Post Facto Violation

(1a) Appellant contends the retroactive application of these mandatory provisions violates the ex post facto clauses of the United States and California Constitutions (art I, § 9, cl. 3, and art I, § 9, respectively). We agree. ***1431**

(2) Two critical elements must be present for a statute to violate the ex post facto clause; (1) it must be a criminal or penal law which applies to events occurring prior to its effective date, and (2) it must substantially disadvantage the offender affected by it. (*In re Jackson* (1985) 39 Cal.3d 464, 469-477 [216 Cal.Rptr. 760, 703 P.2d 100].)

A law constitutes an ex post facto violation when it retrospectively (1) imposes criminal liability for conduct which was innocent when it occurred, or (2) increases the punishment prescribed for a crime, or (3) by necessary operation alters the situation of the accused to his disadvantage. (*Conservatorship of Hofferber, supra*, 28 Cal.3d 161, 180.) The mentally disordered offender provisions (MDO) of section 2962 et seq. both increase punishment and alter the situation of the accused to his disadvantage.

In order to determine whether retrospective laws are disadvantageous, we must look to the effect of the present system of laws compared to those in place at the time the offense was committed. (See *In re Stanworth* (1982) 33 Cal.3d 176, 186 [187 Cal.Rptr. 783, 654 P.2d 1311]; *Dobbert v. Florida* (1977) 432 U.S. 282, 294 [53 L.Ed.2d 344, 356-357, 97 S.Ct. 2290]; *Weaver v. Graham* (1981) 450 U.S. 24, 25 [67 L.Ed.2d 17, 20-21, 101 S.Ct. 960].)

(1b) At the time of appellant's offense he was subject to a determinate sentence (§ 1170) and had to be released on parole at the end thereof (§ 3000 subds. (a) and (d); *People v. Burgener* (1986) 41 Cal.3d 505, 529, fn. 12 [224 Cal.Rptr. 112, 714 P.2d 1251].) The Board of Prison Terms (BPT) had discretion to set such reasonable parole conditions as it deemed proper (§ 3053), including the condition of outpatient psychiatric counseling. (*In re Naito* (1986) 186 Cal.App.3d 1656 [231 Cal.Rptr. 506], also see § 3002.) The BPT could revoke his parole and recommit him for failure to abide by the conditions. (§ § 3056 and 3060.)

His total period of parole and custody on recommitment for revocation of parole could not exceed four years (§ 3057, subd. (a)) [FN8] unless he engaged in misconduct while confined on a parole revocation (§ 3057, subd. (c); also see § 3060.5.)

FN8 All references to this section are to the prior version under Statutes 1984, chapter 805, section 3.

When appellant committed his offense he could only have been confined involuntarily for evaluation and treatment on the same basis as all nonprisoners or parolees, that is, if he was mentally ill and gravely disabled (Welf. & Inst. Code, § § 5000, 5008, subd. (h)(1)) or dangerous. (Welf. & Inst. Code, § § 5000, 5250) (former Pen. Code, § 2960, now § 2974,

applicable to all prisoners other than those described in § 2962.) *1432

Under section 2962 the following changes occur. The persons described therein are required to be retained in physical custody by the Department of Mental Health (§ 2962) and must be treated on an inpatient basis for a minimum of 60 days (§ 2964) and may be retained on an inpatient basis for annual periods for life (§ § 2966, subd. (c), 2970) so long as their severe mental disorder is not in remission or cannot be kept in remission without treatment. Therefore, persons who are neither gravely disabled nor demonstrably dangerous but who meet the section 2962 criteria must undergo treatment on an inpatient and on outpatient basis during their parole term and may be required to do so indefinitely.

(3) Respondent argues that the legislation does not violate the ex post facto clauses because it is not penal, but rather therapeutic, and it does not disadvantage appellant as an accused. We disagree.

Respondent is, however, correct that a necessary determination is whether the statutes imprison appellant as a criminal or require compulsory treatment in involuntary confinement as a sick person. (See *Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 181 and *In re Gary W.* (1971) 5 Cal.3d 296, 301 [96 Cal.Rptr. 1, 486 P.2d 1201].) We believe section 2962 has overwhelming penal attributes and therefore constitutes part of appellant's punishment for his criminal offense.

Section 2960 states the legislative purpose in the enactment of section 2962 et seq.: "The Legislature finds that there are prisoners who have a treatable, severe mental disorder that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated. [FN[9]] Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public. Thirdly, the Legislature finds that in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission. [¶] The Legislature further finds and declares the Department of Corrections should evaluate each prisoner for severe mental *1433 disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community." [FN10]

FN9] It is interesting to note this declaration came just four years after the Legislature "recognize[d] and declare[d] that the commission of sex offenses is not in itself the product of mental diseases." (Stats. 1981, ch. 928, § 4.) Consequently it terminated prospectively an involuntary commitment scheme for mentally disordered sex offenders. (Former Welf. & Inst. Code, § § 6300 to 6330.) Many sex offenders will now "qualify" under the MDO scheme since their crimes definitionally involved the use of force or violence. (See e.g., § § 261, subd. (2), 288, subd. (b) and 288a, subds. (c) and (d)(1).)

FN10 While the provisions operate retroactively for prisoners incarcerated before the effective date of the legislation, it is of course impossible to retroactively evaluate and treat them. Consequently persons imprisoned before July 1, 1986, did not have this advantage during their terms.

The primary purpose of the legislation is to protect the public. The mechanism by which the public is being protected is by requiring confinement and treatment of some former prisoners who have severe mental disorders as defined by section 2962, subdivision (a).

The fact that a person is treated while confined involuntarily does not ipso facto make the confinement nonpenal. For example, section 2684 provides for the transfer of mentally ill prisoners to a state hospital for treatment during their period of imprisonment. By the terms thereof, the time spent in the hospital for treatment is credited toward their terms of imprisonment. Obviously this period of treatment is "penal" within the meaning of the ex post facto clauses. (Also see § 1364.)

The California Supreme Court has identified several criteria to determine whether a statute is criminal or civil. In *Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793] (hereafter *Cramer*) the court identified four features which resulted in its admittedly close determination that involuntary commitment of certain mentally retarded persons was not punishment: (1) it was not initiated in response or

necessarily related to any criminal acts, (2) it was of limited duration although renewable, (3) the person with the burden of proof was not necessarily a public prosecutor, and (4) the sole purpose of the legislation was the custodial care, treatment and protection of the person committed.

In contrast to the statutory scheme for the involuntary commitment of the mentally retarded, MDO commitments are: (1) necessarily related to the commission of and conviction and imprisonment for crimes involving use of force or violence or in which serious bodily injury was inflicted; (2) the commitment of MDO's can only be brought about by prison officials (§ 2962) or district attorneys (§ 2970); and (3) the sole purpose is not treatment for the safety of the person committed but is primarily protection of the public (§ 2960), the same purpose for imposing imprisonment for criminal conduct. (Cal. Rules of Court, rules 410(a) and 414(b).) The MDO commitment scheme has more penal features than that for mentally retarded persons. *1434

Other criteria were identified in *Conservatorship of Hofferber, supra*, 28 Cal.3d 161, at pages 181 and 182 in determining whether the involuntary extended confinement of persons gravely disabled due to incompetence to stand trial on felony charges and who are presently dangerous (hereafter GDI's) was punitive. The court specified the following factors leading to its conclusion this scheme was not punitive: (1) The commitment did not extend, directly or indirectly, any incarceration imposed on appellant for criminal conduct, (2) a criminal sentence would probably never be imposed, (3) the confinement did not arise from criminal conduct but from a mental condition, (4) the person committed would be placed in a state hospital or a less restrictive setting (see Welf. & Inst. Code, § 5358) rather than in a prison, and (5) the GDI commitment did not disadvantage the person as an accused because he or she was not forced to defend against a criminal adjudication. While a MDO commitment shares some of these civil attributes, it differs in important respects.

An MDO commitment, unlike one for GDI's, results directly from the commission of a crime and a period of imprisonment as well as from the mental condition. Failure to follow the treatment plan during the period of parole can result in a return to prison on parole revocation and it may therefore extend indirectly the incarceration of appellant as a result of his criminal conduct. Specified prestatute criminal conduct is both a requisite and the reason for custodial confinement.

MDO's may be forced to defend against a criminal adjudication since whether the crime which resulted in the prison commitment "involved the use of force or violence or caused serious bodily injury" may not have been adjudicated at the time of conviction. Unlike other involuntary commitment schemes which apply either to persons involved in certain specified offenses (see e.g., Welf. & Inst. Code, § 3052) or to any felony offender (see e.g., § 1026.5, subd. (b)(1)) the MDO scheme applies to persons who committed any felony offense only if it involved the use of force or violence or if it involved inflicting serious bodily injury. Except in those instances where force, violence or serious bodily injury are elements of the offense or an enhancement thereof, a new adjudication relating to the offense may be required.

These differences between the MDO commitment scheme and those considered in *Cramer* and *Hofferber* require us to find that it is essentially penal in nature and consequently it is subject to the limitations of the ex post facto clauses.

(1c) We find the retroactive application of the MDO provisions to persons whose crimes were committed prior to their effective date violates the *1435 ex post facto clauses of the United States and California Constitutions because the provisions: (1) are applicable only to persons who were convicted for certain crimes and who are still serving their terms of imprisonment on the operative date of the legislation (§ 2962), and mandate a potentially onerous change in the terms of parole which is part of the sentence for a criminal conviction (§ § 1170, subd. (e), 3000); [FN11] and (2) potentially could result in custody for life in a state hospital setting without proof that the person is either gravely disabled or demonstrably dangerous as a result of mental illness.

FN11 This feature alone may suffice to establish an ex post facto violation. In *In re Stanworth, supra*, 33 Cal.3d 176, the change from the discretionary parole release date setting provisions in effect under the indeterminate sentencing law (ISL) to the directory (mandatory) provisions under the determinate sentencing law (DSL) were found to be ex post facto as applied to persons whose offenses were committed prior to DSL. (Also see *Weaver* v. *Graham, supra*, 450 U.S. 24 (change from mandatory to discretionary good time credits violates clause) and *Lindsey* v. *Washington* (1937)

301 U.S. 397 [81 L.Ed. 1182, 57 S.Ct. 797] (change from discretionary to mandatory maximum sentence violates clause).)

Equal Protection

(4a) We also find the MDO provisions violate the equal protection clauses of the United States and California Constitutions. (U.S. Const., 14th Amend. and Cal. Const., art I, § 7.)

Equal Protection Under the United States Constitution

(5) The equal protection clause of the United States Constitution requires at a minimum that persons standing in the same relation to a challenged government action will be uniformly treated. (*Reynolds* v. *Sims* (1964) 377 U.S. 533 [12 L.Ed.2d 506, 84 S.Ct. 1362].) Traditionally, social and economic legislation will be upheld if the classification drawn by the statutes is rationally related to legitimate state interests. (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432 [87 L.Ed.2d 313, 105 S.Ct. 3249].) When the classification touches on a fundamental right, it must be judicially determined under the strictest standard whether it is necessary to promote a compelling government interest. (*Shapiro* v. *Thompson* (1969) 394 U.S. 618 [22 L.Ed.2d 600, 89 S.Ct. 1322].) Whether a right is fundamental depends on whether it is implicitly or explicitly guaranteed by the federal Constitution. (*San Antonio School District v. Rodriguez* (1973) 411 U.S. 1 [36 L.Ed.2d 16, 93 S.Ct. 1278].)

Although freedom from involuntary custodial confinement would appear to be the equivalent of "liberty" explicitly guaranteed by the Fifth and Fourteenth Amendments, the United States Supreme Court has not *1436 expressly held that classifications touching upon liberty are fundamental for these purposes. In *Jones v. United States* (1983) 463 U.S. 354 [77 L.Ed.2d 694, 103 S.Ct. 3043] and *Baxstrom v. Herold* (1966) 383 U.S. 107 [15 L.Ed.2d 620, 86 S.Ct. 760], both of which related to challenged classifications in substance and procedure for involuntary commitment, the court appears to use the traditional rational basis test. Consequently for purposes of federal law analysis so shall we.

Any equal protection challenge requires a determination whether the groups which are differently treated are similarly situated for purposes of the law. If they are not, no equal protection claim is applicable. (*Tigner* v. *Texas* (1940) 310 U.S. 141, 147 [84 L.Ed. 1124, 1128, 60 S.Ct. 879, 130 A.L.R. 1321].)

(4b) Appellant claims, and we agree, that an MDO is similarly situated for purposes of the law to other adult persons involuntarily committed for mental health treatment. One purpose of all of these pertinent involuntary commitment schemes is the protection of the public from the dangerous mentally ill and their involuntary commitment for treatment, for renewable periods, until they no longer pose a danger to the public whether or not they remain mentally ill. [FN12]

FN12 See Penal Code section 1026.5, subdivision (b)(1) (person posing substantial danger of physical harm to others by reason of mental disease); Welfare and Institutions Code, section 1801.5 (wards physically dangerous to public due to mental deficiency), section 5300, subdivisions (a)-(c) (persons demonstrating danger of inflicting substantial physical harm to others due to mental defect), section 6500 (mentally retarded persons dangerous to themselves or others).

The MDO commitment scheme, however, contains one critical and significant difference from all the others; it does not require proof of any present dangerousness as a result of mental illness for commitment or recommitment. Because there is no reasonable basis to exempt MDO's from this proof requirement merely because they are at the end of their prison term, we find the provisions violate the equal protection clause of the Fourteenth Amendment of the United States Constitution.

MDO's are most similarly situated to two groups of mentally ill persons subject to involuntary commitment in California: those persons found not guilty by reason of insanity (NGI) and recommitted after expiration of the maximum term of imprisonment which could have been imposed on them (§ 1026.2) and those mentally ill persons, now adults, who have been recommitted after expiration of the potential maximum term of imprisonment for criminal conduct as wards of the state (MDW). (Welf. & Inst. Code, § § 602, 707, subd. (b), 1731.5.) *1437

An MDO, like the MDW and an NGI, has been adjudged to have committed a criminal offense. Both the MDO and NGI are committed after proof of a causal connection between their mental illness and the crime which they committed [FN13] (§ 2962;

CALJIC 4.00 (1979 rev.) and *In re Moye* (1978) 22 Cal.3d 457, 462 [149 Cal.Rptr. 491, 584 P.2d 1097].) Unlike the NGI and MDW the MDO, however, is not confined only on proof of dangerousness and is not subject to release when he or she is no longer proven to be dangerous. The MDO alone is subject to commitment and recommitment until such time as his or her severe mental disorder is in remission without proof of present dangerousness. The sole basis for the distinction is that MDO's are at the end of their prison terms.

> FN13 This was true at least until June 9, 1982, when the insanity standard was changed. (Now see § 25 and *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752].) It remains true of persons committed under the pre-1982 law when the standard used was that set forth in *People v. Drew* (1978) 22 Cal.3d 333 [149 Cal.Rptr. 275, 583 P.2d 1318] (see CALJIC 4.00 (1979 rev.)) who continue to be recommitted under section 1026.2.

Like those commitment schemes considered by the United States Supreme Court in *Jackson v. Indiana* (1972) 406 U.S. 715 [32 L.Ed.2d 435, 92 S.Ct. 1845] and *Baxstrom* v. *Herold, supra*, 383 U.S. 107, we find the MDO commitment scheme violates the equal protection clause of the Fourteenth Amendment because it has subjected appellant to a commitment standard more lenient and a release standard more stringent than that required for the involuntary commitment and treatment of any other mentally ill person in California for the arbitrary reason that he is nearing completion of service of his term of imprisonment.

In *Jackson* the court found the indefinite commitment of persons who were incompetent to assist in their own defense on a lesser standard with a more difficult standard of release than all others violative of equal protection. The court found the basis of the distinction of two pending criminal charges was insufficient to justify the difference in treatment.

In *Baxstrom* the court considered a commitment scheme closely analogous to that here. There the state scheme provided for involuntary commitment of persons whose prison term was about to expire which differed from that applicable to all other persons in two different ways. First, it denied a jury trial on the issue of mental illness to the prisoner but gave it to all others. Second, it required a determination of dangerousness for all mentally ill persons committed to the Department of Corrections rather than to the state hospital except prisoners nearing the end of their term. The Supreme Court found both distinctions irrational and therefore violative of equal protection. *1438

The MDO commitment scheme does not suffer the first infirmity identified in *Baxstrom*; it grants the same procedural protections of a jury trial and unanimous verdict applicable to all others. It suffers the second infirmity, however; it permits commitment without proof of dangerousness, a standard applicable to all others involuntarily confined and treated for mental illness. Since the basis for the distinction, i.e., nearing the end of a prison term, is the same as that considered in *Baxstrom*, we too find it is irrational and violative of the equal protection guaranteed by the United States Constitution.

Respondent argues the MDO is not similarly situated to any other involuntarily committed person because of his parole status. This fact, however, is irrelevant for purposes of equal protection analysis for several reasons.

(6) Parole in California is different from the traditional concept of parole. In *Morrissey v. Brewer* (1972) 408 U.S. 471, 477 [33 L.Ed.2d 484, 492, 92 S.Ct. 2593], the court defined parole as "... release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." In California determinately sentenced prisoners serve the complete term specified under section 1170, less any applicable credits for work performed under sections 2931 or 2933 and are then placed on parole for three years regardless of the length of the term served. Under section 3000, this parole period is an essential part of the actual sentence and is not dependent on early release.

(4c) The question for equal protection purposes is not whether potential MDO's are similarly situated to other dissimilarly treated groups for all purposes but rather whether they are similarly situated for purposes of the law challenged. Parole status has been held to be enough to distinguish parolees from all others as to the quantity and quality of procedural due process required for incarceration (*Morrissey v. Brewer, supra*, 408 U.S. 471) or as to rights to be free from warrantless searches and seizures. (*People v. Burgener, supra*, 41 Cal.3d at p. 532.) This is because of the purpose of those restrictions, which

are to promptly punish or rectify a breach of conditions of traditional parole and to facilitate supervision and surveillance to discover breaches. However, parole status is irrelevant to the purpose of MDO involuntary commitment or treatment.

As noted, the purposes of this statutory scheme are twofold. One is to protect the public from mentally ill persons deemed dangerous by the Legislature; the other is to treat these mentally ill persons. (§ 2960.) The impending release on parole, the basis of defining the group, has nothing to do with either purpose. Any danger to public safety has nothing to do with their *1439 status as parolees per se but arises from their release from prison into the general population. Therefore, these are not parole condition cases.

That parole status has nothing to do with any purpose of the act is indicated by features of the act itself: the MDO confinement and treatment are not limited to the parole period (§ 2970); existing parolees, including those released just prior to July 1, 1986, are not covered by the act even if they have all of the other pertinent characteristics defined in the act (Stats. 1985, ch. 1419, § 3; § 2962, subd. (d)) [FN14] and mentally ill parolees in remission at the time scheduled for their release on parole, even though they suffer a relapse after release, are not covered by the act. Obviously the Legislature was not relying on dangers unique to persons on parole in enacting the legislation.

> FN14 Persons convicted of qualifying felonies but not sentenced to imprisonment also do not come under the act even if presently on probation. Such persons would appear to otherwise be in the same situation as potential MDO's as a threat to public safety and in need of treatment.

For the articulated purposes of the act, public safety and treatment of the mentally ill prior offender, we find appellant's situation identical to an NGI whose continuing mental illness once caused a criminal violation and similar to MDW's who also engaged in criminal conduct and remain mentally ill at the time scheduled for release.

The respondent argues that even assuming MDO's are similarly situated to NGI's for the legitimate purposes of the law no factual finding on the issue of present dangerousness is required because the Legislature has found MDO's to be dangerous and so stated in section 2960. (7) Great deference is due a legislative determination that a certain class of persons endangers public safety and that involuntary commitment of persons in that class is necessary to protect the public. However, a determination of which individuals belong to that class is a judicial, not legislative, function. (See *United States v. Brown* (1965) 381 U.S. 437 [14 L.Ed.2d 484, 85 S.Ct. 1707].) To determine otherwise would permit a permanent conclusive presumption of dangerousness from proof of mental illness so long as it had once been proved the illness was causally related to or an aggravating factor in the commission of a criminal offense.

A conclusive presumption of one fact from proof of another violates the due process clause when the existence of the fact presumed is not universally or necessarily coexistent with the fact proved. (*Vlandis v. Kline* (1973) 412 U.S. 441 [37 L.Ed.2d 63, 93 S.Ct. 2230].) Dangerousness is not universally and necessarily coexistent with unremitted mental illness. A finding that a mental illness was once a contributing cause or aggravating factor in *1440 criminality does not change the fact that all former felons suffering mental illness are not dangerous or violent. This fact is implicitly recognized by the several California involuntary commitment schemes requiring proof of both present mental illness and present dangerousness without regard to the criminality of the person.

Respondent claims such a legislative determination of dangerousness has been found constitutional under both the due process and equal protection clauses by the United States Supreme Court in *Jones v. United States* (1983) 463 U.S. 354 [77 L.Ed.2d 694, 103 S.Ct. 3043].) The court's actual holdings do not support this conclusion.

Jones challenged (1) the constitutionality of the automatic commitment of persons found not guilty of an offense by reason of insanity, and (b) the distinctions regarding the burden of proof between persons committed after a finding of NGI and those civilly committed. The court upheld the statutory scheme on both substantive and procedural grounds. In so doing, it approved a presumption of continuing insanity which was conclusive in effect only for 50 days following a jury finding of not guilty by reason of insanity. At that time and at six-month intervals the acquittee had the same opportunity as other civilly committed persons to secure release upon proof by a preponderance of the evidence that he was either no longer mentally ill or dangerous. Consequently, in effect any presumption of insanity

was rebuttable at all hearings following the automatic 50-day commitment.

The presumption of dangerousness approved by the court in *Jones* was also a rebuttable one; it did not completely substitute the judgment of the Legislature as to dangerousness for a jury determination thereof. Unlike the statutory scheme here, the person involuntarily committed could secure his release in as little as 50 days following conviction upon his showing [FN15] he was not dangerous even if he remained mentally ill. Here, appellant is in effect conclusively presumed dangerous so long as he remains mentally ill regardless of the length of time since his criminal offense and conviction. [FN16] Clearly, *Jones* does not support the respondent's position.

> FN15 In contrast to this holding, our Supreme Court in *In re Moye, supra*, 22 Cal.3d at page 466, rejected placing the burden of proof on the insanity acquittee after the expiration of the maximum term of potential imprisonment.
>
> FN16 Our Supreme Court has expressly rejected a permanent conclusive presumption of dangerousness because, inter alia, the passage of time by itself diminishes the validity of the presumption. (*Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 177.)

(4d) We therefore hold it is unreasonable and arbitrary to exempt MDO's from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment. The commitment scheme *1441 under consideration violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Equal Protection Under California Constitution

(8) Because the statutory scheme at issue deprives persons of their liberty, i.e., freedom from involuntary confinement and treatment for mental illness, it is subject to close scrutiny under the California Constitution (art. I, § 7). (*Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 171, fn. 8; see *In re Gary W., supra*, 5 Cal.3d at p. 306.) The law can withstand constitutional attack as discriminatory among similarly situated persons only if the government can demonstrate a compelling interest which justifies the law and that the distinction drawn by the statute is necessary to further that purpose. (*Ibid.*)

We find respondent has failed to demonstrate either a compelling interest in the continued confinement of mentally ill former prisoners simply because their mental illness continues or that exclusion of a requisite finding of dangerousness is necessary to serve any legitimate government interest.

The only justification presented here for the plan is the statements of the Legislature in section 2960 that unremitted mental illness of prisoners is a danger to the public if those prisoners were mentally ill when their offense was committed and that fact was connected to the violent commission of a felony. If the mere declarations of the legislative branch were sufficient to satisfy the strict scrutiny test, no judicial review of the constitutionality of statutes would be necessary.

The legislative history of the MDO scheme does not demonstrate that persons whose mental illness once was related to felonious criminal conduct were actually found to pose a unique danger to the public so long as their mental illness remains based on any studies or hearings. The concern of the Legislature was that the determinate sentencing law which required the release of prisoners at the expiration of a fixed amount of time, combined with the revisions of the insanity law which decreased the number of mentally ill persons found not guilty by reason of insanity and subject to potential life commitment, had resulted and would continue to result in the release of persons who were mentally ill and might reoffend. [FN17]

> FN17 A statement on Sen. Bill No. 1296 to the Assembly Public Safety Committee dated August 26, 1985, opined "SB 1296 will solve the dilemma that has perplexed the Legislature since enactment of the determinate sentencing law how to control criminals who have serious mental illness without disturbing the protection of the LPS Act for civilians."

The then existing system for commitment of mentally ill parolees under the LPS Act was deemed unsatisfactory by the legislative proponents *1442 because it required proof of demonstrable present dangerousness; this proof was viewed as problematic to achieve by both courts and psychiatrists; and courts, according to the author, insisted on recent evidence to support a finding of future dangerousness and such proof was difficult to obtain in the case of inmates who lived in a highly restrictive

environment. It was viewed as necessary to fill a loophole in the determinate sentencing law which left officials helpless to avoid the release of prisoners who still pose a serious risk to society. (See Conference Completed Analysis of Sen. Bill No. 1296, prepared by the office of Sen. Floor Analysis for use by Sen. Rules Com., pp. 2 and 4.)

Nothing in the legislative history however indicates that there was any factual basis upon which the Legislature concluded that all persons whose mental illness once caused or aggravated a criminal offense were again going to reoffend unless their mental illness was in remission. [FN18] In fact, the difficulty of sustaining the proof requirement of dangerousness was the sole apparent basis for its elimination, not any perceived knowledge of its universal existence from unremitted mental illness. Consequently, the respondent has failed to demonstrate a compelling state interest in involuntarily committing and/or treating all presently unremitted mentally ill former prisoners released after July 1, 1986, whose illness was once connected to the commission of a violent felonious offense.

> FN18 At best, the bill's author and others simply cited instances where mentally ill persons were released from LPS confinement or had once been diagnosed as mentally ill and subsequently committed violent crimes. No evidence of a connection between mental illness and violent offenses was presented in any of the legislative history documents nor is there any evidence that mentally ill offenders are more likely to be recidivists than others.

Difficulty of proof of dangerousness under the LPS standard does not constitute necessity for its complete elimination; if it did, the Legislature would be free to vary the burden of proof as to various elements of criminal offenses depending on the difficulty of proof. The LPS standard of dangerousness, the highest and most narrowly drawn among California's various dangerousness criteria set forth in different involuntary commitment schemes, is not constitutionally necessary. (See *Conservatorship of Hofferber, supra*, 28 Cal.3d at pp. 171-172.) There has been no showing that the complete elimination of proof of some degree of present dangerousness is necessary to protect the public.

It must be remembered that appellant and those in this class of MDO committees are all legally sane and have been subject to punishment for their offenses for the term prescribed by the Legislature. At the end of their terms even the most dangerous offenders and most likely recidivists are subject to release so long as they are not mentally ill as defined. Unless *1443 proven to be dangerous the equal protection clause requires the mentally ill inmate must also be released from custody.

It is unnecessary to address the merits of appellant's other constitutional challenges to the MDO scheme.

The judgment is reversed. Appellant is entitled to parole on terms without reference to the requirements of section 2962 et seq.

Stone (S. J.), P. J., and Gilbert, J., concurred.

Respondent's petition for review by the Supreme Court was denied February 2, 1989. *1444

Cal.App.2.Dist.,1988.

People v. Gibson

END OF DOCUMENT

Date of Printing: JAN 12,2006

KEYCITE

People v. Gibson, 204 Cal.App.3d 1425, 252 Cal.Rptr. 56 (Cal.App. 2 Dist., Oct 06, 1988) (NO. CR. B025616)

History
Direct History

=> 1 **People v. Gibson**, 204 Cal.App.3d 1425, 252 Cal.Rptr. 56 (Cal.App. 2 Dist. Oct 06, 1988) (NO. CR. B025616), review denied (Feb 02, 1989)

Negative Citing References (U.S.A.)

Abrogated by

C 2 People v. Robinson, 63 Cal.App.4th 348, 74 Cal.Rptr.2d 52, 98 Cal. Daily Op. Serv. 2975, 98 Daily Journal D.A.R. 4009 (Cal.App. 2 Dist. Apr 20, 1998) (NO. B107563) **** **HN: 1,2,5 (Cal.Rptr.)**

Disagreed With by

H 3 People v. Superior Court (Myers), 50 Cal.App.4th 826, 58 Cal.Rptr.2d 32, 96 Cal. Daily Op. Serv. 8075, 96 Daily Journal D.A.R. 13,367 (Cal.App. 2 Dist. Nov 04, 1996) (NO. B103647), review denied (Jan 22, 1997) **** **HN: 1,2,5 (Cal.Rptr.)**

Declined to Follow by

4 People v. Superior Court (Cain), 57 Cal.Rptr.2d 296, 96 Cal. Daily Op. Serv. 7341, 96 Daily Journal D.A.R. 12,033 (Cal.App. 1 Dist. Oct 01, 1996) (NO. A074501, A074644, A075283), as modified (Oct 16, 1996) *** **HN: 2 (Cal.Rptr.)**

H 5 Griffiths v. Superior Court, 96 Cal.App.4th 757, 117 Cal.Rptr.2d 445, 02 Cal. Daily Op. Serv. 1948, 2002 Daily Journal D.A.R. 2367 (Cal.App. 2 Dist. Feb 28, 2002) (NO. B143674), review denied (Jun 12, 2002) ** **HN: 5 (Cal.Rptr.)**

Implied Overruling Recognized by

6 Garcetti v. Superior Court, 57 Cal.Rptr.2d 420, 96 Cal. Daily Op. Serv. 7588, 96 Daily Journal D.A.R. 12,442 (Cal.App. 2 Dist. Oct 10, 1996) (NO. B103020) **** **HN: 1,2,5 (Cal.Rptr.)**

Declined to Extend by

7 Hubbart v. Superior Court, 58 Cal.Rptr.2d 268, 96 Cal. Daily Op. Serv. 8264, 96 Daily Journal D.A.R. 13,729 (Cal.App. 6 Dist. Nov 14, 1996) (NO. H015007) **** **HN: 1,2,5 (Cal.Rptr.)**

8 People v. Hedge, 65 Cal.Rptr.2d 693, 97 Cal. Daily Op. Serv. 5888, 97 Daily Journal D.A.R. 9317 (Cal.App. 4 Dist. Jul 22, 1997) (NO. D026713) **** **HN: 1,2,5 (Cal.Rptr.)**

Original List Date: 7/10/2001
Last Updated: 12/21/2005
List Print Date: 01/12/2006
Claim Number: 00-TC-28
Issue: Mentally Disordered Offenders: Treatment as a Condition of Parole

Mailing Information: Draft Staff Analysis

Mailing List

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Mr. Mark Sigman
Riverside County Sheriff's Office
4095 Lemon Street
P O Box 512
Riverside, CA 92502

Tel: (951) 955-2700
Fax: (951) 955-2720

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244
Fax: (916) 368-5723

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350
Fax: (916) 727-1734

Mr. David Hinchee
Department of Corrections (B-23)
Forensic Services
P.O. Box 942883
Sacramento, CA 94283-0001

Tel: (916) 324-4771
Fax: (916) 324-6621

Office of the County Counsel
County of San Luis Obispo
County Government Center, Room 386
San Luis Obispo, CA 93408

Tel: (805) 781-5400
Fax: (805) 781-4221

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 324-4888

Mr. Michael E. Cantrall California Public Defenders Association 3273 Ramos Circle, Suite 100 Sacramento, CA 95827	Tel: Fax:	(916) 362-1686 (916) 362-5498
Ms. Terrie Tatosian Department of Mental Health (A-31) 1600 9th Street, Room 150 Sacramento, CA 95814	Tel: Fax:	(916) 654-2378 (916) 654-2440
Mr. Steve Keil California State Association of Counties 1100 K Street, Suite 101 Sacramento, CA 95814-3941	Tel: Fax:	(916) 327-7523 (916) 441-5507
Ms. Marianne O'Malley Legislative Analyst's Office (B-29) 925 L Street, Suite 1000 Sacramento, CA 95814	Tel: Fax:	(916) 319-8315 (916) 324-4281
Mr. J. Bradley Burgess Public Resource Management Group 1380 Lead Hill Boulevard, Suite #106 Roseville, CA 95661	Tel: Fax:	(916) 677-4233 (916) 677-2283
Ms. Jesse McGuinn Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: Fax:	(916) 445-8913 (916) 327-0225
Ms. Bonnie Ter Keurst County of San Bernardino Office of the Auditor/Controller-Recorder 222 West Hospitality Lane San Bernardino, CA 92415-0018	**Claimant** Tel: Fax:	 (909) 386-8850 (909) 386-8830
Ms. Ginny Brummels State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: Fax:	(916) 324-0256 (916) 323-6527
Mr. Allan Burdick MAXIMUS 4320 Auburn Blvd., Suite 2000 Sacramento, CA 95841	Tel: Fax:	(916) 485-8102 (916) 485-0111

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Tel: (213) 974-8564

Fax: (213) 617-8106

AUDITOR/CONTROLLER-RECORDER
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AUDITOR/CONTROLLER • 222 West Hospitality Lane, Fourth Floor
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San Bernardino, CA 92415-0022 • (909) 387-8306 • Fax (909) 386-8940

LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

February 2, 2006

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

As a representative for the County of San Bernardino, I have reviewed the Draft Staff Analysis for the test claim "Mentally Disordered Offenders: Treatment as a Condition of Parole (00-TC-28)" attached as Exhibit G and incorporated herein by reference. This claim was written and submitted by one of my predecessors. I readily acknowledge that Statutes 1985, Chapter 1419 (SB 1296), attached as Exhibit H and incorporated herein by reference, was not listed in the test claim heading nor included in the schedule of exhibits. It was an inadvertent error. However, I disagree with the staff conclusion that the test claim should be denied on the basis of not putting forth the original legislation. To that end, I submit the following arguments:

- It is a matter of form, not substance. Although SB 1296 was not attached, the mandated activities are clearly identified in the narrative section of the test claim. Criteria, as defined in Penal Code Section 2962 under which the State can require a Mentally Disordered Offender (MDO) be treated for a severe mental disorder, is listed on page one of the test claim. A discussion of Section 2966 which states the county's cause for mandated costs follows on pages one and two. I surmise that the oversight in attaching SB 1296 lies in the fact that section 2966 was added to the Penal Code pursuant to the Statutes of 1986, Chapter 858. Prior to that time, the substance of Section 2966 was set forth as part of Penal Code 2960, subdivision (d) under the original legislation, Statutes 1985, Chapter 1419, operative July 1, 1986. The renumbering of this code to create Section 2966 was filed with the Secretary of State September 17, 1986, two and a half months after the original legislation became operative and the original filer of this test claim may not have traced the law back to its predecessor statute. Ms. Pamela King, Deputy Public Defender, County of San Bernardino has provided additional comment in Exhibit A attached as incorporated herein by reference.

- The test claim as prepared was not intended to mislead any of the affected parties. Code of Civil Procedure §469, attached as Exhibit B and incorporated herein by reference, provides, in pertinent part: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his

- prejudice in maintaining his action or defense upon the merits...." Clearly the comments submitted by the Department of Corrections on 8-3-01, as well as the comments submitted by the Department of Finance on 8-9-01, reflect that neither state department was "misled" as to the state mandated program addressed by the test claim. It is clear from the narrative that the "technical," "clerical" exclusion of a reference to Statutes 1985, Chapter 1419, was simply a "non-material," "ministerial" exclusion that at most, warrants "modification" without amendment. No entity was misled; indeed, the test claim has no particular import to warrant pursuit of the process when it is construed consistent with the staff analysis.

- There was a breakdown in the test claim procedure. The original test claim was filed July 5, 2001. The Commission on State Mandates determined the subject test claim submittal to be complete in a letter dated July 10, 2001, attached as Exhibit I and incorporated herein by reference. California Code of Regulations, Title 2, section 1183, as it existed in 2001, attached as Exhibit C and incorporated herein by reference, states, in pertinent part:
  - (e) Content of a test claim. All test claims, or amendments thereto, shall be filed on a form provided by the commission. All test claims or amendments thereto shall contain at least the following elements and documents:
    - (1) A copy of the statute or executive order alleged to contain or impact a mandate. The specific sections of chaptered bill or executive order alleged to contain a mandate must be identified.

    * * *
  - (i) Within ten (10) days of receipt of a test claim, the commission shall notify the claimant if the test claim is complete or incomplete and send a copy of these regulations unless a correct copy has been previously provided. Test claims will be considered incomplete if any of the preceding elements or documents required in subsections (e), (f), (g), or (h) of this section are illegible or are not included. If a completed test claim is not received by the commission within thirty (30) calendar days from the date that the incomplete test claim was returned by the commission, the original test claim filing date can be disallowed, and a new test claim(s) can be accepted on the same statute or executive order alleged to contain or impact a mandate.

I would submit that based on section 1183, the test claim as submitted was incomplete. The regulations are clear on what course of action the commission is to follow upon receipt of such an incomplete test claim. The commission instead issued a letter of completeness. Moreover, not only did the commission not notice that the test claim was incomplete, neither did the state departments who responded. The commission through its negligence failed to act within the time specified by regulation to advise the county of the fact that the test claim was incomplete. The county relied upon the letter of completeness to its detriment. Under both law and equity, the commission is estopped from asserting as an affirmative defense that the test claim is incomplete and, in so doing, denying this test claim. "Acquiescence in error takes away the right of objecting to it." Civil Code section 3516.

If, however, the commission is issuing via the draft staff analysis, a notification that the test claim is incomplete, then the county has thirty days to amend its test claim to make it complete. The draft staff analysis is dated January 12, 2006. Therefore, attached as Exhibit J and incorporated herein by reference is the amended test claim filed within the thirty day period.

I would further support this argument with the events of the test claim filed for Statutes 1985, Chapter 1418. This particular legislation was identified in the draft staff analysis, page 3, as follows:

> "Major legislation affecting the mentally disordered offender program came forward in 1985. That year, the Legislature enacted Statutes 1985, Chapter 1418 (Senate Bill No. (SB) 1054) and Statutes 1985, Chapter 1419 (SB 1296), which were double-joined."

The County of Los Angeles filed a test claim with the Commission on State Mandates on November 19, 1998, to recover its costs in providing mentally disordered offender's extended commitment proceeding services. The Commission found this filing to be complete on December 3, 1998. However, in a September 6, 2000 letter, attached as Exhibit E and incorporated herein by reference, Commission's Executive Director, Paula Higashi, wrote County's claimant representative, Leonard Kaye, and indicated that "...Penal Code section 2972 (as added and amended by Statutes of 1986, Chapter 858, Statutes of 1987, Chapter 687, and Statutes of 1989, Chapter 228), which was not included in the test claim, does address the procedures for the court hearing on the petition, the rights of the offender, including the right to a trial by jury and the appointment of a public defender if indigent, and the filing of petitions for recommitment" [pages 1-2] and "...that Government Code section 17557, subdivision c, allows the claimant to amend the test claim any time prior to the Commission hearing without affecting the original filing date as long as the amendment substantially relates to the original test claim" [page 2] (Amendment to County of Los Angeles Test Claim, September 19, 2000, attached as Exhibit D and incorporated herein by reference) As a result of that notification from the Commission's Executive Director, the County of Los Angeles submitted an amended test claim. While it is clearly identified in the correspondence that Government Code allows amendment any time prior to the Commission hearing, I submit that given similar notification, the omitted legislative reference would have been a very simple fix.

Finally, I would like to address Ms. Pamela King's statement seeking to amend the test claim. Government Code 17557 subdivision (c) identified by the Commission's Executive Director in the September 6, 2000, correspondence continues to be in effect today. It has been renumbered to 17557 (e): "...The claimant may thereafter amend the test claim at any time, but before the test claim is set for a hearing, without affecting the original filing date as long as the amendment substantially relates to the original test claim." However, while that particular directive remains, several other legislative changes have brought about new test claim filing requirements. One of those requirements limits the time frame for filing on test claim legislation. This claim was originally filed in 2001. The California Code of Regulations, Title 2, section 1183.01,

subdivision (b) attached as Exhibit F and incorporated herein by reference, states, in pertinent part: "The following timelines *shall* be used by commission staff as a reference for the timely processing of test claims and adoption of a statewide cost estimate: (1) Timeline for a Test Claim (12 Months)." (Italics added) At that time, had the test claim been processed per the 12-month schedule and denied as proposed in the draft staff analysis, the County would have been afforded the opportunity to correct our omission by submitting a new test claim. Under the current government code, we do not have that option. Government Code 17551 (c) reads: "Local agency and school district 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 increased costs as a result of a statute or executive order, whichever is later." This claim has well exceeded the 12 month test claim process; the test claim is set to be heard well into the fifth year.

With that in mind, I would respectfully request that the Commission on State Mandates, upon authority as given in Government Code 17554, consider an amendment to the test claim under consideration by adding Statutes 1985, Chapter 1419.

DECLARATION of CLAIMANT:

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Bonnie Ter Keurst

Bonnie Ter Keurst
Manager, Reimbursable Projects

BT:dlp
Attachments

EXHIBITS

Exhibit A: Response by Pamela King, Deputy Public Defender, County of San Bernardino

Exhibit B: Code of Civil Procedure (§)469 Materiality of Variance; Order to amend From Deering's California Codes, Annotated; 1995 Bancroft-Whitney Law Publishers

Exhibit C: California Code of Regulations; Title 2, s1183 and s1183.01, as existed in 2001 (2 pages)

Exhibit D: Amendment to County of Los Angeles Test Claim [CSM 98-TC-09), Mentally Disordered Offenders' Extended Commitment Proceedings (22 pages)

Exhibit E: Copy of Letter dated September 6, 2000 from the Executive Director to Leonard Kaye, County of Los Angeles (2 pages)

Exhibit F: California Code of Regulations; Title 2, s1183.01 (4 pages)

Exhibit G: Draft Staff Analysis; Mentally Disordered Offenders: Treatment as a Condition of Parole (36 pages)

Exhibit H: Statutes of 1985, Chapter 1418; Statutes of 1985, Chapter 1419 (6 pages)

Exhibit I: Copy of Letter dated July 10, 2001 stating subject test claim is complete (6 pages)

Exhibit J: Test Claim, as amended (43 pages)

Exhibit A

It is accurate that the Mentally Disordered Offender [MDO] civil commitment program was enacted in 1985 pursuant to Chapters 1418 and 1419, addressing Penal Code §§2970 and 2960 respectively, *operative on July 1, 1986*. It is also accurate that the "Penal Code Section 2966" Test Claim (00-TC-28) failed to list, "Statutes of 1985, Chapter 1419" amongst the various chaptered bills (5 in number), which reflect the statutory development of the 2966/MDO commitment provisions, as we know them. The earliest chaptered bill listed in the Test Claim is, "Statutes of 1986, chapter 858 (Section 4)," which amended Sections 2960 and 2970, and added sections 2962, 2964, 2966, 2972, 2974, 2976, 2978, and 2980 to the Penal Code, *operative January 1, 1987*.

Based thereon, we hereby seek to amend the Test Claim to include reference to, "Statutes of 1985, chapter 1419." [Prior to this enactment, indeed since 1969, Penal Code 2960 existed; however, Section 2960 simply provided for 72-hour mental health treatment and evaluation of prisoners about to be paroled, as well as 14-day intensive treatment.]

The 2970, 2972 and 2972.1 Test Claim (98-TC-09) similarly did not plead, "Statutes of 1985, Chapter 1419," pertaining to Section 2960, yet Statutes of 1985, Chapter 1418, pertaining to Penal Code 2970, specifically provided:

" (j) The definitions in Section 2960 apply to this section.

(k) If there is a conflict between the provisions of this section and Section 2960, the provisions of Section 2960 shall apply."

Clearly, some of the provisions of Statutes of 1985, Chapter 1419, namely definitions and other sections that conflict with Section 2970, were part of the foundational legislation for the civil commitment program addressed in the 2970, 2972 and 2972.1 Test Claim. Notwithstanding, "Statutes of 1985, chapter 1419" was not referenced in the Test Claim and the Test Claim was not rejected based on this technical exclusion. So too, the technical exclusion of a reference to "Statutes of 1985, chapter 1419," relative to this Test Claim pertaining to MDO/2966 commitments, should not be the basis for rejecting this good faith, well founded claim for reimbursement under SB 90.

Because Penal Code §2966(b) provides in pertinent part, "A prisoner ... may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing...," San Bernardino County and San Luis Obispo County are required to adjudicate, potentially through jury trial, hundreds of cases annually for individuals committed to prison from all of the fifty-six counties in the state. Other than the location of Patton State Hospital being in San Bernardino County, and Atascadero State Hospital being in San Luis Obispo County, there is no financial justification for these particular two counties to have to bear the cost of adjudicating parolee initiated court hearings for the other fifty-four counties.

The Mentally Disordered Offenders: Treatment as a Condition of Parole (00-TC-28) Test Claim was prepared by the Auditor's Office in 2001, not by legal staff. The

failure to list the initial chaptered bill is an error of form, not substance. Had this issue been raised early in the process, it could have easily been rectified by amendment, or even a new Test Claim should amendments be discouraged. After waiting almost six years for the processing of this Test Claim, denial of the claim based on a technical omission does not seem to be in keeping with the spirit of the reimbursement program contemplated by the State Mandates Claims Fund.

DECLARATION of CLAIMANT:

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Pamela P. King

Pamela P. King
Deputy Public Defender

San Bernardino, CA

February 3, 2006

§ 469. Materiality of variance; Order to amend

No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended upon such terms as may be just.

Enacted 1872. Amended Code Amdts 1873-74 ch 383 § 58.

Amendments:

1873-74 Amendment: Prior to 1873-74 the section read: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it have actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits. When it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and thereupon the court may order the pleading to be amended, upon such terms as may be just."

1873-74 Amendment amended the section to read as at present.

Historical Derivation:

Practice Act § 579 (Stats 1851 ch 5 § 579).

Code Commissioners' Note:

The latter part of this section has been added by the commissioners. It accords with the construction placed by the courts upon the section as it originally stood. Catlin v Gunther, 10 How Pr 321; Cotheal v Talmadge, 1 ED Smith, 575; and see also Began v O'Rielly, 32 Cal 11; Plate v Vega, 31 Cal 338.

Cross References:

Immaterial variance: CCP § 470.
Variance and failure of proof: CCP § 471.
Proceedings on amendment of complaint: CCP § 471.5.
Immaterial errors, generally: CCP § 475.

Collateral References:

Witkin Procedure (3d ed) Pleading §§ 1138, 1139, 1142.
Cal Jur 3d (Rev) Family Law §§ 688, 689.
Cal Jur 3d Appellate Review § 556, Pleading §§ 224, 240, 246, 318, Restitution and Constructive Contracts § 82.
Cal Trial Handbook 3d § 20:56.
Cal Digest of Official Reports 3d Series, Pleading §§ 96 et seq.
B-W Cal Civil Practice, Procedure §§ 8:1 et seq.

Law Review Articles:

When is a variance immaterial. 20 SCLR 182.

NOTES OF DECISIONS

EXHIBIT B

History

1. Renumbering of former section 1182.2 to new section 1182.1 and renumbering of former section 1182.3 to new section 1182.2 filed 7–23–96; operative 7–23–96. Submitted to OAL for printing only (Register 96, No. 30).

§ 1182.3. Permanent Record.

(a) The commission shall keep minutes of its meetings. Minutes shall be approved by the commission and, upon approval, shall be signed by the chairperson or other person designated by the chairperson. Signed minutes shall be the original evidence of actions taken at any meeting, including the text of any resolutions adopted.

(b) Commission public meetings shall be recorded by stenographic reporter or electronic recording or both. The transcript or recordings shall be kept for the period of time required by applicable law governing the retention of records of state agency public proceedings, or until conclusion of administrative or judicial proceedings, whichever is later.

NOTE: Authority cited: Section 17527(g), Government Code. Reference: Section 17530, Government Code.

History

1. Renumbering of former section 1182.3 to new section 1182.2 and renumbering of former section 1182.4 to new section 1182.3 and amendment of NOTE filed 7–23–96; operative 7–23–96. Submitted to OAL for printing only (Register 96, No. 30).

§ 1182.4. Default Rules.

In all cases not provided for by Government Code Section 17500 et seq., the Bagley–Keene Open Meetings Act (Government Code Section 11120 et seq.) and the commission's rules and regulations, the authority shall be Robert's Rules of Order (revised), unless otherwise designated by the commission at the annual election meeting.

NOTE: Authority cited: Sections 17500 and 17527(g), Government Code. Reference: Sections 11120 et seq. and 17526, Government Code.

History

1. New section filed 11–13–98; operative 11–13–98 pursuant to Government Code section 11343.4(d) (Register 98, No. 46). For prior history, see Register 96, No. 30.

§ 1182.5. Teleconference.

The commission may hold an open or closed meeting by teleconference if it is difficult or impossible for the commission to achieve a quorum. A meeting held by teleconference shall be held subject to all of the following:

(a) A meeting held by teleconference shall comply with the Bagley–Keene Open Meetings Act.

(b) Each teleconference location shall be identified in the notice of the meeting and shall be accessible to the public.

(c) The portion of the teleconference meeting that is required to be open to the public shall be audible to the public at the location specified in the notice of the meeting.

(d) All votes taken during a teleconference meeting shall be by rollcall.

(e) The portion of the teleconferenced meeting that is closed to the public may not include the consideration of any agenda item pursuant to Section 11125.5 of the Government Code.

(f) At least one member of the commission shall be physically present at the location specified in the notice of the meeting.

NOTE: Authority cited: Section 17527(g), Government Code. Reference: Sections 11123, 17527(b) and (c), Government Code.

History

1. Repealer and new section heading, section and NOTE filed 7–23–96; operative 7–23–96. Submitted to OAL for printing only (Register 96, No. 30).

Article 3. Test Claims

§ 1183. Test Claim Filing.

(a) In order to obtain a mandate determination, a qualifying local agency or school district must file a "test claim" with the commission.

(b) Test claims prepared as a joint effort between two or more claimants may be consolidated and filed with the commission if all of the following exist in the filing: the test claimants allege state-mandated costs resulting from the same statute or executive order; the test claimants agree on all issues of the test claim; and, the claimants have designated one contact person to act as the resource for information regarding the test claim.

(c) The commission may accept more than one test claim on a statute or executive order if each claim involves different issues and/or is filed by a different type of local governmental entity as defined in Government Code sections 17518, 17519 and 17520. For purposes of this section, the four types of local governmental entities are school districts, counties, cities, and special districts.

(d) Notwithstanding Section 1181, subdivision (c), and Section 1183, subdivision (c), of these regulations, the executive director may accept more than one test claim filed by a similar type of local governmental entity, as defined in Government Code sections 17518, 17519 and 17520, alleging costs mandated by the state pursuant to Government Code section 17514 in a particular statute or executive order upon written application to the commission. All written applications shall be filed within thirty (30) days of the original test claim filing and shall include the following:

(1) The content and filing requirements of a test claim, as described in Section 1183, subdivisions (e) through (h); and

(2) A narrative detailing the reasons why the original test claim filing will not ensure a complete and fair consideration of the test claim.

Written applications will be considered incomplete if any of the preceding elements or documents are illegible or not included. Incomplete written applications shall be returned to the local agency or school district for completion. Upon receipt of a completed application, the commission shall send a copy of the written application and test claim to the original claimant. The original claimant may file comments with the commission on the written application within fifteen (15) days of service. If the executive director accepts more than one test claim under this subdivision, the executive director may consolidate part or all of the test claims pursuant to Section 1183.05 or 1183.06 of these regulations. Any party may appeal to the commission for review of the actions and decisions of the executive director under this subdivision pursuant to Section 1181 of these regulations.

(e) Content of a Test Claim. All test claims, or amendments thereto, shall be filed on a form provided by the commission. All test claims or amendments thereto shall contain at least the following elements and documents:

(1) A copy of the statute or executive order alleged to contain or impact a mandate. The specific sections of chaptered bill or executive order alleged to contain a mandate must be identified.

(2) A copy of relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate and a copy of administrative decisions and court decisions that may impact the alleged mandate. The specific chapters, articles, sections, or page numbers must be identified. Published court decisions arising from a state mandate determination by the Board of Control or the Commission on State Mandates are exempt from the requirements of this subsection.

(3) A written narrative which includes a detailed description of:

(A) What activities were required under prior law or executive order, and

(B) What new program or higher level of service is required under the statute or executive order alleged to contain or impact a mandate, and

(C) Whether there are any costs mandated by the state as defined in Government Code sections 17514 and 17556.

(4) If the narrative describing an alleged mandate involves more than discussion of statutes or regulations or legal argument and utilizes assertions or representations of fact, such assertions or representations must be supported by documentary evidence which shall be submitted with the test claim. All documentary evidence must be authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge or information or belief.

EXHIBIT C

(5) A statement that actual and/or estimated costs which result from the alleged mandate exceed two hundred dollars ($200).

(6) A test claim or amendment thereto shall be signed at the end of the document, under penalty of perjury by the claimant or its authorized representative, with the declaration that the test claim is true and complete to the best of the declarant's personal knowledge or information or belief. The date of signing, the declarant's title, address, and telephone number shall be included. If the claimant or its authorized representative can be reached via facsimile machine, that telephone number should also be included.

(f) Number of copies. The claimant shall file an original and seven (7) copies of the test claim or amendment thereto and accompanying documents with the commission.

(g) The original test claim, amendment thereto, and accompanying documents shall be unbound and single-sided.

(h) Any test claim filed with the commission must involve alleged mandated costs exceeding two hundred dollars ($200). A test claim filed with the commission, the amount of which does not exceed the minimum will be returned to the claimant with the exception of claims of a county superintendent of schools or county which may submit a combined claim if the county superintendent of schools or the county is the fiscal agent for multiple districts.

(i) Within ten (10) days of receipt of a test claim, the commission shall notify the claimant if the test claim is complete or incomplete and send a copy of these regulations unless a correct copy has previously been provided. Test claims will be considered incomplete if any of the preceeding elements or documents required in subsections (e), (f), (g), or (h) of this section are illegible or are not included. If a completed test claim is not received by the commission within thirty (30) calendar days from the date that the incomplete test claim was returned by the commission, the original test claim filing date can be disallowed, and a new test claim(s) can be accepted on the same statute or executive order alleged to contain impact a mandate.

NOTE: Authority cited: Sections 17527(g) and 17553, Government Code. Reference: Sections 17521, 17553, 17555 and 17564, Government Code.

HISTORY

1. New subsection (f) and amendment of NOTE filed 4-29-87; operative 5-29-87 (Register 87, No. 18).
2. Amendment of section and NOTE filed 7-23-96; operative 7-23-96. Submitted to OAL for printing only (Register 96, No. 30).
3. Amendment filed 9-13-99; operative 9-13-99. Submitted to OAL for printing only pursuant to Government Code section 17527 (Register 99, No. 38).

§ 1183.01. Timelines.

(a) In computing any period of time prescribed by these regulations and applicable statutes, the following rules shall apply:

(1) The day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a state holiday.

(2) Days representing extensions of time and postponements of hearings filed by the claimant and/or by stipulation of the parties, including the claimant, shall be tolled and may not be counted toward the date on which a statewide cost estimate must be adopted by the commission.

(3) Days following a test claimant's submission of incomplete information to the commission, from the date on which the commission returns the incomplete information to the claimant up to the date on which the commission receives complete information from the test claimant, shall be tolled and may not be counted toward the date on which a statewide cost estimate must be adopted by the commission.

(4) Three (3) days shall be added to any prescribed period in which a party or interested party is required or permitted to do an act after service of a document upon that party or interested party by mail. For purposes of this section, "mail" includes interdepartmental mail between state agencies. The three days added for mail service shall be tolled and may not be counted toward the date on which a statewide cost estimate must be adopted.

(b) The following timelines shall be used by commission staff as a reference for the timely processing of test claims and adoption of a statewide cost estimate:

(1) Timeline for a Test Claim (12 Months)

PARTY/ACTIVITIES	*DAY NUMBER*
CLAIMANT files test claim with the commission.	0
COMMISSION staff begins counting days on the first day after receipt.	1
COMMISSION staff reviews test claim to determine if complete	by 10
COMMISSION staff sets informal conference and hearing.	by 10
COMMISSION staff sends test claim to state agencies for review.	by 10
COMMISSION staff convenes informal conference with parties.	by 30
STATE AGENCIES file comments on test claim.	by 40
CLAIMANT submits rebuttal.	by 70
COMMISSION staff completes draft analysis of test claim and serves on parties.	by 100
PARTIES submit comments on staff's draft analysis of test claim.	by 130
COMMISSION staff completes analysis and issues Proposed Statement of Decision.	by 160
COMMISSION hears test claim and adopts Proposed Statement of Decision.	by 180
COMMISSION staff issues Statement of Decision and serves on parties.	by 190
PARAMETERS AND GUIDELINES	
CLAIMANT submits proposed Parameters and Guidelines.	by 220
STATE AGENCIES AND PARTIES may file comments.	by 235
CLAIMANT rebuts comments.	by 250
COMMISSION staff completes draft Parameters and Guidelines and serves on parties.	by 265
PARTIES submit comments on staff's draft Parameters and Guidelines.	by 275
COMMISSION staff completes Parameters and Guidelines and serves on parties.	by 279
COMMISSION conducts hearing and adopts Parameters and Guidelines	by 293
COMMISSION staff issues adopted Parameters and Guidelines.	by 303
STATEWIDE COST ESTIMATE	
COMMISSION staff develops Statewide Cost Estimate.	by 335
ALL PARTIES comment on Statewide Cost Estimate.	by 345
COMMISSION staff revises Statewide Cost Estimate.	by 350
COMMISSION conducts hearing and adopts Statewide Cost Estimate.	by 365

(c) Extensions Of Time And Postponements Of Hearings

(1) Any party or interested party may request an extension of time by filing a request with the commission before the date set for filing of responses, opposition, recommendations, rebuttals, or comments with the commission. Such request shall fully explain the reason(s) for the extension, propose a new date for filing, and be simultaneously served on all parties and interested parties to the claim pursuant to Section 1181.2 of these regulations. Within forty eight (48) hours of receipt of the request, the executive director shall make a determination and shall notify all parties and interested parties of the determination.

(A) A request filed by the claimant may be approved by the executive director for good cause.

(B) A request filed by stipulation of the parties, including the claimant, shall be approved by the executive director for good cause.

(C) A request filed by a state agency or interested party may be approved by the executive director for good cause.

(2) Any party may request the postponement of a hearing on a test claim, parameters and guidelines, or statewide cost estimate, until the next regularly scheduled hearing, or other date. Such request shall fully explain the reason(s) for the postponement, and be simultaneously served on all parties and interested parties to the claim pursuant to Section 1181.2 of these regulations. Within forty eight (48) hours of receipt of such a request, the executive director shall make a determination and shall notify all parties and interested parties of the determination.

(A) A request filed by the claimant or by stipulation of the parties, including the claimant, at least fifteen (15) days before the hearing, shall be approved by the executive director for good cause.

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

September 19, 2000

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Amendment to County of Los Angeles Test Claim [CSM 98-TC-09]
Mentally Disordered Offenders' Extended Commitment Proceedings

We submit and enclose herein an amendment to the subject test claim.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley
Auditor-Controller

JTM:JN:LK
Enclosures

Amendment
County of Los Angeles Test Claim [CSM 98-TC-09]
Mentally Disordered Offenders' Extended Commitment Proceedings

The County of Los Angeles filed a test claim on November 19, 1998 with the Commission on State Mandates to recover its costs in providing mentally disordered offenders' extended commitment proceeding services. The Commission found this filing to be complete on December 3, 1998.

On February 1, 1999, the State Department of Finance found that the test claim legislation "resulted in a reimbursable state mandate as it requires the district attorney to review cases submitted to extend mentally disordered offenders' (MDO) commitments, petition the court for the commitment, provide legal counsel to MDOs that are indigent, and provide transportation and housing during court proceedings" [letter attached].

On September 6, 2000, Commission's Executive Director, Paula Higashi, wrote County's claimant representative, Leonard Kaye, and indicated that "... Penal Code section 2972 (as added and amended by Statutes of 1986, Chapter 858, Statutes of 1987, Chapter 687, and Statutes of 1989, Chapter 228), which was not included in the test claim, does address the procedures for the court hearing on the petition, the rights of the offender, including the right to a trial by jury and the appointment of a public defender if indigent, and the filing of petitions for recommitment" [pages 1-2] and "... that Government Code section 17557, subdivision (c), allows the claimant to amend the test claim any time prior to the Commission hearing without affecting the original filing date as long as the amendment substantially relates to the original test claim" [page 2].

The County finds that Penal Code section 2972 (as added and amended by Statutes of 1986, Chapter 858, Statutes of 1987, Chapter 687, and Statutes of 1989, Chapter 228 and Statutes of 2000, Chapter 324) and Penal Code section 2972.1 (as added by Statutes of 2000, Chapter 3240), which addresses MDO procedures for the court hearing on the petition, the rights of the MDO offender, including the right to a trial by jury and the appointment of a public defender if indigent, and the filing of MDO petitions for recommitment, substantially relate to the original test claim.

Therefore, pursuant to Government Code section 17557, subdivision (c), the County's requests that its original MDO test claim filing be amended. To this end, eight sets [one set of originals and seven copies] of this supplementary test claim document, including their attachments, are herewith being submitted to the Commission as an amendment to the County's original test claim filing. In addition, copies of this amendment are being served on all State agencies and interested parties listed on this test claim's mailing list.

The County further requests that this test claim filing's caption be changed to reflect additional sections of the Penal Code as specified below.

Penal Code section 2972 (as added and amended by Statutes of 1986, Chapter 858, Statutes of 1987, Chapter 687, and Statutes of 1989, Chapter 228 and Statutes of 2000, Chapter 324[1]) elaborates on MDO procedures set forth in Penal Code section 2970, as follows:

> "2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof under this section shall be proof beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.
>
> (b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.
>
> (c) If the court or jury finds that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970. Time spent on outpatient status, except when placed in a locked facility at the direction of the outpatient supervisor, shall not count as actual custody and shall not be credited toward the person's maximum term of commitment or toward the person's term of extended commitment.
>
> (d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this

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1 Copies of Chapter 858, Statutes of 1986, Chapter 687, Statutes of 1987, Chapter 228, Statutes of 1989, and Chapter 324, Statutes of 2000, are attached.

paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date."

In addition, Penal Code section 2972.1 was added by Chapter 324, Statutes of 2000, to elaborate on MDO procedures for those persons on outpatient status under Penal Code section 2972, as follows:

"2972.1. (a) Outpatient status for persons committed pursuant to Section 2972 shall be for a period not to exceed one year. Pursuant to Section 1606, at the end of a period of outpatient status approved by the court, the court shall, after actual notice to the prosecutor, the defense attorney, the community program director or a designee, the medical director of the facility that is treating the person, and the person on outpatient status, and after a hearing in court, either discharge the person from commitment under appropriate provisions of law, order the person confined to a treatment facility, or renew its approval of outpatient status.

(b) Prior to the hearing described in subdivision (a), the community program director or a designee shall furnish a report and recommendation to the court, the prosecution, the defense attorney, the medical director of the facility that is treating the person, and the person on outpatient status. If the recommendation is that the person continue on outpatient status or be

confined to a treatment facility, the report shall also contain a statement that conforms with requirements of subdivision (c).

(c)(1) Upon receipt of a report prepared pursuant to Section 1606 that recommends confinement or continued outpatient treatment, the court shall direct prior defense counsel, or, if necessary, appoint new defense counsel, to meet and confer with the person who is on outpatient status and explain the recommendation contained therein. Following this meeting, both defense counsel and the person on outpatient status shall sign and return to the court a form which shall read as follows:

"Check One:"

"____ I do not believe that I need further treatment and I demand a jury trial to decide this question."

"___ I accept the recommendation that I continue treatment."

(2) The signed form shall be returned to the court at least 10 days prior to the hearing described in subdivision (a). If the person on outpatient status refuses or is unable to sign the form, his or her counsel shall indicate, in writing, that the form and the report prepared pursuant to Section 1606 were explained to the person and the person refused or was unable to sign the form.

(d) If the person on outpatient status either requests a jury trial or fails to waive his or her right to a jury trial, a jury trial meeting all of the requirements of Section 2972 shall be set within 60 days of the initial hearing.

(e) The trier of fact, or the court if trial is waived, shall determine whether or not the requirements of subdivisions (c) and (d) of Section 2972 have been met. The court shall then make an appropriate disposition under subdivision (a) of this section.

(f) The court shall notify the community program director or a designee, the person on outpatient status, and the medical director or person in charge of the facility providing treatment of the person whether or not the person was found suitable for release."

Thus, Penal Code section 2972 (as added and amended by Statutes of 1986, Chapter 858, Statutes of 1987, Chapter 687, Statutes of 1989, Chapter 228 and Statutes of 2000, Chapter 324) and Penal Code section 2972.1 (as added by Statutes of 2000, Chapter 324), which address MDO procedures for the court hearing on the petition, the rights of the MDO offender, including the right to a trial by jury and the appointment of a public defender if indigent, and

the filing of MDQ petitions for recommitment, substantially relate to the original test claim; and, therefore should be incorporated and amended into the original test filing as requested herein.

EXHIBIT D-5

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

Amendment to County of Los Angeles Test Claim [CSM 98-TC-09]
Mentally Disordered Offenders' Extended Commitment Proceedings

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I, Leonard Kaye, SB90 Coordinator, in and for the County of Los Angeles, am responsible for filing test claims and supplemental amendments thereto, reviews of State agency comments, Commission staff analyses, and for proposing parameters and guidelines (Ps&Gs) and amendments thereto, and for filing incorrect reduction claims, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the attached test claim amendment,

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the attached test claim amendment, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> "'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

9/19/2000, Los Angeles, CA — Leonard Kaye

Date and Place — Signature

EXHIBIT D-6

of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when it continues the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the parolee represents a substantial danger of physical harm to others.

SEC. 3. Section 2970 of the Penal Code is amended to read:

2970. Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections, shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison or in a state mental hospital, the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written

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evaluation shall be accompanied by supporting affidavits.

The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others.

SEC. 4. Section 2972 of the Penal Code is amended to read:

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable.

The standard of proof under this section shall be proof beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(c) If the court or jury finds that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970.

(d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be

that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date.

SEC. 5. Section 2980 of the Penal Code is amended to read:

2980. This article applies to persons who committed their crimes on and after January 1, 1986.

SEC. 6. It is not the intent of the Legislature to directly or indirectly imply by this act that courts may not use the standard of evidence accepted by the court in People v. Beard, 173, Cal. App. 3d 1113, in cases arising under Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

SEC. 7. (a) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall submit a report to the Legislature on or before September 30, 1990, on the following:

(1) A description of the disposition of cases of patients released from treatment under the mentally disordered offender program following the invalidation of that program by the Court of Appeal in People v. Gibson (204 Cal. App. 3d 1425), including discussion regarding any subsequent acts recorded by the Department of Justice, the State Department of Mental Health, and the Department of Corrections, to the extent resources are available.

(2) A description of the criteria used to select which prisoners are personally evaluated for possible treatment under the mentally disordered offender program, and the criteria used to determine which of those prisoners are to be treated under the program.

(b) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall submit an annual report to the Legislature on the status of the

mentally disordered offender program on or before December 31, 1991, and on or before December 31 each year thereafter through 1996, which shall include all of the following:

(1) The following information on persons committed to the mentally disordered offender program on or after July 1, 1989, who have exhausted their rights under Section 2966 of the Penal Code.

(A) The duration of treatment for those patients selected for the mentally disordered program, including both inpatient and outpatient treatment.

(B) The number of mentally disordered offender patients returned to custody or to a hospital due to the commission of a new crime, to the extent this information is available from the Department of Justice, or due to parole revocation.

(C) The number of parole revocations of persons who have been treated previously under the mentally disordered offender program and the reasons for the revocations.

(D) The number of parole revocations for all parolees whose parole was revoked based upon psychiatric reasons pursuant to Section 2646 of Title 15 of the California Code of Regulations.

(E) Information regarding recidivism rates for criminal conduct by persons previously treated under the mentally disordered offender program to the extent this information is available from the Department of Justice.

(F) Any other information that would be useful to the Legislature in evaluating the performance of the mentally disordered offender program.

(2) A summary description of the number and disposition of cases of all prisoners who are personally clinically evaluated on and after July 1, 1989, by the Department of Corrections and the State Department of Mental Health for possible treatment under the mentally disordered offender program, including disposition of any hearing or court proceedings. The report also shall contain a brief explanation, as the departments deem appropriate, to explain the data.

(c) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall provide a preliminary report to the Legislature on or before December 31, 1990, describing the report protocol they intend to use for the report required under subdivision (b) and any problems which they anticipate.

(d) The reports required under this section shall be submitted to the Assembly Committee on Public Safety and to the Senate Judiciary Committee.

(e) Notwithstanding any other provision of law, the Department of Justice, the Department of Corrections, the State Department of Mental Health, and the Board of Prison Terms shall make available any information required for purposes of this section. Any confidential information obtained pursuant to this subdivision may be used for purposes of preparing the reports required by this

section, but the information shall not be used in any way that discloses confidential information, nor shall that confidential information be used for any other purpose.

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The Court of Appeal in People v. Gibson (204 Cal. App. 3d 1425) declared part of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code in violation of the equal protection clause of the United States Constitution because it does not require proof the person represents a substantial danger of physical harm to others by reason of his or her severe mental disorder. In order to keep the mentally disordered offender program in effect for those persons who committed their crimes on or after January 1, 1986, it is necessary that this act take effect immediately.

CHAPTER 229

An act to amend Sections 5651, 5661, and 5681 of the Business and Professions Code, relating to landscape architecture, and making an appropriation therefor.

[Approved by Governor July 27, 1999. Filed with Secretary of State July 28, 1999.]

The people of the State of California do enact as follows:

SECTION 1. Section 5651 of the Business and Professions Code is amended to read:

5651. (a) The board shall by means of examination, ascertain the professional qualifications of all applicants for licenses to practice landscape architecture in this state and shall issue a license to every person whom it finds to be qualified on payment of the initial license fee prescribed by this chapter.

(b) The examination shall consist of a written examination. The written examination may be waived by the board if the applicant (1) is licensed in a state and demonstrates to the board that he or she has passed the Uniform National Examination for Landscape Architects or is certified by the Council of Landscape Architects Registration Boards and has submitted proof of job experience equivalent to that which is required of California candidates and (2) has taken a written examination equivalent in scope and subject matter to the written examination last given in California as determined by the board, and has achieved a score on the out-of-state examination at least equal to the score required to pass the California written examination. The written examination shall include testing of the applicants knowledge of California plants and environmental conditions,

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CA LEGIS 324 (2000)
2000 Cal. Legis. Serv. Ch. 324 (A.B. 1881) (WEST)

CALIFORNIA 2000 LEGISLATIVE SERVICE
2000 Portion of 1999-2000 Regular Session

Additions are indicated by <<+ Text +>>; deletions by <<- * * * ->>. Changes in tables are made but not highlighted.

CHAPTER 324
A.B. No. 1881
CRIMINAL PROCEDURE--OUTPATIENT CONFINEMENT--MENTALLY DISORDERED OFFENDERS

Ch. 324

AN ACT to amend Sections 1600.5, 1607, and 2972 of, and to add Section 2972.1 to, the Penal Code, relating to mentally disordered offenders.

[Filed with Secretary of State September 7, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1881, Gallegos. Mentally disordered offenders.

(1) Existing law authorizes the placement on outpatient status of persons convicted of a crime and committed to a state hospital or other treatment facility under specified provisions of law. Time spent on outpatient status pursuant to these provisions is not counted as actual custody and is not credited toward the person's maximum term of imprisonment.

(2) Existing law also requires the community program director of the treatment facility where a person is committed for treatment, to submit to the medical director of a state hospital and to the court, when appropriate, the opinion of the outpatient supervisor that a committed person has regained competence as specified.

This bill would include persons committed to a treatment facility as a mentally disordered prisoner as specified in the above 2 provisions.

(3) Existing law authorizes as a condition of parole, the treatment of a prisoner who has a severe mental disorder, as defined, that is not in remission, as defined, or cannot be kept in remission without treatment. Treatment includes inpatient and outpatient status.

This bill would provide that outpatient status be for a period not to exceed one year and would establish a procedure, after notice and a hearing, to either discharge the person, order the person confined to a treatment facility, or continue the person on

EXHIBIT D-12

outpatient status. The community program director or designee would be required to furnish a report and recommendation to the court and the parties. Upon receipt by the court of a related specified report that recommends confinement or continued outpatient treatment, the court shall direct that person's prior defense counsel to meet and confer with that person to explain the recommendation contained therein. The bill would also direct the court to appoint new counsel for this purpose, if necessary. The bill would provide that after this meeting, both defense counsel and the person on outpatient status shall sign a specified form concerning the person's decision whether to challenge the recommendation and proceed to a jury trial, which shall be returned to the court at least 10 days prior to the described hearing. The bill would also provide for the person's counsel to sign the form on his or her behalf if he or she refuses or is unable to do so, as specified. The bill would require that a jury trial be set for hearing within 60 days of the initial hearing if the person either requests a jury trial or fails to waive his or her right to a jury trial. This bill would also provide that its provisions not be construed to extend the maximum period of parole of a mentally disordered offender. By expanding the grounds for release from commitment to a treatment facility, this bill would increase the duties of local officials and would impose a state-mandated local program.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

EXHIBIT D-13

Ch. 324, s 1
SECTION 1. Section 1600.5 of the Penal Code is amended to read:

<< CA PENAL s 1600.5 >>

1600.5. For a person committed as a mentally disordered sex offender under former Section 6316 or 6316.2 of the Welfare and Institutions Code, or committed pursuant to Section 1026 or 1026.5<<+, or committed pursuant to Section 2972+>>, who is placed on outpatient status under the provisions of this title, time spent on outpatient status, except when placed in a locked facility at the direction of the outpatient supervisor, shall not count as actual custody and shall not be credited toward the person's maximum term of commitment or toward the person's term of extended commitment. Nothing in this section shall be construed to extend the maximum period of parole of a mentally disordered offender.
Ch. 324, s 2
SEC. 2. Section 1607 of the Penal Code is amended to read:

<< CA PENAL s 1607 >>

1607. If the outpatient supervisor is of the opinion that the person has regained competence to stand trial, or is no longer insane, is no longer a mentally disordered offender, or is no longer a mentally disordered sex offender, the community program director shall submit <<-* * *->> <<+his or her+>> opinion to the medical director of the state hospital, where appropriate, and to the court which shall calendar the case for further proceedings under the provisions of Section 1372, <<-* * *->> 1026.2<<+, or 2972+>> of this code or Section 6325 of the Welfare and Institutions Code.
Ch. 324, s 3
SEC. 3. Section 2972 of the Penal Code is amended to read:

<< CA PENAL s 2972 >>

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable.
The standard of proof under this section shall be proof beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.
(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

Ch. 324, s 1

SECTION 1. Section 1600.5 of the Penal Code is amended to read:

<< CA PENAL s 1600.5 >>

1600.5. For a person committed as a mentally disordered sex offender under former Section 6316 or 6316.2 of the Welfare and Institutions Code, or committed pursuant to Section 1026 or 1026.5<<+, or committed pursuant to Section 2972+>>, who is placed on outpatient status under the provisions of this title, time spent on outpatient status, except when placed in a locked facility at the direction of the outpatient supervisor, shall not count as actual custody and shall not be credited toward the person's maximum term of commitment or toward the person's term of extended commitment. Nothing in this section shall be construed to extend the maximum period of parole of a mentally disordered offender.

Ch. 324, s 2

SEC. 2. Section 1607 of the Penal Code is amended to read:

<< CA PENAL s 1607 >>

1607. If the outpatient supervisor is of the opinion that the person has regained competence to stand trial, or is no longer insane, is no longer a mentally disordered offender, or is no longer a mentally disordered sex offender, the community program director shall submit <<-* * *->> <<+his or her+>> opinion to the medical director of the state hospital, where appropriate, and to the court which shall calendar the case for further proceedings under the provisions of Section 1372, <<-* * *->> 1026.2<<+, or 2972+>> of this code or Section 6325 of the Welfare and Institutions Code.

Ch. 324, s 3

SEC. 3. Section 2972 of the Penal Code is amended to read:

<< CA PENAL s 2972 >>

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable.

The standard of proof under this section shall be proof beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

EXHIBIT D-15

<< CA PENAL s 2972.1 >>

2972.1. (a) Outpatient status for persons committed pursuant to Section 2972 shall be for a period not to exceed one year.
Pursuant to Section 1606, at the end of a period of outpatient status approved by the court, the court shall, after actual notice to the prosecutor, the defense attorney, the community program director or a designee, the medical director of the facility that is treating the person, and the person on outpatient status, and after a hearing in court, either discharge the person from commitment under appropriate provisions of law, order the person confined to a treatment facility, or renew its approval of outpatient status.

(b) Prior to the hearing described in subdivision (a), the community program director or a designee shall furnish a report and recommendation to the court, the prosecution, the defense attorney, the medical director of the facility that is treating the person, and the person on outpatient status. If the recommendation is that the person continue on outpatient status or be confined to a treatment facility, the report shall also contain a statement that conforms with requirements of subdivision (c).

(c)(1) Upon receipt of a report prepared pursuant to Section 1606 that recommends confinement or continued outpatient treatment, the court shall direct prior defense counsel, or, if necessary, appoint new defense counsel, to meet and confer with the person who is on outpatient status and explain the recommendation contained therein. Following this meeting, both defense counsel and the person on outpatient status shall sign and return to the court a form which shall read as follows:

"Check One:

"____ I do not believe that I need further treatment and I demand a jury trial to decide this question.

"___ I accept the recommendation that I continue treatment."

(2) The signed form shall be returned to the court at least 10 days prior to the hearing described in subdivision (a). If the person on outpatient status refuses or is unable to sign the form, his or her counsel shall indicate, in writing, that the form and the report prepared pursuant to Section 1606 were explained to the person and the person refused or was unable to sign the form.

(d) If the person on outpatient status either requests a jury trial or fails to waive his or her right to a jury trial, a jury trial meeting all of the requirements of Section 2972 shall be set within 60 days of the initial hearing.

(e) The trier of fact, or the court if trial is waived, shall determine whether or not the requirements of subdivisions (c) and (d) of Section 2972 have been met. The court shall then make an appropriate disposition under subdivision (a) of this section.

(f) The court shall notify the community program director or a designee, the person on outpatient status, and the medical director or person in charge of the facility providing treatment of the person whether or not the person was found suitable for release.

Ch. 324, s 5

SEC. 5. Nothing in this act shall be construed to extend the maximum period of parole of a mentally disordered offender.

Ch. 324, s 6

EXHIBIT D-16

Complainant

<<<+(3) The advisory shall be available in multiple languages.+>>>

(b) Every person who files a civil claim against a peace officer or a lien against his or her property, knowing the claim or lien to be false and with the intent to harass or dissuade the officer from carrying out his or her official duties, is guilty of a misdemeanor. This section applies only to claims pertaining to actions that arise in the course and scope of the peace officer's duties.

Ch. 289, s 2

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

CA LEGIS 289 (2000)

END OF DOCUMENT

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Lorraine E. Hadden states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 19th day of September, 2000, I served the attached:

Documents: County of Los Angeles test claim amendment, *including a 1 page letter dated 9/19/00, a 5 page narrative, a 1 page declaration of Leonard Kaye, and a 29 page attachment, all pursuant to the test claim on "Mentally Disordered Offenders' Extended Commitment Proceedings"*, CSM-98-TC-09, now pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

[ ] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of September, 2000, at Los Angeles, California.

Lorraine E. Hadden

EXHIBIT D-18

Commission on State Mandates

List Date: 11/24/1998 Mailing Information

Mailing List

Claim Number 98-TC-09 **Claimant** County of Los Angeles

Subject Penal Code Section 2970
Chap. 1418/85,858/86,657/88,658/88,228/89,435/91

Issue Mentally Disordered Offenders' Extended Commitment Proceedings

Mr. Michael E. Cantrall, Executive Director
California Public Defenders Association

3273 Ramos Circle, Suite 100
Sacramento CA 95827

Tel: (916) 421-8299
FAX: (916) 362-5498

Ms. Annette Chinn,
Cost Recovery Systems

1750 Creekside Oaks Drive, Suite 290
Sacramento CA 95833-3640

Tel: (916) 939-7901
FAX: (916) 939-7801

Ms. Marcia C. Faulkner, Manager, Reimbursable Projects
County of San Bernadino
Office of the Auditor/Controller
222 W. Hospitality Lane, 4th Floor
San Bernardino CA 92415-0018

Tel: (909) 386-8850
FAX: (909) 386-8830

Mr. Dean Getz, Director
Vavrinek Trine Day & Co., LLP

12150 Tributary Point Drive, Suite 150
Gold River CA 95670

Tel: (916) 944-7394
FAX: (916) 944-8657

Mr. Michael P. Judge,
California Public Defenders Association

210 West Temple Street - 19th Floor
Los Angeles CA 90012

Tel: (213) 974-2801
FAX: (213) 625-5031

EXHIBIT D-19

Claim Number 98-TC-09 Claimant County of Los Angeles

Penal Code Section 2970

Subject Chap. 1418/85,858/86,657/88,658/88,228/89,435/91

Issue Mentally Disordered Offenders' Extended Commitment Proceedings

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300 Tel: (916) 323-3562
Sacramento, California 95814 Fax: (916) 445-0278

Mr. James Lombard (A-15), Principal Analyst
Department of Finance

915 L Street *Tel:* (916) 445-8913
Sacramento CA 95814 *FAX:* (916) 327-0225

Mr. Rick Mandella, Executive Office (E-18)
Board of Prison Terms

428 J Street 6th Floor *Tel:* (916) 445-4072
Sacramento CA 95814 *FAX:* (916) 445-5242

Ms. Laurie McVay,
SMG-MAXIMUS

4320 Auburn Blvd. Suite 2000 *Tel:* (916) 485-8102
Sacramento CA 95841 *FAX:* (916) 485-0111

Mr. Andy Nichols,
Vavrinek Trine Day & Co., LLP

12150 Tributary Point Drive, Suite 150 *Tel:* (916) 351-1050
Gold River CA 95670 *FAX:* (916) 351-1020

Ms. Linda Powell (A-31), Deputy Director
Dept. of Mental Health

1600 9th Street Room 250 *Tel:* (916) 654-2378
Sacramento CA 95814 *FAX:* (916) 654-2440

Claim Number 98-TC-0[illegible] **Claimant** County of Los [illegible]geles

Subject Penal Code Section 2970
Chap. 1418/85,858/86,657/88,658/88,228/89,435/91

Issue Mentally Disordered Offenders' Extended Commitment Proceedings

Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518 P.O. Box 942850 *Tel:* (916) 323-5849
Sacramento CA 95814 *FAX:* (916) 324-7223

Mr. Paige Vorhies (B-8), Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500 *Tel:* (916) 445-8756
Sacramento CA 95816 *FAX:* (916) 323-4807

3

September 6, 2000

Mr. Leonard Kaye
County of Los Angeles
Auditor-Controller's Office
500 West Temple Street, Room 603
Los Angeles, CA 90012

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

RE: ***Mentally Disordered Offenders' Extended Commitment Proceedings***
CSM 98-TC-09
Penal Code Section 2970
Added and Amended by Statutes of 1985, Chapter 1418; Statutes of 1986, Chapter 858; Statutes of 1988, Chapters 657 and 658; Statutes of 1989, Chapter 228; Statutes of 1991, Chapter 435.
County of Los Angeles, Claimant

Dear Mr. Kaye:

Commission staff has started to analyze the above test claim, which alleges that Penal Code section 2970 constitutes a reimbursable state mandated program. Penal Code section 2970 provides that the district attorney may file a petition with the superior court for the continued involuntary treatment of mentally disordered offenders for one year. That section states in relevant part the following:

> "The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others."

In its test claim, the claimant requests reimbursement for activities performed by the district attorney, indigent defense counsel, sheriff's department, witnesses, investigators, and support staff regarding the hearing on the petition. Staff notes that most of these activities are *not* addressed in Penal Code section 2970.

However, Penal Code section 2972 (as added and amended by Statutes of 1986, Chapter 858, Statutes of 1987, Chapter 687, and Statutes of 1989, Chapter 228), which was not included in the

test claim, does address the procedures for the court hearing on the petition, the rights of the offender, including the right to a trial by jury and the appointment of a public defender if indigent, and the filing of petitions for recommitment.

Please be advised that Government Code section 17557, subdivision (c), allows the claimant to amend the test claim any time prior to the Commission hearing without affecting the original filing date as long as the amendment substantially relates to the original test claim.

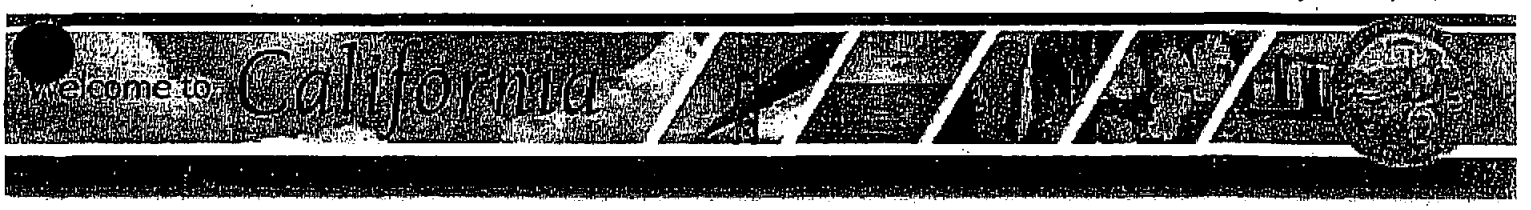
This test claim is scheduled to be heard at the Commission's November 30/December 1, 2000 hearing. The draft staff analysis will be released on or about October 5, 2000.

Please contact Camille Shelton, Staff Counsel, with questions regarding the above.

Sincerely,

Paula Higashi
Executive Director

EXHIBIT E-1



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4. Expand "Chapter 2.5 Commission on State Mandates" by clicking on the grey plus sign.

See below for a screenshot of the correct location.

- ⊞ TITLE 1. General Provisions
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  - ⊞ Division 1. Administrative Personnel
  - ⊟ Division 2. Financial Operations
    - ⊞ Chapter 1. State Board of Control
    - ⊞ Chapter 2. State Controller
    - ⊟ Chapter 2.5. Commission on State Mandates
      - ⊞ Article 1. General
      - ⊞ Article 2. Commission Meetings
      - ⊞ Article 3. Test Claims
      - ⊞ Article 4. Mandates Recognized by the Legislature
      - ⊞ Article 4.5. State Mandates Apportionment System
      - ⊞ Article 5. Incorrect Reduction Claims
      - ⊞ Article 6. Review of Office of State Controller's Claiming Instructions
      - ⊞ Article 6.5. Applications for a Finding of Significant Financial Distress
      - ⊞ Article 7. Hearings and Decisions
      - ⊞ Article 8. Rulemaking and Informational Hearings
      - ⊞ Article 8.5. Forms
      - ⊞ Article 9. Conflict of Interest Code

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2 CA ADC § 1183.01

2 CCR s. 1183.01

Cal. Admin. Code tit. 2, s 1183.01

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 2. ADMINISTRATION
DIVISION 2. FINANCIAL OPERATIONS
CHAPTER 2.5. COMMISSION ON STATE MANDATES
ARTICLE 3. TEST CLAIMS
This database is current through 01/13/2006 Register 2006, No. 2.

s 1183.01. Timelines.

(a) In computing any period of time prescribed by these regulations and applicable statutes, the following rules shall apply:

(1) The day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or state holiday.

(2) Days representing extensions of time and postponements of hearings granted to the parties shall be tolled and may not be counted toward the date on which a statewide cost estimate must be adopted by the commission.

(3) Days following a test claimant's submission of incomplete information to the commission, from the date on which commission staff returns the incomplete information to the claimant up to the date on which the commission receives complete information from the test claimant, shall be tolled and may not be counted toward the date on which a statewide cost estimate must be adopted by the commission.

(4) If a party or interested party to a test claim notifies commission staff that a reasonable reimbursement methodology may be developed for inclusion in pending parameters and guidelines, the days following the date of the notification up to the date on which a reasonable reimbursement methodology is developed, shall be tolled and may not be counted toward the date on which a statewide cost estimate must be adopted by the commission. The days tolled shall not exceed sixty (60) days from the date of the notification.

(5) Three (3) days shall be added to any prescribed period in which a party or interested party is required or permitted to do an act after service of a document upon that party or interested party by mail. For purposes of this Section, "mail" includes interdepartmental mail between state agencies. The three (3) days added for mail service shall be tolled and may not be counted toward the date on which a statewide cost estimate must be adopted.

(6) Solely for the purpose of determining when a statewide cost estimate shall be adopted, test claims that are amended, severed, or consolidated shall be deemed received on the effective date of the last amendment, severance, or consolidation, unless otherwise stipulated by the parties and approved by the executive director.

(7) Days between the effective date of the parameters and guidelines and the date the initial reimbursement claims are due to the Office of the State Controller shall be tolled and may not be counted toward the date on which a statewide cost estimate must be adopted by the commission.

(b) The following timelines shall be used by commission staff as a reference for the timely processing of test claims and adoption of a statewide cost estimate:

(1) Timeline for a Test Claim (12 Months)

PARTY/ACTIVITIES	DAY NUMBER

CLAIMANT files test claim with the commission.	0
COMMISSION staff begins counting days on the [illegible]t day after receipt.	1
COMMISSION staff reviews test claim to determine if complete	by 10
COMMISSION staff sends test claim to state agencies for review.	by 10
COMMISSION staff convenes informal conference with parties, if necessary.	by 30
STATE AGENCIES file comments on test claim.	by 40
CLAIMANT submits rebuttal.	by 70
COMMISSION staff completes draft analysis of test claim and serves on parties.	by 100
PARTIES submit comments on staff's draft analysis of test claim.	by 130
COMMISSION staff completes analysis and issues Proposed Statement of Decision.	by 160
COMMISSION hears test claim and adopts Proposed Statement of Decision.	by 180
COMMISSION staff issues Statement of Decision and serves on parties.	by 190
PARAMETERS AND GUIDELINES	
CLAIMANT submits proposed Parameters and Guidelines.	by 220
STATE AGENCIES AND PARTIES may file comments.	by 235
CLAIMANT rebuts comments.	by 250
COMMISSION staff completes draft Parameters and Guidelines and serves on parties.	by 265
PARTIES submit comments on staff's draft Parameters and Guidelines.	by 275
COMMISSION staff completes Parameters and Guidelines a[illegible]serves on parties.	by 279
CO[illegible]SSION conducts hearing and adopts Parameters and Guidelines	by 293
COMMISSION staff issues adopted Parameters and Guidelines.	by 303
STATEWIDE COST ESTIMATE	
COMMISSION staff develops Statewide Cost Estimate.	by 335
ALL PARTIES comment on Statewide Cost Estimate.	by 345
COMMISSION staff revises Statewide Cost Estimate.	by 350
COMMISSION conducts hearing and adopts Statewide Cost Estimate.	by 365

(c) Extensions of Time and Postponements of Hearings

(1) Any party or interested party may request an extension of time by filing a request with the executive director before the date set for filing of responses, opposition, recommendations, rebuttals, or comments with commission staff. Such request shall fully explain the reason(s) for the extension, propose a new date for filing, and be simultaneously served on all parties and interested parties who are on the mailing list pursuant to Section 1181.2 of these regulations. Any request for extension of time to file comments that would necessitate rescheduling a hearing shall also include a request for postponement of the hearing, pursuant to Section 1183.01(c)(2). Within forty-eight (48) hours of receipt of the request, the executive director shall make a determination and shall notify all parties and interested parties who are on the mailing list of the determination.

(A) A request filed by stipulation of the parties, including the claimant, shall be approved by the executive director for good cause.

(B) [illegible]request filed by the claimant, a state agency or interested party may be approved by the executive director fo[illegible]od cause.

(2) Any party may request the postponement of a hearing on a test claim, parameters and guidelines, or statewide

cost estimate, until the next regularly scheduled hearing, or other date if specified. Such request shall fully explain the reason(s) for the postponement, and be simultaneously served on all parties and interested parties who are on the mailing list pursuant to Section 1181.2 of these regulations. Within forty-eight (48) hours of receipt of such a request, the executive director shall make a determination and shall notify all parties and interested parties who are on the mailing list of the determination.

(A) A request filed by the claimant at least fifteen (15) days before the hearing shall be approved by the executive director for good cause.

(B) A request filed by stipulation of the parties, including the claimant, shall be approved by the executive director for good cause.

(C) A request filed by the claimant less than fifteen (15) days before the hearing may be approved by the executive director for good cause.

(D) A request filed by a state agency may be approved by the executive director for good cause. If a state agency makes such a request before filing a response, opposition, or recommendation on the test claim, such request shall be accompanied by a notice of intent to oppose the test claim in whole or in part.

(3) The executive director may postpone a hearing on a test claim, parameters and guidelines, and a statewide cost estimate for good cause and shall notify all parties and interested parties who are on the mailing list.

<General Materials (GM) - References, Annotations, or Tables>

Note: Authority cited: Sections 17527(g) and 17553, Government Code. Reference: Sections 17530, 17553 and 17557, Government Code.

HISTORY

1. New section filed 7-23-96; operative 7-23-96. Submitted to OAL for printing only (Register 96, No. 30).

2. Amendment filed 9-13-99; operative 9-13-99. Submitted to OAL for printing only pursuant to Government Code section 17527 (Register 99, No. 38).

3. Amendment of section andNotefiled 4-21-2003; operative 4-21-2003. Submitted to OAL for printing only pursuant to Government Code section17527(g) (Register 2003, No. 17).

4. Amendment of subsection (a)(2) and new subsections (a)(6)-(7) filed 2-23-2004; operative 2-23-2004. Submitted to OAL for printing only (Register 2004, No. 9).

5. Amendment of subsections (a)(1), (a)(4)-(7), (c)(1), (c)(2), (c)(2)(A) and (c)(2)(C) and amendment ofNote filed 9-6-2005; operative 9-6-2005. Exempt from OAL review and submitted to OAL for printing only pursuant to GovernmentCode section 17527(g) (Register 2005, No. 36).

2 CA ADC s 1183.01

END OF DOCUMENT

Docs In Sequence Table of Contents

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

January 12, 2006

Mr. John Logger
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 W. Hospitality Lane
San Bernardino, CA 92415-0018

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis and Hearing Date
Mentally Disordered Offenders: Treatment as a Condition of Parole (00-TC-28)
County of San Bernardino, Claimant
Statutes 1986, chapter 858, Statutes 1987, chapter 687; Statutes 1988, chapter 658; Statutes 1989, chapter 228; Statutes 1994, chapter 706
Penal Code section 2966

Dear Mr. Logger:

The draft staff analysis of this test claim is enclosed for your review and comment.

Written Comments
Any party or interested person may file written comments on the draft staff analysis by Friday, **February 3, 2006**. You are advised that comments filed with the 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. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing
This test claim is set for hearing on **Thursday, March 30, 2006** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about March 16, 2006. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Deborah Borzelleri at (916) 322-2430 with any questions regarding the above.

Sincerely,

PAULA HIGASHI
Executive Director

Enc. Draft Staff Analysis

EXHIBIT G

EXHIBIT G-1

ITEM ____

TEST CLAIM
DRAFT STAFF ANALYSIS

Penal Code Section 2966
Statutes 1986, Chapter 858
Statutes 1987, Chapter 687
Statutes 1988, Chapter 658
Statutes 1989, Chapter 228
Statutes 1994, Chapter 706

Mentally Disordered Offenders:

Treatment as a Condition of Parole (00-TC-28)

County of San Bernardino, Claimant

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS.

EXHIBIT G-2

STAFF ANALYSIS

Claimant

County of San Bernardino

Chronology

07/05/01	County of San Bernardino filed test claim with Commission (00-TC-28)
08/03/01	The Department of Corrections submitted comments
08/09/01	The Department of Finance submitted comments
09/05/01	County of San Bernardino requested an extension of time through October 25, 2001 to respond to comments
09/07/01	Request for extension to respond to comments on or before October 25, 2001 was granted
11/08/01	County of San Bernardino requested an extension of time until December 3, 2001 to respond to comments
11/09/01	Request for extension to respond to comments on or before December 3, 2001 was granted
02/05/02	County of San Bernardino requested an extension of time until February 22, 2002 to respond to comments
02/06/02	Request for extension to respond to comments is granted; comments are due on or before March 8, 2002
02/27/02	County of San Bernardino files reply to Department of Finance comments
01/19/06	Commission staff issues draft staff analysis

Background

This test claim addresses amendments to Mentally Disordered Offender legislation, codified in Penal Code sections 2960 et seq., which establishes continued mental health treatment and civil commitment procedures for persons with severe mental disorders, following termination of their sentence or parole.

Overview of Mentally Disordered Offender Program

Since 1969, the Mentally Disordered Offender legislation has required certain offenders who have been convicted of specified violent crimes to receive treatment by the Department of Mental Health as a condition of parole.[1] Penal Code section 2960 establishes the Legislature's intent to protect the public by requiring those prisoners who received a determinate sentence and who have a treatable, severe mental disorder at the time of their parole, or upon termination of parole, to receive mental health treatment until the disorder is in remission and can be kept in remission. Section 2960 further states that "the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely

[1] Penal Code section 2962, subdivisions (a) through (f).

EXHIBIT G-3

mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community."

To impose mental health treatment as a condition of parole, the prospective parolee must have: 1) a severe mental disorder that is not in remission or cannot be kept in remission without treatment, and the disorder was one of the causes of or was an aggravating factor in the commission of the crime for which the prisoner was sentenced to prison; 2) been in treatment for 90 days or more within the year prior to his or her parole or release; and 3) been certified by designated mental health professionals as meeting conditions 1 and 2 above, in addition to representing a substantial danger of physical harm to others by reason of the severe mental disorder.[2]

Procedurally, prior to release on parole or prior to termination of parole, such a prisoner must be evaluated and certified by mental health professionals as to whether he or she meets the conditions set forth in Penal Code section 2962.[3] A prisoner has the right to a hearing before the Board of Prison Terms to contest such a finding that he or she has a severe mental disorder.[4] If the prisoner is dissatisfied with the results of the Board of Prison Terms hearing, he or she may petition the superior court for a civil hearing to determine if he or she meets the criteria of a mentally disordered offender.[5]

The evaluation must also be submitted to the district attorney of the county in which the person is being treated, incarcerated or committed not later than 180 days prior to termination of parole or release from parole.[6] The district attorney may then file a petition in superior court for continued involuntary treatment for one year and the court shall conduct a civil hearing on the matter[7]

If the prisoner's severe mental disorder is put into remission during the parole period, and can be kept in remission during the parole period, the Department of Mental Health must discontinue treatment.[8]

Major legislation affecting the mentally disordered offender program came forward in 1985. That year, the Legislature enacted Statutes 1985, chapter 1418 (Senate Bill No. (SB) 1054) and Statutes 1985, chapter 1419 (SB 1296), which were double-joined. Chapter 1418 added Penal Code section 2970, to set forth procedures for the *local district attorney* to petition the court for a hearing when a mentally disordered offender is scheduled to be released from prison or parole. Penal Code section 2970 hearings were addressed in a prior test claim (98-TC-09).

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[2] Penal Code section 2962, subdivisions (a) through (d).

[3] Penal Code section 2962, subdivision (d).

[4] Penal Code section 2966, subdivision (a).

[5] Penal Code section 2966, subdivision (b).

[6] Penal Code section 2970.

[7] Penal Code sections 2970 and 2972, subdivision (a).

[8] Penal Code section 2968.

Chapter 1419 amended Penal Code section 2960, adding text in subdivision (d) to set forth procedures for allowing a *prisoner or parolee* to petition the court for a hearing to contest a Board of Prison Terms determination that he or she meets the mentally disordered offender criteria. The current test claim did not plead chapter 1419, but does address subsequent amendments to the procedures for prisoner- or parolee-initiated court hearings under the mentally disordered offender program.

Prior Test Claim Regarding District Attorney-Initiated Court Hearings (Pen. Code, §§ 2970, 2972 and 2972.1)

Chapter 1418 was the subject of a prior test claim (98-TC-09) in which the Commission on State Mandates found a reimbursable state-mandated program was imposed on local agencies. That prior test claim addressed Penal Code sections 2970, 2972 and 2972.1, which established court procedures initiated by the local district attorney to extend the involuntary treatment of a mentally disordered offender for one year beyond the offender's parole termination date – or release from prison if the prisoner refused treatment as a condition of parole – if the offender's severe mental disorder is not in remission at the end of the parole period or cannot be kept in remission without treatment.

Not later than 180 days prior to the termination of parole, the professionals treating the prisoner or parolee are required to submit a written evaluation to the district attorney in the county of treatment or commitment. The district attorney reviews the evaluation and files a Penal Code section 2970 petition in the superior court for continued involuntary treatment for one year and the court conducts a civil hearing on the matter.

For that test claim, the following activities were determined to be reimbursable:

1. review the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970);
2. prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, § 2970);
3. represent the state and the indigent offender in civil hearings on the petition and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972, 2972.1);
4. retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions for recommitment;
5. travel to and from state hospitals where detailed medical records and case files are maintained; and
6. provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County Sheriff's Department.

Prior Law Regarding Prisoner- or Parolee-Initiated Court Hearings [Pen. Code, § 2960, subdivision (d)]

Chapter 1419 established the appeal process for a prisoner or parolee, which was enacted into Penal Code section 2960, subdivision (d).

Subdivision (d) as it was originally enacted in the 1985 legislation stated:

> (1) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner does not meet the criteria in subdivision (b). At the hearing the burden of proof shall be on the person or agency who certified the prisoner under paragraph (4) of subdivision (b). If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in paragraph (4) of subdivision (b). The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to paragraph (2) of this subdivision. The Board of Prison Terms shall provide a prisoner who requests a trial a petition form and instructions for filing the petition.
>
> (2) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of subdivision (b) may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she meets the criteria of subdivision (b). The court shall conduct a hearing on the petition within sixty calendar days after the petition is filed, unless either time is waived by the petitioner or his counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.
>
> (3) The provisions of this subdivision shall be applicable to a continuation of a parole pursuant to Section 3001.

Test Claim Legislation Regarding Prisoner- or Parolee-Initiated Court Hearings (Pen. Code, § 2966)

As noted above, chapter 1419 was the *first* legislation to establish the appeal process for a prisoner or parolee under the mentally disordered offender provisions; the process was enacted into Penal Code section 2960, subdivision (d). However, *chapter 1419 was not pled in this current test claim and has never been pled in a test claim.*

The test claim legislation that *was* pled addresses minor changes to the prisoner or parolee appeal procedures, which now exist under Penal Code section 2966. The test claim legislation involves five statutes, one that added and four that amended Penal Code section 2966. Each of the five test claim statutes is listed below with a summary of the relevant provisions.

1. Statutes 1986, Chapter 858, Section 4 (SB 1845) – This legislation did not make substantive changes to the original Penal Code section 2960, subdivision (d) provisions. Instead, it renumbered the existing provisions of 2960, and in so doing created section 2966.

2. Statutes 1987, Chapter 687, Section 8 (SB 425) – This legislation modified the first sentence of section 2966, subdivision (b), replacing the text that originally read: "A prisoner ... may file ... a petition for a hearing on whether he or she meets the [mentally disordered offender] criteria ..." The modified text reads: "A prisoner ... may file ... a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the [mentally disordered offender] criteria..." This change provides more detail and narrows the subject of the Penal Code section 2966 hearing.

3. Statutes 1988, Chapter 658, Section 1 (SB 538) – This legislation narrowed the scope of the Penal Code section 2966 hearing when the parolee is *retained* on parole because of severe mental disorder. It replaced the text of subdivision (c), which at the time read: "If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole ..., this section shall be applicable for the purpose of determining whether the parolee meets the criteria of Section 2962." Section 2962 at that time had established four criteria for determining whether the prisoner or parolee must continue treatment as a condition of parole: 1) the prisoner had a severe mental disorder that was not in remission or could not be kept in remission without treatment; 2) the severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison; 3) the crime was a violent crime; and 4) the prisoner had been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

The text was modified to read: "If the Board of Prison Terms continues a parolee's mental health treatment under section 2962 when it continues the parolee's parole ..., the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment."

4. Statutes 1989, Chapter 228, Section 2 (SB 1625) – This legislation enacted an additional requirement for finding a severe mental disorder, i.e., that the prisoner or parolee represents a substantial danger of physical harm to others, as a result of *People v. Gibson* (1988) 204 Cal.App.3d 1425. The *Gibson* court addressed whether the mentally disordered offender legislation violated the equal protection clause of the United States and California Constitutions by not requiring current proof of dangerousness as required of other adult persons involuntarily committed for mental health treatment.

5. Statutes 1994, Chapter 706, Section 1 (SB 1918) – This legislation modified Penal Code section 2966 by: 1) prohibiting the court's consideration of evidence of petitioner's behavior or mental status subsequent to Board of Prison Terms hearing; 2) allowing the court to consider, upon stipulation of the parties, an affidavit or declaration of any psychiatrist, psychologist, or other professional person involved in the evaluation or treatment of the petitioner during the certification process; and 3) providing that, if the court reverses Board's decision, the court shall stay execution of decision for five working days to allow for orderly release of the prisoner.

EXHIBIT A-7

Claimant's Position

Claimant contends that the test claim statutes constitute a reimbursable state-mandated local program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The County of San Bernardino, according to its test claim, is seeking reimbursement for the following activities:

- District Attorney services to represent the people, and Public Defender services to represent indigent petitioners, both of which are specialized to deal with complex psychiatric issues, including travel time for this personnel
- Forensic expert witness and investigator services
- Sheriff's department services for transporting inmates between prison or state hospital and court house, care and custody associated with confinement awaiting, during and after the court proceeding

Position of Department of Corrections

The Department of Corrections filed comments on August 3, 2001, citing additional workload and subpoenas for mental health professionals at the Department resulting from mentally disordered offender evaluations. Hearings are particularly increasing in San Bernardino County as a result of mentally disordered offenders being placed in Patton State Hospital, which is located within that county. The Department stated that it had received approximately 20 such subpoenas in the last year, and "[i]t is evident that county resources are impacted by the necessity of conducting these hearings as well." The comments further noted that "[t]he Department of Mental Health has indicated that increasing numbers of [mentally disordered offender] cases will be placed at [Patton State Hospital], at least over the next year or so."

The Department stated that it "appears the County's claim for reimbursement does have merit."

Position of Department of Finance

The Department of Finance filed comments on August 9, 2001, stating that the test claim legislation should not be considered a reimbursable mandate because "the costs claimed for reimbursement are related to enforcement of a changed penalty for a crime or infraction, as specified in Government Code section 17556(g)."

The basis for the Department's argument is that when a petitioner is requesting a hearing to contest a condition of parole, in effect he or she is petitioning to change the penalty for a crime. The county is responsible to provide a sentencing hearing, which determines the penalty for a crime. In this case, the hearing requested by the inmate is a "continuation of the pre-incarceration hearing that is the responsibility of the county." Therefore the costs should not be reimbursable under article XIII B, section 6 of the California Constitution.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[9] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[10] "Its purpose 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."[11] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[12] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[13]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state."[14] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[15] A "higher level of service" occurs

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[9] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected/ (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[10] *Department of Finance v. Commission on State Mandates* (Kern High School Dist.) (2003) 30 Cal.4th 727, 735.

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

[12] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[13] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (San Diego Unified School Dist.); Lucia Mar Unified School District v. Honig (1988) 44 Cal.3d 830, 835-836 (Lucia Mar).

[14] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.).

[15] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

when the new "requirements were intended to provide an enhanced service to the public."[16]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[17]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[18] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[19]

The fact that claimant did not plead the original legislation establishing prisoner- or parolee-initiated court hearings under the mentally disordered offender program limits the issues raised in this test claim. In fact, the only issue presented is whether the test claim statutes, which make minor modifications to the program, are subject to article XIII B, section 6 of the California Constitution. That issue is analyzed below.

Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

In order for a test claim statute to impose a reimbursable state mandated program under article XIII B, section 6, the statutory language must mandate an activity or task upon local governmental agencies. If the statutory language does not mandate or require local agencies to perform a task, then article XIII B, section 6, is not triggered. In such a case, compliance with the test claim statute is within the discretion of the local agency.

The determination as to whether the statute mandates an activity is a question of law.[20] In order to interpret the law, a "fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute."[21] In so doing, the first step is to give the words of the statute their usual and ordinary meaning. "If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs."[22]

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[16] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

[17] *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 (*County of Sonoma*); Government Code sections 17514 and 17556.

[18] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[19] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[20] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 171.

[21] *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.

[22] *Ibid.*

Furthermore, the interpretation may not disregard or enlarge the plain provisions of a statute, nor may it go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the interpretation cannot write into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[23] Consistent with this principle, the courts have strictly construed the meaning and effect of statutes analyzed under article XIII B, section 6, and have not applied section 6 as an equitable remedy:

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to include matters not covered by the language used." [Citations omitted.]["Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation."] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies.[24]

In this test claim, claimant is seeking blanket reimbursement for services of the district attorney, public defender and sheriff's office relating to any prisoner- or parolee-initiated court hearings under the mentally disordered offender program. However, the original legislation establishing those court hearings – Statutes 1985, Chapter 1419 – was not pled. The test claim statutes that were pled modify to some extent the original 1985 provisions. Each test claim statute that was pled is reviewed and analyzed below as to whether any mandate is created by the plain meaning of the language, and therefore subject to article XIII B, section 6 of the California Constitution.

Statutes 1986, Chapter 858, Section 4 (SB 1845) – Chapter 858 did not create a mandate and is therefore not subject to article XIII B, section 6. This legislation did not make substantive changes to the original Penal Code section 2960, subdivision (d) provisions. Instead, it renumbered the existing relevant provisions by breaking down section 2960, subdivisions (a) through (e) into sections 2960, 2962, 2964, 2966 and 2968.

Statutes 1987, Chapter 687, Section 8 (SB 425) – Chapter 687 did not create a mandate and is therefore not subject to article XIII B, section 6.

This legislation modified the first sentence of section 2966, subdivision (b), replacing the text that originally read: "A prisoner … may file … a petition for a hearing on whether he or she meets the [mentally disordered offender] criteria…" The modified text reads: "A prisoner … may file … a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the [mentally disordered offender] criteria…" Thus, it provides more detail and narrows the subject of the Penal Code section 2966 hearing, but does not create a mandate.

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[23] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

[24] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

EXHIBIT G-11

Statutes 1988, Chapter 658, Section 1 (SB 538) – Chapter 658 did not create a mandate and is therefore not subject to article XIII B, section 6.

This legislation addressed the scope of the Penal Code section 2966 hearing when the parolee is *retained* on parole because of severe mental disorder. It replaced the text of subdivision (c), which at the time read: "If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole ..., this section shall be applicable for the purpose of determining whether the parolee meets the criteria of Section 2962." Section 2962 at that time had established four criteria for determining whether the prisoner or parolee must continue treatment as a condition of parole: 1) the prisoner had a severe mental disorder that was not in remission or could not be kept in remission without treatment; 2) the severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison; 3) the crime was a violent crime; and 4) the prisoner had been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

The text was modified to read: "If the Board of Prison Terms continues a parolee's mental health treatment under section 2962 when it continues the parolee's parole ..., the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment."

Penal Code section 2966 hearings may be conducted at the time a prisoner is being released from prison on parole, or at the time the parolee is scheduled to be released from parole. It is possible that several such hearings could be conducted over time. The Senate Third Reading analysis of the bill stated that according to the author, the Board of Prison Terms requested the changes "to remove redundant aspects of annual renewal of commitment."[25] Thus the scope of the hearing is narrowed, but no mandate is created.

Statutes 1989, Chapter 228, Section 2 (SB 1625) – Chapter 228 did not create a mandate and is not subject to article XIII B, section 6.

As a result of *People v. Gibson* (1988) 204 Cal.App.3d 1425, the Legislature enacted an additional requirement for a finding of severe mental disorder, i.e., that the prisoner or parolee represents a substantial danger of physical harm to others. The *Gibson* court found that the mentally disordered offender legislation violated the equal protection clause of the United States and California Constitutions by not requiring current proof of dangerousness as required of other adult persons involuntarily committed for mental health treatment.[26]

Penal Code section 2966, subdivision (c) was modified to add another condition that must be met in order to continue involuntary mental health treatment in response to *Gibson*.[27]

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[25] Senate Bill 538 (as amended June 9, 1988), Senate Third Reading Analysis (1987-88 Regular Session), August 4, 1988, page 2.

[26] *Gibson* at 1437.

[27] Senate Bill 1625 (as amended April 27, 1989), Senate Committee on Judiciary Analysis (1989-90 Regular Session), May 2, 1989, pages 1-2.

The condition is whether, by reason of his or her severe mental disorder, the prisoner or parolee represents a substantial danger of physical harm to others.

This provision expands the scope of the Penal Code section 2966 hearing by requiring proof of an additional matter, but does not mandate any activity on the district attorney, public defender or sheriff. According to the rules of statutory construction, this interpretation cannot "write into the statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute."[28] Furthermore, there is nothing in the record to support a finding that adding this condition creates a mandate.

Statutes 1994, Chapter 706, Section 1(SB 1918) – Chapter 706 did not create a mandate and is not subject to article XIII B, section 6.

This legislation modified Penal Code section 2966 by: 1) prohibiting the court's consideration of evidence of petitioner's behavior or mental status subsequent to Board of Prison Terms hearing; 2) allowing the court to consider, upon stipulation of the parties, an affidavit or declaration of any psychiatrist, psychologist, or other professional person involved in the evaluation or treatment of the petitioner during the certification process; and 3) providing that, if the court reverses the Board's decision, the court shall stay execution of decision for five working days to allow for orderly release of prisoner.

The first modification appears to clarify the intent of the 1987 statute, which narrowed the scope of the hearing to establishing the prisoner's or parolee's condition at a particular point in time, i.e., as of the date of the Board of Prison Terms hearing. The first modification did not create a mandate.

The second modification allows specified evidence into the hearing upon stipulation of the parties. The Senate Third Reading analysis states the author's comment that "[t]he use of affidavits or declarations in place of personal appearances would be more efficient, less expensive and allow for continuity between the BPT and the court hearing."[29] However, since there was no previous provision that excluded such evidence, this provision clarifies existing law because evidence that is stipulated to by both parties will generally be allowed into any trial. The second modification did not create a mandate.

The third modification requires that, in the event the court reverses the Board of Prison Terms decision, which would result in releasing the prisoner, execution of that decision must be stayed for five working days. According to the Assembly Committee on Public Safety bill analysis, the author commented that this provision was needed because parolees have been ordered released by courts "'forthwith' which prevents the Department [of Corrections] from developing the necessary release supervision and program arrangements which may be fairly extensive given the nature of the parolee's crimes and the concerns of previous victims, local law enforcement and others."[30]

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[28] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

[29] Senate Bill 1918 (as amended August 22, 1994), Senate Third Reading Bill Analysis (1993-94 Regular Session), August 26, 1994, page 2.

[30] SB 1918 (as introduced February 25, 1994), Assembly Committee on Public Safety Bill Analysis (1993-94 Regular Session), June 28, 1994, page 3.

This modification directs the court to stay execution of its decision, but does not mandate any other activity on the district attorney, public defender or sheriff's office. According to the rules of statutory construction, this interpretation cannot "write into the statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute."[31] Furthermore, there is nothing in the record to support a finding that staying execution of the decision creates a mandate.

Conclusion

Staff finds that the test claim statutes do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends that the Commission adopt this analysis to deny the test claim.

[31] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

WHITCOMB HOTEL, INC. (a Corporation) et al., Petitioners,
v.
CALIFORNIA EMPLOYMENT COMMISSION et al., Respondents; FERNANDO R. NIDOY et al., Interveners and Respondents.
S. F. No. 16854.

Supreme Court of California

Aug. 18, 1944.

HEADNOTES

(1) Statutes § 180(2)--Construction--Executive or Departmental Construction.
The construction of a statute by the officials charged with its administration must be given great weight, for their substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in drafting the statute.

See 23 **Cal.Jur.** 776; 15 **Am.Jur.** 309.

(2) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment.

(3) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change.

(4) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
The disqualification imposed on a claimant by Unemployment Insurance Act, § 56(b) (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), for refusing without good cause to accept suitable employment when offered to him, or failing to apply for such employment when notified by the district public employment office, is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment.

See 11 **Cal.Jur. Ten-year Supp.** (Pocket Part) "Unemployment Reserves and Social Security."

(5) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within the Unemployment Insurance Act. *754

(6) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
Employment Commission Rule 56.1, which attempts to create a limitation as to the time a person may be disqualified for refusing to accept suitable employment, conflicts with Unemployment Insurance Act, § 56(b), and is void.

(7) Unemployment Relief--Powers of Employment Commission--Adoption of Rules.
The power given the Employment Commission by the Unemployment Insurance Act, § 90, to adopt rules and regulations is not a grant of legislative power, and in promulgating such rules the commission may not alter or amend the statute or enlarge or impair its scope.

(8) Unemployment Relief--Remedies of Employer--Mandamus.
Inasmuch as the Unemployment Insurance Act, § 67, provides that in certain cases payment of benefits shall be made irrespective of a subsequent appeal, the fact that such payment has been made does not deprive an employer of the issuance of a writ of mandamus to compel the vacation of an award of benefits when he is entitled to such relief.

SUMMARY

PROCEEDING in mandamus to compel the California Employment Commission to vacate an award of unemployment benefits and to refrain from charging petitioners' accounts with benefits paid. Writ granted.

COUNSEL

EXHIBIT C-15

Brobeck, Phleger & Harrison, Gregory A. Harrison and Richard Ernst for Petitioners.

Robert W. Kenny, Attorney General, John J. Dailey, Deputy Attorney General, Forrest M. Hill, Gladstein, Grossman, Margolis & Sawyer, Ben Margolis, William Murrish, Gladstein, Grossman, Sawyer & Edises, Aubrey Grossman and Richard Gladstein for Respondents.

Clarence E. Todd and Charles P. Scully as Amici Curiae on behalf of Respondents.

TRAYNOR, J.

In this proceeding the operators of the Whitcomb Hotel and of the St. Francis Hotel in San Francisco seek a writ of mandamus to compel the California Employment Commission to set aside its order granting unemployment insurance benefits to two of their former employees, Fernando R. Nidoy and Betty Anderson, corespondents in this action, and to restrain the commission from charging petitioners' accounts with benefits paid pursuant to *755 that order. Nidoy had been employed as a dishwasher at the Whitcomb Hotel, and Betty Anderson as a maid at the St. Francis Hotel. Both lost their employment but were subsequently offered reemployment in their usual occupations at the Whitcomb Hotel. These offers were made through the district public employment office and were in keeping with a policy adopted by the members of the Hotel Employers' Association of San Francisco, to which this hotel belonged, of offering available work to any former employees who recently lost their work in the member hotels. The object of this policy was to stabilize employment, improve working conditions, and minimize the members' unemployment insurance contributions. Both claimants refused to accept the proffered employment, whereupon the claims deputy of the commission ruled that they were disqualified for benefits under section 56(b) of the California Unemployment Insurance Act (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), on the ground that they had refused to accept offers of suitable employment, but limited their disqualification to four weeks in accord with the commission's Rule 56.1. These decisions were affirmed by the Appeals Bureau of the commission. The commission, however, reversed the rulings and awarded claimants benefits for the full period of unemployment on the ground that under the collective bargaining contract in effect between the hotels and the unions, offers of employment could be made only through the union.

In its return to the writ, the commission concedes that it misinterpreted the collective bargaining contract, that the agreement did not require all offers of employment to be made through the union, and that the claimants are therefore subject to disqualification for refusing an offer of suitable employment without good cause. It alleges, however, that the maximum penalty for such refusal under the provisions of Rule 56.1, then in effect, was a four-week disqualification, and contends that it has on its own motion removed all charges against the employers for such period.

The sole issue on the merits of the case involves the validity of Rule 56.1, which limits to a specific period the disqualification imposed by section 56(b) of the act. Section 56 of the act, under which the claimants herein were admittedly disqualified, *756 provides that: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: ... (b) If without good cause he has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the District Public Employment Office." Rule 56.1, as adopted by the commission and in effect at the time here in question, restated the statute and in addition provided that: "In pursuance of its authority to promulgate rules and regulations for the administration of the Act, the Commission hereby provides that an individual shall be disqualified from receiving benefits if it finds that he has failed or refused, without good cause, either to apply for available, suitable work when so directed by a public employment office of the Department of Employment or to accept suitable work when offered by any employing unit or by any public employment office of said Department. Such disqualification shall continue for the week in which such failure or refusal occurred, and for not more than three weeks which immediately follow such week as determined by the Commission according to the circumstances in each case." The validity of this rule depends upon whether the commission was empowered to adopt it, and if so, whether the rule is reasonable.

The commission contends that in adopting Rule 56.1 it exercised the power given it by section 90 of the act to adopt "rules and regulations which to it seem necessary and suitable to carry out the provisions of this act" (2 Deering's Gen. Laws, 1937, Act 8780d, § 90(a)). In its view section 56(b) is ambiguous because it fails to specify a definite period of

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disqualification. The commission contends that a fixed period is essential to proper administration of the act and that its construction of the section should be given great weight by the court. It contends that in any event its interpretation of the act as embodied in Rule 56.1 received the approval of the Legislature in 1939 by the reenactment of section 56(b) without change after Rule 56.1 was already in effect.

(1) The construction of a statute by the officials charged with its administration must be given great weight, for their "substantially contemporaneous expressions of opinion are *757 highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute." (*White v. Winchester Country Club*, 315 U.S. 32, 41 [62 S.Ct. 425, 86 L.Ed. 619]; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 [51 S.Ct. 144, 75 L.Ed. 397]; *Riley v. Thompson*, 193 Cal. 773, 778 [227 P. 772]; *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 643 [122 P.2d 526]; *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; see, Griswold, *A Summary of the Regulations Problem*, 54 Harv.L.Rev. 398, 405; 27 Cal.L.Rev. 578; 23 Cal.Jur. 776.) When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation. (*Helvering v. Griffiths*, 318 U.S. 371, 403 [63 S.Ct. 636, 87 L.Ed. 843]; *United States v. Hill*, 120 U.S. 169, 182 [7 S.Ct. 510, 30 L.Ed. 627]; see *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; *Hoyt v. Board of Civil Service Commissioners*, 21 Cal.2d 399, 402 [132 P.2d 804].) Whatever the force of administrative construction, however, final responsibility for the interpretation of the law rests with the courts. "At most administrative practice is a weight in the scale, to be considered but not to be inevitably followed. ... While we are of course bound to weigh seriously such rulings, they are never conclusive." (*F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976.) (2) An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment. (*California Drive-In Restaurant Assn. v. Clark*, 22 Cal.2d 287, 294 [140 P.2d 657, 147 A.L.R. 1028]; *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935]; *Boone v. Kingsbury*, 206 Cal. 148, 161 [273 P. 797]; *Bank of Italy v. Johnson*, 200 Cal. 1, 21 [251 P. 784]; *Hodge v. McCall*, 185 Cal. 330, 334 [197 P. 86]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev.*, 297 U.S. 129 [56 S.Ct. 397, 80 L.Ed. 528]; *Montgomery v. Board of Administration*, 34 Cal.App.2d 514, 521 [93 P.2d 1046, 94 A.L.R. 610].) (3) Moreover, an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted *758 without change. (*Biddle v. Commissioner of Internal Revenue*, 302 U.S. 573, 582 [58 S.Ct. 379, 82 L.Ed. 431]; *Houghton v. Payne*, 194 U.S. 88 [24 S.Ct. 590, 48 L.Ed. 888]; *Iselin v. United States*, 270 U.S. 245, 251 [46 S.Ct. 248, 70 L.Ed. 566]; *Louisville & N. R. Co. v. United States*, 282 U.S. 740, 757 [51 S.Ct. 297, 75 L.Ed. 672]; *F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976; *Pacific Greyhound Lines v. Johnson*, 54 Cal.App.2d 297, 303 [129 P.2d 32]; see *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 [60 S.Ct. 18, 84 L.Ed. 101]; *Helvering v. Hallock*, 309 U.S. 106, 119 [60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368]; *Federal Comm. Com. v. Columbia Broadcasting System*, 311 U.S. 132, 137 [61 S.Ct. 152, 85 L.Ed. 87]; Feller, *Addendum to the Regulations Problem*, 54 Harv.L.Rev. 1311, and articles there cited.)

In the present case Rule 56.1 was first adopted by the commission in 1938. It was amended twice to make minor changes in language, and again in 1942 to extend the maximum period of disqualification to six weeks. The commission's construction of section 56(b) has thus been neither uniform nor of long standing. Moreover, the section is not ambiguous, nor does it fail to indicate the extent of the disqualification. (4) The disqualification imposed upon a claimant who without good cause "has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the district public employment office" is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment. (Accord: 5 C.C.H. Unemployment Insurance Service 35,100, par. 1965.04 [N.Y.App.Bd.Dec. 830-39, 5/27/39].) The Unemployment Insurance Act was expressly intended to establish a system of unemployment insurance to provide benefits for "persons unemployed through no fault of their own, and to reduce involuntary unemployment. ..." (Stats. 1939, ch. 564, § 2; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 1.) The public policy of the State as thus declared by the Legislature was intended as a guide to the interpretation and application of the act. (*Ibid.*) (5) One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his

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own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within *759 the provisions of the statute. (See 1 C.C.H. Unemployment Insurance Service 869, par. 1963.) Section 56(b) in excluding absolutely from benefits those who without good cause have demonstrated an unwillingness to work at suitable employment stands out in contrast to other sections of the act that impose limited disqualifications. Thus, section 56(a) disqualifies a person who leaves his work because of a trade dispute for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed; and other sections at the time in question disqualified for a fixed number of weeks persons discharged for misconduct, persons who left their work voluntarily, and those who made wilful misstatements. (2 Deering's Gen. Laws, 1937, Act 8780(d), § § 56(a), 55, 58(e); see, also, Stats. 1939, ch. 674, § 14; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 58.) Had the Legislature intended the disqualification imposed by section 56(b) to be similarly limited, it would have expressly so provided. (6) Rule 56.1, which attempts to create such a limitation by an administrative ruling, conflicts with the statute and is void. (*Hodge v. McCall, supra;* Manhattan General Equipment Co. v. Commissioner of Int. Rev., 297 U.S. 129, 134 [56 S.Ct. 397, 80 L.Ed. 528]; see *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935].) Even if the failure to limit the disqualification were an oversight on the part of the Legislature, the commission would have no power to remedy the omission. (7) The power given it to adopt rules and regulations (§ 90) is not a grant of legislative power (see 40 Columb. L. Rev. 252; cf. Deering's Gen. Laws, 1939 Supp., Act 8780(d), § 58(b)) and in promulgating such rules it may not alter or amend the statute or enlarge or impair its scope. (*Hodge v. McCall, supra;* Bank of Italy v. Johnson, 200 Cal. 1, 21 [251 P. 784]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev., supra;* Koshland v. Helvering, 298 U.S. 441 [56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756]; *Iselin v. United States, supra.*) Since the commission was without power to adopt Rule 56.1, it is unnecessary to consider whether, if given such power, the provisions of the rule were reasonable.

The commission contends, however, that petitioners are not entitled to the writ because they have failed to exhaust *760 their administrative remedies under section 41.1. This contention was decided adversely in *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]. It contends further that since all the benefits herein involved have been paid, the only question is whether the charges made to the employers' accounts should be removed, and that since the employers will have the opportunity to protest these charges in other proceedings, they have an adequate remedy and there is therefore no need for the issuance of the writ in the present case. The propriety of the payment of benefits, however, is properly challenged by an employer in proceedings under section 67 and by a petition for a writ of mandamus from the determination of the commission in such proceedings. (See *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]; *W. R. Grace & Co. v. California Employment Com., ante,* p. 720 [151 P.2d 215].) An employer's remedy thereunder is distinct from that afforded by section 45.10 and 41.1, and the commission may not deprive him of it by the expedient of paying the benefits before the writ is obtained. (8) The statute itself provides that in certain cases payment shall be made irrespective of a subsequent appeal (§ 67) and such payment does not preclude issuance of the writ. (See *Bodinson Mfg. Co. v. California Emp. Com., supra,* at pp. 330-331; *Matson Terminals, Inc. v. California Emp. Com., supra.*)

Let a peremptory writ of mandamus issue ordering the California Employment Commission to set aside its order granting unemployment insurance benefits to the corespondents, and to refrain from charging petitioners' accounts with any benefits paid pursuant to that award.

Gibson, C. J., Shenk, J., Curtis, J., and Edmonds, J., concurred.

CARTER, J.

I concur in the conclusion reached in the majority opinion for the reason stated in my concurring opinion in *Mark Hopkins, Inc. v. California Emp. Co.*, this day filed, *ante*, p. 752 [151 P.2d 233].

Schauer, J., concurred.

Intervener's petition for a rehearing was denied September 13, 1944. Carter, J., and Schauer, J., voted for a rehearing. *761

Cal.,1944.

Whitcomb Hotel v. California Employment Commission

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END OF DOCUMENT

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Date of Printing: JAN 12,2006

KEYCITE

Whitcomb Hotel v. California Employment Commission, 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405 (Cal., Aug 18, 1944) (NO. S.F. 16854)

History
Direct History

=> 1 **Whitcomb Hotel v. California Employment Commission**, 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405 (Cal. Aug 18, 1944) (NO. S.F. 16854)

Negative Citing References (U.S.A.)

Distinguished by

2 Hanerfeld v. City of Berkeley Rent Stabilization Bd., 2004 WL 2030255 (Cal.App. 1 Dist. Sep 13, 2004) (NO. A103412), unpublished/noncitable ** **HN: 4,6,7 (P.2d)**

THE PEOPLE, Plaintiff and Respondent,
v.
ANDREW FRASER GIBSON, Defendant and Appellant
No. B025616.

Court of Appeal, Second District, California.

Oct 6, 1988.

SUMMARY

Defendant was convicted of forcible rape in violation of Pen. Code, § 261, subd. (2), and was sentenced to six years in the state prison. Instead of being released on parole on his due date, he was required to accept inpatient treatment through the Department of Health under Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of future dangerousness. After trial he was found to be a severely mentally disordered offender subject to involuntary confinement and treatment under Pen. Code, § 2962, and he appealed. (Superior Court of San Luis Obispo County, No. PC4, Harry E. Woolpert, Judge.)

The Court of Appeal reversed, holding defendant was entitled to parole on terms without reference to the requirements of Pen. Code, § 2962 et seq. The court held the retroactive application of the mandatory provisions violated the ex post facto clauses of the United States and California Constitutions as applied to a defendant whose crimes which resulted in imprisonment were committed prior to the enactment of the legislation. It further held the provisions violated the equal protection clauses of the United States and California Constitutions, as it was unreasonable and arbitrary to exempt persons such as defendant from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment, and no compelling governmental interest justified the exception. (Opinion by Abbe, J., with Stone (S. J.), P. J., and Gilbert, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Criminal Law § 7.2--Ex Post Facto Laws--Mental Treatment as Condition of Parole.
Legislation (Pen. Code, § § 2962-2980) requiring *1426 certain mentally ill persons about to be paroled to accept inpatient mental treatment violates the ex post facto clauses of U.S. Const., art. I, § 9, cl. 3, and Cal. Const., art. I, § 9, as applied to a prisoner whose crime, which resulted in imprisonment and a determinate sentence, was committed prior to the enactment of the legislation. The provisions are applicable only to persons who were convicted for certain crimes and who were still serving their terms of imprisonment on the operative date of the legislation, and mandate a potentially onerous change in the terms of parole which is part of the sentence for a criminal conviction; the result could potentially be custody for life in a state hospital setting without proof that the person was either gravely disabled or demonstrably dangerous as the result of mental illness.

[See **Cal.Jur.3d (Rev)**, Criminal Law, § 9; Am.Jur.2d, Constitutional Law, § 654.]

(2) Criminal Law § 7--Ex Post Facto Laws.
Two critical elements must be present for a statute to violate the ex post facto clause: (1) it must be a criminal or penal law which applies to events occurring prior to its effective date and (2) it must substantially disadvantage the offender affected by it. A law constitutes an ex post facto violation when it retrospectively imposes criminal liability for conduct which was innocent when it occurred, or increases the punishment prescribed for a crime, or by necessary operation alters the situation of the accused to his disadvantage. In order to determine whether retrospective laws are disadvantageous, courts must look to the effect of the present system of laws compared to those in place at the time the offense was committed.

(3) Criminal Law § 7--Ex Post Facto Laws--Penal or Therapeutic Laws.
Pen. Code, § § 2962-2980, requiring certain mentally ill prisoners about to be paroled to accept inpatient mental treatment without a determination of future dangerousness, must be characterized as penal, rather than therapeutic, for determining whether it violates the ex post facto clause when applied retrospectively. The primary purpose of the legislation is to protect the public, and the fact the

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person is treated while confined involuntarily does not ipso facto make the confinement nonpenal. Failure to follow the treatment plan during the period of parole can result in a return to prison on parole revocation and it may therefore extend indirectly the incarceration of the person as a result of his criminal conduct.

(4a, 4b, 4c, 4d) Constitutional Law § 101--Equal Protection--Basis of Classification--Criminal Conviction or Acquittal--Involuntary Mental *1427 Treatment of Parolees.

Legislation (Pen. Code, § § 2962-2980) requiring certain mentally ill prisoners about to be paroled to accept inpatient mental treatment without a determination of dangerousness violates the equal protection clause of the United States Constitution, since it is unreasonable and arbitrary to exempt such persons from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment. Although parole status is a distinctive characteristic for disparate treatment under certain circumstances, it is irrelevant to the purpose of the statute's involuntary commitment or treatment.

(5) Constitutional Law § 76--Nature and Scope of Equal Protection--United States Constitution.

The equal protection clause of the United States Constitution requires at a minimum that persons standing in the same relation to a challenged government action will be uniformly treated. Traditionally, social and economic legislation is upheld if the classification drawn is rationally related to legitimate state interests. When the classification touches on a fundamental right, it must be judicially determined under the strictest standard whether it is necessary to promote a compelling government interest. Whether a right is fundamental depends on whether it is implicitly or explicitly granted by the federal Constitution. An equal protection challenge requires a determination whether the groups which are differently treated are similarly situated for purposes of the law. If they are not, no equal protection claim is applicable.

(6) Penal and Correctional Institutions § 22--Nature of Parole.

Parole in California is different than the traditional concept of parole, under which it is a release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the term. In California, determinately sentenced prisoners serve the complete term specified under Pen. Code, § 1170, less any applicable credits for work performed under Pen. Code, § § 2931 or 2933, and are then placed on parole for three years regardless of the length of the term served. Under Pen. Code, § 3000, this parole period is an essential part of the actual sentence and is not dependent on early release.

(7) Constitutional Law § 84--Equal Protection--Classification--Judicial Review--Deference to Legislature--Dangerousness--Class.

Under equal protection analysis, although great deference is due a legislative determination that a certain class of persons endangers public safety and that involuntary commitment of persons in that class is necessary to protect the public, the determination of which individuals belong to *1428 that class is a judicial, not legislative, function. Thus, Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of dangerousness establishes an invalid classification, since it would permit a permanent conclusive presumption of dangerousness from proof of mental illness so long as it had once been proved the illness was causally related to or an aggravating factor in the commission of a criminal offense. Such conclusive presumption would violate due process since dangerousness is not universally and necessarily coexistent with mental illness, and a finding that a mental illness was once a contributing cause or aggravating factor in criminality does not change the fact that all former felons suffering mental illness are not dangerous or violent.

(8) Constitutional Law § 101--Equal Protection--Basis of Classification-- Criminal Conviction or Acquittal--Parolees--Mental Illness.

Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of dangerousness, is subject to close scrutiny under the California Constitution (Cal. Const., art. I, § 7) in an equal protection analysis, since the statutory scheme deprives persons of their liberty. The law can withstand constitutional attack as discriminatory among similarly situated persons only if the government can demonstrate a compelling interest which justifies the law and that the distinction drawn by the statute is necessary to further that purpose. Because there is no demonstrable compelling interest in the continued confinement of mentally ill former prisoners simply because their mental illness continues, or that exclusion of a requisite finding of dangerousness is necessary to serve any legitimate government interest, the statutes violate equal protection. The difficulty of proof of dangerousness

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does not constitute necessity for its complete elimination.

COUNSEL

Rowan W. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Morris Lenk, Karl S. Mayer and Bruce M. Slavin, Deputy Attorneys General, for Plaintiff and Respondent. *1429

ABBE, J.

Legislation, [FN1] effective July 1, 1986, requiring a person who had been sentenced to a determinate sentence prior to that date to be confined in a mental hospital as a condition of parole, violates constitutional ex post facto clauses. The legislation also violates equal protection because it mandates involuntary confinement and treatment of former prisoners who are mentally ill without proof of dangerousness.

> FN1 Statutes 1985, chapter 1419, section 3. The provisions were originally found in Penal Code section 2960. They were amended and recodified without substantive change by Statutes 1986, chapter 858, to have separate section numbers (Pen. Code, § § 2962-2980). For easy reference, all sections are referred to by their present section numbers.

Appellant was convicted of forcible rape in violation of Penal Code [FN2] section 261, subdivision (2) and on June 29, 1983, was sentenced to six years in the state prison. With applicable credits he was to be released from custody on parole on September 10, 1986. Instead of being released, he was required to accept inpatient treatment through the Department of Mental Health under the statutory scheme under consideration. After trial in the superior court, he was found to be a severely mentally disordered offender subject to involuntary confinement and treatment under section 2962.

> FN2 All further statutory references are to this code unless otherwise specified.

The confinement then ordered for appellant expired one year from the date he should have been released on parole. This appeal is therefore technically moot. However, since appellant is subject to repetition of this process, the issues are of recurring importance and time constraints make it likely any annual commitment will evade appellate review, we address the merits. [FN3] (See *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 167, fn. 2 [167 Cal.Rptr. 854, 616 P.2d 836].)

> FN3 Appellant has been continued on parole for another year under section 2962 and is continuing to be confined for treatment as an inpatient at Atascadero State Hospital.

In 1983, when appellant was committed to prison, section 2960 (now § 2974 as amended) provided discretion to seek civil commitment of prisoners under the Lanterman-Petris-Short (hereafter LPS) Act, which was incorporated in part by reference in the Penal Code as an alternative to their release. Involuntary commitment under the LPS Act is applicable to all persons regardless of their former penal status who are proved to be gravely disabled or demonstrably dangerous to themselves or others. (See Welf. & Inst. Code, § § 5150, 5200, 5250, subd. (a), 5300, subds. (a)-(c).) If such confinement was not both sought and imposed, appellant would have been entitled to be released from confinement into the community. *1430

Section 2962 now mandates treatment for any person who meets all the following criteria: (1) Is about to be released on parole, [FN4] (2) has a severe mental disorder, as defined, (3) the mental disorder is not in remission or cannot be kept in remission without treatment, as defined, (4) whose severe mental disorder was one of the causes of or was an aggravating factor [FN5] in the commission of a crime for which the person was sentenced to prison, (5) whose crime was one in which the person used force or violence or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of section 243, and (6) who has been in treatment for the severe mental disorder for 90 days or more within the year prior to parole or release. [FN6]

> FN4 Section 2970 also permits the same standards be applied for recommitment of persons who would otherwise be released without parole or whose parole has expired. Appellant is not such a person.

> FN5 Ironically, mental disorders which do not constitute a defense under California insanity provisions (§ 25) are mitigating factors for purposes of sentencing. (See Cal.

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Rules of Court, rules 416(e), 423(b)(2) and 425(b).) Consequently a mental illness which is causally related to criminal conduct may at the same time reduce the term of imprisonment and then result in custodial confinement for life.

FN6 The procedural provisions for commitment are not challenged. They are complex and need not be considered here.

The treatment mandated is inpatient (§ 2964) unless the patient can be safely and effectively treated on an outpatient basis, but if not released to outpatient status within 60 days the person may request a hearing before the Board of Prison Terms (BPT) where the Department of Mental Health must establish that inpatient treatment is necessary. (§ 2964, subd. (b).) This treatment can be continued under the same provisions so long as parole is continued and, as a condition thereof, treatment is mandated pursuant to section 2962. (§ 2964, subd. (c).)

These provisions apply to all persons affected who were incarcerated before as well as after January 1, 1986. (§ 2980.) It is therefore expressly retroactive to persons whose crimes which resulted in imprisonment were committed prior to the enactment of the Legislature so long as they had not earlier been released on parole. [FN7]

FN7 The provisions apply to all persons whether sentenced to a determinate term under section 1170 or to an indeterminate term either prior to the enactment of section 1170 or under section 1168. As appellant was a determinately sentenced prisoner we confine our consideration only to persons released on parole after serving a determinate term imposed pursuant to section 1170.

Ex Post Facto Violation

(1a) Appellant contends the retroactive application of these mandatory provisions violates the ex post facto clauses of the United States and California Constitutions (art I, § 9, cl. 3, and art I, § 9, respectively). We agree. ***1431**

(2) Two critical elements must be present for a statute to violate the ex post facto clause; (1) it must be a criminal or penal law which applies to events occurring prior to its effective date, and (2) it must substantially disadvantage the offender affected by it. (*In re Jackson* (1985) 39 Cal.3d 464, 469-477 [216 Cal.Rptr. 760, 703 P.2d 100].)

A law constitutes an ex post facto violation when it retrospectively (1) imposes criminal liability for conduct which was innocent when it occurred, or (2) increases the punishment prescribed for a crime, or (3) by necessary operation alters the situation of the accused to his disadvantage. (*Conservatorship of Hofferber, supra*, 28 Cal.3d 161, 180.) The mentally disordered offender provisions (MDO) of section 2962 et seq. both increase punishment and alter the situation of the accused to his disadvantage.

In order to determine whether retrospective laws are disadvantageous, we must look to the effect of the present system of laws compared to those in place at the time the offense was committed. (See *In re Stanworth* (1982) 33 Cal.3d 176, 186 [187 Cal.Rptr. 783, 654 P.2d 1311]; *Dobbert v. Florida* (1977) 432 U.S. 282, 294 [53 L.Ed.2d 344, 356-357, 97 S.Ct. 2290]; *Weaver v. Graham* (1981) 450 U.S. 24, 25 [67 L.Ed.2d 17, 20-21, 101 S.Ct. 960].)

(1b) At the time of appellant's offense he was subject to a determinate sentence (§ 1170) and had to be released on parole at the end thereof (§ 3000 subds. (a) and (d); *People v. Burgener* (1986) 41 Cal.3d 505, 529, fn. 12 [224 Cal.Rptr. 112, 714 P.2d 1251].) The Board of Prison Terms (BPT) had discretion to set such reasonable parole conditions as it deemed proper (§ 3053), including the condition of outpatient psychiatric counseling. (*In re Naito* (1986) 186 Cal.App.3d 1656 [231 Cal.Rptr. 506], also see § 3002.) The BPT could revoke his parole and recommit him for failure to abide by the conditions. (§ § 3056 and 3060.)

His total period of parole and custody on recommitment for revocation of parole could not exceed four years (§ 3057, subd. (a)) [FN8] unless he engaged in misconduct while confined on a parole revocation (§ 3057, subd. (c); also see § 3060.5.)

FN8 All references to this section are to the prior version under Statutes 1984, chapter 805, section 3.

When appellant committed his offense he could only have been confined involuntarily for evaluation and treatment on the same basis as all nonprisoners or parolees, that is, if he was mentally ill and gravely disabled (Welf. & Inst. Code, § § 5000, 5008, subd. (h)(1)) or dangerous. (Welf. & Inst. Code, § § 5000, 5250) (former Pen. Code, § 2960, now § 2974,

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applicable to all prisoners other than those described in § 2962.) *1432

Under section 2962 the following changes occur. The persons described therein are required to be retained in physical custody by the Department of Mental Health (§ 2962) and must be treated on an inpatient basis for a minimum of 60 days (§ 2964) and may be retained on an inpatient basis for annual periods for life (§ § 2966, subd. (c), 2970) so long as their severe mental disorder is not in remission or cannot be kept in remission without treatment. Therefore, persons who are neither gravely disabled nor demonstrably dangerous but who meet the section 2962 criteria must undergo treatment on an inpatient and on outpatient basis during their parole term and may be required to do so indefinitely.

(3) Respondent argues that the legislation does not violate the ex post facto clauses because it is not penal, but rather therapeutic, and it does not disadvantage appellant as an accused. We disagree.

Respondent is, however, correct that a necessary determination is whether the statutes imprison appellant as a criminal or require compulsory treatment in involuntary confinement as a sick person. (See *Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 181 and *In re Gary W.* (1971) 5 Cal.3d 296, 301 [96 Cal.Rptr. 1, 486 P.2d 1201].) We believe section 2962 has overwhelming penal attributes and therefore constitutes part of appellant's punishment for his criminal offense.

Section 2960 states the legislative purpose in the enactment of section 2962 et seq.: "The Legislature finds that there are prisoners who have a treatable, severe mental disorder that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated. [FN[9]] Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public. Thirdly, the Legislature finds that in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission. [¶] The Legislature further finds and declares the Department of Corrections should evaluate each prisoner for severe mental *1433 disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community." [FN10]

FN9] It is interesting to note this declaration came just four years after the Legislature "recognize[d] and declare[d] that the commission of sex offenses is not in itself the product of mental diseases." (Stats. 1981, ch. 928, § 4.) Consequently it terminated prospectively an involuntary commitment scheme for mentally disordered sex offenders. (Former Welf. & Inst. Code, § § 6300 to 6330.) Many sex offenders will now "qualify" under the MDO scheme since their crimes definitionally involved the use of force or violence. (See e.g., § § 261, subd. (2), 288, subd. (b) and 288a, subds. (c) and (d)(1).)

FN10 While the provisions operate retroactively for prisoners incarcerated before the effective date of the legislation, it is of course impossible to retroactively evaluate and treat them. Consequently persons imprisoned before July 1, 1986, did not have this advantage during their terms.

The primary purpose of the legislation is to protect the public. The mechanism by which the public is being protected is by requiring confinement and treatment of some former prisoners who have severe mental disorders as defined by section 2962, subdivision (a).

The fact that a person is treated while confined involuntarily does not ipso facto make the confinement nonpenal. For example, section 2684 provides for the transfer of mentally ill prisoners to a state hospital for treatment during their period of imprisonment. By the terms thereof, the time spent in the hospital for treatment is credited toward their terms of imprisonment. Obviously this period of treatment is "penal" within the meaning of the ex post facto clauses. (Also see § 1364.)

The California Supreme Court has identified several criteria to determine whether a statute is criminal or civil. In *Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793] (hereafter *Cramer*) the court identified four features which resulted in its admittedly close determination that involuntary commitment of certain mentally retarded persons was not punishment: (1) it was not initiated in response or

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necessarily related to any criminal acts, (2) it was of limited duration although renewable, (3) the person with the burden of proof was not necessarily a public prosecutor, and (4) the sole purpose of the legislation was the custodial care, treatment and protection of the person committed.

In contrast to the statutory scheme for the involuntary commitment of the mentally retarded, MDO commitments are: (1) necessarily related to the commission of and conviction and imprisonment for crimes involving use of force or violence or in which serious bodily injury was inflicted; (2) the commitment of MDO's can only be brought about by prison officials (§ 2962) or district attorneys (§ 2970); and (3) the sole purpose is not treatment for the safety of the person committed but is primarily protection of the public (§ 2960), the same purpose for imposing imprisonment for criminal conduct. (Cal. Rules of Court, rules 410(a) and 414(b).) The MDO commitment scheme has more penal features than that for mentally retarded persons. ***1434**

Other criteria were identified in *Conservatorship of Hofferber, supra*, 28 Cal.3d 161, at pages 181 and 182 in determining whether the involuntary extended confinement of persons gravely disabled due to incompetence to stand trial on felony charges and who are presently dangerous (hereafter GDI's) was punitive. The court specified the following factors leading to its conclusion this scheme was not punitive: (1) The commitment did not extend, directly or indirectly, any incarceration imposed on appellant for criminal conduct, (2) a criminal sentence would probably never be imposed, (3) the confinement did not arise from criminal conduct but from a mental condition, (4) the person committed would be placed in a state hospital or a less restrictive setting (see Welf. & Inst. Code, § 5358) rather than in a prison, and (5) the GDI commitment did not disadvantage the person as an accused because he or she was not forced to defend against a criminal adjudication. While a MDO commitment shares some of these civil attributes, it differs in important respects.

An MDO commitment, unlike one for GDI's, results directly from the commission of a crime and a period of imprisonment as well as from the mental condition. Failure to follow the treatment plan during the period of parole can result in a return to prison on parole revocation and it may therefore extend indirectly the incarceration of appellant as a result of his criminal conduct. Specified prestatute criminal conduct is both a requisite and the reason for custodial confinement.

MDO's may be forced to defend against a criminal adjudication since whether the crime which resulted in the prison commitment "involved the use of force or violence or caused serious bodily injury" may not have been adjudicated at the time of conviction. Unlike other involuntary commitment schemes which apply either to persons involved in certain specified offenses (see e.g., Welf. & Inst. Code, § 3052) or to any felony offender (see e.g., § 1026.5, subd. (b)(1)) the MDO scheme applies to persons who committed any felony offense only if it involved the use of force or violence or if it involved inflicting serious bodily injury. Except in those instances where force, violence or serious bodily injury are elements of the offense or an enhancement thereof, a new adjudication relating to the offense may be required.

These differences between the MDO commitment scheme and those considered in *Cramer* and *Hofferber* require us to find that it is essentially penal in nature and consequently it is subject to the limitations of the ex post facto clauses.

(1c) We find the retroactive application of the MDO provisions to persons whose crimes were committed prior to their effective date violates the ***1435** ex post facto clauses of the United States and California Constitutions because the provisions: (1) are applicable only to persons who were convicted for certain crimes and who are still serving their terms of imprisonment on the operative date of the legislation (§ 2962), and mandate a potentially onerous change in the terms of parole which is part of the sentence for a criminal conviction (§ § 1170, subd. (e), 3000); [FN11] and (2) potentially could result in custody for life in a state hospital setting without proof that the person is either gravely disabled or demonstrably dangerous as a result of mental illness.

> FN11 This feature alone may suffice to establish an ex post facto violation. In *In re Stanworth, supra*, 33 Cal.3d 176, the change from the discretionary parole release date setting provisions in effect under the indeterminate sentencing law (ISL) to the directory (mandatory) provisions under the determinate sentencing law (DSL) were found to be ex post facto as applied to persons whose offenses were committed prior to DSL. (Also see *Weaver* v. *Graham, supra*, 450 U.S. 24 (change from mandatory to discretionary good time credits violates clause) and *Lindsey* v. *Washington* (1937)

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301 U.S. 397 [81 L.Ed. 1182, 57 S.Ct. 797] (change from discretionary to mandatory maximum sentence violates clause).)

Equal Protection

(4a) We also find the MDO provisions violate the equal protection clauses of the United States and California Constitutions. (U.S. Const., 14th Amend. and Cal. Const., art I, § 7.)

Equal Protection Under the United States Constitution

(5) The equal protection clause of the United States Constitution requires at a minimum that persons standing in the same relation to a challenged government action will be uniformly treated. (*Reynolds* v. *Sims* (1964) 377 U.S. 533 [12 L.Ed.2d 506, 84 S.Ct. 1362].) Traditionally, social and economic legislation will be upheld if the classification drawn by the statutes is rationally related to legitimate state interests. (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432 [87 L.Ed.2d 313, 105 S.Ct. 3249].) When the classification touches on a fundamental right, it must be judicially determined under the strictest standard whether it is necessary to promote a compelling government interest. (*Shapiro* v. *Thompson* (1969) 394 U.S. 618 [22 L.Ed.2d 600, 89 S.Ct. 1322].) Whether a right is fundamental depends on whether it is implicitly or explicitly guaranteed by the federal Constitution. (*San Antonio School District v. Rodriguez* (1973) 411 U.S. 1 [36 L.Ed.2d 16, 93 S.Ct. 1278].)

Although freedom from involuntary custodial confinement would appear to be the equivalent of "liberty" explicitly guaranteed by the Fifth and Fourteenth Amendments, the United States Supreme Court has not *1436 expressly held that classifications touching upon liberty are fundamental for these purposes. In *Jones v. United States* (1983) 463 U.S. 354 [77 L.Ed.2d 694, 103 S.Ct. 3043] and *Baxstrom v. Herold* (1966) 383 U.S. 107 [15 L.Ed.2d 620, 86 S.Ct. 760], both of which related to challenged classifications in substance and procedure for involuntary commitment, the court appears to use the traditional rational basis test. Consequently for purposes of federal law analysis so shall we.

Any equal protection challenge requires a determination whether the groups which are differently treated are similarly situated for purposes of the law. If they are not, no equal protection claim is applicable. (*Tigner* v. *Texas* (1940) 310 U.S. 141, 147 [84 L.Ed. 1124, 1128, 60 S.Ct. 879, 130 A.L.R. 1321].)

(4b) Appellant claims, and we agree, that an MDO is similarly situated for purposes of the law to other adult persons involuntarily committed for mental health treatment. One purpose of all of these pertinent involuntary commitment schemes is the protection of the public from the dangerous mentally ill and their involuntary commitment for treatment, for renewable periods, until they no longer pose a danger to the public whether or not they remain mentally ill. [FN12]

FN12 See Penal Code section 1026.5, subdivision (b)(1) (person posing substantial danger of physical harm to others by reason of mental disease); Welfare and Institutions Code, section 1801.5 (wards physically dangerous to public due to mental deficiency), section 5300, subdivisions (a)-(c) (persons demonstrating danger of inflicting substantial physical harm to others due to mental defect), section 6500 (mentally retarded persons dangerous to themselves or others).

The MDO commitment scheme, however, contains one critical and significant difference from all the others; it does not require proof of any present dangerousness as a result of mental illness for commitment or recommitment. Because there is no reasonable basis to exempt MDO's from this proof requirement merely because they are at the end of their prison term, we find the provisions violate the equal protection clause of the Fourteenth Amendment of the United States Constitution.

MDO's are most similarly situated to two groups of mentally ill persons subject to involuntary commitment in California: those persons found not guilty by reason of insanity (NGI) and recommitted after expiration of the maximum term of imprisonment which could have been imposed on them (§ 1026.2) and those mentally ill persons, now adults, who have been recommitted after expiration of the potential maximum term of imprisonment for criminal conduct as wards of the state (MDW). (Welf. & Inst. Code, § § 602, 707, subd. (b), 1731.5.) *1437

An MDO, like the MDW and an NGI, has been adjudged to have committed a criminal offense. Both the MDO and NGI are committed after proof of a causal connection between their mental illness and the crime which they committed [FN13] (§ 2962;

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CALJIC 4.00 (1979 rev.) and *In re Moye* (1978) 22 Cal.3d 457, 462 [149 Cal.Rptr. 491, 584 P.2d 1097].) Unlike the NGI and MDW the MDO, however, is not confined only on proof of dangerousness and is not subject to release when he or she is no longer proven to be dangerous. The MDO alone is subject to commitment and recommitment until such time as his or her severe mental disorder is in remission without proof of present dangerousness. The sole basis for the distinction is that MDO's are at the end of their prison terms.

> FN13 This was true at least until June 9, 1982, when the insanity standard was changed. (Now see § 25 and *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752].) It remains true of persons committed under the pre-1982 law when the standard used was that set forth in *People v. Drew* (1978) 22 Cal.3d 333 [149 Cal.Rptr. 275, 583 P.2d 1318] (see CALJIC 4.00 (1979 rev.)) who continue to be recommitted under section 1026.2.

Like those commitment schemes considered by the United States Supreme Court in *Jackson v. Indiana* (1972) 406 U.S. 715 [32 L.Ed.2d 435, 92 S.Ct. 1845] and *Baxstrom* v. *Herold, supra*, 383 U.S. 107, we find the MDO commitment scheme violates the equal protection clause of the Fourteenth Amendment because it has subjected appellant to a commitment standard more lenient and a release standard more stringent than that required for the involuntary commitment and treatment of any other mentally ill person in California for the arbitrary reason that he is nearing completion of service of his term of imprisonment.

In *Jackson* the court found the indefinite commitment of persons who were incompetent to assist in their own defense on a lesser standard with a more difficult standard of release than all others violative of equal protection. The court found the basis of the distinction of two pending criminal charges was insufficient to justify the difference in treatment.

In *Baxstrom* the court considered a commitment scheme closely analogous to that here. There the state scheme provided for involuntary commitment of persons whose prison term was about to expire which differed from that applicable to all other persons in two different ways. First, it denied a jury trial on the issue of mental illness to the prisoner but gave it to all others. Second, it required a determination of dangerousness for all mentally ill persons committed to the Department of Corrections rather than to the state hospital except prisoners nearing the end of their term. The Supreme Court found both distinctions irrational and therefore violative of equal protection. ***1438**

The MDO commitment scheme does not suffer the first infirmity identified in *Baxstrom*; it grants the same procedural protections of a jury trial and unanimous verdict applicable to all others. It suffers the second infirmity, however; it permits commitment without proof of dangerousness, a standard applicable to all others involuntarily confined and treated for mental illness. Since the basis for the distinction, i.e., nearing the end of a prison term, is the same as that considered in *Baxstrom*, we too find it is irrational and violative of the equal protection guaranteed by the United States Constitution.

Respondent argues the MDO is not similarly situated to any other involuntarily committed person because of his parole status. This fact, however, is irrelevant for purposes of equal protection analysis for several reasons.

(6) Parole in California is different from the traditional concept of parole. In *Morrissey v. Brewer* (1972) 408 U.S. 471, 477 [33 L.Ed.2d 484, 492, 92 S.Ct. 2593], the court defined parole as "... release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." In California determinately sentenced prisoners serve the complete term specified under section 1170, less any applicable credits for work performed under sections 2931 or 2933 and are then placed on parole for three years regardless of the length of the term served. Under section 3000, this parole period is an essential part of the actual sentence and is not dependent on early release.

(4c) The question for equal protection purposes is not whether potential MDO's are similarly situated to other dissimilarly treated groups for all purposes but rather whether they are similarly situated for purposes of the law challenged. Parole status has been held to be enough to distinguish parolees from all others as to the quantity and quality of procedural due process required for incarceration (*Morrissey v. Brewer, supra*, 408 U.S. 471) or as to rights to be free from warrantless searches and seizures. (*People v. Burgener, supra*, 41 Cal.3d at p. 532.) This is because of the purpose of those restrictions, which

are to promptly punish or rectify a breach of conditions of traditional parole and to facilitate supervision and surveillance to discover breaches. However, parole status is irrelevant to the purpose of MDO involuntary commitment or treatment.

As noted, the purposes of this statutory scheme are twofold. One is to protect the public from mentally ill persons deemed dangerous by the Legislature; the other is to treat these mentally ill persons. (§ 2960.) The impending release on parole, the basis of defining the group, has nothing to do with either purpose. Any danger to public safety has nothing to do with their ***1439** status as parolees per se but arises from their release from prison into the general population. Therefore, these are not parole condition cases.

That parole status has nothing to do with any purpose of the act is indicated by features of the act itself: the MDO confinement and treatment are not limited to the parole period (§ 2970); existing parolees, including those released just prior to July 1, 1986, are not covered by the act even if they have all of the other pertinent characteristics defined in the act (Stats. 1985, ch. 1419, § 3; § 2962, subd. (d)) [FN14] and mentally ill parolees in remission at the time scheduled for their release on parole, even though they suffer a relapse after release, are not covered by the act. Obviously the Legislature was not relying on dangers unique to persons on parole in enacting the legislation.

> FN14 Persons convicted of qualifying felonies but not sentenced to imprisonment also do not come under the act even if presently on probation. Such persons would appear to otherwise be in the same situation as potential MDO's as a threat to public safety and in need of treatment.

For the articulated purposes of the act, public safety and treatment of the mentally ill prior offender, we find appellant's situation identical to an NGI whose continuing mental illness once caused a criminal violation and similar to MDW's who also engaged in criminal conduct and remain mentally ill at the time scheduled for release.

The respondent argues that even assuming MDO's are similarly situated to NGI's for the legitimate purposes of the law no factual finding on the issue of present dangerousness is required because the Legislature has found MDO's to be dangerous and so stated in section 2960. (7) Great deference is due a legislative determination that a certain class of persons endangers public safety and that involuntary commitment of persons in that class is necessary to protect the public. However, a determination of which individuals belong to that class is a judicial, not legislative, function. (See *United States v. Brown* (1965) 381 U.S. 437 [14 L.Ed.2d 484, 85 S.Ct. 1707].) To determine otherwise would permit a permanent conclusive presumption of dangerousness from proof of mental illness so long as it had once been proved the illness was causally related to or an aggravating factor in the commission of a criminal offense.

A conclusive presumption of one fact from proof of another violates the due process clause when the existence of the fact presumed is not universally or necessarily coexistent with the fact proved. (*Vlandis v. Kline* (1973) 412 U.S. 441 [37 L.Ed.2d 63, 93 S.Ct. 2230].) Dangerousness is not universally and necessarily coexistent with unremitted mental illness. A finding that a mental illness was once a contributing cause or aggravating factor in ***1440** criminality does not change the fact that all former felons suffering mental illness are not dangerous or violent. This fact is implicitly recognized by the several California involuntary commitment schemes requiring proof of both present mental illness and present dangerousness without regard to the criminality of the person.

Respondent claims such a legislative determination of dangerousness has been found constitutional under both the due process and equal protection clauses by the United States Supreme Court in *Jones v. United States* (1983) 463 U.S. 354 [77 L.Ed.2d 694, 103 S.Ct. 3043].) The court's actual holdings do not support this conclusion.

Jones challenged (1) the constitutionality of the automatic commitment of persons found not guilty of an offense by reason of insanity, and (b) the distinctions regarding the burden of proof between persons committed after a finding of NGI and those civilly committed. The court upheld the statutory scheme on both substantive and procedural grounds. In so doing, it approved a presumption of continuing insanity which was conclusive in effect only for 50 days following a jury finding of not guilty by reason of insanity. At that time and at six-month intervals the acquittee had the same opportunity as other civilly committed persons to secure release upon proof by a preponderance of the evidence that he was either no longer mentally ill or dangerous. Consequently, in effect any presumption of insanity

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was rebuttable at all hearings following the automatic 50-day commitment.

The presumption of dangerousness approved by the court in *Jones* was also a rebuttable one; it did not completely substitute the judgment of the Legislature as to dangerousness for a jury determination thereof. Unlike the statutory scheme here, the person involuntarily committed could secure his release in as little as 50 days following conviction upon his showing [FN15] he was not dangerous even if he remained mentally ill. Here, appellant is in effect conclusively presumed dangerous so long as he remains mentally ill regardless of the length of time since his criminal offense and conviction. [FN16] Clearly, *Jones* does not support the respondent's position.

> FN15 In contrast to this holding, our Supreme Court in *In re Moye, supra*, 22 Cal.3d at page 466, rejected placing the burden of proof on the insanity acquittee after the expiration of the maximum term of potential imprisonment.
>
> FN16 Our Supreme Court has expressly rejected a permanent conclusive presumption of dangerousness because, inter alia, the passage of time by itself diminishes the validity of the presumption. (*Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 177.)

(4d) We therefore hold it is unreasonable and arbitrary to exempt MDO's from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment. The commitment scheme ***1441** under consideration violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Equal Protection Under California Constitution

(8) Because the statutory scheme at issue deprives persons of their liberty, i.e., freedom from involuntary confinement and treatment for mental illness, it is subject to close scrutiny under the California Constitution (art. 1, § 7). (*Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 171, fn. 8; see *In re Gary W., supra*, 5 Cal.3d at p. 306.) The law can withstand constitutional attack as discriminatory among similarly situated persons only if the government can demonstrate a compelling interest which justifies the law and that the distinction drawn by the statute is necessary to further that purpose. (*Ibid.*)

We find respondent has failed to demonstrate either a compelling interest in the continued confinement of mentally ill former prisoners simply because their mental illness continues or that exclusion of a requisite finding of dangerousness is necessary to serve any legitimate government interest.

The only justification presented here for the plan is the statements of the Legislature in section 2960 that unremitted mental illness of prisoners is a danger to the public if those prisoners were mentally ill when their offense was committed and that fact was connected to the violent commission of a felony. If the mere declarations of the legislative branch were sufficient to satisfy the strict scrutiny test, no judicial review of the constitutionality of statutes would be necessary.

The legislative history of the MDO scheme does not demonstrate that persons whose mental illness once was related to felonious criminal conduct were actually found to pose a unique danger to the public so long as their mental illness remains based on any studies or hearings. The concern of the Legislature was that the determinate sentencing law which required the release of prisoners at the expiration of a fixed amount of time, combined with the revisions of the insanity law which decreased the number of mentally ill persons found not guilty by reason of insanity and subject to potential life commitment, had resulted and would continue to result in the release of persons who were mentally ill and might reoffend. [FN17]

> FN17 A statement on Sen. Bill No. 1296 to the Assembly Public Safety Committee dated August 26, 1985, opined "SB 1296 will solve the dilemma that has perplexed the Legislature since enactment of the determinate sentencing law how to control criminals who have serious mental illness without disturbing the protection of the LPS Act for civilians."

The then existing system for commitment of mentally ill parolees under the LPS Act was deemed unsatisfactory by the legislative proponents ***1442** because it required proof of demonstrable present dangerousness; this proof was viewed as problematic to achieve by both courts and psychiatrists; and courts, according to the author, insisted on recent evidence to support a finding of future dangerousness and such proof was difficult to obtain in the case of inmates who lived in a highly restrictive

environment. It was viewed as necessary to fill a loophole in the determinate sentencing law which left officials helpless to avoid the release of prisoners who still pose a serious risk to society. (See Conference Completed Analysis of Sen. Bill No. 1296, prepared by the office of Sen. Floor Analysis for use by Sen. Rules Com., pp. 2 and 4.)

Nothing in the legislative history however indicates that there was any factual basis upon which the Legislature concluded that all persons whose mental illness once caused or aggravated a criminal offense were again going to reoffend unless their mental illness was in remission. [FN18] In fact, the difficulty of sustaining the proof requirement of dangerousness was the sole apparent basis for its elimination, not any perceived knowledge of its universal existence from unremitted mental illness. Consequently, the respondent has failed to demonstrate a compelling state interest in involuntarily committing and/or treating all presently unremitted mentally ill former prisoners released after July 1, 1986, whose illness was once connected to the commission of a violent felonious offense.

> FN18 At best, the bill's author and others simply cited instances where mentally ill persons were released from LPS confinement or had once been diagnosed as mentally ill and subsequently committed violent crimes. No evidence of a connection between mental illness and violent offenses was presented in any of the legislative history documents nor is there any evidence that mentally ill offenders are more likely to be recidivists than others.

Difficulty of proof of dangerousness under the LPS standard does not constitute necessity for its complete elimination; if it did, the Legislature would be free to vary the burden of proof as to various elements of criminal offenses depending on the difficulty of proof. The LPS standard of dangerousness, the highest and most narrowly drawn among California's various dangerousness criteria set forth in different involuntary commitment schemes, is not constitutionally necessary. (See *Conservatorship of Hofferber, supra*, 28 Cal.3d at pp. 171-172.) There has been no showing that the complete elimination of proof of some degree of present dangerousness is necessary to protect the public.

It must be remembered that appellant and those in this class of MDO committees are all legally sane and have been subject to punishment for their offenses for the term prescribed by the Legislature. At the end of their terms even the most dangerous offenders and most likely recidivists are subject to release so long as they are not mentally ill as defined. Unless *1443 proven to be dangerous the equal protection clause requires the mentally ill inmate must also be released from custody.

It is unnecessary to address the merits of appellant's other constitutional challenges to the MDO scheme.

The judgment is reversed. Appellant is entitled to parole on terms without reference to the requirements of section 2962 et seq.

Stone (S. J.), P. J., and Gilbert, J., concurred.

Respondent's petition for review by the Supreme Court was denied February 2, 1989. *1444

Cal.App.2.Dist.,1988.

People v. Gibson

END OF DOCUMENT

EXHIBIT G-37

Date of Printing: JAN 12,2006

KEYCITE

People v. Gibson, 204 Cal.App.3d 1425, 252 Cal.Rptr. 56 (Cal.App. 2 Dist., Oct 06, 1988) (NO. CR. B025616)

History
Direct History

=> 1 **People v. Gibson,** 204 Cal.App.3d 1425, 252 Cal.Rptr. 56 (Cal.App. 2 Dist. Oct 06, 1988) (NO. CR. B025616), review denied (Feb 02, 1989)

Negative Citing References (U.S.A.)

Abrogated by

C 2 People v. Robinson, 63 Cal.App.4th 348, 74 Cal.Rptr.2d 52, 98 Cal. Daily Op. Serv. 2975, 98 Daily Journal D.A.R. 4009 (Cal.App. 2 Dist. Apr 20, 1998) (NO. B107563) **** **HN: 1,2,5 (Cal.Rptr.)**

Disagreed With by

H 3 People v. Superior Court (Myers), 50 Cal.App.4th 826, 58 Cal.Rptr.2d 32, 96 Cal. Daily Op. Serv. 8075, 96 Daily Journal D.A.R. 13,367 (Cal.App. 2 Dist. Nov 04, 1996) (NO. B103647), review denied (Jan 22, 1997) **** **HN: 1,2,5 (Cal.Rptr.)**

Declined to Follow by

4 People v. Superior Court (Cain), 57 Cal.Rptr.2d 296, 96 Cal. Daily Op. Serv. 7341, 96 Daily Journal D.A.R. 12,033 (Cal.App. 1 Dist. Oct 01, 1996) (NO. A074501, A074644, A075283), as modified (Oct 16, 1996) *** **HN: 2 (Cal.Rptr.)**

H 5 Griffiths v. Superior Court, 96 Cal.App.4th 757, 117 Cal.Rptr.2d 445, 02 Cal. Daily Op. Serv. 1948, 2002 Daily Journal D.A.R. 2367 (Cal.App. 2 Dist. Feb 28, 2002) (NO. B143674), review denied (Jun 12, 2002) ** **HN: 5 (Cal.Rptr.)**

Implied Overruling Recognized by

6 Garcetti v. Superior Court, 57 Cal.Rptr.2d 420, 96 Cal. Daily Op. Serv. 7588, 96 Daily Journal D.A.R. 12,442 (Cal.App. 2 Dist. Oct 10, 1996) (NO. B103020) **** **HN: 1,2,5 (Cal.Rptr.)**

Declined to Extend by

7 Hubbart v. Superior Court, 58 Cal.Rptr.2d 268, 96 Cal. Daily Op. Serv. 8264, 96 Daily Journal D.A.R. 13,729 (Cal.App. 6 Dist. Nov 14, 1996) (NO. H015007) **** **HN: 1,2,5 (Cal.Rptr.)**

8 People v. Hedge, 65 Cal.Rptr.2d 693, 97 Cal. Daily Op. Serv. 5888, 97 Daily Journal D.A.R. 9317 (Cal.App. 4 Dist. Jul 22, 1997) (NO. D026713) **** **HN: 1,2,5 (Cal.Rptr.)**

EXHIBIT G-32

Original List Date: 7/10/2001
Last Updated: 12/21/2005
List Print Date: 01/12/2006
Claim Number: 00-TC-28
Issue: Mentally Disordered Offenders: Treatment as a Condition of Parole

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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, § 1181.2.)

Mr. Mark Sigman
Riverside County Sheriff's Office
4095 Lemon Street
P O Box 512
Riverside, CA 92502

Tel: (951) 955-2700
Fax: (951) 955-2720

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244
Fax: (916) 368-5723

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350
Fax: (916) 727-1734

Mr. David Hinchee
Department of Corrections (B-23)
Forensic Services
P.O. Box 942883
Sacramento, CA 94283-0001

Tel: (916) 324-4771
Fax: (916) 324-6621

Office of the County Counsel
County of San Luis Obispo
County Government Center, Room 386
San Luis Obispo, CA 93408

Tel: (805) 781-5400
Fax: (805) 781-4221

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 324-4888

Mr. Michael E. Cantrall California Public Defenders Association 3273 Ramos Circle, Suite 100 Sacramento, CA 95827	Tel: Fax:	(916) 362-1686 (916) 362-5498
Ms. Terrie Tatosian Department of Mental Health (A-31) 1600 9th Street, Room 150 Sacramento, CA 95814	Tel: Fax:	(916) 654-2378 (916) 654-2440
Mr. Steve Keil California State Association of Counties 1100 K Street, Suite 101 Sacramento, CA 95814-3941	Tel: Fax:	(916) 327-7523 (916) 441-5507
Ms. Marianne O'Malley Legislative Analyst's Office (B-29) 925 L Street, Suite 1000 Sacramento, CA 95814	Tel: Fax:	(916) 319-8315 (916) 324-4281
Mr. J. Bradley Burgess Public Resource Management Group 1380 Lead Hill Boulevard, Suite #106 Roseville, CA 95661	Tel: Fax:	(916) 677-4233 (916) 677-2283
Ms. Jesse McGuinn Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: Fax:	(916) 445-8913 (916) 327-0225
Ms. Bonnie Ter Keurst County of San Bernardino Office of the Auditor/Controller-Recorder 222 West Hospitality Lane San Bernardino, CA 92415-0018	**Claimant** Tel: Fax:	 (909) 386-8850 (909) 386-8830
Ms. Ginny Brummels State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: Fax:	(916) 324-0256 (916) 323-6527
Mr. Allan Burdick MAXIMUS 4320 Auburn Blvd., Suite 2000 Sacramento, CA 95841	Tel: Fax:	(916) 485-8102 (916) 485-0111

*Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Tel: (213) 974-8564

Fax: (213) 617-8106

EXHIBIT G-35

victims.

(e) To encourage and facilitate community support for child abuse and neglect programs.

18982.3. Councils may form committees to carry out specific functions, such as the following:

(a) Interagency coordination committees.
(b) Multidisciplinary personnel teams.
(c) Professional training committees.
(d) Public awareness committees.
(e) Service improvement committees.
(f) Advocacy committees.
(g) Fundraising committees.

18982.4. The multidisciplinary personnel team provisions of subdivision (*l*) of Section 5328, subdivision (d) of Section 18951, and Section 18961 shall apply to child abuse prevention coordinating councils funded under this chapter.

Article 3. Selection and Administration

18983. Each county shall fund child abuse prevention coordinating councils which meet the criteria in Section 18982 from the county's children's trust fund. In the event that the county does not create a children's trust fund, the board of supervisors shall apply for funds from the State Children's Trust Fund. Initial funding of councils shall be scheduled to accommodate ongoing funding of programs or funds already encumbered for other purposes.

Funds for councils selected pursuant to this chapter shall not be considered administrative costs for purposes of Sections 18967 and 18969.

18983.3. In the event that more than one council per county exists, the county board of supervisors shall develop a procedure for selecting a council for funding. More than one existing council may be funded in counties with geographically distinct population centers.

18983.4. For counties without existing councils the county board of supervisors shall make every effort to facilitate the formation and funding of a council in that county.

18983.5. Councils funded under this chapter shall be incorporated as nonprofit corporations, or established as independent organizations within county government, or comparably independent organizations as determined by the office. New or existing councils may apply for funds using a fiscal agent pending incorporation.

18983.6. Councils receiving funding under this chapter shall develop a protocol for interagency coordination and provide yearly reports to the county board of supervisors.

18983.8. Councils receiving funding under this chapter shall provide a local cash or in-kind match of 33⅓ percent. For councils unable to raise the full match for the maximum allocation, a partial grant shall be provided in the amount of three grant dollars to each match dollar.

Article 4. Fiscal Provisions

18984. This chapter shall remain in effect only until June 30, 1989, and as of that date is repealed, unless a later enacted statute, which is enacted before June 30, 1989, deletes or extends that date.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a county has the authority to obtain sufficient funds to pay for the program or level of service mandated by this act.

CHAPTER 1418

An act to add Section 2970 to the Penal Code, relating to mentally disordered offenders.

[Approved by Governor October 1, 1985. Filed with Secretary of State October 1, 1985.]

The people of the State of California do enact as follows:

SECTION 1. Section 2970 is added to the Penal Code, to read:

2970. (a) Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2960, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits. The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall state the reasons necessitating the continued treatment, with accompanying affidavits specifying the conditions in subdivision (b) of Section 2960 and that treatment during the parole period, if any, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify why the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued.

(b) The court shall conduct a hearing on the petition for

continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing is a civil hearing, however, in order to reduce costs the rules of criminal discovery as well as civil discovery shall be applicable. The need for continued treatment shall be proven beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(c) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(d) If the court or jury finds that the patient is a person described in subdivision (b) of Section 2960, and his or her severe mental disorder is not in remission or cannot be kept in remission if treatment is not continued, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in subdivision (a).

(e) The person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(f) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient remains a person described in subdivision (b) of Section 2960 in which severe mental disorder is not in remission or cannot be kept in remission if treatment is not continued. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(g) Any commitment under this section places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(h) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 1 (commencing with Section 5325) of Chapter 2 of Part 1 of Division

5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This paragraph and the regulations adopted pursuant thereto shall become operative on January 1, 1987.

(i) This section applies to persons incarcerated before, as well as after, the effective date of this section.

(j) The definitions in Section 2960 apply to this section.

(k) If there is a conflict between the provisions of this section and Section 2960, the provisions of Section 2960 shall apply.

SEC. 1.5. Notwithstanding any other provision of law, there shall be no prohibition or limitation on the placement in any state hospital by the Director of Mental Health of judicially committed persons or persons confined in a state hospital for purposes of mental health treatment pursuant to the Penal Code.

SEC. 1.7. Reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.

SEC. 2. This act shall only become operative if SB 1296 of the 1985–86 Regular Session is enacted, in which case both this act and SB 1296 shall become operative on the operative date contained in SB 1296. If SB 1296 of the 1985–86 Regular Session is not enacted, this act shall not become operative.

CHAPTER 1419

An act to amend Sections 2960 and 3003 of the Penal Code, relating to prisoners.

[Approved by Governor October 1, 1985. Filed with Secretary of State October 1, 1985.]

The people of the State of California do enact as follows:

SECTION 1. Section 2960 of the Penal Code is amended to read:

2960. (a) The Legislature finds that there are prisoners who have a treatable, severe mental disorder which caused, was one of the causes of, or was an aggravating factor in the commission of the crimes for which they were incarcerated. Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole from or termination of parole, there is a danger to society, and the

Legislature finds that in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission.

The Legislature further finds and declares the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community.

(b) As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(1) The prisoner has a severe mental disorder which is not in remission or cannot be kept in remission without treatment. The term "severe mental disorder" means an illness or disease or condition which substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or which demonstrates evidence of an acute brain syndrome for which prompt remission in the absence of treatment is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances. The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(2) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(3) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(4) Prior to release on parole the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission due to medical or psychosocial reasons or failure of the prisoner to voluntarily follow prescribed medical treatment, or both, and that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

If the professionals doing the evaluation do not concur that (A) the prisoner has a severe mental disorder, or (B) that the disorder is not in remission or cannot be kept in remission, or (C) that the severe mental disorder was a cause of, or aggravated the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, who have at least five years of experience in the diagnosis and treatment of mental disorders, who may be either psychiatrists, or licensed psychologists who have a doctoral degree in psychology. Only if both independent professionals concur with the chief psychiatrist's certification, shall the provisions of this subdivision be applicable to the prisoner.

On July 1 of each year the Department of Corrections and the State Department of Mental Health shall submit to the Board of Prison Terms a list of 20 or more independent professionals on which both departments concur. The professionals shall not be state government employees and shall have at least five years of experience in the diagnosis and treatment of mental disorders and shall include psychiatrists and licensed psychologists who have a doctoral degree in psychology. For purposes of this subdivision, when the Board of Prison Terms receives the list, they shall only appoint independent professionals from the list. The list shall not be binding on the Board of Prison Terms until they have received it, and shall not be binding after June 30 following receipt of the list.

(5) The crime referred to in paragraph (2) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

(c) (1) The treatment required by subdivision (b) shall be inpatient unless the State Department of Mental Health certifies to the Board of Prison Terms that there is reasonable cause to believe the parolee can be safely and effectively treated on an outpatient basis, in which case the Board of Prison Terms shall permit the State Department of Mental Health to place the parolee in an outpatient treatment program specified by the State Department of Mental

Health. Any prisoner who is to be required to accept treatment pursuant to subdivision (b) shall be informed in writing of his or her right to request a hearing pursuant to subdivision (d). Prior to placing a parolee in a local outpatient program, the State Department of Mental Health shall consult with the local outpatient program as to the appropriate treatment plan. Notwithstanding any other provision of law, a parolee ordered to have outpatient treatment pursuant to this section may be placed in an outpatient treatment program used to provide outpatient treatment under Title 15 (commencing with Section 1600) of Part 2, but the procedural provisions of Title 15 shall not apply. The director of an outpatient program used to provide treatment under Title 15 in which a parolee is placed may place the parolee in a secure mental health facility if the parolee can no longer be safely or effectively treated in the outpatient program, and until the parolee can be safely and effectively treated in the program. Within 15 days after placement in a secure facility the State Department of Mental Health shall conduct a hearing on whether the parolee can be safely and effectively treated in the program. Before deciding to seek revocation of the parole of a parolee receiving mental health treatment pursuant to subdivision (b), and return him or her to prison, the parole officer shall consult with the director of the parolee's outpatient program.

(2) If the State Department of Mental Health has not placed a parolee on outpatient treatment within sixty days after receiving custody of the parolee or after parole is continued pursuant to Section 3001, the parolee may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing to determine whether the prisoner shall be treated as an inpatient or an outpatient. At the hearing, the burden shall be on the State Department of Mental Health to establish that the prisoner requires inpatient treatment as described in this subdivision. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in paragraph (4) of subdivision (b).

(d) (1) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner does not meet the criteria in subdivision (b). At the hearing the burden of proof shall be on the person or agency who certified the prisoner under paragraph (4) of subdivision (b). If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in paragraph (4) of subdivision (b). The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to paragraph (2) of this subdivision. The Board of Prison Terms shall provide a prisoner who requests a trial a petition form and instructions for filing the petition.

(2) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of subdivision (b), may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she meets the criteria of subdivision (b). The court shall conduct a hearing on the petition within sixty calendar days after the petition is filed, unless either time is waived by the petitioner or his counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(3) The provisions of this subdivision shall be applicable to a continuation of a parole pursuant to Section 3001.

(e) If the prisoner's severe mental disorder is put into remission during the parole period, and can be kept in remission, the Director of Mental Health shall notify the Board of Prison Terms and the State Department of Mental Health shall discontinue treating the parolee.

(f) (1) Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by this section, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits. The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall state the reasons necessitating the continued treatment, with accompanying affidavits specifying the conditions in subdivision (b) and that treatment during the parole period, if any, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify why the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued.

(2) The court shall conduct a hearing on the petition for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial.

The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. The need for continued treatment shall be proven beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(3) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(4) If the court or jury finds that the patient is a person described in subdivision (b), and his or her severe mental disorder is not in remission or cannot be kept in remission if treatment is not continued, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in paragraph (1).

(5) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this paragraph, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(6) Prior to the termination of a commitment under this subdivision, a petition for recommitment may be filed to determine whether the patient remains a person described in subdivision (b) which severe mental disorder is not in remission or cannot be kept in remission if treatment is not continued. The recommitment proceeding shall be conducted in accordance with the provisions of this subdivision.

(7) Any commitment under this section places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(8) Except as provided in this paragraph, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This paragraph and the regulations adopted pursuant thereto shall become operative on January 1, 1987.

(g) Before releasing any inmate or terminating supervision of any parolee who is a danger to self or others, or gravely disabled as a result of mental disorder, and who does not come within the provisions of subdivision (b), the Director of Corrections may, upon probable cause, place, or cause to be placed, the person in a state hospital pursuant to the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code.

(h) The cost of inpatient or outpatient treatment under this article shall be a state expense while the person is under the jurisdiction of the Department of Corrections.

(i) Any person placed outside of a facility of the Department of Corrections for the purposes of inpatient treatment under this article shall not be deemed to be released from imprisonment or from the custody of the Department of Corrections prior to the expiration of the maximum term of imprisonment of the person.

(j) The amendments to this section made in the first year of the 1985–86 Regular Session apply to persons incarcerated before, as well as after, the effective date of those amendments.

SEC. 2. Section 3003 of the Penal Code is amended to read:

3003. (a) An inmate who is released on parole shall be returned to the county from which he or she was committed.

(b) Notwithstanding subdivision (a), an inmate may be returned to another county in a case where that would be in the best interests of the public and of the parolee. If the authority setting the conditions of parole decides on a return to another county, it shall place its reasons in writing in the parolee's permanent record. In making its decision, the authority may consider, among others, the following factors:

(1) The need to protect the life or safety of a victim, the parolee, a witness or any other person.

(2) Public concern that would reduce the chance that the inmate's parole would be successfully completed.

(3) The verified existence of a work offer, or an educational or vocational training program.

(4) The last legal residence of the inmate having been in another county.

(5) The existence of family in another county with whom the inmate has maintained strong ties and whose support would increase the chance that the inmate's parole would be successfully completed.

(6) The lack of necessary outpatient treatment programs for parolees receiving treatment pursuant to Section 2960.

(c) An inmate may be paroled to another state pursuant to any other provision of law.

SEC. 2.5. Notwithstanding any other provision of law, there shall be no prohibition or limitation on the placement in any state hospital by the Director of Mental Health of judicially committed persons or

EXHIBIT H-4

of persons confined in a state hospital for purposes of mental health treatment pursuant to the Penal Code.

SEC. 2.75. The Legislature finds and declares that Department of Corrections prisoners subject to the provisions of this act are in a separate, distinct class from persons who have been committed by the State Department of Mental Health under the provisions of Section 1026 or 1370 of the Penal Code, or former Section 6316 of the Welfare and Institutions Code. Therefore, it is not intended that any provision of this act be construed in any way to effect the status of persons committed to the State Department of Mental Health under Section 1026 or 1370 of the Penal Code, or former Section 6316 of the Welfare and Institutions Code. Nor are the provisions of this act intended in any manner to affect decisional law interpreting those statutes.

SEC. 2.85. Reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.

SEC. 3. Except as provided in paragraph (8) of subdivision (f) of Section 2960 of the Penal Code, this act shall become operative on July 1, 1986.

CHAPTER 1420

An act to add Section 11165.5 to the Penal Code, relating to crimes.

[Approved by Governor October 1, 1985. Filed with Secretary of State October 1, 1985.]

The people of the State of California do enact as follows:

SECTION 1. Section 11165.5 is added to the Penal Code, to read:

11165.5. As used in Sections 11165 and 11166.5, "child care custodian," in addition to the persons specified therein, means an instructional aide, a teacher's aide, or a teacher's assistant employed by any public or private school, who has been trained in the duties imposed by this article, if the school district has so warranted to the State Department of Education. It also includes a classified employee of any public school who has been trained in the duties imposed by this article if the school has so warranted to the State Department of Education.

SEC. 2. School districts which do not train the employees specified in Section 11165.5 of the Penal Code in the duties of child care custodians under the child abuse reporting laws shall report to the State Department of Education the reasons why this training is

not provided.

SEC. 3. The Legislature declares that this act mandates a new program or higher level of service on local government. As required by Section 6 of Article XIII B of the California Constitution, reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.

CHAPTER 1421

An act to amend Sections 39510 and 39512.5 of, and to repeal Section 39510.5 of, the Health and Safety Code, relating to air pollution.

[Approved by Governor October 1, 1985. Filed with Secretary of State October 1, 1985.]

The people of the State of California do enact as follows:

SECTION 1. Section 39510 of the Health and Safety Code is amended to read:

39510. (a) The State Air Resources Board is continued in existence in the Resources Agency. The state board shall consist of nine members.

(b) The members shall be appointed by the Governor with the consent of the Senate on the basis of their demonstrated interest and proven ability in the field of air pollution control and their understanding of the needs of the general public in connection with air pollution problems. Five members shall have the following qualifications:

(1) One member shall have training and experience in automotive engineering or closely related fields.

(2) One member shall have training and experience in chemistry, meteorology, or related scientific fields, including agriculture or law.

(3) One member shall be a physician and surgeon or an authority on health effects of air pollution.

(4) One member shall be a public member.

(5) One member shall have the qualifications specified in paragraph (1), (2), or (3) or shall have experience in the field of air

EXHIBIT H-5

STATE OF CALIFORNIA
GRAY DAVIS, Governor

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

July 10, 2001

Mr. John Logger
SB-90 Coordinator
County of San Bernardino
222 West Hospitality Lane, 4th Floor
San Bernardino, CA 92415-0018

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

Re: *Mentally Disordered Offenders: Treatment as a Condition of Parole* - 00-TC-28
County of San Bernardino, Claimant
Statutes of 1994, Chapter 706
Statutes of 1989, Chapter 228
Statues of 1988, Chapter 658
Statutes of 1987, Chapter 687
Statutes of 1986; Chapter 858
Penal Code Section 2966

Dear Mr. Logger:

The Commission on State Mandates determined that the subject test claim submittal is complete. The test claim initiates the process for the Commission to consider whether the provisions listed above impose a reimbursable state-mandated program upon local entities. State agencies and interested parties are receiving a copy of this test claim because they may have an interest in the Commission's determination.

The key issues before the Commission are:

- Do the provisions listed above impose a new program or higher level of service within an existing program upon local entities within the meaning of section 6, article XIII B of the California Constitution and costs mandated by the state pursuant to section 17514 of the Government Code?

- Does Government Code section 17556 preclude the Commission from finding that any of the test claim provisions impose costs mandated by the state?

EXHIBIT I

The Commission requests your participation in the following activities concerning this test claim:

- **Informal Conference.** An informal conference may be scheduled if requested by any interested party. See Title 2, California Code of Regulations, section 1183.04 (the regulations).

- **State Agency Review of Test Claim.** State agencies receiving this letter are requested to analyze the merits of the enclosed test claim and to file written comments on the key issues before the Commission. Alternatively, if a state agency chooses not to respond to this request, please submit a written statement of non-response to the Commission. Requests for extensions of time may be filed in accordance with sections 1183.01 (c) and 1181.1 (g) of the regulations. State agency comments are due 30 days from the date of this letter.

- **Claimant Rebuttal.** The claimant and interested parties may file rebuttals to state agencies' comments under section 1183.02 of the regulations. The rebuttal is due 30 days from the service date of written comments.

- **Hearing and Staff Analysis.** A hearing on the test claim will be set when the record closes. Pursuant to section 1183.07 of the Commission's regulations, at least eight weeks before the hearing is conducted, a draft staff analysis will be issued to parties, interested parties, and interested persons for comment. Comments are due 30 days following receipt of the analysis. Following receipt of any comments, and before the hearing, a final staff analysis will be issued.

- **Mailing Lists.** Under section 1181.2 of the Commission's regulations, the Commission will promulgate a mailing list of parties, interested parties, and interested persons for each test claim and provide the list to those included on the list, and to anyone who requests a copy. Any written material filed on that claim with the Commission shall be simultaneously served on the other parties listed on the claim.

- **Dismissal of Test Claims.** Under section 1183.09 of the Commission's regulations, test claims filed after May 5, 2001, may be dismissed if postponed or placed on inactive status by the claimant for more than one year. Prior to dismissing a test claim, the Commission will provide 150 days notice and opportunity for other parties to take over the claim.

If the Commission determines that a reimbursable state mandate exists, the claimant is responsible for submitting proposed parameters and guidelines for reimbursing all eligible local entities. All interested parties and affected state agencies will be given an opportunity to comment on the claimant's proposal before consideration and adoption by the Commission.

Finally, the Commission is required to adopt a statewide cost estimate of the reimbursable state-mandated program within 12 months of receipt of an amended test claim. This deadline may be extended for up to six months upon the request of either the claimant or the Commission.

Please contact Nancy Patton at (916) 323-8217 if you have any questions.

Sincerely,

SHIRLEY OPIE
Assistant Executive Director

Enclosures: Mailing List and Test Claim

f:/mandates/2000/tc/00tc27/completeltr

List Date: 07/10/2001 Mailing Information

Mailing List

Claim Number 00-TC-28 **Claimant** County of San Bernardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Harmeet Barkschat,
Mandate Resource Services

8254 Heath Peak Place
Antelope CA 95843

Tel: (916) 727-1350
FAX: (916) 727-1734

Interested Person

Mr. Louie DiNinni, Executive Officer
Board of Prison Terms

1515 K Street, Suite 600
Sacramento CA 95814-4053

Tel: (916) 445-1539
FAX: (916) 445-5242

State Agency

Mr. Glenn Haas, Bureau Chief (B-8)
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500
Sacramento CA 95816

Tel: (916) 445-8756
FAX: (916) 323-4807

State Agency

Mr. Steve Keil,
California State Association of Counties

1100 K Street Suite 101
Sacramento CA 95814-3941

Tel: (916) 327-7523
FAX: (916) 441-5507

Interested Person

Mr. John Logger, SB-90 Coordinator
Auditor-Controller's Office

222 West Hospitality Lane
San Bernardino CA 92415-0018

Tel: (909) 386-8850
FAX: (909) 386-8830

Claimant

Claim Number 00-TC-2[illegible] Claimant County of San[illegible]rnardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Mr. James Lombard, Principal Analyst (A-15)
Department of Finance

915 L Street
Sacramento CA 95814

Tel: (916) 445-8913
FAX: (916) 327-0225

State Agency

Mr. Stephen Mayberg, Director
Department of Mental Health

1600 9th Street
Sacramento CA 95814

Tel: (916) 654-3565
FAX: (916) 654-3198

State Agency

Mr. Manuel Medeiros, Asst. Attorney General (D-8)
Department of Justice
Government Law Section
1300 I Street 17th Floor
Sacramento CA 95814

Tel: (916) 324-5475
FAX: (916) 324-8835

State Agency

Mr. Ron Metz, Facility Captain - MDO Program
Department of Corrections

P O Box 942883
Sacramento CA 94283-0001

Tel: (916) 324-4771
FAX: (916) 000-0000

State Agency

Mr. Paul Minney,
Spector, Middleton, Young & Minney, LLP

7 Park Center Drive
Sacramento Ca 95825

Tel: (916) 646-1400
FAX: (916) 646-1300

Interested Person

Ms. Marianne O'Malley, Principal Fiscal & Policy Analyst (B-29)
Legislative Analysts' Office

925 L Street Suite 1000
Sacramento CA 95814

Tel: (916) 445-6442
FAX: (916) 324-4281

Interested Person

Claim Number 00-TC-[illegible] Claimant County of San[illegible]rnardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Mr. Keith B. Petersen, President
Sixten & Associates

5252 Balboa Avenue Suite 807
San Diego CA 92117

Tel: (858) 514-8605
FAX: (858) 514-8645

Interested Person

Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.

2275 Watt Avenue Suite C
Sacramento CA 95825

Tel: (916) 487-4435
FAX: (916) 487-9662

Interested Person

Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518 P.O. Box 942850
Sacramento CA 95814

Tel: (916) 323-5849
FAX: (916) 324-7223

State Agency

Ms. Pam Stone, Legal Counsel
DMG-MAXIMUS

4320 Auburn Blvd. Suite 2000
Sacramento CA 95841

Tel: (916) 485-8102
FAX: (916) 485-0111

Interested Person

Mr. David Wellhouse,
Wellhouse & Associates

9175 Kiefer Blvd Suite 121
Sacramento CA 95826

Tel: (916) 368-9244
FAX: (916) 368-5723

Interested Person

Mr. Gary Winsom, President
California Public Defenders Association

3273 Ramos Circle, Suite 100
Sacramento CA 95827

Tel: (916) 362-1686
FAX: (916) 362-5498

Interested Person

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2/91)

For Official Use Only
Claim No.

TEST CLAIM FORM

Local Agency or School District Submitting Claim

COUNTY OF SAN BERNARDINO

Contact Person — Telephone No.

Bonnie Ter Keurst (as amended); Original claim – John Logger (909) 386-8850

Address

OFFICE OF THE AUDITOR/CONTROLLER-RECORDER
222 W. HOSPITALITY LANE, SAN BERNARDINO, CA 92415-0018

Representative Organization to be Notified

None

This test claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.
Statutes of 1986, Chapter 858 (Section 4); Statutes of 1987, Chapter 687 (Section 8); Statutes of 1988, Chapter 658 (Section 1); Statutes of 1989, Chapter 228 (Section 2); Statutes of 1994, Chapter 706 (Section 1); Statutes of 1985, Chapter 1419; Penal Code Section 2966

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative — Telephone No.

Bonnie Ter Keurst
REIMBURSABLE PROJECTS MANAGER — (909) 386-8850

Signature of Authorized Representative — Date

Bonnie Ter Keurst — February 2, 2006

EXHIBIT J

COUNTY OF SAN BERNARDINO
TEST CLAIM
As Amended February 2, 2006

Penal Code Section 2966
Statutes of 1985, Chapter 1419
Statutes of 1986, Chapter 858
Statutes of 1987, Chapter 687
Statutes of 1988, Chapter 658
Statutes of 1989, Chapter 228
Statutes of 1994, Chapter 706

MENTALLY DISORDERED OFFENDERS; TREATMENT AS A CONDITION OF PAROLE

TEST CLAIM NARRATIVE:

The statutes cited above that are the subject of this test claim added and amended Section 2966 of the California Penal Code. Section 2966 allows a prisoner or parolee to file a petition in superior court to challenge the State's determination that the prisoner/parolee is a mentally disordered offender (MDO) and subject to Penal Code Section 2962 which requires continued mental health treatment as a condition of parole.

Section 2962 defines the criteria under which the State can require an MDO be treated for a severe mental disorder by the State Department of Mental Health. The criteria includes:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment.
(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.
(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.
(d) Psychiatric professionals of the State Department of Mental Health and the Department of Corrections have certified to the Board of Prison Terms that the prisoner has a severe mental disorder.
(e) The prisoner received a determinate sentence and the prison sentence was imposed for specified crimes such as voluntary manslaughter, kidnapping, robbery with a dangerous weapon, and rape.

Section 2966 allows the prisoner or parolee to request a hearing before the State Board of Prison Terms to appeal the determination that Section 2962 applies to them. If the MDO continues to disagree with the Section 2962 determination of the Board of Prison Terms he or she may appeal that decision to the superior court of the county in which they are incarcerated or being treated.

The superior court is then required to conduct a civil hearing on the petition within 60 calendar days. The MDO is entitled to representation by a public defender (or a county-provided indigent defense attorney) and has the right to a jury trial requiring a unanimous verdict of the jury to uphold the state's position. The district attorney is required to represent the state's determination of the applicability of Section 2962 in these proceedings.

It should be noted that the determination and the defense of an MDO involves complex psychiatric issues such as whether the offender has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others. Therefore, the County of San Bernardino has had to provide specialized attorney, expert, investigator, paralegal, and secretarial services in order to perform these mandated duties.

Upon the filing of an appeal pursuant to Penal Code Section 2966, each MDO's criminal and treatment case information must be carefully reviewed by the district attorney and the public defender. Reviewing attorneys may need travel to and from state hospitals where detailed MDO medical records and other case file information is maintained. Forensic expert witnesses are appointed by the court at the request of indigent defense counsel. Such experts are regularly consulted in preparing the case for trial.

Once an MDO appeal proceeding is scheduled, MDOs are transported from their State hospitals or prison to county facilities (and returned if required) by the county sheriff's department. The sheriff's department is also responsible for MDO care and custody associated with confinement awaiting, during, and (if necessary) after their court proceeding.

Therefore, under the subject law, the county has had to provide specialized legal services in selecting, filing, adjudicating MDO defendants as well as transporting and housing such defendants during the pendency of their appeals.

The State's MDO population is primarily housed at Patton and Atascadero State Hospitals. Because Section 2966 hearings must take place in the superior court of the county in which the hospital is located, San Bernardino County and San Luis Obispo County (respectively) are subject to the majority of the costs for this mandate.

SIMILAR SERVICES HAVE BEEN FOUND TO BE REIMBURSABLE

The types of 'costs mandated by the state', as defined in Government Code Section 17514 and claimed herein are all reimbursable to the County under comparable programs, like the 'not guilty by reason of insanity' (NGI), 'sexually violent predator' (SVP), and the 'mentally disordered offender' (MDO) extended commitment programs.

These activities include:

- Review of the state's written evaluation and supporting affidavits indicating that the

offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment;

- Prepare and file responses with the superior court to the prisoner's petition to appeal the Board of Prison Terms decision;
- Represent the State and the indigent prisoner in civil hearing on the petition and any subsequent petitions or hearings regarding the applicability of Penal Code Section 2962;
- Retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions;
- Travel to and from state hospitals where detailed medical records and case files are maintained;
- Travel to and from state hospitals by the defense counsel in order to meet with the prisoner client;
- Provide transportation and custody by the county sheriff's department of each potential mentally disordered offender before, during, and after the civil proceedings.

WIC 4117 PROVIDES LIMITED REIMBURSEMENT FOR MDO APPEALS

It should be noted that WIC 4117 provides very limited reimbursement for MDO appeals. For example, no reimbursement for indirect costs is provided. Further WIC 4117 is not a reliable funding source. Even reimbursement for a small percentage of a claimant's costs may not be available because the appropriation is exhausted and no deficiency is authorized. Therefore, in order to ensure the uniform and reliable performance of MDO appeal proceedings throughout the State it is imperative that dependable and comprehensive reimbursement for all counties' MDO "costs mandated by the State" be provided.

MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by these statutes clearly meets both tests that the Supreme Court in the *County of Los Angeles v. State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on state Mandates relies upon to determine if a reimbursable mandate exists, are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate Is Unique to Local Government

The statutory scheme set forth above imposes a unique requirement on local government. Only the county district attorney and public defender (or County provided defense attorney) may appear and represent the respective parties in these court proceedings. Where transportation and housing cannot be provided by the State institution, the county sheriff's department must perform these functions. This mandate applies only to local government.

Mandate Carries Out a State Policy

The mandate clearly carries out state policy. In Penal Code Section 2960, the Legislature finds that if the severe mental disorders of these prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public by requiring these prisoners to continue to receive treatment for these disorders.

GOVERNMENT CODE SECTION 17556 DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code Section 17556 which would prohibit a finding of costs mandated by the state. The letter in parenthesis represents the pertinent subsection of 17556.

(a) San Bernardino County did not request the legislation imposing the mandate.

(b) The statutes do not affirm for the state that which had been declared existing law or regulation by action of the courts.

(c) The statutes do not implement a federal law or regulation.

(d) The statutes do not provide fee authority sufficient to pay for the mandated program

(e) The statutes do not provide for offsetting savings resulting which result in no net costs to local agencies or school districts, nor do they include additional revenue specifically intended to sufficiently fund the costs of the state mandate.

(f) The statutes do not impose duties expressly included in a ballot measure approved by the voters in a statewide election.

(g) The costs claimed for reimbursement are not related to the enforcement of a new crime or infraction.

Therefore, the above seven disclaimers do not prohibit a finding for state reimbursement for the costs mandated by the state as contained in these test claim statutes.

COSTS MANDATED BY THE STATE:

Government Code Section 17514 defines "costs mandated by the state" as:

"Any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1,

EXHIBIT J-11

1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

The activities required by Penal Code Section 2966 as added and/or amended by the statutes of this test claim, result in increased costs which local agencies are required to incur after July 1, 1980, as a result of a statute enacted on or after January 1, 1975.

Therefore, based on the foregoing, the County of San Bernardino respectfully requests that the Commission on State Mandates determine that these test claim statutes impose reimbursable state-mandated costs pursuant to Section 6 of Article XIII B of the California Constitution.

EFFECTIVE DATES FOR REIMBURSEMENT

Due to the filing date of this test claim, July 2, 2001 (note: June 30, 2001 falls on a Saturday), local agencies are entitled to reimbursement for this program from July 1, 1999. All subject test claim statutes were chaptered and effective prior to July 1, 1999.

ESTIMATED COSTS

The following are estimated costs for a complete fiscal year (2000/01):

District Attorney	$110,000
Public Defender	130,000
Sheriff	50,000
TOTAL	$290,000

DECLARATION of CLAIMANT:

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Originally executed the 2nd day of July, 2001, at San Bernardino, California by Aly Saleh, Chief Deputy Auditor. This amendment is executed the 2nd day of February, 2006 at San Bernardino, California by:

Bonnie Ter Keurst

Bonnie Ter Keurst, Manager Reimbursable Projects

SCHEDULE OF EXHIBITS

Exhibit A: Penal Code Section 2966

Exhibit B: Penal Code Section 2962

Exhibit C: Statutes of 1986, Chapter 858

Exhibit D: Statutes of 1987, Chapter 687

Exhibit E: Statutes of 1988, Chapter 658

Exhibit F: Statutes of 1989, Chapter 228

Exhibit G: Statutes of 1994, Chapter 706

Exhibit H: Statutes of 1985, Chapter 1419

l force to property in a manner
o persons in the area. People v
Dist) 68 Cal App 4th 1120, 80
., 11,24.

of unarmed second-degree rob-
by any actual display of force
ırt, and resulting in no bodily
ıot constitute a crime of "force
'enal C § 2962. Accordingly,
ıave been adjudged a mentally
DO), and his commitment was
zalone (1999) 19 Cal 4th 1074,
ıtr 2d 315, 969 P2d 160.

in Penal C § 2962(e)(2)(P) is
include the implied threat of
ery defendant's disclosure that
f the Legislature had intended
f force was sufficient to sustain
ordered offender) commitment,
o provided, as it did in several
tions (e.g., §§ 136.1(c)(1) [in-
"by force or by an express or
or violence"], 190.3 [permit-
pital cases of defendant's other
lving the "express or implied
violence"], 261(b) [defining
ıte as meaning "direct or im-
lolence, etc.]). People v Anza-
h 1074, 1080, 81 Cal Rptr 2d

ive intent underlying Penal C
e treatment of defendants as
ordered offenders) only in cer-
s, namely where, because of
risoner inflicted serious bodily
ch forcible or violent crimes as
, kidnapping, rape, or robbery
on use. Given the aggravated
imes specified in § 2962(e)(2),
usion of robberies involving
adly or dangerous weapon in
it is quite unlikely that the
make every robbery attempt a
v Anzalone (1999) 19 Cal 4th
tr 2d 315, 969 P2d 160.

n for arson of property, defen-
committed as a mentally dis-
O) under Penal C § 2962. De-
pline to set fire to his wife's
r she filed for divorce. At the
ommitted as an MDO, arson
njury under Penal C § 451(a)
umerated MDO offense, but
ıot. Subsequently, the Legisla-
gislation defining an MDO of-
n in violation of any provision
of § 455 where the act posed
physical harm to others. It is
e of the amendment that it ap-
ıdy committed under § 2962.
tes are part of a civil scheme
te the rule against ex post facto
's arson offense posed a sub-
ccupants of nearby structures,
(e)(2)(L). People v Macauley
l App 4th 704, 86 Cal Rptr 2d

Defendant, convicted of stalking, was properly committed as a mentally disordered offender (MDO) under Penal C § 2962, even though his offense did not involve "force or violence." While serving his prison sentence, defendant had been diagnosed as suffering from a bipolar disorder. The amendment to § 2962 was designed to prevent the release of MDO's on the sole ground that their crimes involved the threat of force rather than actual force. Because the MDO statutes are part of a civil scheme which does not implicate the rule against ex post facto laws, the amendment may be applied retroactively. Defendant's stalking offense under Penal C § 646.9(e)(2)(Q) met the criteria in that he followed his victim and threatened to kill her and members of her family. These threats were made in such a manner that a reasonable person would believe and expect that the force or violence would be used. People v Butler (1999, 2nd Dist) 74 Cal App 4th 557, 88 Cal Rptr 2d 210.

Defendant was convicted and imprisoned for making terrorist threats. He had said to his father's girlfriend, among other things, "I'm going to get my friends out here to kill you." For purposes of determining whether defendant was a mentally disordered offender (MDO), his conviction of Penal C § 422 involved a threat of immediate force or violence likely to produce substantial physical harm, as required by Penal C § 2962(e)(2)(Q). Although defendant argued that his threats concerned only future violence, the immediacy element of defendant's threat was adjudicated by his guilty plea and conviction. People v Lopez (1999, 2nd Dist) 74 Cal App 4th 675, 679, 88 Cal Rptr 2d 252.

§ 2966. Administrative hearing regarding eligibility for treatment; Superior court hearing; Continuation of treatment

(a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing, the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. *Evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the Board of Prison Terms hearing shall not be considered.* The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. *The court may, upon stipulation of both parties, receive in evidence the affidavit or declaration of any psychiatrist, psychologist, or other professional person who was involved in the certification and hearing process, or any professional person involved in the evaluation or treatment of the petitioner during the certification process. The court may allow the affidavit or declaration to be read and the contents thereof considered in the rendering of a decision or verdict in any proceeding held pursuant to subdivision (b) or (c), or subdivision (a) of Section 2972. If the court or jury reverses the determination of the Board of Prison Terms, the*

inning in 1992.
Italics indicate changes or additions. * * * indicate omissions.

court shall stay the execution of the decision for five working days to allow fo an orderly release of the prisoner.

(c) If the Board of Prison Terms continues a parolee's mental health treatmer under Section 2962 when it continues the parolee's parole under Section 3001 the procedures of this section shall only be applicable for the purpose c determining if the parolee has a severe mental disorder, whether the parolee' severe mental disorder is not in remission or cannot be kept in remission witho treatment, and whether by reason of his or her severe mental disorder, the parole represents a substantial danger of physical harm to others.

Amended Stats 1994 ch 706 § 1 (SB 1918).

Amendments:

1994 Amendment: Amended subd (b) by (1) adding the third sentence; and (2) the tenth, eleventh, and twelfi sentences.

Editor's Notes—For legislative intent, see the 1989 Note following Pen C § 2962.

NOTES OF DECISIONS

Principles of double jeopardy, res judicata, and collateral estoppel did not preclude the filing of another mentally disordered offender certification petition (Pen. Code, § 2960 et seq.) after defendant had successfully petitioned for outpatient treatment without having committed a new felony offense involving force or violence. Since the successful petition, there had been a change of circumstances in that while on outpatient parole defendant's mental health deteriorated, he was hearing voices, he cut his wrists, and he "cried out for help" by going to an outpatient clinic. A proceeding to determine mentally disordered offender status is not civil in nature even though the Legislature has so declared it in Pen. Code, § 2966, subd. (b). Where the mental health aspect of such a defendant has changed after reincarceration on parole for the same underlying offense, the People are not foreclosed from seeking a mentally disordered offender determination when parole is again imminent. People v Coronado (1994, 2nd Dist) 28 Cal App 4th 1402, 33 Cal Rptr 2d 835.

In a trial court hearing held at defendant's request after the Board of Prison Terms extended his commitment as a mentally disordered offender, the trial court committed harmless error in failing to instruct the jury sua sponte that it had to determine whether, as of the date of the board hearing, defendant had a severe mental disorder that was not in remission and represented a substantial danger to others. At both a hearing challenging a parolee's initial commitment and at an annual review hearing continuing that commitment, the trier of fact is required to determine that the parolee met the mentally disordered offender criteria on the date of the most recent board hearing. Nevertheless, defendant was not prejudiced by the error, since it was not reasonably probable that, even if the jury had been instructed properly, it would have found that defendant did not meet the mentally disordered offender criteria as of the proper date. People Bell (1994, 2nd Dist) 30 Cal App 4th 1705, 36 C Rptr 2d 746.

The trial court properly found defendant to be mentally disordered offender (MDO) pursuant to Pe C § 2962 et seq., where the date of the underlyin offenses occurred during the period after the MD statutory scheme was declared unconstitutional by th Court of Appeal and before the Legislature amende the statutes to comply with the decision. The retroa tive application of a nonpenal statute does not violat ex post facto laws. The MDO scheme is a nonpun tive, civil law in view of the Legislature's expres declaration that the MDO law provides prisoners wit a "civil hearing" to determine whether they meet th criteria of the MDO scheme (Pen C §§ 2966(b 2972(a)), despite the scheme's placement in the Pen Code. People v Robinson (1998, 2nd Dist) 63 C App 4th 348, 74 Cal Rptr 2d 52.

In a court trial, defendant was adjudged to be mentally disordered offender (MDO) as provided h Penal C § 2960 et seq. Counsel had waived a jur trial over defendant's objection. Although defenda did not dispute that an MDO proceeding is a civi rather than criminal matter, he relied on § 2966 whic provides for a jury trial unless waived by both th person and the district attorney. § 2966 concern persons who have been found by the Board of Pris Terms to be mentally disordered. The Legislatu must have contemplated that many persons, such defendant, might not be sufficiently competent determine their own best interests. There is no reas to believe the Legislature intended to leave the dec sion as to whether trial should be before the court a jury in the hands of such a person. People v O (1999, 2nd Dist) 70 Cal App 4th 1174, 1176, 83 C Rptr 2d 326.

§ 2970. Petition for continued involuntary treatment

Editor's Notes—For legislative intent, see the 1989 Note following Pen C § 2962.

NOTES OF DECISIONS

The trial court had jurisdiction to recommit a mentally disordered inmate, who was otherwise almost eligible for unconditional release, for "conti ued involuntary treatment" pursuant to Pen. Cod

iosity, narcissism, and hallucinations. He was also n abuser of cocaine, and had attempted suicide, ireatened hospital staff members, exposed himself, nd claimed to have magical powers and to be Jesus hrist. It could not be said as a matter of law that efendant suffered only from a "personality or adjustent disorder" (Pen. Code, § 3962, subd. (a)); or that s acts were the result of substance abuse or unflagng religious beliefs. These were inferences that ould have been drawn by the jury, but were not, and e reviewing court does not reweigh or reinterpret e evidence on appeal. People v Pace (1994, 2nd ist) 27 Cal App 4th 795.

A parole revocation was an act in excess of the oard of Prison Term's statutory authority, where an mate had served a determinate prison term, and ter his initial parole release date passed, but before was released into the community, his parole was voked twice, based solely on Cal Code Reg § 16(a)(7). Although the Legislature has vested the oard with broad power both to impose conditions of role and to revoke parole, it has also decreed that e Board has no discretion to withhold parole to a isoner who has served a determinate term. The gislature has directly addressed the public safety and treatment concerns such individuals present by supplementing the Lanterman-Petris-Short Act (W & I C § 5000 et seq.) with the mentally disordered offender law (Pen C § 2960 et seq.) and the Sexually Violent Predators Act (W & I C § 6600 et seq.). Each of those acts applies to a precisely defined category of individuals, prescribes a detailed sequence of evaluations and procedures that must be followed, and affords the affected individuals mandatory procedural safeguards, including the right to a jury trial, before civil commitment can occur. When considered together with Pen C § 3000, subd. (b)(1), the mandatory parole release provision of the determinate sentencing law, these statutes impliedly reflect a legislative choice to require the Department of Corrections and the Board to utilize one of these acts when confronted with the problem of the potentially dangerous mentally disordered inmate. Because the Legislature has so fully occupied the subject matter, the Board's utilization of the expedient of parole revocation under Cal Code Reg § 2616(a)(7) instead of civil commitment for the mentally disordered inmate who is about to released into the community on parole was unauthorized. Terhune v Superior Court (1998, 1st Dist) 65 Cal App 4th 864, 76 Cal Rptr 2d 841.

2962. Treatment as condition of parole; Criteria; Proof of substantial anger of physical harm

s a condition of parole, a prisoner who meets the following criteria shall be equired to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

a) The prisoner has a severe mental disorder that is not in remission or cannot e kept in remission without treatment.

The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional rocess, or judgment; or which grossly impairs behavior; or that demonstrates vidence of an acute brain syndrome for which prompt remission, in the absence f treatment, is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental etardation or other developmental disabilities, or addiction to or abuse of ntoxicating substances.

The term "remission" means a finding that the overt signs and symptoms of the evere mental disorder are controlled either by psychotropic medication or sychosocial support. A person "cannot be kept in remission without treatment" f during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(d)(1) Prior to release on parole a practicing psychiatrist or ps Health have evaluated the pris and a chief psychiatrist of Board of Prison Terms that disorder is not in remission, c that the severe mental disord factor in the prisoner's crimin for the severe mental disorder or her parole release day, and the prisoner represents a sub prisoners being treated by th Section 2684, the certification of Corrections, and the evalua at the state hospital in charge or psychologist from the Dep.

(2) If the professionals doing concur that (A) the prisoner is not in remission or cannot the severe mental disorder wa behavior, and a chief psychiat Terms pursuant to this paragr further examination by two in 2978.

(3) Only if both independent paragraph (2) concur with described in paragraph (2) The professionals appointed that the purpose of their exa prisoner meets certain criteria offender. It is not required information.

(e) The crime referred to in s

(1) The defendant received a the crime.

(2) The crime is one of the f

(A) Voluntary manslaughter.

(B) Mayhem.

(C) Kidnapping in violation

(D) Any robbery wherein it ally used a deadly or dange tion 12022, in the commissi

(E) Carjacking, as defined i proved that the defendant provided in subdivision (b) ing.

(F) Rape, as defined in para paragraph (1) or (4) of

(G) Sodomy by force, violen ful bodily injury on the vic

(1) Prior to release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

(2) If the professionals doing the evaluation pursuant to paragraph (1) do not concur that (A) the prisoner has a severe mental disorder, (B) that the disorder is not in remission or cannot be kept in remission without treatment, or (C) that the severe mental disorder was a cause of, or aggravated, the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978.

(3) Only if both independent professionals who evaluate the prisoner pursuant to paragraph (2) concur with the chief psychiatrist's certification of the issues described in paragraph (2), shall this subdivision be applicable to the prisoner. The professionals appointed pursuant to Section 2978 shall inform the prisoner that the purpose of their examination is not treatment but to determine if the prisoner meets certain criteria to be involuntarily treated as a mentally disordered offender. It is not required that the prisoner appreciate or understand that information.

(e) The crime referred to in subdivision (b) meets both of the following criteria:

(1) The defendant received a determinate sentence pursuant to Section 1170 for the crime.

(2) The crime is one of the following:

(A) Voluntary manslaughter.

(B) Mayhem.

(C) Kidnapping in violation of Section 207.

(D) Any robbery wherein it was charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery.

(E) Carjacking, as defined in subdivision (a) of Section 215, if it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of the carjacking.

(F) Rape, as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.

(G) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(H) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(I) Lewd acts on a child under the age of 14 years in violation of Section 288.

(J) Continuous sexual abuse in violation of Section 288.5.

(K) The offense described in subdivision (a) of Section 289 where the act was accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(*l*) Arson in violation of subdivision (a) of Section 451, or arson in violation of any other provision of Section 451 or in violation of Section 455 where the act posed a substantial danger of physical harm to others.

(M) Any felony in which the defendant used a firearm which use was charged and proved as provided in Section 12022.5, 12022.53, or 12022.55.

(N) A violation of Section 12308.

(O) Attempted murder.

(P) A crime not enumerated in *subparagraphs* (A) to (O), inclusive, in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (4) of subdivision (f) of Section 243.

(Q) A crime in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used. For purposes of this subparagraph, substantial physical harm shall not require proof that the threatened act was likely to cause great or serious bodily injury.

(f) As used in this chapter, "substantial danger of physical harm" does not require proof of a recent overt act.

Amended Stats 1995 ch 761 § 1 (SB 34); Stats 1998 ch 936 § 16 (AB 105), effective September 28, 1998; Stats 1999 ch 16 § 1 (SB 279), effective April 22, 1999. Amended Stats 2000 ch 135 § 137 (AB 2539).

Amendments:

1995 Amendment: (1) Deleted "that the prisoner used force or violence or caused serious bodily injury in committing the crime referred to in subdivision (b)," before "and that by" in the first sentence of subd (d)(1); (2) substituted "(i)", "(ii)", and "(iii)" for "(1)", "(2)", and "(3)" in subd (d)(2); and (3) substituted subd (e) for former subd (e) which read: "(e) The crime referred in subdivision (b) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (f) of Section 243."

1998 Amendment: (1) Redesignated former subds (d)(2)(i)–(d)(2)(iii) to be subds (d)(2)(A)–(d)(2)(C); (2) substituted "Section 12022.5, 12022.53, or 12022.55" for "Section 12022.5 or 12022.55" in subd (e)(2)(M); and (3) substituted "paragraph (4)" for "paragraph (5)" in subd (e)(2)(P).

1999 Amendment: Amended subd (e)(2) by adding (1) ", or arson in violation of any other provision of Section 451 or in violation of Section 455 where the act posed a substantial danger of physical harm to others" in subd (e)(2)(L); and (2) subd (e)(2)(Q).

Note—Stats 1989 ch 228 provides:

SEC. 6. It is not the intent of the Legislature to directly or indirectly imply by this act that courts may not use the standard of evidence accepted by the court in People v. Beard, 173, Cal. App. 3d 1113, in cases arising under Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The Court of Appeal in People v. Gibson (204 Cal. App. 3d 1425) declared part of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code in violation of the equal protection clause of the United States Constitution because it does not require proof the person represents a substantial danger of physical harm to others by reason of his or her severe mental disorder. In order to keep the mentally disordered offender program in effect for those persons who committed their crimes on or after January 1, 1986, it is necessary that this act take effect immediately.

Note—Stats 1999 ch 16 provides:

SEC. 2. The provisions of this act s with Section 2960) of Chapter 7 of T

The trial court properly found t crime involved "force or violence," dant was a mentally disordered offen § 2962), even though his offense i false imprisonment involved a threat than application of physical power primary purpose of § 2962 is to prote and defendant's conduct in pretendi posed a danger to the victims. The ment of § 2962 was satisfied, since d power over the victims and overcame to escape. People v Pretzer (1992, App 4th 1078, 11 Cal Rptr 2d 860.

In a proceeding to determine wh met the mentally disordered offender of Pen. Code, § 2962, the trial co erred in instructing the jury with CAL which is the definition of force or purpose of battery, and under which lence are synonymous. Force and vio Pen. Code, § 2962, subds. (b) and (e) ing defendant for treatment as MDO). mous. The words "force" and "viol of ordinary meaning and require no fi People v Collins (1992, 2nd Dist) 690, 12 Cal Rptr 2d 768.

In a proceeding in which defend be a mentally disordered offende § 2960 et seq.), a doctor who dant's MDO status properly referred report in concluding that defendant's fense involved "force or violence" v ing of Pen. Code, § 2962, subd. (e). ence did not violate the hearsay ru § 1200 et seq.) In the context of an M a qualified mental health profession and consider the underlying probati pressing an opinion that the prisoner i includes reference to the criterion or underlying offense is one involving lence." A probation report, albeit h sonably be relied on by an expert opinion on the subject to which his relates, within the meaning of Evid Since a probation report is sufficient to permit the imposition of a state pr fortiori, it is sufficiently reliable so mental health professional to rely on MDO opinion. In any event, defe object to the testimony on this bas entitled to raise the issue for the first People v Miller (1994, 2nd Dist) 25 (31 Cal Rptr 2d 423.

In mentally disordered certificat (Pen. Code, § 2960 et seq.), in whi fense against a custodial officer wa "controlling offense," and sex offen trolling," the trial court properl to introduce evidence of both th the sex offenses. The psychiatrist may into account the prisoner's entire his

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CHAPTER 858

An act to amend Sections 2960 and 2970 of, and to add Sections 2962, 2964, 2966, 2968, 2972, 2974, 2976, 2978, and 2980 to, the Penal Code, relating to mentally disordered offenders.

[Approved by Governor September 16, 1986. Filed with Secretary of State September 17, 1986.]

The people of the State of California do enact as follows:

SECTION 1. Section 2960 of the Penal Code is amended to read:

2960. The Legislature finds that there are prisoners who have a treatable, severe mental disorder that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated. Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public. Thirdly, the Legislature finds that in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission.

The Legislature further finds and declares the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community.

SEC. 2. Section 2962 is added to the Penal Code, to read:

2962. As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment. The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission in the absence of treatment is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances. The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or

psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(d) Prior to release on parole the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, and that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

If the professionals doing the evaluation do not concur that (1) the prisoner has a severe mental disorder, or (2) that the disorder is not in remission or cannot be kept in remission without treatment, or (3) that the severe mental disorder was a cause of, or aggravated the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978. Only if both independent professionals concur with the chief psychiatrist's certification, shall the provisions of this subdivision be applicable to the prisoner.

(e) The crime referred to in subdivision (b) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

SEC. 3. Section 2964 is added to the Penal Code, to read:

2964. (a) The treatment required by Section 2962 shall be

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inpatient unless the State Department of Mental Health certifies to the Board of Prison Terms that there is reasonable cause to believe the parolee can be safely and effectively treated on an outpatient basis, in which case the Board of Prison Terms shall permit the State Department of Mental Health to place the parolee in an outpatient treatment program specified by the State Department of Mental Health. Any prisoner who is to be required to accept treatment pursuant to Section 2962 shall be informed in writing of his or her right to request a hearing pursuant to Section 2966. Prior to placing a parolee in a local outpatient program, the State Department of Mental Health shall consult with the local outpatient program as to the appropriate treatment plan. Notwithstanding any other provision of law, a parolee ordered to have outpatient treatment pursuant to this section may be placed in an outpatient treatment program used to provide outpatient treatment under Title 15 (commencing with Section 1600) of Part 2, but the procedural provisions of Title 15 shall not apply. The director of an outpatient program used to provide treatment under Title 15 in which a parolee is placed may place the parolee in a secure mental health facility if the parolee can no longer be safely or effectively treated in the outpatient program, and until the parolee can be safely and effectively treated in the program. Within 15 days after placement in a secure facility the State Department of Mental Health shall conduct a hearing on whether the parolee can be safely and effectively treated in the program. Before deciding to seek revocation of the parole of a parolee receiving mental health treatment pursuant to Section 2962, and return him or her to prison, the parole officer shall consult with the director of the parolee's outpatient program.

(b) If the State Department of Mental Health has not placed a parolee on outpatient treatment within 60 days after receiving custody of the parolee or after parole is continued pursuant to Section 3001, the parolee may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing to determine whether the prisoner shall be treated as an inpatient or an outpatient. At the hearing, the burden shall be on the State Department of Mental Health to establish that the prisoner requires inpatient treatment as described in this subdivision. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978.

SEC. 4. Section 2966 is added to the Penal Code, to read:

2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two

independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she meets the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in it's verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole under Section 3001, this section shall be applicable for the purpose of determining whether the parolee meets the criteria of Section 2962.

SEC. 5. Section 2968 is added to the Penal Code, to read:

2968. If the prisoner's severe mental disorder is put into remission during the parole period, and can be kept in remission, the Director of Mental Health shall notify the Board of Prison Terms and the State Department of Mental Health shall discontinue treating the parolee.

SEC. 6. Section 2970 of the Penal Code is amended to read:

2970. Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison or in a state mental hospital the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits. The

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district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall state the reasons necessitating the continued treatment, with accompanying affidavits specifying the conditions in Section 2962 and that treatment during the parole period, if any, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify why the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued.

SEC. 7. Section 2972 is added to the Penal Code, to read:

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. The need for continued treatment shall be proven beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(c) If the court or jury finds that the patient is a person described in Section 2962, and his or her severe mental disorder is not in remission or cannot be kept in remission without treatment, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970.

(d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient remains a person described in Section 2962 whose severe

mental disorder is not in remission or cannot be kept in remission without treatment. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date.

SEC. 8. Section 2974 is added to the Penal Code, to read:

2974. Before releasing any inmate or terminating supervision of any parolee who is a danger to self or others, or gravely disabled as a result of mental disorder, and who does not come within the provisions of Section 2962, the Director of Corrections may, upon probable cause, place, or cause to be placed, the person in a state hospital pursuant to the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code.

SEC. 9. Section 2976 is added to the Penal Code, to read:

2976. (a) The cost of inpatient or outpatient treatment under this article shall be a state expense while the person is under the jurisdiction of the Department of Corrections.

(b) Any person placed outside of a facility of the Department of Corrections for the purposes of inpatient treatment under this article shall not be deemed to be released from imprisonment or from the custody of the Department of Corrections prior to the expiration of the maximum term of imprisonment of the person.

SEC. 10. Section 2978 is added to the Penal Code, to read:

2978. (a) Any independent professionals appointed by the Board of Prison Terms for purposes of this article shall not be state government employees; shall have at least five years of experience in the diagnosis and treatment of mental disorders; and shall include psychiatrists, and licensed psychologists who have a doctoral degree in psychology.

(b) On July 1 of each year the Department of Corrections and the State Department of Mental Health shall submit to the Board of Prison Terms a list of 20 or more independent professionals on which both departments concur. The professionals shall not be state government employees and shall have at least five years of experience in the diagnosis and treatment of mental disorders and shall include psychiatrists and licensed psychologists who have a

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doctoral degree in psychology. For purposes of this article, when the Board of Prison Terms receives the list, they shall only appoint independent professionals from the list. The list shall not be binding on the Board of Prison Terms until they have received it, and shall not be binding after June 30 following receipt of the list.

SEC. 11. Section 2980 is added to the Penal Code, to read:

2980. This article applies to persons incarcerated before, as well as after, January 1, 1986.

CHAPTER 859

An act to amend Section 40000.7 of, and to add Section 4463.5 to, the Vehicle Code, relating to vehicles.

[Approved by Governor September 16, 1986. Filed with Secretary of State September 17, 1986.]

The people of the State of California do enact as follows:

SECTION 1. Section 4463.5 is added to the Vehicle Code, to read:

4463.5. (a) No person shall manufacture or sell a decorative or facsimile license plate of a size substantially similar to the license plate issued by the department.

(b) Notwithstanding subdivision (a), the director may authorize the manufacture and sale of decorative or facsimile license plates for special events or media productions.

(c) A violation of this section is a misdemeanor punishable by a fine of not less than five hundred dollars ($500).

SEC. 2. Section 40000.7 of the Vehicle Code is amended to read:

40000.7. A violation of any of the following provisions is a misdemeanor, and not an infraction:

(a) Section 2416, relating to regulations for emergency vehicles.

(b) Section 2800, relating to failure to obey an officer's lawful order or submit to a lawful inspection.

(c) Section 2800.1, relating to fleeing from a peace officer.

(d) Section 2801, relating to failure to obey a fireman's lawful order.

(e) Section 2803, relating to unlawful vehicle or load.

(f) Section 2813, relating to stopping for inspection.

(g) Subdivision (b) of Section 4461 and subdivisions (b) and (c) of Section 4463, relating to disabled person placards.

(h) Section 4463.5, relating to deceptive or facsimile license plates.

(i) Section 5500, relating to the surrender of registration documents and license plates before dismantling may begin.

(j) Section 5753, relating to delivery of certificates of ownership and registration when committed by a dealer or any person while a dealer within the preceding 12 months.

act is in accordance with the request of a local agency which desired legislative authority to carry out the program specified in this act. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to provide for the continuation of the prohibition against requiring prior authorization from the State Department of Health Services for the provision of portable X-ray services provided in skilled nursing or intermediate care facilities under the Medi-Cal program, and in order to apply the provisions of this act to the special commission in San Mateo County prior to the end of the 1987 calendar year, it is necessary that this act go into immediate effect.

CHAPTER 687

An act to amend Section 1017 of the Evidence Code, and to amend Sections 1615, 1617, 1618, 1619, 1620, 2962, 2966, 2972, and 2978 of, and to add Section 2981 to, the Penal Code, relating to mentally disordered offenders.

[Approved by Governor September 16, 1987. Filed with Secretary of State September 17, 1987.]

The people of the State of California do enact as follows:

SECTION 1. Section 1017 of the Evidence Code is amended to read:

1017. (a) There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition.

(b) There is no privilege under this article if the psychotherapist is appointed by the Board of Prison Terms to examine a patient pursuant to the provisions of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

SEC. 2. Section 1615 of the Penal Code is amended to read:

1615. Pursuant to Section 5709.8 of the Welfare and Institutions Code, the State Department of Mental Health shall be responsible for the community treatment and supervision of judicially committed patients. These services shall be available on a county or regional basis. The department may provide these services directly or through contract with private providers or counties. The program

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or programs through which these services are provided shall be known as the Mental Health Conditional Release Program.

The department shall contact all county mental health programs by January 1, 1986, to determine their interest in providing an appropriate level of supervision and treatment of judicially committed patients at reasonable cost. County mental health agencies may agree or refuse to operate such a program.

The State Department of Mental Health shall ensure consistent data gathering and program standards for use statewide by the Mental Health Conditional Release Program.

SEC. 3. Section 1617 of the Penal Code is amended to read:

1617. The State Department of Mental Health shall research the demographic profiles and other related information pertaining to persons receiving supervision and treatment in the Mental Health Conditional Release Program. An evaluation of the program shall determine its effectiveness in successfully reintegrating these persons into society after release from state institutions. This evaluation of program effectiveness shall include, but not be limited to, a determination of the rates of reoffense while these persons are served by the program and after their discharge. This evaluation shall also address the effectiveness of the various treatment components of the program and their intensity.

The State Department of Mental Health may contract with an independent research agency to perform this research and evaluation project. Any independent research agency conducting this research shall consult with the Forensic Mental Health Association concerning the development of the research and evaluation design.

SEC. 4. Section 1618 of the Penal Code is amended to read:

1618. The administrators and the supervision and treatment staff of the Mental Health Conditional Release Program shall not be held criminally or civilly liable for any criminal acts committed by the persons on parole or judicial commitment status who receive supervision or treatment. This waiver of liability shall apply to employees of the State Department of Mental Health and the agencies or persons under contract to this department to provide supervision or treatment to mentally ill parolees or persons under judicial commitment.

SEC. 5. Section 1619 of the Penal Code is amended to read:

1619. The Department of Justice shall automate the criminal histories of all persons treated in the Mental Health Conditional Release Program, as well as all persons committed as not guilty by reason of insanity pursuant to Section 1026, incompetent to stand trial pursuant to Section 1370 or 1370.2, any person currently under commitment as a mentally disordered sex offender, and persons treated pursuant to Section 1364 or 2684 or Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3.

SEC. 6. Section 1620 of the Penal Code is amended to read:

1620. The Department of Justice shall provide mental health

agencies providing treatment to patients pursuant to Sections 1600 to 1610, inclusive, or pursuant to Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3, with access to criminal histories of those mentally ill offenders who are receiving treatment and supervision. Treatment and supervision staff who have access to these criminal histories shall maintain the confidentiality of the information and shall sign a statement to be developed by the Department of Justice which informs them of this obligation.

SEC. 7. Section 2962 of the Penal Code is amended to read:

2962. As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment. The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission in the absence of treatment is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances. The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(d) Prior to release on parole the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison

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Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, and that the prisoner used force or violence or caused serious bodily injury in committing the crime referred to in subdivision (b). For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

If the professionals doing the evaluation do not concur that (1) the prisoner has a severe mental disorder, or (2) that the disorder is not in remission or cannot be kept in remission without treatment, or (3) that the severe mental disorder was a cause of, or aggravated the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978. Only if both independent professionals concur with the chief psychiatrist's certification, shall the provisions of this subdivision be applicable to the prisoner. The professionals appointed pursuant to Section 2978 shall inform the prisoner that the purpose of their examination is not treatment but to determine if the prisoner meets the criteria to be involuntarily treated as a mentally disordered offender. It is not required that the prisoner appreciate or understand such information.

(e) The crime referred to in subdivision (b) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

SEC. 8. Section 2966 of the Penal Code is amended to read:

2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the count313 which he or she is

incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole under Section 3001, this section shall be applicable for the purpose of determining whether the parolee meets the criteria of Section 2962.

SEC. 9. Section 2972 of the Penal Code is amended to read:

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. The need for continued treatment shall be proven beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(c) If the court or jury finds that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970.

(d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that

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the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date.

SEC. 10. Section 2978 of the Penal Code is amended to read:

2978. (a) Any independent professionals appointed by the Board of Prison Terms for purposes of this article shall not be state government employees; shall have at least five years of experience in the diagnosis and treatment of mental disorders; and shall include psychiatrists, and licensed psychologists who have a doctoral degree in psychology.

(b) On July 1 of each year the Department of Corrections and the State Department of Mental Health shall submit to the Board of Prison Terms a list of 20 or more independent professionals on which both departments concur. The professionals shall not be state government employees and shall have at least five years of experience in the diagnosis and treatment of mental disorders and shall include psychiatrists and licensed psychologists who have a doctoral degree in psychology. For purposes of this article, when the Board of Prison Terms receives the list, they shall only appoint independent professionals from the list. The list shall not be binding on the Board of Prison Terms until they have received it, and shall not be binding after June 30 following receipt of the list.

SEC. 11. Section 2981 is added to the Penal Code, to read:

2981. For the purpose of proving the fact that a prisoner has received 90 days or more of treatment within the year prior to the prisoner's parole or release, the records or copies of records of any

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state penitentiary, county jail, federal penitentiary, or state hospital in which that person has been confined, when the records or copies thereof have been certified by the official custodian of those records, may be admitted as evidence.

CHAPTER 688

An act to amend Sections 6140, 6140.1, and 6140.3 of, and to add Section 6032 to, the Business and Professions Code, relating to the State Bar of California.

[Approved by Governor September 16, 1987. Filed with Secretary of State September 17, 1987.]

The people of the State of California do enact as follows:

SECTION 1. Section 6032 is added to the Business and Professions Code, to read:

6032. Subject to the approval of the Committees on Judiciary of each house of the Legislature, the board shall contract with an independent expert for the purpose of conducting a comprehensive study of the State Bar's affirmative action program with regard to its employees. A final report shall be submitted to each of the Committees on Judiciary no later than September 1, 1988. The amount expended pursuant to the contract shall not exceed twenty-five thousand dollars ($25,000).

SEC. 2. Section 6140 of the Business and Professions Code is amended to read:

6140. (a) The board shall fix the annual membership fee for 1988 as follows:

(1) For active members who have been admitted to the practice of law in this state for three years or longer preceding the first day of February of the year for which the fee is payable, at the sum of two hundred fifteen dollars ($215).

(2) For active members who have been admitted to the practice of law in this state for less than three years but more than one year preceding the first day of February of the year for which the fee is payable, at the sum of one hundred forty-seven dollars ($147).

(3) For active members who have been admitted to the practice of law in this state during, or for less than one year preceding the first day of February of, the year for which the fee is payable, at a sum not exceeding one hundred sixteen dollars ($116).

(b) The annual membership fee for active members is payable on or before the first day of February of each year.

This section shall remain in effect only until January 1, 1989, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1989, deletes or extends that date.

SEC. 3. Section 6140.1 of the Business and Professions Code is

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CHAPTER 658

(Senate Bill No. 538)

An act to amend Sections 2966 and 2970 of the Penal Code, relating to mentally disordered offenders.

[Approved by Governor August 27, 1988.]

LEGISLATIVE COUNSEL'S DIGEST

SB 538, McCorquodale. Mentally disordered offenders.

Existing law authorizes a prisoner to request a hearing before the Board of Prison Terms for purposes of proving that the prisoner meets specified criteria for treatment by the State Department of Mental Health as a condition of parole. Existing law provides that if the prisoner disagrees with the determination of the board, he or she may file a petition for a hearing in the superior court, as specified, on whether the prisoner, as of the date of the Board of Prison Terms hearing, has met the prescribed criteria for treatment by the State Department of Mental Health. If the Board of Prison Terms continues a parolee's mental health treatment when it continues his or her parole under specified provisions, existing law provides that these provisions shall be applicable for the purpose of determining whether the parolee meets the criteria for continued treatment as a condition of parole.

This bill would provide instead that, if the Board of Prison Terms continues a parolee's mental health treatment under those specified provisions, the above procedures shall only be applicable for the purpose of determining if the parolee has a severe mental disorder and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment.

Existing law, as specified above, provides for the required treatment of certain convicted felons with a severe mental disorder as a condition of parole, and for their continued treatment upon termination of parole or release from prison. Existing law also provides that if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the director of the mental health facility or the Director of Corrections shall submit his or her evaluation on remission to the district attorney. The district attorney may file a petition for the continued treatment of the person for a period of one year, as specified. The petition shall state the reasons necessitating the continued treatment and be accompanied by affidavits stating specified conditions and that treatment during the parole period, if any, has continuously been provided by the State Department of Mental Health, as specified.

This bill would delete the requirement that the petition state the reasons necessitating the continued treatment of the person. It would require the petition be accompanied by an affidavit specifying certain conditions including a statement that the treatment was provided by the State Department of Mental Health, as specified.

The people of the State of California do enact as follows:

SECTION 1. Section 2966 of the Penal Code is amended to read:

§ 2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing the burden of

proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment.

SEC. 2. Section 2970 of the Penal Code is amended to read:

§ 2970. Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment or for those in prison or in a state mental hospital the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits. The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify whether the prisoner has a severe mental disorder and why the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued.

EXPLANATORY NOTES SENATE BILL 538:

Pen C § 2966. Amended subd (c) by substituting (1) "the procedures of this section shall only" for "this section shall" after "Section 3001,"; and (2) "if the parolee has a severe mental disorder, and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment" for "whether the parolee meets the criteria of Section 2962".

Pen C § 2970. (1) Deleted the comma after "outpatient treatment" in the first sentence; (2) substituted "be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole" for "state the reasons necessitating the continued treatment, with accompanying affidavits specifying the conditions in Section 2962 and that treatment during the parole period, if any" in the fourth sentence; and (3) added "whether the prisoner has a severe mental disorder and" in the last sentence.

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CHAPTER 228

An act to amend Sections 2962, 2966, 2970, 2972, and 2980 of the Penal Code, relating to prisoners, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 27, 1989. Filed with Secretary of State July 27, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 2962 of the Penal Code is amended to read:

2962. As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment.

The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances.

The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(d) (1) Prior to release on parole, the person in charge of treating

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the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, that the prisoner used force or violence or caused serious bodily injury in committing the crime referred to in subdivision (b), and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

(2) If the professionals doing the evaluation pursuant to paragraph (1) do not concur that (1) the prisoner has a severe mental disorder, or (2) that the disorder is not in remission or cannot be kept in remission without treatment, or (3) that the severe mental disorder was a cause of, or aggravated the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978.

(3) Only if both independent professionals who evaluate the prisoner pursuant to paragraph (2) concur with the chief psychiatrist's certification of the issues described in paragraph (2), shall the provisions of this subdivision be applicable to the prisoner. The professionals appointed pursuant to Section 2978 shall inform the prisoner that the purpose of their examination is not treatment but to determine if the prisoner meets certain criteria to be involuntarily treated as a mentally disordered offender. It is not required that the prisoner appreciate or understand that information.

(e) The crime referred to in subdivision (b) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

(f) As used in this chapter, "substantial danger of physical harm" does not require proof of a recent overt act.

SEC. 2. Section 2966 of the Penal Code is amended to read:

2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing, the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d)

of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when it continues the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the parolee represents a substantial danger of physical harm to others.

SEC. 3. Section 2970 of the Penal Code is amended to read:

2970. Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections, shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison or in a state mental hospital, the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written

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The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others.

SEC. 4. Section 2972 of the Penal Code is amended to read:

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable.

The standard of proof under this section shall be proof beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(c) If the court or jury finds that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970.

(d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be

that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date.

SEC. 5. Section 2980 of the Penal Code is amended to read:

2980. This article applies to persons who committed their crimes on and after January 1, 1986.

SEC. 6. It is not the intent of the Legislature to directly or indirectly imply by this act that courts may not use the standard of evidence accepted by the court in People v. Beard, 173, Cal. App. 3d 1113, in cases arising under Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

SEC. 7. (a) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall submit a report to the Legislature on or before September 30, 1990, on the following:

(1) A description of the disposition of cases of patients released from treatment under the mentally disordered offender program following the invalidation of that program by the Court of Appeal in People v. Gibson (204 Cal. App. 3d 1425), including discussion regarding any subsequent acts recorded by the Department of Justice, the State Department of Mental Health, and the Department of Corrections, to the extent resources are available.

(2) A description of the criteria used to select which prisoners are personally evaluated for possible treatment under the mentally disordered offender program, and the criteria used to determine which of those prisoners are to be treated under the program.

(b) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall submit an annual report to the Legislature on the status of the

EXHIBIT 3

mentally disordered offender program on or before December 31, 1991, and on or before December 31 each year thereafter through 1996, which shall include all of the following:

(1) The following information on persons committed to the mentally disordered offender program on or after July 1, 1989, who have exhausted their rights under Section 2966 of the Penal Code.

(A) The duration of treatment for those patients selected for the mentally disordered program, including both inpatient and outpatient treatment.

(B) The number of mentally disordered offender patients returned to custody or to a hospital due to the commission of a new crime, to the extent this information is available from the Department of Justice, or due to parole revocation.

(C) The number of parole revocations of persons who have been treated previously under the mentally disordered offender program and the reasons for the revocations.

(D) The number of parole revocations for all parolees whose parole was revoked based upon psychiatric reasons pursuant to Section 2646 of Title 15 of the California Code of Regulations.

(E) Information regarding recidivism rates for criminal conduct by persons previously treated under the mentally disordered offender program to the extent this information is available from the Department of Justice.

(F) Any other information that would be useful to the Legislature in evaluating the performance of the mentally disordered offender program.

(2) A summary description of the number and disposition of cases of all prisoners who are personally clinically evaluated on and after July 1, 1989, by the Department of Corrections and the State Department of Mental Health for possible treatment under the mentally disordered offender program, including disposition of any hearing or court proceedings. The report also shall contain a brief explanation, as the departments deem appropriate, to explain the data.

(c) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall provide a preliminary report to the Legislature on or before December 31, 1990, describing the report protocol they intend to use for the report required under subdivision (b) and any problems which they anticipate.

(d) The reports required under this section shall be submitted to the Assembly Committee on Public Safety and to the Senate Judiciary Committee.

(e) Notwithstanding any other provision of law, the Department of Justice, the Department of Corrections, the State Department of Mental Health, and the Board of Prison Terms shall make available any information required for purposes of this section. Any confidential information obtained pursuant to this subdivision may be used for purposes of preparing the reports required by this

section, but the information shall not be used in any way that discloses confidential information, nor shall that confidential information be used for any other purpose.

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The Court of Appeal in People v. Gibson (204 Cal. App. 3d 1425) declared part of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code in violation of the equal protection clause of the United States Constitution because it does not require proof the person represents a substantial danger of physical harm to others by reason of his or her severe mental disorder. In order to keep the mentally disordered offender program in effect for those persons who committed their crimes on or after January 1, 1986, it is necessary that this act take effect immediately.

CHAPTER 229

An act to amend Sections 5651, 5661, and 5681 of the Business and Professions Code, relating to landscape architecture, and making an appropriation therefor.

[Approved by Governor July 27, 1989. Filed with Secretary of State July 28, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 5651 of the Business and Professions Code is amended to read:

5651. (a) The board shall by means of examination, ascertain the professional qualifications of all applicants for licenses to practice landscape architecture in this state and shall issue a license to every person whom it finds to be qualified on payment of the initial license fee prescribed by this chapter.

(b) The examination shall consist of a written examination. The written examination may be waived by the board if the applicant (1) is licensed in a state and demonstrates to the board that he or she has passed the Uniform National Examination for Landscape Architects or is certified by the Council of Landscape Architects Registration Boards and has submitted proof of job experience equivalent to that which is required of California candidates and (2) has taken a written examination equivalent in scope and subject matter to the written examination last given in California as determined by the board, and has achieved a score on the out-of-state examination at least equal to the score required to pass the California written examination. The written examination shall include testing of the applicants knowledge of California plants and environmental conditions,

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CHAPTER 706

(Senate Bill No. 1918)

An act to amend Section 2966 of the Penal Code, relating to prisoners.

[Approved by Governor September 20, 1994.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1918, Campbell. Prisoners: severe mental disorders.

Under existing law, a prisoner who disagrees with the determination of the Board of Prison Terms that he or she has a severe mental disorder that is not in remission or cannot be kept in remission without treatment, as defined, may file a petition in the superior court of the county in which he or she is incarcerated or is being treated for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of having a severe mental disorder that is not in remission or cannot be kept in remission without treatment. The court is required to conduct a hearing on the petition, as specified. The standard of proof is beyond a reasonable doubt, and if the trial is by jury, the jury is required to be unanimous in its verdict.

This bill would prohibit the court's consideration, at the hearing on the petition, of evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the Board of Prison Terms hearing.

This bill would also provide that the court may, upon stipulation of the parties, receive in evidence the affidavit or declaration of any psychiatrist, psychologist, or other professional person who was involved in the certification and hearing process, or any professional person involved in the evaluation or treatment of the petitioner during the certification process, as specified.

This bill would also provide that if the court or jury reverses the determination of the Board of Prison Terms, the court shall stay the execution of the decision for 5 working days to allow for an orderly release of the prisoner.

The people of the State of California do enact as follows:

SECTION 1. Section 2966 of the Penal Code is amended to read:

§ 2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing, the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962327e court shall conduct a hearing on the petition within 60

calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. *Evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the Board of Prison Terms hearing shall not be considered.* The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. *The court may, upon stipulation of both parties, receive in evidence the affidavit or declaration of any psychiatrist, psychologist, or other professional person who was involved in the certification and hearing process, or any professional person involved in the evaluation or treatment of the petitioner during the certification process. The court may allow the affidavit or declaration to be read and the contents thereof considered in the rendering of a decision or verdict in any proceeding held pursuant to subdivision (b) or (c), or subdivision (a) of Section 2972. If the court or jury reverses the determination of the Board of Prison Terms, the court shall stay the execution of the decision for five working days to allow for an orderly release of the prisoner.*

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when it continues the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the parolee represents a substantial danger of physical harm to others.

EXPLANATORY NOTES SENATE BILL 1918:

Pen C §.2966. Added the third and tenth through twelfth sentences of subd (b).

Italics indicate changes or additions. * * * indicate ommissions.

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continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing is a civil hearing, however, in order to reduce costs the rules of criminal discovery as well as civil discovery shall be applicable. The need for continued treatment shall be proven beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(c) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(d) If the court or jury finds that the patient is a person described in subdivision (b) of Section 2960, and his or her severe mental disorder is not in remission or cannot be kept in remission if treatment is not continued, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in subdivision (a).

(e) The person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(f) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient remains a person described in subdivision (b) of Section 2960 in which severe mental disorder is not in remission or cannot be kept in remission if treatment is not continued. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(g) Any commitment under this section places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(h) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article (commencing with Section 5325) of Chapter 2 of Part 1 of Division

of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This paragraph and the regulations adopted pursuant thereto shall become operative on January 1, 1987.

(i) This section applies to persons incarcerated before, as well as after the effective date of this section.

(j) The definitions in Section 2960 apply to this section.

(k) If there is a conflict between the provisions of this section and Section 2960, the provisions of Section 2960 shall apply.

SEC. 1.5. Notwithstanding any other provision of law, there shall be no prohibition or limitation on the placement in any state hospital by the Director of Mental Health of judicially committed persons or persons confined in a state hospital for purposes of mental health treatment pursuant to the Penal Code.

SEC. 1.7. Reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.

SEC. 2. This act shall only become operative if SB 1296 of the 1985-86 Regular Session is enacted, in which case both this act and SB 1296 shall become operative on the operative date contained in SB 1296. If SB 1296 of the 1985-86 Regular Session is not enacted, this act shall not become operative.

CHAPTER 1419

An act to amend Sections 2960 and 3003 of the Penal Code, relating to prisoners.

[Approved by Governor October 1, 1985. Filed with Secretary of State October 1, 1985.]

The people of the State of California do enact as follows:

SECTION 1. Section 2960 of the Penal Code is amended to read:

2960. (a) The Legislature finds that there are prisoners who have a treatable severe mental disorder which caused, was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated. Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or termination of parole, there is a danger to society, and the compelling interest in protecting the

Legislature finds that in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission.

The Legislature further finds and declares the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community.

(b) As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(1) The prisoner has a severe mental disorder which is not in remission or cannot be kept in remission without treatment. The term "severe mental disorder" means an illness or disease or condition which substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or which demonstrates evidence of an acute brain syndrome for which prompt remission in the absence of treatment is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances. The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(2) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(3) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(4) Prior to release on parole the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission due to medical or psychosocial reasons or failure of the prisoner to voluntarily follow prescribed medical treatment, or both, and that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

If the professionals doing the evaluation do not concur that (A) the prisoner has a severe mental disorder, or (B) that the disorder is not in remission or cannot be kept in remission, or (C) that the severe mental disorder was a cause of, or aggravated the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, who have at least five years of experience in the diagnosis and treatment of mental disorders, who may be either psychiatrists, or licensed psychologists who have a doctoral degree in psychology. Only if both independent professionals concur with the chief psychiatrist's certification, shall the provisions of this subdivision be applicable to the prisoner.

On July 1 of each year the Department of Corrections and the State Department of Mental Health shall submit to the Board of Prison Terms a list of 20 or more independent professionals on which both departments concur. The professionals shall not be state government employees and shall have at least five years of experience in the diagnosis and treatment of mental disorders and shall include psychiatrists and licensed psychologists who have a doctoral degree in psychology. For purposes of this subdivision, when the Board of Prison Terms receives the list, they shall only appoint independent professionals from the list. The list shall not be binding on the Board of Prison Terms until they have received it, and shall not be binding after June 30 following receipt of the list.

(5) The crime referred to in paragraph (2) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

(c) (1) The treatment required by subdivision (b) shall be inpatient unless the State Department of Mental Health certifies to the Board of Prison Terms that there is reasonable cause to believe the parolee can be safely and effectively treated on an outpatient basis, in which case the Board of Prison Terms shall permit the State Department of Mental Health to place the parolee in an outpatient treatment program specified by the State Department of Mental

Health. Any prisoner who is to be required to accept treatment pursuant to subdivision (b) shall be informed in writing of his or her right to request a hearing pursuant to subdivision (d). Prior to placing a parolee in a local outpatient program, the State Department of Mental Health shall consult with the local outpatient program as to the appropriate treatment plan. Notwithstanding any other provision of law, a parolee ordered to have outpatient treatment pursuant to this section may be placed in an outpatient treatment program used to provide outpatient treatment under Title 15 (commencing with Section 1600) of Part 2, but the procedural provisions of Title 15 shall not apply. The director of an outpatient program used to provide treatment under Title 15 in which a parolee is placed may place the parolee in a secure mental health facility if the parolee can no longer be safely or effectively treated in the outpatient program, and until the parolee can be safely and effectively treated in the program. Within 15 days after placement in a secure facility the State Department of Mental Health shall conduct a hearing on whether the parolee can be safely and effectively treated in the program. Before deciding to seek revocation of the parole of a parolee receiving mental health treatment pursuant to subdivision (b), and return him or her to prison, the parole officer shall consult with the director of the parolee's outpatient program.

(2) If the State Department of Mental Health has not placed a parolee on outpatient treatment within sixty days after receiving custody of the parolee or after parole is continued pursuant to Section 3001, the parolee may request a hearing before the Board of Prison Terms; and the board shall conduct a hearing to determine whether the prisoner shall be treated as an inpatient or an outpatient. At the hearing, the burden shall be on the State Department of Mental Health to establish that the prisoner requires inpatient treatment as described in this subdivision. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in paragraph (4) of subdivision (b).

(d) (1) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner does not meet the criteria in subdivision (b). At the hearing the burden of proof shall be on the person or agency who certified the prisoner under paragraph (4) of subdivision (b). If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in paragraph (4) of subdivision (b). The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to paragraph (2) of this subdivision. The Board of Prison Terms shall provide a prisoner who requests a trial a petition form and instructions for filing the petition.

(2) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of subdivision (b), may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she meets the criteria of subdivision (b). The court shall conduct a hearing on the petition within sixty calendar days after the petition is filed, unless either time is waived by the petitioner or his counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(3) The provisions of this subdivision shall be applicable to a continuation of a parole pursuant to Section 3001.

(e) If the prisoner's severe mental disorder is put into remission during the parole period, and can be kept in remission, the Director of Mental Health shall notify the Board of Prison Terms and the State Department of Mental Health shall discontinue treating the parolee.

(f) (1) Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by this section, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits. The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall state the reasons necessitating the continued treatment, with accompanying affidavits specifying the conditions in subdivision (b) and that treatment during the parole period, if any, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify why the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued.

(2) The court shall conduct a hearing on the petition for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial.

The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. The need for continued treatment shall be proven beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(3) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(4) If the court or jury finds that the patient is a person described in subdivision (b), and his or her severe mental disorder is not in remission or cannot be kept in remission if treatment is not continued, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in paragraph (1).

(5) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this paragraph, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(6) Prior to the termination of a commitment under this subdivision, a petition for recommitment may be filed to determine whether the patient remains a person described in subdivision (b) which severe mental disorder is not in remission or cannot be kept in remission if treatment is not continued. The recommitment proceeding shall be conducted in accordance with the provisions of this subdivision.

(7) Any commitment under this section places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(8) Except as provided in this paragraph, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This paragraph and the regulations adopted pursuant thereto shall become operative on January 1, 1987.

(g) Before releasing any inmate or terminating supervision of any parolee who is a danger to self or others, or gravely disabled as a result of mental disorder, and who does not come within the provisions of subdivision (b), the Director of Corrections may, upon probable cause, place, or cause to be placed, the person in a state hospital pursuant to the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code.

(h) The cost of inpatient or outpatient treatment under this article shall be a state expense while the person is under the jurisdiction of the Department of Corrections.

(i) Any person placed outside of a facility of the Department of Corrections for the purposes of inpatient treatment under this article shall not be deemed to be released from imprisonment or from the custody of the Department of Corrections prior to the expiration of the maximum term of imprisonment of the person.

(j) The amendments to this section made in the first year of the 1985-86 Regular Session apply to persons incarcerated before, as well as after, the effective date of those amendments.

SEC. 2. Section 3003 of the Penal Code is amended to read:

3003. (a) An inmate who is released on parole shall be returned to the county from which he or she was committed.

(b) Notwithstanding subdivision (a), an inmate may be returned to another county in a case where that would be in the best interests of the public and of the parolee. If the authority setting the conditions of parole decides on a return to another county, it shall place its reasons in writing in the parolee's permanent record. In making its decision, the authority may consider, among others, the following factors:

(1) The need to protect the life or safety of a victim, the parolee, a witness or any other person.

(2) Public concern that would reduce the chance that the inmate's parole would be successfully completed.

(3) The verified existence of a work offer, or an educational or vocational training program.

(4) The last legal residence of the inmate having been in another county.

(5) The existence of family in another county with whom the inmate has maintained strong ties and whose support would increase the chance that the inmate's parole would be successfully completed.

(6) The lack of necessary outpatient treatment programs for parolees receiving treatment pursuant to Section 2960.

(c) An inmate may be paroled to another state pursuant to any other provision of law.

SEC. 2.5. Notwithstanding any other provision of law, there shall be no prohibition or limitation on the placement in any state hospital by the Director of Mental Health of judicially committed persons or

of persons confined in a state hospital for purposes of mental health treatment pursuant to the Penal Code.

SEC. 2.75. The Legislature finds and declares that Department of Corrections prisoners subject to the provisions of this act are in a separate, distinct class from persons who have been committed by the State Department of Mental Health under the provisions of Section 1026 or 1370 of the Penal Code, or former Section 6316 of the Welfare and Institutions Code. Therefore, it is not intended that any provision of this act be construed in any way to effect the status of persons committed to the State Department of Mental Health under Section 1026 or 1370 of the Penal Code, or former Section 6316 of the Welfare and Institutions Code. Nor are the provisions of this act intended in any manner to affect decisional law interpreting those statutes.

SEC. 2.85. Reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.

SEC. 3. Except as provided in paragraph (8) of subdivision (f) of Section 2960 of the Penal Code, this act shall become operative on July 1, 1986.

CHAPTER 1420

An act to add Section 11165.5 to the Penal Code, relating to crimes.

[Approved by Governor October 1, 1985. Filed with Secretary of State October 1, 1985.]

The people of the State of California do enact as follows:

SECTION 1. Section 11165.5 is added to the Penal Code, to read:

11165.5. As used in Sections 11165 and 11166.5, "child care custodian," in addition to the persons specified therein, means an instructional aide, a teacher's aide, or a teacher's assistant employed by any public or private school, who has been trained in the duties imposed by this article, if the school district has so warranted to the State Department of Education. It also includes a classified employee of any public school who has been trained in the duties imposed by this article if the school has so warranted to the State Department of Education.

SEC. 2. School districts which do not train the employees specified in Section 11165.5 of the Penal Code in the duties of child care custodians under the child abuse reporting laws shall report to the State Department of Education the reasons why this training is not provided.

SEC. 3. The Legislature declares that this act mandates a new program or higher level of service on local government. As required by Section 6 of Article XIII B of the California Constitution, reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.

CHAPTER 1421

An act to amend Sections 39510 and 39512.5 of, and to repeal Section 39510.5 of, the Health and Safety Code, relating to air pollution.

[Approved by Governor October 1, 1985. Filed with Secretary of State October 1, 1985.]

The people of the State of California do enact as follows:

SECTION 1. Section 39510 of the Health and Safety Code is amended to read:

39510. (a) The State Air Resources Board is continued in existence in the Resources Agency. The state board shall consist of nine members.

(b) The members shall be appointed by the Governor with the consent of the Senate on the basis of their demonstrated interest and proven ability in the field of air pollution control and their understanding of the needs of the general public in connection with air pollution problems. Five members shall have the following qualifications:

(1) One member shall have training and experience in automotive engineering or closely related fields.

(2) One member shall have training and experience in chemistry, meteorology, or related scientific fields, including agriculture or law.

(3) One member shall be a physician and surgeon or an authority on health effects of air pollution.

(4) One member shall be a public member.

(5) One member shall have the qualifications specified in paragraph (1), (2), or (3) or shall have experience in the field of air

AUDITOR/CONTROLLER-RECORDER
COUNTY CLERK

COUNTY OF SAN BERNARDINO

AUDITOR/CONTROLLER • 222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415-0018 • (909) 387-8322 • Fax (909) 386-8830
RECORDER • COUNTY CLERK • 222 West Hospitality Lane, First Floor
San Bernardino, CA 92415-0022 • (909) 387-8306 • Fax (909) 386-8940

LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed by the County of San Bernardino, State of California. My business address is 222 W. Hospitality Lane, San Bernardino, CA 92415. I am 18 years of age or older.

On February 3, 2006, I faxed and mailed the letter dated February 2, 2006 to the Commission on State Mandates in response to the Statutes of 1994, Chapter 06 et al; Penal Code Section 2966 Mentally Disordered Offenders: Treatment as a Condition of Parole 00-TC-28, and I mailed it also to the other parties listed 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 February 3, 2006 at San Bernardino, California.

Deborah L. Pittenger

DEBORAH L. PITTENGER

Commission on State Mandates

List Date: 07/10/2001 Mailing Information

Mailing List

Claim Number 00-TC-28 Claimant County of San Bernardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Harmeet Barkschat,
Mandate Resource Services
5325 ElKhorn Blvd #307
~~8254 Heath Peak Place~~
~~Antelope CA 95843~~
Sacramento, CA 95842
Tel: (916) 727-1350
FAX: (916) 727-1734
Interested Person

Mr. Louie DiNinni, Executive Officer
Board of Prison Terms
1515 K Street, Suite 600
Sacramento CA 95814-4053
Tel: (916) 445-1539
FAX: (916) 445-5242
State Agency

~~Mr. Glenn Haas, Bureau Chief~~ (B-8) Ms. Ginny Brummels
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500
Sacramento CA 95816
324-0256
Tel: (916) ~~445-8756~~
FAX: (916) 323-~~4807~~ 6527
State Agency

Mr. Steve Keil,
California State Association of Counties
1100 K Street Suite 101
Sacramento CA 95814-3941
Tel: (916) 327-7523
FAX: (916) 441-5507
Interested Person

Bonnie Terkeurst
~~Mr. John Jaggar~~, SB-90 Coordinator
Auditor-Controller's Office
222 West Hospitality Lane
San Bernardino CA 92415-0018
Tel: (909) 386-8850
FAX: (909) 386-8830
Claimant

Claim Number 00-TC-2[illegible] Claimant County of San[illegible]rnardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

~~Mr. James Lombard, Principal Analyst (A-15)~~
Department of Finance Ms. Susan Geanacou

915 L Street
Sacramento CA 95814

Tel: (916) 445-~~8913~~ 3274
FAX: (916) ~~327-0225~~ 324-7888

State Agency

Mr. Stephen Mayberg, Director
Department of Mental Health

1600 9th Street
Sacramento CA 95814

Tel: (916) 654-3565
FAX: (916) 654-3198

State Agency

Mr. Manuel Medeiros, Asst. Attorney General (D-8)
Department of Justice
Government Law Section
1300 I Street 17th Floor
Sacramento CA 95814

Tel: (916) 324-5475
FAX: (916) 324-8835

State Agency

Mr. Ron Metz, Facility Captain - MDO Program
Department of Corrections

P O Box 942883
Sacramento CA 94283-0001

Tel: (916) 324-4771
FAX: (916) 000-0000

State Agency

Mr. Paul Minney,
Spector, Middleton, Young & Minney, LLP

7 Park Center Drive
Sacramento Ca 95825

Tel: (916) 646-1400
FAX: (916) 646-1300

Interested Person

Ms. Marianne O'Malley, Principal Fiscal & Policy Analyst (B-29)
Legislative Analysts' Office

925 L Street Suite 1000
Sacramento CA 95814

Tel: ~~(916) 445-6442~~ 916 319-8315
FAX: (916) 324-4281

Interested Person

Claim Number 00-TC-[illegible] Claimant County of San[illegible]rnardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Mr. Keith B. Petersen, President
Sixten & Associates

5252 Balboa Avenue Suite 807
San Diego CA 92117

Tel: (858) 514-8605
FAX: (858) 514-8645

Interested Person

Mr. Steve Smith, ~~CEO~~
~~Mandated Cost Systems, Inc.~~ Steve Smith Enterprises, Inc.
4633 Whitney Ave., Suite A
~~3275 Watt Avenue Suite C~~
~~Sacramento CA 95825~~
Sacramento, CA 95821

Tel: (916) ~~487-4435~~ 483-4231
FAX: (916) ~~487-9662~~ 483-1403

Interested Person

Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518 P.O. Box 942850
Sacramento CA 95814

Tel: (916) 323-5849
FAX: (916) 324-7223

State Agency

Ms. Pam Stone, Legal Counsel
DMG-MAXIMUS

4320 Auburn Blvd. Suite 2000
Sacramento CA 95841

Tel: (916) 485-8102
FAX: (916) 485-0111

Interested Person

Mr. David Wellhouse,
Wellhouse & Associates

9175 Kiefer Blvd Suite 121
Sacramento CA 95826

Tel: (916) 368-9244
FAX: (916) 368-5723

Interested Person

Mr, Gary Winsom, President
California Public Defenders Association

3273 Ramos Circle, Suite 100
Sacramento CA 95827

Tel: (916) 362-1686
FAX: (916) 362-5498

Interested Person

Commission on State Mandates

Original List Date: 7/10/2001
Last Updated: 12/21/2005
List Print Date: 01/12/2006
Claim Number: 00-TC-28
Issue: Mentally Disordered Offenders: Treatment as a Condition of Parole

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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Mr. Mark Sigman
Riverside County Sheriff's Office
4095 Lemon Street
P O Box 512
Riverside, CA 92502

Tel: (951) 955-2700
Fax: (951) 955-2720

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244
Fax: (916) 368-5723

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350
Fax: (916) 727-1734

Mr. David Hinchee
Department of Corrections (B-23)
Forensic Services
P.O. Box 942883
Sacramento, CA 94283-0001

Tel: (916) 324-4771
Fax: (916) 324-6621

Office of the County Counsel
County of San Luis Obispo
County Government Center, Room 386
San Luis Obispo, CA 93408

Tel: (805) 781-5400
Fax: (805) 781-4221

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 324-4888

Mr. Michael E. Cantrall
California Public Defenders Association
1273 Ramos Circle, Suite 100
Sacramento, CA 95827
Tel: (916) 362-1686
Fax: (916) 362-5498

Ms. Terrie Tatosian
Department of Mental Health (A-31)
1600 9th Street, Room 150
Sacramento, CA 95814
Tel: (916) 654-2378
Fax: (916) 654-2440

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941
Tel: (916) 327-7523
Fax: (916) 441-5507

Ms. Marianne O'Malley
Legislative Analyst's Office (B-29)
925 L Street, Suite 1000
Sacramento, CA 95814
Tel: (916) 319-8315
Fax: (916) 324-4281

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Boulevard, Suite #106
Roseville, CA 95661
Tel: (916) 677-4233
Fax: (916) 677-2283

Ms. Jesse McGuinn
Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814
Tel: (916) 445-8913
Fax: (916) 327-0225

Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, CA 92415-0018
Claimant
Tel: (909) 386-8850
Fax: (909) 386-8830

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816
Tel: (916) 324-0256
Fax: (916) 323-6527

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841
Tel: (916) 485-8102
Fax: (916) 485-0111

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Tel: (213) 974-8564
Fax: (213) 617-8106

EXHIBIT G

AUDITOR/CONTROLLER-RECORDER
COUNTY CLERK

COUNTY OF SAN BERNARDINO

AUDITOR/CONTROLLER • 222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415-0018 • (909) 387-8322 • Fax (909) 386-8830
RECORDER • COUNTY CLERK • 222 West Hospitality Lane, First Floor
San Bernardino, CA 92415-0022 • (909) 387-8306 • Fax (909) 386-8940

LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

March 1, 2006

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

RE: Mentally Disordered Offenders: Treatment as a Condition of Parole
CSM 00-TC-28
Penal Code Sections 2966 and 2962
Statutes of 1985, Chapter 1419; Statutes of 1986, Chapter 858; Statutes of 1987, Chapter 687; Statutes of 1988, Chapter 658; Statutes of 1989, Chapter 228; Statutes of 1994, Chapter 706

Dear Ms. Higashi:

Pursuant to my discussion with Nancy Patton on February 28, we are requesting that the above named test claim be taken off of the March 2006 agenda for the following reasons:

1. The Draft Staff Analysis in the Commission of State Mandates (CSM) letter dated January 12, 2006 recommended that the test claim be denied on the basis that the original legislation in Statutes of 1985, Chapter 1419 was not cited in the test claim heading. The recommendation to deny the claim was not based on the merits of the test claim, but on an inadvertent omission.

2. The County of San Bernardino responded on February 2, 2006 to the Draft Staff Analysis. An amended test claim was attached and was accepted as part of the San Bernardino County's comments. The amendment was prepared based on the rules in place as of the original test claim filing date of July 2, 2001. The Commission staff has directed the County to submit an amended test claim using the new test claim filing form.

Therefore, I respectfully request that the test claim for the March hearing be removed from the agenda in order to give your staff time to consider the amended test claim. The amended test claim is attached and submitted for your review.

If you have any questions, please call me at (909) 386-8850.

Sincerely,

Bonnie Ter Keurst

Bonnie Ter Keurst
Reimbursable Projects Section Manager

BT:wds

Attachments

Commission on State Mandates

Original List Date: 7/10/2001
Last Updated: 12/21/2005
List Print Date: 01/12/2006
Claim Number: 00-TC-28
Issue: Mentally Disordered Offenders: Treatment as a Condition of Parole

Mailing Information: Draft Staff Analysis

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Riverside County Sheriffs Office
4095 Lemon Street
P O Box 512
Riverside, CA 92502

Tel: (951) 955-2700
Fax: (951) 955-2720

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244
Fax: (916) 368-5723

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350
Fax: (916) 727-1734 FAX 3/6

Mr. David Hinchee
Department of Corrections (B-23)
Forensic Services
P.O. Box 942883
Sacramento, CA 94283-0001

Tel: (916) 324-4771
Fax: (916) 324-6621

Office of the County Counsel
County of San Luis Obispo
County Government Center, Room 386
San Luis Obispo, CA 93408

Tel: (805) 781-5400
Fax: (805) 781-4221

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 324-4888 FAX 4/10

Mr. Michael E. Cantrall
California Public Defenders Association
[redacted]3 Ramos Circle, Suite 100
Sacramento, CA 95827
Tel: (916) 362-1686
Fax: (916) 362-5498

Ms. Terrie Tatosian
Department of Mental Health (A-31)
1600 9th Street, Room 150
Sacramento, CA 95814
Tel: (916) 654-2378
Fax: (916) 654-2440

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941
Tel: (916) 327-7523
Fax: (916) 441-5507

Ms. Marianne O'Malley
Legislative Analyst's Office (B-29)
925 L Street, Suite 1000
Sacramento, CA 95814
Tel: (916) 319-8315
Fax: (916) 324-4281

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Boulevard, Suite #106
Roseville, CA 95661
Tel: (916) 677-4233
Fax: (916) 677-2283

Ms. Jesse McGuinn
Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814
Tel: (916) 445-8913
Fax: (916) 327-0225

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County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, CA 92415-0018
Claimant
Tel: (909) 386-8850
Fax: (909) 386-8830

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816
Tel: (916) 324-0256
Fax: (916) 323-6527 Done 3-4-05

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841
Tel: (916) 485-8102
Fax: (916) 485-0111

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Tel: (213) 974-8564
Fax: (213) 617-8106

Commission on State Mandates

List Date: 07/10/2001 Mailing Information

Mailing List

aim Number 00-TC-28 Claimant County of San Bernardino

ıbject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

sue Mentally Disordered Offenders: Treatment as a Condition of Parole

Harmeet Barkschat,
Mandate Resource Services
5325 ElKhorn Blvd #307
~~8254 Heath Peak Place~~
~~Antelope CA 95843~~
Sacramento, CA 95842
Tel: (916) 727-1350
FAX: (916) 727-1734
Interested Person

Spoke w/ Harmeet
Does not do County Claims
just school & College. 3/1/06 WDS

Mr. Louie DiNinni, Executive Officer
Board of Prison Terms
1515 K Street, Suite 600
Sacramento CA 95814-4053
Tel: (916) 445-1539
FAX: (916) 445-5242
State Agency

~~Mr. Glenn Haas, Bureau Chief~~ (B-8) Ms. Ginny Brummels
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500
Sacramento CA 95816
324-0256
Tel: (916) ~~445-8756~~
FAX: (916) 323-~~4807~~ 6527
State Agency

Please send a copy to Jac Crawford County of San Luis Obispo, Caly 93408

Mail to County Government Center Room D320 San Luis Obispo, Ca 93408

Mr. Steve Keil,
California State Association of Counties
1100 K Street Suite 101
Sacramento CA 95814-3941
Tel: (916) 327-7523
FAX: (916) 441-5507
Interested Person

Bonnie Ter Keurst
~~Mr. John Logger~~, SB-90 Coordinator
Auditor-Controller's Office
222 West Hospitality Lane
San Bernardino CA 92415-0018
Tel: (909) 386-8850
FAX: (909) 386-8830
Claimant

Claim Number 00-TC-20 Claimant County of San Bernardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

~~Mr. James Lombard, Principal Analyst (A-15)~~
Department of Finance Ms. Susan Geanacou

915 L Street
Sacramento CA 95814

Tel: (916) ~~445-8913~~ 3274
FAX: (916) ~~327-0225~~ 324-4888

State Agency

Mr. Stephen Mayberg, Director
Department of Mental Health

1600 9th Street
Sacramento CA 95814

Tel: (916) 654-3565
FAX: (916) 654-3198

State Agency

Mr. Manuel Medeiros, Asst. Attorney General (D-8)
Department of Justice
Government Law Section
1300 I Street 17th Floor
Sacramento CA 95814

Tel: (916) 324-5475
FAX: (916) 324-8835

State Agency

Mr. Ron Metz, Facility Captain - MDO Program
Department of Corrections

P O Box 942883
Sacramento CA 94283-0001

Tel: (916) 324-4771
FAX: (916) 000-0000

State Agency

Mr. Paul Minney,
Spector, Middleton, Young & Minney, LLP

7 Park Center Drive
Sacramento Ca 95825

Tel: (916) 646-1400
FAX: (916) 646-1300

Interested Person

Ms. Marianne O'Malley, Principal Fiscal & Policy Analyst (B-29)
Legislative Analysts' Office

925 L Street Suite 1000
Sacramento CA 95814

Tel: ~~(916) 445-6442~~ 916 319-8315
FAX: (916) 324-4281

Interested Person

Claim Number 00-TC-[illegible] Claimant County of San Bernardino

Subject Statutes of 1994, Chapter 706 et al; Penal Code Section 2966

Issue Mentally Disordered Offenders: Treatment as a Condition of Parole

Mr. Keith B. Petersen, President
Sixten & Associates

5252 Balboa Avenue Suite 807
San Diego CA 92117

Tel: (858) 514-8605
FAX: (858) 514-8645

Interested Person

Mr. Steve Smith, ~~CEO~~
~~Mandated Cost Systems, Inc.~~ Steve Smith Enterprises, Inc.
4633 Whitney Ave., Suite A 483-4231
~~2275 Watt Avenue Suite C~~
~~Sacramento CA 95825~~
Sacramento, CA 95821

Tel: (916) ~~487-4435~~
FAX: (916) ~~487-9662~~ 483-1403

Interested Person

Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518 P.O. Box 942850
Sacramento CA 95814

Tel: (916) 323-5849
FAX: (916) 324-7223

State Agency

Ms. Pam Stone, Legal Counsel
DMG-MAXIMUS

4320 Auburn Blvd. Suite 2000
Sacramento CA 95841

Tel: (916) 485-8102
FAX: (916) 485-0111

Interested Person

Mr. David Wellhouse,
Wellhouse & Associates

9175 Kiefer Blvd Suite 121
Sacramento CA 95826

Tel: (916) 368-9244
FAX: (916) 368-5723

Interested Person

Mr. Gary Winsom, President
California Public Defenders Association

3273 Ramos Circle, Suite 100
Sacramento CA 95827

Tel: (916) 362-1686
FAX: (916) 362-5498

Interested Person

1. TEST CLAIM TITLE

~~Mentally Disordered Offenders: Treatment as~~ a Condition of Parole (CSM 00-TC-28)

2. CLAIMANT INFORMATION

County of San Bernardino
Name of Local Agency or School District

Bonnie Ter Keurst
Claimant Contact

Reimbursable Projects Section Manager
Title

222 W. Hospitality Lane, 4th Floor
Street Address

San Bernardino, CA 92415
City, State, Zip

(909)386-8850
Telephone Number

(909)386-8830
Fax Number

bterkeurst@acr.sbcounty.gov
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be forwarded to this representative. Any change in representation must be authorized by the claimant in writing, and sent to the Commission on State Mandates.

Claimant Representative Name

Title

Organization

Street Address

City, State, Zip

Telephone Number

Fax Number

E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #:

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

Please identify all code sections, statutes, bill numbers, regulations, and/or executive orders that impose the alleged mandate (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]). When alleging regulations or executive orders, please include the effective date of each one.

Penal Code Section 2966
Penal Code Section 2962
Statutes of 1985, Chapter 1419
Statutes of 1986, Chapter 858
Statutes of 1987, Chapter 687
Statutes of 1988, Chapter 658
Statutes of 1989, Chapter 228
Statutes of 1994, Chapter 706

☐ *Copies of all statutes and executive orders cited are attached.*

Sections 5, 6, and 7 are attached as follows:

5. Written Narrative: pages 1 to 5.
6. Declarations: pages 6 to 8.
7. Documentation: pages 9 to 47.

8 CLAIM CERTIFICATION

Read, sign, and date this section and insert at the end of the test claim submission. *

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim submission is true and complete to the best of my own knowledge or information or belief.

Bonnie Ter Keurst
Print or Type Name of Authorized Local Agency or School District Official

Reimbursable Projects Section Manager
Print or Type Title

Bonnie Ter Keurst
Signature of Authorized Local Agency or School District Official

March 1, 2006
Date

* *If the declarant for this Claim Certification is different from the Claimant contact identified in section 2 of the test claim form, please provide the declarant's address, telephone number, fax number, and e-mail address below.*

COUNTY OF SAN BERNARDINO
TEST CLAIM
As Amended February 28, 2006

Penal Code Section 2966
Penal Code Section 2962
Statutes of 1985, Chapter 1419
Statutes of 1986, Chapter 858
Statutes of 1987, Chapter 687
Statutes of 1988, Chapter 658
Statutes of 1989, Chapter 228
Statutes of 1994, Chapter 706

MENTALLY DISORDERED OFFENDERS: TREATMENT AS A CONDITION OF PAROLE

TEST CLAIM NARRATIVE:

The statutes cited above that are the subject of this test claim added and amended Section 2966 of the California Penal Code. Section 2966 allows a prisoner or parolee to file a petition in superior court to challenge the State's determination that the prisoner/parolee is a mentally disordered offender (MDO) and subject to Penal Code Section 2962 which requires continued mental health treatment as a condition of parole.

Section 2962 defines the criteria under which the State can require an MDO be treated for a severe mental disorder by the State Department of Mental Health. The criteria includes:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment.
(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.
(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.
(d) Psychiatric professionals of the State Department of Mental Health and the Department of Corrections have certified to the Board of Prison Terms that the prisoner has a severe mental disorder.
(e) The prisoner received a determinate sentence and the prison sentence was imposed for specified crimes such as voluntary manslaughter, kidnapping, robbery with a dangerous weapon, and rape.

Section 2966 allows the prisoner or parolee to request a hearing before the State Board of Prison Terms to appeal the determination that Section 2962 applies to them. If the MDO continues to disagree with the Section 2962 determination of the Board of Prison Terms he or she may appeal that decision to the superior court of the county in which they are incarcerated or being treated.

The superior court is then required to conduct a civil hearing on the petition within 60 calendar days. The MDO is entitled to representation by a public defender (or a county-provided indigent defense attorney) and has the right to a jury trial requiring a unanimous verdict of the jury to uphold the state's position. The district attorney is required to represent the state's determination of the applicability of Section 2962 in these proceedings.

It should be noted that the determination and the defense of an MDO involves complex psychiatric issues such as whether the offender has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others. Therefore, the County of San Bernardino has had to provide specialized attorney, expert, investigator, paralegal, and secretarial services in order to perform these mandated duties.

Upon the filing of an appeal pursuant to Penal Code Section 2966, each MDO's criminal and treatment case information must be carefully reviewed by the district attorney and the public defender. Reviewing attorneys may need travel to and from state hospitals where detailed MDO medical records and other case file information is maintained. Forensic expert witnesses are appointed by the court at the request of indigent defense counsel. Such experts are regularly consulted in preparing the case for trial.

Once an MDO appeal proceeding is scheduled, MDOs are transported from their State hospitals or prison to county facilities (and returned if required) by the county sheriff's department. The sheriff's department is also responsible for MDO care and custody associated with confinement awaiting, during, and (if necessary) after their court proceeding.

Therefore, under the subject law, the county has had to provide specialized legal services in selecting, filing, adjudicating MDO defendants as well as transporting and housing such defendants during the pendency of their appeals.

The State's MDO population is primarily housed at Patton and Atascadero State Hospitals. Because Section 2966 hearings must take place in the superior court of the county in which the hospital is located, San Bernardino County and San Luis Obispo County (respectively) are subject to the majority of the costs for this mandate.

SIMILAR SERVICES HAVE BEEN FOUND TO BE REIMBURSABLE

The types of 'costs mandated by the state', as defined in Government Code Section 17514 and claimed herein are all reimbursable to the County under comparable programs, like the 'not guilty by reason of insanity' (NGI), 'sexually violent predator' (SVP), and the 'mentally disordered offender' (MDO) extended commitment programs.

These activities include:

- Review of the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission

without continued treatment;

- Prepare and file responses with the superior court to the prisoner's petition to appeal the Board of Prison Terms decision;
- Represent the State and the indigent prisoner in civil hearing on the petition and any subsequent petitions or hearings regarding the applicability of Penal Code Section 2962;
- Retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions;
- Travel to and from state hospitals where detailed medical records and case files are maintained;
- Travel to and from state hospitals by the defense counsel in order to meet with the prisoner client;
- Provide transportation and custody by the county sheriff's department of each potential mentally disordered offender before, during, and after the civil proceedings.

WIC 4117 PROVIDES LIMITED REIMBURSEMENT FOR MDO APPEALS

It should be noted that WIC 4117 provides very limited reimbursement for MDO appeals. For example, no reimbursement for indirect costs is provided. Further WIC 4117 is not a reliable funding source. Even reimbursement for a small percentage of a claimant's costs may not be available because the appropriation is exhausted and no deficiency is authorized. Therefore, in order to ensure the uniform and reliable performance of MDO appeal proceedings throughout the State it is imperative that dependable and comprehensive reimbursement for all counties' MDO "costs mandated by the State" be provided.

MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by these statutes clearly meets both tests that the Supreme Court in the *County of Los Angeles v. State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on state Mandates relies upon to determine if a reimbursable mandate exists, are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate Is Unique to Local Government

The statutory scheme set forth above imposes a unique requirement on local government. Only the county district attorney and public defender (or County provided defense attorney) may appear and represent the respective parties in these court proceedings. Where transportation and housing cannot be provided by the State institution, the county sheriff's department must perform these functions. This mandate applies only to local government.

Mandate Carries Out a State Policy

The mandate clearly carries out state policy. In Penal Code Section 2960, the Legislature finds that if the severe mental disorders of these prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public by requiring these prisoners to continue to receive treatment for these disorders.

GOVERNMENT CODE SECTION 17556 DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code Section 17556 which would prohibit a finding of costs mandated by the state. The letter in parenthesis represents the pertinent subsection of 17556.

(a) San Bernardino County did not request the legislation imposing the mandate.

(b) The statutes do not affirm for the state that which had been declared existing law or regulation by action of the courts.

(c) The statutes do not implement a federal law or regulation.

(d) The statutes do not provide fee authority sufficient to pay for the mandated program

(e) The statutes do not provide for offsetting savings resulting which result in no net costs to local agencies or school districts, nor do they include additional revenue specifically intended to sufficiently fund the costs of the state mandate.

(f) The statutes do not impose duties expressly included in a ballot measure approved by the voters in a statewide election.

(g) The costs claimed for reimbursement are not related to the enforcement of a new crime or infraction.

Therefore, the above seven disclaimers do not prohibit a finding for state reimbursement for the costs mandated by the state as contained in these test claim statutes.

COSTS MANDATED BY THE STATE:

Government Code Section 17514 defines "costs mandated by the state" as:

"Any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of

an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

The activities required by Penal Code Section 2966 as added and/or amended by the statutes of this test claim, result in increased costs which local agencies are required to incur after July 1, 1980, as a result of a statute enacted on or after January 1, 1975.

Therefore, based on the foregoing, the County of San Bernardino respectfully requests that the Commission on State Mandates determine that these test claim statutes impose reimbursable state-mandated costs pursuant to Section 6 of Article XIII B of the California Constitution.

EFFECTIVE DATES FOR REIMBURSEMENT

Due to the filing date of this test claim, July 2, 2001 (note: June 30, 2001 falls on a Saturday), local agencies are entitled to reimbursement for this program from July 1, 1999. All subject test claim statutes were chaptered and effective prior to July 1, 1999.

ESTIMATED COSTS

The following are estimated costs for a complete fiscal year (2000/01):

County of San Bernardino	$290,000
County of San Luis Obispo	160,000
Statewide Cost Estimate FY 2000/01	$450,000

The following are estimated costs for the fiscal year (2001/02) following the fiscal year for which the claim was filed:

County of San Bernardino	$320,000
County of San Luis Obispo	176,000
Statewide Cost Estimate FY 2001/02	$496,000

The following are estimated costs for the current fiscal year (2005/06):

County of San Bernardino	$ 900,000
County of San Luis Obispo	460,000
Statewide Cost Estimate FY 2005/06	$1,360,000

DECLARATION of CLAIMANT:

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Originally executed the 2nd day of July, 2001, at San Bernardino, California by Aly Saleh, Chief Deputy Auditor. This amendment is executed the 28th day of February, 2006 at San Bernardino, California by:

Bonnie Ter Keurst February 28, 2006
Bonnie Ter Keurst, Manager Reimbursable Projects

SCHEDULE OF EXHIBITS

Exhibit A: Penal Code Section 2966

Exhibit B: Penal Code Section 2962

Exhibit C: Statutes of 1986, Chapter 858

Exhibit D: Statutes of 1987, Chapter 687

Exhibit E: Statutes of 1988, Chapter 658

Exhibit F: Statutes of 1989, Chapter 228

Exhibit G: Statutes of 1994, Chapter 706

Exhibit H: Statutes of 1985, Chapter 1419

It is accurate that the Mentally Disordered Offender [MDO] civil commitment program was enacted in 1985 pursuant to Chapters 1418 and 1419, addressing Penal Code §§2970 and 2960 respectively, *operative on July 1, 1986.* It is also accurate that the "Penal Code Section 2966" Test Claim (00-TC-28) failed to list, "Statutes of 1985, Chapter 1419" amongst the various chaptered bills (5 in number), which reflect the statutory development of the 2966/MDO commitment provisions, as we know them. The earliest chaptered bill listed in the Test Claim is, "Statutes of 1986, chapter 858 (Section 4)," which amended Sections 2960 and 2970, and added sections 2962, 2964, 2966, 2972, 2974, 2976, 2978, and 2980 to the Penal Code, *operative January 1, 1987.*

Based thereon, we hereby seek to amend the Test Claim to include reference to, "Statutes of 1985, chapter 1419." [Prior to this enactment, indeed since 1969, Penal Code 2960 existed; however, Section 2960 simply provided for 72-hour mental health treatment and evaluation of prisoners about to be paroled, as well as 14-day intensive treatment.]

The 2970, 2972 and 2972.1 Test Claim (98-TC-09) similarly did not plead, "Statutes of 1985, Chapter 1419," pertaining to Section 2960, yet Statutes of 1985, Chapter 1418, pertaining to Penal Code 2970, specifically provided:

" (j) The definitions in Section 2960 apply to this section.

(k) If there is a conflict between the provisions of this section and Section 2960, the provisions of Section 2960 shall apply."

Clearly, some of the provisions of Statutes of 1985, Chapter 1419, namely definitions and other sections that conflict with Section 2970, were part of the foundational legislation for the civil commitment program addressed in the 2970, 2972 and 2972.1 Test Claim. Notwithstanding, "Statutes of 1985, chapter 1419" was not referenced in the Test Claim and the Test Claim was not rejected based on this technical exclusion. So too, the technical exclusion of a reference to "Statutes of 1985, chapter 1419," relative to this Test Claim pertaining to MDO/2966 commitments, should not be the basis for rejecting this good faith, well founded claim for reimbursement under SB 90.

Because Penal Code §2966(b) provides in pertinent part, "A prisoner ... may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing:..," San Bernardino County and San Luis Obispo County are required to adjudicate, potentially through jury trial, hundreds of cases annually for individuals committed to prison from all of the fifty-six counties in the state. Other than the location of Patton State Hospital being in San Bernardino County, and Atascadero State Hospital being in San Luis Obispo County, there is no financial justification for these particular two counties to have to bear the cost of adjudicating parolee initiated court hearings for the other fifty-four counties.

The Mentally Disordered Offenders: Treatment as a Condition of Parole (00-TC-28) Test Claim was prepared by the Auditor's Office in 2001, not by legal staff. The

failure to list the initial chaptered bill is an error of form, not substance. Had this issue been raised early in the process, it could have easily been rectified by amendment, or even a new Test Claim should amendments be discouraged. After waiting almost six years for the processing of this Test Claim, denial of the claim based on a technical omission does not seem to be in keeping with the spirit of the reimbursement program contemplated by the State Mandates Claims Fund.

DECLARATION of CLAIMANT:

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Pamela P. King

Pamela P. King
Deputy Public Defender

San Bernardino, CA February 3, 2006

2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing, the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. Evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the Board of Prison Terms hearing shall not be considered. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The court may, upon stipulation of both parties, receive in evidence the affidavit or declaration of any psychiatrist, psychologist, or other professional person who was involved in the certification and hearing process, or any professional person involved in the evaluation or treatment of the petitioner during the certification process. The court may allow the affidavit or declaration to be read and the contents thereof considered in the rendering of a decision or verdict in any proceeding held pursuant to subdivision (b) or (c), or subdivision (a) of Section 2972. If the court or jury reverses the determination of the Board of Prison Terms, the court shall stay the execution of the decision for five working days to allow for an orderly release of the prisoner.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when it continues the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the parolee represents a substantial danger of physical harm to others.

2962. As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment.

The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely.

The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances.

The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(d) (1) Prior to release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by

the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

(2) If the professionals doing the evaluation pursuant to paragraph (1) do not concur that (A) the prisoner has a severe mental disorder, (B) that the disorder is not in remission or cannot be kept in remission without treatment, or (C) that the severe mental disorder was a cause of, or aggravated, the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978.

(3) Only if both independent professionals who evaluate the prisoner pursuant to paragraph (2) concur with the chief psychiatrist's certification of the issues described in paragraph (2), shall this subdivision be applicable to the prisoner. The professionals appointed pursuant to Section 2978 shall inform the prisoner that the purpose of their examination is not treatment but to determine if the prisoner meets certain criteria to be involuntarily treated as a mentally disordered offender. It is not required that the prisoner appreciate or understand that information.

(e) The crime referred to in subdivision (b) meets both of the following criteria:

(1) The defendant received a determinate sentence pursuant to Section 1170 for the crime.

(2) The crime is one of the following:

(A) Voluntary manslaughter.

(B) Mayhem.

(C) Kidnapping in violation of Section 207.

(D) Any robbery wherein it was charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery.

(E) Carjacking, as defined in subdivision (a) of Section 215, if it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of the carjacking.

(F) Rape, as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.

(G) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(H) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(I) Lewd acts on a child under the age of 14 years in violation of Section 288.

(J) Continuous sexual abuse in violation of Section 288.5.

(K) The offense described in subdivision (a) of Section 289 where the act was accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(L) Arson in violation of subdivision (a) of Section 451, or arson

in violation of any other provision of Section 451 or in violation of Section 455 where the act posed a substantial danger of physical harm to others.

(M) Any felony in which the defendant used a firearm which use was charged and proved as provided in Section 12022.5, 12022.53, or 12022.55.

(N) A violation of Section 12308.

(O) Attempted murder.

(P) A crime not enumerated in subparagraphs (A) to (O), inclusive, in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (4) of subdivision (f) of Section 243.

(Q) A crime in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used. For purposes of this subparagraph, substantial physical harm shall not require proof that the threatened act was likely to cause great or serious bodily injury.

(f) As used in this chapter, "substantial danger of physical harm" does not require proof of a recent overt act.

(C)

CHAPTER 858

An act to amend Sections 2960 and 2970 of, and to add Sections 2962, 2964, 2966, 2968, 2972, 2974, 2976, 2978, and 2980 to, the Penal Code, relating to mentally disordered offenders.

[Approved by Governor September 16, 1986. Filed with Secretary of State September 17, 1986.]

The people of the State of California do enact as follows:

SECTION 1. Section 2960 of the Penal Code is amended to read:

2960. The Legislature finds that there are prisoners who have a treatable, severe mental disorder that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated. Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public. Thirdly, the Legislature finds that in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission.

The Legislature further finds and declares the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community.

SEC. 2. Section 2962 is added to the Penal Code, to read:

2962. As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment. The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission in the absence of treatment is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances. The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or

psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(d) Prior to release on parole the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, and that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

If the professionals doing the evaluation do not concur that (1) the prisoner has a severe mental disorder, or (2) that the disorder is not in remission or cannot be kept in remission without treatment, or (3) that the severe mental disorder was a cause of, or aggravated the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978. Only if both independent professionals concur with the chief psychiatrist's certification shall the provisions of this subdivision be applicable to the prisoner.

(e) The crime referred to in subdivision (b) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

SEC. 3. Section 2964 is added to the Penal Code, to read:

2964. (a) The treatment required by Section 2962 shall be

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inpatient unless the State Department of Mental Health certifies to the Board of Prison Terms that there is reasonable cause to believe the parolee can be safely and effectively treated on an outpatient basis, in which case the Board of Prison Terms shall permit the State Department of Mental Health to place the parolee in an outpatient treatment program specified by the State Department of Mental Health. Any prisoner who is to be required to accept treatment pursuant to Section 2962 shall be informed in writing of his or her right to request a hearing pursuant to Section 2966. Prior to placing a parolee in a local outpatient program, the State Department of Mental Health shall consult with the local outpatient program as to the appropriate treatment plan. Notwithstanding any other provision of law, a parolee ordered to have outpatient treatment pursuant to this section may be placed in an outpatient treatment program used to provide outpatient treatment under Title 15 (commencing with Section 1600) of Part 2, but the procedural provisions of Title 15 shall not apply. The director of an outpatient program used to provide treatment under Title 15 in which a parolee is placed may place the parolee in a secure mental health facility if the parolee can no longer be safely or effectively treated in the outpatient program, and until the parolee can be safely and effectively treated in the program. Within 15 days after placement in a secure facility the State Department of Mental Health shall conduct a hearing on whether the parolee can be safely and effectively treated in the program. Before deciding to seek revocation of the parole of a parolee receiving mental health treatment pursuant to Section 2962, and return him or her to prison, the parole officer shall consult with the director of the parolee's outpatient program.

(b) If the State Department of Mental Health has not placed a parolee on outpatient treatment within 60 days after receiving custody of the parolee or after parole is continued pursuant to Section 3001, the parolee may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing to determine whether the prisoner shall be treated as an inpatient or an outpatient. At the hearing, the burden shall be on the State Department of Mental Health to establish that the prisoner requires inpatient treatment as described in this subdivision. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978.

SEC. 4. Section 2966 is added to the Penal Code, to read:

2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two

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independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she meets the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole under Section 3001, this section shall be applicable for the purpose of determining whether the parolee meets the criteria of Section 2962.

SEC. 5. Section 2968 is added to the Penal Code, to read:

2968. If the prisoner's severe mental disorder is put into remission during the parole period, and can be kept in remission, the Director of Mental Health shall notify the Board of Prison Terms and the State Department of Mental Health shall discontinue treating the parolee.

SEC. 6. Section 2970 of the Penal Code is amended to read:

2970. Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison or in a state mental hospital the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits. The

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district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall state the reasons necessitating the continued treatment, with accompanying affidavits specifying the conditions in Section 2962 and that treatment during the parole period, if any, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify why the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued.

SEC. 7. Section 2972 is added to the Penal Code, to read:

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. The need for continued treatment shall be proven beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(c) If the court or jury finds that the patient is a person described in Section 2962, and his or her severe mental disorder is not in remission or cannot be kept in remission without treatment, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970.

(d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient remains a person described in Section 2962 whose severe

mental disorder is not in remission or cannot be kept in remission without treatment. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date.

SEC. 8. Section 2974 is added to the Penal Code, to read:

2974. Before releasing any inmate or terminating supervision of any parolee who is a danger to self or others, or gravely disabled as a result of mental disorder, and who does not come within the provisions of Section 2962, the Director of Corrections may, upon probable cause, place, or cause to be placed, the person in a state hospital pursuant to the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code.

SEC. 9. Section 2976 is added to the Penal Code, to read:

2976. (a) The cost of inpatient or outpatient treatment under this article shall be a state expense while the person is under the jurisdiction of the Department of Corrections.

(b) Any person placed outside of a facility of the Department of Corrections for the purposes of inpatient treatment under this article shall not be deemed to be released from imprisonment or from the custody of the Department of Corrections prior to the expiration of the maximum term of imprisonment of the person.

SEC. 10. Section 2978 is added to the Penal Code, to read:

2978. (a) Any independent professionals appointed by the Board of Prison Terms for purposes of this article shall not be state government employees; shall have at least five years of experience in the diagnosis and treatment of mental disorders; and shall include psychiatrists, and licensed psychologists who have a doctoral degree in psyschology.

(b) On July 1 of each year the Department of Corrections and the State Department of Mental Health shall submit to the Board of Prison Terms a list of 20 or more independent professionals on which both departments concur. The professionals shall not be state government employees and shall have at least five years of experience in the diagnosis and treatment of mental disorders and shall include psychiatrists and licensed psychologists who have a

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doctoral degree in psychology. For purposes of this article, when the Board of Prison Terms receives the list, they shall only appoint independent professionals from the list. The list shall not be binding on the Board of Prison Terms until they have received it, and shall not be binding after June 30 following receipt of the list.

SEC. 11. Section 2980 is added to the Penal Code, to read:

2980. This article applies to persons incarcerated before, as well as after, January 1, 1986.

CHAPTER 859

An act to amend Section 40000.7 of, and to add Section 4463.5 to, the Vehicle Code, relating to vehicles.

[Approved by Governor September 16, 1986. Filed with Secretary of State September 17, 1986.]

The people of the State of California do enact as follows:

SECTION 1. Section 4463.5 is added to the Vehicle Code, to read:

4463.5. (a) No person shall manufacture or sell a decorative or facsimile license plate of a size substantially similar to the license plate issued by the department.

(b) Notwithstanding subdivision (a), the director may authorize the manufacture and sale of decorative or facsimile license plates for special events or media productions.

(c) A violation of this section is a misdemeanor punishable by a fine of not less than five hundred dollars ($500).

SEC. 2. Section 40000.7 of the Vehicle Code is amended to read:

40000.7. A violation of any of the following provisions is a misdemeanor, and not an infraction:

(a) Section 2416, relating to regulations for emergency vehicles.

(b) Section 2800, relating to failure to obey an officer's lawful order or submit to a lawful inspection.

(c) Section 2800.1, relating to fleeing from a peace officer.

(d) Section 2801, relating to failure to obey a fireman's lawful order.

(e) Section 2803, relating to unlawful vehicle or load.

(f) Section 2813, relating to stopping for inspection.

(g) Subdivision (b) of Section 4461 and subdivisions (b) and (c) of Section 4463, relating to disabled person placards.

(h) Section 4463.5, relating to deceptive or facsimile license plates.

(i) Section 5500, relating to the surrender of registration documents and license plates before dismantling may begin.

(j) Section 5753, relating to delivery of certificates of ownership and registration when committed by a dealer or any person while a dealer within the preceding 12 months.

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act is in accordance with the request of a local agency which desired legislative authority to carry out the program specified in this act. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to provide for the continuation of the prohibition against requiring prior authorization from the State Department of Health Services for the provision of portable X-ray services provided in skilled nursing or intermediate care facilities under the Medi-Cal program, and in order to apply the provisions of this act to the special commission in San Mateo County prior to the end of the 1987 calendar year, it is necessary that this act go into immediate effect.

CHAPTER 687

An act to amend Section 1017 of the Evidence Code, and to amend Sections 1615, 1617, 1618, 1619, 1620, 2962, 2966, 2972, and 2978 of, and to add Section 2981 to, the Penal Code, relating to mentally disordered offenders.

[Approved by Governor September 16, 1987. Filed with Secretary of State September 17, 1987.]

The people of the State of California do enact as follows:

SECTION 1. Section 1017 of the Evidence Code is amended to read:

1017. (a) There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition.

(b) There is no privilege under this article if the psychotherapist is appointed by the Board of Prison Terms to examine a patient pursuant to the provisions of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

SEC. 2. Section 1615 of the Penal Code is amended to read:

1615. Pursuant to Section 5709.8 of the Welfare and Institutions Code, the State Department of Mental Health shall be responsible for the community treatment and supervision of judicially committed patients. These services shall be available on a county or regional basis. The department may provide these services directly or through contract with private providers or counties. The program

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or programs through which these services are provided shall be known as the Mental Health Conditional Release Program.

The department shall contact all county mental health programs by January 1, 1988, to determine their interest in providing an appropriate level of supervision and treatment of judicially committed patients at reasonable cost. County mental health agencies may agree or refuse to operate such a program.

The State Department of Mental Health shall ensure consistent data gathering and program standards for use statewide by the Mental Health Conditional Release Program.

SEC. 3. Section 1617 of the Penal Code is amended to read:

1617. The State Department of Mental Health shall research the demographic profiles and other related information pertaining to persons receiving supervision and treatment in the Mental Health Conditional Release Program. An evaluation of the program shall determine its effectiveness in successfully reintegrating these persons into society after release from state institutions. This evaluation of program effectiveness shall include, but not be limited to, a determination of the rates of reoffense while these persons are served by the program and after their discharge. This evaluation shall also address the effectiveness of the various treatment components of the program and their intensity.

The State Department of Mental Health may contract with an independent research agency to perform this research and evaluation project. Any independent research agency conducting this research shall consult with the Forensic Mental Health Association concerning the development of the research and evaluation design.

SEC. 4. Section 1618 of the Penal Code is amended to read:

1618. The administrators and the supervision and treatment staff of the Mental Health Conditional Release Program shall not be held criminally or civilly liable for any criminal acts committed by the persons on parole or judicial commitment status who receive supervision or treatment. This waiver of liability shall apply to employees of the State Department of Mental Health and the agencies or persons under contract to this department to provide supervision or treatment to mentally ill parolees or persons under judicial commitment.

SEC. 5. Section 1619 of the Penal Code is amended to read:

1619. The Department of Justice shall automate the criminal histories of all persons treated in the Mental Health Conditional Release Program, as well as all persons committed as not guilty by reason of insanity pursuant to Section 1026, incompetent to stand trial pursuant to Section 1370 or 1370.2, any person currently under commitment as a mentally disordered sex offender, and persons treated pursuant to Section 1364 or 2684 or Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3.

SEC. 6. Section 1620 of the Penal Code is amended to read:

1620. The Department of Justice shall provide mental health

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agencies providing treatment to patients pursuant to Sections 1600 to 1610, inclusive, or pursuant to Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3, with access to criminal histories of those mentally ill offenders who are receiving treatment and supervision. Treatment and supervision staff who have access to these criminal histories shall maintain the confidentiality of the information and shall sign a statement to be developed by the Department of Justice which informs them of this obligation.

SEC. 7. Section 2962 of the Penal Code is amended to read:

2962. As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment. The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission in the absence of treatment is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances. The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(d) Prior to release on parole the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison

Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, and that the prisoner used force or violence or caused serious bodily injury in committing the crime referred to in subdivision (b). For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

If the professionals doing the evaluation do not concur that (1) the prisoner has a severe mental disorder, or (2) that the disorder is not in remission or cannot be kept in remission without treatment, or (3) that the severe mental disorder was a cause of, or aggravated the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978. Only if both independent professionals concur with the chief psychiatrist's certification, shall the provisions of this subdivision be applicable to the prisoner. The professionals appointed pursuant to Section 2978 shall inform the prisoner that the purpose of their examination is not treatment but to determine if the prisoner meets the criteria to be involuntarily treated as a mentally disordered offender. It is not required that the prisoner appreciate or understand such information.

(e) The crime referred to in subdivision (b) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

SEC. 8. Section 2966 of the Penal Code is amended to read:

2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is

incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole under Section 3001, this section shall be applicable for the purpose of determining whether the parolee meets the criteria of Section 2962.

SEC. 9. Section 2972 of the Penal Code is amended to read:

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. The need for continued treatment shall be proven beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(c) If the court or jury finds that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970.

(d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that

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the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date.

SEC. 10. Section 2978 of the Penal Code is amended to read:

2978. (a) Any independent professionals appointed by the Board of Prison Terms for purposes of this article shall not be state government employees; shall have at least five years of experience in the diagnosis and treatment of mental disorders; and shall include psychiatrists, and licensed psychologists who have a doctoral degree in psychology.

(b) On July 1 of each year the Department of Corrections and the State Department of Mental Health shall submit to the Board of Prison Terms a list of 20 or more independent professionals on which both departments concur. The professionals shall not be state government employees and shall have at least five years of experience in the diagnosis and treatment of mental disorders and shall include psychiatrists and licensed psychologists who have a doctoral degree in psychology. For purposes of this article, when the Board of Prison Terms receives the list, they shall only appoint independent professionals from the list. The list shall not be binding on the Board of Prison Terms until they have received it, and shall not be binding after June 30 following receipt of the list.

SEC. 11. Section 2981 is added to the Penal Code to read:

2981. For the purpose of proving the fact that a prisoner has received 90 days or more of treatment within the year prior to the prisoner's parole or release, the records or copies of records of any

state penitentiary, county jail, federal penitentiary, or state hospital in which that person has been confined, when the records or copies thereof have been certified by the official custodian of those records, may be admitted as evidence.

CHAPTER 688

An act to amend Sections 6140, 6140.1, and 6140.3 of, and to add Section 6032 to, the Business and Professions Code, relating to the State Bar of California.

[Approved by Governor September 16, 1987. Filed with Secretary of State September 17, 1987.]

The people of the State of California do enact as follows:

SECTION 1. Section 6032 is added to the Business and Professions Code, to read:

6032. Subject to the approval of the Committees on Judiciary of each house of the Legislature, the board shall contract with an independent expert for the purpose of conducting a comprehensive study of the State Bar's affirmative action program with regard to its employees. A final report shall be submitted to each of the Committees on Judiciary no later than September 1, 1988. The amount expended pursuant to the contract shall not exceed twenty-five thousand dollars ($25,000).

SEC. 2. Section 6140 of the Business and Professions Code is amended to read:

6140. (a) The board shall fix the annual membership fee for 1988 as follows:

(1) For active members who have been admitted to the practice of law in this state for three years or longer preceding the first day of February of the year for which the fee is payable, at the sum of two hundred fifteen dollars ($215).

(2) For active members who have been admitted to the practice of law in this state for less than three years but more than one year preceding the first day of February of the year for which the fee is payable, at the sum of one hundred forty-seven dollars ($147).

(3) For active members who have been admitted to the practice of law in this state during, or for less than one year preceding the first day of February of the year for which the fee is payable, at a sum not exceeding one hundred sixteen dollars ($116).

(b) The annual membership fee for active members is payable on or before the first day of February of each year.

This section shall remain in effect only until January 1, 1989, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1989, deletes or extends that date.

SEC. 3. Section 6140.1 of the Business and Professions Code is

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CHAPTER 658

(Senate Bill No. 538)

An act to amend Sections 2966 and 2970 of the Penal Code, relating to mentally disordered offenders.

[Approved by Governor August 27, 1988.]

LEGISLATIVE COUNSEL'S DIGEST

SB 538, McCorquodale. Mentally disordered offenders.

Existing law authorizes a prisoner to request a hearing before the Board of Prison Terms for purposes of proving that the prisoner meets specified criteria for treatment by the State Department of Mental Health as a condition of parole. Existing law provides that if the prisoner disagrees with the determination of the board, he or she may file a petition for a hearing in the superior court, as specified, on whether the prisoner, as of the date of the Board of Prison Terms hearing, has met the prescribed criteria for treatment by the State Department of Mental Health. If the Board of Prison Terms continues a parolee's mental health treatment when it continues his or her parole under specified provisions, existing law provides that these provisions shall be applicable for the purpose of determining whether the parolee meets the criteria for continued treatment as a condition of parole.

This bill would provide instead that, if the Board of Prison Terms continues a parolee's mental health treatment under those specified provisions, the above procedures shall only be applicable for the purpose of determining if the parolee has a severe mental disorder and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment.

Existing law, as specified above, provides for the required treatment of certain convicted felons with a severe mental disorder as a condition of parole, and for their continued treatment upon termination of parole or release from prison. Existing law also provides that if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the director of the mental health facility or the Director of Corrections shall submit his or her evaluation on remission to the district attorney. The district attorney may file a petition for the continued treatment of the person for a period of one year, as specified. The petition shall state the reasons necessitating the continued treatment and be accompanied by affidavits stating specified conditions and that treatment during the parole period, if any, has continuously been provided by the State Department of Mental Health, as specified.

This bill would delete the requirement that the petition state the reasons necessitating the continued treatment of the person. It would require the petition be accompanied by an affidavit specifying certain conditions including a statement that the treatment was provided by the State Department of Mental Health, as specified.

The people of the State of California do enact as follows:

SECTION 1. Section 2966 of the Penal Code is amended to read:

§2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing 376 requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing, the burden of

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proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when they continue the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment.

SEC. 2. Section 2970 of the Penal Code is amended to read:

§ 2970. Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment or for those in prison or in a state mental hospital the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits. The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify whether the prisoner has a severe mental disorder and why the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued.

EXPLANATORY NOTES SENATE BILL 538:

Pen C § 2966. Amended subd (c) by substituting (1) "the procedures of this section shall only ... for ... this section shall" after "Sec 3001. ", and (2) "if the parolee has a severe mental disorder, and whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment" for "whether the parolee meets the criteria of Section 2962".

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Pen C § 2970: (1) Deleted the comma after "outpatient treatment" in the first sentence; (2) substituted "be accompanied by affidavits specifying that treatment while the prisoner was released from prison on parole" for "state the reasons necessitating the continued treatment, with accompanying affidavits specifying the conditions in Section 2962 and that treatment during the parole period, if any" in the fourth sentence; and (3) added "whether the prisoner has a severe mental disorder and" in the last sentence.

CHAPTER 228

An act to amend Sections 2962, 2966, 2970, 2972, and 2980 of the Penal Code, relating to prisoners, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 27, 1989. Filed with Secretary of State July 27, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 2962 of the Penal Code is amended to read:

2962. As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(a) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment.

The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances.

The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(d) (1) Prior to release on parole, the person in charge of treating

the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, that the prisoner used force or violence or caused serious bodily injury in committing the crime referred to in subdivision (b), and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

(2) If the professionals doing the evaluation pursuant to paragraph (1) do not concur that (1) the prisoner has a severe mental disorder, or (2) that the disorder is not in remission or cannot be kept in remission without treatment, or (3) that the severe mental disorder was a cause of, or aggravated the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978.

(3) Only if both independent professionals who evaluate the prisoner pursuant to paragraph (2) concur with the chief psychiatrist's certification of the issues described in paragraph (2), shall the provisions of this subdivision be applicable to the prisoner. The professionals appointed pursuant to Section 2978 shall inform the prisoner that the purpose of their examination is not treatment but to determine if the prisoner meets certain criteria to be involuntarily treated as a mentally disordered offender. It is not required that the prisoner appreciate or understand that information.

(e) The crime referred to in subdivision (b) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

(f) As used in this chapter, "substantial danger of physical harm" does not require proof of a recent overt act.

SEC. 2. Section 2966 of the Penal Code is amended to read:

2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing, the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d),

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of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when it continues the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the parolee represents a substantial danger of physical harm to others.

SEC. 3. Section 2970 of the Penal Code is amended to read:

2970. Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections, shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison or in a state mental hospital the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written

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evaluation shall be accompanied by supporting affidavits.

The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others.

SEC. 4. Section 2972 of the Penal Code is amended to read:

2972. (a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable.

The standard of proof under this section shall be proof beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(c) If the court or jury finds that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment; and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970.

(d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2 shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be

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that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others. The recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date.

SEC. 5. Section 2980 of the Penal Code is amended to read:

2980. This article applies to persons who committed their crimes on and after January 1, 1986.

SEC. 6. It is not the intent of the Legislature to directly or indirectly imply by this act that courts may not use the standard of evidence accepted by the court in People v. Beard, 173, Cal. App. 3d 1113, in cases arising under Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

SEC. 7. (a) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall submit a report to the Legislature on or before September 30, 1990, on the following:

(1) A description of the disposition of cases of patients released from treatment under the mentally disordered offender program following the invalidation of that program by the Court of Appeal in People v. Gibson (204 Cal. App. 3d 1425), including discussion regarding any subsequent acts recorded by the Department of Justice, the State Department of Mental Health, and the Department of Corrections, to the extent resources are available.

(2) A description of the criteria used to select which prisoners are personally evaluated for possible treatment under the mentally disordered offender program, and the criteria used to determine which of those prisoners are to be treated under the program.

(b) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall submit an annual report to the Legislature on the status of the

mentally disordered offender program on or before December 31, 1991, and on or before December 31 each year thereafter through 1996, which shall include all of the following:

(1) The following information on persons committed to the mentally disordered offender program on or after July 1, 1989, who have exhausted their rights under Section 2966 of the Penal Code.

(A) The duration of treatment for those patients selected for the mentally disordered program, including both inpatient and outpatient treatment.

(B) The number of mentally disordered offender patients returned to custody or to a hospital due to the commission of a new crime, to the extent this information is available from the Department of Justice, or due to parole revocation.

(C) The number of parole revocations of persons who have been treated previously under the mentally disordered offender program and the reasons for the revocations.

(D) The number of parole revocations for all parolees whose parole was revoked based upon psychiatric reasons pursuant to Section 2646 of Title 15 of the California Code of Regulations.

(E) Information regarding recidivism rates for criminal conduct by persons previously treated under the mentally disordered offender program to the extent this information is available from the Department of Justice.

(F) Any other information that would be useful to the Legislature in evaluating the performance of the mentally disordered offender program.

(2) A summary description of the number and disposition of cases of all prisoners who are personally clinically evaluated on and after July 1, 1989, by the Department of Corrections and the State Department of Mental Health for possible treatment under the mentally disordered offender program, including disposition of any hearing or court proceedings. The report also shall contain a brief explanation, as the departments deem appropriate, to explain the data.

(c) The Department of Corrections and the State Department of Mental Health, in conjunction with the Board of Prison Terms, shall provide a preliminary report to the Legislature on or before December 31, 1990, describing the report protocol they intend to use for the report required under subdivision (b) and any problems which they anticipate.

(d) The reports required under this section shall be submitted to the Assembly Committee on Public Safety and to the Senate Judiciary Committee.

(e) Notwithstanding any other provision of law, the Department of Justice, the Department of Corrections, the State Department of Mental Health, and the Board of Prison Terms shall make available any information required for purposes of this section. Any confidential information obtained pursuant to this subdivision may be used for purposes of preparing the reports required by this

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section, but the information shall not be used in any way that discloses confidential information, nor shall that confidential information be used for any other purpose.

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The Court of Appeal in People v. Gibson (204 Cal. App. 3d 1425) declared part of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code in violation of the equal protection clause of the United States Constitution because it does not require proof the person represents a substantial danger of physical harm to others by reason of his or her severe mental disorder. In order to keep the mentally disordered offender program in effect for those persons who committed their crimes on or after January 1, 1986, it is necessary that this act take effect immediately.

CHAPTER 229

An act to amend Sections 5651, 5661, and 5681 of the Business and Professions Code, relating to landscape architecture, and making an appropriation therefor.

[Approved by Governor July 27, 1989. Filed with Secretary of State July 28, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 5651 of the Business and Professions Code is amended to read:

5651. (a) The board shall by means of examination, ascertain the professional qualifications of all applicants for licenses to practice landscape architecture in this state and shall issue a license to every person whom it finds to be qualified on payment of the initial license fee prescribed by this chapter.

(b) The examination shall consist of a written examination. The written examination may be waived by the board if the applicant (1) is licensed in a state and demonstrates to the board that he or she has passed the Uniform National Examination for Landscape Architects or is certified by the Council of Landscape Architects Registration Boards and has submitted proof of job experience equivalent to that which is required of California candidates and (2) has taken a written examination equivalent in scope and subject matter to the written examination last given in California as determined by the board, and has achieved a score on the out-of-state examination at least equal to the score required to pass the California written examination. The written examination shall include testing of the applicants knowledge of California plants and environmental conditions.

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BILL NUMBER: SB 1918 CHAPTERED 09/21/94

CHAPTER 706
FILED WITH SECRETARY OF STATE SEPTEMBER 21, 1994
APPROVED BY GOVERNOR SEPTEMBER 20, 1994
PASSED THE SENATE AUGUST 29, 1994
PASSED THE ASSEMBLY AUGUST 25, 1994
AMENDED IN ASSEMBLY AUGUST 22, 1994
AMENDED IN ASSEMBLY JULY 7, 1994

INTRODUCED BY Senator Campbell

FEBRUARY 25, 1994

An act to amend Section 2966 of the Penal Code, relating to prisoners.

LEGISLATIVE COUNSEL'S DIGEST

SB 1918, Campbell. Prisoners: severe mental disorders.

Under existing law, a prisoner who disagrees with the determination of the Board of Prison Terms that he or she has a severe mental disorder that is not in remission or cannot be kept in remission without treatment, as defined, may file a petition in the superior court of the county in which he or she is incarcerated or is being treated for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of having a severe mental disorder that is not in remission or cannot be kept in remission without treatment. The court is required to conduct a hearing on the petition, as specified. The standard of proof is beyond a reasonable doubt, and if the trial is by jury, the jury is required to be unanimous in its verdict.

This bill would prohibit the court's consideration, at the hearing on the petition, of evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the Board of Prison Terms hearing.

This bill would also provide that the court may, upon stipulation of the parties, receive in evidence the affidavit or declaration of any psychiatrist, psychologist, or other professional person who was involved in the certification and hearing process, or any professional person involved in the evaluation or treatment of the petitioner during the certification process, as specified.

This bill would also provide that if the court or jury reverses the determination of the Board of Prison Terms, the court shall stay the execution of the decision for 5 working days to allow for an orderly release of the prisoner.

BILL NUMBER: SB 1918 CHAPTERED 09/21/94

CHAPTER 706

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 2966 of the Penal Code is amended to read:

2966. (a) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962. At the hearing, the burden of proof shall be on the person or agency who certified the prisoner under subdivision (d) of Section 2962. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in Section 2978. The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to subdivision (b). The Board of Prison Terms shall provide a prisoner who requests a trial, a petition form and instructions for filing the petition.

(b) A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown.

Evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the Board of Prison Terms hearing shall not be considered. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The court may, upon stipulation of both parties, receive in evidence the affidavit or declaration of any psychiatrist, psychologist, or other professional person who was involved in the certification and hearing process, or any professional person involved in the evaluation or treatment of the petitioner during the certification process. The court may allow the affidavit or declaration to be read and the contents thereof considered in the rendering of a decision or verdict in any proceeding held pursuant to subdivision (b) or (c), or subdivision (a) of Section 2972. If the court or jury reverses the determination of the Board of Prison Terms, the court shall stay the execution of the decision for five working days to

allow for an orderly release of the prisoner.

(c) If the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when it continues the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the parolee represents a substantial danger of physical harm to others.

5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This paragraph and the regulations adopted pursuant thereto shall become operative on January 1, 1987.

(i) This section applies to persons incarcerated before, as well as after, the effective date of this section.

(j) The definitions in Section 2960 apply to this section.

(k) If there is a conflict between the provisions of this section and Section 2960, the provisions of Section 2960 shall apply.

SEC. 1.5. Notwithstanding any other provision of law, there shall be no prohibition or limitation on the placement in any state hospital by the Director of Mental Health of judicially committed persons or of persons confined in a state hospital for purposes of mental health treatment pursuant to the Penal Code.

SEC. 1.7. Reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.

SEC. 2. This act shall only become operative if SB 1296 of the 1985–86 Regular Session is enacted, in which case both this act and SB 1296 shall become operative on the operative date contained in SB 1296. If SB 1296 of the 1985–86 Regular Session is not enacted, this act shall not become operative.

CHAPTER 1419

An act to amend Sections 2960 and 3003 of the Penal Code, relating to prisoners.

[Approved by Governor October 1, 1985. Filed with Secretary of State October 1, 1985.]

The people of the State of California do enact as follows:

SECTION 1. Section 2960 of the Penal Code is amended to read:

2960. (a) The Legislature finds that there are prisoners who have a treatable, severe mental disorder which caused, was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated. Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public. Thirdly, the

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Legislature finds that in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission.

The Legislature further finds and declares the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community.

(b) As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(1) The prisoner has a severe mental disorder which is not in remission or cannot be kept in remission without treatment. The term "severe mental disorder" means an illness or disease or condition which substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or which demonstrates evidence of an acute brain syndrome for which prompt remission in the absence of treatment is unlikely. The term " severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances. The term "remission" means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person "cannot be kept in remission without treatment" if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

(2) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

(3) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

(4) Prior to release on parole the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a

facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission due to medical or psychosocial reasons or failure of the prisoner to voluntarily follow prescribed medical treatment, or both, and that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

If the professionals doing the evaluation do not concur that (A) the prisoner has a severe mental disorder, or (B) that the disorder is not in remission or cannot be kept in remission, or (C) that the severe mental disorder was a cause of, or aggravated the prisonet's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, who have at least five years of experience in the diagnosis and treatment of mental disorders, who may be either psychiatrists, or licensed psychologists who have a doctoral degree in psychology. Only if both independent professionals concur with the chief psychiatrist's certification, shall the provisions of this subdivision be applicable to the prisoner.

On July 1 of each year the Department of Corrections and the State Department of Mental Health shall submit to the Board of Prison Terms a list of 20 or more independent professionals on which both departments concur. The professionals shall not be state government employees and shall have at least five years of experience in the diagnosis and treatment of mental disorders and shall include psychiatrists and licensed psychologists who have a doctoral degree in psychology. For purposes of this subdivision, when the Board of Prison Terms receives the list, they shall only appoint independent professionals from the list. The list shall not be binding on the Board of Prison Terms until they have received it, and shall not be binding after June 30 following receipt of the list.

(5) The crime referred to in paragraph (2) was a crime in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of Section 243.

(c) (1) The treatment required by subdivision (b) shall be inpatient unless the State Department of Mental Health certifies to the Board of Prison Terms that there is reasonable cause to believe the parolee can be safely and effectively treated on an outpatient basis, in which case the Board of Prison Terms shall permit the State Department of Mental Health to place the parolee in an outpatient treatment program specified by the State Department of Mental

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Health. Any prisoner who is to be required to accept treatment pursuant to subdivision (b) shall be informed in writing of his or her right to request a hearing pursuant to subdivision (d). Prior to placing a parolee in a local outpatient program, the State Department of Mental Health shall consult with the local outpatient program as to the appropriate treatment plan. Notwithstanding any other provision of law, a parolee ordered to have outpatient treatment pursuant to this section may be placed in an outpatient treatment program used to provide outpatient treatment under Title 15 (commencing with Section 1600) of Part 2, but the procedural provisions of Title 15 shall not apply. The director of an outpatient program used to provide treatment under Title 15 in which a parolee is placed may place the parolee in a secure mental health facility if the parolee can no longer be safely or effectively treated in the outpatient program, and until the parolee can be safely and effectively treated in the program. Within 15 days after placement in a secure facility the State Department of Mental Health shall conduct a hearing on whether the parolee can be safely and effectively treated in the program. Before deciding to seek revocation of the parole of a parolee receiving mental health treatment pursuant to subdivision (b), and return him or her to prison, the parole officer shall consult with the director of the parolee's outpatient program.

(2) If the State Department of Mental Health has not placed a parolee on outpatient treatment within sixty days after receiving custody of the parolee or after parole is continued pursuant to Section 3001, the parolee may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing to determine whether the prisoner shall be treated as an inpatient or an outpatient. At the hearing, the burden shall be on the State Department of Mental Health to establish that the prisoner requires inpatient treatment as described in this subdivision. If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in paragraph (4) of subdivision (b).

(d) (1) A prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner does not meet the criteria in subdivision (b). At the hearing the burden of proof shall be on the person or agency who certified the prisoner under paragraph (4) of subdivision (b). If the prisoner or any person appearing on his or her behalf at the hearing requests it, the board shall appoint two independent professionals as provided for in paragraph (4) of subdivision (b). The prisoner shall be informed at the hearing of his or her right to request a trial pursuant to paragraph (2) of this subdivision. The Board of Prison Terms shall provide a prisoner who requests a trial a petition form and instructions for filing the petition.

(2) A prisoner who disagrees with the determination of the Board

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of Prison Terms that he or she meets the criteria of subdivision (b), may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she meets the criteria of subdivision (b). The court shall conduct a hearing on the petition within sixty calendar days after the petition is filed, unless either time is waived by the petitioner or his counsel, or good cause is shown. The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings. The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the petitioner shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable. The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney.

(3) The provisions of this subdivision shall be applicable to a continuation of a parole pursuant to Section 3001.

(e) If the prisoner's severe mental disorder is put into remission during the parole period, and can be kept in remission, the Director of Mental Health shall notify the Board of Prison Terms and the State Department of Mental Health shall discontinue treating the parolee.

(f) (1) Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by this section, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission, the medical director of the state hospital which is treating the parolee, or the county mental health director in charge of the parolee's outpatient program, or the Director of Corrections shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or, for those in prison, the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits. The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall state the reasons necessitating the continued treatment, with accompanying affidavits specifying the conditions in subdivision (b) and that treatment during the parole period, if any, has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify why the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued.

(2) The court shall conduct a hearing on the petition for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial.

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The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. The need for continued treatment shall be proven beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(3) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(4) If the court or jury finds that the patient is a person described in subdivision (b), and his or her severe mental disorder is not in remission or cannot be kept in remission if treatment is not continued, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in paragraph (1).

(5) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this paragraph, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(6) Prior to the termination of a commitment under this subdivision, a petition for recommitment may be filed to determine whether the patient remains a person described in subdivision (b) which severe mental disorder is not in remission or cannot be kept in remission if treatment is not continued. The recommitment proceeding shall be conducted in accordance with the provisions of this subdivision.

(7) Any commitment under this section places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(8) Except as provided in this paragraph, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is

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being held. This paragraph and the regulations adopted pursuant thereto shall become operative on January 1, 1987.

(g) Before releasing any inmate or terminating supervision of any parolee who is a danger to self or others, or gravely disabled as a result of mental disorder, and who does not come within the provisions of subdivision (b), the Director of Corrections may, upon probable cause, place, or cause to be placed, the person in a state hospital pursuant to the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code.

(h) The cost of inpatient or outpatient treatment under this article shall be a state expense while the person is under the jurisdiction of the Department of Corrections.

(i) Any person placed outside of a facility of the Department of Corrections for the purposes of inpatient treatment under this article shall not be deemed to be released from imprisonment or from the custody of the Department of Corrections prior to the expiration of the maximum term of imprisonment of the person.

(j) The amendments to this section made in the first year of the 1985–86 Regular Session apply to persons incarcerated before, as well as after, the effective date of those amendments.

SEC. 2. Section 3003 of the Penal Code is amended to read:

3003. (a) An inmate who is released on parole shall be returned to the county from which he or she was committed.

(b) Notwithstanding subdivision (a), an inmate may be returned to another county in a case where that would be in the best interests of the public and of the parolee. If the authority setting the conditions of parole decides on a return to another county, it shall place its reasons in writing in the parolee's permanent record. In making its decision, the authority may consider, among others, the following factors:

(1) The need to protect the life or safety of a victim, the parolee, a witness or any other person.

(2) Public concern that would reduce the chance that the inmate's parole would be successfully completed.

(3) The verified existence of a work offer, or an educational or vocational training program.

(4) The last legal residence of the inmate having been in another county.

(5) The existence of family in another county with whom the inmate has maintained strong ties and whose support would increase the chance that the inmate's parole would be successfully completed.

(6) The lack of necessary outpatient treatment programs for parolees receiving treatment pursuant to Section 2960.

(c) An inmate may be paroled to another state pursuant to any other provision of law.

SEC. 2.5. Notwithstanding any other provision of law, there shall be no prohibition or limitation on the placement in any state hospital by the Director of Mental Health of judicially committed persons or

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of persons confined in a state hospital for purposes of mental health treatment pursuant to the Penal Code.

SEC. 2.75. The Legislature finds and declares that Department of Corrections prisoners subject to the provisions of this act are in a separate, distinct class from persons who have been committed by the State Department of Mental Health under the provisions of Section 1026 or 1370 of the Penal Code, or former Section 6316 of the Welfare and Institutions Code. Therefore, it is not intended that any provision of this act be construed in any way to effect the status of persons committed to the State Department of Mental Health under Section 1026 or 1370 of the Penal Code, or former Section 6316 of the Welfare and Institutions Code. Nor are the provisions of this act intended in any manner to affect decisional law interpreting those statutes.

SEC. 2.85. Reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.

SEC. 3. Except as provided in paragraph (8) of subdivision (f) of Section 2960 of the Penal Code, this act shall become operative on July 1, 1986.

CHAPTER 1420

An act to add Section 11165.5 to the Penal Code, relating to crimes.

[Approved by Governor October 1, 1985. Filed with Secretary of State October 1, 1985.]

The people of the State of California do enact as follows:

SECTION 1. Section 11165.5 is added to the Penal Code, to read:

11165.5. As used in Sections 11165 and 11166.5, "child care custodian," in addition to the persons specified therein, means an instructional aide, a teacher's aide, or a teacher's assistant employed by any public or private school, who has been trained in the duties imposed by this article, if the school district has so warranted to the State Department of Education. It also includes a classified employee of any public school who has been trained in the duties imposed by this article if the school has so warranted to the State Department of Education.

SEC. 2. School districts which do not train the employees specified in Section 11165.5 of the Penal Code in the duties of child care custodians under the child abuse reporting laws shall report to the State Department of Education the reasons why this training is

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AUDITOR/CONTROLLER-RECORDER
COUNTY CLERK

AUDITOR/CONTROLLER • 222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415-0018 • (909) 387-8322 • Fax (909) 386-8830
RECORDER • COUNTY CLERK • 222 West Hospitality Lane, First Floor
San Bernardino, CA 92415-0022 • (909) 387-8306 • Fax (909) 386-8940

COUNTY OF SAN BERNARDINO

LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed by the County of San Bernardino, State of California. My business address is 222 W. Hospitality Lane, San Bernardino, CA 92415. I am 18 years of age or older.

On March 1, 2006, I faxed and mailed the letter dated March 1, 2006 to the Commission on State Mandates in response to the Mentally Disordered Offenders: Treatment as a Condition of Parole, CSM 00-TC-28, Penal Code Sections 2966 and 2962, Statutes of 1985, Chapter 1419; Statutes of 1986, Chapter 858; Statutes of 1987, Chapter 687; statutes of 1988, Chapter 658; Statutes of 1989, Chapter 228; Statutes of 1994, Chapter 706, faxed and/or mailed it also to the other parties listed on this 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 March 1, 2006 at San Bernardino, California.

WENDY SULZMANN

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

May 26, 2006

Ms. Bonnie Ter Keurst
County of San Bernardino
Auditor/Controller-Recorder, County Clerk
222 W. Hospitality Lane, Fourth Floor
San Bernardino, CA 92415-0018

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis and Hearing Date
Mentally Disordered Offenders: Treatment as a Condition of Parole (00-TC-28, 05-TC-06)
Penal Code section 2966
County of San Bernardino, Claimant
Statutes 1985, chapter 1419; Statutes 1986, chapter 858; Statutes 1987, chapter 687; Statutes 1988, chapter 658; Statutes 1989, chapter 228; Statutes 1994, chapter 706

Dear Ms. Ter Keurst:

The Department of Finance has agreed to waive its comment period on the amendment (05-TC-06) to this test claim. Therefore, the draft staff analysis is enclosed for your review and comment.

Written Comments
Any party or interested person may file written comments on the draft staff analysis by Friday, **June 23, 2006**. You are advised that comments filed with the 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. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the regulations.

Hearing
This test claim is set for hearing on **Friday, July 28, 2006**. We will notify you of the time and location of the hearing when a hearing room has been confirmed. The final staff analysis will be issued on or about July 13, 2006. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Deborah Borzelleri at (916) 322-4230 with any questions regarding the above.

Sincerely,

PAULA HIGASHI
Executive Director

Enc. Draft Staff Analysis

MAILED: _____ FAXED: _____
DATE: 5/26/06 INITIAL: LD
CHRON: _____ FILE: /
WORKING BINDER: _____

ITEM ____

TEST CLAIM
DRAFT STAFF ANALYSIS

Penal Code Section 2966
Statutes 1985, Chapter 1419[1]
Statutes 1986, Chapter 858
Statutes 1987, Chapter 687
Statutes 1988, Chapter 658
Statutes 1989, Chapter 228
Statutes 1994, Chapter 706

Mentally Disordered Offenders:
Treatment as a Condition of Parole

(00-TC-28, 05-TC-06)

County of San Bernardino, Claimant

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS.

[1] The test claim was amended on March 2, 2006 to add this statute. The amendment was accepted based on provisions of Government Code section 17557, subdivision (c), that were in effect on the date of the filing of the original test claim.

STAFF ANALYSIS

Claimant

County of San Bernardino

Chronology

07/05/01	County of San Bernardino filed test claim with Commission (00-TC-28)
08/03/01	The Department of Corrections submitted comments
08/09/01	The Department of Finance submitted comments
09/05/01	County of San Bernardino requested an extension of time through October 25, 2001 to respond to comments
09/07/01	Request for extension to respond to comments on or before October 25, 2001 was granted
11/08/01	County of San Bernardino requested an extension of time until December 3, 2001 to respond to comments
11/09/01	Request for extension to respond to comments on or before December 3, 2001 was granted
02/05/02	County of San Bernardino requested an extension of time until February 22, 2002 to respond to comments
02/06/02	Request for extension to respond to comments was granted; comments due on or before March 8, 2002
02/27/02	County of San Bernardino filed reply to Department of Finance comments
01/19/06	Commission staff issued draft staff analysis
02/03/06	County of San Bernardino filed comments on draft staff analysis
03/02/06	County of San Bernardino filed amendment to test claim (05-TC-06)
05/26/06	Department of Finance waived its comment period on the amendment
05/26/06	Commission staff issued draft staff analysis based on amended test claim

Background

This test claim addresses the Mentally Disordered Offender law, codified in Penal Code sections 2960 et seq., which establishes continued mental health treatment and civil commitment procedures for persons with severe mental disorders, following termination of their sentence or parole.

Overview of Mentally Disordered Offender Program

Since 1969, the Mentally Disordered Offender law has required certain offenders who have been convicted of specified violent crimes to receive treatment by the Department of Mental Health as a condition of parole.[2] Penal Code section 2960 establishes the Legislature's intent to protect the public by requiring those prisoners who received a

[2] Penal Code section 2962, subdivisions (a) through (f).

determinate sentence and who have a treatable, severe mental disorder at the time of their parole, or upon termination of parole, to receive mental health treatment until the disorder is in remission and can be kept in remission. Section 2960 further states that "the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community."

To impose mental health treatment as a condition of parole, the prospective parolee must have: 1) a severe mental disorder that is not in remission or cannot be kept in remission without treatment, and the disorder was one of the causes of or was an aggravating factor in the commission of the crime for which the prisoner was sentenced to prison; 2) been in treatment for 90 days or more within the year prior to his or her parole or release; and 3) been certified by designated mental health professionals as meeting conditions 1 and 2 above, in addition to representing a substantial danger of physical harm to others by reason of the severe mental disorder.[3]

Prior to release on parole or prior to termination of parole, such a person must be evaluated and certified by mental health professionals as to whether he or she meets the mentally disordered offender criteria set forth in Penal Code section 2962.[4] The person has the right to a hearing before the Board of Prison Terms to contest such a finding that he or she meets the mentally disordered offender criteria.[5] If the person is dissatisfied with the results of the Board of Prison Terms hearing, the person may petition the superior court for a civil hearing to determine whether he or she meets the mentally disordered offender criteria.[6]

The evaluation must also be submitted to the district attorney of the county in which the person is being treated, incarcerated or committed not later than 180 days prior to termination of parole or release from parole.[7] The district attorney may then file a petition in superior court for continued involuntary treatment for one year and the court shall conduct a civil hearing on the matter.[8]

If the person's severe mental disorder is put into remission during the parole period, and can be kept in remission during the parole period, the Department of Mental Health must discontinue treatment.[9]

Major legislation affecting the mentally disordered offender program came forward in 1985. That year, the Legislature enacted Statutes 1985, chapter 1418 (Senate Bill No.

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[3] Penal Code section 2962, subdivisions (a) through (d).

[4] Penal Code section 2962, subdivision (d).

[5] Penal Code section 2966, subdivision (a).

[6] Penal Code section 2966, subdivision (b).

[7] Penal Code section 2970.

[8] Penal Code sections 2970 and 2972, subdivision (a).

[9] Penal Code section 2968.

(SB) 1054) and Statutes 1985, chapter 1419 (SB 1296), which were double-joined. Chapter 1418 added Penal Code section 2970, to set forth procedures for the *local district attorney* to petition the court for a hearing when a mentally disordered offender is scheduled to be released from prison or parole. Penal Code section 2970 hearings were addressed in a prior test claim (98-TC-09).

Chapter 1419 amended Penal Code section 2960, adding subdivision (d) text to set forth procedures for allowing a *prisoner or parolee* to petition the court for a hearing to contest a Board of Prison Terms determination that he or she meets the mentally disordered offender criteria. Although chapter 1419 was not pled in the original test claim, the test claim was amended on March 2, 2006 to add it.

The two types of hearing and the statutes affecting them are further described below.

Prior Test Claim – District Attorney-Initiated Court Hearings (Pen. Code, §§ 2970, 2972 and 2972.1)

District Attorney-initiated court hearings under the Mentally Disordered Offender law, established by Statutes 1985, chapter 1418, were the subject of a prior test claim[10] in which the Commission on State Mandates found a reimbursable state-mandated program was imposed on local agencies. That prior test claim addressed Penal Code sections 2970, 2972 and 2972.1, which established court procedures initiated by the local district attorney to extend for one year the involuntary treatment of a mentally disordered offender. The district attorney may extend involuntary treatment if the offender's severe mental disorder is not in remission or cannot be kept in remission without treatment.

Not later than 180 days prior to the termination of parole, the professionals treating the prisoner or parolee are required to submit a written evaluation to the district attorney in the county of treatment or commitment. The district attorney reviews the evaluation and files a Penal Code section 2970 petition in the superior court for continued involuntary treatment for one year and the court conducts a civil hearing on the matter.

For that test claim, the following activities were determined to be reimbursable:

1. review the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970);
2. prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, § 2970);
3. represent the state and the indigent offender in civil hearings on the petition and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972, 2972.1);
4. retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions for recommitment;
5. travel to and from state hospitals where detailed medical records and case files are maintained; and

[10] Test Claim number 98-TC-09.

6. provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County Sheriff's Department.

Prisoner- or Parolee-Initiated Court Hearings [Pen. Code, § 2960, subdivision (d), & Pen. Code § 2966]

Prisoner- or parolee-initiated court hearings under the Mentally Disordered Offender law, established by Statutes 1985, chapter 1419, are the subject of this test claim. Codified originally in Penal Code section 2960, subdivision (d), the provisions for these court hearings are currently set forth in Penal Code section 2966. Such hearings are initiated by a prisoner or parolee who wishes to contest a finding, made at the time of parole or upon termination of parole, that he or she meets the mentally disordered offender criteria. Section 2960, subdivision (d), as it was originally enacted, provided that:

- A prisoner or parolee may request a hearing before the Board of Prison Terms, and the Board shall conduct a hearing if so requested, for the purpose of the prisoner proving that he or she does not meet the mentally disordered offender criteria.
- At the hearing the burden of proof shall be on the person or agency who certified the prisoner or parolee as meeting the mentally disordered offender criteria.
- If the prisoner or parolee, or any person appearing on his or her behalf at the hearing requests it, the Board of Prison Terms shall appoint two independent professionals for further evaluation.
- The prisoner or parolee shall be informed at the Board of Prison Terms hearing of his or her right to file a petition in the superior court for a trial on whether he or she meets the mentally disordered offender criteria. The Board of Prison Terms shall provide a prisoner or parolee who requests a trial a petition form and instructions for filing the petition.
- A prisoner or parolee who disagrees with the determination of the Board of Prison Terms that he or she meets the mentally disordered offender criteria may file a petition for a hearing in the superior court of the county in which he or she is incarcerated or is being treated.
- The court shall conduct a hearing on the petition within sixty calendar days after the petition is filed, unless either: 1) time is waived by the petitioner or his counsel; or 2) good cause is shown to delay the hearing.
- The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings.
- The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial.
- The attorney for the petitioner shall be given a copy of the petition, and any supporting documents.
- The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable.

- The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the petitioner and the district attorney.
- The hearing procedures are applicable to a continuation of a parole pursuant to Penal Code section 3001, which provides for discharge from parole unless the Department of Corrections recommends to the Board of Prison Terms that the person be retained on parole, and the Board, for good cause, determines that the person will be retained.

These basic provisions were subsequently modified as follows:

1. Statutes 1986, Chapter 858, Section 4 (SB 1845) – This statute renumbered the existing provisions of section 2960, and in so doing created section 2966.

2. Statutes 1987, Chapter 687, Section 8 (SB 425) – This statute modified the provisions to specify the time frame for examining the person's mental state.

3. Statutes 1988, Chapter 658, Section 1 (SB 538) – This statute clarified the scope of the Penal Code section 2966 hearing.

4. Statutes 1989, Chapter 228, Section 2 (SB 1625) – This statute enacted an additional requirement for finding a severe mental disorder, i.e., that the prisoner or parolee represents a substantial danger of physical harm to others, as a result of *People v. Gibson* (1988) 204 Cal.App.3d 1425. The *Gibson* court found that the mentally disordered offender legislation violated the equal protection clause of the United States and California Constitutions by not requiring current proof of dangerousness as required of other adult persons involuntarily committed for mental health treatment.

5. Statutes 1994, Chapter 706, Section 1 (SB 1918) – This statute modified Penal Code section 2966 regarding admissible evidence, and to provide that, if the court reverses the Board's decision, the court shall stay execution of decision for five working days to allow for orderly release of the prisoner.

Claimant's Position

The County of San Bernardino contends that the test claim statutes constitute a reimbursable state-mandated local program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The County is seeking reimbursement for the following activities:

- District Attorney services to represent the people, and Public Defender services to represent indigent petitioners, both of which are specialized to deal with complex psychiatric issues, including travel time for these personnel.

- Forensic expert witness and investigator services.
- Sheriff's department services for transporting inmates between prison or the state hospital and court house, care and custody associated with confinement awaiting, during and after the court proceeding.

Claimant filed comments in response to Department of Finance, rejecting the Department's assertions that costs to implement the test claim legislation are related to enforcement of a changed penalty for a crime, and therefore must be denied under Government Code section 17556, subdivision (g). This is addressed in Issue 3 of the following analysis.

Claimant filed an amendment to the test claim to include the original legislation (Stats. 1985, ch. 1419) which established the provisions allowing the prisoner or parolee to initiate a hearing contesting a finding that he or she meets the mentally disordered offender criteria.

Position of Department of Corrections

The Department of Corrections filed comments on August 3, 2001, citing additional workload and subpoenas for mental health professionals at the Department resulting from mentally disordered offender evaluations. Hearings are particularly increasing in San Bernardino County as a result of mentally disordered offenders being placed in Patton State Hospital, which is located within that county. The Department stated that it had received approximately 20 such subpoenas in the last year, and "[i]t is evident that county resources are impacted by the necessity of conducting these hearings as well." The comments further noted that "[t]he Department of Mental Health has indicated that increasing numbers of [mentally disordered offender] cases will be placed at [Patton State Hospital], at least over the next year or so."

The Department stated that it "appears the County's claim for reimbursement does have merit."

Position of Department of Finance

The Department of Finance filed comments on August 9, 2001, stating that the test claim legislation should not be considered a reimbursable mandate because "the costs claimed for reimbursement are related to enforcement of a changed penalty for a crime or infraction, as specified in Government Code section 17556(g)."

The basis for the Department's argument is that when a petitioner is requesting a hearing to contest a condition of parole, in effect he or she is petitioning to change the penalty for a crime. The county is responsible to provide a sentencing hearing, which determines the penalty for a crime. In this case, the hearing requested by the inmate is a "continuation of the pre-incarceration hearing that is the responsibility of the county." Therefore the costs should not be reimbursable under article XIII B, section 6 of the California Constitution.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[11] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[12] "Its purpose 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."[13] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[14] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[15]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state."[16] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[17] A "higher level of service" occurs

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[11] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected/ (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[12] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

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

[14] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[15] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); Lucia Mar Unified School District v. Honig (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[16] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.).

[17] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

when the new "requirements were intended to provide an enhanced service to the public."[18]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[19]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[20] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[21]

This test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a "new program" or "higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose "costs mandated by the state" within the meaning of article XIII B, section 6 and Government Code section 17514?

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

In order for a test claim statute to impose a reimbursable state mandated program under article XIII B, section 6, the statutory language must mandate an activity or task upon local governmental agencies. If the statutory language does not mandate or require local agencies to perform a task, then article XIII B, section 6, is not triggered.

Here, claimant is seeking reimbursement for services of the district attorney to represent the people, services of the public defender to represent indigent prisoners or parolees, forensic expert witness and investigative services, and sheriff's department services for transportation and custodial matters. The Penal Code provides that, when a prisoner or parolee initiates a court hearing under the mentally disordered offender program, the "court shall conduct a hearing on the petition...,"[22] the "court shall advise the petitioner

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[18] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

[19] *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 (*County of Sonoma*); Government Code sections 17514 and 17556.

[20] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[21] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[22] Penal Code section 2966, subdivision (b).

of his or her right to be represented by an attorney and of the right to a jury trial"[23] and "the trial shall be by jury unless waived by both the person and the district attorney."[24]

Thus, once the prisoner or parolee petitions the court for a Penal Code section 2966 hearing, the court shall conduct it. The test claim legislation requires the district attorney to represent the people in any such hearing. Because the statute also gives the prisoner or parolee "the right to be represented by an attorney," the public defender is required to represent the prisoner or parolee when he or she is indigent. Therefore, staff finds that activities of the district attorney, representing the people, and public defender, representing indigent offenders, are mandated by the test claim legislation.[25]

The test claim legislation must also constitute a "program" in order to be subject to article XIII B, section 6 of the California Constitution. Commission staff finds representation by the district attorney and public defender at the subject hearings does constitute a program for the reasons stated below.

The relevant tests regarding whether test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 are set forth in case law. The California Supreme Court, in the case of *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[26]

Here, the district attorney represents the people at the subject hearings, and the public defender represents the prisoner or parolee. Such representation is a peculiarly governmental function administered by a local agency – the county district attorney's office and the county public defender's office – as a service to the public. Moreover, the test claim legislation imposes unique requirements upon counties that do not apply generally to all residents and entities in the state.

Accordingly, staff finds that the test claim legislation mandates an activity or task upon local government and constitutes a "program." Therefore, the test claim legislation is subject to article XIII B, section 6 of the California Constitution.

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[23] *Ibid.*

[24] *Ibid.*

[25] The Commission can consider claimant's request for reimbursement for expert witnesses, investigators, and sheriff's department transportation and custodial services at the parameters and guidelines stage to determine whether these services are needed as a reasonable method of complying with the mandate pursuant to California Code of Regulations, title 2, section 1183.1, subdivision (a)(4).

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

Issue 2: Does the test claim legislation impose a "new program" or "higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

The courts have held that legislation imposes a "new program" or "higher level of service" when: a) the requirements are new in comparison with the preexisting scheme; and b) the requirements were intended to provide an enhanced service to the public.[27] To make this determination, the test claim legislation must initially be compared with the legal requirements in effect immediately prior to its enactment.[28]

The test claim statutes require counties to provide district attorney and public defender services when a prisoner or parolee requests a court hearing to contest a finding that he or she meets the mentally disordered offender criteria. The law in effect immediately prior to the test claim statutes allowed for commitment of inmates or parolees to a state hospital under the Welfare and Institutions Code, but did not require any of the activities or procedures set forth in the test claim legislation. Therefore, staff finds that the requirements of the test claim legislation are new in comparison with the preexisting scheme.

Staff further finds that the requirements in the test claim legislation were intended to provide an enhanced service to the public by protecting the public from severely mentally disordered persons while ensuring a fair hearing for the prisoner or parolee.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of article XIII B, section 6 and Government Code section 17514?

For the mandated activities to impose a reimbursable, state-mandated program under article XIII B, section 6, two additional elements must be satisfied. First, the activities must impose costs mandated by the state pursuant to Government Code section 17514. Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The test claim alleged costs of $110,000 for a district attorney, $130,000 for a public defender, and $50,000 for sheriff's office services for a complete fiscal year of 2000/2001. Thus, there is evidence in the record, signed under penalty of perjury, that there are increased costs as a result of the test claim legislation.

Government Code section 17556 lists several exceptions which preclude the Commission from finding costs mandated by the state. For the reasons stated below, staff finds that none of the exceptions apply to deny this test claim.

Government Code section 17556, subdivision (b), requires the Commission to deny the test claim where the test claim statute "affirmed for the state a mandate that had been

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[27] *San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[28] *Ibid.*

declared existing law or regulation by action of the courts." In *People v. Gibson* (1988) 204 Cal.App.3d 1425, the court found that the test claim legislation violated the equal protection clause of the United States and California Constitutions by not requiring current proof of dangerousness as required of other adult persons involuntarily committed for mental health treatment.[29] In response to *Gibson,* Penal Code section 2966, subdivision (c), was modified to add another condition that must be met in order to continue involuntary mental health treatment.[30] The condition is whether, by reason of his or her severe mental disorder, the prisoner or parolee represents a substantial danger of physical harm to others.

Although this new provision expands the scope of the Penal Code section 2966 hearing by requiring proof of an additional element, i.e., current proof of dangerousness, staff finds that the first test claim statute actually created the mandate for district attorney and public defender services. This additional element cannot feasibly be considered a separate, mandated activity, but instead is "part and parcel" to the original mandated hearing activities.[31] Therefore, Government Code section 17556, subdivision (b), is inapplicable to deny the test claim.

Government Code section 17556, subdivision (c), requires the Commission to deny the test claim where the test claim statute "imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute ... mandates costs that exceed the mandate in that federal law or regulation."

Here, the hearing can result in involuntary commitment and treatment of the prisoner or parolee beyond the parole termination date. Although the Mentally Disordered Offender legislation is located in the Penal Code, the California Appellate Court has held that the statutory scheme is civil rather than penal.[32] The U.S. Supreme Court has repeatedly found that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,[33] and some courts have determined that the assistance of counsel under those circumstances is required to meet federal due process standards.[34] Moreover, California courts recognize that legal services for indigent

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[29] *Gibson, supra,* 204 Cal.App.3d 1425, 1437.

[30] Statutes 1989, chapter 228; Senate Bill 1625 (as amended April 27, 1989), Senate Committee on Judiciary Analysis (1989-90 Regular Session), May 2, 1989, pages 1-2.

[31] Cf. *San Diego Unified School Dist. v. Commission on State Mandates, supra,* 33 Cal.4th 859, 881-882.

[32] *People v. Robinson* (1998) 63 Cal.App.4th 348, 352 *(Robinson)*; *People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826 *(Myers)*.

[33] *Addington v. Texas* (1979) 441 U.S. 418.

[34] *Heryford v. Parker* (10th Cir. 1968) 396 F.2d 393, where the court held that a civil proceeding resulting in involuntary treatment commands observance of the constitutional safeguards of due process, including the right to counsel.

persons at public expense are mandated in civil proceedings relating to mental health matters where restraint of liberty is possible.[35]

Thus, the question is whether public defender services for indigent prisoners or parolees results in costs mandated by the federal government — in the form of constitutional rights to counsel under the Sixth Amendment and rights to due process under the Fourteenth Amendment. Staff finds the public defender services do not result in costs mandated by the federal government for the reasons stated below.

The California Supreme Court in *San Diego Unified School Dist.*[36] addressed the issue of costs mandated by the federal government in the context of school expulsion due process hearings. There, the relevant test claim statute compelled suspension and mandated a recommendation of expulsion for certain offenses, which then triggered a mandatory expulsion hearing.[37] It was not disputed that the resulting expulsion hearing was required to "comply with basic federal due process requirements, such as notice of charges, a right to representation by counsel, an explanation of the evidence supporting the charges, and an opportunity to call and cross-examine witnesses and to present evidence."[38]

The court stated that in the absence of the mandatory provision, a school district would not automatically incur the due process hearing costs that are mandated under federal law.[39] Further, the mandatory expulsion provision did not implement a federal law or regulation, since the federal law did not at the time mandate an expulsion recommendation or expulsion for the cited offenses.[40] Even the provisions setting forth expulsion hearing *procedures* did not in themselves require the school district to incur any costs, since neither those provisions nor federal law required that any such expulsion recommendation be made in the first place.[41] The court concluded:

> Because it is state law [the mandatory expulsion provision], and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows … that we cannot characterize *any* of the hearing costs incurred by the District, triggered by the mandatory [state] provision …, as constituting a federal mandate (and hence being nonreimbursable). We conclude that under the statutes existing at the time of the test claim in this case …, *all* such hearing costs—those designed to satisfy the minimum requirements of federal due process, and those that may exceed those requirements—are, with respect to the mandatory

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[35] *Phillips v. Seely* (1974) 43 Cal.App.3d 104, 113; *Waltz v. Zumwalt* (1985) 167 Cal.App.3d 835, 838.

[36] *San Diego Unified School Dist., supra,* 33 Cal.4th 859.

[37] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 879.

[38] *Ibid.*

[39] *Id.* at 880.

[40] *Id.* at 881.

[41] *Ibid.*

expulsion provision …, state mandated costs, fully reimbursable by the state. (Emphasis in original.)[42]

Like the test claim legislation in the *San Diego Unified School Dist.* case, there is no pre-existing federal statutory scheme requiring the states to implement civil commitment proceedings for mentally disordered offenders. Rather, the civil proceedings set forth in the test claim statute constitute a new state program, and counties would not otherwise be compelled to provide defense services to indigent persons wishing to contest involuntary treatment or commitment if the new program had not first been created by the state. Therefore, Government Code section 17556, subdivision (c), is inapplicable to deny the test claim.

Government Code section 17556, subdivision (e), requires the Commission to deny the test claim if the "statute … or an appropriation in the Budget Act or other bill provides for offsetting savings to local agencies … that result in no net costs to the local agencies …, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." Welfare and Institutions Code section 4117 allows reimbursement to local agencies for certain mental health trials or hearings involving inmates of state mental hospitals. Section 4117 specifically allows for reimbursement of costs incurred by counties for hearings conducted as a result of district attorney-initiated petitions to continue involuntary treatment as a continuation of parole, pursuant to Penal Code section 2972.

Neither section 4117, nor any other statutory or Budget Act provisions, provide for reimbursement for costs incurred by counties for hearings conducted pursuant to Penal Code section 2966. Therefore, Government Code section 17556, subdivision (e), is inapplicable to deny the test claim.

Government Code section 17556, subdivision (g), requires the Commission to deny the test claim if 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." The Department of Finance, in its comments of August 9, 2001, asserted that the test claim legislation should not be considered a reimbursable mandate because "the costs claimed for reimbursement are related to enforcement of a changed penalty for a crime or infraction, as specified in Government Code section 17556 (g)."

However, as noted above, the test claim statute itself identifies the subject hearings as "civil hearings,"[43] and California courts have reaffirmed that the Mentally Disordered Offender legislation is civil rather than penal.[44] In the *Robinson* case, the Second District Court of Appeal overruled its previous determination that the Mentally Disordered Offender law was penal in nature. Citing an earlier case, it stated that the Mentally Disordered Offender scheme is "concerned with two objectives, neither of which is

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[42] *Id.* at 881-882.

[43] Penal Code section 2966, subdivision (b).

[44] *People v. Robinson, supra,* 63 Cal.App.4th 348; *People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826.

penal: protection of the public, and providing mental heath treatment for certain offenders who are dangerous and suffering from severe mental illnesses."[45] Based on the case law interpreting the Mentally Disordered Offender law, Government Code section 17556, subdivision (g), is inapplicable to deny the test claim.

Conclusion

Based on the foregoing, staff finds that Penal Code section 2966 imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities resulting from Penal Code section 2966 hearings:

- district attorney services to represent the people; and
- public defender services to represent indigent prisoners or parolees.

Recommendation

Staff recommends that the Commission adopt this analysis, which finds district attorney and public defender services for Penal Code section 2966 hearings are reimbursable.

[45] *People v. Robinson, supra,* 63 Cal.App.4th 348, 352.

THE PEOPLE, Plaintiff and Respondent,
v.
ANDREW FRASER GIBSON, Defendant and Appellant
No. B025616.

Court of Appeal, Second District, California.

Oct 6, 1988.

SUMMARY

Defendant was convicted of forcible rape in violation of Pen. Code, § 261, subd. (2), and was sentenced to six years in the state prison. Instead of being released on parole on his due date, he was required to accept inpatient treatment through the Department of Health under Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of future dangerousness. After trial he was found to be a severely mentally disordered offender subject to involuntary confinement and treatment under Pen. Code, § 2962, and he appealed. (Superior Court of San Luis Obispo County, No. PC4, Harry E. Woolpert, Judge.)

The Court of Appeal reversed, holding defendant was entitled to parole on terms without reference to the requirements of Pen. Code, § 2962 et seq. The court held the retroactive application of the mandatory provisions violated the ex post facto clauses of the United States and California Constitutions as applied to a defendant whose crimes which resulted in imprisonment were committed prior to the enactment of the legislation. It further held the provisions violated the equal protection clauses of the United States and California Constitutions, as it was unreasonable and arbitrary to exempt persons such as defendant from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment, and no compelling governmental interest justified the exception. (Opinion by Abbe, J., with Stone (S. J.), P. J., and Gilbert, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Criminal Law § 7.2--Ex Post Facto Laws--Mental Treatment as Condition of Parole.
Legislation (Pen. Code, § § 2962-2980) requiring *1426 certain mentally ill persons about to be paroled to accept inpatient mental treatment violates the ex post facto clauses of U.S. Const., art. I, § 9, cl. 3, and Cal. Const., art. I, § 9, as applied to a prisoner whose crime, which resulted in imprisonment and a determinate sentence, was committed prior to the enactment of the legislation. The provisions are applicable only to persons who were convicted for certain crimes and who were still serving their terms of imprisonment on the operative date of the legislation, and mandate a potentially onerous change in the terms of parole which is part of the sentence for a criminal conviction; the result could potentially be custody for life in a state hospital setting without proof that the person was either gravely disabled or demonstrably dangerous as the result of mental illness.

[See Cal.Jur.3d (Rev), Criminal Law, § 9; Am.Jur.2d, Constitutional Law, § 654.]

(2) Criminal Law § 7--Ex Post Facto Laws.
Two critical elements must be present for a statute to violate the ex post facto clause: (1) it must be a criminal or penal law which applies to events occurring prior to its effective date and (2) it must substantially disadvantage the offender affected by it. A law constitutes an ex post facto violation when it retrospectively imposes criminal liability for conduct which was innocent when it occurred, or increases the punishment prescribed for a crime, or by necessary operation alters the situation of the accused to his disadvantage. In order to determine whether retrospective laws are disadvantageous, courts must look to the effect of the present system of laws compared to those in place at the time the offense was committed.

(3) Criminal Law § 7--Ex Post Facto Laws--Penal or Therapeutic Laws.
Pen. Code, § § 2962-2980, requiring certain mentally ill prisoners about to be paroled to accept inpatient mental treatment without a determination of future dangerousness, must be characterized as penal, rather than therapeutic, for determining whether it violates the ex post facto clause when applied retrospectively. The primary purpose of the legislation is to protect the public, and the fact the

person is treated while confined involuntarily does not ipso facto make the confinement nonpenal. Failure to follow the treatment plan during the period of parole can result in a return to prison on parole revocation and it may therefore extend indirectly the incarceration of the person as a result of his criminal conduct.

(4a, 4b, 4c, 4d) Constitutional Law § 101--Equal Protection--Basis of Classification--Criminal Conviction or Acquittal--Involuntary Mental *1427 Treatment of Parolees.

Legislation (Pen. Code, § § 2962-2980) requiring certain mentally ill prisoners about to be paroled to accept inpatient mental treatment without a determination of dangerousness violates the equal protection clause of the United States Constitution, since it is unreasonable and arbitrary to exempt such persons from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment. Although parole status is a distinctive characteristic for disparate treatment under certain circumstances, it is irrelevant to the purpose of the statute's involuntary commitment or treatment.

(5) Constitutional Law § 76--Nature and Scope of Equal Protection--United States Constitution.

The equal protection clause of the United States Constitution requires at a minimum that persons standing in the same relation to a challenged government action will be uniformly treated. Traditionally, social and economic legislation is upheld if the classification drawn is rationally related to legitimate state interests. When the classification touches on a fundamental right, it must be judicially determined under the strictest standard whether it is necessary to promote a compelling government interest. Whether a right is fundamental depends on whether it is implicitly or explicitly granted by the federal Constitution. An equal protection challenge requires a determination whether the groups which are differently treated are similarly situated for purposes of the law. If they are not, no equal protection claim is applicable.

(6) Penal and Correctional Institutions § 22--Nature of Parole.

Parole in California is different than the traditional concept of parole, under which it is a release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the term. In California, determinately sentenced prisoners serve the complete term specified under Pen. Code, § 1170, less any applicable credits for work performed under Pen. Code, § § 2931 or 2933, and are then placed on parole for three years regardless of the length of the term served. Under Pen. Code, § 3000, this parole period is an essential part of the actual sentence and is not dependent on early release.

(7) Constitutional Law § 84--Equal Protection--Classification--Judicial Review--Deference to Legislature--Dangerousness--Class.

Under equal protection analysis, although great deference is due a legislative determination that a certain class of persons endangers public safety and that involuntary commitment of persons in that class is necessary to protect the public, the determination of which individuals belong to *1428 that class is a judicial, not legislative, function. Thus, Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of dangerousness establishes an invalid classification, since it would permit a permanent conclusive presumption of dangerousness from proof of mental illness so long as it had once been proved the illness was causally related to or an aggravating factor in the commission of a criminal offense. Such conclusive presumption would violate due process since dangerousness is not universally and necessarily coexistent with mental illness, and a finding that a mental illness was once a contributing cause or aggravating factor in criminality does not change the fact that all former felons suffering mental illness are not dangerous or violent.

(8) Constitutional Law § 101--Equal Protection--Basis of Classification-- Criminal Conviction or Acquittal--Parolees--Mental Illness.

Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of dangerousness, is subject to close scrutiny under the California Constitution (Cal. Const., art. I, § 7) in an equal protection analysis, since the statutory scheme deprives persons of their liberty. The law can withstand constitutional attack as discriminatory among similarly situated persons only if the government can demonstrate a compelling interest which justifies the law and that the distinction drawn by the statute is necessary to further that purpose. Because there is no demonstrable compelling interest in the continued confinement of mentally ill former prisoners simply because their mental illness continues, or that exclusion of a requisite finding of dangerousness is necessary to serve any legitimate government interest, the statutes violate equal protection. The difficulty of proof of dangerousness

does not constitute necessity for its complete elimination.

COUNSEL

Rowan W. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Morris Lenk, Karl S. Mayer and Bruce M. Slavin, Deputy Attorneys General, for Plaintiff and Respondent. *1429

ABBE, J.

Legislation, [FN1] effective July 1, 1986, requiring a person who had been sentenced to a determinate sentence prior to that date to be confined in a mental hospital as a condition of parole, violates constitutional ex post facto clauses. The legislation also violates equal protection because it mandates involuntary confinement and treatment of former prisoners who are mentally ill without proof of dangerousness.

FN1 Statutes 1985, chapter 1419, section 3. The provisions were originally found in Penal Code section 2960. They were amended and recodified without substantive change by Statutes 1986, chapter 858, to have separate section numbers (Pen. Code, § § 2962-2980). For easy reference, all sections are referred to by their present section numbers.

Appellant was convicted of forcible rape in violation of Penal Code [FN2] section 261, subdivision (2) and on June 29, 1983, was sentenced to six years in the state prison. With applicable credits he was to be released from custody on parole on September 10, 1986. Instead of being released, he was required to accept inpatient treatment through the Department of Mental Health under the statutory scheme under consideration. After trial in the superior court, he was found to be a severely mentally disordered offender subject to involuntary confinement and treatment under section 2962.

FN2 All further statutory references are to this code unless otherwise specified.

The confinement then ordered for appellant expired one year from the date he should have been released on parole. This appeal is therefore technically moot. However, since appellant is subject to repetition of this process, the issues are of recurring importance and time constraints make it likely any annual commitment will evade appellate review, we address the merits. [FN3] (See *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 167, fn. 2 [167 Cal.Rptr. 854, 616 P.2d 836].)

FN3 Appellant has been continued on parole for another year under section 2962 and is continuing to be confined for treatment as an inpatient at Atascadero State Hospital.

In 1983, when appellant was committed to prison, section 2960 (now § 2974 as amended) provided discretion to seek civil commitment of prisoners under the Lanterman-Petris-Short (hereafter LPS) Act, which was incorporated in part by reference in the Penal Code as an alternative to their release. Involuntary commitment under the LPS Act is applicable to all persons regardless of their former penal status who are proved to be gravely disabled or demonstrably dangerous to themselves or others. (See Welf. & Inst. Code, § § 5150, 5200, 5250, subd. (a), 5300, subds. (a)-(c).) If such confinement was not both sought and imposed, appellant would have been entitled to be released from confinement into the community. *1430

Section 2962 now mandates treatment for any person who meets all the following criteria: (1) Is about to be released on parole, [FN4] (2) has a severe mental disorder, as defined, (3) the mental disorder is not in remission or cannot be kept in remission without treatment, as defined, (4) whose severe mental disorder was one of the causes of or was an aggravating factor [FN5] in the commission of a crime for which the person was sentenced to prison, (5) whose crime was one in which the person used force or violence or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of section 243, and (6) who has been in treatment for the severe mental disorder for 90 days or more within the year prior to parole or release. [FN6]

FN4 Section 2970 also permits the same standards be applied for recommitment of persons who would otherwise be released without parole or whose parole has expired. Appellant is not such a person.

FN5 Ironically, mental disorders which do not constitute a defense under California insanity provisions (§ 25) are mitigating factors for purposes of sentencing. (See Cal.

Rules of Court, rules 416(e), 423(b)(2) and 425(b).) Consequently a mental illness which is causally related to criminal conduct may at the same time reduce the term of imprisonment and then result in custodial confinement for life.

FN6 The procedural provisions for commitment are not challenged. They are complex and need not be considered here.

The treatment mandated is inpatient (§ 2964) unless the patient can be safely and effectively treated on an outpatient basis, but if not released to outpatient status within 60 days the person may request a hearing before the Board of Prison Terms (BPT) where the Department of Mental Health must establish that inpatient treatment is necessary. (§ 2964, subd. (b).) This treatment can be continued under the same provisions so long as parole is continued and, as a condition thereof, treatment is mandated pursuant to section 2962. (§ 2964, subd. (c).)

These provisions apply to all persons affected who were incarcerated before as well as after January 1, 1986. (§ 2980.) It is therefore expressly retroactive to persons whose crimes which resulted in imprisonment were committed prior to the enactment of the Legislature so long as they had not earlier been released on parole. [FN7]

FN7 The provisions apply to all persons whether sentenced to a determinate term under section 1170 or to an indeterminate term either prior to the enactment of section 1170 or under section 1168. As appellant was a determinately sentenced prisoner we confine our consideration only to persons released on parole after serving a determinate term imposed pursuant to section 1170.

Ex Post Facto Violation

(1a) Appellant contends the retroactive application of these mandatory provisions violates the ex post facto clauses of the United States and California Constitutions (art I, § 9, cl. 3, and art I, § 9, respectively). We agree. *1431

(2) Two critical elements must be present for a statute to violate the ex post facto clause; (1) it must be a criminal or penal law which applies to events occurring prior to its effective date, and (2) it must substantially disadvantage the offender affected by it. (*In re Jackson* (1985) 39 Cal.3d 464, 469-477 [216 Cal.Rptr. 760, 703 P.2d 100].)

A law constitutes an ex post facto violation when it retrospectively (1) imposes criminal liability for conduct which was innocent when it occurred, or (2) increases the punishment prescribed for a crime, or (3) by necessary operation alters the situation of the accused to his disadvantage. (*Conservatorship of Hofferber, supra,* 28 Cal.3d 161, 180.) The mentally disordered offender provisions (MDO) of section 2962 et seq. both increase punishment and alter the situation of the accused to his disadvantage.

In order to determine whether retrospective laws are disadvantageous, we must look to the effect of the present system of laws compared to those in place at the time the offense was committed. (See *In re Stanworth* (1982) 33 Cal.3d 176, 186 [187 Cal.Rptr. 783, 654 P.2d 1311]; *Dobbert v. Florida* (1977) 432 U.S. 282, 294 [53 L.Ed.2d 344, 356-357, 97 S.Ct. 2290]; *Weaver v. Graham* (1981) 450 U.S. 24, 25 [67 L.Ed.2d 17, 20-21, 101 S.Ct. 960].)

(1b) At the time of appellant's offense he was subject to a determinate sentence (§ 1170) and had to be released on parole at the end thereof (§ 3000 subds. (a) and (d); *People v. Burgener* (1986) 41 Cal.3d 505, 529, fn. 12 [224 Cal.Rptr. 112, 714 P.2d 1251].) The Board of Prison Terms (BPT) had discretion to set such reasonable parole conditions as it deemed proper (§ 3053), including the condition of outpatient psychiatric counseling. (*In re Naito* (1986) 186 Cal.App.3d 1656 [231 Cal.Rptr. 506], also see § 3002.) The BPT could revoke his parole and recommit him for failure to abide by the conditions. (§ § 3056 and 3060.)

His total period of parole and custody on recommitment for revocation of parole could not exceed four years (§ 3057, subd. (a)) [FN8] unless he engaged in misconduct while confined on a parole revocation (§ 3057, subd. (c); also see § 3060.5.)

FN8 All references to this section are to the prior version under Statutes 1984, chapter 805, section 3.

When appellant committed his offense he could only have been confined involuntarily for evaluation and treatment on the same basis as all nonprisoners or parolees, that is, if he was mentally ill and gravely disabled (Welf. & Inst. Code, § § 5000, 5008, subd. (h)(1)) or dangerous. (Welf. & Inst. Code, § § 5000, 5250) (former Pen. Code, § 2960, now § 2974,

applicable to all prisoners other than those described in § 2962.) *1432

Under section 2962 the following changes occur. The persons described therein are required to be retained in physical custody by the Department of Mental Health (§ 2962) and must be treated on an inpatient basis for a minimum of 60 days (§ 2964) and may be retained on an inpatient basis for annual periods for life (§ § 2966, subd. (c), 2970) so long as their severe mental disorder is not in remission or cannot be kept in remission without treatment. Therefore, persons who are neither gravely disabled nor demonstrably dangerous but who meet the section 2962 criteria must undergo treatment on an inpatient and on outpatient basis during their parole term and may be required to do so indefinitely.

(3) Respondent argues that the legislation does not violate the ex post facto clauses because it is not penal, but rather therapeutic, and it does not disadvantage appellant as an accused. We disagree.

Respondent is, however, correct that a necessary determination is whether the statutes imprison appellant as a criminal or require compulsory treatment in involuntary confinement as a sick person. (See *Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 181 and *In re Gary W.* (1971) 5 Cal.3d 296, 301 [96 Cal.Rptr. 1, 486 P.2d 1201].) We believe section 2962 has overwhelming penal attributes and therefore constitutes part of appellant's punishment for his criminal offense.

Section 2960 states the legislative purpose in the enactment of section 2962 et seq.: "The Legislature finds that there are prisoners who have a treatable, severe mental disorder that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated. [FN[9]] Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public. Thirdly, the Legislature finds that in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission. [¶] The Legislature further finds and declares the Department of Corrections should evaluate each prisoner for severe mental *1433 disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community." [FN10]

FN9] It is interesting to note this declaration came just four years after the Legislature "recognize[d] and declare[d] that the commission of sex offenses is not in itself the product of mental diseases." (Stats. 1981, ch. 928, § 4.) Consequently it terminated prospectively an involuntary commitment scheme for mentally disordered sex offenders. (Former Welf. & Inst. Code, § § 6300 to 6330.) Many sex offenders will now "qualify" under the MDO scheme since their crimes definitionally involved the use of force or violence. (See e.g., § § 261, subd. (2), 288, subd. (b) and 288a, subds. (c) and (d)(1).)

FN10 While the provisions operate retroactively for prisoners incarcerated before the effective date of the legislation, it is of course impossible to retroactively evaluate and treat them. Consequently persons imprisoned before July 1, 1986, did not have this advantage during their terms.

The primary purpose of the legislation is to protect the public. The mechanism by which the public is being protected is by requiring confinement and treatment of some former prisoners who have severe mental disorders as defined by section 2962, subdivision (a).

The fact that a person is treated while confined involuntarily does not ipso facto make the confinement nonpenal. For example, section 2684 provides for the transfer of mentally ill prisoners to a state hospital for treatment during their period of imprisonment. By the terms thereof, the time spent in the hospital for treatment is credited toward their terms of imprisonment. Obviously this period of treatment is "penal" within the meaning of the ex post facto clauses. (Also see § 1364.)

The California Supreme Court has identified several criteria to determine whether a statute is criminal or civil. In *Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793] (hereafter *Cramer*) the court identified four features which resulted in its admittedly close determination that involuntary commitment of certain mentally retarded persons was not punishment: (1) it was not initiated in response or

necessarily related to any criminal acts, (2) it was of limited duration although renewable, (3) the person with the burden of proof was not necessarily a public prosecutor, and (4) the sole purpose of the legislation was the custodial care, treatment and protection of the person committed.

In contrast to the statutory scheme for the involuntary commitment of the mentally retarded, MDO commitments are: (1) necessarily related to the commission of and conviction and imprisonment for crimes involving use of force or violence or in which serious bodily injury was inflicted; (2) the commitment of MDO's can only be brought about by prison officials (§ 2962) or district attorneys (§ 2970); and (3) the sole purpose is not treatment for the safety of the person committed but is primarily protection of the public (§ 2960), the same purpose for imposing imprisonment for criminal conduct. (Cal. Rules of Court, rules 410(a) and 414(b).) The MDO commitment scheme has more penal features than that for mentally retarded persons. *1434

Other criteria were identified in *Conservatorship of Hofferber, supra*, 28 Cal.3d 161, at pages 181 and 182 in determining whether the involuntary extended confinement of persons gravely disabled due to incompetence to stand trial on felony charges and who are presently dangerous (hereafter GDI's) was punitive. The court specified the following factors leading to its conclusion this scheme was not punitive: (1) The commitment did not extend, directly or indirectly, any incarceration imposed on appellant for criminal conduct, (2) a criminal sentence would probably never be imposed, (3) the confinement did not arise from criminal conduct but from a mental condition, (4) the person committed would be placed in a state hospital or a less restrictive setting (see Welf. & Inst. Code, § 5358) rather than in a prison, and (5) the GDI commitment did not disadvantage the person as an accused because he or she was not forced to defend against a criminal adjudication. While a MDO commitment shares some of these civil attributes, it differs in important respects.

An MDO commitment, unlike one for GDI's, results directly from the commission of a crime and a period of imprisonment as well as from the mental condition. Failure to follow the treatment plan during the period of parole can result in a return to prison on parole revocation and it may therefore extend indirectly the incarceration of appellant as a result of his criminal conduct. Specified prestatute criminal conduct is both a requisite and the reason for custodial confinement.

MDO's may be forced to defend against a criminal adjudication since whether the crime which resulted in the prison commitment "involved the use of force or violence or caused serious bodily injury" may not have been adjudicated at the time of conviction. Unlike other involuntary commitment schemes which apply either to persons involved in certain specified offenses (see e.g., Welf. & Inst. Code, § 3052) or to any felony offender (see e.g., § 1026.5, subd. (b)(1)) the MDO scheme applies to persons who committed any felony offense only if it involved the use of force or violence or if it involved inflicting serious bodily injury. Except in those instances where force, violence or serious bodily injury are elements of the offense or an enhancement thereof, a new adjudication relating to the offense may be required.

These differences between the MDO commitment scheme and those considered in *Cramer* and *Hofferber* require us to find that it is essentially penal in nature and consequently it is subject to the limitations of the ex post facto clauses.

(1c) We find the retroactive application of the MDO provisions to persons whose crimes were committed prior to their effective date violates the *1435 ex post facto clauses of the United States and California Constitutions because the provisions: (1) are applicable only to persons who were convicted for certain crimes and who are still serving their terms of imprisonment on the operative date of the legislation (§ 2962), and mandate a potentially onerous change in the terms of parole which is part of the sentence for a criminal conviction (§ § 1170, subd. (e), 3000); [FN11] and (2) potentially could result in custody for life in a state hospital setting without proof that the person is either gravely disabled or demonstrably dangerous as a result of mental illness.

FN11 This feature alone may suffice to establish an ex post facto violation. In *In re Stanworth, supra*, 33 Cal.3d 176, the change from the discretionary parole release date setting provisions in effect under the indeterminate sentencing law (ISL) to the directory (mandatory) provisions under the determinate sentencing law (DSL) were found to be ex post facto as applied to persons whose offenses were committed prior to DSL. (Also see *Weaver* v. *Graham, supra*, 450 U.S. 24 (change from mandatory to discretionary good time credits violates clause) and *Lindsey* v. *Washington* (1937)

301 U.S. 397 [81 L.Ed. 1182, 57 S.Ct. 797] (change from discretionary to mandatory maximum sentence violates clause).)

Equal Protection

(4a) We also find the MDO provisions violate the equal protection clauses of the United States and California Constitutions. (U.S. Const., 14th Amend. and Cal. Const., art I, § 7.)

Equal Protection Under the United States Constitution

(5) The equal protection clause of the United States Constitution requires at a minimum that persons standing in the same relation to a challenged government action will be uniformly treated. (*Reynolds* v. *Sims* (1964) 377 U.S. 533 [12 L.Ed.2d 506, 84 S.Ct. 1362].) Traditionally, social and economic legislation will be upheld if the classification drawn by the statutes is rationally related to legitimate state interests. (*Cleburne* v. *Cleburne Living Center, Inc.* (1985) 473 U.S. 432 [87 L.Ed.2d 313, 105 S.Ct. 3249].) When the classification touches on a fundamental right, it must be judicially determined under the strictest standard whether it is necessary to promote a compelling government interest. (*Shapiro* v. *Thompson* (1969) 394 U.S. 618 [22 L.Ed.2d 600, 89 S.Ct. 1322].) Whether a right is fundamental depends on whether it is implicitly or explicitly guaranteed by the federal Constitution. (*San Antonio School District* v. *Rodriguez* (1973) 411 U.S. 1 [36 L.Ed.2d 16, 93 S.Ct. 1278].)

Although freedom from involuntary custodial confinement would appear to be the equivalent of "liberty" explicitly guaranteed by the Fifth and Fourteenth Amendments, the United States Supreme Court has not ***1436** expressly held that classifications touching upon liberty are fundamental for these purposes. In *Jones* v. *United States* (1983) 463 U.S. 354 [77 L.Ed.2d 694, 103 S.Ct. 3043] and *Baxstrom* v. *Herold* (1966) 383 U.S. 107 [15 L.Ed.2d 620, 86 S.Ct. 760], both of which related to challenged classifications in substance and procedure for involuntary commitment, the court appears to use the traditional rational basis test. Consequently for purposes of federal law analysis so shall we.

Any equal protection challenge requires a determination whether the groups which are differently treated are similarly situated for purposes of the law. If they are not, no equal protection claim is applicable. (*Tigner* v. *Texas* (1940) 310 U.S. 141, 147 [84 L.Ed. 1124, 1128, 60 S.Ct. 879, 130 A.L.R. 1321].)

(4b) Appellant claims, and we agree, that an MDO is similarly situated for purposes of the law to other adult persons involuntarily committed for mental health treatment. One purpose of all of these pertinent involuntary commitment schemes is the protection of the public from the dangerous mentally ill and their involuntary commitment for treatment, for renewable periods, until they no longer pose a danger to the public whether or not they remain mentally ill. [FN12]

FN12 See Penal Code section 1026.5, subdivision (b)(1) (person posing substantial danger of physical harm to others by reason of mental disease); Welfare and Institutions Code, section 1801.5 (wards physically dangerous to public due to mental deficiency), section 5300, subdivisions (a)-(c) (persons demonstrating danger of inflicting substantial physical harm to others due to mental defect), section 6500 (mentally retarded persons dangerous to themselves or others).

The MDO commitment scheme, however, contains one critical and significant difference from all the others; it does not require proof of any present dangerousness as a result of mental illness for commitment or recommitment. Because there is no reasonable basis to exempt MDO's from this proof requirement merely because they are at the end of their prison term, we find the provisions violate the equal protection clause of the Fourteenth Amendment of the United States Constitution.

MDO's are most similarly situated to two groups of mentally ill persons subject to involuntary commitment in California: those persons found not guilty by reason of insanity (NGI) and recommitted after expiration of the maximum term of imprisonment which could have been imposed on them (§ 1026.2) and those mentally ill persons, now adults, who have been recommitted after expiration of the potential maximum term of imprisonment for criminal conduct as wards of the state (MDW). (Welf. & Inst. Code, § § 602, 707, subd. (b), 1731.5.) ***1437**

An MDO, like the MDW and an NGI, has been adjudged to have committed a criminal offense. Both the MDO and NGI are committed after proof of a causal connection between their mental illness and the crime which they committed [FN13] (§ 2962;

CALJIC 4.00 (1979 rev.) and *In re Moye* (1978) 22 Cal.3d 457, 462 [149 Cal.Rptr. 491, 584 P.2d 1097].) Unlike the NGI and MDW the MDO, however, is not confined only on proof of dangerousness and is not subject to release when he or she is no longer proven to be dangerous. The MDO alone is subject to commitment and recommitment until such time as his or her severe mental disorder is in remission without proof of present dangerousness. The sole basis for the distinction is that MDO's are at the end of their prison terms.

> FN13 This was true at least until June 9, 1982, when the insanity standard was changed. (Now see § 25 and *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752].) It remains true of persons committed under the pre-1982 law when the standard used was that set forth in *People v. Drew* (1978) 22 Cal.3d 333 [149 Cal.Rptr. 275, 583 P.2d 1318] (see CALJIC 4.00 (1979 rev.)) who continue to be recommitted under section 1026.2.

Like those commitment schemes considered by the United States Supreme Court in *Jackson v. Indiana* (1972) 406 U.S. 715 [32 L.Ed.2d 435, 92 S.Ct. 1845] and *Baxstrom* v. *Herold, supra*, 383 U.S. 107, we find the MDO commitment scheme violates the equal protection clause of the Fourteenth Amendment because it has subjected appellant to a commitment standard more lenient and a release standard more stringent than that required for the involuntary commitment and treatment of any other mentally ill person in California for the arbitrary reason that he is nearing completion of service of his term of imprisonment.

In *Jackson* the court found the indefinite commitment of persons who were incompetent to assist in their own defense on a lesser standard with a more difficult standard of release than all others violative of equal protection. The court found the basis of the distinction of two pending criminal charges was insufficient to justify the difference in treatment.

In *Baxstrom* the court considered a commitment scheme closely analogous to that here. There the state scheme provided for involuntary commitment of persons whose prison term was about to expire which differed from that applicable to all other persons in two different ways. First, it denied a jury trial on the issue of mental illness to the prisoner but gave it to all others. Second, it required a determination of dangerousness for all mentally ill persons committed to the Department of Corrections rather than to the state hospital except prisoners nearing the end of their term. The Supreme Court found both distinctions irrational and therefore violative of equal protection. *1438

The MDO commitment scheme does not suffer the first infirmity identified in *Baxstrom*; it grants the same procedural protections of a jury trial and unanimous verdict applicable to all others. It suffers the second infirmity, however; it permits commitment without proof of dangerousness, a standard applicable to all others involuntarily confined and treated for mental illness. Since the basis for the distinction, i.e., nearing the end of a prison term, is the same as that considered in *Baxstrom*, we too find it is irrational and violative of the equal protection guaranteed by the United States Constitution.

Respondent argues the MDO is not similarly situated to any other involuntarily committed person because of his parole status. This fact, however, is irrelevant for purposes of equal protection analysis for several reasons.

(6) Parole in California is different from the traditional concept of parole. In *Morrissey v. Brewer* (1972) 408 U.S. 471, 477 [33 L.Ed.2d 484, 492, 92 S.Ct. 2593], the court defined parole as "... release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." In California determinately sentenced prisoners serve the complete term specified under section 1170, less any applicable credits for work performed under sections 2931 or 2933 and are then placed on parole for three years regardless of the length of the term served. Under section 3000, this parole period is an essential part of the actual sentence and is not dependent on early release.

(4c) The question for equal protection purposes is not whether potential MDO's are similarly situated to other dissimilarly treated groups for all purposes but rather whether they are similarly situated for purposes of the law challenged. Parole status has been held to be enough to distinguish parolees from all others as to the quantity and quality of procedural due process required for incarceration (*Morrissey v. Brewer, supra*, 408 U.S. 471) or as to rights to be free from warrantless searches and seizures. (*People v. Burgener, supra*, 41 Cal.3d at p. 532.) This is because of the purpose of those restrictions, which

are to promptly punish or rectify a breach of conditions of traditional parole and to facilitate supervision and surveillance to discover breaches. However, parole status is irrelevant to the purpose of MDO involuntary commitment or treatment.

As noted, the purposes of this statutory scheme are twofold. One is to protect the public from mentally ill persons deemed dangerous by the Legislature; the other is to treat these mentally ill persons. (§ 2960.) The impending release on parole, the basis of defining the group, has nothing to do with either purpose. Any danger to public safety has nothing to do with their *1439 status as parolees per se but arises from their release from prison into the general population. Therefore, these are not parole condition cases.

That parole status has nothing to do with any purpose of the act is indicated by features of the act itself: the MDO confinement and treatment are not limited to the parole period (§ 2970); existing parolees, including those released just prior to July 1, 1986, are not covered by the act even if they have all of the other pertinent characteristics defined in the act (Stats. 1985, ch. 1419, § 3; § 2962, subd. (d)) [FN14] and mentally ill parolees in remission at the time scheduled for their release on parole, even though they suffer a relapse after release, are not covered by the act. Obviously the Legislature was not relying on dangers unique to persons on parole in enacting the legislation.

FN14 Persons convicted of qualifying felonies but not sentenced to imprisonment also do not come under the act even if presently on probation. Such persons would appear to otherwise be in the same situation as potential MDO's as a threat to public safety and in need of treatment.

For the articulated purposes of the act, public safety and treatment of the mentally ill prior offender, we find appellant's situation identical to an NGI whose continuing mental illness once caused a criminal violation and similar to MDW's who also engaged in criminal conduct and remain mentally ill at the time scheduled for release.

The respondent argues that even assuming MDO's are similarly situated to NGI's for the legitimate purposes of the law no factual finding on the issue of present dangerousness is required because the Legislature has found MDO's to be dangerous and so stated in section 2960. (7) Great deference is due a legislative determination that a certain class of persons endangers public safety and that involuntary commitment of persons in that class is necessary to protect the public. However, a determination of which individuals belong to that class is a judicial, not legislative, function. (See *United States v. Brown* (1965) 381 U.S. 437 [14 L.Ed.2d 484, 85 S.Ct. 1707].) To determine otherwise would permit a permanent conclusive presumption of dangerousness from proof of mental illness so long as it had once been proved the illness was causally related to or an aggravating factor in the commission of a criminal offense.

A conclusive presumption of one fact from proof of another violates the due process clause when the existence of the fact presumed is not universally or necessarily coexistent with the fact proved. (*Vlandis v. Kline* (1973) 412 U.S. 441 [37 L.Ed.2d 63, 93 S.Ct. 2230].) Dangerousness is not universally and necessarily coexistent with unremitted mental illness. A finding that a mental illness was once a contributing cause or aggravating factor in *1440 criminality does not change the fact that all former felons suffering mental illness are not dangerous or violent. This fact is implicitly recognized by the several California involuntary commitment schemes requiring proof of both present mental illness and present dangerousness without regard to the criminality of the person.

Respondent claims such a legislative determination of dangerousness has been found constitutional under both the due process and equal protection clauses by the United States Supreme Court in *Jones v. United States* (1983) 463 U.S. 354 [77 L.Ed.2d 694, 103 S.Ct. 3043].) The court's actual holdings do not support this conclusion.

Jones challenged (1) the constitutionality of the automatic commitment of persons found not guilty of an offense by reason of insanity, and (b) the distinctions regarding the burden of proof between persons committed after a finding of NGI and those civilly committed. The court upheld the statutory scheme on both substantive and procedural grounds. In so doing, it approved a presumption of continuing insanity which was conclusive in effect only for 50 days following a jury finding of not guilty by reason of insanity. At that time and at six-month intervals the acquittee had the same opportunity as other civilly committed persons to secure release upon proof by a preponderance of the evidence that he was either no longer mentally ill or dangerous. Consequently, in effect any presumption of insanity

was rebuttable at all hearings following the automatic 50-day commitment.

The presumption of dangerousness approved by the court in *Jones* was also a rebuttable one; it did not completely substitute the judgment of the Legislature as to dangerousness for a jury determination thereof. Unlike the statutory scheme here, the person involuntarily committed could secure his release in as little as 50 days following conviction upon his showing [FN15] he was not dangerous even if he remained mentally ill. Here, appellant is in effect conclusively presumed dangerous so long as he remains mentally ill regardless of the length of time since his criminal offense and conviction. [FN16] Clearly, *Jones* does not support the respondent's position.

> FN15 In contrast to this holding, our Supreme Court in *In re Moye, supra,* 22 Cal.3d at page 466, rejected placing the burden of proof on the insanity acquittee after the expiration of the maximum term of potential imprisonment.
>
> FN16 Our Supreme Court has expressly rejected a permanent conclusive presumption of dangerousness because, inter alia, the passage of time by itself diminishes the validity of the presumption. (*Conservatorship of Hofferber, supra,* 28 Cal.3d at p. 177.)

(4d) We therefore hold it is unreasonable and arbitrary to exempt MDO's from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment. The commitment scheme ***1441** under consideration violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Equal Protection Under California Constitution

(8) Because the statutory scheme at issue deprives persons of their liberty, i.e., freedom from involuntary confinement and treatment for mental illness, it is subject to close scrutiny under the California Constitution (art. 1, § 7). (*Conservatorship of Hofferber, supra,* 28 Cal.3d at p. 171, fn. 8; see *In re Gary W., supra,* 5 Cal.3d at p. 306.) The law can withstand constitutional attack as discriminatory among similarly situated persons only if the government can demonstrate a compelling interest which justifies the law and that the distinction drawn by the statute is necessary to further that purpose. (*Ibid.*)

We find respondent has failed to demonstrate either a compelling interest in the continued confinement of mentally ill former prisoners simply because their mental illness continues or that exclusion of a requisite finding of dangerousness is necessary to serve any legitimate government interest.

The only justification presented here for the plan is the statements of the Legislature in section 2960 that unremitted mental illness of prisoners is a danger to the public if those prisoners were mentally ill when their offense was committed and that fact was connected to the violent commission of a felony. If the mere declarations of the legislative branch were sufficient to satisfy the strict scrutiny test, no judicial review of the constitutionality of statutes would be necessary.

The legislative history of the MDO scheme does not demonstrate that persons whose mental illness once was related to felonious criminal conduct were actually found to pose a unique danger to the public so long as their mental illness remains based on any studies or hearings. The concern of the Legislature was that the determinate sentencing law which required the release of prisoners at the expiration of a fixed amount of time, combined with the revisions of the insanity law which decreased the number of mentally ill persons found not guilty by reason of insanity and subject to potential life commitment, had resulted and would continue to result in the release of persons who were mentally ill and might reoffend. [FN17]

> FN17 A statement on Sen. Bill No. 1296 to the Assembly Public Safety Committee dated August 26, 1985, opined "SB 1296 will solve the dilemma that has perplexed the Legislature since enactment of the determinate sentencing law how to control criminals who have serious mental illness without disturbing the protection of the LPS Act for civilians."

The then existing system for commitment of mentally ill parolees under the LPS Act was deemed unsatisfactory by the legislative proponents ***1442** because it required proof of demonstrable present dangerousness; this proof was viewed as problematic to achieve by both courts and psychiatrists; and courts, according to the author, insisted on recent evidence to support a finding of future dangerousness and such proof was difficult to obtain in the case of inmates who lived in a highly restrictive

environment. It was viewed as necessary to fill a loophole in the determinate sentencing law which left officials helpless to avoid the release of prisoners who still pose a serious risk to society. (See Conference Completed Analysis of Sen. Bill No. 1296, prepared by the office of Sen. Floor Analysis for use by Sen. Rules Com., pp. 2 and 4.)

Nothing in the legislative history however indicates that there was any factual basis upon which the Legislature concluded that all persons whose mental illness once caused or aggravated a criminal offense were again going to reoffend unless their mental illness was in remission. [FN18] In fact, the difficulty of sustaining the proof requirement of dangerousness was the sole apparent basis for its elimination, not any perceived knowledge of its universal existence from unremitted mental illness. Consequently, the respondent has failed to demonstrate a compelling state interest in involuntarily committing and/or treating all presently unremitted mentally ill former prisoners released after July 1, 1986, whose illness was once connected to the commission of a violent felonious offense.

> FN18 At best, the bill's author and others simply cited instances where mentally ill persons were released from LPS confinement or had once been diagnosed as mentally ill and subsequently committed violent crimes. No evidence of a connection between mental illness and violent offenses was presented in any of the legislative history documents nor is there any evidence that mentally ill offenders are more likely to be recidivists than others.

Difficulty of proof of dangerousness under the LPS standard does not constitute necessity for its complete elimination; if it did, the Legislature would be free to vary the burden of proof as to various elements of criminal offenses depending on the difficulty of proof. The LPS standard of dangerousness, the highest and most narrowly drawn among California's various dangerousness criteria set forth in different involuntary commitment schemes, is not constitutionally necessary. (See *Conservatorship of Hofferber, supra*, 28 Cal.3d at pp. 171-172.) There has been no showing that the complete elimination of proof of some degree of present dangerousness is necessary to protect the public.

It must be remembered that appellant and those in this class of MDO committees are all legally sane and have been subject to punishment for their offenses for the term prescribed by the Legislature. At the end of their terms even the most dangerous offenders and most likely recidivists are subject to release so long as they are not mentally ill as defined. Unless *1443 proven to be dangerous the equal protection clause requires the mentally ill inmate must also be released from custody.

It is unnecessary to address the merits of appellant's other constitutional challenges to the MDO scheme.

The judgment is reversed. Appellant is entitled to parole on terms without reference to the requirements of section 2962 et seq.

Stone (S. J.), P. J., and Gilbert, J., concurred.

Respondent's petition for review by the Supreme Court was denied February 2, 1989. *1444

Cal.App.2.Dist.,1988.

People v. Gibson

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SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1989-90 Regular Session

SB 1625 (McCorquodale)
As Amended April 27
Hearing date: May 2, 1989
Penal Code
JRP

SB 1625

MENTALLY DISORDERED OFFENDER PROGRAM

HISTORY

Source: Author

Prior Legislation: None

Support: Joint Committee for Revision of the Penal Code; Governor's Office; Attorney General of California

Opposition: California Attorneys for Criminal Justice

KEY ISSUE

SHOULD THE MENTALLY DISORDERED OFFENDER (MDO) PROGRAM BE REENACTED AS MODIFIED?

SHOULD THE REENACTED MDO PROGRAM BE APPLIED RETROACTIVELY TO THOSE WHO COMMITTED THEIR CRIMES ON OR AFTER JANUARY 1, 1986?

PURPOSE

Existing law provides for the confinement of certain offenders with mental disorders in a mental institution upon the person's eligibility for parole. However, the existing statutory scheme was declared unconstitutional because it was applied retroactively to persons originally confined prior to the effective date of the legislation on July 1, 1986. The statute was also held to violate the due process clause because it required involuntary confinement of former prisoners without proof that their mental condition presented a danger to others.

This bill would amend and reenact the MDO Program. In order to confine a former prisoner by reason of the prisoner's severe mental disorder the bill would require a showing that the person

(More)

represents a substantial danger of physical harm to others. However, the bill would permit the examination to be made through psychiatric testimony and would not require prosecutorial evaluation pursuant to the Lanterman-Petris-Short Act. The person would have the right to hearing to contest the commitment.

The bill would also continue a provision under existing law permitting a district attorney to seek a one year extension of the involuntary commitment beyond the parole. However, the District Attorney must prove, beyond a reasonable doubt, that the person, by reason of his or her severe mental disorder, represents a substantial danger of physical harm to others.

The bill would apply retroactively to all persons who committed their crime on or after January 1, 1986.

The purpose of this bill is to reinstate the Mentally Disordered Offender Program.

COMMENT

1. Retroactive application may be unconstitutional

The bill as written may be unconstitutional since it applies what amounts to an ex-post-facto extension of a prison term for those who commit crimes prior to the date this bill is enacted. See People v. Gibson (1988) 204 Cal.App.3d 1425. The Joint Committee staff argues that it is not an ex-post facto law because persons who committed crimes after the enactment of the original unconstitutional statute were on notice of the MDO Program. However, there is no authority for the argument that the prior existence of an invalid stature is sufficient to give persons notice of a new statute with new and different standards.

2. Standard for commitment specified

The bill would appear to solve the due process problem in the original statute which allowed a commitment without a finding that the person posed a threat to others. The proposed standard of "substantial danger of physical harm to others" is stronger than the standard for civil commitment under the Lanterman-Petris-Short Act (see Welfare and Institutions Code Section 5150).

(More)

Opponents of the bill do not dispute the validity of the proposed standard to determine the involuntary commitment of a MDO.

3. Public policy

CACJ objects to the MDO program in principle because it requires a mentally ill offender to serve his or her sentence in prison before treatment is provided in an appropriate facility. This subjects the inmate to pressures and an environment which may exacerbate his or her mental problems. It also results in an extended term of confinement. CACJ feels that it is fundamentally unfair to confine a person for a prison term and then require an additional term of confinement for treatment.

CACJ points out that existing law permits the transfer of a prison inmate to a mental hospital for treatment during the term of imprisonment, and asserts that this procedure is a better alternative than reenactment of the MDO Program.

The Joint Committee for Revision of the Penal Code is concerned that if the bill is not enacted it may be necessary to release some mentally disordered offenders who are currently confined.

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C

THE PEOPLE, Plaintiff and Respondent,
v.
JESSE ROBINSON, Defendant and Appellant.
No. B107563.

Court of Appeal, Second District, California.

Apr 20, 1998.

SUMMARY

The trial court found defendant to be a mentally disordered offender (MDO) pursuant to Pen. Code, § 2962 et seq., notwithstanding that the date of his underlying offenses was after the MDO statutory scheme was declared unconstitutional in a 1988 decision by the Court of Appeal, but before the Legislature amended the statutes effective July 1989 to comply with that decision. (Superior Court of San Luis Obispo County, No. F248907, Teresa Estrada-Mullaney, Judge.)

The Court of Appeal affirmed the judgment, holding that the trial court properly found defendant to be a mentally disordered offender. The retroactive application of a nonpenal statute does not violate ex post facto laws, and the MDO scheme is a nonpunitive, civil law, despite the scheme's placement in the Penal Code. The Legislature has expressly declared that the MDO law provides prisoners with a "civil hearing" to determine whether they meet the criteria of the MDO scheme (Pen. Code, § § 2966, subd. (b), 2972, subd. (a)). The MDO scheme does not implicate the two primary objectives of criminal punishment: retribution or deterrence. Rather, the MDO scheme is concerned with two objectives, neither of which is penal: protection of the public and providing mental health treatment for certain offenders who are dangerous and suffering from severe mental illnesses. (Opinion by Stone (S. J.), P. J., with Gilbert and Yegan, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Criminal Law § 191--Mentally Disordered Offenders--Retroactive Application of Statute--Ex Post Facto Analysis--Statute as Nonpunitive Civil Law.

The trial court properly found defendant to be a mentally disordered offender (MDO) pursuant to Pen. Code, § 2962 et seq., notwithstanding that the date of his underlying offenses *349 was after the MDO statutory scheme was declared unconstitutional in a 1988 decision by the Court of Appeal, but before the Legislature amended the statutes effective July 1989 to comply with that decision. The retroactive application of a nonpenal statute does not violate ex post facto laws, and the MDO scheme is a nonpunitive, civil law, despite the scheme's placement in the Penal Code. The Legislature has expressly declared that the MDO law provides prisoners with a "civil hearing" to determine whether they meet the criteria of the MDO scheme (Pen. Code, § § 2966, subd. (b), 2972, subd. (a)). The MDO scheme does not implicate the two primary objectives of criminal punishment: retribution or deterrence. Rather, the MDO scheme is concerned with two objectives, neither of which is penal: protection of the public and providing mental health treatment for certain offenders who are dangerous and suffering from severe mental illnesses.

[See 3 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 1747A.]

COUNSEL

Kent Douglas Baker, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, Marc E. Turchin and Kent J. Bullard, Deputy Attorneys General, for Plaintiff and Respondent.

STONE (S. J.), P. J.

Jesse Robinson appeals the trial court's judgment finding him to be a mentally disordered offender (MDO) pursuant to Penal Code section 2962 et seq. [FN1] We affirm on the ground the MDO statutory scheme is civil and does not violate the ex post facto clauses of the federal and state Constitutions.

FN1 All statutory citations henceforth will refer to the Penal Code.

Appellant was convicted of two counts of involuntary manslaughter. (§ 192, subd. (b).) He was sentenced to state prison and eventually paroled. After appellant violated his parole, the Board of Prison Terms (BPT) determined he met the statutory MDO criteria. (§ 2962.) He was remanded to Atascadero State Hospital. A court trial was conducted to review the BPT's determination. (§ 2966, subd. (b).) The court upheld the BPT's decision. *350

(1) Appellant contends the trial court erred by denying his motion, arguing that the application of the MDO law violated the federal and state ex post facto clauses. He bases his contention on the date of his underlying offenses-January 16, 1989-which was during the period *after* the MDO statutory scheme was declared unconstitutional in *People v. Gibson* (1988) 204 Cal.App.3d 1425 [252 Cal.Rptr. 56] (*Gibson*) and *before* the Legislature amended the statutes effective July 1989 to comply with *Gibson*. Appellant argues there was no valid MDO statute in existence at the time of his offenses. He states that retroactively applying the amended, post-*Gibson* statutory scheme increases the punishment for his offenses beyond the punishment available when his offenses were committed. (*People v. McVickers* (1992) 4 Cal.4th 81, 84 [13 Cal.Rptr.2d 850, 840 P.2d 955].)

The parties dispute whether the inpatient mental treatment required by the MDO statutes is penal or nonpenal. The retroactive application of a nonpenal statute does not violate ex post facto laws. (1 Witkin, Cal. Criminal Law (2d ed. 1988) Introduction to Crimes, § 19, p. 25, citing *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 182 [167 Cal.Rptr. 854, 616 P.2d 836].) Appellant here argues the MDO treatment scheme is a punitive, penal law. Respondent argues the MDO scheme is a nonpunitive, civil law. We agree with respondent.

In *Gibson*, we held the MDO law did not require proof of present dangerousness, a requirement applicable to other similarly situated mentally ill offenders subject to involuntary commitment, and therefore violated the federal and state equal protection clauses. The Legislature responded by amending the law to require proof that a defendant represents a substantial danger of physical harm to others prior to commitment or recommitment to an inpatient facility or an outpatient program. (*People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826, 830 [58 Cal.Rptr.2d 32] (*Myers*).)

We also stated in *Gibson* that the MDO scheme was essentially penal in nature and consequently was subject to the limitations of the ex post facto clauses. (204 Cal.App.3d at p. 1434.)

In *Kansas v. Hendricks* (1997) 521 U.S. 346 [117 S.Ct. 2072, 138 L.Ed.2d 501] (*Hendricks*), the United States Supreme Court decided the constitutionality of Kansas's Sexually Violent Predator Act, a law which established civil commitment procedures for repeat sexual offenders. The act became effective shortly before Hendricks, an inmate who had a long history of sexually abusing children, was scheduled for release from prison. Hendricks argued that, since he was convicted before the law was enacted, application of the law violated the federal constitutional ban on ex post facto statutes. He asserted the act established criminal proceedings and hence was punitive. *351 (*Hendricks*, *supra*, 521 U.S. at pp. ___, ___ [117 S.Ct. at pp. 2076-2077, 2081-2082, 138 L.Ed.2d at pp. 508, 514].)

The Supreme Court decided the Kansas Legislature intended the act to establish a civil proceeding. (*Hendricks*, *supra*, 521 U.S. at pp. ___, ___ [117 S.Ct. at pp. 2081-2082, 138 L.Ed.2d at pp. 514-515].) The Legislature described the act as creating a "civil commitment procedure" and placed it in the state's probate code.

The law further did not implicate the two primary objectives of criminal punishment, retribution or deterrence. It was not retributive since the prior criminal conduct was used solely to establish a mental abnormality or to support a finding of future dangerousness. (*Hendricks*, *supra*, 521 U.S. at p. ___ [117 S.Ct. at p. 2082, 138 L.Ed.2d at p. 515].) The law did not function as a deterrent since the persons subject to the law were unlikely to be deterred by the threat of confinement, and the conditions of confinement were essentially the same conditions placed on any involuntarily committed patient in the state mental institution. (*Id.*, at pp. ___-___ [117 S.Ct. at pp. 2082-2083, 138 L.Ed.2d at pp. 515-516].) The potentially indefinite duration of confinement under the act was not punitive since the maximum amount of time a person could be confined pursuant to a single judicial proceeding was one year. (*Id.*, at p. ___ [117 S.Ct. at pp. 2082-2083, 138 L.Ed.2d at p. 516].) "This requirement ... demonstrates that Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness." (*Ibid.*)

Regarding Hendricks's argument that the state's use of criminal procedural safeguards made the law criminal in nature, the Supreme Court held that such safeguards merely demonstrated the Legislature's "great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution." (*Hendricks*, *supra*, 521 U.S. at pp. ___, ___ [117 S.Ct. at p. 2083, 138 L.Ed.2d at pp. 516-517].)

The court concluded: "Where the State has 'disavowed any punitive intent'; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.... Our conclusion that the *352 Act is nonpunitive thus removes an essential prerequisite for ... Hendricks' ... *ex post facto* claim []." (*Hendricks*, *supra*, 521 U.S. at p. ___ [117 S.Ct. at p. 2085, 138 L.Ed.2d at p. 519].)

Hendricks was decided nine years after our decision in *Gibson*. Its reasoning is sound and supersedes our ruling in *Gibson* on the ex post facto issue. [FN2] *Hendricks*'s analysis of the noncriminal features of Kansas's sexually violent predator law applies equally to California's MDO law. The features of the law analyzed in *Hendricks* are substantially similar to the features of the MDO law (521 U.S. at p. ___ [117 S.Ct. at pp. 2085-2086, 138 L.Ed.2d at p. 519]), except that the MDO law governs the mental health treatment of a different type of offender and is placed in the Penal Code instead of a civil law code.

> FN2 Our reliance in *People v. Jenkins* (1995) 35 Cal.App.4th 669, 672-674 [41 Cal.Rptr.2d 502], on *Gibson*'s ruling, that the MDO statutory scheme could be applied so as to violate the prohibition against ex post facto laws, also is superseded by *Hendricks*. (See also our dicta in *People v. Superior Court (Jump)* (1995) 40 Cal.App.4th 9, 12-13 [46 Cal.Rptr.2d 829], stating that MDO commitments are penal in nature.)

Hendricks also supports a post-*Gibson* California appellate case, *Myers*, which holds that the MDO law is civil, not penal, as expressly described by the Legislature in sections 2966, subdivision (b), and 2972, subdivision (a). (50 Cal.App.4th at pp. 834, 835.) *Myers* describes the MDO scheme as being concerned with two objectives, neither of which is penal: protection of the public, and providing mental health treatment for certain offenders who are dangerous and suffering from severe mental illnesses. (*Id.*, at pp. 837-841.)

In view of the Legislature's express declaration that the MDO law provides prisoners with a "civil hearing" to determine whether they meet the criteria of the MDO scheme (§ § 2966, subd. (b), 2972, subd. (a)), the scheme's placement in the Penal Code is not a material feature in differentiating it from the mentally ill offender scheme in *Hendricks*.

The trial court here properly denied appellant's ex post facto violation motion. The judgment is affirmed.

Gilbert, J., and Yegan, J., concurred. *353

Cal.App.2.Dist.,1998.

People v. Robinson

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Date of Printing: MAY 24,2006

KEYCITE

HPeople v. Superior Court (Myers), 50 Cal.App.4th 826, 58 Cal.Rptr.2d 32, 96 Cal. Daily Op. Serv. 8075, 96 Daily Journal D.A.R. 13,367 (Cal.App. 2 Dist., Nov 04, 1996) (NO. B103647)

History

Direct History

=> 1 **People v. Superior Court (Myers)**, 50 Cal.App.4th 826, 58 Cal.Rptr.2d 32, 96 Cal. Daily Op. Serv. 8075, 96 Daily Journal D.A.R. 13,367 (Cal.App. 2 Dist. Nov 04, 1996) (NO. B103647), review denied (Jan 22, 1997)

H

THE PEOPLE, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; EVON MYERS, Real Party in Interest.
No. B103647.

Court of Appeal, Second District, Division 4, California.

Nov 4, 1996.

SUMMARY

An alleged mentally disordered offender, under the Mentally Disordered Offender (MDO) Law (Pen. Code, § 2960 et seq.), was sentenced to state prison for seven years following his plea of guilty to assault with a knife and commission of great bodily injury and his admission that he had previously been convicted of a serious felony. At the expiration of his sentence, he was released on parole on condition that he accept treatment for his mental disorder through a community outpatient treatment program pursuant to Pen. Code, § 2962. Shortly before his parole termination date, the People filed a petition in the trial court to continue involuntary treatment, pursuant to Pen. Code, § 2970, alleging that the individual had a severe mental disorder that either was not in remission or could not be kept in remission if his treatment were not continued and that, by reason of his severe mental disorder, he represented a substantial danger of physical harm to others. The trial court dismissed the petition on the ground that the MDO Law was penal in nature and therefore was an ex post facto law when applied to this individual in that he committed his predicate crime prior to passage of legislation that cured previously identified constitutional defects in the law. (Superior Court of Los Angeles County, Nos. ZM001828 and A928026, Harold E. Shabo, Judge.)

The Court of Appeal granted the People's petition for a writ of mandate and directed the trial court to vacate its order dismissing the People's petition for extended commitment and to proceed on the underlying petition as required by the MDO Law. The court held that the People had a right to appeal the trial court's order dismissing their petition to continue involuntary treatment, since MDO proceedings are civil and the order dismissing the petition was a final judgment. Further, the petition presented a question of substantial right warranting mandamus review, since there was no evidence that the individual could have been detained under Welf. & Inst. Code, § 5150, on the ground that he was "gravely disabled," and thus the People did not have an adequate remedy at law and were faced with a potentially *827 dangerous individual who allegedly needed treatment. The court further held that the MDO Law's extended treatment provisions have no penal consequences when applied to mentally disordered offenders whose parole is completed. Therefore, the law was not ex post facto when applied to this individual. (Opinion by Baron, J., with Epstein, Acting P. J., and Hastings, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Criminal Law § 7--Prohibition by Law--Ex Post Facto Laws--Constitutional Analysis.
The ex post facto clause of the federal and state Constitutions (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9) prohibits three legislative categories, including legislation that punishes as a crime an act previously committed, which was innocent when done, legislation that makes more burdensome the punishment for a crime, after its commission, and legislation that deprives one charged with crime of any defense available according to law at the time when the act was committed. Although the Latin phrase "ex post facto" literally encompasses any law passed after the fact, the constitutional prohibition on ex post facto laws applies only to penal statutes that disadvantage the offender affected by them.

(2) Criminal Law § 635--Appellate Review--Appealable Judgments and Orders-- Appeal by People--Dismissal of People's Petition to Extend Involuntary Treatment--Mentally Disordered Offender Law.
Pursuant to Code Civ. Proc., § 904.1, subd. (a)(1) (appeal may be taken from superior court judgment), the People had a right to appeal a trial court's order dismissing the People's petition to continue involuntary treatment, pursuant to Pen. Code, § 2970, of the Mentally Disordered Offender (MDO) Law, of an alleged MDO whose parole was

completed, since MDO proceedings are civil and the trial court's order dismissing the petition was a final judgment. In determining whether a particular proceeding is criminal, the court looks to the Legislature's intent and to the purpose and effect of the statute. The Legislature has expressly provided that an MDO hearing is a civil hearing. This civil label is not dispositive; where a defendant provides the clearest proof that the statutory scheme is so punitive either in purpose or effect, the proceeding must be considered criminal. However, the MDO provisions are neither punitive in purpose nor effect, and the MDO Law's procedural safeguards do not require the court to transform the hearing into a criminal trial. *828

(3) Mandamus and Prohibition § 74--Mandamus--Appeal--Review--Appeal by People--Petition to Extend Involuntary Treatment After Parole Completed--Mentally Disordered Offender Law--Lack of Adequate Remedy at Law:Criminal Law § 191--Mentally Disordered Offender Law.
The People's petition seeking to continue involuntary treatment, pursuant to Pen. Code, § 2970, of the Mentally Disordered Offender (MDO) Law, of an alleged MDO whose parole was completed, presented a question of substantial right warranting mandamus review. There was no evidence that the individual could have been detained under Welf. & Inst. Code, § 5150, on the ground that he was "gravely disabled" under the definitions in Welf. & Inst. Code, § § 5350, subd. (e)(1) or 5008, subd. (h)(1). Thus, the People did not have an adequate remedy at law within the meaning of Code Civ. Proc., § 1086 (plain, speedy, and adequate remedy in ordinary course of law), and were faced with a potentially dangerous individual who allegedly needed treatment. The public has a clear interest in seeing its legislative purposes properly implemented.

(4) Criminal Law § 191--Mentally Disordered Offender Law--Extension of Involuntary Mental Treatment After Parole Completed--As Ex Post Facto Law.
The trial court erred in dismissing, on ex post facto grounds, the People's petition to continue involuntary treatment, pursuant to Pen. Code, § 2970, of the Mentally Disordered Offender (MDO) Law, of an alleged MDO whose parole was completed, even though he committed his predicate crime prior to passage of legislation that cured previously identified constitutional defects in the law. The MDO Law's extended treatment provisions have no penal consequences when applied to mentally disordered offenders whose parole is completed. A refusal to comply with treatment cannot lead to denial of parole or reincarceration in state prison. Its provisions do not provide for the extension of the MDO's parole. The law does not punish as a crime an act previously committed, which was innocent when done. It imposes no punishment for a crime after its commission and does not deprive an MDO of any defense available at the time his or her criminal act was committed. Furthermore, that the purpose of the MDO Law is to protect the public does not turn its provisions into punishment. Laws imposing involuntary treatment on people who suffer from present mental illnesses that cause them to be dangerous are not penal merely because the class of people subject to the laws are accused of, or have been convicted of, a crime. Therefore, the law was not ex post facto when applied to this individual.

[See 1 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1988) § § 16-20.] *829

COUNSEL

Gil Garcetti, District Attorney, Brent Riggs and Fred Klink, Deputy District Attorneys, for Petitioner.

No appearance for Respondent.

Michael P. Judge, Public Defender, Albert J. Menaster, Stuart Mentzer and Jack T. Weedin, Deputy Public Defenders, for Real Party in Interest.

BARON, J.

The People of the State of California filed a petition in respondent superior court to continue involuntary treatment of real party in interest Evon Myers, an alleged mentally disordered offender, pursuant to section 2970 of the Mentally Disordered Offender (MDO) Law (Pen. Code, § 2970). [FN1] Respondent ruled the statute constitutes an ex post facto law when applied to Myers and dismissed the petition. We issued a stay of the order and an alternative writ of mandate on the request of the People in order to determine the constitutionality of applying the extended involuntary treatment provisions of the MDO Law to paroled prisoners like Myers who committed their predicate crimes prior to passage of legislation which cured previously identified constitutional defects in the law. For the reasons set forth in this opinion, we conclude that the MDO Law's extended treatment provisions have no penal consequences when applied to mentally disordered offenders whose parole is completed. Accordingly, we grant the People's petition for writ of mandate and

order respondent to proceed on the underlying petition as required by the MDO Law.

FN1 The MDO Law is codified in Penal Code sections 2960 through 2981. Unless otherwise specified, all statutory references are to the Penal Code.

Background

The Petition to Extend Treatment

On August 10, 1990, Myers was sentenced to state prison for seven years following his plea of guilty to a March 18, 1989, assault with a knife and commission of great bodily injury on Dalton Roe, and his admission that he had previously been convicted of a serious felony. At the expiration of his sentence, Myers was released on parole on condition that he accept treatment for his mental disorder through a community outpatient treatment program pursuant to section 2962. On February 13, 1996, the District Attorney of Los *830 Angeles County filed a petition, pursuant to section 2970, alleging that Myers's parole termination date was May 16, 1996, and that he has a severe mental disorder that either is not in remission or cannot be kept in remission if his treatment is not continued and that, by reason of his severe mental disorder, Myers represents a substantial danger of physical harm to others. On June 12, 1996, Myers's motion to dismiss the petition on the ground that the MDO Law, as applied to him, was ex post facto was granted by respondent court.

The Mentally Disordered Offender Law

In order to protect the public from dangerously mentally disordered criminal offenders, the Legislature enacted a mandatory mental health evaluation and treatment program in the form of the MDO Law. As originally enacted, the MDO Law applied to all persons incarcerated before and after January 1, 1986, and became operative on July 1, 1986. (*People v. Jenkins* (1995) 35 Cal.App.4th 669, 672 [41 Cal.Rptr.2d 502].)

On October 6, 1988, the Court of Appeal in *People v. Gibson* (1988) 204 Cal.App.3d 1425 [252 Cal.Rptr. 56] concluded that "section 2962 has overwhelming penal attributes", and, therefore constitutes part of a prisoner's "punishment for his criminal offense." (204 Cal.App.3d at p. 1432.) Accordingly, the court held that retroactive application of the mentally disordered offender provisions to persons who had committed crimes prior to the effective date of the MDO Law violated the federal and state constitutional ex post facto clauses (U.S. Const., art. I, § 9, cl. 3; Cal. Const., art. I, § 9). (*People v. Gibson*, *supra*, at pp. 1434-1435.) The court also held that because the act did not require proof of present dangerousness, a requirement that was applicable to other similarly situated mentally ill offenders subject to involuntary commitment (see § 1026.5, subd. (b)(1); Welf. & Inst. Code, § § 1800, 1801.5), the MDO Law violated the equal protection clauses of the federal and state Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7).

In response to *Gibson*, the Legislature enacted urgency legislation effective July 27, 1989. Various sections of the MDO Law were amended to require proof that the patient "represents a substantial danger of physical harm to others" prior to commitment or recommitment to an inpatient facility or an outpatient program. (Stats. 1989, ch. 228, § 4, pp. 1255-1256.) In order to keep the mentally disordered offender program in effect, section 2980 was amended to provide that the MDO Law applies to persons who committed their crimes on and after January 1, 1986. (Stats. 1989, ch. 228, § § 5, 8, pp. 1256, 1258.)

As it now reads, the MDO Law requires certain mentally disordered prisoners who have committed specifically identified violent crimes to submit to continued mental health treatment after their release on parole. *831 (§ § 2960-2981; Stats. 1985, ch. 1419, § 1, p. 5011; Stats. 1986, ch. 858, § 1, p. 2951.) All such prospective parolees (a) who are suffering from a severe mental disorder that is not in remission or cannot be kept in remission without treatment, (b) whose mental disorder was one of the causes of, or was an aggravating factor in, the commission of his or her crime, (c) who have been in treatment for 90 days or more within the year prior to his or her parole release day, and (d) who have been certified by a designated mental health professional to represent a substantial danger of physical harm to others by reason of his or her severe mental disorder, are required to be treated by the State Department of Mental Health as a condition of parole. (§ 2962, subds. (a)-(d).) The treatment must be inpatient unless the Department of Mental Health certifies to the Board of Prison Terms that it is safe to treat the parolee on an outpatient basis. Outpatient treatment can be revoked and the parolee can be placed in a secure mental health facility if the outpatient mental health director thinks the parolee cannot be safely and effectively treated in the community. (§ 2964, subd. (a).)

A parolee has the right to contest the findings of mental disorder and the decision to impose inpatient

versus outpatient treatment before the Board of Prison Terms and, if dissatisfied with the results of the hearing, may petition the superior court for a hearing to determine whether he or she genuinely falls under the criteria of section 2962. (§ 2966, subds. (a) and (b).) The hearing in the superior court "shall be a civil hearing," in which the burden of proof is on the person or agency who certified the prisoner under subdivision (d) of section 2962. Both the rules of criminal discovery and civil discovery apply, trial is by jury, and a unanimous verdict of proof beyond a reasonable doubt is required. (§ 2966, subds. (a) and (b).)

If the paroled prisoner's mental disorder is put into, and can be kept in, remission during the parole period, the Department of Mental Health must discontinue treating the parolee. (§ 2968.) However, if by the conclusion of his or her parole period the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, the extension provisions which are the subject of this petition come into play. [FN2] (§ 2970.)

> FN2 Section 2970 also applies to severely mentally disordered prisoners who remain in prison due to their refusal to agree to treatment as a condition of parole.

Under these provisions, the director of the program which has been responsible for the parolee's treatment must submit a written evaluation on remission to the district attorney's office not later than 180 days prior to the termination of parole. The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition must be supported by affidavits specifying "that treatment, while the prisoner was released from prison on parole, has been continuously provided by *832 the State Department of Mental Health either in a state hospital or in an outpatient program[,] ... that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others." (§ 2970.) At this point, the court is once again required to conduct a "civil" hearing on the petition for continued treatment. And, like the hearing provided at the time of the initial finding, there is a right to a jury trial, both civil and criminal discovery rules apply, representation for the People is by the district attorney, the public defender is appointed if the patient is indigent, and the jury's verdict must be unanimous and based upon proof beyond a reasonable doubt. (§ 2972, subds. (a) and (b).)

Subdivision (c) of section 2972 provides: "If the court or jury finds that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970."

The treatment facility has an affirmative obligation to provide treatment for the underlying causes of the person's mental disorder (§ 2972, subd. (f)) and the person is considered an involuntary mental health patient who is entitled to all the rights accorded to civil committees under the Lanterman-Petris-Short (LPS) Act. (§ 2972, subd. (g); Welf. & Inst. Code, § 5325.)

A new petition may be filed each year in accordance with all the foregoing provisions so long as the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and by reason thereof, the patient still presents a substantial danger of physical harm to others. (§ 2972, subd. (d).)

The Constitutional Prohibition on Ex Post Facto Laws

Article I, section 10 of the United States Constitution provides: "No State shall ... pass any ... ex post facto law ...." In *833 *Collins v. Youngblood* (1990) 497 U.S. 37 [111 L.Ed.2d 30, 110 S.Ct. 2715], the Supreme Court reviewed its decisions analyzing the clause and found that expansive language had crept into its decisions which had caused considerable confusion in state and lower federal courts about the scope of the clause. (*Id.* at p. 41 [111 L.Ed.2d at p. 38].) In order to clarify its views, the court rejected statutory analyses which were phrased in terms of whether a law eliminated a "substantial protection" or "altered the situation of the accused to his

disadvantage." Instead, the court returned to an analysis of the ex post facto law consistent with its understanding of that term at the time the Constitution was adopted. (*Id.* at pp. 47-52 [11 L.Ed.2d at pp. 42-45].) (1) Under this analysis, "... the clause prohibits three legislative categories: legislation ' "[1] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed ...." ' (*Collins, supra,* 497 U.S. 37, 42 [111 L.Ed.2d 30, 39, 110 S.Ct. 2715, 2719], quoting *Beazell v. Ohio* (1925) 269 U.S. 167, 169 [70 L.Ed. 216, 217, 46 S.Ct. 68].).... [T]he ex post facto clause of the California Constitution [article I, section 9] is to be analyzed identically." (*People v. McVickers* (1992) 4 Cal.4th 81, 84 [13 Cal.Rptr.2d 850, 840 P.2d 955]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295-297 [279 Cal.Rptr. 592, 807 P.2d 434].)

"Although the Latin phrase 'exi *ipostì ifàctò*' literally encompasses any law passed 'after the fact,' it has long been recognized by [the high court] that the constitutional prohibition on *ex post facto* laws applies only to *penal* statutes which disadvantage the offender affected by them. [Citations.]" (*Collins v. Youngblood, supra,* 497 U.S. at p. 41 [111 L.Ed.2d at p. 38], third italics added.) With this background in mind, we turn to the issues presented by the petition.

Discussion

I. The People's Right to Review

(2) We must first consider whether the People have a right to review by extraordinary writ in the instant case. Myers contends that even if respondent court's order constitutes judicial error, or is "egregiously erroneous," the People have no right to appeal, and when the People have no right to appeal, extraordinary relief is not available. (*People v. Superior Court (Stanley)* (1979) 24 Cal.3d 622, 625-626 [156 Cal.Rptr. 626, 596 P.2d 691].) Myers *834 points out that the People's right to appeal in *criminal* cases is limited by section 1238 to an order setting aside an indictment, information, or complaint, none of which, he argues, is applicable because the pleading here is by petition. He reminds us that "[t]he statutory restriction of the People's right to appeal in criminal cases 'is not merely a procedural limitation allocating appellate review between direct appeals and extraordinary writs but is a substantive limitation on review of trial court determinations in criminal trials.' [Citations.]" (*People v. Drake* (1977) 19 Cal.3d 749, 758-759 [139 Cal.Rptr. 720, 566 P.2d 622], quoting *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 498 [72 Cal.Rptr. 330, 446 P.2d 138].)

In determining whether a particular proceeding is criminal we look to the Legislature's intent and to the purpose and effect of the statute. (See *United States v. Ward* (1980) 448 U.S. 242, 248 [65 L.Ed.2d 742, 749, 100 S.Ct. 2636].) Here, the Legislature has expressly provided that an MDO "hearing shall be a *civil* hearing" (§ § 2966, subd. (b), 2972, subd. (a), italics added) thereby indicating that when a petition is filed against a person it intends that the court proceed in a nonpunitive, noncriminal manner. We recognize that the civil label is not dispositive. Where a defendant provides " 'the clearest proof' " that the " 'statutory scheme [is] so punitive either in purpose or effect' " the proceeding must be considered criminal. (*Allen v. Illinois* (1986) 478 U.S. 364, 369 [92 L.Ed.2d 296, 304, 106 S.Ct. 2988].) As we shall explain, however, the MDO provisions are neither punitive in purpose nor effect and their procedural safeguards do not require us to transform the hearing into a criminal trial. (*Allen v. Illinois, supra,* at p. 371 [92 L.Ed.2d at pp. 305-306].)

We conclude that the proceedings are civil and that the court's order dismissing the petition was a final judgment. Accordingly, the People have the right to appeal pursuant to section 904.1, subdivision (a)(1) of the Code of Civil Procedure which provides "[a]n appeal may be taken from a superior court ... [¶] ... judgment ...."

(3) We turn then to the question of whether the People have "a plain, speedy, and adequate remedy, in the ordinary course of law." If not, the writ must issue. (Code Civ. Proc., § 1086.) The People argue that they do not have "an adequate remedy [at law] in this case because the dismissal of the People's petition would result in Myers's release from all commitments and the attendant danger to the public occasioned by the removal of all structure that assures that Myers continues to take the medication that prevents him from becoming violent." Attorneys for Myers argue that such "allegation is without merit" because if Myers "does have a discernible mental disorder and if he is a danger to others," as alleged in the petition, he may be detained *835 under sections 5150 and 5250 of the Welfare and Institutions Code which provide for the detention and hold of a person who, "as a result of a mental disorder, is a danger to others, or to himself or herself, or gravely disabled[.]" (Welf. & Inst. Code, §

5150.) Thereafter, the People may seek "further treatment" by referral for and the establishment of a conservatorship under Welfare and Institutions Code sections 5270.55 and 5350 et seq.

However, as the People point out, Welfare and Institutions Code section 5150 provides for the detention for evaluation of persons with mental disorders for a period not to exceed 72 hours, and Welfare and Institutions Code section 5250 provides that a person detained pursuant to section 5150 can be certified for an additional period, not to exceed 14 days for intensive treatment. Welfare and Institutions Code section 5350 allows for the appointment of a conservator for "gravely disabled" persons, i.e., those who, as a result of mental illness, cannot provide their own food, shelter, or clothing. (Welf. & Inst. Code, § 5008, subd. (h)(1).) There is no evidence that Myers is "gravely disabled" under the definitions in Welfare and Institutions Code sections 5350, subdivision (e)(1) or 5008, subdivision (h)(1). Accordingly, we conclude that the People do not have an adequate remedy at law within the meaning of Code of Civil Procedure section 1086, and are faced with a potentially dangerous individual who allegedly needs treatment. "[B]ecause the public has a clear interest in seeing its legislative purposes properly implemented, we find that the present petition presents a question of substantial right warranting mandamus review." (*People v. Superior Court (John D.)* (1979) 95 Cal.App.3d 380, 387 [157 Cal.Rptr. 157].)

II. The Mentally Disordered OffenderLaw Is Not a Penal Statute

Respondent dismissed the petition to extend Myers's involuntary treatment on the ground that the MDO Law has been held to be "penal in nature" and therefore is ex post facto as applied to Myers in that Myers committed his crime after *Gibson* declared the law unconstitutional and before the date the urgency legislation curing the constitutional deficiencies went into effect.

In his return to the petition filed herein, Myers acknowledges that *Collins v. Youngblood, supra*, 497 U.S. 37, and *People v. McVickers, supra*, 4 Cal.4th 81, redefined the principles previously governing ex post facto analysis by deleting the " 'substantial disadvantage [to] the offender' prong" *836 -one of the grounds used by *Gibson* for its finding that the MDO Law violated the ex post facto clauses. Myers argues that is irrelevant because "[u]nder *Collins*, a statute remains ex post facto in its application if it changes the punishment or inflicts greater punishment than the law annexed to the crime when it was committed" and "[u]nder *McVickers*, a statute also remains *ex post facto* in its application which makes more burdensome the punishment for a crime, after its commission."

Myers's theory is that *Gibson* relied only in part on the substantial disadvantage prong. He contends the penal attributes of the MDO statutory scheme as amended still change or inflict greater punishment and make the punishment for a crime more burdensome under the *Collins* and *McVickers* tests. Therefore, in Myers's view, the outcome of *Gibson* would be unaffected by either the *Collins* or *McVickers* decisions.

In support of this contention, Myers points out that since *Gibson* decided that the MDO statutes have "overwhelming penal attributes," five decisions have been published affirming the "penal" nature of the MDO Law, all decided after the amendments curing the equal protection defect took effect. (See *People v. Pretzer* (1992) 9 Cal.App.4th 1078, 1085 [11 Cal.Rptr.2d 860] [Fifth Amendment permits prosecutor to call MDO as witness at hearing to answer questions concerning his present mental competence but forbids questions relating to predicate crime]; *People v. Collins* (1992) 10 Cal.App.4th 690, 694 [12 Cal.Rptr.2d 768] [jury instructions regarding the consequences of a verdict of mental illness and defining "force and violence" held prejudicial]; *People v. Coronado* (1994) 28 Cal.App.4th 1402, 1406 [33 Cal.Rptr.2d 835] [evidence sufficient to support MDO determination and People not foreclosed from seeking an MDO determination after reincarceration on parole where parole is again imminent and mental status has changed]; *People v. Jenkins, supra*, 35 Cal.App.4th at p. 674 [MDO statute not ex post facto as applied to offender whose February 21, 1986, offense was committed over one month after statute's effective date but five months before statute's operative date]; and *People v. Superior Court (Jump)* (1995) 40 Cal.App.4th 9, 12 [46 Cal.Rptr.2d 829], review den. Feb. 15, 1996 [proper court in which to initiate petition for continued involuntary treatment is superior court located in county in which inmate is convicted of crime that serves as foundation for his placement in state hospital as a MDO].)

The People contend each of the foregoing cases "relies upon *Gibson* without further analysis or discussion" and that "subsequent changes in the law have undermined the rationale of *Gibson* to the extent that *Gibson* is no longer good authority for the

proposition that [the] MDO [Law] is an ex post facto law." (4) The People argue that a careful analysis of the MDO Law *837 reveals that the law is concerned with two objectives, neither of which is penal: "(1) protection of the public, and (2) treating persons who have committed crimes who have severe mental disorders."

We agree with the People. The cases cited by Myers only tangentially touch on the issue presented here. In none of the cases was there an analysis of the amended MDO Law in light of the United States Supreme Court's clarification of ex post facto principles. The *Gibson* decision itself was based on the faulty premise that the "mentally disordered offender provisions (MDO) of section 2962 et seq. both increase punishment and alter the situation of the accused to his disadvantage" (*People v. Gibson, supra*, 204 Cal.App.3d at p. 1431) when in fact it does neither. The purpose of the MDO statutory scheme is to provide *mental health treatment* for those offenders who are suffering from *presently severe mental illness*, not to punish them for their past offenses. Subdivision (c) of section 2972 specifically requires a jury finding "that the patient has a severe mental disorder, [FN3] that the patient's severe mental disorder is not in remission or cannot be kept in remission [FN4] without treatment, [FN5] and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others...."

FN3 "The term 'severe mental disorder' means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. The term 'severe mental disorder' as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances." (§ 2962, subd. (a).)

FN4 "The term 'remission' means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support." (§ 2962, subd. (a).)

FN5 "A person 'cannot be kept in remission without treatment' if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan." (§ 2962, subd. (a).)

Laws which impose involuntary treatment upon people who suffer from present mental illnesses which cause them to be dangerous are not penal merely because the class of people subject to the laws are accused of, or have been convicted of, a crime. This was made clear in *Conservatorship of Hofferber* (1980) 28 Cal.3d 161 [167 Cal.Rptr. 854, 616 P.2d 836]. There, our Supreme Court held that the 1974 amendments to the LPS Act providing *838 for a civil conservatorship of a defendant found incompetent to stand trial did not violate constitutional limitations on retroactive and ex post facto laws, even though the crime of which he was accused occurred before the amendments became effective. This was because the act's "provisions ... have nothing to do with any punitive disability attached to the homicide charged against appellant at the time it occurred. They did not alter or affect the sentence for that crime. They did not extend, directly or indirectly, any incarceration that had been or could be imposed on appellant for criminal conduct.... [A]ppellant's confinement arose not from criminal conduct but from his mental condition. He does not face incarceration in a prison but must be placed in a state hospital or some other less restrictive setting. [Citation.]" (*Conservatorship of Hofferber*, *supra*, at pp. 181-182, fn. omitted.) The court was not dissuaded from this holding even though it "recognize[d] that LPS Act conservatees often are confined at Patton and Atascadero State Hospitals, prisonlike institutions that also house MDSO's convicted of crime. [Citations.]" (*Id.* at p. 182, fn. 18.) "Statutes that focus on a *continuing dangerous condition* ... are not retroactive simply because they employ pre-statute conduct as evidence of the ongoing dangerousness. [Citations.]" (*Id.* at p. 182,

original italics.)

In *Allen v. Illinois, supra*, 478 U.S. 364, the United States Supreme Court similarly held that proceedings under the Illinois Sexually Dangerous Persons Act are not "criminal" within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination. The court rationalized that since the act's aim was to provide treatment, not punishment, for persons adjudged sexually dangerous, the act was not an ex post facto law. In reaching this conclusion, the court was swayed by the act's requirement that the state prove more than the commission of a criminal act. Under the act, the state was obligated to prove the existence of a mental disorder lasting for more than one year and a propensity to commit criminal acts through something more than the prior commission of such acts. On the other hand, the fact that the state could not file a sexually-dangerous-person petition under the act unless it had already filed criminal charges against the defendant-which meant the act did not apply to the larger class of mentally ill persons who might be found sexually dangerous-did not change the civil proceeding into a criminal one. In addition, the availability of some of the safeguards applicable in criminal proceedings-rights to counsel, to a jury trial, and to confront and cross-examine witnesses, and the requirement that sexual dangerousness be proved beyond a reasonable doubt-did not turn the proceedings under the act into criminal proceedings requiring the full panoply of rights applicable there. And the fact that a person adjudged sexually dangerous under the act is committed to a maximum-security institution that also houses convicts needing psychiatric care did not transform the conditions of that person's confinement into "punishment" and thus render "criminal" the proceedings that led to confinement. *839

Three years earlier, in *Jones v. United States* (1983) 463 U.S. 354 [77 L.Ed.2d 694, 103 S.Ct. 3043], the Supreme Court dealt with the question of whether the due process clause was violated in the case of a not guilty by reason of insanity (NGI) acquittee because he had been hospitalized for a period longer than he could have been incarcerated if convicted. In holding it was not, the court ruled: "The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness." (*Id.* at p. 368 [77 L.Ed.2d at p. 708].)

In the same vein, our Supreme Court in *McVickers* cited with approval a Connecticut case, *Payne v. Fairfield Hills Hosp.* (1990) 215 Conn. 675, 683 [578 A.2d 1025, 1029], which held that "confinement of a person acquitted of a crime because of insanity is generally not punishment in the ex post facto context because its purposes are treatment for the individual and protection of society." (*People v. McVickers, supra*, 4 Cal.4th at p. 87.)

Our state appellate courts also have addressed the issue of whether the ex post facto clause was violated as applied to NGI committees. In *People v. Buttes* (1982) 134 Cal.App.3d 116, 128 [184 Cal.Rptr. 497], the appellant was committed in 1975 and it was not until January 1, 1980, that he was subject to a two-year extended commitment. Prior to that, the appellant was subject to only a one-year extended commitment. Appellant's argument that the law was ex post facto was "grounded upon the erroneous assumption that the original insanity commitment was a penal commitment." (*Ibid.*) According to the court, "[t]he law is to the contrary. [Citations.] [¶] Neither the original commitment nor the extension was criminal punishment but was for treatment in a state hospital." (*Ibid.*; see also *People v. Juarez* (1986) 184 Cal.App.3d 570 [229 Cal.Rptr. 145] [application of new definitional criteria for offense-related predicate for extended commitment of NGI was not ex post facto, as recommitment procedures could not disadvantage the defendant in the determination of his criminal guilt]; *People v. Superior Court (Woods)* (1990) 219 Cal.App.3d 614, 617 [268 Cal.Rptr. 379] ["Retroactive changes in the law which result in increased terms of commitment for NGI defendants are not considered ex post facto because the commitments are not penal but for treatment purposes. [Citations.]"].)

Furthermore, that the purpose of the MDO Law is "to protect the public" does not turn its provisions into punishment despite what *Gibson* may state to the contrary. (*People v. Gibson, supra*, 204 Cal.App.3d at p. 1433.) As noted previously, *McVickers*, *Hofferber*, and *Jones* each upheld the constitutionality of laws enacted with the protection of society in mind. (See also *840 *Addington v. Texas* (1979) 441 U.S. 418, 426 [60 L.Ed.2d 323, 331, 99 S.Ct. 1804] [state has "authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."].)

Finally, Myers argues that, because the MDO Law did not require a finding of present dangerousness as a prerequisite to imposing treatment until its amendment on July 27, 1989, the law may not be applied to those mentally disordered offenders who

committed their predicate crime prior to that date without also violating the due process clauses of the United States and California Constitutions. In support of this contention, Myers relies on cases which analyzed the retroactive applicability of substantial changes in criminal laws effected by judicial decisions overruling previous case law. (*People v. King* (1993) 5 Cal.4th 59, 70-81 [19 Cal.Rptr.2d 233, 851 P.2d 27] [overruling limitation on consecutive enhancements under section 12022.5]; *In re Baert* (1988) 205 Cal.App.3d 514, 518-519 [252 Cal.Rptr. 418] [eliminating proof of intent to kill as an element of the felony-murder special circumstance]; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353 [12 L.Ed.2d 894, 899-900, 84 S.Ct. 1697] [judicial expansion of South Carolina's criminal trespass law].) These cases are inapplicable as they are based upon " 'the notion that persons have a right to fair warning of that conduct which will give rise to *criminal penalties* ....' [Citations.]" (*In re Baert, supra*, 205 Cal.App.3d at p. 518, italics added.)

We find the analysis of the urgency amendments to the LPS Act in *Hofferber* more analogous to the amendments to the MDO Law. There, in language equally applicable to mentally disordered offenders, it was stated: "We have held that a legislative attempt to cure an unconstitutional statute may suggest an intent that the curative provision be applied retroactively. [Citations.] Moreover, the 1974 amendments [to the LPS Act] seek to protect against a particular class of *potentially* dangerous persons. In such cases, legislative expressions of urgency in the interest of public safety necessarily indicate an attempt to reach all persons in the class who represent the continuing danger even if they fall within the legislative purview partly by reason of prior conduct. [Citation.] [¶] ... [D]angerous mentally ill persons gain no perpetual 'vested right' in the commitment scheme extant when their illnesses first came to public attention. To say that they have 'reasonably relied' on that scheme in displaying their dangerous conditions is to indulge a patent fiction. Such a rule would severely hamper legislative efforts to respond to new knowledge about mental illness, correct perceived deficiencies in the statutory scheme, and refine the state's machinery for treatment and restraint of dangerously disturbed people. [Citation.]" (*Conservatorship of Hofferber, supra*, 28 Cal.3d at pp.183-184, fns. omitted.)

In sum, section 2970 does not subject a mentally disordered offender to any punitive ramifications. A refusal to comply with treatment cannot lead to *841 denial of parole or reincarceration in state prison. Its provisions do not provide for the extension of the MDO's parole. MDO's subject to its provisions are not under the supervision of a parole officer or the Board of Prison Terms. The law does not punish as a crime an act previously committed, which was innocent when done. It imposes no punishment for a crime after its commission and it does not deprive an MDO of any defense available at the time his or her criminal act was committed. Laws which require treatment for people who are currently mentally ill and who are gravely disabled or dangerous to others (or themselves for that matter) are not punitive and therefore such laws do not violate the ex post facto clauses. [FN6]

> FN6 We note that in two recent decisions, the 1995 Sexually Violent Predators Act (Welf. & Inst. Code, div. 6, pt. 2, ch. 2, art. 4, § 6600 et seq.) which mandates confinement and treatment for sexually violent predators who committed their crimes prior to 1995 and who are about to complete their prison sentences also was held not to be an ex post facto law. (*People v. Superior Court (Cain)* (1996) 49 Cal.App.4th 1164 [57 Cal.Rptr.2d 296] review granted Feb. 5, 1997 (S057272); *Garcetti v. Superior Court* (1996) 49 Cal.App.4th 1533 [57 Cal.Rptr.2d 420] review granted Feb. 5, 1997 (S057336).) While these decisions are in accord with our holding, we do not rely upon them in reaching our decision as they are not yet final. (Cal. Rules of Court, rule 24(a).)

Disposition

Let a peremptory writ of mandate issue directing respondent superior court to vacate its order of June 12, 1996, which granted real party in interest Myers's motion to dismiss the People's petition for extended commitment, and to make a new and different order denying Myers's motion and reinstating proceedings on the People's petition for involuntary treatment pursuant to section 2970. It is further ordered that the temporary stay issued herein on August 12, 1996, shall remain in effect until respondent complies with our direction.

To facilitate the relief requested, this opinion is final forthwith. (Cal. Rules of Court, rule 24(d).)

Epstein, Acting P. J., and Hastings, J., concurred.

The petition of real party in interest for review by the Supreme Court was denied January 22, 1997. *842

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END OF DOCUMENT

Date of Printing: MAY 25,2006

KEYCITE

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (U.S.Tex., Apr 30, 1979) (NO. 77-5992)

History

Direct History

1 Addington v. State, 546 S.W.2d 105 (Tex.Civ.App.-Beaumont Jan 06, 1977) (NO. 7910)

Judgment Reversed by

2 State v. Addington, 557 S.W.2d 511 (Tex. Oct 12, 1977) (NO. B-6597)

Probable Jurisdiction Noted by

3 Addington v. Texas, 435 U.S. 967, 98 S.Ct. 1604, 56 L.Ed.2d 58 (U.S.Tex. Apr 17, 1978) (NO. 77 5992)

AND Judgment Vacated by

4 **Addington v. Texas,** 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (U.S.Tex. Apr 30, 1979) (NO. 77-5992)

On Remand to

5 State v. Addington, 588 S.W.2d 569 (Tex. Oct 03, 1979) (NO. B-6597)

Negative Citing References (U.S.A.)

Declined to Extend by

6 U.S. v. Lam Kwong-Wah, 966 F.2d 682, 296 U.S.App.D.C. 162 (D.C.Cir. May 19, 1992) (NO. 91-3131) ** **HN: 11 (S.Ct.)**

Distinguished by

7 Matter of Joseph, 416 N.E.2d 857 (Ind.App. 4 Dist. Feb 23, 1981) (NO. 2-680A182) *** **HN: 11 (S.Ct.)**

8 People v. Bye, 116 Cal.App.3d 569, 172 Cal.Rptr. 186 (Cal.App. 4 Dist. Mar 05, 1981) (NO. CR. 11726) **** **HN: 10,11 (S.Ct.)**

9 Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (Cal.App. 4 Dist. May 29, 1981) (NO. CIV. 20095) ** **HN: 11 (S.Ct.)**

10 Matter of Polk, 90 N.J. 550, 449 A.2d 7 (N.J. Jul 30, 1982) (NO. A-89) *** **HN: 2,11 (S.Ct.)**

11 Com. v. Wright, 508 Pa. 25, 494 A.2d 354 (Pa. Jun 10, 1985) (NO. 4 E.D. APPEAL 1984, 101 E.D. APPEAL 1984, 28 E.D. APPEAL 1984, 106 E.D. APPEAL 1983, 62 E.D. APPEAL 1984, J-216-219-1984) **** **HN: 2,10,11 (S.Ct.)**

12 State v. Riccio, 130 N.H. 376, 540 A.2d 1239 (N.H. Mar 29, 1988) (NO. 87-404) ** **HN: 10 (S.Ct.)**

13 In re Azzarella, 207 Cal.App.3d 1240, 254 Cal.Rptr. 922 (Cal.App. 4 Dist. Jan 27, 1989) (NO. E004149), review denied (May 18, 1989) *** **HN: 10,11 (S.Ct.)**

14 U.S. v. Restrepo, 946 F.2d 654, 60 USLW 2274, 4 Fed.Sent.R. 251 (9th Cir.(Alaska) Oct 04, 1991) (NO. 88-3207) **** **HN: 2,10,11 (S.Ct.)**

15 Guardianship of Doe, 411 Mass. 512, 583 N.E.2d 1263, 2 NDLR P 245 (Mass. Jan 06, 1992) (NO. 5637) **

16 Noll v. Knowles, 19 F.3d 1440 (9th Cir.(Ariz.) Mar 23, 1994) (TABLE, TEXT IN WESTLAW, NO. 93-15402) ** **HN: 11 (S.Ct.)**

17 U.S. v. Muhammad, 165 F.3d 327 (5th Cir.(Tex.) Jan 15, 1999) (NO. 98-10960) *** **HN: 9,10,11 (S.Ct.)**

18 U.S. v. Klat, 180 F.3d 264 (5th Cir.(Tex.) Apr 27, 1999) (Not selected for publication in the Federal Reporter, NO. 97-11282)

19 Coe v. Bell, 209 F.3d 815, 2000 Fed.App. 0130P (6th Cir.(Tenn.) Apr 11, 2000) (NO. 00-5419),

rehearing and rehearing en banc denied (Apr 17, 2000) *** HN: 10,11 (S.Ct.)

H 20 Stout v. Com., 44 S.W.3d 781 (Ky.App. Aug 11, 2000) (NO. 1998-CA-002456-MR), review denied (Jun 07, 2001) ** HN: 2,10 (S.Ct.)

P 21 Calvert County Planning Com'n v. Howlin Realty Management, Inc., 364 Md. 301, 772 A.2d 1209 (Md. Jun 04, 2001) (NO. 61 SEPT.TERM 2000) ** HN: 10 (S.Ct.)

P 22 In re Christopher C., 2002 WL 31770397 (Cal.App. 4 Dist. Dec 11, 2002) (NO. E030485, E031395), unpublished/noncitable *** HN: 5,10 (S.Ct.)

C 23 Mays v. State, 116 Wash.App. 864, 68 P.3d 1114 (Wash.App. Div. 1 May 12, 2003) (NO. 50222-1-I) ** HN: 8,9,10 (S.Ct.)

P 24 Born v. Thompson, 117 Wash.App. 57, 69 P.3d 343 (Wash.App. Div. 1 May 19, 2003) (NO. 49384-1-I) *** HN: 9,10,11 (S.Ct.)

P 25 People v. Pihl, 2003 WL 21246778 (Cal.App. 3 Dist. May 30, 2003) (NO. C039196), unpublished/noncitable (May 30, 2003), review denied (Sep 10, 2003) ** HN: 9 (S.Ct.)

P 26 State ex rel. Nixon v. Kinder, 129 S.W.3d 5 (Mo.App. W.D. Aug 05, 2003) (NO. WD62363), rehearing and/or transfer denied (Sep 30, 2003), cause ordered transferred to mo.s.ct. (Nov 25, 2003), retransferred to mo. ct. of appeals (Mar 30, 2004) **

H 27 Golub v. Giles, 814 N.E.2d 1034 (Ind.App. Sep 15, 2004) (NO. 49A02-0405-CV-386) ** HN: 5,6 (S.Ct.)

H 28 State v. Perkins, 277 Wis.2d 243, 689 N.W.2d 684, 2004 WI App 213 (Wis.App. Oct 12, 2004) (NO. 03-3296-CR) * HN: 9 (S.Ct.)

H 29 Thomas v. Nicholson, 423 F.3d 1279 (Fed.Cir. Sep 09, 2005) (NO. 05-7019) ** HN: 10 (S.Ct.)

30 J.J.F. v. State, 132 P.3d 170, 2006 WY 41 (Wyo. Apr 06, 2006) (NO. 05-91, C-05-10) **** HN: 9,10,11 (S.Ct.)

Limitation of Holding Recognized by

H 31 Tavares v. State, 871 So.2d 974, 29 Fla. L. Weekly D879 (Fla.App. 5 Dist. Apr 08, 2004) (NO. 5D03-2004), rehearing denied (May 06, 2004) ** HN: 11 (S.Ct.)

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C 32 Hoskins v. Hislop, 26 B.C.L.R. 165, 121 D.L.R. (3d) 337, 1981 CarswellBC 17 (B.C. S.C. Feb 16, 1981)

H 33 R. v. Williams, 140 A.R. 132, 1993 CarswellAlta 613, [1993] A.W.L.D. 574, [1993] A.J. No. 441 (Alta. Q.B. May 11, 1993)

Court Documents

Appellate Court Documents (U.S.A.)

U.S. Appellate Briefs

34 Frank O'Neal ADDINGTON, Appellant, v. The State of Texas, Appellee., 1978 WL 207143 (Appellate Brief) (U.S. Jun. 30, 1978) **Brief for the National Association for Mental Health, American Orthopsychiatric Association, Nationa** (NO. 77-5992)

35 Frank O'Neal ADDINGTON, Appellant, v. The State of Texas, Appellee., 1978 WL 207144 (Appellate Brief) (U.S. Jul. 01, 1978) **Brief of the National Center for Law and the Handicapped, Amicus Curiae** (NO. 77-5992)

36 Frank O'Neal ADDINGTON, Appellant, v. The State of Texas, Appellee., 1978 WL 207141 (Appellate Brief) (U.S. Jul. 07, 1978) **Brief for the Appellant** (NO. 77-5992)

37 Frank O'Neal ADDINGTON, Appellant, v. The State of Texas, Appellee., 1978 WL 207145 (Appellate Brief) (U.S. Aug. 30, 1978) **Brief for the American Psychiatric Association as Amicus Curiae** (NO. 77-5992)

38 Frank O'Neal ADDINGTON, Appellant, v. The State of Texas, Appellee., 1978 WL 207142 (Appellate Brief) (U.S. Sep. 01, 1978) **Brief for the Appellee** (NO. 77-5992)

39 Frank O'Neal ADDINGTON, Appellant, v. The State of Texas, Appellee., 1978 WL 207147 (Appellate Brief) (U.S. Sep. 16, 1978) **Brief for the State of Illinois as Amicus Curiae** (NO. 77-

5992)

Briefs and Other Related Documents

Supreme Court of the United States
Frank O'Neal ADDINGTON, Appellant,
v.
State of TEXAS.
No. 77-5992.

Argued Nov. 28, 1978.
Decided April 30, 1979.

In an indefinite commitment case, a probate court in Texas found that defendant was mentally ill and required hospitalization for his own welfare and protection as well as for the protection of others. The Beaumont Court of Civil Appeals, Ninth Supreme Judicial District, 546 S.W.2d 105, reversed, holding that the proper standard of proof was "beyond a reasonable doubt." The State was granted a writ of error by the Supreme Court of Texas, 557 S.W.2d 511. On grant of certiorari, the Supreme Court, Mr. Chief Justice Burger, held that to meet due process demands, the standard for use in commitment for mental illness must inform the fact finder that proof must be greater than the preponderance of evidence standard applicable to other categories of civil cases, but the reasonable-doubt standard is not constitutionally required.

Vacated and remanded.

Opinion after remand, 588 S.W.2d 569.

West Headnotes

[1] **Federal Courts 170B 509**

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk509 k. Mode of Review and Proceedings. Most Cited Cases
Where no challenge to constitutionality of any state statute was presented, appeal to United States Supreme Court was not authorized, and papers were construed as petition for writ of certiorari. 28 U.S.C.A. § 1257(2).

[2] **Constitutional Law 92 311**

92 Constitutional Law
92XII Due Process of Law
92k304 Civil Remedies and Proceedings
92k311 k. Rules of Evidence. Most Cited Cases
Function of standard of proof, as that concept is embodied in due process clause and in realm of fact-finding, is to instruct fact finder concerning degree of confidence society thinks he should have in correctness of factual conclusions for particular type of adjudication. U.S.C.A.Const. Amend. 14.

[3] **Constitutional Law 92 251.5**

92 Constitutional Law
92XII Due Process of Law
92k251.5 k. Procedural Due Process in General. Most Cited Cases
Function of legal process is to minimize risk of erroneous decisions. U.S.C.A.Const. Amend. 14.

[4] **Constitutional Law 92 81**

92 Constitutional Law
92IV Police Power in General
92k81 k. Nature and Scope in General. Most Cited Cases

Mental Health 257A 36

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons Subject to Control or Treatment. Most Cited Cases
State has legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves, and state also has authority under its police power to protect community from dangerous tendencies of some who are mentally ill. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51.

[5] **Mental Health 257A 36**

257A Mental Health
257AII Care and Support of Mentally Disordered

Persons
257AII(A) Custody and Cure
257Ak36 k. Persons Subject to Control or Treatment. Most Cited Cases
Under Texas mental health code, state has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51.

[6] Mental Health 257A 36

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons Subject to Control or Treatment. Most Cited Cases
Loss of liberty by confinement for mental illness calls for showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; Code Miss.1972, § 41-21-75.

[7] States 360 4

360 States
360I Political Status and Relations
360I(A) In General
360k4 k. Status Under Constitution of United States, and Relations to United States in General. Most Cited Cases
Essence of federalism is that states must be free to develop variety of solutions to problems and not be forced into common, uniform mold.

[8] Constitutional Law 92 255(5)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases
Substantive standards for civil commitment for mental illness may vary from state to state, and procedures must be allowed to vary so long as they meet constitutional minimum. Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; U.S.C.A.Const. Amend. 14; Code Miss.1972, § 41-21-75.

[9] Constitutional Law 92 255(5)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases

Mental Health 257A 41

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak41 k. Hearing and Determination in General. Most Cited Cases
Reasonable-doubt standard is inappropriate in civil commitment proceedings, and use of term "unequivocal" is not constitutionally required, although states are free to use that standard. Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; U.S.C.A.Const. Amend. 14; Code Miss.1972, § 41-21-75.

[10] Constitutional Law 92 255(5)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases
To meet due process demands, standard for use in commitment for mental illness must inform fact finder that proof must be greater than preponderance-of-evidence standard applicable to other categories of civil cases. Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; U.S.C.A.Const. Amend. 14; Code Miss.1972, § 41-21-75.

[11] Constitutional Law 92 255(5)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases

Federal Courts 170B 513

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk513 k. Determination and Disposition of Cause. Most Cited Cases
Instruction used in proceeding in Texas for commitment for mental illness, such instruction employing the standard of "clear, unequivocal, and convincing" evidence, was constitutionally adequate, but determination of precise burden, equal to or greater than such standard, required to meet due process requirements was matter of state law to be left to Texas Supreme Court. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; Code Miss.1972, § 41-21-75.
***1805 *418 Syllabus** [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Appellant's mother filed a petition for his indefinite commitment to a state mental hospital in accordance with Texas law governing involuntary commitments. Appellant had a long history of confinements for mental and emotional disorders. The state trial court instructed the jury to determine whether, based on "clear, unequivocal and convincing evidence," appellant was mentally ill and required hospitalization for his own welfare and protection or the protection of others. Appellant contended that the trial court should have employed the "beyond a reasonable doubt" standard of proof. The jury found that appellant was mentally ill and that he required hospitalization, and the trial court ordered his commitment for an indefinite period. The Texas Court of Appeals reversed, agreeing with appellant on the standard of proof issue. The Texas Supreme Court reversed the Court of Appeals' decision and reinstated the trial court's judgment, concluding that a "preponderance of the evidence" standard of proof in a civil commitment proceeding satisfied due process and that since the trial court's improper instructions in the instant case had benefited appellant, the error was harmless.

Held: A "clear and convincing" standard of proof is required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital. Pp. 1809-1813.

(a) The individual's liberty interest in the outcome of a civil commitment proceeding is of such weight and gravity, compared with the state's interests in providing care to its citizens who are unable, because of emotional disorders, to care for themselves and in protecting the community from the dangerous tendencies of some who are mentally ill, that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence. Pp. 1809-1810.

(b) Due process does not require states to use the "beyond a reasonable doubt" standard of proof applicable in criminal prosecutions and delinquency proceedings. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, distinguished. The reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it ***1806** may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. The state should *419 not be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments. Pp. 1810-1812.

(c) To meet due process demands in commitment proceedings, the standard of proof has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases. However, use of the term "unequivocal" in conjunction with the term "clear and convincing" in jury instructions (as included in the instructions given by the Texas state court in this case) is not constitutionally required, although states are free to use that standard. Pp. 1812-1813.

Appeal dismissed and certiorari granted; 557 S.W.2d 511, vacated and remanded.

Martha L. Boston, Austin, Tex., for appellant.
James F. Hury, Jr., Galveston, Tex., for appellee.
Joel I. Klein, Washington, D. C., for the American Psychiatric Ass'n, as amicus curiae, by special leave of Court.
Mr. Chief Justice BURGER delivered the opinion of the Court.

The question in this case is what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an *420 individual involuntarily for an indefinite period to a state mental hospital.

I

On seven occasions between 1969 and 1975, appellant was committed temporarily, Tex.Rev.Civ.Stat.Ann., Arts. 5547-31 to 5547-39 (Vernon 1958 and Supp. 1978-1979), to various Texas state mental hospitals and was committed for indefinite periods, Arts. 5547-40 to 5547-57, to Austin State Hospital on three different occasions. On December 18, 1975, when appellant was arrested on a misdemeanor charge of "assault by threat" against his mother, the county and state mental health authorities therefore were well aware of his history of mental and emotional difficulties.

Appellant's mother filed a petition for his indefinite commitment in accordance with Texas law. The county psychiatric examiner interviewed appellant while in custody and after the interview issued a Certificate of Medical Examination for Mental Illness. In the certificate, the examiner stated his opinion that appellant was "mentally ill and require[d] hospitalization in a mental hospital." Art. 5547-42 (Vernon 1958).

Appellant retained counsel and a trial was held before a jury to determine in accord with the statute:

"(1) whether the proposed patient is mentally ill, and if so

"(2) whether he requires hospitalization in a mental hospital for his own welfare and protection or the protection of others, and if so

"(3) whether he is mentally incompetent." Art. 5547-51 (Vernon 1958).

The trial on these issues extended over six days.

The State offered evidence that appellant suffered from serious delusions, that he often had threatened to injure both of his parents and others, that he had been involved in several *421 assaultive episodes while hospitalized and that he had caused substantial property damage both at his own apartment and at his parents' home. From these undisputed facts, two psychiatrists, who qualified as experts, expressed opinions that appellant suffered from psychotic schizophrenia and that he had paranoid tendencies. They also expressed medical opinions that appellant was probably dangerous both to himself and to others. They explained that appellant required hospitalization in a closed area to treat his condition because in the past he had refused to attend **1807 outpatient treatment programs and had escaped several times from mental hospitals.

Appellant did not contest the factual assertions made by the State's witnesses; indeed, he conceded that he suffered from a mental illness. What appellant attempted to show was that there was no substantial basis for concluding that he was probably dangerous to himself or others.

The trial judge submitted the case to the jury with the instructions in the form of two questions:

"1. Based on clear, unequivocal and convincing evidence, is Frank O'Neal Addington mentally ill?

"2. Based on clear, unequivocal and convincing evidence, does Frank O'Neal Addington require hospitalization in a mental hospital for his own welfare and protection or the protection of others?"

Appellant objected to these instructions on several grounds, including the trial court's refusal to employ the "beyond a reasonable doubt" standard of proof.

The jury found that appellant was mentally ill and that he required hospitalization for his own or others' welfare. The trial court then entered an order committing appellant as a patient to Austin State Hospital for an indefinite period.

Appellant appealed that order to the Texas Court of Civil Appeals, arguing, among other things, that the standards for commitment violated his substantive due process rights and that any standard of proof for commitment less than that *422 required for criminal convictions, *i. e.*, beyond a reasonable doubt, violated his procedural due process rights. The Court of Civil Appeals agreed with appellant on the standard-of-proof issue and reversed the judgment of the trial court. Because of its treatment of the standard of proof that court did not consider any of the other issues raised in the appeal.

On appeal, the Texas Supreme Court reversed the Court of Civil Appeals' decision. 557 S.W.2d 511. In so holding, the Supreme Court relied primarily upon its previous decision in *State v. Turner*, 556 S.W.2d 563 (1977), cert. denied, 435 U.S. 929, 98 S.Ct. 1499, 55 L.Ed.2d 525 (1978).

In *Turner*, the Texas Supreme Court held that a "preponderance of the evidence" standard of proof in

a civil commitment proceeding satisfied due process. The court declined to adopt the criminal law standard of "beyond a reasonable doubt" primarily because it questioned whether the State could prove by that exacting standard that a particular person would or would not be dangerous in the future. It also distinguished a civil commitment from a criminal conviction by noting that under Texas law the mentally ill patient has the right to treatment, periodic review of his condition, and immediate release when no longer deemed to be a danger to himself or others. Finally, the *Turner* court rejected the "clear and convincing" evidence standard because under Texas rules of procedure juries could be instructed only under a beyond-a-reasonable-doubt or a preponderance standard of proof.

Reaffirming *Turner*, the Texas Supreme Court in this case concluded that the trial court's instruction to the jury, although not in conformity with the legal requirements, had benefited appellant, and hence the error was harmless. Accordingly, the court reinstated the judgment of the trial court.

[1] We noted probable jurisdiction. 435 U.S. 967, 98 S.Ct. 1604, 56 L.Ed.2d 58. After oral argument it became clear that no challenge to the constitutionality of any Texas statute was presented. Under 28 U.S.C. § 1257(2) no appeal is authorized; accordingly, construing*423 the papers filed as a petition for a writ of certiorari, we now grant the petition. [FN1]

FN1. See *Kulko v. California Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *May v. Anderson*, 345 U.S. 528, 72 S.Ct. 840, 97 L.Ed. 1221 (1953). As in those cases, we continue to refer to the parties as appellant and appellee. See *Kulko v. California Superior Court, supra*, 436 U.S. at 90 n. 4, 98 S.Ct. at 1696.

**1808 II

[2] The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.

In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.[FN2] In the *424 administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt. *In re Winship, supra.*

FN2. Compare Morano, A Reexamination of the Development of the Reasonable Doubt Rule, 55 B.U.L.Rev. 507 (1975) (reasonable doubt represented a less strict standard than previous common-law rules); with May, Some Rules of Evidence, 10 Am.L.Rev. 642 (1875) (reasonable doubt constituted a stricter rule than previous ones). See generally Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299 (1977).

The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal," and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law." *Woodby v. INS*, 385 U.S. 276, 285, 87 S.Ct. 483, 488, 17 L.Ed.2d 362 (1966). See also McCormick, Evidence § 320 (1954); 9 J. Wigmore, Evidence § 2498 (3d ed. 1940). One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's

burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. See, e. g., *Woodby v. INS*, supra, at 285, 87 S.Ct., at 487 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353, 81 S.Ct. 147, 149, 5 L.Ed.2d 120 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336, 1353, 87 L.Ed. 1796 (1943) (denaturalization).

Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies.[FN3] Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be *425 unknowable, given that factfinding is a process shared by countless thousands of **1809 individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence. Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a "standard of proof is more than an empty semantic exercise." *Tippett v. Maryland*, 436 F.2d 1153, 1166 (CA4 1971) (Sobeloff, J., concurring in part and dissenting in part), cert. dismissed *sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 92 S.Ct. 2091, 32 L.Ed.2d 791 (1972). In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty." 436 F.2d, at 1166.

FN3. There have been some efforts to evaluate the effect of varying standards of proof on jury factfinding, see, e. g., L. S. E. Jury Project, Juries and the Rules of Evidence, 1973 Crim.L.Rev. 208, but we have found no study comparing all three standards of proof to determine how juries, real or mock, apply them.

III

[3] In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions. See *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); *Speiser v. Randall*, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1341-1342, 2 L.Ed.2d 1460 (1958).

A

This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. See, e. g., *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); *Humphrey v. Cady*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding *426 of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

[4][5] The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill. Under the Texas Mental Health Code, however, the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others. Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings.

The expanding concern of society with problems of mental disorders is reflected in the fact that in recent years many states have enacted statutes designed to protect the rights of the mentally ill. However, only one state by statute permits involuntary commitment by a mere preponderance of the evidence, Miss.Code

Ann. § 41-21-75 (1978 Supp.), and Texas is the only state where a court has concluded that the preponderance-of-the-evidence standard satisfies due process. We attribute this not to any lack of concern in those states, but rather to a belief that the varying standards tend to produce comparable results. As we noted earlier, however, standards of proof are important for their symbolic meaning as well as for their practical effect.

**1810 [6] At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within *427 a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.

The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.

B

Appellant urges the Court to hold that due process requires use of the criminal law's standard of proof-"beyond a reasonable doubt." He argues that the rationale of the *Winship* holding that the criminal law standard of proof was required in a delinquency proceeding applies with equal force to a civil commitment proceeding.

In *Winship*, against the background of a gradual assimilation of juvenile proceedings into traditional criminal prosecutions, we declined to allow the state's "civil labels and good intentions" to "obviate the need for criminal due process safeguards in juvenile courts." 397 U.S., at 365-366, 90 S.Ct., at 1073. The Court saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. *Winship* recognized that the basic issue-whether the individual in fact committed a criminal act-was *428 the same in both proceedings. There being no meaningful distinctions between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt.

There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense.[FN4] Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution. Cf. *Woodby v. INS*, 385 U.S., at 284-285, 87 S.Ct., at 487-488.

FN4. The State of Texas confines only for the purpose of providing care designed to treat the individual. As the Texas Supreme Court said in *State v. Turner*, 556 S.W.2d 563, 566 (1977):

"The involuntary mental patient is entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others."

In addition, the "beyond a reasonable doubt" standard historically has been reserved for criminal cases. This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the "moral force of the criminal law," *In re Winship*, 397 U.S., at 364, 90 S.Ct., at 1072, and we should hesitate to apply it too broadly or casually in noncriminal cases. Cf. *ibid.*

The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free. *Patterson v. New York*, 432 U.S. 197, 208, 97 S.Ct. 2319, 2326, 53 L.Ed.2d 281 (1977). The full force of that idea does not apply to a civil commitment. It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction, 5 J. Wigmore, Evidence § 1400 **1811 (Chadbourn rev. 1974). However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and *429 friends generally will provide continuous

opportunities for an erroneous commitment to be corrected. Moreover, it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. See Chodoff, The Case for Involuntary Hospitalization of the Mentally Ill, 133 Am.J.Psychiatry 496, 498 (1976); Schwartz, Myers & Astrachan, Psychiatric Labeling and the Rehabilitation of the Mental Patient, 31 Arch.Gen.Psychiatry 329, 334 (1974). It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

Finally, the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question-did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous. See *O'Connor v. Donaldson*, 422 U.S. 563, 584, 95 S.Ct. 2486, 2498, 45 L.Ed.2d 396 (1975) (concurring opinion); *Blocker v. United States*, 110 U.S.App.D.C. 41, 48-49, 288 F.2d 853, 860-861 (1961) (opinion concurring in result). See also *Tippett v. Maryland*, 436 F.2d, at 1165 (Sobeloff, J., concurring in part and dissenting in part); Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 Harv.L.Rev. 1288, 1291 (1966); Note, Due Proces and the Development of "Criminal" Safeguards *430 in Civil Commitment Adjudications, 42 Ford.L.Rev. 611, 624 (1974).

The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Within the medical discipline, the traditional standard for "factfinding" is a "reasonable medical certainty." If a trained psychiatrist has difficulty with the categorical "beyond a reasonable doubt" standard, the untrained lay juror-or indeed even a trained judge-who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care. See *ibid.* Such "freedom" for a mentally ill person would be purchased at a high price.

That practical considerations may limit a constitutionally based burden of proof is demonstrated by the reasonable doubt standard, which is a compromise between what is possible to prove and what protects the rights of the individual. If the state was required to guarantee error-free convictions, it would be required to prove guilt beyond all doubt. However, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson v. New York, supra*, 432 U.S., at 208, 97 S.Ct., at 2326. Nor should the state be required to employ a standard of proof that may completely undercut its **1812 efforts to further the legitimate interests of both the state and the patient that are served by civil commitments.

[7][8] That some states have chosen either legislatively or judicially *431 to adopt the criminal law standard [FN5] gives no assurance that the more stringent standard of proof is needed or is even adaptable to the needs of all states. The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum. See Monahan & Wexler, A Definite Maybe: Proof and Probability in Civil Commitment, 2 Law & Human Behavior 37, 41-42 (1978); Share, The Standard of Proof in Involuntary Civil Commitment Proceedings, 1977 Detroit College L.Rev. 209, 210. We conclude that it is unnecessary to require states to apply the strict, criminal standard.

FN5. Haw.Rev.Stat. § 334-60(b)(4)(I) (Supp. 1978); Idaho Code § 66-329(i)

(Supp. 1978); Kan.Stat.Ann. § 59-2917 (1976); Mont.Rev.Codes Ann. § 38-1305(7) (1977 Supp.); Okla.Stat., Tit. 43A, § 54.1(C) (1978 Supp.); Ore.Rev.Stat. § 426.130 (1977); Utah Code Ann. § 64-7-36(6) (1953); Wis.Stat. § 51.20(14)(e) (Supp.1978-1979); *Superintendent of Worcester State Hospital v. Hagberg*, 374 Mass. 271, 372 N.E.2d 242 (1978); *Proctor v. Butler*, 117 N.H. 927, 380 A.2d 673 (1977); *In re Hodges*, 325 A.2d 605 (D.C.App.1974); *Lausche v. Commissioner of Public Welfare*, 302 Minn. 65, 225 N.W.2d 366 (1974), cert. denied, 420 U.S. 993, 95 S.Ct. 1430, 43 L.Ed.2d 674 (1975). See also *In re J. W.*, 44 N.J.Super. 216, 130 A.2d 64 (App.Div.), cert. denied, 24 N.J. 465, 132 A.2d 558 (1957); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky.App.1964) (dicta).

C

Having concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable-doubt standard is not required, we turn to a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the state. We note that 20 states, most by statute, employ the standard of "clear and convincing" evidence; [FN6] 3 states use *432 "clear, *cogent*, and convincing" evidence; [FN7] and 2 states require "clear, *unequivocal* and convincing" evidence.[FN8]

FN6. Ariz.Rev.Stat.Ann. § 36-540 (1974); Colo.Rev.Stat. § 27-10-111(1) (Supp.1976); Conn.Gen.Stat. § 17-178(c) (1979); Del.Code Ann., Tit. 16, § 5010(2) (Supp.1978); Ga.Code § 88-501(u) (1978); Ill.Rev.Stat. ch. 91 1/2 , § 3-808 (Supp.1977); Iowa Code § 229.12 (1979); La.Rev.Stat.Ann., § 28:55E (West Supp. 1979); Me.Rev.Stat.Ann., Tit. 34, § 2334(5)(A)(1) (1978); Mich.Stat.Ann. § 14.800(465) (1976) [M.C.L.A. § 330.1465]; Neb.Rev.Stat. § 83-1035 (1976); N.M.Stat.Ann. § 43-1-11C (1978); N.D.Cent.Code § 25-03.1-19 (1978); Ohio Rev.Code Ann. § 5122.15(B) (Supp.1978); Pa.Stat.Ann., Tit. 50, § 7304(f) (Purdon Supp.1978-1979); S.C.Code § 44-17-580 (Supp.1978); S.D.Comp.Laws Ann. § 27A-9-18 (1977); Vt.Stat.Ann., Tit. 18, § 7616(b) (Supp.1978); Md. Dept. of Health & Mental Hygiene Reg. 10.21.03G (1973); *In re Beverly*, 342 So.2d 481 (Fla.1977).

FN7. N.C.Gen.Stat. § 122-58.7(i) (1977 Supp.); Wash.Rev.Code § 71.05.310; *State ex rel. Hawks v. Lazaro*, 157 W.Va. 417, 202 S.E.2d 109 (1974).

FN8. Ala.Code § 22-52-10(a) (Supp.1978); Tenn.Code Ann. § 33-604(d) (Supp.1978).

In *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966), dealing with deportation, and *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336, 1353, 87 L.Ed. 1796, dealing with denaturalization, the Court held that "clear, unequivocal, and convincing" evidence was the appropriate standard of proof. The term "unequivocal," taken by itself, means proof that admits of no doubt,[FN9] a burden approximating, if not exceeding, that used in criminal cases. The issues in *Schneiderman* and *Woodby* were basically factual and therefore susceptible of objective proof and the consequences to the individual were unusually drastic-loss of citizenship and expulsion from the United States.

FN9. See Webster's Third New International Dictionary 2494 (1961).

[9][10][11] We have concluded that the reasonable-doubt standard is inappropriate in civil commitment proceedings because, given**1813 the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. Similarly, we conclude that use of the term "unequivocal" is not constitutionally required, although the states are free to use that standard. To meet due process demands, the standard has to *433 inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases.

We noted earlier that the trial court employed the standard of "clear, unequivocal and convincing" evidence in appellant's commitment hearing before a jury. That instruction was constitutionally adequate. However, determination of the precise burden equal to or greater than the "clear and convincing" standard which we hold is required to meet due process guarantees is a matter of state law which we leave to the Texas Supreme Court.[FN10] Accordingly, we

remand the case for further proceedings not inconsistent with this opinion.

FN10. We noted earlier the court's holding on harmless error. See *supra*, at 1087.

Vacated and remanded.

Mr. Justice POWELL took no part in the consideration or decision of this case.

U.S.Tex.,1979.
Addington v. Texas
441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323

Briefs and Other Related Documents (Back to top)

- 1978 WL 207147 (Appellate Brief) Brief for the State of Illinois as Amicus Curiae (Sep. 16, 1978)
- 1978 WL 207142 (Appellate Brief) Brief for the Appellee (Sep. 01, 1978)
- 1978 WL 207145 (Appellate Brief) Brief for the American Psychiatric Association as Amicus Curiae (Aug. 30, 1978)
- 1978 WL 207141 (Appellate Brief) Brief for the Appellant (Jul. 07, 1978)
- 1978 WL 207144 (Appellate Brief) Brief of the National Center for Law and the Handicapped, Amicus Curiae (Jul. 01, 1978)
- 1978 WL 207143 (Appellate Brief) Brief for the National Association for Mental Health, American Orthopsychiatric Association, National Association of Social Workers, and American Psychological Association as Amici Curiae (Jun. 30, 1978)

END OF DOCUMENT

Date of Printing: MAY 24,2006

KEYCITE

Heryford v. Parker, 396 F.2d 393 (10th Cir.(Wyo.), Jun 14, 1968) (NO. 9724)

History

Direct History

H 1 Parker v. Heryford, 379 F.2d 556 (10th Cir.(Wyo.) Jun 22, 1967) (NO. 8862)

Appeal After Remand

=> 2 **Heryford v. Parker**, 396 F.2d 393 (10th Cir.(Wyo.) Jun 14, 1968) (NO. 9724)

Negative Citing References (U.S.A.)

Distinguished by

H 3 U. S. ex rel. Crowson v. Brierley, 411 F.2d 910 (3rd Cir.(Pa.) Jun 05, 1969) (NO. 17611) **

United States Court of Appeals Tenth Circuit.
Fred W. HERYFORD, Superintendent of the Wyoming Training School in Fremont County, Wyoming, Appellant,
v.
Charles W. PARKER, by and through Mabel A. Parker, his mother and next friend, Appellee.
No. 9724.

June 14, 1968.

Habeas corpus proceeding brought by mother as natural guardian in behalf of her mentally deficient son who had been committed to state training school for feeble-minded and epileptic. On hearing after remand, 379 F.2d 556, the United States District Court for the District of Wyoming, Ewing T. Kerr, J., granted the writ and the state appealed. The Court of Appeals, Murrah, Chief Judge, held that where mentally deficient person was not afforded legal counsel at hearing which resulted in his involuntary commitment to state institution, he was denied due process.

Affirmed.

West Headnotes

[1] **Constitutional Law 92 ⚷255(2)**

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(2) k. Particular Applications. Most Cited Cases
(Formerly 92k255)
It matters not whether proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency for it is the likelihood of involuntary incarceration, whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent, which commands observance of the constitutional safeguards of due process. U.S.C.A.Const. Amend. 14.

[2] **Infants 211 ⚷205**

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(D) Proceedings
211k205 k. Counsel or Guardian Ad Litem. Most Cited Cases
(Formerly 211k16.9)

Mental Health 257A ⚷41

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak41 k. Hearing and Determination in General. Most Cited Cases
Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes duty to see that a subject of an involuntary commitment proceeding is afforded the opportunity to guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf. W.S.1957, § § 9-444 to 9-449; U.S.C.A.Const. Amend. 14.

[3] **Mental Health 257A ⚷41**

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak41 k. Hearing and Determination in General. Most Cited Cases
State's duty to see that a subject of an involuntary commitment proceedings is afforded opportunity to guiding hand of legal counsel at every step of proceedings is not discharged when the prosecuting attorney undertakes to prosecute the application for commitment on behalf of the state and the proposed mental patient is not otherwise represented by counsel. W.S.1957, § § 9-444 to 9-449; U.S.C.A.Const. Amend. 14.

[4] **Mental Health 257A ⚷41**

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak41 k. Hearing and Determination in General. Most Cited Cases
That Wyoming statutes for commitment of mentally deficient persons permissively provides that proposed patient may be represented by counsel is not sufficient to discharge state's duty to see that proposed patient is afforded opportunity to guiding hand of legal counsel at every step of the proceedings. W.S.1957, § 9-449; U.S.C.A.Const. Amend. 14.

[5] Constitutional Law 92 ⚿255(5)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases
(Formerly 92k255)
Due process requires that the infirm person, or one acting in his behalf, be fully advised of his rights and accorded each of them in commitment proceeding unless knowingly and understandingly waived. W.S.1957, § § 9-444 to 9-449; U.S.C.A.Const. Amend. 14.

[6] Constitutional Law 92 ⚿255(5)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases
(Formerly 92k255)
Where mentally deficient person was not afforded legal counsel at hearing which resulted in his involuntary commitment to state institution, he was denied due process. W.S.1957, § § 9-444 to 9-449; U.S.C.A.Const. Amend. 14.

[7] Mental Health 257A ⚿41

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak41 k. Hearing and Determination in General. Most Cited Cases
Record in proceeding for commitment of mentally deficient person established that patient's mother as natural guardian did not expressly attempt towaive patient's right to counsel. W.S.1957, § § 9-444 to 9-449; U.S.C.A.Const. Amend. 14.

[8] Courts 106 ⚿100(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
Retroactivity of rule establishing a new standard for Fourteenth Amendment due process is not automatic, nor does it have case-by-case application. U.S.C.A.Const. Amend. 14.

[9] Courts 106 ⚿100(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
Retroactivity of a rule establishing a new standard for due process depends upon a pragmatic balancing of the public interest against the gravity of the right involved and if the rule or newly established standard goes to the very integrity of the fact-finding process by which liberty is taken, retroactivity should be accorded even though it may result in wholesale consideration of the standards by which factual determinations were made. U.S.C.A.Const. Amend. 14.

[10] Courts 106 ⚿100(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
Rule that a juvenile or a mentally deficient person is entitled to representation by counsel at every step of proceedings which might result in involuntary

incarceration would be retroactively applied. U.S.C.A.Const. Amend. 14.

*394 Lawrence E. Johnson, Cheyenne, Wyo., and Jack Speight, Asst. Atty. Gen., Cheyenne, Wyo. (James E. Barrett, Cheyenne, Wyo., on the brief), for appellant.
Barkley Clark, Denver, Colo., for appellee.

Before MURRAH, Chief Judge, HILL and SETH, Circuit Judges.

MURRAH, Chief Judge.
This case was first before us on denial of a writ of habeas corpus sought by a mother as natural guardian in behalf of her mentally deficient son. The complaint was that the son was committed to the Wyoming State Training School for feeble-minded and epileptic under applicable Wyoming statutes without due process and particularly that he was denied his right to counsel and confrontation. We remanded to determine whether in view of In the Matter of the Application of Gault, etc., 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527, the patient had a constitutional right to counsel, and if so, whether his mother as natural guardian could and did waive it. 10 Cir., 379 F.2d 556. On remand the writ was granted and the State of Wyoming brings this appeal. We affirm.

The background and undisputed facts are that in 1946, when Charles Parker was about nine years of age, his mother requested the County Attorney to institute proceedings for commitment of Charles to the Wyoming Training School for feeble-minded and epileptic. The Wyoming Statutory procedure, i.e. see 9-444 thru 9-449, Wyo.Stat., provides that commitment of the feeble-minded and epileptic may be initiated by application of a relative or guardian or the prosecuting attorney on a form subscribed to under oath which states that the applicant verily believes the the proposed patient is a fit subject for care, treatment and training in the school and asks that the subject be brought before the District Court for examination and commitment; that if the subject be a minor without parent or guardian, the Judge shall appoint a guardian ad litem to represent him. The statute further provides that the application shall be accompanied by a written history of the proposed patient certified under oath by an examining physician in which he answers prescribed questions touching suitability of the subject for admission to the school. The court shall, upon receipt of the application and history, cause the proposed patient to be examined by a physician and psychologist separately, and each shall certify that the subject is fit for care, treatment and training at the school. Provision is made for a hearing on the application pursuant to notice before a judge of the District Court, and it becomes the duty of the County and Prosecuting Attorney to 'appear and prosecute the application on behalf of the state'. § 9-449. The applicant,*395 at least one examiner and the patient (unless his presence would be injurious to him) shall be present, and the court is authorized to require any other person to appear and testify. The application, history and certificates of suitability by the two doctors are expressly made a part of the evidence in the case, and the statute pertinently provides that the proposed patient 'may be represented by counsel'. § 9-449. A jury may be demanded, and if it is found that the patient should be committed, the judge may forthwith order commitment.

Pursuant to this procedure, and at the instance of the mother, the application for Parker's commitment was signed by the County Attorney, and a hearing was conducted at which the prosecuting attorney, the certifying psychologist and the mother as natural guardian were all present. While the certifying physician did not appear, both his and the certifying psychologist's certificates of suitability were admitted into evidence. At no time during the hearing was Charles Parker represented by retained or appointed counsel, nor was he represented by a court appointed guardian ad litem. Parker was found to be a fit subject and was committed to the training school where he remained continually until 1963, at which time he was released to the custody of his parents. In 1965, against the wishes of his parents, he was returned to the training school where he remains to this day.

Subsequent to Parker's return to the school, this federal habeas corpus proceedings[FN1] was instituted alleging that he had been denied his constitutional right to counsel and confrontation in the proceedings pursuant to which he was originally confined in the training school. On remand the trial judge held that in view of Gault, Parker was constitutionally entitled to the assistance of counsel in the original commitment proceedings, and that while his mother as natural guardian could have waived his rights, she did not expressly do so.

FN1. The petition for writ of habeas corpus alleges exhaustion of all available state remedies, and it seems to be conceded.

In the posture in which the case comes to us on this appeal the constitutionality of the Wyoming statute as according due process is not directly in issue. The state apparently takes the position, as indeed it must, that the standards for due process erected in Gault are not the same as required in civil proceedings such as these. The argument seems to be that the nature of the proceedings in Gault is easily distinguishable from ours in that Gault was concerned with commitment for correction or rehabilitation of juveniles, while our proceedings are concerned solely with civil commitment for teaching and training the mentally deficient.

It is true that Gault involved procedures for adjudging a juvenile offender 'Delinquent' and committing him to a state institution. The query was whether he is entitled to the same Fourteenth Amendment due process procedures required to deprive an adult of his freedom for the commission of a crime. The effect of the decision was to place both juveniles and adults on the same Fourteenth Amendment due process footing. Mr. Justice Fortas reasoned that, 'It is of no constitutional consequence * * * that the institution to which (a juvenile) is committed is called an Industrial School. The fact of the matter is that however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a 'building with whitewashed walls, regimented routine and institutional hours * * *'. The overriding consideration of the court was that in either case the determination carried with it the 'awesome prospect of incarceration in a state institution.' The court concluded that in these circumstances the Due Process Clause of the Fourteenth Amendment entitles the child *396 to the fundamental right of representation by counsel, confrontation and cross-examination.

[1][2][3][4][5][6] We do not have the distinction between the procedures used to commit juveniles and adults as in Gault. But, like Gault, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in Gault emphatically applies. It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration- whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent- with commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf. Certainly, this duty is not discharged when, as here, the prosecuting attorney undertakes to 'prosecute the application (for commitment) on behalf of the state', and the proposed patient is not otherwise represented by counsel. In re Custody of a Minor, 102 U.S.App.D.C. 94, 250 F.2d 419; Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84; McDaniel v. Shea, 108 U.S.App.D.C. 15, 278 F.2d 460; Dooling v. Overholser, 100 U.S.App.D.C. 247, 243 F.2d 825; Shioutakon v. District of Columbia, 98 U.S.App.D.C. 371, 236 F.2d 666; Anno. 87 A.L.R.2d 950. Nor is it sufficient that the Wyoming statute permissively provides that the proposed patient 'may be represented by counsel'. Fourteenth Amendment due process requires that the infirm person, or one acting in his behalf, be fully advised of his rights, and accorded each of them unless knowingly and understandingly waived.

[7] We recognize, as did the court in Gault that special problems may arise with respect to the effective waiver of rights by minors and mentally deficient persons. But, we need not decide here whether Parker's mother as natural guardian, having set into motion the commitment machinery, represented such conflicting interests that she could not effectively waive her son's right to counsel, for we agree with the trial court, no one seems to dispute, and it is sufficient to affirmance that there was no express attempt to waive such right.

This brings us to the question of the retroactivity of the Fourteenth Amendment due process standards recognized for the first time in Gault and made applicable to situations like ours. The crux of the state's argument seems to be that there is nothing in the principles announced in Gault to warrant retroactivity and its application in collateral proceedings would result in wholesale release of inmates in the Wyoming institutions and like institutions all over the country.

[8][9] Retroactivity of a rule establishing a new standard for Fourteenth Amendment due process is not automatic. Nor does it have case-by-case

application. Rather, as we read the case law as epitomized in Stovall v. Deno, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199, and Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948, retroactivity depends upon a pragmatic balancing of the public interests against the gravity of the right involved. Thus, if the rule or newly established standard goes to the very integrity of the fact finding process by which liberty is taken- as where the accused was convicted without benefit of counsel, i.e. see Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, or upon a coerced confession, i.e. see Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, or was denied an appeal because of his proverty, i.e. see *397Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269; Cf. Hamilton v. State of Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114; Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 and also Cf. Peyton, Superintendent v. Rowe, et al., 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426- retroactivity should be accorded even though it may result in wholesale consideration of the standards by which factual determinations were made.

[10] In our case the fundamental right to counsel is involved and failure to have counsel at every step of the proceedings may result in indefinite and oblivious confinement and work shameful injustice. Indeed, the expressed concern lest retroactivity in cases like these result in wholesale release from confinement in mental institutions is a compelling reason for the desirability, if not necessity, for retroactivity in our case.

Affirmed.

C.A.Wyo. 1968.
Heryford v. Parker
396 F.2d 393

END OF DOCUMENT

Date of Printing: MAY 23,2006

KEYCITE

C Phillips v. Seely, 43 Cal.App.3d 104, 117 Cal.Rptr. 863 (Cal.App. 3 Dist., Nov 15, 1974) (NO. CIV. 13635)

History

=> 1 Phillips v. Seely, 43 Cal.App.3d 104, 117 Cal.Rptr. 863 (Cal.App. 3 Dist. Nov 15, 1974) (NO. CIV. 13635)

C

HARRY A. PHILLIPS et al., Plaintiffs and Appellants,
v.
F. H. SEELY, JR., as Auditor, etc., et al., Defendants and Respondents; JEROME E. WARREN, Intervener and Respondent
Civ. No. 13635.

Court of Appeal, Third District, California.

November 15, 1974.

SUMMARY

Plaintiff-taxpayers, in an action against the board of supervisors of a county without an established public defender's office, attacked the validity of a contract between the county and an attorney under which the county agreed to pay him a specified monthly compensation to defend indigents. The contract was challenged on the grounds that the board lacked authority to make it, and that it was invalid for failure to allocate between services and investigatory expenses, as having been made as a result of proscribed solicitation by the attorney, as having been made without competitive bidding, as contrary to public policy for conflict of interest reasons, and for failure to give adequate notice with regard to the board's meeting which concerned the contract. The judgment, however, favored defendants and upheld the contract. (Superior Court of Butte County, No. 52803, James E. Kleaver, Judge. [FN*])

The Court of Appeal affirmed. In addition to rejecting defendants' contention as to the timeliness of plaintiffs' complaint, the court held there was no merit in any of plaintiffs' assertions in support of their attack. For example, it was held that Gov. Code, § 31000, empowering boards of supervisors to contract for special services, constituted authority for making the contract. The contract was held to be outside of competitive bidding requirements. The court stated there were no conflicts of interests, nor any proscribed solicitation on the part of the attorney. And the court held that notice requirements with respect to the board's meeting had been met.

FN* Assigned by the Chairman of the Judicial Council.(Opinion by Carter, J., [FN†] with Richardson, P. J., and Janes, J., concurring.) *105

FN† Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Counties § 153--Limitation of Actions--Challenge to Validity of County's Contract.
Although a county's contract to pay an attorney a specified monthly compensation for legal services for indigents involves a public agency financial obligation, it is not the kind contemplated to be automatically validated absent a challenge within the 60 days specified in Code Civ. Proc., § § 860, 863. Thus, failure of plaintiff-taxpayers to file their complaint in an action challenging the contract's validity within 60 days after the county's entry into the contract was not jurisdictional.

(2) Criminal Law § 107(1)--Rights of Accused--Aid of Counsel.
In the area of criminal proceedings, an accused, whether indigent or otherwise, has a right to the immediate and effective assistance of counsel.

[See **Cal.Jur.3d,** Criminal Law (**Cal.Jur.2d,** Criminal Law, § 146); Am.Jur.2d, Criminal Law, § 309.]

(3) Constitutional Law § 113--Fundamental Rights, Privileges and Immunities--Right to Counsel.
Legal services for indigents at public expense are mandated in juvenile and mental health matters where a charge of wrongdoing is involved or restraint of liberty is possible.

(4a, 4b) Counties § 116--Contract With Attorney to Represent Indigents.
Under Gov. Code, § 31000, empowering county boards of supervisors to contract for special services, the board of a county without an established public defender's office had authority to contract with an attorney to represent indigents, where the contract provided that the board might cancel the contract on 10 days' notice in the event the superior court or any of its judges declined or refused to appoint him as defense counsel for any reason other than a conflict

of interest, and where it appeared that the judicial act of assigning counsel with knowledge of the compensation contract would constitute judicial approval and ratification of reasonable compensation under the circumstances.

(5) Attorneys at Law § 111.5--Compensation--Court-appointed Counsel.
Where assigned counsel for an indigent questions the reasonableness of the compensation to be allowed, it is for the court, not the county board of supervisors, to determine the matter. *106

(6) Attorneys at Law § 111.5--Compensation--Court-appointed Counsel.
In a county without an established public defender's office, the matter of reasonable compensation of court-assigned counsel involves some degree of cooperation between the court and the board of supervisors. The availability of reasonable funds for reasonable compensation required by law is the board's responsibility, but it is for the court to determine whether indigents who are entitled to counsel at public expense are being adequately represented by reasonably compensated counsel.

(7) Attorneys at Law § 111.5--Compensation--Court-appointed Counsel.
The purpose of providing reasonable compensation for counsel assigned to indigents is to insure that they receive legal services of competent attorneys who are at least reasonably compensated, and thereby contribute to the ultimate objective of the people of the state, who are the source of the compensation, to provide equal justice under law to any accused, regardless of his financial condition.

(8) Counties § 116--Contract With Attorney to Represent Indigents--Conflict of Interest.
With respect to a contract between a county without an established public defender's office and an attorney under which he was to defend indigents in exchange for a specified monthly compensation, the fact that the contract failed to allocate the compensation between services and investigative expenses did not render it invalid on the theory that such failure created a conflict of interest. It is a judgmental matter for defense counsel to decide how much time and expense for investigatory or research effort may be reasonably productive for the defense based on the particular case. An attorney is duty bound to explore reasonably and seek to verify possible defenses.

(9) Attorneys at Law § 149(7)--Disbarment and Suspension--Acts Justifying Discipline--Solicitation.
In the absence of any evidence that the idea to submit an offer to represent indigents for a county without an established public defender's office originated with the attorney with whom the county subsequently executed a contract for such services, it could not be said that the contract was the result of solicitation by him in violation of Bus. & Prof. Code, § § 6152, 6153.

(10) Counties § 116--Contract With Attorney to Represent Indigents--Need for Competitive Bidding.
Competitive bidding is not a pre-requisite to a contract between a county without an established public *107 defender's office and an attorney under which he is to represent indigents for a specified monthly compensation.

(11) Counties § 116--Contract With Attorney to Represent Indigents-- Conflict of Interest.
A contract under which an attorney agreed with a county without an established public defender's office to represent indigents for a specified monthly compensation was not invalidated under the theory of a conflict of interest based on the fact that the person who was the district attorney when the contract was executed subsequently resigned and, as an associate of the contracting attorney, represented indigents pursuant to court appointment, where the former prosecutor defended only in cases which arose after he had left the district attorney's office.

(12a, 12b) Counties § 53--Boards of Supervisors--Meetings--Adequacy of Notice.
A contract under which an attorney agreed to defend indigents for a county without an established public defender's office was not subject to attack on the ground that the board of supervisors failed to give adequate notice of the scope and action to be taken at the board's meeting with regard to the contract, where the subject matter and the contract were not of such nature as to require special statutory notice, the meeting was a regular one, and the agenda item made it clear that under the heading of "public defender," there had been an offer by two local lawyers to supply public defender services.

(13) Notice § 9--Notice Required by Law--Meetings of Public Bodies.
The deliberations of local governing bodies elected by the people should, with few exceptions, be conducted openly and with due notice. However, where the subject matter is sufficiently defined to apprise the public of the matter to be considered and notice has been given in the matter required by law,

the body is not required to give further special notice of what action it might take.

COUNSEL

Blade, Farmer & LeClerc, Blade & LeClerc, Robert V. Blade and Raoul J. LeClerc for Plaintiffs and Appellants.

Daniel V. Blackstock, County Counsel, for Defendants and Respondents.

Skow & Jones and Charles A. Skow for Intervener and Respondent. *108

CARTER, J. [FN*]

FN* Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

Plaintiff taxpayers appeal after a court trial from a judgment upholding the validity of a contract entered into between the County of Butte and intervener Jerome F. Warren for the rendition of legal services by Warren to certain indigent defendants in criminal matters, indigent juveniles and conservatees in need of and entitled to legal assistance at public expense. The judgment further ordered the defendant, F. H. Seely, Jr., as Auditor of Butte County to pay warrants to Warren pursuant to the contract.

Plaintiffs contend on appeal:

1. Defendant board of supervisors lacked authority, express or implied, to contract with Warren to represent indigents;

2. The contract is invalid because it fails to allocate between "services" and "investigatory expenses" the gross monthly payment to Warren;

3. The contract was the result of solicitation on the part of Warren and is void as violative of public policy;

4. Public policy requires competitive bidding for the contracted services;

5. The contract is contrary to public policy because of a conflict of interest;

6. The board of supervisors failed to give adequate notice of the scope and action to be taken at the board meeting regarding the contract.

Defendants contend that the appeal is moot and since plaintiffs failed to comply with Code of Civil Procedure sections 860-870, they are precluded from challenging the validity of the contract.

Facts

In early May of 1971, a news article attributable to the County Administrator of Butte County indicated the existence of a problem of providing funds for court-appointed counsel for indigent persons in Butte County. As a result of this article, Warren discussed the matter with Jack McKillop, a member of the Butte County Board of Supervisors. McKillop suggested that Warren submit a proposal regarding legal services, an idea in which John Schroder, an attorney, and Robert Mueller, the Butte County District Attorney, were interested as well. On May 24, 1971, Warren submitted a proposal to the board for the rendition of legal services to indigents which *109 was accepted, with minor changes, on that day. A written contract was executed by the duly authorized chairman of the board, Jere E. Reynolds, and by Warren. Thereafter, Mueller resigned his position as district attorney, and, along with Schroder as associates of Warren, has represented indigents pursuant to court assignment in Butte County. The agreement provided, among other things, that Warren was to assume full responsibility for furnishing with associate counsel the required legal services on a daily basis in two departments of the superior court, the Chico Municipal Court and the Oroville, Gridley, Paradise and Biggs Justice Courts. The county retained the right to cancel the contract upon 10 days' written notice, if for any reason other than a conflict of interest any of the judges of the superior court declined or refused to appoint Warren as defense counsel for indigents.

On August 6, 1971, 73 days after execution of the agreement, plaintiffs filed their complaint to enjoin defendant F. H. Seely, Jr., Auditor of Butte County, from expending public moneys for or as a consequence of services rendered pursuant to the contract. Copies of the summons and complaint were served on the various defendants. Answers were filed, and on December 14, 1971, the case proceeded to trial. At the beginning of the trial the defendants and intervener Warren orally moved to dismiss, contending plaintiffs had failed to comply with Government Code sections 53510 and 53511 and Code of Civil Procedure sections 860-870. Without holding a hearing on whether good cause existed to excuse plaintiffs' noncompliance, the court took the motion under advisement. After the case was tried;

briefed and submitted, the trial court held that Code of Civil Procedure sections 860-870 did not apply.

Discussion of Contentions

1. *Failure of Plaintiffs to File Their Complaint Within 60 Days of Execution of the Contract on May 24, 1971, Was Not Jurisdictional.*

There is no dispute that plaintiffs' complaint was a taxpayers' action seeking to challenge the validity of a contract between a public agency (Butte County Board of Supervisors) and Warren. Government Code section 53510, relating to validating proceedings provides: "As used in this article [art. 5, pt. 1, div. 2, tit. 5] 'local agency' means county, city, city and county, public district or any public or municipal corporation, public agency or public authority."

Government Code section 53511 provides: "A local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations *110 or evidences of indebtedness pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure."

Code of Civil Procedure section 860 provides: "A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem."

Code of Civil Procedure section 863 provides: "If no proceedings have been brought by the public agency pursuant to this chapter, any interested person may bring an action within the time and in the court specified by Section 860 to determine the validity of such matter. The public agency shall be a defendant and shall be served with the summons and complaint in the action in the manner provided by law for the service of a summons in a civil action. In any such action the summons shall be in the form prescribed in Section 861.1 except that in addition to being directed to 'all persons interested in the matter of [specifying the matter],' it shall also be directed to the public agency. If the interested person bringing such action fails to complete the publication and such other notice as may be prescribed by the court in accordance with Section 861 and to file proof thereof in the action within 60 days from the filing of his complaint, the action shall be forthwith dismissed on the motion of the public agency unless good cause for such failure is shown by the interested person."

On April 2, 1970, Justice Mosk, in *City of Ontario v. Superior Court*, 2 Cal.3d 335, 339-344 [85 Cal.Rptr. 149, 466 P.2d 693], carefully summarized the statutory history of Code of Civil Procedure sections 860-870, and the consequences which resulted from the enactment of sections 53510 and 53511 of the Government Code in 1963. The Supreme Court stated: "If, as the City here argues, the word 'contracts' in section 53511 is taken to mean *any* contract into which the agency may lawfully enter, the farreaching expansion of the statute becomes apparent. The vast majority of such an agency's dealings are necessarily undertaken by means of contracts; some involve routine ministerial matters, but others embody important policy decisions affecting the public at large.

"The public's opportunity to challenge those decisions, moreover, is commensurately restricted by this legislation. Section 863 of chapter 9 provides that if the public agency does not initiate validating proceedings, ' any interested person may bring an action within the time and in the court specified by Section 860 of this chapter to determine the validity of such matter.' This seems innocuous enough, until one reads section 869: 'No *111 contest except by the public agency or its officer or agent of any thing or matter under this chapter *shall be made* other than within the time and the manner herein specified.' (Italics added.) In other words, while section 863 says that an interested person 'may' bring such an action, section 869 says he *must* do so or be forever barred from contesting the validity of the agency's action in a court of law. Yet no such restriction is placed on the agency itself, which is in effect authorized by section 869 to disregard the 60-day statute of limitations imposed by section 860.

"The practical consequence of this statutory scheme should be clearly recognized: an agency may indirectly but effectively 'validate' its action *by doing nothing to validate it*; unless an 'interested person' brings an action of his own under section 863 within the 60-day period, the agency's action will become immune from attack whether it is legally valid or not. Indeed, in the case at bar the City concedes this to be so. Thus a statute which begins by providing a remedy to be pursued by public agencies, expressly declaring it to be 'in the nature of a proceeding in rem' (§ 860), concludes by making it unnecessary for such agencies to do anything at all, and the incidental or derivative remedy of an 'interested person' turns

out to be controlling. This is truly a case of the tail wagging the dog." (*Id.* at pp. 341-342.) (Original italics; fn. omitted.)

Our research has failed to disclose any legislative action which has sought to extend the 60-day period of time in which an action may be brought by "interested persons" to challenge the validity of public agency contracts of the *kind* subject to the provisions of sections 860 and 863. We hold that the trial court correctly concluded that the contract for rendition of legal services to the county by Warren was not subject to sections 860 and 863, and thus the question of "good cause" for failure to publish summons is of no significance. (*City of Ontario v. Superior Court, supra,* 2 Cal.3d 335; *Arnold v. Newhall County Water Dist.* (1970) 11 Cal.App.3d 794, 803 [96 Cal.Rptr. 894].)

In *City of Ontario, supra,* at pages 343-344, the court stated: "On its face, section 53511 would seem to be applicable. It lists, as matters for validation under chapter 9, 'bonds, warrants, *contracts*, obligations or evidences of indebtedness' (italics added). There is no limitation or qualification on the word 'contracts,' and it would therefore appear to include a multipurpose municipal contract such as the Ontario Motor Stadium Agreement. Yet the legislative history of the statute suggests a contrary result. First, the Legislative Counsel's digest of the bill proposing section 53511 characterized the measure as one allowing 'a local agency to bring an action to determine the validity of evidences of indebtedness.' Second, *112 section 53511 was enacted as part of chapter 3 of part 1, division 2, title 5, of the Government Code. Chapter 3 is entitled 'Bonds,' and deals exclusively with the power of local agencies to sell their bonds, replace defaced or lost bonds, and pledge their revenues to pay or secure such bonds. If section 53511 was intended to be a provision of general application, logically it should have been placed in article 4 ('Miscellaneous') of chapter 1 ('General') of the same part, in which a group of such unrelated matters are collected. Third, the key language of section 53511 - 'bonds, warrants, contracts, obligations or evidences of indebtedness' - was taken directly from section 864 of chapter 9; under well-known canons of statutory interpretation, it should ordinarily be given the same meaning as it had in the earlier statute. But as a perusal of the companion 1961 legislation reveals, when chapter 9 was adopted it was made applicable only to such matters as the legality of the local entity's existence, the validity of its bonds and assessments, and the validity of joint financing agreements with other agencies. If section 53511 was intended to reach any and all contracts into which an agency may lawfully enter, the restricted language of section 864 was inappropriate for that purpose. Finally, that language is peculiarly inapt for expressing such a general meaning in any event, as it lists the word ' contracts' in the midst of four other terms which all deal with the limited topic of a local agency's financial obligations."

In the matter before us, plaintiffs sought an injunction to prevent the alleged illegal expenditure of public funds, an action expressly authorized by section 526a of the Code of Civil Procedure, and to compel restitution, both remedies predating the enactment of section 53511 of the Government Code. (1) We hold that while the agreement to pay Warren the sum of $12,500 per month for legal services of course involves a public agency financial obligation, it is not the kind of financial obligation contemplated to be automatically validated absent a challenge within the 60 days proscribed in sections 860 and 863 for instruments, such as bonds and assessments, whose very marketability may well depend upon their prompt and automatic validation upon the passing of the 60-day period.

2. *Authority of the Board of Supervisors to Contract for Rendition of Legal Services to Indigents.*

Plaintiffs urge there are but two methods whereby public funds may be disbursed by a county to attorneys for legal services rendered to indigent persons in criminal, juvenile or mental health matters, namely, pursuant to Government Code section 27700 or Penal Code section 987.2.

(2) In the area of criminal proceedings the right of an accused person, whether indigent or otherwise, to the immediate and effective assistance of *113 counsel is settled law in California. (Cal. Const., art. I, § 13; U.S. Const., 6th Amend.; *In re Williams* (1969) 1 Cal.3d 168 [81 Cal.Rptr. 784, 460 P.2d 984]; *People v. Ibarra* (1963) 60 Cal.2d 460 [34 Cal.Rptr. 863, 386 P.2d 487]; Pen. Code, § 987.) (3) Legal services for indigent persons at public expense are also mandated in juvenile and mental health matters where a charge of wrongdoing is involved or restraint of liberty is possible. (Welf. & Inst. Code, § § 634, 5111; *In re Joseph T.* (1972) 25 Cal.App.3d 120, 126 [101 Cal.Rptr. 606].)

Section 27700 of the Government Code provides in part as follows: "The board of supervisors of any county *may* establish the office of public defender for

the county." (Italics ours.)

The duties of the public defender if the office is so established by the board, whether elective or appointive, are specifically defined in Government Code section 27706.

The agreement of May 25, 1971, did not establish the office of public defender in Butte County but was merely a contract between the county and Warren, whereby the latter agreed to provide, with a few exceptions, the usual and customary public defender legal services enumerated in Government Code section 27706 to indigent persons in Butte County for an agreed sum of $12,500 per month.

Plaintiffs urge that since a public defender's office was not established, the board of supervisors was without authority to enter into the subject contract with Warren, because Penal Code section 987.2 is the only remaining basis upon which counsel for indigents may be assigned and a reasonable compensation determined and disbursed from public funds.

Penal Code section 987.2 reads: "(a) In any case in which a person, including a person who is a minor, desires but is unable to employ counsel and in which counsel is assigned in the superior court, municipal court, or justice court to represent such a person in a criminal trial, proceeding or appeal, such counsel, in a county or city and county in which there is no public defender, or in a case in which the court finds that because of conflict of interest or other reasons the public defender has properly refused to represent the person accused, shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county.

"(b) The sum provided for in subdivision (a) may be determined by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the total amount of compensation and expenses to be paid, which shall be within the amount of *114 funds allocated by the board of supervisors for cost of assigned counsel in such cases.

"(c) The board of supervisors may by contract provide that any public defender duly appointed or elected may charge reasonable fees to the Department of Corrections for representing inmates of prisons under its control, and the Department of Corrections may upon approval by the court pay such fees into the county treasury to be placed in the general fund of the county.

"(d) Counsel shall be appointed to represent, in the municipal or justice court, a person who desires but is unable to employ counsel, when it appears that such appointment is necessary to provide an adequate and effective defense for defendant."

(4a) As we have seen, the contract between the board and Warren expressly reserved to the board the right to cancel the agreement upon 10 days' notice, "in the event the Superior Court or any of the judges thereof declines or refuses to appoint attorney as defense counsel for indigents as provided for herein for any reason other than a conflict of interest ...."

Plaintiffs forcefully urge that if a public defender's office has not been established in the county, then in those instances where private counsel is assigned to represent an indigent person under section 987.2 of the Penal Code, the court must fix a reasonable sum as compensation and expenses for such legal services.

This court, in referring to the fixing of reasonable compensation in court-assigned cases under section 987a (now § 987.2), held in *Halpin v. Superior Court* (1966) 240 Cal.App.2d 701, 706 [49 Cal.Rptr. 857]: "To substitute for the independent exercise of discretion of the court in each case where counsel is assigned to represent a criminal defendant under section 987a, the order fixing compensation dated November 16, 1965, may conceivably in some cases constitute an abuse of judicial discretion ...." Thus the trial court could not refuse to exercise its discretion by simply adopting a daily rate of compensation which had been previously established by the board of supervisors for court-assigned attorneys. (5) In substance, where assigned counsel for an indigent person questions the reasonableness of the compensation to be allowed, it is for the court and not the board to make that determination. In addition, since *Halpin*, section 987.2, subdivision (b), was amended to provide that the reasonable sum for compensation of court-assigned counsel to represent indigents "may be determined by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the total *115 amount of compensation and expenses to be paid, which shall be within the amount of funds allocated by the board of supervisors for the cost of assigned counsel in such cases."

In *Ingram v. Justice Court* (1968) 69 Cal.2d 832,

842 [73 Cal.Rptr. 410, 447 P.2d 1391], the Supreme Court stated: "In short, the fundamental flaw in the People's position is its unstated assumption that the courts are the guardians of the county coffers. In our system of government this is not, and should not be, their role. The Constitution and the statutes commit that responsibility, more appropriately, to the board of supervisors, assisted by such officers as the district attorney, the county counsel, the treasurer, the controller and auditor, and the inquisitorial body of citizens, the grand jury."

(6) Consideration of the statutory and case law impels the conclusion that where a public defender's office has not been established in a county, the matter of reasonable compensation of court-assigned counsel for indigent persons understandably involves some degree of cooperation between the court and the board of supervisors. The availability of a reasonable sum of money to reasonably compensate assigned counsel where required by law is the responsibility of the board of supervisors; whether indigent persons entitled to counsel at public expense are being adequately represented by reasonably compensated counsel is for the court to determine. Where the court is required to determine the reasonableness of compensation, section 987.3 of the Penal Code enumerates the factors which the court shall consider.

In substance, plaintiffs really urge that sections 987.2 and 987.3 create a *right* in every member of the Bar in a given county to be appointed to represent indigent persons at public expense where there is no established public defender's office. (7) Such contention is not necessarily consistent with the purpose of providing reasonable compensation for counsel assigned to indigent persons. That purpose is to insure indigent persons the legal services of competent attorneys who are at least reasonably compensated, and thereby contribute to the ultimate objective of the people of this state, who are the source of the compensation, to provide equal justice under the law to any accused person regardless of financial condition.

The record indicates that the instant controversy arose because the Board of Supervisors of Butte County was rightly concerned with the possible increased cost of compensation and expenses which would be incurred for court-assigned counsel to defend indigent persons during the ensuing fiscal year. While the board has the duty to provide the money to reasonably compensate defense counsel for indigent persons in Butte County, the people of *116 Butte County are entitled to expect their elected representatives, both the board of supervisors *and* the courts to act with fiscal responsibility. The saving of substantial public funds without diminishing the quality of reasonably compensated defense counsel in indigent cases is not only prudent, but tends to enhance the public's respect for our judicial system.

It is apparent the agreement between Warren and the board of supervisors would be of little impact if the courts in which Warren agreed to provide counsel for qualified indigents *refused* to assign him to act. Thus to the extent that the court remains the final authority for assignment of counsel, the court retains the inherent means and carries out its contracting responsibility of passing on the matter of reasonable compensation for assigned counsel in indigent cases. (4b) The judicial act of assigning counsel with knowledge of the compensation contract between the board of supervisors and Warren constitutes judicial approval and ratification of reasonable compensation under the circumstances.

Finally, subject to the foregoing rule that *the court* is to determine whether indigent persons entitled to counsel at public expense are being adequately represented by reasonably compensated counsel, we think authority for the challenged contract is found in section 31000 of the Government Code (as it then read); "The board of supervisors may contract with and employ any person for the furnishing to the county, or to a county officer, or for any court within the county, or for and on behalf of any district within the county for furnishing to the district, of special services and advice in financial, economic, accounting, engineering, legal, medical, or administrative matters, or in matters related to the courts, by any persons specially trained and experienced and who is competent to perform the special services required.

"The authority herein given to contract shall include the right of the board of supervisors, to contract for the issuance and preparation of payroll checks.

"The board may pay from any available funds such compensation to any such expert as it deems proper for the services rendered."

While the last sentence of the foregoing code section may appear to be inconsistent with the ultimate responsibility of the court in determining reasonable compensation for court-assigned counsel, the exercise of this duty by the court arises where there is no contract between the board of supervisors *and*

counsel assigned by the court to represent indigents or where assigned counsel challenges the adequacy of compensation sought to be set by the board (see *Halpin, supra*). *117

If in the judgment of the court a particular counsel possesses the requisite ability to represent adequately an indigent person in the particular matter before the court, and such counsel is satisfied with the compensation contractually arrived at between himself and the board of supervisors, there is generally no need for judical intervention to fix reasonable compensation under the particular circumstances. This is the case at bench.

Accordingly we hold that the Board of Supervisors of Butte County had the authority pursuant to Government Code section 31000 to enter into the agreement with Warren.

3. *Allocation of Compensation Between Services and Investigatory Expenses.*

(8) Paragraph 6 of the agreement provides that the cost of criminal investigators is to be borne by Warren. Plaintiffs urge this creates a "conflict of interest in the ultimate[,] [n]o matter how conscientious and ethical such counsel may be," and "thus, the attorneys representing the indigents face the cruel dilemma resulting from the fact that every dollar spent for investigation means a dollar less for the three attorneys."

We see no dilemma or conflict at all, since an attorney's duty runs to his client, not the attorney's pocket. We reject plaintiffs' contention that a mere possible opportunity for misconduct is a legal basis to void the contract. It is a judgmental matter for defense counsel to decide how much time and expense required for investigatory or research effort may be reasonably productive for the defense based upon the particular case. An attorney is duty bound to explore reasonably and seek to verify possible defenses in order to meet the constitutional standard of adequate defense counsel. (*People v. Ibarra, supra*, 60 Cal.2d 460.)

Our Supreme Court has expressed in broad language the principles applicable to appointed criminal defense counsel: "[W]hen the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court. The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were it not so his client would not be afforded the full right 'to have assistance of counsel for his defense' which the Constitutions, both state and federal, give to one accused of crime. With such plenary powers given a public *118 defender when appointed to defend one accused of crime, it necessarily follows that no act of his in advising his client or in defending the latter upon the charge against him can be considered in any different light than if such act were performed by an attorney regularly employed and retained by the defendant." (*In re Hough* (1944) 24 Cal.2d 522, 528-529 [150 P.2d 448].)

Finally, we think the interest of the accused indigent, his counsel and the public may well be better served by the employment of a full-time investigator by Warren, rather than on a case-by-case basis.

4. *The Contract Was Not the Result of Solicitation by Warren.*

Plaintiffs urge that since the board of supervisors did not take formal action to invite Warren's offer *before* it was submitted, the offer to furnish legal services to indigents in Butte County amounted to solicitation of business by an attorney in violation of Business and Professions Code sections 6152 and 6153. The record shows that a news article reflected the board's concern with anticipated increasing costs of court-appointed counsel in the various courts of the county, and in fact Warren was requested by a member of the board to submit an offer for consideration by the board respecting such matter. (9) There is no evidence that the idea to submit the offer originated with Warren (see *People v. Levy* (1935) 8 Cal.App.2d Supp. 763, 769 [50 P.2d 509]), and we find no "solicitation of business" by Warren within the meaning of the Business and Professions Code.

5. *Competitive Bidding Was Not Required.*

(10) Plaintiffs seek to bring the agreement to render legal services to indigent persons within the purview of public works contracts. They cite no authority for such position, and our research fails to disclose any. Here the service to be rendered at public expense was professional in nature. Since the board has a responsibility both to the public and to the indigent person in need of counsel, the board is entitled to rely upon its own knowledge and judgment as to the reputation of counsel in the county in order to equate

the experience, reputation and skill of counsel with the amount of funds to be allocated to the defense of indigent cases, and thus contribute in cooperation with the courts to the ultimate goal that indigent persons be adequately represented by adequate counsel.

6. *There Was No Conflict of Interest.*

(11) Plaintiffs urge next that because the District Attorney of Butte County resigned and became an associate of Warren rendering legal services *119 to indigent persons, a conflict of interest was created. None of the conflict cases cited by plaintiffs are applicable since all involved situations where defense counsel, at the time of representation of the accused, maintained directly or indirectly a continuing relationship with the prosecutor's office, or held a confidential attorney-client relationship with the accused and later became the prosecutor.

In *People v. Rhodes* (1974) 12 Cal.3d 180, 186 [115 Cal.Rptr. 235, 524 P.2d 363], our Supreme Court recently disapproved of the appointment of a city attorney with *prosecutorial responsibilities* to represent an indigent defendant. The case at bench is clearly distinguishable since the record before us fully establishes that Mr. Mueller, the former district attorney, resigned from office and severed his connections with the prosecutor's office *before* he undertook assignment to represent indigent persons in Butte County. In addition, such assigned services were rendered on a per diem basis to indigent persons whose case arose *after* Mueller left the district attorney's office, thus eliminating even the appearance of impropriety. (*Rhodes, supra*, at p. 185.)

Section 6131 of the Business and Professions Code provides in part: "Every attorney is guilty of a misdemeanor and, in addition to the punishment prescribed therefor, shall be disbarred:

"

. . . . . .

"(b) Who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court as district attorney or other public prosecutor, afterwards, directly or indirectly, advises, in relation to or takes any part in the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from or on behalf of any defendant in any such action upon any understanding or agreement whatever having relation to the defense thereof."

Plaintiffs do not urge that Mueller violated section 6131, subdivision (b), *supra*, nor does the record before us even support such an inference. Finally, we note that the agreement was between Warren and the board of supervisors. Whom Warren engaged to assist him in the performance of his to-be-assigned duties did not affect the validity of the agreement.

7. *Adequacy of Notice of Board's Action.*

(12a) There is no dispute that the meeting of May 25, 1971, at which the subject agreement with Warren was considered, approved and executed, was a regular meeting of the Butte County Board of Supervisors. The agenda item made it clear that the board was to hear and consider an offer to supply *120 public defender services to the county. There is no evidence that the agenda was not properly posted as required by Government Code section 25151 and it must be thus presumed that the county clerk duly performed his duty. (Evid. Code, § 664.)

The subject matter and contract were not of such nature as to require special statutory notice. Plaintiffs' reliance on *Carlson v. Paradise Unified Sch. Dist.* (1971) 18 Cal.App.3d 196 [95 Cal.Rptr. 650], is misplaced. (13) In *Carlson*, we stated at page 199: "There has been a long and vigorous battle fought against secrecy in government. [Citations.] It is now the rule that local governing bodies, elected by the people, exist to aid in the conduct of the people's business, and thus their deliberations should be conducted openly and with due notice with a few exceptions not applicable here. (See Gov. Code, § 54950 et seq.; cf. 3 Witkin, Summary of Cal. Law (1960) Constitutional Law, § 116, p. 1919; 70 Ops.Cal.Atty.Gen. 113.)"

We strongly reaffirm the foregoing rule, with the observation that where the subject matter is sufficiently defined to apprise the public of the matter to be considered and notice has been given in the manner required by law, the governing body is not required to give further special notice of what action it might take. (12b) The agenda item made it clear that under the heading of public defender there had been an offer to supply public defender services to the county by Jerome Warren and John Schroder, two local lawyers who were interested in supplying such services to the county. We hold that the definition of the subject matter and notice given were sufficient to meet due process standards.

Judgment affirmed.

Richardson, P. J., and Janes, J., concurred.

A petition for a rehearing was denied November 29, 1974, and appellants' petition for a hearing by the Supreme Court was denied January 8, 1975. Richardson, J., did not participate therein. *121

Cal.App.3.Dist.,1974.

Phillips v. Seely

END OF DOCUMENT

Date of Printing: MAY 23,2006

KEYCITE

C Waltz v. Zumwalt, 167 Cal.App.3d 835, 213 Cal.Rptr. 529 (Cal.App. 4 Dist., May 02, 1985) (NO. D002407)

History

=> 1 Waltz v. Zumwalt, 167 Cal.App.3d 835, 213 Cal.Rptr. 529 (Cal.App. 4 Dist. May 02, 1985) (NO. D002407)

C

JOHN WALTZ, Petitioner,
v.
ROBERT D. ZUMWALT, as County Clerk, etc., Respondent; SAN DIEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, Real Party in Interest.
No. D002407.

Court of Appeal, Fourth District, Division 1, California.

May 2, 1985.

SUMMARY

A county clerk refused to prepare and certify a record of public conservatorship proceedings for an indigent, who wanted to appeal the imposition of a conservatorship and his confinement to a mental health facility, until the indigent paid for the transcript. The indigent told the clerk by letter he would present a forma pauperis to the court to get the fee waived, but the clerk refused to give him the time to make his request by not extending the time for fees to be deposited and instead entered a default.

The Court of Appeal issued a peremptory writ of mandate directing the county clerk to vacate its notice of default and to prepare a record for appeal at county expense. The court held that although involuntary commitment proceedings under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.) are civil in nature, the possibility of confinement, perhaps for life, invokes due process and equal protection guarantees which require that indigent persons appealing grave disability proceedings be furnished with the necessary record for appeal free of charge. (Opinion by Brown (Gerald), P. J., with Wiener and Work, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Incompetent Persons § 4--Determination of Status--Proceedings--Appeal-- Right of Indigent to Free Transcript.
An indigent person found to be "gravely disabled" and involuntarily committed to a mental hospital under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.) was entitled to a free transcript of the public conservatorship proceedings for purposes of appeal, at county expense. Although proceedings under the act are civil in nature, a person may be *836 involuntarily committed to a mental hospital, perhaps for the rest of his life. Accordingly, due process and equal protection guarantees require such a person to be furnished with a complete and adequate record on appeal. There is no state interest in not providing a free transcript to an indigent conservatee.

[See Cal.Jur.3d, Incompetent, Addicted, and Disordered Persons, § 113; Am.Jur.2d, Incompetent Persons, § 25.]

COUNSEL

Sharron Voorhees, under appointment by the Court of Appeal, for Petitioner.

Lloyd M. Harmon, Jr., County Counsel, Howard P. Brody, Chief Deputy County Counsel, and Thomas E. Montgomery, Deputy County Counsel, for Respondent and for Real Party in Interest.

BROWN (Gerald), P. J.

John Waltz wants to appeal the imposition of a conservatorship and his confinement in a county mental health facility. We determined he is indigent and we appointed appellate counsel for him. The county clerk, however, refused to prepare and certify the record until Waltz paid $634 (Cal. Rules of Court, rule 5(c)). Waltz told the clerk by letter he would present a forma pauperis to the court to get the fee waived. The clerk refused to give him the time to make his request by not extending the time for fees to be deposited and instead entered a default. [FN1]

FN1 Waltz was foreclosed by the clerk's entry of default from seeking relief in superior court. Thus, the court is not joined as a party in these proceedings.

(1)Waltz petitioned this court for a writ of mandate. He claims a public conservatorship proceeding is criminal in nature and he is entitled to free transcripts as well as appointed counsel. Recognizing Waltz is representative of a class of persons similarly situated,

we issued an alternative writ. After further briefing and argument, we issue the peremptory writ.

The clerk's contentions assume proceedings under the Lanterman-Petris-Short Act are civil in nature and any appeal must follow the rules for civil appeals. In civil appeals, costs must be deposited in advance or waived by *837 the court (Cal. Rules of Court, rule 4(c)). Waltz wanted to request a waiver of costs but was foreclosed by the clerk's entering the default. The clerk argues the superior court cannot authorize a waiver of fees and this court cannot order the superior court directly to provide a free transcript; although we might under ordinary circumstances order the superior court to waive fees, we cannot do so here, says the clerk, because the superior court has not been joined as an indispensable party (Code Civ. Proc., § 389).

In addition, the clerk argues if this court were to order free transcripts be prepared, we would have no authority to order payment for their preparation since only the Legislature can authorize the expenditure of public funds for indigent civil litigants (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 920 [132 Cal.Rptr. 405, 553 P.2d 565]). The fact the Legislature provides payment by the county for transcript costs in criminal cases (Pen. Code, § 1246.5) and fails to do so for proceedings under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.) shows the intent of the Legislature that these costs not be borne by the county. Counsel have in some civil cases been appointed for indigent litigants even after the court found the county could not pay them because attorneys have a professional responsibility to accept "the cause of the defenseless or the oppressed" (Bus. & Prof. Code, § 6068, subd. (h)). Court reporters are not subject to such legislation and cannot be required to absorb the cost of preparing free transcripts for the indigent.

Although proceedings under the Lanterman-Petris-Short Act are civil in nature (see Welf. & Inst. Code, § 5118), Waltz, or any person similarly situated, may be involuntarily committed to a mental hospital. If he is found to be "gravely disabled" (Welf. & Inst. Code, § § 5352.1, 5353), this confinement may continue for a year with the possibility of additional year-long extensions (Welf. & Inst. Code, § § 5358, 5361), perhaps for the rest of his life. Persons confined in mental hospitals are deprived of their personal freedom (*In re Roger S.* (1977) 19 Cal.3d 921, 929 [141 Cal.Rptr. 298, 569 P.2d 1286]; *People v. Burnick* (1975) 14 Cal.3d 306, 323 [121 Cal.Rptr. 488, 535 P.2d 352]; see *People v. Olivas* (1976) 17 Cal.3d 236, 244-245 [131 Cal.Rptr. 55, 551 P.2d 375]). It is no less incarceration because it is called civil or because it is deemed to be remedial or beneficial (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225 [152 Cal.Rptr. 425, 590 P.2d 1]; see *Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 811 [210 Cal.Rptr. 204, 693 P.2d 789]). Because of the potential for loss of liberty and the social stigma associated with such commitments, a jury determining whether a person is gravely disabled must consist of 12 jurors and arrive at a unanimous verdict (*Conservatorship of Roulet, supra.*, 23 Cal.3d at p. 230). The standard of proof at such a hearing is that of beyond *838 a reasonable doubt (*People v. Thomas* (1977) 19 Cal.3d 630, 638 [139 Cal.Rptr. 594, 566 P.2d 228]).

In *Griffin v. Illinois* (1956) 351 U.S. 12 [100 L.Ed. 891, 76 S.Ct. 585, 55 A.L.R.2d 1055] the United States Supreme Court held "a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. There, as in *Draper v. Washington* [(1963) 372 U.S.]487 [9 L.Ed.2d 899, 83 S.Ct. 774], the right to a free transcript on appeal was in issue. [In *Douglas v. California*] the issue is whether ... an indigent shall be denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' *Griffin v. Illinois, supra.*, [351 U.S.] at p. 19." (*Douglas v. California* (1963) 372 U.S. 353, 355 [9 L.Ed.2d 811, 813-814, 83 S.Ct. 814, 815-816].)

Against this criminal law background, it is not surprising Waltz received the benefit of appointed trial counsel (Welf. & Inst. Code, § 5111; Gov. Code, § 27706; Pen. Code, § 1240). This court appoints counsel for indigent persons wishing to appeal grave disability proceedings under the Lanterman-Petris-Short Act (Gov. Code, § 15421). Common sense dictates appointed appellate counsel cannot act on Waltz's behalf without a transcript of the trial proceedings. Waltz's constitutional right to effective counsel includes the right to reasonably necessary ancillary services (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320 [204 Cal.Rptr. 165, 682 P.2d 360]). Indigent persons appealing grave disability proceedings must be provided with the necessary record for appeal free of charge.

Welfare and Institutions Code section 5305, concerning postcertification proceedings for imminently dangerous persons, provides for

constitutional due process guarantees as set out in California Constitution, article I, section 15. That constitutional section relates to various safeguards in criminal proceedings such as speedy trial and assistance of counsel. It has been held to apply to proceedings for the gravely disabled as well, at least as to the requirement of a unanimous jury. [FN2] In addition, it states no person may be deprived of his liberty without due process of law. Due process includes the right to a complete and adequate record on appeal. Waltz is in danger of losing his liberty. To deny him a record is to deny him access to the courts at a time when the state is prepared to confine him involuntarily. To threaten to do so is a threat to violate Waltz's rights to due process and *839 equal protection (see *In re James R.* (1978) 83 Cal.App.3d 977, 980 [148 Cal.Rptr. 145]; *In re Armstrong* (1981) 126 Cal.App.3d 565, 570 [178 Cal.Rptr. 902]). He is entitled to a complete transcript of the proceedings free of cost.

FN2 The proposed conservatee does not, however, have the right not to testify nor may he assert the defense of double jeopardy in instances where a petition to reestablish the conservator can be filed. (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 550 [200 Cal.Rptr. 262].)

Closely aligned with the concept of due process is that of equal protection. Waltz is unable to have appellate review of the court's determination to deprive him of his freedom because he lacks the funds to have a proper transcript prepared. Where one's liberty is at stake application of the strict scrutiny test is required. It then becomes the government's burden to justify the procedure by showing it has a compelling interest which is furthered by the procedure in question. Since Waltz did not present the argument of equal protection, the county has, quite properly, not attempted to justify its practice. However, in light of the potential of keeping Waltz in custody involuntarily for the remainder of his life, this court is unable to discern any possible state interest in not providing a transcript to counterbalance Waltz's position. At the court's request, the county provided information from 1981 to the present on appeals of mental health proceedings. These data show there were less than five requests for transcripts per year at a total cost of less than $1, 000 per year. Equal protection demands that Waltz be provided a free transcript.

The county suggests if Waltz is entitled to a free record, it should be under the conditions set out in *Crespo v. Superior Court* (1974) 41 Cal.App.3d 115, 119-120 [115 Cal.Rptr. 681] where the superior court was instructed to determine whether a complete or partial transcript was necessary or whether a settled statement would suffice. However, *Crespo* is a case where free transcripts on appeal were granted to indigent parents seeking custody of their children. Here, we deal with persons threatened with loss of liberty and exposure to social stigma, persons similarly situated to defendants in criminal matters. As such, they must be granted the same benefits as if the proceedings were truly criminal.

Let a peremptory writ of mandate issue directing the county clerk to vacate its notice of default. In that petitioner has been found indigent by this court and counsel has been appointed, the county is ordered to prepare a record for appeal, the expense to be borne by the county.

Wiener, J., and Work, J., concurred. *840

Cal.App.4.Dist.,1985.

Conservatorship of Waltz

END OF DOCUMENT

Original List Date: 7/10/2001
Last Updated: 5/19/2006
List Print Date: 05/26/2006
Claim Number: 00-TC-28
Issue: Mentally Disordered Offenders: Treatment as a Condition of Parole

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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, § 1181.2.)

Mr. Mark Sigman
Riverside County Sheriff's Office
4095 Lemon Street
P O Box 512
Riverside, CA 92502

Tel: (951) 955-2700
Fax: (951) 955-2720

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244
Fax: (916) 368-5723

Office of the County Counsel
County of San Luis Obispo
County Government Center, Room 386
San Luis Obispo, CA 93408

Tel: (805) 781-5400
Fax: (805) 781-4221

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 324-4888

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941

Tel: (916) 327-7523
Fax: (916) 441-5507

Ms. Marianne O'Malley
Legislative Analyst's Office (B-29)
925 L Street, Suite 1000
Sacramento, CA 95814

Tel: (916) 319-8315
Fax: (916) 324-4281

Mr. J. Bradley Burgess Public Resource Management Group 1380 Lead Hill Boulevard, Suite #106 Roseville, CA 95661	Tel: Fax:	(916) 677-4233 (916) 677-2283
Ms. Jesse McGuinn Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: Fax:	(916) 445-8913 (916) 327-0225
Ms. Bonnie Ter Keurst County of San Bernardino Office of the Auditor/Controller-Recorder 222 West Hospitality Lane San Bernardino, CA 92415-0018	**Claimant** Tel: Fax:	 (909) 386-8850 (909) 386-8830
Mr. Stephen Saucedo Department of Mental Health (A-31) 1600 9th Street, Room 153 Sacramento, CA 95814	Tel: Fax:	(916) 654-2316
Ms. Ginny Brummels State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: Fax:	(916) 324-0256 (916) 323-6527
Mr. Allan Burdick MAXIMUS 4320 Auburn Blvd., Suite 2000 Sacramento, CA 95841	Tel: Fax:	(916) 485-8102 (916) 485-0111
Mr. Leonard Kaye, Esq. County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: Fax:	(213) 974-8564 (213) 617-8106
Mr. Glen Everroad City of Newport Beach 3300 Newport Blvd. P. O. Box 1768 Newport Beach, CA 92659-1768	Tel: Fax:	(949) 644-3127 (949) 644-3339
Mr. Jim Jaggers P.O. Box 1993 Carmichael, CA 95609	Tel: Fax:	(916) 848-8407 (916) 848-8407

Ms. Beth Hunter
Centration, Inc.
8570 Utica Avenue, Suite 100
Rancho Cucamonga, CA 91730

Tel: (866) 481-2621
Fax: (866) 481-2682

Ms. Catherine Van Aken
Attorney General's Office
1300 I Street, 17th Floor
P.O. Box 944255
Sacramento, CA 95814

Tel: (916) 324-5470
Fax: (916) 323-2137

EXHIBIT I

AUDITOR/CONTROLLER-RECORDER
COUNTY CLERK

AUDITOR/CONTROLLER • 222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415-0018 • (909) 387-8322 • Fax (909) 386-8830
RECORDER • COUNTY CLERK • 222 West Hospitality Lane, First Floor
San Bernardino, CA 92415-0022 • (909) 387-8306 • Fax (909) 386-8940

COUNTY OF SAN BERNARDINO

LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

June 23, 2006

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

And Interested Parties (See Enclosed Mailing List)

RE: **Response to Draft Staff Analysis**
Mentally Disorder Offenders: Treatment as a condition of Parole
(00-TC-28, 05-TC-06)
Penal Code section 2966
Statutes of 1985, Chapter 1419; Statutes of 1986, Chapter 858; Statutes of 1987, Chapter 687; Statutes of 1988, Chapter 658; Statutes of 1989, Chapter 228; Statutes of 1994, Chapter 706

Dear Ms. Higashi:

We herein submit our review of the Draft Staff Analysis for the test claim "Mentally Disordered Offenders: Treatment as a Condition of Parole (00-TC-28, 05-TC-06)."

We concur with the Commission staff's findings for the following two reimbursable activities:

- District Attorney services to represent the people, and
- Public Defender services to represent indigent petitioners.

However, we would note that the staff analysis did not acknowledge in the conclusion, nor discuss within the document body, the fact that both services are specialized to deal with complex psychiatric issues.

The County of San Bernardino (County), as claimant, also requested reimbursement for the following activities:

- Expert witness and investigative services, and
- Sheriff's department services to transport inmates between prison or the state hospital and court house, care and custody associated with confinement awaiting, during and after the court proceeding.

MDO commitment trials pursuant to Penal Code §2966, address the diagnosis of a mental disorder, its remission status, and an assessment of risk stemming from the diagnosed mental disorder. These are precisely the issues addressed in MDO commitment trials pursuant to Penal Code §2970 and 2972, for which the above referenced 'activities' have been found to be reimbursable. MDO adjudications, whether pursuant to 2966 or 2970/2972, are by definition, expert driven. Representation without the assistance of expert witnesses would constitute ineffective assistance of counsel.

The County feels that the items as stated above are reasonably necessary to comply with the mandate. The draft staff analysis acknowledges that the claimant is seeking reimbursement for these activities (Claimant's Position (page 6) and Issue 1 (page 9-10)).

On page 10, staff states "Activities of the district attorney, representing the people, and public defender, representing indigent offenders, are mandated by the test claim legislation." 'Activities,' as referenced above is a broader term and encompasses more than the District Attorney 'services' and Public Defender 'services' as listed in the conclusion of the draft staff analysis. The County is interpreting the 'Activities' as referenced above to include expert witnesses, investigators, and sheriff's department transportation and custodial services, based on Footnote 25, attached to the staff's statement. The staff analysis is acknowledging the necessity for activities outside the narrower scope of District Attorney services and/or Public Defender services.

Please contact me at (909)386-8850 or Wayne Shimabukuro at (909)386-8994 with any questions regarding the above.

DECLARATION of CLAIMANT:

The foregoing facts are know to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Bonnie Ter Keurst
Manager, Reimbursable Projects

BT:dlp
Enclosures

Commission on State Mandates

Original List Date: 7/10/2001
Last Updated: 5/12/2006
List Print Date: 05/12/2006
Claim Number: 00-TC-28
Issue: Mentally Disordered Offenders: Treatment as a Condition of Parole

Mailing Information: Completeness Determination

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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Mr. Mark Sigman
Riverside County Sheriff's Office
4095 Lemon Street
P O Box 512
Riverside, CA 92502

Tel: (951) 955-2700
Fax: (951) 955-2720

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244
Fax: (916) 368-5723

Office of the County Counsel
County of San Luis Obispo
County Government Center, Room 386
San Luis Obispo, CA 93408

Tel: (805) 781-5400
Fax: (805) 781-4221

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 324-4888

Ms. Terrie Tatoslan
Department of Mental Health (A-31)
1600 9th Street, Room 150
Sacramento, CA 95814

Tel: (916) 654-2378
Fax: (916) 654-2440

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941

Tel: (916) 327-7523
Fax: (916) 441-5507

Ms. Marianne O'Malley Legislative Analyst's Office (B-29) 925 L Street, Suite 1000 Sacramento, CA 95814	Tel: (916) 319-8315 Fax: (916) 324-4281
Mr. J. Bradley Burgess Public Resource Management Group 1380 Lead Hill Boulevard, Suite #106 Roseville, CA 95661	Tel: (916) 677-4233 Fax: (916) 677-2283
Ms. Jesse McGuinn Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: (916) 445-8913 Fax: (916) 327-0225
Ms. Bonnie Ter Keurst County of San Bernardino Office of the Auditor/Controller-Recorder 222 West Hospitality Lane San Bernardino, CA 92415-0018	Claimant Tel: (909) 386-8850 Fax: (909) 386-8830
Mr. Stephen Sauceda Department of Mental Health (A-31) 1600 9th Street, Room 153 Sacramento, CA 95814	Tel: (916) 654-2316 Fax:
Ms. Ginny Brummels State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: (916) 324-0256 Fax: (916) 323-6527
Mr. Stephen Sauceda Department of Mental Health (A-31) 1600 9th Street, Room 153 Sacramento, CA 95814	Tel: (916) 654-2316 Fax:
Mr. Allan Burdick MAXIMUS 4320 Auburn Blvd., Suite 2000 Sacramento, CA 95841	Tel: (916) 485-8102 Fax: (916) 485-0111
Mr. Leonard Kaye, Esq. County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: (213) 974-8564 Fax: (213) 617-8106

Mr. Glen Everroad
City of Newport Beach
3300 Newport Blvd.
P. O. Box 1768
Newport Beach, CA 92659-1768
Tel: (949) 644-3127
Fax: (949) 644-3339

Mr. Jim Jaggers
P.O. Box 1993
Carmichael, CA 95609
Tel: (916) 848-8407
Fax: (916) 848-8407

Ms. Beth Hunter
Centration, Inc.
8570 Utica Avenue, Suite 100
Rancho Cucamonga, CA 91730
Tel: (866) 481-2621
Fax: (866) 481-2682

Ms. Catherine Van Aken
Attorney General's Office
1300 I Street, 17th Floor
P.O. Box 944255
Sacramento, CA 95814
Tel: (916) 324-5470
Fax: (916) 323-2137

AUDITOR/CONTROLLER-RECORDER
COUNTY CLERK

COUNTY OF SAN BERNARDINO

AUDITOR/CONTROLLER • 222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415-0018 • (909) 387-8322 • Fax (909) 386-8830
RECORDER • COUNTY CLERK • 222 West Hospitality Lane, First Floor
San Bernardino, CA 92415-0022 • (909) 387-8306 • Fax (909) 386-8940

LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed by the County of San Bernardino, State of California. My business address is 222 W. Hospitality Lane, San Bernardino, CA 92415. I am 18 years of age or older.

On June 23, 2006, I faxed the letter dated June 23, 2006 to the Commission on State Mandates in response to draft staff analysis, Mentally Disordered Offenders: Treatment as a condition of Parole (00-TC-28, 05_TC-06). I faxed and/or mailed it also to the other parties listed on this 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 23, 2006 at San Bernardino, California.

DEBORAH L. PITTENGER

COUNTY OF SAN BERNARDINO
AUDITOR/CONTROLLER-RECORDER

FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Paula Higashi, Executive Director	Debbie Pittenger (909) 386-8821 On behalf of Bonnie Ter Keurst
COMPANY: Commission on State Mandates	DATE: 6/23/06
FAX NUMBER: 916-445-0278	TOTAL NO. OF PAGES INCLUDING COVER: 7
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE: Response to Draft Staff Analysis Mentally Disordered Offenders: Treatment as a condition of parole (00-TC-28, 05-TC-06)	YOUR REFERENCE NUMBER:

☒ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

222 W. HOSPITALITY LANE, SAN BERNARDINO, CA 92415-0018
FAX: (909) 386-8830

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

May 25, 2001

Mr. Leonard Kaye
Department of Auditor-Controller
County of Los Angeles
Kenneth Hahn Hall of Administration
500 West Temple Street, Suite 603
Los Angeles, CA 90012

Mr. Paige Vorhies, Bureau Chief
State Controller's Office
Division of Accounting & Reporting (B-8)
3301 C Street, Suite 500
Sacramento, CA 95816

And Affected State Agencies and Interested Parties (See Attached Mailing List)

RE: **Adopted Parameters and Guidelines**
Mentally Disordered Offenders' Extended Commitment Proceedings, CSM 98-TC-09
Penal Code Sections 2970, 2972, and 2972.1
Statutes of 1985, Chapter 1418; Statutes of 1986, Chapter 858;
Statutes of 1987, Chapter 687; Statutes of 1988, Chapters 657 and 658;
Statutes of 1989, Chapter 228; Statutes of 1991, Chapter 435; and
Statutes of 2000, Chapter 324

Dear Mr. Kaye and Mr. Vorhies:

On May 25, 2001, the Commission on State Mandates adopted the Parameters and Guidelines for this test claim.

A copy of the final Parameters and Guidelines is enclosed. If you have any questions, please contact Ms. Cathy Cruz at (916) 323-8216.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosure

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MAILED: Mail List FAXED:
DATE: 5/25/10 INITIAL: VS
CHRON: FILE:
WORKING BINDER:

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Sections 2970, 2972, and 2972.1, As Added or Amended by Statutes of 1985, Chapter 1418; Statutes of 1986, Chapter 858; Statutes of 1987, Chapter 687; Statutes of 1988, Chapters 657 and 658; Statutes of 1989, Chapter 228; Statutes of 1991, Chapter 435; and Statutes of 2000, Chapter 324; Filed on November 19, 1998; By the County of Los Angeles, Claimant.	No. CSM 98-TC-09 *Mentally Disordered Offenders' Extended Commitment Proceedings* ADOPTION OF PARAMETERS AND GUIDELINES PURSUANT TO GOVERNMENT CODE SECTION 17557 AND TITLE 2, CALIFORNIA CODE OF REGULATIONS, SECTION 1183.12 *(Adopted on May 24, 2001)*

ADOPTED PARAMETERS AND GUIDELINES

The attached Parameters and Guidelines is hereby adopted in the above-entitled matter.

This Decision shall become effective on May 25, 2001.

Paula Higashi

PAULA HIGASHI, Executive Director

Adopted: May 24, 2001
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Parameters and Guidelines

Penal Code Sections 2970, 2972, and 2972.1
Statutes of 1985, Chapter 1418
Statutes of 1986, Chapter 858
Statutes of 1987, Chapter 687
Statutes of 1988, Chapter 657
Statutes of 1988, Chapter 658
Statutes of 1989, Chapter 228
Statutes of 1991, Chapter 435
Statutes of 2000, Chapter 324

Mentally Disordered Offenders' Extended Commitment Proceedings

I. SUMMARY OF MANDATE

The test claim legislation establishes civil commitment procedures for the continued involuntary treatment of persons with severe mental disorders for one year following their parole termination date. These commitment procedures generally require the following:

- A civil hearing on the petition for continued involuntary treatment;
- The right to a jury trial, with a unanimous verdict by the jury before the offender can be committed;
- The appointment of defense counsel for indigent offenders; and
- Subsequent petitions and hearings regarding the recommitment of the offender for another year of involuntary treatment.

At its January 25, 2001 hearing, the Commission adopted its Statement of Decision which concluded that Penal Code sections 2970, 2972, and 2972.1 impose a reimbursable state mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities:

- Review the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, §2970);
- Prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, §2970);
- Represent the state and the indigent offender in civil hearings on the petition and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972, 2972.1);
- Retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions for recommitment;
- Travel to and from state hospitals where detailed medical records and case files are maintained; and

- Provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County's Sheriff Department.

II. ELIGIBLE CLAIMANTS

Any county or city and county which incurs increased costs as a result of this reimbursable state mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

Section 17557 of the Government Code states that a test claim must be submitted on or before June 30th following a given fiscal year to establish eligibility for reimbursement for that fiscal year. This test claim was filed by the County of Los Angeles on November 19, 1998. Therefore, costs incurred in implementing the provisions of Penal Code sections 2970 and 2972, as added and amended by Statutes of 1985, chapter 1418; Statutes of 1986, chapter 858; Statutes of 1987, chapter 687; Statutes of 1988, chapters 657 and 658; Statutes of 1989, chapter 228; and Statutes of 1991, chapter 435, after July 1, 1997 are eligible for reimbursement.

Statutes of 2000, chapter 324, was not in effect until January 1, 2000. Therefore, costs incurred pursuant to Penal Code section 2972.1, as added by Statutes of 2000, chapter 324, regarding services to persons committed pursuant to Penal Code section 2972 who are on *outpatient* status, are reimbursable only on or after January 1, 2001.

Actual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent fiscal year may be included on the same claim, if applicable. Pursuant to section 17561, subdivision (d)(1) of the Government Code, all claims for reimbursement shall be submitted within 120 days of notification by the State Controller of the enactment of the claim's bill.

If total costs for a given year do not exceed $200, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

For each eligible claimant, the direct and indirect costs of labor, materials and supplies, contracted services, fixed assets, travel, and training incurred for the following mandate components are reimbursable:

A. <u>One-time Activities</u>

1. To develop policies and procedures to implement Penal Code sections 2970, 2972, and 2972.1.
2. To train staff on the mandated program (one-time per employee).
3. To develop or procure computer software to track the status of persons committed pursuant to Penal Code section 2972.

B. Continuing Activities

The following reimbursable activities must be specifically identified to a mentally disordered offender:

1. Review the state's written evaluation and supporting affidavits to determine if the county concurs with the state's recommendation that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970). This activity includes the following:
    a) Attorney, secretarial, and paralegal services;
    b) Copying charges; and
    c) Long distance telephone charges.
2. Prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, § 2970). This activity includes the following:
    a) Attorney, secretarial, and paralegal services;
    b) Copying charges; and
    c) Long distance telephone charges.
3. Represent the state and the indigent offender in civil hearings regarding recommitment (Pen. Code, §§ 2972, 2972.1). This activity includes the following:
    a) Attorney, secretarial, and paralegal services;
    b) Copying charges; and
    c) Long distance telephone charges.
4. Retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions for recommitment;
5. Travel to and from state hospitals where detailed medical records and case files are maintained;
6. Provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County's Sheriff Department;
7. Meet and confer on outpatient status reports issued pursuant to Penal Code section 2792.1 (c) and assist outpatient offenders committed pursuant to Penal Code section 2972 in completing a form indicating whether the offender agrees to continued treatment, or refuses continued treatment and demands a jury trial to decide the need for further treatment; and
8. Represent the state and the indigent offender in a jury trial to decide the need for further treatment and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972, 2972.1). This activity includes the following:
    a) Attorney, secretarial, and paralegal services;
    b) Copying charges; and
    c) Long distance telephone charges.

V. CLAIM PREPARATION AND SUBMISSION

Claims for reimbursement must be timely filed and identify each cost element for which reimbursement is claimed under this mandate. Claimed costs must be identified to each reimbursable activity identified in section IV of this document and they must be supported by the following cost element information:

A. Direct Costs

Direct costs are defined as costs that can be traced to specific goods, services, units, programs, activities or functions and shall be supported by the following cost element information:

1. Salaries and Benefits

   Identify the employee(s), and/or show the classification of the employee(s) involved. Describe the reimbursable activities performed and specify the actual time devoted to each reimbursable activity by each employee, productive hourly rate, and related fringe benefits.

   Reimbursement for personal services includes compensation paid for salaries, wages, and employee fringe benefits. Employee fringe benefits include regular compensation paid to an employee during periods of authorized absences (e.g., annual leave, sick leave) and the employer's contribution of social security, pension plans, insurance and worker's compensation insurance. Fringe benefits are eligible for reimbursement when distributed equitably to all job activities which the employee performs.

2. Materials and Supplies

   Only expenditures that can be identified as direct costs of this mandate may be claimed. List the cost of the materials and supplies consumed specifically for the purposes of this mandate. Purchases shall be claimed at the actual price after deducting cash discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged based on a recognized method of costing, consistently applied.

3. Contract Services

   Provide the name(s) of the contractor(s) who performed the service(s), including any fixed contracts for services. Describe the reimbursable activity(ies) performed by each named contractor and give the number of actual hours spent on the activities, if applicable. Show the inclusive dates when services were performed and itemize all costs for those services. Submit contract consultant and attorney invoices with the claim.

4. Fixed Assets

   List the costs of the fixed assets that have been acquired specifically for the purpose of this mandate. If the fixed mandate is utilized in some way not directly related to the mandated program, only the pro-rata portion of the asset which is used for the purposes of the mandated program is eligible for reimbursement.

5. Travel

Travel expenses for mileage, per diem, lodging, and other employee entitlements are eligible for reimbursement in accordance with the rules of the local jurisdiction. Provide the name(s) of the traveler(s), purpose of travel, inclusive dates and times of travel, destination point(s), and travel costs.

6. Training

The cost of training an employee to perform the mandated activities, as specified in section IV of these parameters and guidelines, is eligible for reimbursement. Identify the employee(s) by name and job classification. Provide the title and subject of the training session, the date(s) attended, and the location. Reimbursable costs may include salaries and benefits of trainees and trainers, registration fees, transportation, lodging, per diem, and incidental audiovisual aids. If the training encompasses subjects broader than this mandate, only the pro rata portion of the training costs can be claimed.

B. Indirect Costs

Compensation for indirect costs is eligible for reimbursement. Indirect costs are those that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs include (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) pursuant to the Office of Management and Budget (OMB) Circular A-87.

VI. SUPPORTING DATA

For auditing purposes, all costs claimed shall be traceable to source documents (e.g., invoices, receipts, purchase orders, contracts, worksheets, calendars, declarations, etc.) that show evidence of the validity of such costs and their relationship to the state mandated program. All documentation in support of the claimed costs shall be made available to the State Controller's Office, as may be requested. Pursuant to Government Code section 17558.5, these documents must be kept on file by the agency submitting the claim for a period of no less than two years after the later of (1) the end of the calendar year in which the reimbursement claim is filed or last amended, or (2) if no funds are appropriated for the fiscal year for which the claim is made, the date of initial payment of the claim.

VII. OFFSETTING SAVINGS AND OTHER REIMBURSEMENT

Any offsetting savings the claimant experiences as a direct result of the subject mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, including but not limited to federal funds and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S OFFICE REQUIRED CERTIFICATION

An authorized representative of the claimant shall be required to provide a certification of the claim, as specified in the State Controller's Office claiming instructions, for those costs mandated by the state contained herein.

IX. PARAMETERS AND GUIDELINES AMENDMENTS

Pursuant to Title 2, California Code of Regulations, section 1183.2, Parameters and Guidelines amendments filed before the deadline for initial claims as specified in the Claiming Instructions shall apply to all years eligible for reimbursement as defined in the original parameters and guidelines. A Parameters and Guidelines amendment filed after the initial claiming deadline must be submitted on or before January 15, following a fiscal year in order to establish eligibility for reimbursement for that fiscal year.

List Date: 11/24/1998 Mailing Information

Mailing List

Claim Number 98-TC-09 **Claimant** County of Los Angeles

Subject Penal Code Section 2970
Chap. 1418/85,858/86,657/88,658/88,228/89,435/91

Issue Mentally Disordered Offenders' Extended Commitment Proceedings

Mr. Michael E. Cantrall, Executive Director
California Public Defenders Association

3273 Ramos Circle, Suite 100
Sacramento CA 95827

Tel: (916) 362-1686
FAX: (916) 362-5498

Ms. Annette Chinn,
Cost Recovery Systems

705-2 East Bidwell Street #294
Folsom CA 95630

Tel: (916) 939-7901
FAX: (916) 939-7801

Mr. Dean Getz, Director
Centration, Inc.

12150 Tributary Point Drive, Suite 150
Gold River CA 95670

Tel: (916) 944-7394
FAX: (916) 944-8657

Mr. Michael P. Judge,
California Public Defenders Association

210 West Temple Street - 19th Floor
Los Angeles CA 90012

Tel: (213) 974-2801
FAX: (213) 625-5031

Mr. Leonard Kaye, Esq.,
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles CA 90012

Tel: (213) 974-8564
FAX: (213) 617-8106

Claim Number 98-TC-09 **Claimant** County of Los Angeles

Subject Penal Code Section 2970
Chap. 1418/85,858/86,657/88,658/88,228/89,435/91

Issue Mentally Disordered Offenders' Extended Commitment Proceedings

Mr. John Logger, Reimbursable Projects Manager
Auditor-Controller's Office

222 West Hospitality Lane
San Bernardino CA 92415-0018

Tel: (909) 386-8850
FAX: (909) 386-8830

Mr. James Lombard, Principal Analyst (A-15)
Department of Finance

915 L Street
Sacramento CA 95814

Tel: (916) 445-8913
FAX: (916) 327-0225

Interested Party

Mr. Rick Mandella, Executive Office (E-18)
Board of Prison Terms

428 J Street 6th Floor
Sacramento CA 95814

Tel: (916) 445-4072
FAX: (916) 445-5242

Ms. Laurie McVay,
DMG-MAXIMUS

4320 Auburn Blvd. Suite 2000
Sacramento CA 95841

Tel: (916) 485-8102
FAX: (916) 485-0111

Mr. Andy Nichols, Senior Manager
Centration, Inc.

12150 Tributary Point Drive, Suite 150
Gold River CA 95670

Tel: (916) 351-1050
FAX: (916) 351-1020

Interested Person

Ms. Lola Oduniami, Legal Assistant
City & County of San Francisco District Att

850 Bryant Street
San Francisco CA 94103

Tel: (415) 553-1802
FAX: (916) 000-0000

Claim Number 98-TC-09 Claimant County of Los Angeles

Penal Code Section 2970

Subject Chap. 1418/85,858/86,657/88,658/88,228/89,435/91

Issue Mentally Disordered Offenders' Extended Commitment Proceedings

Ms. Linda Powell (A-31), Deputy Director
Dept. of Mental Health

1600 9th Street Room 250
Sacramento CA 95814

Tel: (916) 654-2378
FAX: (916) 654-2440

Mr. Mark Sigman, Accountant II
Riverside Co. Sheriff's Office

4095 Lemon Street P O Box 512
Riverside Ca 92502

Tel: (909) 955-2709
FAX: (909) 955-2428

Interested Person

Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518 P.O. Box 942850
Sacramento CA 95814

Tel: (916) 323-5849
FAX: (916) 324-7223

Mr. Paige Vorhies, Bureau Chief (B-8)
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500
Sacramento CA 95816

Tel: (916) 445-8756
FAX: (916) 323-4807

Interested Party

STATE OF CALIFORNIA GRAY DAVIS, Governor

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

January 29, 2001

Mr. Leonard Kaye
Department of Auditor-Controller
County of Los Angeles
Kenneth Hahn Hall of Administration
500 West Temple Street, Suite 603
Los Angeles, California 90012

State Agencies and Interested Parties (See Attached Mailing List)

RE: Statement of Decision
Mentally Disordered Offenders' Extended Commitment Proceedings (98-TC-09)
Penal Code Sections 2970, 2972, and 2972.1
Statutes of 1985, Chapter 1418; Statutes of 1986, Chapter 858;
Statutes of 1987, Chapter 687; Statutes of 1988, Chapters 657 and 658;
Statutes of 1989, Chapter 228; Statutes of 1991, Chapter 435; and
Statutes of 2000, Chapter 324
County of Los Angeles, Claimant

Dear Mr. Kaye:

The Commission on State Mandates adopted the attached Statement of Decision on January 25, 2001. This decision is effective on January 29, 2001.

State law provides that reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program; approval of a statewide cost estimate; a specific legislative appropriation for such purpose; a timely-filed claim for reimbursement; and subsequent review of the claim by the State Controller's Office. Following is a description of the responsibilities of all parties and the Commission during the parameters and guidelines phase.

- **Claimant's Submission of Proposed Parameters and Guidelines.** Pursuant to Government Code 17557 and Title 2, CCR sections 1183.1 et seq (the regulations), the claimant is responsible for submitting proposed parameters and guidelines by February 29, 2001. See Government Code section 17557 and Title 2, CCR sections 1183.1 et seq for guidance in preparing and filing a timely submission.

- **Review of Proposed Parameters and Guidelines.** Within ten days of receipt of completed proposed parameters and guidelines, the Commission will send copies to the Department of Finance, Office of the State Controller, affected state agencies, and interested parties who are on the enclosed mailing list. All recipients will be given an opportunity to provide written comments or recommendations to the Commission within 30 days of service. The claimant and other interested parties may submit written rebuttals. See CCR section 1183.11.

- **Adoption of Parameters and Guidelines.** After review of the proposed parameters and guidelines and all comments, Commission staff will recommend the adoption of the claimant's proposed parameters and guidelines or adoption of an amended, modified, or supplemented version of the claimant's original submission. See CCR section 1183.12.

Please contact Ms. Nancy Patton at (916) 323-3562 if you have any questions.

Sincerely,

Paula Higashi

PAULA HIGASHI
Executive Director

Enclosure: Adopted Statement of Decision

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MAILED: FAXED:
DATE: 1/29/01 INITIAL: VS
CHRON: FILE:
WORKING BINDER:

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:

Penal Code Sections 2970, 2972, and 2972.1,

As Added or Amended by Statutes of 1985, Chapter 1418; Statutes of 1986, Chapter 858; Statutes of 1987, Chapter 687; Statutes of 1988, Chapter 657; Statutes of 1989, Chapter 228; Statutes of 1991, Chapter 435; and Statutes of 2000, Chapter 324;

Filed on November 19, 1998;

By the County of Los Angeles, Claimant.

NO. CSM 98-TC-09

Mentally Disordered Offenders' Extended Commitment Proceedings

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on January 25, 2001)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

This Decision shall become effective on January 29, 2001.

Paula Higashi

Paula Higashi, Executive Director

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:

Penal Code Sections 2970, 2972, and 2972.1,

As Added or Amended by Statutes of 1985, Chapter 1418; Statutes of 1986, Chapter 858; Statutes of 1987, Chapter 687; Statutes of 1988, Chapter 657; Statutes of 1989, Chapter 228; Statutes of 1991, Chapter 435; and Statutes of 2000, Chapter 324;

Filed on November 19, 1998;

By the County of Los Angeles, Claimant.

NO. CSM-98-TC-09

Mentally Disordered Offenders' Extended Commitment Proceedings

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on January 25, 2001)

STATEMENT OF DECISION

On November 30, 2000, the Commission on State Mandates (Commission) heard this test claim during a regularly scheduled hearing. Mr. Leonard Kaye appeared for the County of Los Angeles. Mr. James Apps appeared for the Department of Finance.

At the hearing, oral and documentary evidence was introduced, the test claim was submitted, and the vote was taken.

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 section 17500 and following, and related case law.

The Commission, by a vote of 7 to 0, approved this test claim.

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BACKGROUND

This test claim involves the Mentally Disordered Offender legislation, codified in Penal Code section 2960 et seq., which establishes civil commitment procedures for the continued involuntary treatment of persons with severe mental disorders for one year following their parole termination date.

Since 1969, the Mentally Disordered Offender legislation has required certain offenders who have been convicted of enumerated violent crimes to receive treatment by the Department of Mental Health as a condition of parole.[1] To impose such a condition, the prospective parolee must have (a) a severe mental disorder that is not in remission or cannot be kept in remission without treatment; (b) the mental disorder was one of the causes of, or was an aggravating factor in, the commission of the crime; (c) the prospective parolee has been in treatment for 90 days or more within the year prior to his or her parole release day; and (d) the prospective parolee has been certified by a designated mental health professional to represent a substantial danger of physical harm to others by reason of the severe mental disorder.[2]

Both the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Mental Health must evaluate the prisoner before a prisoner may be classified as a mentally disordered offender. A chief psychiatrist of the Department of Corrections must then certify to the Board of Prison Terms that the prisoner meets the statutory qualifications of a mentally disordered offender. If the professionals evaluating the prisoner do not agree, further professional examinations are conducted.

A prisoner has the right to a hearing before the Board of Prison Terms to contest a finding that he or she has a severe mental disorder, as defined by the legislation.[3] If dissatisfied with the results of the hearing, the prisoner may petition the superior court for a civil hearing to determine if he or she meets the criteria of a mentally disordered offender.

If the prisoner's severe mental disorder is put into remission during the parole period, and can be kept into remission during the parole period, the Department of Mental Health must discontinue treatment.[4]

Test Claim Legislation

In 1986, the Legislature enacted the test claim statute, Penal Code section 2970, which established, for the first time, procedures to *extend* the involuntary treatment of a mentally disordered offender for one year beyond the offender's parole termination date if the offender's severe mental disorder is not in remission at the end of the parole period or cannot be kept in remission without treatment.

Specifically, Penal Code section 2970 authorizes the district attorney to file a petition with the superior court, following receipt of the state's written evaluation on the status of the offender's

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[1] Penal Code section 2962.

[2] Penal Code section 2962, subdivisions (a) – (d).

[3] Penal Code section 2966.

[4] Penal Code section 2968.

mental disorder, for the continued involuntary treatment of the offender. The petition is required to allege that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others. Penal Code section 2970 states the following:

> Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, or the community program director in charge of the parolee's outpatient program, or the Director of Corrections, shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison or in a state mental hospital, the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits.
>
> The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole; has been continuously provided by the State Department of Mental Health either in a state hospital or in an outpatient program. The petition shall also specify that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others.

After the section 2970 petition has been filed, the court is required by Penal Code section 2972 to conduct a civil hearing on the petition. Penal Code section 2972 also establishes the procedures for the civil hearing on the petition, which includes the following:

- The defendant has the right to a jury trial;[5]
- Both civil and criminal discovery rules apply;[6]
- A public defender shall be appointed to indigent defendants;[7]
- Representation for the People is by the district attorney;[8]
- The standard of proof is beyond a reasonable doubt;[9] and

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[5] Penal Code section 2972, subdivision (a).

[6] *Id.*

[7] Penal Code section 2972, subdivision (b).

[8] *Id.*

- The jury's verdict must be unanimous.[10]

If the court or jury finds that the offender has a severe mental disorder, that the offender's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the offender represents a substantial danger of physical harm to others, the court is required to order the offender committed to either an inpatient or outpatient program for one year.[11]

If an offender is committed to an outpatient program, the outpatient status can be revoked if the district attorney believes that the offender cannot be safely and effectively treated on an outpatient basis. In such a case, the district attorney files a petition for revocation with the court and a hearing is conducted. If the court agrees that the offender cannot be safely and effectively treated on an outpatient basis, the court is required to order that the offender be treated in a state hospital or other treatment facility as an inpatient.[12]

A new petition and civil trial for recommitment may be filed and conducted each successive year in accordance with Penal Code section 2970 and 2972 as long as the offender's severe mental disorder still presents a substantial danger of physical harm to others.[13]

On September 7, 2000, the Legislature enacted Assembly Bill 1881, which added Penal Code section 2972.1 and amended Penal Code section 2972 to change the recommitment procedures for mentally disordered offenders receiving *outpatient* treatment following parole.

Under Assembly Bill 1881, the community program director of the outpatient facility is required to furnish a yearly report and recommendation to the court, the district attorney, the defense counsel, the offender, and the medical director of the facility that is treating the offender. The report shall recommend whether the outpatient offender should be discharged from commitment, ordered to an inpatient facility, or renewed as an outpatient for another year.

If the recommendation is that the offender continue on outpatient status or be confined to an inpatient treatment facility, the defense counsel is required to meet and confer with the outpatient offender and explain the recommendation. Under these circumstances, the outpatient offender has the right to a jury trial under Penal Code section 2972 before the offender can be recommitted. The offender also has the option of accepting the recommendation of continued involuntary treatment and waiving the right to a trial under Penal Code section 2972. Thus, under Assembly Bill 1881, the district attorney is no longer required to annually re-litigate mentally disordered offender cases to extend treatment for an additional year when the outpatient offender affirmatively waives the right to trial and accepts the recommendation.

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[9] Penal Code section 2972, subdivision (a).

[10] *Id.*

[11] Penal Code section 2972, subdivision (c).

[12] Penal Code section 2972, subdivision (d).

[13] Penal Code section 2972, subdivision (e).

The amendments imposed by Assembly Bill 1881 become operative on January 1, 2001.[14]

Claimant's Position

The claimant contends that the test claim statutes constitute a reimbursable state mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant submits that the test claim statutes are similar to the *Sexually Violent Predator* (CSM 4509) and *Not Guilty by Reason of Insanity* (CSM 2753) extended commitment legislation, both of which were approved by the Commission as reimbursable state mandated programs. Similar to these approved programs, the claimant is seeking reimbursement for the following activities:

- Review, preparation, and attendance at the civil trial and hearings on the petition by the district attorney, indigent defense counsel, support staff, experts, and investigators;
- Retention of necessary experts, investigators, and professionals to prepare for the civil trial;
- Travel to and from state hospitals where detailed medical records and case files are maintained; and
- Transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County's Sheriff Department.[15]

Position of the Department of Finance

On February 1, 1999, the Department of Finance filed comments to the test claim agreeing that the test claim statutes constitute a reimbursable state mandated program. The Department stated the following:

> "As a result of our review, we have concluded that the statute has resulted in a reimbursable state mandate as it requires the district attorney to review cases submitted to extend mentally disordered offenders' (MDO) commitments, petition the court for the commitment, provide legal counsel to MDOs that are indigent, and provide transportation and housing during court proceedings."

On November 6, 2000, the Department of Finance filed comments on the Draft Staff Analysis changing their position. The Department now contends that the test claim should be denied pursuant to article XIII B, section 6, and Government Code section 17556, subdivision (a),

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[14] See, Bill Analyses for Assembly Bill 1881.

[15] The *Sexually Violent Predator* test claim (CSM 4509) involved legislation establishing new civil commitment procedures for the continued detention and treatment of sexually violent predators following completion of the prison term for certain sexually-related offenses. In *Sexually Violent Predators*, the Commission approved reimbursement for the activities requested by the claimant here.

The *Not Guilty by Reason of Insanity* test claim (CSM 2753) involved legislation establishing civil commitment procedures extending the commitment of individuals found not guilty by reason of insanity in state institutions. The Commission also approved reimbursement for the activities requested by the claimant here.

since the District Attorney for the County of Los Angeles, acting on behalf of the County of Los Angeles as a whole, sponsored the test claim legislation.

FINDINGS

In order for a statute to impose a reimbursable state mandated program under article XIII B, section 6 of the California Constitution, the statutory language must first direct or obligate an activity or task upon local governmental agencies. If the statutory language does not mandate or require local agencies to perform a task, then compliance with the test claim statute is within the discretion of the local agency and a reimbursable state mandated program does not exist.

In addition, the required activity or task must constitute a new program or create an increased or higher level of service over the former required level of service. The California Supreme Court has defined the word "program" subject to article XIII B, section 6, of the California Constitution as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the new program or increased level of service must impose "costs mandated by the state" pursuant to Government Code section 17514.[16]

This test claim presents the following issues:

- Are Penal Code sections 2970, 2972, and 2972.1 subject to article XIII B, section 6 of the California Constitution?
- Do Penal Code sections 2970, 2972, and 2972.1 constitute a new program or higher level of service?
- Do Penal Code sections 2970, 2972, and 2972.1 impose "costs mandated by the state" under article XIII B, section 6, of the California Constitution and Government Code section 17514?

These issues are addressed below.

Issue 1: Are Penal Code sections 2970, 2972, and 2972.1 subject to article XIII B, section 6 of the California Constitution?

Article XIII B, section 6 of the California Constitution states that "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." (Emphasis added.)

Thus, in order for a test claim statute to impose a reimbursable state mandated program under article XIII B, section 6 of the California Constitution, the statutory language must first direct

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[16] Article XIII B, section 6 of the California Constitution; *County of Los Angeles v. State of California*, *supra*, 43 Cal.3d at 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; Government Code section 17514.

or obligate an activity or task upon local governmental agencies. If the statutory language does not mandate or require local agencies to perform a task, then article XIII B, section 6 is not triggered. In such a case, compliance with the test claim statute is within the discretion of the local agency.

In the present case, the extended involuntary treatment proceedings begin when the county's district attorney receives the state's written evaluation alleging that the offender's mental disorder is not in remission. The district attorney may request, from the state, affidavits supporting the evaluation. If the state's written evaluation and supporting affidavits support extending the offender's involuntary treatment, "the district attorney *may* then file a petition with the superior court for continued involuntary treatment for one year." (Emphasis added.) Despite the use of the word "may" in the statute, the Commission finds that counties are mandated by the state to comply with the test claim statutes for the reasons stated below.

The Legislature declared the following in the Mentally Disordered Offender legislation: "if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, *there is a danger to society, and the state has a compelling interest in protecting the public.*" (Emphasis added.)[17] The courts have further noted that the fundamental purpose of this legislation is to protect the public from dangerous mentally disordered prisoners.[18]

Thus, in order to protect the public, the district attorney has no choice but to review the state's evaluation, request supporting affidavits if necessary, and then file a petition for continued involuntary treatment when the state's evaluation and affidavits reveal that the offender's mental disorder is not in remission and that, as a result, the offender presents a danger of physical harm to others.

Accordingly, the Commission finds that the test claim statutes are subject to article XIII B, section 6 of the California Constitution.

Issue 2: Do Penal Code sections 2970, 2972, and 2972.1 constitute a new program or higher level of service?

The test claim statutes require counties to initiate court proceedings to commit mentally disordered offenders to continued involuntary treatment for one year beyond the parole termination date. In this regard, counties, through the district attorney and indigent defense counsel, are required to perform the following activities:

- Review the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970);
- Prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, § 2970); and

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[17] Government Code section 2960.

[18] *People v. Fernandez* (1999) 70 Cal.App.4th 117.

- Represent the state and the indigent offender in civil hearings on the petition and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972 and 2972.1).

The purpose of the test claim legislation is to protect the public from mentally disordered offenders whose mental disorder is not in remission or cannot be kept in remission without continued treatment. Thus, the Commission finds that the test claim statutes carry out a governmental function of providing a service to the public. Moreover, the test claim statutes impose unique requirements on counties to initiate court proceedings to commit mentally disordered offenders to continued involuntary treatment. Such activities do not apply generally to all residents and entities of the state. Therefore, the Commission finds that the test claim statutes constitute a "program" within the meaning of article XIII B, section 6 of the California Constitution.

The Commission further finds that the activities performed by the district attorney to review the state's evaluation, to prepare and file the petition for continued involuntary treatment, and to represent the state in all subsequent proceedings regarding the continued treatment of the mentally disordered offender were not previously imposed on counties and, thus, constitute a new program within the meaning of article XIII B, section 6 of the California Constitution.

The Commission recognizes, however, that there is a connection between the indigent's right to counsel to defend the petition and subsequent requests for continued involuntary treatment, and the requirements *previously* imposed by the United States Constitution. Since the hearing on the petition can result in the continued involuntary commitment and treatment of the offender for an additional year beyond the final parole termination date, the Sixth Amendment (right to counsel) and Fourteenth Amendment (due process clause) of the U.S. Constitution are implicated.

Although the Mentally Disordered Offender legislation is in the Penal Code, the court has held that the petition for continued involuntary treatment is a civil proceeding.[19] In this regard, the U.S. Supreme Court has repeatedly found that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.[20]

When analyzing the rights of an individual during civil commitment proceedings, some federal courts have determined that the assistance of counsel is required to meet federal due process standards.[21] Moreover, California courts recognize that legal services for indigent persons at public expense are mandated in civil proceedings relating to mental health matters where restraint of liberty is possible.[22] Finally, case law is clear that where there is a right to

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[19] *People* v. *Williams* (1999) 77 Cal.App.4th 436.

[20] *Addington* v. *Texas* (1979) 441 U.S. 418.

[21] *Heryford* v. *Parker* (10th Cir. 1968) 396 F.2d 393, where the court held that a civil proceeding resulting in involuntary treatment commands observance of the constitutional safeguards of due process, including the right to counsel.

[22] *Phillips* v. *Seely* (1974) 43 Cal.App.3d 104, 113; *Waltz* v. *Zumwalt* (1985) 167 Cal.App.3d 835, 838.

representation by counsel, necessary ancillary services, such as experts and investigative services, are within the scope of that right.[23]

Thus, indigent persons defending a petition and subsequent requests for continued involuntary treatment under the test claim statutes have a constitutional right to counsel and ancillary services. Nevertheless, for the reasons stated below, the Commission finds that the activities performed by the indigent defense counsel under the test claim statutes constitute a new program or higher level of service.

In *County of Los Angeles v. Commission on State Mandates*, the court analyzed the federal constitutional requirements under the Sixth and Fourteenth Amendments in relation to test claim legislation requiring counties to pay for investigators and experts in preparation of the defense for indigent defendants in death penalty cases.[24] The court denied the test claim and concluded that the test claim legislation merely implemented the indigent defendant's preexisting rights under the U.S. Constitution and that the legislation did not impose any *new* requirements on counties. Thus, the court determined that even in the absence of the state law, counties are still compelled to provide defense services under the Sixth and Fourteenth Amendments to indigents facing the death penalty.

Unlike the test claim legislation in the *County of Los Angeles* case, however, there is *no* pre-existing federal statutory or regulatory scheme requiring the states to implement civil commitment proceedings for mentally disordered offenders. Rather, this program is brand new. Therefore, counties would not be compelled to provide defense and ancillary services to indigent persons facing a petition for continued involuntary treatment if the new program had not been created by the state.

Accordingly, the Commission finds that the activities performed by indigent defense counsel, investigators and experts to defend the first civil hearing on the petition and any subsequent petitions for recommitment constitutes a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Issue 3: Do Penal Code sections 2970, 2972, and 2972.1 impose "costs mandated by the state" under article XIII B, section 6, of the California Constitution and Government Code section 17514?

As indicated above, the Department of Finance now contends that the test claim should be denied pursuant to article XIII B, section 6, and Government Code section 17556, subdivision (a), since the District Attorney for the County of Los Angeles, acting on behalf of the County of Los Angeles as a whole, sponsored the test claim legislation. The Department contends that these authorities specifically provide that no reimbursement is required for a local agency that requests legislative authority to implement a mandated program.

For the reasons stated below, the Commission disagrees with the Department of Finance.

Article XIII B, section 6, states in relevant part the following:

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[23] *People* v. *Worthy* (1980) 109 Cal.App.3d 514.

[24] *County of Los Angeles* v. *Commission on State Mandates* (1995) 32 Cal.App.4th 805.

> 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 program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:
>
> (a) *Legislative mandates requested by the local agency affected*; . . . . (Emphasis added.)

In 1984, the Legislature implemented article XIII B, section 6, by enacting Government Code section 17500 and following.[25] As part of that implementation, Government Code section 17514 was enacted to define "costs mandated by the state" as any increased costs that a local agency is required to incur as a result of any statute that mandates a new program or higher level of service.

Government Code section 17556 was also enacted to provide seven exceptions to reimbursement. Government Code section 17556, subdivision (a), states the following:

> 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 that:
>
> (a) The claim is submitted by a local agency or school district which requested legislative authority for *that* local agency or school district to implement the program specified in the statute; and *that statute imposes costs upon that local agency* or school district requesting the legislative authority. *A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.* (Emphasis added.)

Thus, in order for Government Code section 17556, subdivision (a), to apply, evidence must be presented to show the following:

- That the local agency filing the test claim requested legislative authority to implement the program. Such a request shall be evidenced by either a resolution from the governing body or a letter from a delegated representative of the governing body; and
- That the statute imposes costs upon that local agency.

In the present case, the Department of Finance has submitted the Department of Finance's Enrolled Bill Report for Assembly Bill 1881, enacted on September 7, 2000, which reveals that the sponsor of Assembly Bill 1881 was the Los Angeles County District Attorney. The

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[25] Government Code section 17500 states in relevant part the following: "It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution."

Department also cites the case of *Pitts v. County of Kern*[26] for the proposition that when the District Attorney sponsored the legislation, he acted on behalf of the County of Los Angeles.

The Commission finds that the evidence submitted by the Department of Finance does not satisfy the requirements of Government Code section 17556, subdivision (a), to deny the test claim, and that the case of *Pitts v. County of Kern* does not apply here.

First, the evidence presented by the Department of Finance reveals that the District Attorney for the County of Los Angeles sponsored *only* Assembly Bill 1881. Assembly Bill 1881, enacted on September 7, 2000, added Penal Code section 2972.1 and amended Penal Code section 2972 to amend the recommitment procedures of mentally disordered offenders receiving *outpatient* treatment following parole.

AB 1881 did *not* amend or affect the following required activities imposed by other statutes included in this test claim:

- Review the state's initial written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970);
- Prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, § 2970); and
- Represent the state and the indigent offender in the first civil hearing on the petition and any subsequent petitions or hearings regarding the recommitment of an *inpatient* offender (Pen. Code, §§ 2972).

Thus, there is no evidence in the record that the Los Angeles County District Attorney, or the County of Los Angeles, requested legislative authority to perform the above activities required by Penal Code sections 2970 and 2972. Accordingly, the Commission finds that Government Code section 17556, subdivision (a), does not apply to the activities listed above, and that there are costs mandated by the state for these activities.

The Commission further finds that Government Code section 17556, subdivision (a), does not apply to deny this test claim for the activities imposed by Assembly Bill 1881.

The amendments enacted by Assembly Bill 1881 allow the outpatient offender to affirmatively agree to continued treatment and waive the right to trial when there is a recommendation that the offender continue receiving outpatient or inpatient care for another year. Thus, as a result of Assembly Bill 1881, the district attorney may perform a *lower* level of service since they are no longer required to retain experts, prepare for, or attend a civil trial on the issue of recommitment when the outpatient offender agrees to continued treatment for another year and waives the right to trial. Accordingly, the Commission finds that there is no evidence that Assembly Bill 1881 imposes any increased costs on the Los Angeles County District Attorney, as required for Government Code section 17556, subdivision (a), to apply.

Assembly Bill 1881 may, however, increase the costs of the defense attorney retained by the county for the indigent outpatient offender that receives a recommendation for continued

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[26] *Pitts v. County of Kern* (1998) 17 Cal.4th 340.

treatment. Under these circumstances, Assembly Bill 1881 imposed a new requirement on the defense counsel to meet and confer with the outpatient offender and explain the recommendation. Following the meeting, both the defense counsel and the outpatient offender are required to sign and return to the court a form indicating whether the offender demands a jury trial or accepts the recommendation and waives the right to trial. If the outpatient offender waives the right to trial under Assembly Bill 1881, then the costs imposed on the county under the Mentally Disordered Offender program are reduced since, like the district attorney, the defense attorney is not required to retain experts, prepare for, or attend a civil trial to defend the matter. If, on the other hand, the outpatient offender demands a jury trial, then the meeting between the defense counsel and the outpatient offender, and their completion of the form described above, will impose additional costs on the county.

Thus, with regard to the activities imposed on the county's defense attorney, the issue is whether the Los Angeles County District Attorney acted on behalf of the County of Los Angeles as a whole when he sponsored Assembly Bill 1881.

In this regard, the Department of Finance relies on *Pitts v. County of Kern*. In *Pitts*, the plaintiffs, whose convictions for child molestation were reversed on appeal, brought actions seeking damages against the county, the district attorney and the district attorney's employees asserting numerous civil rights violations based on alleged misconduct during the criminal prosecution. The issue presented in the case was whether, for purposes of local government damages liability, a district attorney acts on behalf of the state or the county when prosecuting criminal violations of state law, and when establishing policy and training employees in such areas.[27] The court recognized that the district attorney may act on behalf of the county when performing administrative functions that are unrelated to the prosecution of state criminal laws.[28] The court concluded, however, that the district attorney acted on behalf of the state when prosecuting criminal violations of state law, and when establishing policy and training employees in such areas. Thus, the county was not liable for damages.

Using the *Pitts* case, the Department of Finance contends that the District Attorney acted on behalf of the county since "sponsoring legislation concerning the extended civil commitment of mentally disordered offenders neither prepares for prosecution and prosecutes violations of state criminal law, nor establishes policy and trains employees in these areas."

The Commission finds that the Department's reliance on *Pitts* is misplaced. First, the *Pitts* case does not address the issue of reimbursement of state mandated programs under article XIII B, section 6. Second, the *Pitts* case does not discuss Government Code section 26500.5, which expressly authorizes the district attorney, on his or her own, to *sponsor* any project or program to improve the administration of justice, as is the case here when the Los Angeles County District Attorney sponsored Assembly Bill 1881. In this regard, the courts, including the court in *Pitts*, have consistently held that the county board of supervisors does not have the power to direct the manner in which the district attorney's statutory duties are performed.[29]

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[27] *Pitts, supra,* 17 Cal.4th 340, 345.

[28] *Id.* at 363.

[29] *Id.* at 358. See also, *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 242.

Accordingly, the Commission finds that when the Los Angeles County District Attorney sponsored Assembly Bill 1881, he did not sponsor that legislation on behalf of the County of Los Angeles as a whole.

Moreover, there is *no* evidence in the record that the County of Los Angeles itself requested legislative authority to change the Mentally Disordered Offender program. Government Code section 17556, subdivision (a), requires that such a request be evidenced by a resolution from the governing body or a letter from a delegated representative of the governing body of a local agency requesting authorization for that local agency to implement the program. Such documents have not been presented here.

Accordingly, the Commission finds that Government Code section 17556, subdivision (a), does not apply to the recommitment procedures imposed by Assembly Bill 1881 for mentally disordered offenders receiving outpatient treatment, and that such activities impose costs mandated by the state on counties.

The Commission further finds that the activities requested by the claimant to (1) retain necessary experts, investigators, and professionals to prepare for the civil trial and subsequent proceedings; (2) travel to and from state hospitals where detailed medical records and case files are maintained; and (3) provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County's Sheriff Department, are reasonably necessary to comply with the test claim statutes and, thus, constitute reimbursable state mandated activities.[30]

CONCLUSION

Based on the foregoing, the Commission concludes that Penal Code sections 2970, 2972, and 2972.1 impose a reimbursable state mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities:

- Review the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970);
- Prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, § 2970);
- Represent the state and the indigent offender in civil hearings on the petition and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972, 2972.1);
- Retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions for recommitment;

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[30] Section 1183.1, subdivision (1)(C)(4) of the Commission's regulations authorizes the Commission to include in the parameters and guidelines, as reimbursable state mandated activities, a description of the most reasonable methods of complying with the mandate.

- Travel to and from state hospitals where detailed medical records and case files are maintained; and
- Provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County's Sheriff Department.

Commission on State Mandates

List Date: 11/24/1998 **Mailing Information**

Mailing List

Claim Number 98-TC-09 **Claimant** County of Los Angeles

Subject Penal Code Section 2970
Chap. 1418/85,858/86,657/88,658/88,228/89,435/91

Issue Mentally Disordered Offenders' Extended Commitment Proceedings

Mr. Michael E. Cantrall, Executive Director
California Public Defenders Association

3273 Ramos Circle, Suite 100
Sacramento CA 95827

Tel: (916) 362-1686
FAX: (916) 362-5498

Ms. Annette Chinn,
Cost Recovery Systems

1750 Creekside Oaks Drive, Suite 290
Sacramento CA 95833-3640

Tel: (916) 939-7901
FAX: (916) 939-7801

Ms. Marcia C. Faulkner, Manager, Reimbursable Projects
County of San Bernadino
Office of the Auditor/Controller
222 W. Hospitality Lane, 4th Floor
San Bernardino CA 92415-0018

Tel: (909) 386-8850
FAX: (909) 386-8830

Mr. Dean Getz, Director
Vavrinek Trine Day & Co., LLP

12150 Tributary Point Drive, Suite 150
Gold River CA 95670

Tel: (916) 944-7394
FAX: (916) 944-8657

Mr. Michael P. Judge,
California Public Defenders Association

210 West Temple Street - 19th Floor
Los Angeles CA 90012

Tel: (213) 974-2801
FAX: (213) 625-5031

Claim Number 98-TC-09 **Claimant** County of Los Angeles

Subject Penal Code Section 2970
Chap. 1418/85,858/86,657/88,658/88,228/89,435/91

Issue Mentally Disordered Offenders' Extended Commitment Proceedings

Mr. Leonard Kaye, Esq.,
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603 *Tel:* (213) 974-8564
Los Angeles CA 90012 *FAX:* (213) 617-8106

Mr. James Lombard (A-15), Principal Analyst
Department of Finance

915 L Street *Tel:* (916) 445-8913
Sacramento CA 95814 *FAX:* (916) 327-0225

Mr. Rick Mandella, Executive Office (E-18)
Board of Prison Terms

428 J Street 6th Floor *Tel:* (916) 445-4072
Sacramento CA 95814 *FAX:* (916) 445-5242

Ms. Laurie McVay,
DMG-MAXIMUS

4320 Auburn Blvd. Suite 2000 *Tel:* (916) 485-8102
Sacramento CA 95841 *FAX:* (916) 485-0111

Mr. Andy Nichols,
Vavrinek Trine Day & Co., LLP

12150 Tributary Point Drive, Suite 150 *Tel:* (916) 351-1050
Gold River CA 95670 *FAX:* (916) 351-1020

Ms. Linda Powell (A-31), Deputy Director
Dept. of Mental Health

1600 9th Street Room 250 *Tel:* (916) 654-2378
Sacramento CA 95814 *FAX:* (916) 654-2440

Claim Number 98-TC-09 **Claimant** County of Los Angeles

Subject Penal Code Section 2970
Chap. 1418/85,858/86,657/88,658/88,228/89,435/91

Issue Mentally Disordered Offenders' Extended Commitment Proceedings

Mr. Mark Sigman, Accountant II
Riverside Co. Sheriff's Office

4095 Lemon Street P O Box 512
Riverside Ca 92502

Tel: (909) 955-2709
FAX: (909) 955-2428

Interested Person

Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518 P.O. Box 942850
Sacramento CA 95814

Tel: (916) 323-5849
FAX: (916) 324-7223

Mr. Paige Vorhies (B-8), Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500
Sacramento CA 95816

Tel: (916) 445-8756
FAX: (916) 323-4807

THE PEOPLE, Plaintiff and Respondent,
v.
ANDREW FRASER GIBSON, Defendant and Appellant
No. B025616.

Court of Appeal, Second District, California.

Oct 6, 1988.

SUMMARY

Defendant was convicted of forcible rape in violation of Pen. Code, § 261, subd. (2), and was sentenced to six years in the state prison. Instead of being released on parole on his due date, he was required to accept inpatient treatment through the Department of Health under Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of future dangerousness. After trial he was found to be a severely mentally disordered offender subject to involuntary confinement and treatment under Pen. Code, § 2962, and he appealed. (Superior Court of San Luis Obispo County, No. PC4, Harry E. Woolpert, Judge.)

The Court of Appeal reversed, holding defendant was entitled to parole on terms without reference to the requirements of Pen. Code, § 2962 et seq. The court held the retroactive application of the mandatory provisions violated the ex post facto clauses of the United States and California Constitutions as applied to a defendant whose crimes which resulted in imprisonment were committed prior to the enactment of the legislation. It further held the provisions violated the equal protection clauses of the United States and California Constitutions, as it was unreasonable and arbitrary to exempt persons such as defendant from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment, and no compelling governmental interest justified the exception. (Opinion by Abbe, J., with Stone (S. J.), P. J., and Gilbert, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Criminal Law § 7.2--Ex Post Facto Laws--Mental Treatment as Condition of Parole.
Legislation (Pen. Code, § § 2962-2980) requiring *1426 certain mentally ill persons about to be paroled to accept inpatient mental treatment violates the ex post facto clauses of U.S. Const., art. I, § 9, cl. 3, and Cal. Const., art. I, § 9, as applied to a prisoner whose crime, which resulted in imprisonment and a determinate sentence, was committed prior to the enactment of the legislation. The provisions are applicable only to persons who were convicted for certain crimes and who were still serving their terms of imprisonment on the operative date of the legislation, and mandate a potentially onerous change in the terms of parole which is part of the sentence for a criminal conviction; the result could potentially be custody for life in a state hospital setting without proof that the person was either gravely disabled or demonstrably dangerous as the result of mental illness.

[See **Cal.Jur.3d (Rev)**, Criminal Law, § 9; Am.Jur.2d, Constitutional Law, § 654.]

(2) Criminal Law § 7--Ex Post Facto Laws.
Two critical elements must be present for a statute to violate the ex post facto clause: (1) it must be a criminal or penal law which applies to events occurring prior to its effective date and (2) it must substantially disadvantage the offender affected by it. A law constitutes an ex post facto violation when it retrospectively imposes criminal liability for conduct which was innocent when it occurred, or increases the punishment prescribed for a crime, or by necessary operation alters the situation of the accused to his disadvantage. In order to determine whether retrospective laws are disadvantageous, courts must look to the effect of the present system of laws compared to those in place at the time the offense was committed.

(3) Criminal Law § 7--Ex Post Facto Laws--Penal or Therapeutic Laws.
Pen. Code, § § 2962-2980, requiring certain mentally ill prisoners about to be paroled to accept inpatient mental treatment without a determination of future dangerousness, must be characterized as penal, rather than therapeutic, for determining whether it violates the ex post facto clause when applied retrospectively. The primary purpose of the legislation is to protect the public, and the fact the

person is treated while confined involuntarily does not ipso facto make the confinement nonpenal. Failure to follow the treatment plan during the period of parole can result in a return to prison on parole revocation and it may therefore extend indirectly the incarceration of the person as a result of his criminal conduct.

(4a, 4b, 4c, 4d) Constitutional Law § 101--Equal Protection--Basis of Classification--Criminal Conviction or Acquittal--Involuntary Mental *1427 Treatment of Parolees.

Legislation (Pen. Code, § § 2962-2980) requiring certain mentally ill prisoners about to be paroled to accept inpatient mental treatment without a determination of dangerousness violates the equal protection clause of the United States Constitution, since it is unreasonable and arbitrary to exempt such persons from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment. Although parole status is a distinctive characteristic for disparate treatment under certain circumstances, it is irrelevant to the purpose of the statute's involuntary commitment or treatment.

(5) Constitutional Law § 76--Nature and Scope of Equal Protection--United States Constitution.

The equal protection clause of the United States Constitution requires at a minimum that persons standing in the same relation to a challenged government action will be uniformly treated. Traditionally, social and economic legislation is upheld if the classification drawn is rationally related to legitimate state interests. When the classification touches on a fundamental right, it must be judicially determined under the strictest standard whether it is necessary to promote a compelling government interest. Whether a right is fundamental depends on whether it is implicitly or explicitly granted by the federal Constitution. An equal protection challenge requires a determination whether the groups which are differently treated are similarly situated for purposes of the law. If they are not, no equal protection claim is applicable.

(6) Penal and Correctional Institutions § 22--Nature of Parole.

Parole in California is different than the traditional concept of parole, under which it is a release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the term. In California, determinately sentenced prisoners serve the complete term specified under Pen. Code, § 1170, less any applicable credits for work performed under Pen. Code, § § 2931 or 2933, and are then placed on parole for three years regardless of the length of the term served. Under Pen. Code, § 3000, this parole period is an essential part of the actual sentence and is not dependent on early release.

(7) Constitutional Law § 84--Equal Protection--Classification--Judicial Review--Deference to Legislature--Dangerousness--Class.

Under equal protection analysis, although great deference is due a legislative determination that a certain class of persons endangers public safety and that involuntary commitment of persons in that class is necessary to protect the public, the determination of which individuals belong to *1428 that class is a judicial, not legislative, function. Thus, Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of dangerousness establishes an invalid classification, since it would permit a permanent conclusive presumption of dangerousness from proof of mental illness so long as it had once been proved the illness was causally related to or an aggravating factor in the commission of a criminal offense. Such conclusive presumption would violate due process since dangerousness is not universally and necessarily coexistent with mental illness, and a finding that a mental illness was once a contributing cause or aggravating factor in criminality does not change the fact that all former felons suffering mental illness are not dangerous or violent.

(8) Constitutional Law § 101--Equal Protection--Basis of Classification-- Criminal Conviction or Acquittal--Parolees--Mental Illness.

Pen. Code, § § 2962-2980, requiring certain mentally ill persons about to be paroled to accept inpatient mental treatment without proof of dangerousness, is subject to close scrutiny under the California Constitution (Cal. Const., art. I, § 7) in an equal protection analysis, since the statutory scheme deprives persons of their liberty. The law can withstand constitutional attack as discriminatory among similarly situated persons only if the government can demonstrate a compelling interest which justifies the law and that the distinction drawn by the statute is necessary to further that purpose. Because there is no demonstrable compelling interest in the continued confinement of mentally ill former prisoners simply because their mental illness continues, or that exclusion of a requisite finding of dangerousness is necessary to serve any legitimate government interest, the statutes violate equal protection. The difficulty of proof of dangerousness

does not constitute necessity for its complete elimination.

COUNSEL

Rowan W. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Morris Lenk, Karl S. Mayer and Bruce M. Slavin, Deputy Attorneys General, for Plaintiff and Respondent. *1429

ABBE, J.

Legislation, [FN1] effective July 1, 1986, requiring a person who had been sentenced to a determinate sentence prior to that date to be confined in a mental hospital as a condition of parole, violates constitutional ex post facto clauses. The legislation also violates equal protection because it mandates involuntary confinement and treatment of former prisoners who are mentally ill without proof of dangerousness.

FN1 Statutes 1985, chapter 1419, section 3. The provisions were originally found in Penal Code section 2960. They were amended and recodified without substantive change by Statutes 1986, chapter 858, to have separate section numbers (Pen. Code, § § 2962-2980). For easy reference, all sections are referred to by their present section numbers.

Appellant was convicted of forcible rape in violation of Penal Code [FN2] section 261, subdivision (2) and on June 29, 1983, was sentenced to six years in the state prison. With applicable credits he was to be released from custody on parole on September 10, 1986. Instead of being released, he was required to accept inpatient treatment through the Department of Mental Health under the statutory scheme under consideration. After trial in the superior court, he was found to be a severely mentally disordered offender subject to involuntary confinement and treatment under section 2962.

FN2 All further statutory references are to this code unless otherwise specified.

The confinement then ordered for appellant expired one year from the date he should have been released on parole. This appeal is therefore technically moot. However, since appellant is subject to repetition of this process, the issues are of recurring importance and time constraints make it likely any annual commitment will evade appellate review, we address the merits. [FN3] (See *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 167, fn. 2 [167 Cal.Rptr. 854, 616 P.2d 836].)

FN3 Appellant has been continued on parole for another year under section 2962 and is continuing to be confined for treatment as an inpatient at Atascadero State Hospital.

In 1983, when appellant was committed to prison, section 2960 (now § 2974 as amended) provided discretion to seek civil commitment of prisoners under the Lanterman-Petris-Short (hereafter LPS) Act, which was incorporated in part by reference in the Penal Code as an alternative to their release. Involuntary commitment under the LPS Act is applicable to all persons regardless of their former penal status who are proved to be gravely disabled or demonstrably dangerous to themselves or others. (See Welf. & Inst. Code, § § 5150, 5200, 5250, subd. (a), 5300, subds. (a)-(c).) If such confinement was not both sought and imposed, appellant would have been entitled to be released from confinement into the community. *1430

Section 2962 now mandates treatment for any person who meets all the following criteria: (1) Is about to be released on parole, [FN4] (2) has a severe mental disorder, as defined, (3) the mental disorder is not in remission or cannot be kept in remission without treatment, as defined, (4) whose severe mental disorder was one of the causes of or was an aggravating factor [FN5] in the commission of a crime for which the person was sentenced to prison, (5) whose crime was one in which the person used force or violence or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of section 243, and (6) who has been in treatment for the severe mental disorder for 90 days or more within the year prior to parole or release. [FN6]

FN4 Section 2970 also permits the same standards be applied for recommitment of persons who would otherwise be released without parole or whose parole has expired. Appellant is not such a person.

FN5 Ironically, mental disorders which do not constitute a defense under California insanity provisions (§ 25) are mitigating factors for purposes of sentencing. (See Cal.

Rules of Court, rules 416(e), 423(b)(2) and 425(b).) Consequently a mental illness which is causally related to criminal conduct may at the same time reduce the term of imprisonment and then result in custodial confinement for life.

FN6 The procedural provisions for commitment are not challenged. They are complex and need not be considered here.

The treatment mandated is inpatient (§ 2964) unless the patient can be safely and effectively treated on an outpatient basis, but if not released to outpatient status within 60 days the person may request a hearing before the Board of Prison Terms (BPT) where the Department of Mental Health must establish that inpatient treatment is necessary. (§ 2964, subd. (b).) This treatment can be continued under the same provisions so long as parole is continued and, as a condition thereof, treatment is mandated pursuant to section 2962. (§ 2964, subd. (c).)

These provisions apply to all persons affected who were incarcerated before as well as after January 1, 1986. (§ 2980.) It is therefore expressly retroactive to persons whose crimes which resulted in imprisonment were committed prior to the enactment of the Legislature so long as they had not earlier been released on parole. [FN7]

FN7 The provisions apply to all persons whether sentenced to a determinate term under section 1170 or to an indeterminate term either prior to the enactment of section 1170 or under section 1168. As appellant was a determinately sentenced prisoner we confine our consideration only to persons released on parole after serving a determinate term imposed pursuant to section 1170.

Ex Post Facto Violation

(1a) Appellant contends the retroactive application of these mandatory provisions violates the ex post facto clauses of the United States and California Constitutions (art I, § 9, cl. 3, and art I, § 9, respectively). We agree. ***1431**

(2) Two critical elements must be present for a statute to violate the ex post facto clause; (1) it must be a criminal or penal law which applies to events occurring prior to its effective date, and (2) it must substantially disadvantage the offender affected by it. (*In re Jackson* (1985) 39 Cal.3d 464, 469-477 [216 Cal.Rptr. 760, 703 P.2d 100].)

A law constitutes an ex post facto violation when it retrospectively (1) imposes criminal liability for conduct which was innocent when it occurred, or (2) increases the punishment prescribed for a crime, or (3) by necessary operation alters the situation of the accused to his disadvantage. (*Conservatorship of Hofferber, supra*, 28 Cal.3d 161, 180.) The mentally disordered offender provisions (MDO) of section 2962 et seq. both increase punishment and alter the situation of the accused to his disadvantage.

In order to determine whether retrospective laws are disadvantageous, we must look to the effect of the present system of laws compared to those in place at the time the offense was committed. (See *In re Stanworth* (1982) 33 Cal.3d 176, 186 [187 Cal.Rptr. 783, 654 P.2d 1311]; *Dobbert v. Florida* (1977) 432 U.S. 282, 294 [53 L.Ed.2d 344, 356-357, 97 S.Ct. 2290]; *Weaver v. Graham* (1981) 450 U.S. 24, 25 [67 L.Ed.2d 17, 20-21, 101 S.Ct. 960].)

(1b) At the time of appellant's offense he was subject to a determinate sentence (§ 1170) and had to be released on parole at the end thereof (§ 3000 subds. (a) and (d); *People v. Burgener* (1986) 41 Cal.3d 505, 529, fn. 12 [224 Cal.Rptr. 112, 714 P.2d 1251].) The Board of Prison Terms (BPT) had discretion to set such reasonable parole conditions as it deemed proper (§ 3053), including the condition of outpatient psychiatric counseling. (*In re Naito* (1986) 186 Cal.App.3d 1656 [231 Cal.Rptr. 506], also see § 3002.) The BPT could revoke his parole and recommit him for failure to abide by the conditions. (§ § 3056 and 3060.)

His total period of parole and custody on recommitment for revocation of parole could not exceed four years (§ 3057, subd. (a)) [FN8] unless he engaged in misconduct while confined on a parole revocation (§ 3057, subd. (c); also see § 3060.5.)

FN8 All references to this section are to the prior version under Statutes 1984, chapter 805, section 3.

When appellant committed his offense he could only have been confined involuntarily for evaluation and treatment on the same basis as all nonprisoners or parolees, that is, if he was mentally ill and gravely disabled (Welf. & Inst. Code, § § 5000, 5008, subd. (h)(1)) or dangerous. (Welf. & Inst. Code, § § 5000, 5250) (former Pen. Code, § 2960, now § 2974,

applicable to all prisoners other than those described in § 2962.) *1432

Under section 2962 the following changes occur. The persons described therein are required to be retained in physical custody by the Department of Mental Health (§ 2962) and must be treated on an inpatient basis for a minimum of 60 days (§ 2964) and may be retained on an inpatient basis for annual periods for life (§ § 2966, subd. (c), 2970) so long as their severe mental disorder is not in remission or cannot be kept in remission without treatment. Therefore, persons who are neither gravely disabled nor demonstrably dangerous but who meet the section 2962 criteria must undergo treatment on an inpatient and on outpatient basis during their parole term and may be required to do so indefinitely.

(3) Respondent argues that the legislation does not violate the ex post facto clauses because it is not penal, but rather therapeutic, and it does not disadvantage appellant as an accused. We disagree.

Respondent is, however, correct that a necessary determination is whether the statutes imprison appellant as a criminal or require compulsory treatment in involuntary confinement as a sick person. (See *Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 181 and *In re Gary W.* (1971) 5 Cal.3d 296, 301 [96 Cal.Rptr. 1, 486 P.2d 1201].) We believe section 2962 has overwhelming penal attributes and therefore constitutes part of appellant's punishment for his criminal offense.

Section 2960 states the legislative purpose in the enactment of section 2962 et seq.: "The Legislature finds that there are prisoners who have a treatable, severe mental disorder that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated. [FN[9]] Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public. Thirdly, the Legislature finds that in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission. [¶] The Legislature further finds and declares the Department of Corrections should evaluate each prisoner for severe mental *1433 disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community." [FN10]

FN9] It is interesting to note this declaration came just four years after the Legislature "recognize[d] and declare[d] that the commission of sex offenses is not in itself the product of mental diseases." (Stats. 1981, ch. 928, § 4.) Consequently it terminated prospectively an involuntary commitment scheme for mentally disordered sex offenders. (Former Welf. & Inst. Code, § § 6300 to 6330.) Many sex offenders will now "qualify" under the MDO scheme since their crimes definitionally involved the use of force or violence. (See e.g., § § 261, subd. (2), 288, subd. (b) and 288a, subds. (c) and (d)(1).)

FN10 While the provisions operate retroactively for prisoners incarcerated before the effective date of the legislation, it is of course impossible to retroactively evaluate and treat them. Consequently persons imprisoned before July 1, 1986, did not have this advantage during their terms.

The primary purpose of the legislation is to protect the public. The mechanism by which the public is being protected is by requiring confinement and treatment of some former prisoners who have severe mental disorders as defined by section 2962, subdivision (a).

The fact that a person is treated while confined involuntarily does not ipso facto make the confinement nonpenal. For example, section 2684 provides for the transfer of mentally ill prisoners to a state hospital for treatment during their period of imprisonment. By the terms thereof, the time spent in the hospital for treatment is credited toward their terms of imprisonment. Obviously this period of treatment is "penal" within the meaning of the ex post facto clauses. (Also see § 1364.)

The California Supreme Court has identified several criteria to determine whether a statute is criminal or civil. In *Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793] (hereafter *Cramer*) the court identified four features which resulted in its admittedly close determination that involuntary commitment of certain mentally retarded persons was not punishment: (1) it was not initiated in response or

necessarily related to any criminal acts, (2) it was of limited duration although renewable, (3) the person with the burden of proof was not necessarily a public prosecutor, and (4) the sole purpose of the legislation was the custodial care, treatment and protection of the person committed.

In contrast to the statutory scheme for the involuntary commitment of the mentally retarded, MDO commitments are: (1) necessarily related to the commission of and conviction and imprisonment for crimes involving use of force or violence or in which serious bodily injury was inflicted; (2) the commitment of MDO's can only be brought about by prison officials (§ 2962) or district attorneys (§ 2970); and (3) the sole purpose is not treatment for the safety of the person committed but is primarily protection of the public (§ 2960), the same purpose for imposing imprisonment for criminal conduct. (Cal. Rules of Court, rules 410(a) and 414(b).) The MDO commitment scheme has more penal features than that for mentally retarded persons. *1434

Other criteria were identified in *Conservatorship of Hofferber, supra*, 28 Cal.3d 161, at pages 181 and 182 in determining whether the involuntary extended confinement of persons gravely disabled due to incompetence to stand trial on felony charges and who are presently dangerous (hereafter GDI's) was punitive. The court specified the following factors leading to its conclusion this scheme was not punitive: (1) The commitment did not extend, directly or indirectly, any incarceration imposed on appellant for criminal conduct, (2) a criminal sentence would probably never be imposed, (3) the confinement did not arise from criminal conduct but from a mental condition, (4) the person committed would be placed in a state hospital or a less restrictive setting (see Welf. & Inst. Code, § 5358) rather than in a prison, and (5) the GDI commitment did not disadvantage the person as an accused because he or she was not forced to defend against a criminal adjudication. While a MDO commitment shares some of these civil attributes, it differs in important respects.

An MDO commitment, unlike one for GDI's, results directly from the commission of a crime and a period of imprisonment as well as from the mental condition. Failure to follow the treatment plan during the period of parole can result in a return to prison on parole revocation and it may therefore extend indirectly the incarceration of appellant as a result of his criminal conduct. Specified prestatute criminal conduct is both a requisite and the reason for custodial confinement.

MDO's may be forced to defend against a criminal adjudication since whether the crime which resulted in the prison commitment "involved the use of force or violence or caused serious bodily injury" may not have been adjudicated at the time of conviction. Unlike other involuntary commitment schemes which apply either to persons involved in certain specified offenses (see e.g., Welf. & Inst. Code, § 3052) or to any felony offender (see e.g., § 1026.5, subd. (b)(1)) the MDO scheme applies to persons who committed any felony offense only if it involved the use of force or violence or if it involved inflicting serious bodily injury. Except in those instances where force, violence or serious bodily injury are elements of the offense or an enhancement thereof, a new adjudication relating to the offense may be required.

These differences between the MDO commitment scheme and those considered in *Cramer* and *Hofferber* require us to find that it is essentially penal in nature and consequently it is subject to the limitations of the ex post facto clauses.

(1c) We find the retroactive application of the MDO provisions to persons whose crimes were committed prior to their effective date violates the *1435 ex post facto clauses of the United States and California Constitutions because the provisions: (1) are applicable only to persons who were convicted for certain crimes and who are still serving their terms of imprisonment on the operative date of the legislation (§ 2962), and mandate a potentially onerous change in the terms of parole which is part of the sentence for a criminal conviction (§ § 1170, subd. (e), 3000); [FN11] and (2) potentially could result in custody for life in a state hospital setting without proof that the person is either gravely disabled or demonstrably dangerous as a result of mental illness.

FN11 This feature alone may suffice to establish an ex post facto violation. In *In re Stanworth, supra*, 33 Cal.3d 176, the change from the discretionary parole release date setting provisions in effect under the indeterminate sentencing law (ISL) to the directory (mandatory) provisions under the determinate sentencing law (DSL) were found to be ex post facto as applied to persons whose offenses were committed prior to DSL. (Also see *Weaver* v. *Graham, supra*, 450 U.S. 24 (change from mandatory to discretionary good time credits violates clause) and *Lindsey* v. *Washington* (1937)

301 U.S. 397 [81 L.Ed. 1182, 57 S.Ct. 797] (change from discretionary to mandatory maximum sentence violates clause).)

Equal Protection

(4a) We also find the MDO provisions violate the equal protection clauses of the United States and California Constitutions. (U.S. Const., 14th Amend. and Cal. Const., art I, § 7.)

Equal Protection Under the United States Constitution

(5) The equal protection clause of the United States Constitution requires at a minimum that persons standing in the same relation to a challenged government action will be uniformly treated. (*Reynolds* v. *Sims* (1964) 377 U.S. 533 [12 L.Ed.2d 506, 84 S.Ct. 1362].) Traditionally, social and economic legislation will be upheld if the classification drawn by the statutes is rationally related to legitimate state interests. (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432 [87 L.Ed.2d 313, 105 S.Ct. 3249].) When the classification touches on a fundamental right, it must be judicially determined under the strictest standard whether it is necessary to promote a compelling government interest. (*Shapiro* v. *Thompson* (1969) 394 U.S. 618 [22 L.Ed.2d 600, 89 S.Ct. 1322].) Whether a right is fundamental depends on whether it is implicitly or explicitly guaranteed by the federal Constitution. (*San Antonio School District v. Rodriguez* (1973) 411 U.S. 1 [36 L.Ed.2d 16, 93 S.Ct. 1278].)

Although freedom from involuntary custodial confinement would appear to be the equivalent of "liberty" explicitly guaranteed by the Fifth and Fourteenth Amendments, the United States Supreme Court has not ***1436** expressly held that classifications touching upon liberty are fundamental for these purposes. In *Jones v. United States* (1983) 463 U.S. 354 [77 L.Ed.2d 694, 103 S.Ct. 3043] and *Baxstrom v. Herold* (1966) 383 U.S. 107 [15 L.Ed.2d 620, 86 S.Ct. 760], both of which related to challenged classifications in substance and procedure for involuntary commitment, the court appears to use the traditional rational basis test. Consequently for purposes of federal law analysis so shall we.

Any equal protection challenge requires a determination whether the groups which are differently treated are similarly situated for purposes of the law. If they are not, no equal protection claim is applicable. (*Tigner* v. *Texas* (1940) 310 U.S. 141, 147 [84 L.Ed. 1124, 1128, 60 S.Ct. 879, 130 A.L.R. 1321].)

(4b) Appellant claims, and we agree, that an MDO is similarly situated for purposes of the law to other adult persons involuntarily committed for mental health treatment. One purpose of all of these pertinent involuntary commitment schemes is the protection of the public from the dangerous mentally ill and their involuntary commitment for treatment, for renewable periods, until they no longer pose a danger to the public whether or not they remain mentally ill. [FN12]

FN12 See Penal Code section 1026.5, subdivision (b)(1) (person posing substantial danger of physical harm to others by reason of mental disease); Welfare and Institutions Code, section 1801.5 (wards physically dangerous to public due to mental deficiency), section 5300, subdivisions (a)-(c) (persons demonstrating danger of inflicting substantial physical harm to others due to mental defect), section 6500 (mentally retarded persons dangerous to themselves or others).

The MDO commitment scheme, however, contains one critical and significant difference from all the others; it does not require proof of any present dangerousness as a result of mental illness for commitment or recommitment. Because there is no reasonable basis to exempt MDO's from this proof requirement merely because they are at the end of their prison term, we find the provisions violate the equal protection clause of the Fourteenth Amendment of the United States Constitution.

MDO's are most similarly situated to two groups of mentally ill persons subject to involuntary commitment in California: those persons found not guilty by reason of insanity (NGI) and recommitted after expiration of the maximum term of imprisonment which could have been imposed on them (§ 1026.2) and those mentally ill persons, now adults, who have been recommitted after expiration of the potential maximum term of imprisonment for criminal conduct as wards of the state (MDW). (Welf. & Inst. Code, § § 602, 707, subd. (b), 1731.5.) ***1437**

An MDO, like the MDW and an NGI, has been adjudged to have committed a criminal offense. Both the MDO and NGI are committed after proof of a causal connection between their mental illness and the crime which they committed [FN13] (§ 2962;

CALJIC 4.00 (1979 rev.) and *In re Moye* (1978) 22 Cal.3d 457, 462 [149 Cal.Rptr. 491, 584 P.2d 1097].) Unlike the NGI and MDW the MDO, however, is not confined only on proof of dangerousness and is not subject to release when he or she is no longer proven to be dangerous. The MDO alone is subject to commitment and recommitment until such time as his or her severe mental disorder is in remission without proof of present dangerousness. The sole basis for the distinction is that MDO's are at the end of their prison terms.

> FN13 This was true at least until June 9, 1982, when the insanity standard was changed. (Now see § 25 and *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752].) It remains true of persons committed under the pre-1982 law when the standard used was that set forth in *People v. Drew* (1978) 22 Cal.3d 333 [149 Cal.Rptr. 275, 583 P.2d 1318] (see CALJIC 4.00 (1979 rev.)) who continue to be recommitted under section 1026.2.

Like those commitment schemes considered by the United States Supreme Court in *Jackson v. Indiana* (1972) 406 U.S. 715 [32 L.Ed.2d 435, 92 S.Ct. 1845] and *Baxstrom* v. *Herold, supra*, 383 U.S. 107, we find the MDO commitment scheme violates the equal protection clause of the Fourteenth Amendment because it has subjected appellant to a commitment standard more lenient and a release standard more stringent than that required for the involuntary commitment and treatment of any other mentally ill person in California for the arbitrary reason that he is nearing completion of service of his term of imprisonment.

In *Jackson* the court found the indefinite commitment of persons who were incompetent to assist in their own defense on a lesser standard with a more difficult standard of release than all others violative of equal protection. The court found the basis of the distinction of two pending criminal charges was insufficient to justify the difference in treatment.

In *Baxstrom* the court considered a commitment scheme closely analogous to that here. There the state scheme provided for involuntary commitment of persons whose prison term was about to expire which differed from that applicable to all other persons in two different ways. First, it denied a jury trial on the issue of mental illness to the prisoner but gave it to all others. Second, it required a determination of dangerousness for all mentally ill persons committed to the Department of Corrections rather than to the state hospital except prisoners nearing the end of their term. The Supreme Court found both distinctions irrational and therefore violative of equal protection. *1438

The MDO commitment scheme does not suffer the first infirmity identified in *Baxstrom*; it grants the same procedural protections of a jury trial and unanimous verdict applicable to all others. It suffers the second infirmity, however; it permits commitment without proof of dangerousness, a standard applicable to all others involuntarily confined and treated for mental illness. Since the basis for the distinction, i.e., nearing the end of a prison term, is the same as that considered in *Baxstrom*, we too find it is irrational and violative of the equal protection guaranteed by the United States Constitution.

Respondent argues the MDO is not similarly situated to any other involuntarily committed person because of his parole status. This fact, however, is irrelevant for purposes of equal protection analysis for several reasons.

(6) Parole in California is different from the traditional concept of parole. In *Morrissey v. Brewer* (1972) 408 U.S. 471, 477 [33 L.Ed.2d 484, 492, 92 S.Ct. 2593], the court defined parole as "... release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." In California determinately sentenced prisoners serve the complete term specified under section 1170, less any applicable credits for work performed under sections 2931 or 2933 and are then placed on parole for three years regardless of the length of the term served. Under section 3000, this parole period is an essential part of the actual sentence and is not dependent on early release.

(4c) The question for equal protection purposes is not whether potential MDO's are similarly situated to other dissimilarly treated groups for all purposes but rather whether they are similarly situated for purposes of the law challenged. Parole status has been held to be enough to distinguish parolees from all others as to the quantity and quality of procedural due process required for incarceration (*Morrissey v. Brewer, supra*, 408 U.S. 471) or as to rights to be free from warrantless searches and seizures. (*People v. Burgener, supra*, 41 Cal.3d at p. 532.) This is because of the purpose of those restrictions, which

are to promptly punish or rectify a breach of conditions of traditional parole and to facilitate supervision and surveillance to discover breaches. However, parole status is irrelevant to the purpose of MDO involuntary commitment or treatment.

As noted, the purposes of this statutory scheme are twofold. One is to protect the public from mentally ill persons deemed dangerous by the Legislature; the other is to treat these mentally ill persons. (§ 2960.) The impending release on parole, the basis of defining the group, has nothing to do with either purpose. Any danger to public safety has nothing to do with their *1439 status as parolees per se but arises from their release from prison into the general population. Therefore, these are not parole condition cases.

That parole status has nothing to do with any purpose of the act is indicated by features of the act itself: the MDO confinement and treatment are not limited to the parole period (§ 2970); existing parolees, including those released just prior to July 1, 1986, are not covered by the act even if they have all of the other pertinent characteristics defined in the act (Stats. 1985, ch. 1419, § 3; § 2962, subd. (d)) [FN14] and mentally ill parolees in remission at the time scheduled for their release on parole, even though they suffer a relapse after release, are not covered by the act. Obviously the Legislature was not relying on dangers unique to persons on parole in enacting the legislation.

> FN14 Persons convicted of qualifying felonies but not sentenced to imprisonment also do not come under the act even if presently on probation. Such persons would appear to otherwise be in the same situation as potential MDO's as a threat to public safety and in need of treatment.

For the articulated purposes of the act, public safety and treatment of the mentally ill prior offender, we find appellant's situation identical to an NGI whose continuing mental illness once caused a criminal violation and similar to MDW's who also engaged in criminal conduct and remain mentally ill at the time scheduled for release.

The respondent argues that even assuming MDO's are similarly situated to NGI's for the legitimate purposes of the law no factual finding on the issue of present dangerousness is required because the Legislature has found MDO's to be dangerous and so stated in section 2960. (7) Great deference is due a legislative determination that a certain class of persons endangers public safety and that involuntary commitment of persons in that class is necessary to protect the public. However, a determination of which individuals belong to that class is a judicial, not legislative, function. (See *United States v. Brown* (1965) 381 U.S. 437 [14 L.Ed.2d 484, 85 S.Ct. 1707].) To determine otherwise would permit a permanent conclusive presumption of dangerousness from proof of mental illness so long as it had once been proved the illness was causally related to or an aggravating factor in the commission of a criminal offense.

A conclusive presumption of one fact from proof of another violates the due process clause when the existence of the fact presumed is not universally or necessarily coexistent with the fact proved. (*Vlandis v. Kline* (1973) 412 U.S. 441 [37 L.Ed.2d 63, 93 S.Ct. 2230].) Dangerousness is not universally and necessarily coexistent with unremitted mental illness. A finding that a mental illness was once a contributing cause or aggravating factor in *1440 criminality does not change the fact that all former felons suffering mental illness are not dangerous or violent. This fact is implicitly recognized by the several California involuntary commitment schemes requiring proof of both present mental illness and present dangerousness without regard to the criminality of the person.

Respondent claims such a legislative determination of dangerousness has been found constitutional under both the due process and equal protection clauses by the United States Supreme Court in *Jones v. United States* (1983) 463 U.S. 354 [77 L.Ed.2d 694, 103 S.Ct. 3043].) The court's actual holdings do not support this conclusion.

Jones challenged (1) the constitutionality of the automatic commitment of persons found not guilty of an offense by reason of insanity, and (b) the distinctions regarding the burden of proof between persons committed after a finding of NGI and those civilly committed. The court upheld the statutory scheme on both substantive and procedural grounds. In so doing, it approved a presumption of continuing insanity which was conclusive in effect only for 50 days following a jury finding of not guilty by reason of insanity. At that time and at six-month intervals the acquittee had the same opportunity as other civilly committed persons to secure release upon proof by a preponderance of the evidence that he was either no longer mentally ill or dangerous. Consequently, in effect any presumption of insanity

was rebuttable at all hearings following the automatic 50-day commitment.

The presumption of dangerousness approved by the court in *Jones* was also a rebuttable one; it did not completely substitute the judgment of the Legislature as to dangerousness for a jury determination thereof. Unlike the statutory scheme here, the person involuntarily committed could secure his release in as little as 50 days following conviction upon his showing [FN15] he was not dangerous even if he remained mentally ill. Here, appellant is in effect conclusively presumed dangerous so long as he remains mentally ill regardless of the length of time since his criminal offense and conviction. [FN16] Clearly, *Jones* does not support the respondent's position.

> FN15 In contrast to this holding, our Supreme Court in *In re Moye, supra*, 22 Cal.3d at page 466, rejected placing the burden of proof on the insanity acquittee after the expiration of the maximum term of potential imprisonment.
>
> FN16 Our Supreme Court has expressly rejected a permanent conclusive presumption of dangerousness because, inter alia, the passage of time by itself diminishes the validity of the presumption. (*Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 177.)

(4d) We therefore hold it is unreasonable and arbitrary to exempt MDO's from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment. The commitment scheme ***1441** under consideration violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Equal Protection Under California Constitution

(8) Because the statutory scheme at issue deprives persons of their liberty, i.e., freedom from involuntary confinement and treatment for mental illness, it is subject to close scrutiny under the California Constitution (art. I, § 7). (*Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 171, fn. 8; see *In re Gary W., supra*, 5 Cal.3d at p. 306.) The law can withstand constitutional attack as discriminatory among similarly situated persons only if the government can demonstrate a compelling interest which justifies the law and that the distinction drawn by the statute is necessary to further that purpose. (*Ibid.*)

We find respondent has failed to demonstrate either a compelling interest in the continued confinement of mentally ill former prisoners simply because their mental illness continues or that exclusion of a requisite finding of dangerousness is necessary to serve any legitimate government interest.

The only justification presented here for the plan is the statements of the Legislature in section 2960 that unremitted mental illness of prisoners is a danger to the public if those prisoners were mentally ill when their offense was committed and that fact was connected to the violent commission of a felony. If the mere declarations of the legislative branch were sufficient to satisfy the strict scrutiny test, no judicial review of the constitutionality of statutes would be necessary.

The legislative history of the MDO scheme does not demonstrate that persons whose mental illness once was related to felonious criminal conduct were actually found to pose a unique danger to the public so long as their mental illness remains based on any studies or hearings. The concern of the Legislature was that the determinate sentencing law which required the release of prisoners at the expiration of a fixed amount of time, combined with the revisions of the insanity law which decreased the number of mentally ill persons found not guilty by reason of insanity and subject to potential life commitment, had resulted and would continue to result in the release of persons who were mentally ill and might reoffend. [FN17]

> FN17 A statement on Sen. Bill No. 1296 to the Assembly Public Safety Committee dated August 26, 1985, opined "SB 1296 will solve the dilemma that has perplexed the Legislature since enactment of the determinate sentencing law how to control criminals who have serious mental illness without disturbing the protection of the LPS Act for civilians."

The then existing system for commitment of mentally ill parolees under the LPS Act was deemed unsatisfactory by the legislative proponents ***1442** because it required proof of demonstrable present dangerousness; this proof was viewed as problematic to achieve by both courts and psychiatrists; and courts, according to the author, insisted on recent evidence to support a finding of future dangerousness and such proof was difficult to obtain in the case of inmates who lived in a highly restrictive

environment. It was viewed as necessary to fill a loophole in the determinate sentencing law which left officials helpless to avoid the release of prisoners who still pose a serious risk to society. (See Conference Completed Analysis of Sen. Bill No. 1296, prepared by the office of Sen. Floor Analysis for use by Sen. Rules Com., pp. 2 and 4.)

Nothing in the legislative history however indicates that there was any factual basis upon which the Legislature concluded that all persons whose mental illness once caused or aggravated a criminal offense were again going to reoffend unless their mental illness was in remission. [FN18] In fact, the difficulty of sustaining the proof requirement of dangerousness was the sole apparent basis for its elimination, not any perceived knowledge of its universal existence from unremitted mental illness. Consequently, the respondent has failed to demonstrate a compelling state interest in involuntarily committing and/or treating all presently unremitted mentally ill former prisoners released after July 1, 1986, whose illness was once connected to the commission of a violent felonious offense.

> FN18 At best, the bill's author and others simply cited instances where mentally ill persons were released from LPS confinement or had once been diagnosed as mentally ill and subsequently committed violent crimes. No evidence of a connection between mental illness and violent offenses was presented in any of the legislative history documents nor is there any evidence that mentally ill offenders are more likely to be recidivists than others.

Difficulty of proof of dangerousness under the LPS standard does not constitute necessity for its complete elimination; if it did, the Legislature would be free to vary the burden of proof as to various elements of criminal offenses depending on the difficulty of proof. The LPS standard of dangerousness, the highest and most narrowly drawn among California's various dangerousness criteria set forth in different involuntary commitment schemes, is not constitutionally necessary. (See *Conservatorship of Hofferber, supra*, 28 Cal.3d at pp. 171-172.) There has been no showing that the complete elimination of proof of some degree of present dangerousness is necessary to protect the public.

It must be remembered that appellant and those in this class of MDO committees are all legally sane and have been subject to punishment for their offenses for the term prescribed by the Legislature. At the end of their terms even the most dangerous offenders and most likely recidivists are subject to release so long as they are not mentally ill as defined. Unless ***1443** proven to be dangerous the equal protection clause requires the mentally ill inmate must also be released from custody.

It is unnecessary to address the merits of appellant's other constitutional challenges to the MDO scheme.

The judgment is reversed. Appellant is entitled to parole on terms without reference to the requirements of section 2962 et seq.

Stone (S. J.), P. J., and Gilbert, J., concurred.

Respondent's petition for review by the Supreme Court was denied February 2, 1989. ***1444**

Cal.App.2.Dist.,1988.

People v. Gibson

END OF DOCUMENT

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1989-90 Regular Session

SB 1625 (McCorquodale)
As Amended April 27
Hearing date: May 2, 1989
Penal Code
JRP

SB 1625

MENTALLY DISORDERED OFFENDER PROGRAM

HISTORY

Source: Author

Prior Legislation: None

Support: Joint Committee for Revision of the Penal Code; Governor's Office; Attorney General of California

Opposition: California Attorneys for Criminal Justice

KEY ISSUE

SHOULD THE MENTALLY DISORDERED OFFENDER (MDO) PROGRAM BE REENACTED AS MODIFIED?

SHOULD THE REENACTED MDO PROGRAM BE APPLIED RETROACTIVELY TO THOSE WHO COMMITTED THEIR CRIMES ON OR AFTER JANUARY 1, 1986?

PURPOSE

Existing law provides for the confinement of certain offenders with mental disorders in a mental institution upon the person's eligibility for parole. However, the existing statutory scheme was declared unconstitutional because it was applied retroactively to persons originally confined prior to the effective date of the legislation on July 1, 1986. The statute was also held to violate the due process clause because it required involuntary confinement of former prisoners without proof that their mental condition presented a danger to others.

This bill would amend and reenact the MDO Program. In order to confine a former prisoner by reason of the prisoner's severe mental disorder the bill would require a showing that the person

(More)

representative substantially dangerous physical harm to others. However, the bill would permit the examination to be conducted by a psychiatrist or psychologist and would not require proof of a recent overt act. The person would have the right to hearing to contest the commitment.

The bill would also continue a provision under existing law permitting a district attorney to seek a one year extension of the involuntary commitment beyond the parole. However, the District Attorney must prove, beyond a reasonable doubt, that the person, by reason of his or her severe mental disorder, represents a substantial danger of physical harm to others.

The bill would apply retroactively to all persons who committed their crime on or after January 1, 1986.

The purpose of this bill is to reinstate the Mentally Disordered Offender Program.

COMMENT

1. Retroactive application may be unconstitutional

The bill as written may be unconstitutional since it applies what amounts to an ex-post-facto extension of a prison term for those who commit crimes prior to the date this bill is enacted. See People v. Gibson (1988) 204 Cal.App.3d 1425. The Joint Committee staff argues that it is not an ex-post facto law because persons who committed crimes after the enactment of the original unconstitutional statute were on notice of the MDO Program. However, there is no authority for the argument that the prior existence of an invalid stature is sufficient to give persons notice of a new statute with new and different standards.

2. Standard for commitment specified

The bill would appear to solve the due process problem in the original statute which allowed a commitment without a finding that the person posed a threat to others. The proposed standard of substantial danger of physical harm to others is stronger than the civil commitment language of the Lanterman-Petris-Short Act (see Welfare and Institutions Code Section 5150).

(More)

Opponents of the bill do not dispute the validity of the proposed standard to determine the involuntary commitment of a MDO.

3. Public policy

CACJ objects to the MDO program in principle because it requires a mentally ill offender to serve his or her sentence in prison before treatment is provided in an appropriate facility. This subjects the inmate to pressures and an environment which may exacerbate his or her mental problems. It also results in an extended term of confinement. CACJ feels that it is fundamentally unfair to confine a person for a prison term and then require an additional term of confinement for treatment.

CACJ points out that existing law permits the transfer of a prison inmate to a mental hospital for treatment during the term of imprisonment, and asserts that this procedure is a better alternative than reenactment of the MDO Program.

The Joint Committee for Revision of the Penal Code is concerned that if the bill is not enacted it may be necessary to release some mentally disordered offenders who are currently confined.

****

C

THE PEOPLE, Plaintiff and Respondent,
v.
JESSE ROBINSON, Defendant and Appellant.
No. B107563.

Court of Appeal, Second District, California.

Apr 20, 1998.

SUMMARY

The trial court found defendant to be a mentally disordered offender (MDO) pursuant to Pen. Code, § 2962 et seq., notwithstanding that the date of his underlying offenses was after the MDO statutory scheme was declared unconstitutional in a 1988 decision by the Court of Appeal, but before the Legislature amended the statutes effective July 1989 to comply with that decision. (Superior Court of San Luis Obispo County, No. F248907, Teresa Estrada-Mullaney, Judge.)

The Court of Appeal affirmed the judgment, holding that the trial court properly found defendant to be a mentally disordered offender. The retroactive application of a nonpenal statute does not violate ex post facto laws, and the MDO scheme is a nonpunitive, civil law, despite the scheme's placement in the Penal Code. The Legislature has expressly declared that the MDO law provides prisoners with a "civil hearing" to determine whether they meet the criteria of the MDO scheme (Pen. Code, § § 2966, subd. (b), 2972, subd. (a)). The MDO scheme does not implicate the two primary objectives of criminal punishment: retribution or deterrence. Rather, the MDO scheme is concerned with two objectives, neither of which is penal: protection of the public and providing mental health treatment for certain offenders who are dangerous and suffering from severe mental illnesses. (Opinion by Stone (S. J.), P. J., with Gilbert and Yegan, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Criminal Law § 191--Mentally Disordered Offenders--Retroactive Application of Statute--Ex Post Facto Analysis--Statute as Nonpunitive Civil Law.

The trial court properly found defendant to be a mentally disordered offender (MDO) pursuant to Pen. Code, § 2962 et seq., notwithstanding that the date of his underlying offenses *349 was after the MDO statutory scheme was declared unconstitutional in a 1988 decision by the Court of Appeal, but before the Legislature amended the statutes effective July 1989 to comply with that decision. The retroactive application of a nonpenal statute does not violate ex post facto laws, and the MDO scheme is a nonpunitive, civil law, despite the scheme's placement in the Penal Code. The Legislature has expressly declared that the MDO law provides prisoners with a "civil hearing" to determine whether they meet the criteria of the MDO scheme (Pen. Code, § § 2966, subd. (b), 2972, subd. (a)). The MDO scheme does not implicate the two primary objectives of criminal punishment: retribution or deterrence. Rather, the MDO scheme is concerned with two objectives, neither of which is penal: protection of the public and providing mental health treatment for certain offenders who are dangerous and suffering from severe mental illnesses.

[See 3 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 1747A.]

COUNSEL

Kent Douglas Baker, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, Marc E. Turchin and Kent J. Bullard, Deputy Attorneys General, for Plaintiff and Respondent.

STONE (S. J.), P. J.

Jesse Robinson appeals the trial court's judgment finding him to be a mentally disordered offender (MDO) pursuant to Penal Code section 2962 et seq. [FN1] We affirm on the ground the MDO statutory scheme is civil and does not violate the ex post facto clauses of the federal and state Constitutions.

FN1 All statutory citations henceforth will refer to the Penal Code.

Appellant was convicted of two counts of involuntary manslaughter. (§ 192, subd. (b).) He was sentenced to state prison and eventually paroled. After appellant violated his parole, the Board of Prison Terms (BPT) determined he met the statutory MDO criteria. (§ 2962.) He was remanded to Atascadero State Hospital. A court trial was conducted to review the BPT's determination. (§ 2966, subd. (b).) The court upheld the BPT's decision. *350

(1) Appellant contends the trial court erred by denying his motion, arguing that the application of the MDO law violated the federal and state ex post facto clauses. He bases his contention on the date of his underlying offenses-January 16, 1989-which was during the period *after* the MDO statutory scheme was declared unconstitutional in *People v. Gibson* (1988) 204 Cal.App.3d 1425 [252 Cal.Rptr. 56] (*Gibson*) and *before* the Legislature amended the statutes effective July 1989 to comply with *Gibson*. Appellant argues there was no valid MDO statute in existence at the time of his offenses. He states that retroactively applying the amended, post-*Gibson* statutory scheme increases the punishment for his offenses beyond the punishment available when his offenses were committed. (*People v. McVickers* (1992) 4 Cal.4th 81, 84 [13 Cal.Rptr.2d 850, 840 P.2d 955].)

The parties dispute whether the inpatient mental treatment required by the MDO statutes is penal or nonpenal. The retroactive application of a nonpenal statute does not violate ex post facto laws. (1 Witkin, Cal. Criminal Law (2d ed. 1988) Introduction to Crimes, § 19, p. 25, citing *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 182 [167 Cal.Rptr. 854, 616 P.2d 836].) Appellant here argues the MDO treatment scheme is a punitive, penal law. Respondent argues the MDO scheme is a nonpunitive, civil law. We agree with respondent.

In *Gibson*, we held the MDO law did not require proof of present dangerousness, a requirement applicable to other similarly situated mentally ill offenders subject to involuntary commitment, and therefore violated the federal and state equal protection clauses. The Legislature responded by amending the law to require proof that a defendant represents a substantial danger of physical harm to others prior to commitment or recommitment to an inpatient facility or an outpatient program. (*People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826, 830 [58 Cal.Rptr.2d 32] (*Myers*).)

We also stated in *Gibson* that the MDO scheme was essentially penal in nature and consequently was subject to the limitations of the ex post facto clauses. (204 Cal.App.3d at p. 1434.)

In *Kansas v. Hendricks* (1997) 521 U.S. 346 [117 S.Ct. 2072, 138 L.Ed.2d 501] (*Hendricks*), the United States Supreme Court decided the constitutionality of Kansas's Sexually Violent Predator Act, a law which established civil commitment procedures for repeat sexual offenders. The act became effective shortly before Hendricks, an inmate who had a long history of sexually abusing children, was scheduled for release from prison. Hendricks argued that, since he was convicted before the law was enacted, application of the law violated the federal constitutional ban on ex post facto statutes. He asserted the act established criminal proceedings and hence was punitive. *351 (*Hendricks, supra,* 521 U.S. at pp. ___, ___ [117 S.Ct. at pp. 2076-2077, 2081-2082, 138 L.Ed.2d at pp. 508, 514].)

The Supreme Court decided the Kansas Legislature intended the act to establish a civil proceeding. (*Hendricks, supra,* 521 U.S. at pp. ___, ___ [117 S.Ct. at pp. 2081-2082, 138 L.Ed.2d at pp. 514-515].) The Legislature described the act as creating a "civil commitment procedure" and placed it in the state's probate code.

The law further did not implicate the two primary objectives of criminal punishment, retribution or deterrence. It was not retributive since the prior criminal conduct was used solely to establish a mental abnormality or to support a finding of future dangerousness. (*Hendricks, supra,* 521 U.S. at p. ___ [117 S.Ct. at p. 2082, 138 L.Ed.2d at p. 515].) The law did not function as a deterrent since the persons subject to the law were unlikely to be deterred by the threat of confinement, and the conditions of confinement were essentially the same conditions placed on any involuntarily committed patient in the state mental institution. (*Id.*, at pp. ___-___ [117 S.Ct. at pp. 2082-2083, 138 L.Ed.2d at pp. 515-516].) The potentially indefinite duration of confinement under the act was not punitive since the maximum amount of time a person could be confined pursuant to a single judicial proceeding was one year. (*Id.*, at p. ___ [117 S.Ct. at pp. 2082-2083, 138 L.Ed.2d at p. 516].) "This requirement ... demonstrates that Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness." (*Ibid.*)

Regarding Hendricks's argument that the state's use of criminal procedural safeguards made the law criminal in nature, the Supreme Court held that such safeguards merely demonstrated the Legislature's "great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution." (*Hendricks*, *supra*, 521 U.S. at pp. ___, ___ [117 S.Ct. at p. 2083, 138 L.Ed.2d at pp. 516-517].)

The court concluded: "Where the State has 'disavowed any punitive intent'; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.... Our conclusion that the ***352** Act is nonpunitive thus removes an essential prerequisite for ... Hendricks' ... *ex post facto* claim []." (*Hendricks*, *supra*, 521 U.S. at p. ___ [117 S.Ct. at p. 2085, 138 L.Ed.2d at p. 519].)

Hendricks was decided nine years after our decision in *Gibson*. Its reasoning is sound and supersedes our ruling in *Gibson* on the ex post facto issue. [FN2] *Hendricks*'s analysis of the noncriminal features of Kansas's sexually violent predator law applies equally to California's MDO law. The features of the law analyzed in *Hendricks* are substantially similar to the features of the MDO law (521 U.S. at p. ___ [117 S.Ct. at pp. 2085-2086, 138 L.Ed.2d at p. 519]), except that the MDO law governs the mental health treatment of a different type of offender and is placed in the Penal Code instead of a civil law code.

> FN2 Our reliance in *People v. Jenkins* (1995) 35 Cal.App.4th 669, 672-674 [41 Cal.Rptr.2d 502], on *Gibson*'s ruling, that the MDO statutory scheme could be applied so as to violate the prohibition against ex post facto laws, also is superseded by *Hendricks*. (See also our dicta in *People v. Superior Court (Jump)* (1995) 40 Cal.App.4th 9, 12-13 [46 Cal.Rptr.2d 829], stating that MDO commitments are penal in nature.)

Hendricks also supports a post-*Gibson* California appellate case, *Myers*, which holds that the MDO law is civil, not penal, as expressly described by the Legislature in sections 2966, subdivision (b), and 2972, subdivision (a). (50 Cal.App.4th at pp. 834, 835.) *Myers* describes the MDO scheme as being concerned with two objectives, neither of which is penal: protection of the public, and providing mental health treatment for certain offenders who are dangerous and suffering from severe mental illnesses. (*Id.*, at pp. 837-841.)

In view of the Legislature's express declaration that the MDO law provides prisoners with a "civil hearing" to determine whether they meet the criteria of the MDO scheme (§ § 2966, subd. (b), 2972, subd. (a)), the scheme's placement in the Penal Code is not a material feature in differentiating it from the mentally ill offender scheme in *Hendricks*.

The trial court here properly denied appellant's ex post facto violation motion. The judgment is affirmed.

Gilbert, J., and Yegan, J., concurred. ***353**

Cal.App.2.Dist.,1998.

People v. Robinson

END OF DOCUMENT

H

THE PEOPLE, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; EVON MYERS, Real Party in Interest.
No. B103647.

Court of Appeal, Second District, Division 4, California.

Nov 4, 1996.

SUMMARY

An alleged mentally disordered offender, under the Mentally Disordered Offender (MDO) Law (Pen. Code, § 2960 et seq.), was sentenced to state prison for seven years following his plea of guilty to assault with a knife and commission of great bodily injury and his admission that he had previously been convicted of a serious felony. At the expiration of his sentence, he was released on parole on condition that he accept treatment for his mental disorder through a community outpatient treatment program pursuant to Pen. Code, § 2962. Shortly before his parole termination date, the People filed a petition in the trial court to continue involuntary treatment, pursuant to Pen. Code, § 2970, alleging that the individual had a severe mental disorder that either was not in remission or could not be kept in remission if his treatment were not continued and that, by reason of his severe mental disorder, he represented a substantial danger of physical harm to others. The trial court dismissed the petition on the ground that the MDO Law was penal in nature and therefore was an ex post facto law when applied to this individual in that he committed his predicate crime prior to passage of legislation that cured previously identified constitutional defects in the law. (Superior Court of Los Angeles County, Nos. ZM001828 and A928026, Harold E. Shabo, Judge.)

The Court of Appeal granted the People's petition for a writ of mandate and directed the trial court to vacate its order dismissing the People's petition for extended commitment and to proceed on the underlying petition as required by the MDO Law. The court held that the People had a right to appeal the trial court's order dismissing their petition to continue involuntary treatment, since MDO proceedings are civil and the order dismissing the petition was a final judgment. Further, the petition presented a question of substantial right warranting mandamus review, since there was no evidence that the individual could have been detained under Welf. & Inst. Code, § 5150, on the ground that he was "gravely disabled," and thus the People did not have an adequate remedy at law and were faced with a potentially *827 dangerous individual who allegedly needed treatment. The court further held that the MDO Law's extended treatment provisions have no penal consequences when applied to mentally disordered offenders whose parole is completed. Therefore, the law was not ex post facto when applied to this individual. (Opinion by Baron, J., with Epstein, Acting P. J., and Hastings, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Criminal Law § 7--Prohibition by Law--Ex Post Facto Laws-- Constitutional Analysis.
The ex post facto clause of the federal and state Constitutions (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9) prohibits three legislative categories, including legislation that punishes as a crime an act previously committed, which was innocent when done, legislation that makes more burdensome the punishment for a crime, after its commission, and legislation that deprives one charged with crime of any defense available according to law at the time when the act was committed. Although the Latin phrase "ex post facto" literally encompasses any law passed after the fact, the constitutional prohibition on ex post facto laws applies only to penal statutes that disadvantage the offender affected by them.

(2) Criminal Law § 635--Appellate Review--Appealable Judgments and Orders-- Appeal by People--Dismissal of People's Petition to Extend Involuntary Treatment--Mentally Disordered Offender Law.
Pursuant to Code Civ. Proc., § 904.1, subd. (a)(1) (appeal may be taken from superior court judgment), the People had a right to appeal a trial court's order dismissing the People's petition to continue involuntary treatment, pursuant to Pen. Code, § 2970, of the Mentally Disordered Offender (MDO) Law, of an alleged MDO whose parole was

completed, since MDO proceedings are civil and the trial court's order dismissing the petition was a final judgment. In determining whether a particular proceeding is criminal, the court looks to the Legislature's intent and to the purpose and effect of the statute. The Legislature has expressly provided that an MDO hearing is a civil hearing. This civil label is not dispositive; where a defendant provides the clearest proof that the statutory scheme is so punitive either in purpose or effect, the proceeding must be considered criminal. However, the MDO provisions are neither punitive in purpose nor effect, and the MDO Law's procedural safeguards do not require the court to transform the hearing into a criminal trial. *828

(3) Mandamus and Prohibition § 74--Mandamus--Appeal--Review--Appeal by People--Petition to Extend Involuntary Treatment After Parole Completed-- Mentally Disordered Offender Law--Lack of Adequate Remedy at Law:Criminal Law § 191--Mentally Disordered Offender Law.

The People's petition seeking to continue involuntary treatment, pursuant to Pen. Code, § 2970, of the Mentally Disordered Offender (MDO) Law, of an alleged MDO whose parole was completed, presented a question of substantial right warranting mandamus review. There was no evidence that the individual could have been detained under Welf. & Inst. Code, § 5150, on the ground that he was "gravely disabled" under the definitions in Welf. & Inst. Code, § § 5350, subd. (e)(1) or 5008, subd. (h)(1). Thus, the People did not have an adequate remedy at law within the meaning of Code Civ. Proc., § 1086 (plain, speedy, and adequate remedy in ordinary course of law), and were faced with a potentially dangerous individual who allegedly needed treatment. The public has a clear interest in seeing its legislative purposes properly implemented.

(4) Criminal Law § 191--Mentally Disordered Offender Law--Extension of Involuntary Mental Treatment After Parole Completed--As Ex Post Facto Law.

The trial court erred in dismissing, on ex post facto grounds, the People's petition to continue involuntary treatment, pursuant to Pen. Code, § 2970, of the Mentally Disordered Offender (MDO) Law, of an alleged MDO whose parole was completed, even though he committed his predicate crime prior to passage of legislation that cured previously identified constitutional defects in the law. The MDO Law's extended treatment provisions have no penal consequences when applied to mentally disordered offenders whose parole is completed. A refusal to comply with treatment cannot lead to denial of parole or reincarceration in state prison. Its provisions do not provide for the extension of the MDO's parole. The law does not punish as a crime an act previously committed, which was innocent when done. It imposes no punishment for a crime after its commission and does not deprive an MDO of any defense available at the time his or her criminal act was committed. Furthermore, that the purpose of the MDO Law is to protect the public does not turn its provisions into punishment. Laws imposing involuntary treatment on people who suffer from present mental illnesses that cause them to be dangerous are not penal merely because the class of people subject to the laws are accused of, or have been convicted of, a crime. Therefore, the law was not ex post facto when applied to this individual.

[See 1 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1988) § § 16-20.] *829

COUNSEL

Gil Garcetti, District Attorney, Brent Riggs and Fred Klink, Deputy District Attorneys, for Petitioner.

No appearance for Respondent.

Michael P. Judge, Public Defender, Albert J. Menaster, Stuart Mentzer and Jack T. Weedin, Deputy Public Defenders, for Real Party in Interest.

BARON, J.

The People of the State of California filed a petition in respondent superior court to continue involuntary treatment of real party in interest Evon Myers, an alleged mentally disordered offender, pursuant to section 2970 of the Mentally Disordered Offender (MDO) Law (Pen. Code, § 2970). [FN1] Respondent ruled the statute constitutes an ex post facto law when applied to Myers and dismissed the petition. We issued a stay of the order and an alternative writ of mandate on the request of the People in order to determine the constitutionality of applying the extended involuntary treatment provisions of the MDO Law to paroled prisoners like Myers who committed their predicate crimes prior to passage of legislation which cured previously identified constitutional defects in the law. For the reasons set forth in this opinion, we conclude that the MDO Law's extended treatment provisions have no penal consequences when applied to mentally disordered offenders whose parole is completed. Accordingly, we grant the People's petition for writ of mandate and

order respondent to proceed on the underlying petition as required by the MDO Law.

FN1 The MDO Law is codified in Penal Code sections 2960 through 2981. Unless otherwise specified, all statutory references are to the Penal Code.

Background

The Petition to Extend Treatment

On August 10, 1990, Myers was sentenced to state prison for seven years following his plea of guilty to a March 18, 1989, assault with a knife and commission of great bodily injury on Dalton Roe, and his admission that he had previously been convicted of a serious felony. At the expiration of his sentence, Myers was released on parole on condition that he accept treatment for his mental disorder through a community outpatient treatment program pursuant to section 2962. On February 13, 1996, the District Attorney of Los ***830** Angeles County filed a petition, pursuant to section 2970, alleging that Myers's parole termination date was May 16, 1996, and that he has a severe mental disorder that either is not in remission or cannot be kept in remission if his treatment is not continued and that, by reason of his severe mental disorder, Myers represents a substantial danger of physical harm to others. On June 12, 1996, Myers's motion to dismiss the petition on the ground that the MDO Law, as applied to him, was ex post facto was granted by respondent court.

The Mentally Disordered Offender Law

In order to protect the public from dangerously mentally disordered criminal offenders, the Legislature enacted a mandatory mental health evaluation and treatment program in the form of the MDO Law. As originally enacted, the MDO Law applied to all persons incarcerated before and after January 1, 1986, and became operative on July 1, 1986. (*People v. Jenkins* (1995) 35 Cal.App.4th 669, 672 [41 Cal.Rptr.2d 502].)

On October 6, 1988, the Court of Appeal in *People v. Gibson* (1988) 204 Cal.App.3d 1425 [252 Cal.Rptr. 56] concluded that "section 2962 has overwhelming penal attributes" and therefore constitutes part of a prisoner's "punishment for his criminal offense." (204 Cal.App.3d at p. 1432.) Accordingly, the court held that retroactive application of the mentally disordered offender provisions to persons who had committed crimes prior to the effective date of the MDO Law violated the federal and state constitutional ex post facto clauses (U.S. Const., art. I, § 9, cl. 3; Cal. Const., art. I, § 9). (*People v. Gibson*, *supra*, at pp. 1434-1435.) The court also held that because the act did not require proof of present dangerousness, a requirement that was applicable to other similarly situated mentally ill offenders subject to involuntary commitment (see § 1026.5, subd. (b)(1); Welf. & Inst. Code, § § 1800, 1801.5), the MDO Law violated the equal protection clauses of the federal and state Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7).

In response to *Gibson*, the Legislature enacted urgency legislation effective July 27, 1989. Various sections of the MDO Law were amended to require proof that the patient "represents a substantial danger of physical harm to others" prior to commitment or recommitment to an inpatient facility or an outpatient program. (Stats. 1989, ch. 228, § 4, pp. 1255-1256.) In order to keep the mentally disordered offender program in effect, section 2980 was amended to provide that the MDO Law applies to persons who committed their crimes on and after January 1, 1986. (Stats. 1989, ch. 228, § § 5, 8, pp. 1256, 1258.)

As it now reads, the MDO Law requires certain mentally disordered prisoners who have committed specifically identified violent crimes to submit to continued mental health treatment after their release on parole. ***831** (§ § 2960-2981; Stats. 1985, ch. 1419, § 1, p. 5011; Stats. 1986, ch. 858, § 1, p. 2951.) All such prospective parolees (a) who are suffering from a severe mental disorder that is not in remission or cannot be kept in remission without treatment, (b) whose mental disorder was one of the causes of, or was an aggravating factor in, the commission of his or her crime, (c) who have been in treatment for 90 days or more within the year prior to his or her parole release day, and (d) who have been certified by a designated mental health professional to represent a substantial danger of physical harm to others by reason of his or her severe mental disorder, are required to be treated by the State Department of Mental Health as a condition of parole. (§ 2962, subds. (a)-(d).) The treatment must be inpatient unless the Department of Mental Health certifies to the Board of Prison Terms that it is safe to treat the parolee on an outpatient basis. Outpatient treatment can be revoked and the parolee can be placed in a secure mental health facility if the outpatient mental health director thinks the parolee cannot be safely and effectively treated in the community. (§ 2964, subd. (a).)

A parolee has the right to contest the findings of mental disorder and the decision to impose inpatient

versus outpatient treatment before the Board of Prison Terms and, if dissatisfied with the results of the hearing, may petition the superior court for a hearing to determine whether he or she genuinely falls under the criteria of section 2962. (§ 2966, subds. (a) and (b).) The hearing in the superior court "shall be a civil hearing," in which the burden of proof is on the person or agency who certified the prisoner under subdivision (d) of section 2962. Both the rules of criminal discovery and civil discovery apply, trial is by jury, and a unanimous verdict of proof beyond a reasonable doubt is required. (§ 2966, subds. (a) and (b).)

If the paroled prisoner's mental disorder is put into, and can be kept in, remission during the parole period, the Department of Mental Health must discontinue treating the parolee. (§ 2968.) However, if by the conclusion of his or her parole period the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, the extension provisions which are the subject of this petition come into play. [FN2] (§ 2970.)

> FN2 Section 2970 also applies to severely mentally disordered prisoners who remain in prison due to their refusal to agree to treatment as a condition of parole.

Under these provisions, the director of the program which has been responsible for the parolee's treatment must submit a written evaluation on remission to the district attorney's office not later than 180 days prior to the termination of parole. The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition must be supported by affidavits specifying "that treatment, while the prisoner was released from prison on parole, has been continuously provided by *832 the State Department of Mental Health either in a state hospital or in an outpatient program[,] ... that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others." (§ 2970.) At this point, the court is once again required to conduct a "civil" hearing on the petition for continued treatment. And, like the hearing provided at the time of the initial finding, there is a right to a jury trial, both civil and criminal discovery rules apply, representation for the People is by the district attorney, the public defender is appointed if the patient is indigent, and the jury's verdict must be unanimous and based upon proof beyond a reasonable doubt. (§ 2972, subds. (a) and (b).)

Subdivision (c) of section 2972 provides: "If the court or jury finds that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970."

The treatment facility has an affirmative obligation to provide treatment for the underlying causes of the person's mental disorder (§ 2972, subd. (f)) and the person is considered an involuntary mental health patient who is entitled to all the rights accorded to civil committees under the Lanterman-Petris-Short (LPS) Act. (§ 2972, subd. (g); Welf. & Inst. Code, § 5325.)

A new petition may be filed each year in accordance with all the foregoing provisions so long as the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and by reason thereof, the patient still presents a substantial danger of physical harm to others. (§ 2972, subd. (d).)

The Constitutional Prohibition on Ex Post Facto Laws

Article I, section 10 of the United States Constitution provides: "No State shall ... pass any ... ex post facto law ...." In *833 *Collins v. Youngblood* (1990) 497 U.S. 37 [111 L.Ed.2d 30, 110 S.Ct. 2715], the Supreme Court reviewed its decisions analyzing the clause and found that expansive language had crept into its decisions which had caused considerable confusion in state and lower federal courts about the scope of the clause. (*Id.* at p. 41 [111 L.Ed.2d at p. 38].) In order to clarify its views, the court rejected statutory analyses which were phrased in terms of whether a law eliminated a "substantial protection" or "altered the situation of the accused to his

disadvantage." Instead, the court returned to an analysis of the ex post facto law consistent with its understanding of that term at the time the Constitution was adopted. (*Id.* at pp. 47-52 [11 L.Ed.2d at pp. 42-45].) (1) Under this analysis, "... the clause prohibits three legislative categories: legislation ' "[1] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed ...." ' (*Collins, supra*, 497 U.S. 37, 42 [111 L.Ed.2d 30, 39, 110 S.Ct. 2715, 2719], quoting *Beazell v. Ohio* (1925) 269 U.S. 167, 169 [70 L.Ed. 216, 217, 46 S.Ct. 68].).... [T]he ex post facto clause of the California Constitution [article I, section 9] is to be analyzed identically." (*People v. McVickers* (1992) 4 Cal.4th 81, 84 [13 Cal.Rptr.2d 850, 840 P.2d 955]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295-297 [279 Cal.Rptr. 592, 807 P.2d 434].)

"Although the Latin phrase 'exi *iposti ifacto*' literally encompasses any law passed 'after the fact,' it has long been recognized by [the high court] that the constitutional prohibition on *ex post facto* laws applies only to *penal* statutes which disadvantage the offender affected by them. [Citations.]" (*Collins v. Youngblood, supra*, 497 U.S. at p. 41 [111 L.Ed.2d at p. 38], third italics added.) With this background in mind, we turn to the issues presented by the petition.

Discussion

I. The People's Right to Review

(2) We must first consider whether the People have a right to review by extraordinary writ in the instant case. Myers contends that even if respondent court's order constitutes judicial error, or is "egregiously erroneous," the People have no right to appeal, and when the People have no right to appeal, extraordinary relief is not available. (*People v. Superior Court (Stanley)* (1979) 24 Cal.3d 622, 625-626 [156 Cal.Rptr. 626, 596 P.2d 691].) Myers ***834** points out that the People's right to appeal in *criminal* cases is limited by section 1238 to an order setting aside an indictment, information, or complaint, none of which, he argues, is applicable because the pleading here is by petition. He reminds us that "[t]he statutory restriction of the People's right to appeal in criminal cases 'is not merely a procedural limitation allocating appellate review between direct appeals and extraordinary writs but is a substantive limitation on review of trial court determinations in criminal trials.' [Citations.]" (*People v. Drake* (1977) 19 Cal.3d 749, 758-759 [139 Cal.Rptr. 720, 566 P.2d 622], quoting *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 498 [72 Cal.Rptr. 330, 446 P.2d 138].)

In determining whether a particular proceeding is criminal we look to the Legislature's intent and to the purpose and effect of the statute. (See *United States v. Ward* (1980) 448 U.S. 242, 248 [65 L.Ed.2d 742, 749, 100 S.Ct. 2636].) Here, the Legislature has expressly provided that an MDO "hearing shall be a *civil* hearing" (§ § 2966, subd. (b), 2972, subd. (a), italics added) thereby indicating that when a petition is filed against a person it intends that the court proceed in a nonpunitive, noncriminal manner. We recognize that the civil label is not dispositive. Where a defendant provides " 'the clearest proof' " that the " 'statutory scheme [is] so punitive either in purpose or effect' " the proceeding must be considered criminal. (*Allen v. Illinois* (1986) 478 U.S. 364, 369 [92 L.Ed.2d 296, 304, 106 S.Ct. 2988].) As we shall explain, however, the MDO provisions are neither punitive in purpose nor effect and their procedural safeguards do not require us to transform the hearing into a criminal trial. (*Allen v. Illinois, supra*, at p. 371 [92 L.Ed.2d at pp. 305-306].)

We conclude that the proceedings are civil and that the court's order dismissing the petition was a final judgment. Accordingly, the People have the right to appeal pursuant to section 904.1, subdivision (a)(1) of the Code of Civil Procedure which provides "[a]n appeal may be taken from a superior court ... [¶] ... judgment ...."

(3) We turn then to the question of whether the People have "a plain, speedy, and adequate remedy, in the ordinary course of law." If not, the writ must issue. (Code Civ. Proc., § 1086.) The People argue that they do not have "an adequate remedy [at law] in this case because the dismissal of the People's petition would result in Myers's release from all commitments and the attendant danger to the public occasioned by the removal of all structure that assures that Myers continues to take the medication that prevents him from becoming violent." Attorneys for Myers argue that such "allegation is without merit" because if Myers "does have a discernible mental disorder and if he is a danger to others," as alleged in the petition, he may be detained ***835** under sections 5150 and 5250 of the Welfare and Institutions Code which provide for the detention and hold of a person who, "as a result of a mental disorder, is a danger to others, or to himself or herself, or gravely disabled[.]" (Welf. & Inst. Code, §

5150.) Thereafter, the People may seek "further treatment" by referral for and the establishment of a conservatorship under Welfare and Institutions Code sections 5270.55 and 5350 et seq.

However, as the People point out, Welfare and Institutions Code section 5150 provides for the detention for evaluation of persons with mental disorders for a period not to exceed 72 hours, and Welfare and Institutions Code section 5250 provides that a person detained pursuant to section 5150 can be certified for an additional period, not to exceed 14 days for intensive treatment. Welfare and Institutions Code section 5350 allows for the appointment of a conservator for "gravely disabled" persons, i.e., those who, as a result of mental illness, cannot provide their own food, shelter, or clothing. (Welf. & Inst. Code, § 5008, subd. (h)(1).) There is no evidence that Myers is "gravely disabled" under the definitions in Welfare and Institutions Code sections 5350, subdivision (e)(1) or 5008, subdivision (h)(1). Accordingly, we conclude that the People do not have an adequate remedy at law within the meaning of Code of Civil Procedure section 1086, and are faced with a potentially dangerous individual who allegedly needs treatment. "[B]ecause the public has a clear interest in seeing its legislative purposes properly implemented, we find that the present petition presents a question of substantial right warranting mandamus review." (*People v. Superior Court (John D.)* (1979) 95 Cal.App.3d 380, 387 [157 Cal.Rptr. 157].)

II. The Mentally Disordered OffenderLaw Is Not a Penal Statute

Respondent dismissed the petition to extend Myers's involuntary treatment on the ground that the MDO Law has been held to be "penal in nature" and therefore is ex post facto as applied to Myers in that Myers committed his crime after *Gibson* declared the law unconstitutional and before the date the urgency legislation curing the constitutional deficiencies went into effect.

In his return to the petition filed herein, Myers acknowledges that *Collins v. Youngblood, supra*, 497 U.S. 37, and *People v. McVickers, supra*, 4 Cal.4th 81, redefined the principles previously governing ex post facto analysis by deleting the " 'substantial disadvantage [to] the offender' prong" ***836** -one of the grounds used by *Gibson* for its finding that the MDO Law violated the ex post facto clauses. Myers argues that is irrelevant because "[u]nder *Collins*, a statute remains ex post facto in its application if it changes the punishment or inflicts greater punishment than the law annexed to the crime when it was committed" and "[u]nder *McVickers*, a statute also remains *ex post facto* in its application which makes more burdensome the punishment for a crime, after its commission."

Myers's theory is that *Gibson* relied only in part on the substantial disadvantage prong. He contends the penal attributes of the MDO statutory scheme as amended still change or inflict greater punishment and make the punishment for a crime more burdensome under the *Collins* and *McVickers* tests. Therefore, in Myers's view, the outcome of *Gibson* would be unaffected by either the *Collins* or *McVickers* decisions.

In support of this contention, Myers points out that since *Gibson* decided that the MDO statutes have "overwhelming penal attributes," five decisions have been published affirming the "penal" nature of the MDO Law, all decided after the amendments curing the equal protection defect took effect. (See *People v. Pretzer* (1992) 9 Cal.App.4th 1078, 1085 [11 Cal.Rptr.2d 860] [Fifth Amendment permits prosecutor to call MDO as witness at hearing to answer questions concerning his present mental competence but forbids questions relating to predicate crime]; *People v. Collins* (1992) 10 Cal.App.4th 690, 694 [12 Cal.Rptr.2d 768] [jury instructions regarding the consequences of a verdict of mental illness and defining "force and violence" held prejudicial]; *People v. Coronado* (1994) 28 Cal.App.4th 1402, 1406 [33 Cal.Rptr.2d 835] [evidence sufficient to support MDO determination and People not foreclosed from seeking an MDO determination after reincarceration on parole where parole is again imminent and mental status has changed]; *People v. Jenkins, supra*, 35 Cal.App.4th at p. 674 [MDO statute not ex post facto as applied to offender whose February 21, 1986, offense was committed over one month after statute's effective date but five months before statute's operative date]; and *People v. Superior Court (Jump)* (1995) 40 Cal.App.4th 9, 12 [46 Cal.Rptr.2d 829], review den. Feb. 15, 1996 [proper court in which to initiate petition for continued involuntary treatment is superior court located in county in which inmate is convicted of crime that serves as foundation for his placement in state hospital as a MDO].)

The People contend each of the foregoing cases "relies upon *Gibson* without further analysis or discussion" and that "subsequent changes in the law have undermined the rationale of *Gibson* to the extent that *Gibson* is no longer good authority for the

proposition that [the] MDO [Law] is an ex post facto law." (4) The People argue that a careful analysis of the MDO Law *837 reveals that the law is concerned with two objectives, neither of which is penal: "(1) protection of the public, and (2) treating persons who have committed crimes who have severe mental disorders."

We agree with the People. The cases cited by Myers only tangentially touch on the issue presented here. In none of the cases was there an analysis of the amended MDO Law in light of the United States Supreme Court's clarification of ex post facto principles. The *Gibson* decision itself was based on the faulty premise that the "mentally disordered offender provisions (MDO) of section 2962 et seq. both increase punishment and alter the situation of the accused to his disadvantage" (*People v. Gibson, supra*, 204 Cal.App.3d at p. 1431) when in fact it does neither. The purpose of the MDO statutory scheme is to provide *mental health treatment* for those offenders who are suffering from *presently severe mental illness*, not to punish them for their past offenses. Subdivision (c) of section 2972 specifically requires a jury finding "that the patient has a severe mental disorder, [FN3] that the patient's severe mental disorder is not in remission or cannot be kept in remission [FN4] without treatment, [FN5] and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others...."

FN3 "The term 'severe mental disorder' means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. The term 'severe mental disorder' as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances." (§ 2962, subd. (a).)

FN4 "The term 'remission' means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support." (§ 2962, subd. (a).)

FN5 "A person 'cannot be kept in remission without treatment' if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan." (§ 2962, subd. (a).)

Laws which impose involuntary treatment upon people who suffer from present mental illnesses which cause them to be dangerous are not penal merely because the class of people subject to the laws are accused of, or have been convicted of, a crime. This was made clear in *Conservatorship of Hofferber* (1980) 28 Cal.3d 161 [167 Cal.Rptr. 854, 616 P.2d 836]. There, our Supreme Court held that the 1974 amendments to the LPS Act providing *838 for a civil conservatorship of a defendant found incompetent to stand trial did not violate constitutional limitations on retroactive and ex post facto laws, even though the crime of which he was accused occurred before the amendments became effective. This was because the act's "provisions ... have nothing to do with any punitive disability attached to the homicide charged against appellant at the time it occurred. They did not alter or affect the sentence for that crime. They did not extend, directly or indirectly, any incarceration that had been or could be imposed on appellant for criminal conduct.... [A]ppellant's confinement arose not from criminal conduct but from his mental condition. He does not face incarceration in a prison but must be placed in a state hospital or some other less restrictive setting. [Citation.]" (*Conservatorship of Hofferber*, *supra*, at pp. 181-182, fn. omitted.) The court was not dissuaded from this holding even though it "recognize[d] that LPS Act conservatees often are confined at Patton and Atascadero State Hospitals, prisonlike institutions that also house MDSO's convicted of crime. [Citations.]" (*Id.* at p. 182, fn. 18.) "Statutes that focus on a *continuing dangerous condition* ... are not retroactive simply because they employ pre-statute conduct as evidence of the ongoing dangerousness. [Citations.]" (*Id.* at p. 182,

original italics.)

In *Allen v. Illinois, supra*, 478 U.S. 364, the United States Supreme Court similarly held that proceedings under the Illinois Sexually Dangerous Persons Act are not "criminal" within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination. The court rationalized that since the act's aim was to provide treatment, not punishment, for persons adjudged sexually dangerous, the act was not an ex post facto law. In reaching this conclusion, the court was swayed by the act's requirement that the state prove more than the commission of a criminal act. Under the act, the state was obligated to prove the existence of a mental disorder lasting for more than one year and a propensity to commit criminal acts through something more than the prior commission of such acts. On the other hand, the fact that the state could not file a sexually-dangerous-person petition under the act unless it had already filed criminal charges against the defendant-which meant the act did not apply to the larger class of mentally ill persons who might be found sexually dangerous-did not change the civil proceeding into a criminal one. In addition, the availability of some of the safeguards applicable in criminal proceedings-rights to counsel, to a jury trial, and to confront and cross-examine witnesses, and the requirement that sexual dangerousness be proved beyond a reasonable doubt-did not turn the proceedings under the act into criminal proceedings requiring the full panoply of rights applicable there. And the fact that a person adjudged sexually dangerous under the act is committed to a maximum-security institution that also houses convicts needing psychiatric care did not transform the conditions of that person's confinement into "punishment" and thus render "criminal" the proceedings that led to confinement. *839

Three years earlier, in *Jones v. United States* (1983) 463 U.S. 354 [77 L.Ed.2d 694, 103 S.Ct. 3043], the Supreme Court dealt with the question of whether the due process clause was violated in the case of a not guilty by reason of insanity (NGI) acquittee because he had been hospitalized for a period longer than he could have been incarcerated if convicted. In holding it was not, the court ruled: "The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness." (*Id.* at p. 368 [77 L.Ed.2d at p. 708].)

In the same vein, our Supreme Court in *McVickers* cited with approval a Connecticut case, *Payne v. Fairfield Hills Hosp.* (1990) 215 Conn. 675, 683 [578 A.2d 1025, 1029], which held that "confinement of a person acquitted of a crime because of insanity is generally not punishment in the ex post facto context because its purposes are treatment for the individual and protection of society." (*People v. McVickers, supra*, 4 Cal.4th at p. 87.)

Our state appellate courts also have addressed the issue of whether the ex post facto clause was violated as applied to NGI committees. In *People v. Buttes* (1982) 134 Cal.App.3d 116, 128 [184 Cal.Rptr. 497], the appellant was committed in 1975 and it was not until January 1, 1980, that he was subject to a two-year extended commitment. Prior to that, the appellant was subject to only a one-year extended commitment. Appellant's argument that the law was ex post facto was "grounded upon the erroneous assumption that the original insanity commitment was a penal commitment." (*Ibid.*) According to the court, "[t]he law is to the contrary. [Citations.] [¶] Neither the original commitment nor the extension was criminal punishment but was for treatment in a state hospital." (*Ibid.*; see also *People v. Juarez* (1986) 184 Cal.App.3d 570 [229 Cal.Rptr. 145] [application of new definitional criteria for offense-related predicate for extended commitment of NGI was not ex post facto, as recommitment procedures could not disadvantage the defendant in the determination of his criminal guilt]; *People v. Superior Court (Woods)* (1990) 219 Cal.App.3d 614, 617 [268 Cal.Rptr. 379] ["Retroactive changes in the law which result in increased terms of commitment for NGI defendants are not considered ex post facto because the commitments are not penal but for treatment purposes. [Citations.]"].)

Furthermore, that the purpose of the MDO Law is "to protect the public" does not turn its provisions into punishment despite what *Gibson* may state to the contrary. (*People v. Gibson, supra*, 204 Cal.App.3d at p. 1433.) As noted previously, *McVickers*, *Hofferber*, and *Jones* each upheld the constitutionality of laws enacted with the protection of society in mind. (See also *840*Addington v. Texas* (1979) 441 U.S. 418, 426 [60 L.Ed.2d 323, 331, 99 S.Ct. 1804] [state has "authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."].)

Finally, Myers argues that, because the MDO Law did not require a finding of present dangerousness as a prerequisite to imposing treatment until its amendment on July 27, 1989, the law may not be applied to those mentally disordered offenders who

committed their predicate crime prior to that date without also violating the due process clauses of the United States and California Constitutions. In support of this contention, Myers relies on cases which analyzed the retroactive applicability of substantial changes in criminal laws effected by judicial decisions overruling previous case law. (*People v. King* (1993) 5 Cal.4th 59, 70-81 [19 Cal.Rptr.2d 233, 851 P.2d 27] [overruling limitation on consecutive enhancements under section 12022.5]; *In re Baert* (1988) 205 Cal.App.3d 514, 518-519 [252 Cal.Rptr. 418] [eliminating proof of intent to kill as an element of the felony-murder special circumstance]; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353 [12 L.Ed.2d 894, 899-900, 84 S.Ct. 1697] [judicial expansion of South Carolina's criminal trespass law].) These cases are inapplicable as they are based upon " 'the notion that persons have a right to fair warning of that conduct which will give rise to *criminal penalties* ....' [Citations.]" (*In re Baert, supra*, 205 Cal.App.3d at p. 518, italics added.)

We find the analysis of the urgency amendments to the LPS Act in *Hofferber* more analogous to the amendments to the MDO Law. There, in language equally applicable to mentally disordered offenders, it was stated: "We have held that a legislative attempt to cure an unconstitutional statute may suggest an intent that the curative provision be applied retroactively. [Citations.] Moreover, the 1974 amendments [to the LPS Act] seek to protect against a particular class of *potentially* dangerous persons. In such cases, legislative expressions of urgency in the interest of public safety necessarily indicate an attempt to reach all persons in the class who represent the continuing danger even if they fall within the legislative purview partly by reason of prior conduct. [Citation.] [¶] ... [D]angerous mentally ill persons gain no perpetual 'vested right' in the commitment scheme extant when their illnesses first came to public attention. To say that they have 'reasonably relied' on that scheme in displaying their dangerous conditions is to indulge a patent fiction. Such a rule would severely hamper legislative efforts to respond to new knowledge about mental illness, correct perceived deficiencies in the statutory scheme, and refine the state's machinery for treatment and restraint of dangerously disturbed people. [Citation.]" (*Conservatorship of Hofferber, supra*, 28 Cal.3d at pp.183-184, fns. omitted.)

In sum, section 2970 does not subject a mentally disordered offender to any punitive ramifications. A refusal to comply with treatment cannot lead to *841 denial of parole or reincarceration in state prison. Its provisions do not provide for the extension of the MDO's parole. MDO's subject to its provisions are not under the supervision of a parole officer or the Board of Prison Terms. The law does not punish as a crime an act previously committed, which was innocent when done. It imposes no punishment for a crime after its commission and it does not deprive an MDO of any defense available at the time his or her criminal act was committed. Laws which require treatment for people who are currently mentally ill and who are gravely disabled or dangerous to others (or themselves for that matter) are not punitive and therefore such laws do not violate the ex post facto clauses. [FN6]

FN6 We note that in two recent decisions, the 1995 Sexually Violent Predators Act (Welf. & Inst. Code, div. 6, pt. 2, ch. 2, art. 4, § 6600 et seq.) which mandates confinement and treatment for sexually violent predators who committed their crimes prior to 1995 and who are about to complete their prison sentences also was held not to be an ex post facto law. (*People v. Superior Court (Cain)* (1996) 49 Cal.App.4th 1164 [57 Cal.Rptr.2d 296] review granted Feb. 5, 1997 (S057272); *Garcetti v. Superior Court* (1996) 49 Cal.App.4th 1533 [57 Cal.Rptr.2d 420] review granted Feb. 5, 1997 (S057336).) While these decisions are in accord with our holding, we do not rely upon them in reaching our decision as they are not yet final. (Cal. Rules of Court, rule 24(a).)

Disposition

Let a peremptory writ of mandate issue directing respondent superior court to vacate its order of June 12, 1996, which granted real party in interest Myers's motion to dismiss the People's petition for extended commitment, and to make a new and different order denying Myers's motion and reinstating proceedings on the People's petition for involuntary treatment pursuant to section 2970. It is further ordered that the temporary stay issued herein on August 12, 1996, shall remain in effect until respondent complies with our direction.

To facilitate the relief requested, this opinion is final forthwith. (Cal. Rules of Court, rule 24(d).)

Epstein, Acting P. J., and Hastings, J., concurred.

The petition of real party in interest for review by the Supreme Court was denied January 22, 1997. *842

Cal.App.2.Dist.,1996.

People v. Superior Court (Myers)

END OF DOCUMENT

Briefs and Other Related Documents

Supreme Court of the United States
Frank O'Neal ADDINGTON, Appellant,
v.
State of TEXAS.
No. 77-5992.

Argued Nov. 28, 1978.
Decided April 30, 1979.

In an indefinite commitment case, a probate court in Texas found that defendant was mentally ill and required hospitalization for his own welfare and protection as well as for the protection of others. The Beaumont Court of Civil Appeals, Ninth Supreme Judicial District, 546 S.W.2d 105, reversed, holding that the proper standard of proof was "beyond a reasonable doubt." The State was granted a writ of error by the Supreme Court of Texas, 557 S.W.2d 511. On grant of certiorari, the Supreme Court, Mr. Chief Justice Burger, held that to meet due process demands, the standard for use in commitment for mental illness must inform the fact finder that proof must be greater than the preponderance of evidence standard applicable to other categories of civil cases, but the reasonable-doubt standard is not constitutionally required.

Vacated and remanded.

Opinion after remand, 588 S.W.2d 569.

West Headnotes

[1] **Federal Courts 170B 509**

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk509 k. Mode of Review and Proceedings. Most Cited Cases
Where no challenge to constitutionality of any state statute was presented, appeal to United States Supreme Court was not authorized, and papers were construed as petition for writ of certiorari. 28 U.S.C.A. § 1257(2).

[2] **Constitutional Law 92 311**

92 Constitutional Law
92XII Due Process of Law
92k304 Civil Remedies and Proceedings
92k311 k. Rules of Evidence. Most Cited Cases
Function of standard of proof, as that concept is embodied in due process clause and in realm of fact-finding, is to instruct fact finder concerning degree of confidence society thinks he should have in correctness of factual conclusions for particular type of adjudication. U.S.C.A.Const. Amend. 14.

[3] **Constitutional Law 92 251.5**

92 Constitutional Law
92XII Due Process of Law
92k251.5 k. Procedural Due Process in General. Most Cited Cases
Function of legal process is to minimize risk of erroneous decisions. U.S.C.A.Const. Amend. 14.

[4] **Constitutional Law 92 81**

92 Constitutional Law
92IV Police Power in General
92k81 k. Nature and Scope in General. Most Cited Cases

Mental Health 257A 36

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons Subject to Control or Treatment. Most Cited Cases
State has legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves, and state also has authority under its police power to protect community from dangerous tendencies of some who are mentally ill. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51.

[5] **Mental Health 257A 36**

257A Mental Health
257AII Care and Support of Mentally Disordered

Persons
257AII(A) Custody and Cure
257Ak36 k. Persons Subject to Control or Treatment. Most Cited Cases
Under Texas mental health code, state has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51.

[6] Mental Health 257A 36

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons Subject to Control or Treatment. Most Cited Cases
Loss of liberty by confinement for mental illness calls for showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; Code Miss.1972, § 41-21-75.

[7] States 360 4

360 States
360I Political Status and Relations
360I(A) In General
360k4 k. Status Under Constitution of United States, and Relations to United States in General. Most Cited Cases
Essence of federalism is that states must be free to develop variety of solutions to problems and not be forced into common, uniform mold.

[8] Constitutional Law 92 255(5)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases
Substantive standards for civil commitment for mental illness may vary from state to state, and procedures must be allowed to vary so long as they meet constitutional minimum. Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; U.S.C.A.Const. Amend. 14; Code Miss.1972, § 41-21-75.

[9] Constitutional Law 92 255(5)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases

Mental Health 257A 41

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak41 k. Hearing and Determination in General. Most Cited Cases
Reasonable-doubt standard is inappropriate in civil commitment proceedings, and use of term "unequivocal" is not constitutionally required, although states are free to use that standard. Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; U.S.C.A.Const. Amend. 14; Code Miss.1972, § 41-21-75.

[10] Constitutional Law 92 255(5)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases
To meet due process demands, standard for use in commitment for mental illness must inform fact finder that proof must be greater than preponderance-of-evidence standard applicable to other categories of civil cases. Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; U.S.C.A.Const. Amend. 14; Code Miss.1972, § 41-21-75.

[11] Constitutional Law 92 255(5)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases

Federal Courts 170B 513

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk513 k. Determination and Disposition of Cause. Most Cited Cases
Instruction used in proceeding in Texas for commitment for mental illness, such instruction employing the standard of "clear, unequivocal, and convincing" evidence, was constitutionally adequate, but determination of precise burden, equal to or greater than such standard, required to meet due process requirements was matter of state law to be left to Texas Supreme Court. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; Code Miss.1972, § 41-21-75.
***1805 *418 Syllabus** FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Appellant's mother filed a petition for his indefinite commitment to a state mental hospital in accordance with Texas law governing involuntary commitments. Appellant had a long history of confinements for mental and emotional disorders. The state trial court instructed the jury to determine whether, based on "clear, unequivocal and convincing evidence," appellant was mentally ill and required hospitalization for his own welfare and protection or the protection of others. Appellant contended that the trial court should have employed the "beyond a reasonable doubt" standard of proof. The jury found that appellant was mentally ill and that he required hospitalization, and the trial court ordered his commitment for an indefinite period. The Texas Court of Appeals reversed, agreeing with appellant on the standard of proof issue. The Texas Supreme Court reversed the Court of Appeals' decision and reinstated the trial court's judgment, concluding that a "preponderance of the evidence" standard of proof in a civil commitment proceeding satisfied due process and that since the trial court's improper instructions in the instant case had benefited appellant, the error was harmless.

Held : A "clear and convincing" standard of proof is required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital. Pp. 1809-1813.

(a) The individual's liberty interest in the outcome of a civil commitment proceeding is of such weight and gravity, compared with the state's interests in providing care to its citizens who are unable, because of emotional disorders, to care for themselves and in protecting the community from the dangerous tendencies of some who are mentally ill, that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence. Pp. 1809-1810.

(b) Due process does not require states to use the "beyond a reasonable doubt" standard of proof applicable in criminal prosecutions and delinquency proceedings. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, distinguished. The reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it **1806 may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. The state should *419 not be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments. Pp. 1810-1812.

(c) To meet due process demands in commitment proceedings, the standard of proof has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases. However, use of the term "unequivocal" in conjunction with the term "clear and convincing" in jury instructions (as included in the instructions given by the Texas state court in this case) is not constitutionally required, although states are free to use that standard. Pp. 1812-1813.

Appeal dismissed and certiorari granted; 557 S.W.2d 511, vacated and remanded.

Martha L. Boston, Austin, Tex., for appellant.
James F. Hury, Jr., Galveston, Tex., for appellee.
Joel I. Klein, Washington, D. C., for the American Psychiatric Ass'n, as amicus curiae, by special leave of Court.
Mr. Chief Justice BURGER delivered the opinion of the Court.

The question in this case is what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an *420 individual involuntarily for an indefinite period to a state mental hospital.

I

On seven occasions between 1969 and 1975, appellant was committed temporarily, Tex.Rev.Civ.Stat.Ann., Arts. 5547-31 to 5547-39 (Vernon 1958 and Supp. 1978-1979), to various Texas state mental hospitals and was committed for indefinite periods, Arts. 5547-40 to 5547-57, to Austin State Hospital on three different occasions. On December 18, 1975, when appellant was arrested on a misdemeanor charge of "assault by threat" against his mother, the county and state mental health authorities therefore were well aware of his history of mental and emotional difficulties.

Appellant's mother filed a petition for his indefinite commitment in accordance with Texas law. The county psychiatric examiner interviewed appellant while in custody and after the interview issued a Certificate of Medical Examination for Mental Illness. In the certificate, the examiner stated his opinion that appellant was "mentally ill and require[d] hospitalization in a mental hospital." Art. 5547-42 (Vernon 1958).

Appellant retained counsel and a trial was held before a jury to determine in accord with the statute:
"(1) whether the proposed patient is mentally ill, and if so
"(2) whether he requires hospitalization in a mental hospital for his own welfare and protection or the protection of others, and if so
"(3) whether he is mentally incompetent." Art. 5547-51 (Vernon 1958).

The trial on these issues extended over six days.

The State offered evidence that appellant suffered from serious delusions, that he often had threatened to injure both of his parents and others, that he had been involved in several *421 assaultive episodes while hospitalized and that he had caused substantial property damage both at his own apartment and at his parents' home. From these undisputed facts, two psychiatrists, who qualified as experts, expressed opinions that appellant suffered from psychotic schizophrenia and that he had paranoid tendencies. They also expressed medical opinions that appellant was probably dangerous both to himself and to others. They explained that appellant required hospitalization in a closed area to treat his condition because in the past he had refused to attend **1807 outpatient treatment programs and had escaped several times from mental hospitals.

Appellant did not contest the factual assertions made by the State's witnesses; indeed, he conceded that he suffered from a mental illness. What appellant attempted to show was that there was no substantial basis for concluding that he was probably dangerous to himself or others.

The trial judge submitted the case to the jury with the instructions in the form of two questions:
"1. Based on clear, unequivocal and convincing evidence, is Frank O'Neal Addington mentally ill?
"2. Based on clear, unequivocal and convincing evidence, does Frank O'Neal Addington require hospitalization in a mental hospital for his own welfare and protection or the protection of others?"

Appellant objected to these instructions on several grounds, including the trial court's refusal to employ the "beyond a reasonable doubt" standard of proof.

The jury found that appellant was mentally ill and that he required hospitalization for his own or others' welfare. The trial court then entered an order committing appellant as a patient to Austin State Hospital for an indefinite period.

Appellant appealed that order to the Texas Court of Civil Appeals, arguing, among other things, that the standards for commitment violated his substantive due process rights and that any standard of proof for commitment less than that *422 required for criminal convictions, *i. e.*, beyond a reasonable doubt, violated his procedural due process rights. The Court of Civil Appeals agreed with appellant on the standard-of-proof issue and reversed the judgment of the trial court. Because of its treatment of the standard of proof that court did not consider any of the other issues raised in the appeal.

On appeal, the Texas Supreme Court reversed the Court of Civil Appeals' decision. 557 S.W.2d 511. In so holding, the Supreme Court relied primarily upon its previous decision in *State v. Turner*, 556 S.W.2d 563 (1977), cert. denied, 435 U.S. 929, 98 S.Ct. 1499, 55 L.Ed.2d 525 (1978).

In *Turner*, the Texas Supreme Court held that a "preponderance of the evidence" standard of proof in

a civil commitment proceeding satisfied due process. The court declined to adopt the criminal law standard of "beyond a reasonable doubt" primarily because it questioned whether the State could prove by that exacting standard that a particular person would or would not be dangerous in the future. It also distinguished a civil commitment from a criminal conviction by noting that under Texas law the mentally ill patient has the right to treatment, periodic review of his condition, and immediate release when no longer deemed to be a danger to himself or others. Finally, the *Turner* court rejected the "clear and convincing" evidence standard because under Texas rules of procedure juries could be instructed only under a beyond-a-reasonable-doubt or a preponderance standard of proof.

Reaffirming *Turner*, the Texas Supreme Court in this case concluded that the trial court's instruction to the jury, although not in conformity with the legal requirements, had benefited appellant, and hence the error was harmless. Accordingly, the court reinstated the judgment of the trial court.

[1] We noted probable jurisdiction. 435 U.S. 967, 98 S.Ct. 1604, 56 L.Ed.2d 58. After oral argument it became clear that no challenge to the constitutionality of any Texas statute was presented. Under 28 U.S.C. § 1257(2) no appeal is authorized; accordingly, construing*423 the papers filed as a petition for a writ of certiorari, we now grant the petition. [FN1]

FN1. See *Kulko v. California Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *May v. Anderson*, 345 U.S. 528, 72 S.Ct. 840, 97 L.Ed. 1221 (1953). As in those cases, we continue to refer to the parties as appellant and appellee. See *Kulko v. California Superior Court, supra*, 436 U.S., at 90 n. 4, 98 S.Ct., at 1696.

**1808 II

[2] The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.

In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.[FN2] In the *424 administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt. *In re Winship, supra.*

FN2. Compare Morano, A Reexamination of the Development of the Reasonable Doubt Rule, 55 B.U.L.Rev. 507 (1975) (reasonable doubt represented a less strict standard than previous common-law rules); with May, Some Rules of Evidence, 10 Am.L.Rev. 642 (1875) (reasonable doubt constituted a stricter rule than previous ones). See generally Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299 (1977).

The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal," and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law." *Woodby v. INS*, 385 U.S. 276, 285, 87 S.Ct. 483, 488, 17 L.Ed.2d 362 (1966). See also McCormick, Evidence § 320 (1954); 9 J. Wigmore, Evidence § 2498 (3d ed. 1940). One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's

burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. See, *e. g., Woodby v. INS, supra,* at 285, 87 S.Ct., at 487 (deportation); *Chaunt v. United States,* 364 U.S. 350, 353, 81 S.Ct. 147, 149, 5 L.Ed.2d 120 (1960) (denaturalization); *Schneiderman v. United States,* 320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336, 1353, 87 L.Ed. 1796 (1943) (denaturalization).

Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies.[FN3] Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be ***425** unknowable, given that factfinding is a process shared by countless thousands of ****1809** individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence. Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a "standard of proof is more than an empty semantic exercise." *Tippett v. Maryland,* 436 F.2d 1153, 1166 (CA4 1971) (Sobeloff, J., concurring in part and dissenting in part), cert. dismissed *sub nom. Murel v. Baltimore City Criminal Court,* 407 U.S. 355, 92 S.Ct. 2091, 32 L.Ed.2d 791 (1972). In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty." 436 F.2d, at 1166.

> FN3. There have been some efforts to evaluate the effect of varying standards of proof on jury factfinding, see, *e. g.,* L. S. E. Jury Project, Juries and the Rules of Evidence, 1973 Crim.L.Rev. 208, but we have found no study comparing all three standards of proof to determine how juries, real or mock, apply them.

III

[3] In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions. See *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); *Speiser v. Randall,* 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1341-1342, 2 L.Ed.2d 1460 (1958).

A

This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. See, *e. g., Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); *Humphrey v. Cady,* 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Specht v. Patterson,* 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding ***426** of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

[4][5] The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill. Under the Texas Mental Health Code, however, the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others. Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings.

The expanding concern of society with problems of mental disorders is reflected in the fact that in recent years many states have enacted statutes designed to protect the rights of the mentally ill. However, only one state by statute permits involuntary commitment by a mere preponderance of the evidence, Miss.Code

Ann. § 41-21-75 (1978 Supp.), and Texas is the only state where a court has concluded that the preponderance-of-the-evidence standard satisfies due process. We attribute this not to any lack of concern in those states, but rather to a belief that the varying standards tend to produce comparable results. As we noted earlier, however, standards of proof are important for their symbolic meaning as well as for their practical effect.

**1810 [6] At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within *427 a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.

The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.

B

Appellant urges the Court to hold that due process requires use of the criminal law's standard of proof-"beyond a reasonable doubt." He argues that the rationale of the *Winship* holding that the criminal law standard of proof was required in a delinquency proceeding applies with equal force to a civil commitment proceeding.

In *Winship*, against the background of a gradual assimilation of juvenile proceedings into traditional criminal prosecutions, we declined to allow the state's "civil labels and good intentions" to "obviate the need for criminal due process safeguards in juvenile courts." 397 U.S., at 365-366, 90 S.Ct., at 1073. The Court saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. *Winship* recognized that the basic issue-whether the individual in fact committed a criminal act-was *428 the same in both proceedings. There being no meaningful distinctions between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt.

There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense.[FN4] Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution. Cf. *Woodby v. INS*, 385 U.S., at 284-285, 87 S.Ct., at 487-488.

FN4. The State of Texas confines only for the purpose of providing care designed to treat the individual. As the Texas Supreme Court said in *State v. Turner*, 556 S.W.2d 563, 566 (1977):

"The involuntary mental patient is entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others."

In addition, the "beyond a reasonable doubt" standard historically has been reserved for criminal cases. This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the "moral force of the criminal law," *In re Winship*, 397 U.S., at 364, 90 S.Ct., at 1072, and we should hesitate to apply it too broadly or casually in noncriminal cases. Cf. *ibid.*

The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free. *Patterson v. New York*, 432 U.S. 197, 208, 97 S.Ct. 2319, 2326, 53 L.Ed.2d 281 (1977). The full force of that idea does not apply to a civil commitment. It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction, 5 J. Wigmore, Evidence § 1400 **1811 (Chadbourn rev. 1974). However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and *429 friends generally will provide continuous

opportunities for an erroneous commitment to be corrected. Moreover, it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. See Chodoff, The Case for Involuntary Hospitalization of the Mentally Ill, 133 Am.J.Psychiatry 496, 498 (1976); Schwartz, Myers & Astrachan, Psychiatric Labeling and the Rehabilitation of the Mental Patient, 31 Arch.Gen.Psychiatry 329, 334 (1974). It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

Finally, the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question-did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous. See *O'Connor v. Donaldson*, 422 U.S. 563, 584, 95 S.Ct. 2486, 2498, 45 L.Ed.2d 396 (1975) (concurring opinion); *Blocker v. United States*, 110 U.S.App.D.C. 41, 48-49, 288 F.2d 853, 860-861 (1961) (opinion concurring in result). See also *Tippett v. Maryland*, 436 F.2d, at 1165 (Sobeloff, J., concurring in part and dissenting in part); Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 Harv.L.Rev. 1288, 1291 (1966); Note, Due Proces and the Development of "Criminal" Safeguards ***430** in Civil Commitment Adjudications, 42 Ford.L.Rev. 611, 624 (1974).

The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Within the medical discipline, the traditional standard for "factfinding" is a "reasonable medical certainty." If a trained psychiatrist has difficulty with the categorical "beyond a reasonable doubt" standard, the untrained lay juror-or indeed even a trained judge-who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care. See *ibid.* Such "freedom" for a mentally ill person would be purchased at a high price.

That practical considerations may limit a constitutionally based burden of proof is demonstrated by the reasonable doubt standard, which is a compromise between what is possible to prove and what protects the rights of the individual. If the state was required to guarantee error-free convictions, it would be required to prove guilt beyond all doubt. However, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson v. New York, supra*, 432 U.S., at 208, 97 S.Ct., at 2326. Nor should the state be required to employ a standard of proof that may completely undercut its ****1812** efforts to further the legitimate interests of both the state and the patient that are served by civil commitments.

[7][8] That some states have chosen-either legislatively or judicially***431** -to adopt the criminal law standard [FN5] gives no assurance that the more stringent standard of proof is needed or is even adaptable to the needs of all states. The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum. See Monahan & Wexler, A Definite Maybe: Proof and Probability in Civil Commitment, 2 Law & Human Behavior 37, 41-42 (1978); Share, The Standard of Proof in Involuntary Civil Commitment Proceedings, 1977 Detroit College L.Rev. 209, 210. We conclude that it is unnecessary to require states to apply the strict, criminal standard.

FN5. Haw.Rev.Stat. § 334-60(b)(4)(I) (Supp. 1978); Idaho Code § 66-329(i)

(Supp. 1978); Kan.Stat.Ann. § 59-2917 (1976); Mont.Rev.Codes Ann. § 38-1305(7) (1977 Supp.); Okla.Stat., Tit. 43A, § 54.1(C) (1978 Supp.); Ore.Rev.Stat. § 426.130 (1977); Utah Code Ann. § 64-7-36(6) (1953); Wis.Stat. § 51.20(14)(e) (Supp.1978-1979); *Superintendent of Worcester State Hospital v. Hagberg*, 374 Mass. 271, 372 N.E.2d 242 (1978); *Proctor v. Butler*, 117 N.H. 927, 380 A.2d 673 (1977); *In re Hodges*, 325 A.2d 605 (D.C.App.1974); *Lausche v. Commissioner of Public Welfare*, 302 Minn. 65, 225 N.W.2d 366 (1974), cert. denied, 420 U.S. 993, 95 S.Ct. 1430, 43 L.Ed.2d 674 (1975). See also *In re J. W.*, 44 N.J.Super. 216, 130 A.2d 64 (App.Div.), cert. denied, 24 N.J. 465, 132 A.2d 558 (1957); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky.App.1964) (dicta).

C

Having concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable-doubt standard is not required, we turn to a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the state. We note that 20 states, most by statute, employ the standard of "clear and convincing" evidence; [FN6] 3 states use ***432** "clear, *cogent*, and convincing" evidence; [FN7] and 2 states require "clear, *unequivocal* and convincing" evidence.[FN8]

FN6. Ariz.Rev.Stat.Ann. § 36-540 (1974); Colo.Rev.Stat. § 27-10-111(1) (Supp.1976); Conn.Gen.Stat. § 17-178(c) (1979); Del.Code Ann., Tit. 16, § 5010(2) (Supp.1978); Ga.Code § 88-501(u) (1978); Ill.Rev.Stat. ch. 91 1/2 , § 3-808 (Supp.1977); Iowa Code § 229.12 (1979); La.Rev.Stat.Ann., § 28:55E (West Supp. 1979); Me.Rev.Stat.Ann., Tit. 34, § 2334(5)(A)(1) (1978); Mich.Stat.Ann. § 14.800(465) (1976) [M.C.L.A. § 330.1465]; Neb.Rev.Stat. § 83-1035 (1976); N.M.Stat.Ann. § 43-1-11C (1978); N.D.Cent.Code § 25-03.1-19 (1978); Ohio Rev.Code Ann. § 5122.15(B) (Supp.1978); Pa.Stat.Ann., Tit. 50, § 7304(f) (Purdon Supp.1978-1979); S.C.Code § 44-17-580 (Supp.1978); S.D.Comp.Laws Ann. § 27A-9-18 (1977); Vt.Stat.Ann., Tit. 18, § 7616(b) (Supp.1978); Md. Dept. of Health & Mental Hygiene Reg. 10.21.03G (1973); *In re Beverly*, 342 So.2d 481 (Fla.1977).

FN7. N.C.Gen.Stat. § 122-58.7(i) (1977 Supp.); Wash.Rev.Code § 71.05.310; *State ex rel. Hawks v. Lazaro*, 157 W.Va. 417, 202 S.E.2d 109 (1974).

FN8. Ala.Code § 22-52-10(a) (Supp.1978); Tenn.Code Ann. § 33-604(d) (Supp.1978).

In *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966), dealing with deportation, and *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336, 1353, 87 L.Ed. 1796, dealing with denaturalization, the Court held that "clear, unequivocal, and convincing" evidence was the appropriate standard of proof. The term "unequivocal," taken by itself, means proof that admits of no doubt,[FN9] a burden approximating, if not exceeding, that used in criminal cases. The issues in *Schneiderman* and *Woodby* were basically factual and therefore susceptible of objective proof and the consequences to the individual were unusually drastic-loss of citizenship and expulsion from the United States.

FN9. See Webster's Third New International Dictionary 2494 (1961).

[9][10][11] We have concluded that the reasonable-doubt standard is inappropriate in civil commitment proceedings because, given****1813** the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. Similarly, we conclude that use of the term "unequivocal" is not constitutionally required, although the states are free to use that standard. To meet due process demands, the standard has to ***433** inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases.

We noted earlier that the trial court employed the standard of "clear, unequivocal and convincing" evidence in appellant's commitment hearing before a jury. That instruction was constitutionally adequate. However, determination of the precise burden equal to or greater than the "clear and convincing" standard which we hold is required to meet due process guarantees is a matter of state law which we leave to the Texas Supreme Court.[FN10] Accordingly, we

remand the case for further proceedings not inconsistent with this opinion.

FN10. We noted earlier the court's holding on harmless error. See *supra*, at 1087.

Vacated and remanded.

Mr. Justice POWELL took no part in the consideration or decision of this case.
U.S.Tex.,1979.
Addington v. Texas
441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323

Briefs and Other Related Documents (Back to top)

- 1978 WL 207147 (Appellate Brief) Brief for the State of Illinois as Amicus Curiae (Sep. 16, 1978)
- 1978 WL 207142 (Appellate Brief) Brief for the Appellee (Sep. 01, 1978)
- 1978 WL 207145 (Appellate Brief) Brief for the American Psychiatric Association as Amicus Curiae (Aug. 30, 1978)
- 1978 WL 207141 (Appellate Brief) Brief for the Appellant (Jul. 07, 1978)
- 1978 WL 207144 (Appellate Brief) Brief of the National Center for Law and the Handicapped, Amicus Curiae (Jul. 01, 1978)
- 1978 WL 207143 (Appellate Brief) Brief for the National Association for Mental Health, American Orthopsychiatric Association, National Association of Social Workers, and American Psychological Association as Amici Curiae (Jun. 30, 1978)

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United States Court of Appeals Tenth Circuit.
Fred W. HERYFORD, Superintendent of the Wyoming Training School in Fremont County, Wyoming, Appellant,
v.
Charles W. PARKER, by and through Mabel A. Parker, his mother and next friend, Appellee.
No. 9724.

June 14, 1968.

Habeas corpus proceeding brought by mother as natural guardian in behalf of her mentally deficient son who had been committed to state training school for feeble-minded and epileptic. On hearing after remand, 379 F.2d 556, the United States District Court for the District of Wyoming, Ewing T. Kerr, J., granted the writ and the state appealed. The Court of Appeals, Murrah, Chief Judge, held that where mentally deficient person was not afforded legal counsel at hearing which resulted in his involuntary commitment to state institution, he was denied due process.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ⚷255(2)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(2) k. Particular Applications. Most Cited Cases
(Formerly 92k255)
It matters not whether proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency for it is the likelihood of involuntary incarceration, whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent, which commands observance of the constitutional safeguards of due process. U.S.C.A.Const. Amend. 14.

[2] Infants 211 ⚷205

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(D) Proceedings
211k205 k. Counsel or Guardian Ad Litem. Most Cited Cases
(Formerly 211k16.9)

Mental Health 257A ⚷41

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak41 k. Hearing and Determination in General. Most Cited Cases
Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes duty to see that a subject of an involuntary commitment proceeding is afforded the opportunity to guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf. W.S.1957, § § 9-444 to 9-449; U.S.C.A.Const. Amend. 14.

[3] Mental Health 257A ⚷41

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak41 k. Hearing and Determination in General. Most Cited Cases
State's duty to see that a subject of an involuntary commitment proceedings is afforded opportunity to guiding hand of legal counsel at every step of proceedings is not discharged when the prosecuting attorney undertakes to prosecute the application for commitment on behalf of the state and the proposed mental patient is not otherwise represented by counsel. W.S.1957, § § 9-444 to 9-449; U.S.C.A.Const. Amend. 14.

[4] Mental Health 257A ⚷41

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak41 k. Hearing and Determination in General. Most Cited Cases
That Wyoming statutes for commitment of mentally deficient persons permissively provides that proposed patient may be represented by counsel is not sufficient to discharge state's duty to see that proposed patient is afforded opportunity to guiding hand of legal counsel at every step of the proceedings. W.S.1957, § 9-449; U.S.C.A.Const. Amend. 14.

[5] **Constitutional Law 92 ⚿255(5)**

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases
(Formerly 92k255)
Due process requires that the infirm person, or one acting in his behalf, be fully advised of his rights and accorded each of them in commitment proceeding unless knowingly and understandingly waived. W.S.1957, § § 9-444 to 9-449; U.S.C.A.Const. Amend. 14.

[6] **Constitutional Law 92 ⚿255(5)**

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(5) k. Diseased and Mentally Disordered Persons; Addicts. Most Cited Cases
(Formerly 92k255)
Where mentally deficient person was not afforded legal counsel at hearing which resulted in his involuntary commitment to state institution, he was denied due process. W.S.1957, § § 9-444 to 9-449; U.S.C.A.Const. Amend. 14.

[7] **Mental Health 257A ⚿41**

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak41 k. Hearing and Determination in General. Most Cited Cases
Record in proceeding for commitment of mentally deficient person established that patient's mother as natural guardian did not expressly attempt towaive patient's right to counsel. W.S.1957, § § 9-444 to 9-449; U.S.C.A.Const. Amend. 14.

[8] **Courts 106 ⚿100(1)**

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
Retroactivity of rule establishing a new standard for Fourteenth Amendment due process is not automatic, nor does it have case-by-case application. U.S.C.A.Const. Amend. 14.

[9] **Courts 106 ⚿100(1)**

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
Retroactivity of a rule establishing a new standard for due process depends upon a pragmatic balancing of the public interest against the gravity of the right involved and if the rule or newly established standard goes to the very integrity of the fact-finding process by which liberty is taken, retroactivity should be accorded even though it may result in wholesale consideration of the standards by which factual determinations were made. U.S.C.A.Const. Amend. 14.

[10] **Courts 106 ⚿100(1)**

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
Rule that a juvenile or a mentally deficient person is entitled to representation by counsel at every step of proceedings which might result in involuntary

incarceration would be retroactively applied. U.S.C.A.Const. Amend. 14.

*394 Lawrence E. Johnson, Cheyenne, Wyo., and Jack Speight, Asst. Atty. Gen., Cheyenne, Wyo. (James E. Barrett, Cheyenne, Wyo., on the brief), for appellant.
Barkley Clark, Denver, Colo., for appellee.

Before MURRAH, Chief Judge, HILL and SETH, Circuit Judges.

MURRAH, Chief Judge.
This case was first before us on denial of a writ of habeas corpus sought by a mother as natural guardian in behalf of her mentally deficient son. The complaint was that the son was committed to the Wyoming State Training School for feeble-minded and epileptic under applicable Wyoming statutes without due process and particularly that he was denied his right to counsel and confrontation. We remanded to determine whether in view of In the Matter of the Application of Gault, etc., 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527, the patient had a constitutional right to counsel, and if so, whether his mother as natural guardian could and did waive it. 10 Cir., 379 F.2d 556. On remand the writ was granted and the State of Wyoming brings this appeal. We affirm.

The background and undisputed facts are that in 1946, when Charles Parker was about nine years of age, his mother requested the County Attorney to institute proceedings for commitment of Charles to the Wyoming Training School for feeble-minded and epileptic. The Wyoming Statutory procedure, i.e. see 9-444 thru 9-449, Wyo.Stat., provides that commitment of the feeble-minded and epileptic may be initiated by application of a relative or guardian or the prosecuting attorney on a form subscribed to under oath which states that the applicant verily believes the the proposed patient is a fit subject for care, treatment and training in the school and asks that the subject be brought before the District Court for examination and commitment; that if the subject be a minor without parent or guardian, the Judge shall appoint a guardian ad litem to represent him. The statute further provides that the application shall be accompanied by a written history of the proposed patient certified under oath by an examining physician in which he answers prescribed questions touching suitability of the subject for admission to the school. The court shall, upon receipt of the application and history, cause the proposed patient to be examined by a physician and psychologist separately, and each shall certify that the subject is fit for care, treatment and training at the school. Provision is made for a hearing on the application pursuant to notice before a judge of the District Court, and it becomes the duty of the County and Prosecuting Attorney to 'appear and prosecute the application on behalf of the state'. § 9-449. The applicant,*395 at least one examiner and the patient (unless his presence would be injurious to him) shall be present, and the court is authorized to require any other person to appear and testify. The application, history and certificates of suitability by the two doctors are expressly made a part of the evidence in the case, and the statute pertinently provides that the proposed patient 'may be represented by counsel'. § 9-449. A jury may be demanded, and if it is found that the patient should be committed, the judge may forthwith order commitment.

Pursuant to this procedure, and at the instance of the mother, the application for Parker's commitment was signed by the County Attorney, and a hearing was conducted at which the prosecuting attorney, the certifying psychologist and the mother as natural guardian were all present. While the certifying physician did not appear, both his and the certifying psychologist's certificates of suitability were admitted into evidence. At no time during the hearing was Charles Parker represented by retained or appointed counsel, nor was he represented by a court appointed guardian ad litem. Parker was found to be a fit subject and was committed to the training school where he remained continually until 1963, at which time he was released to the custody of his parents. In 1965, against the wishes of his parents, he was returned to the training school where he remains to this day.

Subsequent to Parker's return to the school, this federal habeas corpus proceedings[FN1] was instituted alleging that he had been denied his constitutional right to counsel and confrontation in the proceedings pursuant to which he was originally confined in the training school. On remand the trial judge held that in view of Gault, Parker was constitutionally entitled to the assistance of counsel in the original commitment proceedings, and that while his mother as natural guardian could have waived his rights, she did not expressly do so.

FN1. The petition for writ of habeas corpus alleges exhaustion of all available state remedies, and it seems to be conceded.

In the posture in which the case comes to us on this appeal the constitutionality of the Wyoming statute as according due process is not directly in issue. The state apparently takes the position, as indeed it must, that the standards for due process erected in Gault are not the same as required in civil proceedings such as these. The argument seems to be that the nature of the proceedings in Gault is easily distinguishable from ours in that Gault was concerned with commitment for correction or rehabilitation of juveniles, while our proceedings are concerned solely with civil commitment for teaching and training the mentally deficient.

It is true that Gault involved procedures for adjudging a juvenile offender 'Delinquent' and committing him to a state institution. The query was whether he is entitled to the same Fourteenth Amendment due process procedures required to deprive an adult of his freedom for the commission of a crime. The effect of the decision was to place both juveniles and adults on the same Fourteenth Amendment due process footing. Mr. Justice Fortas reasoned that, 'It is of no constitutional consequence * * * that the institution to which (a juvenile) is committed is called an Industrial School. The fact of the matter is that however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a 'building with whitewashed walls, regimented routine and institutional hours * * *'.' The overriding consideration of the court was that in either case the determination carried with it the 'awesome prospect of incarceration in a state institution.' The court concluded that in these circumstances the Due Process Clause of the Fourteenth Amendment entitles the child *396 to the fundamental right of representation by counsel, confrontation and cross-examination.

[1][2][3][4][5][6] We do not have the distinction between the procedures used to commit juveniles and adults as in Gault. But, like Gault, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in Gault emphatically applies. It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration- whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent- with commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf. Certainly, this duty is not discharged when, as here, the prosecuting attorney undertakes to 'prosecute the application (for commitment) on behalf of the state', and the proposed patient is not otherwise represented by counsel. In re Custody of a Minor, 102 U.S.App.D.C. 94, 250 F.2d 419; Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84; McDaniel v. Shea, 108 U.S.App.D.C. 15, 278 F.2d 460; Dooling v. Overholser, 100 U.S.App.D.C. 247, 243 F.2d 825; Shioutakon v. District of Columbia, 98 U.S.App.D.C. 371, 236 F.2d 666; Anno. 87 A.L.R.2d 950. Nor is it sufficient that the Wyoming statute permissively provides that the proposed patient 'may be represented by counsel'. Fourteenth Amendment due process requires that the infirm person, or one acting in his behalf, be fully advised of his rights, and accorded each of them unless knowingly and understandingly waived.

[7] We recognize, as did the court in Gault that special problems may arise with respect to the effective waiver of rights by minors and mentally deficient persons. But, we need not decide here whether Parker's mother as natural guardian, having set into motion the commitment machinery, represented such conflicting interests that she could not effectively waive her son's right to counsel, for we agree with the trial court, no one seems to dispute, and it is sufficient to affirmance that there was no express attempt to waive such right.

This brings us to the question of the retroactivity of the Fourteenth Amendment due process standards recognized for the first time in Gault and made applicable to situations like ours. The crux of the state's argument seems to be that there is nothing in the principles announced in Gault to warrant retroactivity and its application in collateral proceedings would result in wholesale release of inmates in the Wyoming institutions and like institutions all over the country.

[8][9] Retroactivity of a rule establishing a new standard for Fourteenth Amendment due process is not automatic. Nor does it have case-by-case

application. Rather, as we read the case law as epitomized in Stovall v. Deno, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199, and Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948, retroactivity depends upon a pragmatic balancing of the public interests against the gravity of the right involved. Thus, if the rule or newly established standard goes to the very integrity of the fact finding process by which liberty is taken- as where the accused was convicted without benefit of counsel, i.e. see Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, or upon a coerced confession, i.e. see Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, or was denied an appeal because of his proverty, i.e. see *397Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269; Cf. Hamilton v. State of Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114; Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 and also Cf. Peyton, Superintendent v. Rowe, et al., 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426- retroactivity should be accorded even though it may result in wholesale consideration of the standards by which factual determinations were made.

[10] In our case the fundamental right to counsel is involved and failure to have counsel at every step of the proceedings may result in indefinite and oblivious confinement and work shameful injustice. Indeed, the expressed concern lest retroactivity in cases like these result in wholesale release from confinement in mental institutions is a compelling reason for the desirability, if not necessity, for retroactivity in our case.

Affirmed.

C.A.Wyo. 1968.
Heryford v. Parker
396 F.2d 393

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C

HARRY A. PHILLIPS et al., Plaintiffs and Appellants,
v.
F. H. SEELY, JR., as Auditor, etc., et al., Defendants and Respondents; JEROME E. WARREN, Intervener and Respondent
Civ. No. 13635.

Court of Appeal, Third District, California.

November 15, 1974.

SUMMARY

Plaintiff-taxpayers, in an action against the board of supervisors of a county without an established public defender's office, attacked the validity of a contract between the county and an attorney under which the county agreed to pay him a specified monthly compensation to defend indigents. The contract was challenged on the grounds that the board lacked authority to make it, and that it was invalid for failure to allocate between services and investigatory expenses, as having been made as a result of proscribed solicitation by the attorney, as having been made without competitive bidding, as contrary to public policy for conflict of interest reasons, and for failure to give adequate notice with regard to the board's meeting which concerned the contract. The judgment, however, favored defendants and upheld the contract. (Superior Court of Butte County, No. 52803, James E. Kleaver, Judge. [FN*])

The Court of Appeal affirmed. In addition to rejecting defendants' contention as to the timeliness of plaintiffs' complaint, the court held there was no merit in any of plaintiffs' assertions in support of their attack. For example, it was held that Gov. Code, § 31000, empowering boards of supervisors to contract for special services, constituted authority for making the contract. The contract was held to be outside of competitive bidding requirements. The court stated there were no conflicts of interests, nor any proscribed solicitation on the part of the attorney. And the court held that notice requirements with respect to the board's meeting had been met.

FN* Assigned by the Chairman of the Judicial Council.(Opinion by Carter, J., [FN†] with Richardson, P. J., and Janes, J., concurring.) *105

FN† Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Counties § 153--Limitation of Actions--Challenge to Validity of County's Contract.
Although a county's contract to pay an attorney a specified monthly compensation for legal services for indigents involves a public agency financial obligation, it is not the kind contemplated to be automatically validated absent a challenge within the 60 days specified in Code Civ. Proc., § § 860, 863. Thus, failure of plaintiff-taxpayers to file their complaint in an action challenging the contract's validity within 60 days after the county's entry into the contract was not jurisdictional.

(2) Criminal Law § 107(1)--Rights of Accused--Aid of Counsel.
In the area of criminal proceedings, an accused, whether indigent or otherwise, has a right to the immediate and effective assistance of counsel.

[See **Cal.Jur.3d,** Criminal Law **(Cal.Jur.2d,** Criminal Law, § 146); Am.Jur.2d, Criminal Law, § 309.]

(3) Constitutional Law § 113--Fundamental Rights, Privileges and Immunities--Right to Counsel.
Legal services for indigents at public expense are mandated in juvenile and mental health matters where a charge of wrongdoing is involved or restraint of liberty is possible.

(4a, 4b) Counties § 116--Contract With Attorney to Represent Indigents.
Under Gov. Code, § 31000, empowering county boards of supervisors to contract for special services, the board of a county without an established public defender's office had authority to contract with an attorney to represent indigents, where the contract provided that the board might cancel the contract on 10 days' notice in the event the superior court or any of its judges declined or refused to appoint him as defense counsel for any reason other than a conflict

of interest, and where it appeared that the judicial act of assigning counsel with knowledge of the compensation contract would constitute judicial approval and ratification of reasonable compensation under the circumstances.

(5) Attorneys at Law § 111.5--Compensation--Court-appointed Counsel.
Where assigned counsel for an indigent questions the reasonableness of the compensation to be allowed, it is for the court, not the county board of supervisors, to determine the matter. *106

(6) Attorneys at Law § 111.5--Compensation--Court-appointed Counsel.
In a county without an established public defender's office, the matter of reasonable compensation of court-assigned counsel involves some degree of cooperation between the court and the board of supervisors. The availability of reasonable funds for reasonable compensation required by law is the board's responsibility, but it is for the court to determine whether indigents who are entitled to counsel at public expense are being adequately represented by reasonably compensated counsel.

(7) Attorneys at Law § 111.5--Compensation--Court-appointed Counsel.
The purpose of providing reasonable compensation for counsel assigned to indigents is to insure that they receive legal services of competent attorneys who are at least reasonably compensated, and thereby contribute to the ultimate objective of the people of the state, who are the source of the compensation, to provide equal justice under law to any accused, regardless of his financial condition.

(8) Counties § 116--Contract With Attorney to Represent Indigents--Conflict of Interest.
With respect to a contract between a county without an established public defender's office and an attorney under which he was to defend indigents in exchange for a specified monthly compensation, the fact that the contract failed to allocate the compensation between services and investigative expenses did not render it invalid on the theory that such failure created a conflict of interest. It is a judgmental matter for defense counsel to decide how much time and expense for investigatory or research effort may be reasonably productive for the defense based on the particular case. An attorney is duty bound to explore reasonably and seek to verify possible defenses.

(9) Attorneys at Law § 149(7)--Disbarment and Suspension--Acts Justifying Discipline--Solicitation.
In the absence of any evidence that the idea to submit an offer to represent indigents for a county without an established public defender's office originated with the attorney with whom the county subsequently executed a contract for such services, it could not be said that the contract was the result of solicitation by him in violation of Bus. & Prof. Code, § § 6152, 6153.

(10) Counties § 116--Contract With Attorney to Represent Indigents--Need for Competitive Bidding.
Competitive bidding is not a pre-requisite to a contract between a county without an established public *107 defender's office and an attorney under which he is to represent indigents for a specified monthly compensation.

(11) Counties § 116--Contract With Attorney to Represent Indigents-- Conflict of Interest.
A contract under which an attorney agreed with a county without an established public defender's office to represent indigents for a specified monthly compensation was not invalidated under the theory of a conflict of interest based on the fact that the person who was the district attorney when the contract was executed subsequently resigned and, as an associate of the contracting attorney, represented indigents pursuant to court appointment, where the former prosecutor defended only in cases which arose after he had left the district attorney's office.

(12a, 12b) Counties § 53--Boards of Supervisors--Meetings--Adequacy of Notice.
A contract under which an attorney agreed to defend indigents for a county without an established public defender's office was not subject to attack on the ground that the board of supervisors failed to give adequate notice of the scope and action to be taken at the board's meeting with regard to the contract, where the subject matter and the contract were not of such nature as to require special statutory notice, the meeting was a regular one, and the agenda item made it clear that under the heading of "public defender," there had been an offer by two local lawyers to supply public defender services.

(13) Notice § 9--Notice Required by Law--Meetings of Public Bodies.
The deliberations of local governing bodies elected by the people should, with few exceptions, be conducted openly and with due notice. However, where the subject matter is sufficiently defined to apprise the public of the matter to be considered and notice has been given in the matter required by law,

the body is not required to give further special notice of what action it might take.

COUNSEL

Blade, Farmer & LeClerc, Blade & LeClerc, Robert V. Blade and Raoul J. LeClerc for Plaintiffs and Appellants.

Daniel V. Blackstock, County Counsel, for Defendants and Respondents.

Skow & Jones and Charles A. Skow for Intervener and Respondent. ***108**

CARTER, J. [FN*]

FN* Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

Plaintiff taxpayers appeal after a court trial from a judgment upholding the validity of a contract entered into between the County of Butte and intervener Jerome E. Warren for the rendition of legal services by Warren to certain indigent defendants in criminal matters, indigent juveniles and conservatees in need of and entitled to legal assistance at public expense. The judgment further ordered the defendant, F. H. Seely, Jr., as Auditor of Butte County to pay warrants to Warren pursuant to the contract.

Plaintiffs contend on appeal:

1. Defendant board of supervisors lacked authority, express or implied, to contract with Warren to represent indigents;

2. The contract is invalid because it fails to allocate between "services" and "investigatory expenses" the gross monthly payment to Warren;

3. The contract was the result of solicitation on the part of Warren and is void as violative of public policy;

4. Public policy requires competitive bidding for the contracted services;

5. The contract is contrary to public policy because of a conflict of interest;

6. The board of supervisors failed to give adequate notice of the scope and action to be taken at the board meeting regarding the contract.

Defendants contend that the appeal is moot and since plaintiffs failed to comply with Code of Civil Procedure sections 860-870, they are precluded from challenging the validity of the contract.

Facts

In early May of 1971, a news article attributable to the County Administrator of Butte County indicated the existence of a problem of providing funds for court-appointed counsel for indigent persons in Butte County. As a result of this article, Warren discussed the matter with Jack McKillop, a member of the Butte County Board of Supervisors. McKillop suggested that Warren submit a proposal regarding legal services, an idea in which John Schroder, an attorney, and Robert Mueller, the Butte County District Attorney, were interested as well. On May 24, 1971, Warren submitted a proposal to the board for the rendition of legal services to indigents which ***109** was accepted, with minor changes, on that day. A written contract was executed by the duly authorized chairman of the board, Jere E. Reynolds, and by Warren. Thereafter, Mueller resigned his position as district attorney, and, along with Schroder as associates of Warren, has represented indigents pursuant to court assignment in Butte County. The agreement provided, among other things, that Warren was to assume full responsibility for furnishing with associate counsel the required legal services on a daily basis in two departments of the superior court, the Chico Municipal Court and the Oroville, Gridley, Paradise and Biggs Justice Courts. The county retained the right to cancel the contract upon 10 days' written notice, if for any reason other than a conflict of interest any of the judges of the superior court declined or refused to appoint Warren as defense counsel for indigents.

On August 6, 1971, 73 days after execution of the agreement, plaintiffs filed their complaint to enjoin defendant F. H. Seely, Jr., Auditor of Butte County, from expending public moneys for or as a consequence of services rendered pursuant to the contract. Copies of the summons and complaint were served on the various defendants. Answers were filed, and on December 14, 1971, the case proceeded to trial. At the beginning of the trial the defendants and intervener Warren orally moved to dismiss, contending plaintiffs had failed to comply with Government Code sections 53510 and 53511 and Code of Civil Procedure sections 860-870. Without holding a hearing on whether good cause existed to excuse plaintiffs' noncompliance, the court took the motion under advisement. After the case was tried,

briefed and submitted, the trial court held that Code of Civil Procedure sections 860-870 did not apply.

Discussion of Contentions

1. *Failure of Plaintiffs to File Their Complaint Within 60 Days of Execution of the Contract on May 24, 1971, Was Not Jurisdictional.*

There is no dispute that plaintiffs' complaint was a taxpayers' action seeking to challenge the validity of a contract between a public agency (Butte County Board of Supervisors) and Warren. Government Code section 53510, relating to validating proceedings provides: "As used in this article [art. 5, pt. 1, div. 2, tit. 5] 'local agency' means county, city, city and county, public district or any public or municipal corporation, public agency or public authority."

Government Code section 53511 provides: "A local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations ***110** or evidences of indebtedness pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure."

Code of Civil Procedure section 860 provides: "A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem."

Code of Civil Procedure section 863 provides: "If no proceedings have been brought by the public agency pursuant to this chapter, any interested person may bring an action within the time and in the court specified by Section 860 to determine the validity of such matter. The public agency shall be a defendant and shall be served with the summons and complaint in the action in the manner provided by law for the service of a summons in a civil action. In any such action the summons shall be in the form prescribed in Section 861.1 except that in addition to being directed to 'all persons interested in the matter of [specifying the matter],' it shall also be directed to the public agency. If the interested person bringing such action fails to complete the publication and such other notice as may be prescribed by the court in accordance with Section 861 and to file proof thereof in the action within 60 days from the filing of his complaint, the action shall be forthwith dismissed on the motion of the public agency unless good cause for such failure is shown by the interested person."

On April 2, 1970, Justice Mosk, in *City of Ontario* v. *Superior Court*, 2 Cal.3d 335, 339-344 [85 Cal.Rptr. 149, 466 P.2d 693], carefully summarized the statutory history of Code of Civil Procedure sections 860-870, and the consequences which resulted from the enactment of sections 53510 and 53511 of the Government Code in 1963. The Supreme Court stated: "If, as the City here argues, the word 'contracts' in section 53511 is taken to mean *any* contract into which the agency may lawfully enter, the farreaching expansion of the statute becomes apparent. The vast majority of such an agency's dealings are necessarily undertaken by means of contracts; some involve routine ministerial matters, but others embody important policy decisions affecting the public at large.

"The public's opportunity to challenge those decisions, moreover, is commensurately restricted by this legislation. Section 863 of chapter 9 provides that if the public agency does not initiate validating proceedings, ' any interested person may bring an action within the time and in the court specified by Section 860 of this chapter to determine the validity of such matter.' This seems innocuous enough, until one reads section 869: 'No ***111** contest except by the public agency or its officer or agent of any thing or matter under this chapter *shall be made* other than within the time and the manner herein specified.' (Italics added.) In other words, while section 863 says that an interested person 'may' bring such an action, section 869 says he *must* do so or be forever barred from contesting the validity of the agency's action in a court of law. Yet no such restriction is placed on the agency itself, which is in effect authorized by section 869 to disregard the 60-day statute of limitations imposed by section 860.

"The practical consequence of this statutory scheme should be clearly recognized: an agency may indirectly but effectively 'validate' its action *by doing nothing to validate it*; unless an 'interested person' brings an action of his own under section 863 within the 60-day period, the agency's action will become immune from attack whether it is legally valid or not. Indeed, in the case at bar the City concedes this to be so. Thus a statute which begins by providing a remedy to be pursued by public agencies, expressly declaring it to be 'in the nature of a proceeding in rem' (§ 860), concludes by making it unnecessary for such agencies to do anything at all, and the incidental or derivative remedy of an 'interested person' turns

out to be controlling. This is truly a case of the tail wagging the dog." (*Id.* at pp. 341-342.) (Original italics; fn. omitted.)

Our research has failed to disclose any legislative action which has sought to extend the 60-day period of time in which an action may be brought by "interested persons" to challenge the validity of public agency contracts of the *kind* subject to the provisions of sections 860 and 863. We hold that the trial court correctly concluded that the contract for rendition of legal services to the county by Warren was not subject to sections 860 and 863, and thus the question of "good cause" for failure to publish summons is of no significance. (*City of Ontario v. Superior Court, supra,* 2 Cal.3d 335; *Arnold v. Newhall County Water Dist.* (1970) 11 Cal.App.3d 794, 803 [96 Cal.Rptr. 894].)

In *City of Ontario, supra,* at pages 343-344, the court stated: "On its face, section 53511 would seem to be applicable. It lists, as matters for validation under chapter 9, 'bonds, warrants, *contracts*, obligations or evidences of indebtedness' (italics added). There is no limitation or qualification on the word 'contracts,' and it would therefore appear to include a multipurpose municipal contract such as the Ontario Motor Stadium Agreement. Yet the legislative history of the statute suggests a contrary result. First, the Legislative Counsel's digest of the bill proposing section 53511 characterized the measure as one allowing 'a local agency to bring an action to determine the validity of evidences of indebtedness.' Second, ***112** section 53511 was enacted as part of chapter 3 of part 1, division 2, title 5, of the Government Code. Chapter 3 is entitled 'Bonds,' and deals exclusively with the power of local agencies to sell their bonds, replace defaced or lost bonds, and pledge their revenues to pay or secure such bonds. If section 53511 was intended to be a provision of general application, logically it should have been placed in article 4 ('Miscellaneous') of chapter 1 ('General') of the same part, in which a group of such unrelated matters are collected. Third, the key language of section 53511 - 'bonds, warrants, contracts, obligations or evidences of indebtedness' - was taken directly from section 864 of chapter 9; under well-known canons of statutory interpretation, it should ordinarily be given the same meaning as it had in the earlier statute. But as a perusal of the companion 1961 legislation reveals, when chapter 9 was adopted it was made applicable only to such matters as the legality of the local entity's existence, the validity of its bonds and assessments, and the validity of joint financing agreements with other agencies. If section 53511 was intended to reach any and all contracts into which an agency may lawfully enter, the restricted language of section 864 was inappropriate for that purpose. Finally, that language is peculiarly inapt for expressing such a general meaning in any event, as it lists the word ' contracts' in the midst of four other terms which all deal with the limited topic of a local agency's financial obligations."

In the matter before us, plaintiffs sought an injunction to prevent the alleged illegal expenditure of public funds, an action expressly authorized by section 526a of the Code of Civil Procedure, and to compel restitution, both remedies predating the enactment of section 53511 of the Government Code. (1) We hold that while the agreement to pay Warren the sum of $12,500 per month for legal services of course involves a public agency financial obligation, it is not the kind of financial obligation contemplated to be automatically validated absent a challenge within the 60 days proscribed in sections 860 and 863 for instruments, such as bonds and assessments, whose very marketability may well depend upon their prompt and automatic validation upon the passing of the 60-day period.

2. *Authority of the Board of Supervisors to Contract for Rendition of Legal Services to Indigents.*

Plaintiffs urge there are but two methods whereby public funds may be disbursed by a county to attorneys for legal services rendered to indigent persons in criminal, juvenile or mental health matters, namely, pursuant to Government Code section 27700 or Penal Code section 987.2.

(2) In the area of criminal proceedings the right of an accused person, whether indigent or otherwise, to the immediate and effective assistance of ***113** counsel is settled law in California. (Cal. Const., art. I, § 13; U.S. Const., 6th Amend.; *In re Williams* (1969) 1 Cal.3d 168 [81 Cal.Rptr. 784, 460 P.2d 984]; *People v. Ibarra* (1963) 60 Cal.2d 460 [34 Cal.Rptr. 863, 386 P.2d 487]; Pen. Code, § 987.) (3) Legal services for indigent persons at public expense are also mandated in juvenile and mental health matters where a charge of wrongdoing is involved or restraint of liberty is possible. (Welf. & Inst. Code, § § 634, 5111; *In re Joseph T.* (1972) 25 Cal.App.3d 120, 126 [101 Cal.Rptr. 606].)

Section 27700 of the Government Code provides in part as follows: "The board of supervisors of any county *may* establish the office of public defender for

the county." (Italics ours.)

The duties of the public defender if the office is so established by the board, whether elective or appointive, are specifically defined in Government Code section 27706.

The agreement of May 25, 1971, did not establish the office of public defender in Butte County but was merely a contract between the county and Warren, whereby the latter agreed to provide, with a few exceptions, the usual and customary public defender legal services enumerated in Government Code section 27706 to indigent persons in Butte County for an agreed sum of $12,500 per month.

Plaintiffs urge that since a public defender's office was not established, the board of supervisors was without authority to enter into the subject contract with Warren, because Penal Code section 987.2 is the only remaining basis upon which counsel for indigents may be assigned and a reasonable compensation determined and disbursed from public funds.

Penal Code section 987.2 reads: "(a) In any case in which a person, including a person who is a minor, desires but is unable to employ counsel and in which counsel is assigned in the superior court, municipal court, or justice court to represent such a person in a criminal trial, proceeding or appeal, such counsel, in a county or city and county in which there is no public defender, or in a case in which the court finds that because of conflict of interest or other reasons the public defender has properly refused to represent the person accused, shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county.

"(b) The sum provided for in subdivision (a) may be determined by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the total amount of compensation and expenses to be paid, which shall be within the amount of *114 funds allocated by the board of supervisors for cost of assigned counsel in such cases.

"(c) The board of supervisors may by contract provide that any public defender duly appointed or elected may charge reasonable fees to the Department of Corrections for representing inmates of prisons under its control, and the Department of Corrections may upon approval by the court pay such fees into the county treasury to be placed in the general fund of the county.

"(d) Counsel shall be appointed to represent, in the municipal or justice court, a person who desires but is unable to employ counsel, when it appears that such appointment is necessary to provide an adequate and effective defense for defendant."

(4a) As we have seen, the contract between the board and Warren expressly reserved to the board the right to cancel the agreement upon 10 days' notice, "in the event the Superior Court or any of the judges thereof declines or refuses to appoint attorney as defense counsel for indigents as provided for herein for any reason other than a conflict of interest ...."

Plaintiffs forcefully urge that if a public defender's office has not been established in the county, then in those instances where private counsel is assigned to represent an indigent person under section 987.2 of the Penal Code, the court must fix a reasonable sum as compensation and expenses for such legal services.

This court, in referring to the fixing of reasonable compensation in court-assigned cases under section 987a (now § 987.2), held in *Halpin v. Superior Court* (1966) 240 Cal.App.2d 701, 706 [49 Cal.Rptr. 857]: "To substitute for the independent exercise of discretion of the court in each case where counsel is assigned to represent a criminal defendant under section 987a, the order fixing compensation dated November 16, 1965, may conceivably in some cases constitute an abuse of judicial discretion ...." Thus the trial court could not refuse to exercise its discretion by simply adopting a daily rate of compensation which had been previously established by the board of supervisors for court-assigned attorneys. (5) In substance, where assigned counsel for an indigent person questions the reasonableness of the compensation to be allowed, it is for the court and not the board to make that determination. In addition, since *Halpin*, section 987.2, subdivision (b), was amended to provide that the reasonable sum for compensation of court-assigned counsel to represent indigents "may be determined by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the total *115 amount of compensation and expenses to be paid, which shall be within the amount of funds allocated by the board of supervisors for the cost of assigned counsel in such cases."

In *Ingram v. Justice Court* (1968) 69 Cal.2d 832,

842 [73 Cal.Rptr. 410, 447 P.2d 1391], the Supreme Court stated: "In short, the fundamental flaw in the People's position is its unstated assumption that the courts are the guardians of the county coffers. In our system of government this is not, and should not be, their role. The Constitution and the statutes commit that responsibility, more appropriately, to the board of supervisors, assisted by such officers as the district attorney, the county counsel, the treasurer, the controller and auditor, and the inquisitorial body of citizens, the grand jury."

(6) Consideration of the statutory and case law impels the conclusion that where a public defender's office has not been established in a county, the matter of reasonable compensation of court-assigned counsel for indigent persons understandably involves some degree of cooperation between the court and the board of supervisors. The availability of a reasonable sum of money to reasonably compensate assigned counsel where required by law is the responsibility of the board of supervisors; whether indigent persons entitled to counsel at public expense are being adequately represented by reasonably compensated counsel is for the court to determine. Where the court is required to determine the reasonableness of compensation, section 987.3 of the Penal Code enumerates the factors which the court shall consider.

In substance, plaintiffs really urge that sections 987.2 and 987.3 create a *right* in every member of the Bar in a given county to be appointed to represent indigent persons at public expense where there is no established public defender's office. (7) Such contention is not necessarily consistent with the purpose of providing reasonable compensation for counsel assigned to indigent persons. That purpose is to insure indigent persons the legal services of competent attorneys who are at least reasonably compensated, and thereby contribute to the ultimate objective of the people of this state, who are the source of the compensation, to provide equal justice under the law to any accused person regardless of financial condition.

The record indicates that the instant controversy arose because the Board of Supervisors of Butte County was rightly concerned with the possible increased cost of compensation and expenses which would be incurred for court-assigned counsel to defend indigent persons during the ensuing fiscal year. While the board has the duty to provide the money to reasonably compensate defense counsel for indigent persons in Butte County, the people of *116 Butte County are entitled to expect their elected representatives, both the board of supervisors *and* the courts to act with fiscal responsibility. The saving of substantial public funds without diminishing the quality of reasonably compensated defense counsel in indigent cases is not only prudent, but tends to enhance the public's respect for our judicial system.

It is apparent the agreement between Warren and the board of supervisors would be of little impact if the courts in which Warren agreed to provide counsel for qualified indigents *refused* to assign him to act. Thus to the extent that the court remains the final authority for assignment of counsel, the court retains the inherent means and carries out its contracting responsibility of passing on the matter of reasonable compensation for assigned counsel in indigent cases. (4b) The judicial act of assigning counsel with knowledge of the compensation contract between the board of supervisors and Warren constitutes judicial approval and ratification of reasonable compensation under the circumstances.

Finally, subject to the foregoing rule that *the court* is to determine whether indigent persons entitled to counsel at public expense are being adequately represented by reasonably compensated counsel, we think authority for the challenged contract is found in section 31000 of the Government Code (as it then read); "The board of supervisors may contract with and employ any person for the furnishing to the county, or to a county officer, or for any court within the county, or for and on behalf of any district within the county for furnishing to the district, of special services and advice in financial, economic, accounting, engineering, legal, medical, or administrative matters, or in matters related to the courts, by any persons specially trained and experienced and who is competent to perform the special services required.

"The authority herein given to contract shall include the right of the board of supervisors, to contract for the issuance and preparation of payroll checks.

"The board may pay from any available funds such compensation to any such expert as it deems proper for the services rendered."

While the last sentence of the foregoing code section may appear to be inconsistent with the ultimate responsibility of the court in determining reasonable compensation for court-assigned counsel, the exercise of this duty by the court arises where there is no contract between the board of supervisors *and*

counsel assigned by the court to represent indigents or where assigned counsel challenges the adequacy of compensation sought to be set by the board (see *Halpin, supra*). *117

If in the judgment of the court a particular counsel possesses the requisite ability to represent adequately an indigent person in the particular matter before the court, and such counsel is satisfied with the compensation contractually arrived at between himself and the board of supervisors, there is generally no need for judical intervention to fix reasonable compensation under the particular circumstances. This is the case at bench.

Accordingly we hold that the Board of Supervisors of Butte County had the authority pursuant to Government Code section 31000 to enter into the agreement with Warren.

3. *Allocation of Compensation Between Services and Investigatory Expenses.*

(8) Paragraph 6 of the agreement provides that the cost of criminal investigators is to be borne by Warren. Plaintiffs urge this creates a "conflict of interest in the ultimate[,] [n]o matter how conscientious and ethical such counsel may be," and "thus, the attorneys representing the indigents face the cruel dilemma resulting from the fact that every dollar spent for investigation means a dollar less for the three attorneys."

We see no dilemma or conflict at all, since an attorney's duty runs to his client, not the attorney's pocket. We reject plaintiffs' contention that a mere possible opportunity for misconduct is a legal basis to void the contract. It is a judgmental matter for defense counsel to decide how much time and expense required for investigatory or research effort may be reasonably productive for the defense based upon the particular case. An attorney is duty bound to explore reasonably and seek to verify possible defenses in order to meet the constitutional standard of adequate defense counsel. (*People v. Ibarra, supra*, 60 Cal.2d 460.)

Our Supreme Court has expressed in broad language the principles applicable to appointed criminal defense counsel: "[W]hen the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court. The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were it not so his client would not be afforded the full right 'to have assistance of counsel for his defense' which the Constitutions, both state and federal, give to one accused of crime. With such plenary powers given a public *118 defender when appointed to defend one accused of crime, it necessarily follows that no act of his in advising his client or in defending the latter upon the charge against him can be considered in any different light than if such act were performed by an attorney regularly employed and retained by the defendant." (*In re Hough* (1944) 24 Cal.2d 522, 528-529 [150 P.2d 448].)

Finally, we think the interest of the accused indigent, his counsel and the public may well be better served by the employment of a full-time investigator by Warren, rather than on a case-by-case basis.

4. *The Contract Was Not the Result of Solicitation by Warren.*

Plaintiffs urge that since the board of supervisors did not take formal action to invite Warren's offer *before* it was submitted, the offer to furnish legal services to indigents in Butte County amounted to solicitation of business by an attorney in violation of Business and Professions Code sections 6152 and 6153. The record shows that a news article reflected the board's concern with anticipated increasing costs of court-appointed counsel in the various courts of the county, and in fact Warren was requested by a member of the board to submit an offer for consideration by the board respecting such matter. (9) There is no evidence that the idea to submit the offer originated with Warren (see *People v. Levy* (1935) 8 Cal.App.2d Supp. 763, 769 [50 P.2d 509]), and we find no "solicitation of business" by Warren within the meaning of the Business and Professions Code.

5. *Competitive Bidding Was Not Required.*

(10) Plaintiffs seek to bring the agreement to render legal services to indigent persons within the purview of public works contracts. They cite no authority for such position, and our research fails to disclose any. Here the service to be rendered at public expense was professional in nature. Since the board has a responsibility both to the public and to the indigent person in need of counsel, the board is entitled to rely upon its own knowledge and judgment as to the reputation of counsel in the county in order to equate

the experience, reputation and skill of counsel with the amount of funds to be allocated to the defense of indigent cases, and thus contribute in cooperation with the courts to the ultimate goal that indigent persons be adequately represented by adequate counsel.

6. *There Was No Conflict of Interest.*

(11) Plaintiffs urge next that because the District Attorney of Butte County resigned and became an associate of Warren rendering legal services ***119** to indigent persons, a conflict of interest was created. None of the conflict cases cited by plaintiffs are applicable since all involved situations where defense counsel, at the time of representation of the accused, maintained directly or indirectly a continuing relationship with the prosecutor's office, or held a confidential attorney-client relationship with the accused and later became the prosecutor.

In *People v. Rhodes* (1974) 12 Cal.3d 180, 186 [115 Cal.Rptr. 235, 524 P.2d 363], our Supreme Court recently disapproved of the appointment of a city attorney with *prosecutorial responsibilities* to represent an indigent defendant. The case at bench is clearly distinguishable since the record before us fully establishes that Mr. Mueller, the former district attorney, resigned from office and severed his connections with the prosecutor's office *before* he undertook assignment to represent indigent persons in Butte County. In addition, such assigned services were rendered on a per diem basis to indigent persons whose case arose *after* Mueller left the district attorney's office, thus eliminating even the appearance of impropriety. (*Rhodes, supra,* at p. 185.)

Section 6131 of the Business and Professions Code provides in part: "Every attorney is guilty of a misdemeanor and, in addition to the punishment prescribed therefor, shall be disbarred:

"

. . . . . .

"(b) Who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court as district attorney or other public prosecutor, afterwards, directly or indirectly, advises, in relation to or takes any part in the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from or on behalf of any defendant in any such action upon any understanding or agreement whatever having relation to the defense thereof."

Plaintiffs do not urge that Mueller violated section 6131, subdivision (b), *supra*, nor does the record before us even support such an inference. Finally, we note that the agreement was between Warren and the board of supervisors. Whom Warren engaged to assist him in the performance of his to-be-assigned duties did not affect the validity of the agreement.

7. *Adequacy of Notice of Board's Action.*

(12a) There is no dispute that the meeting of May 25, 1971, at which the subject agreement with Warren was considered, approved and executed, was a regular meeting of the Butte County Board of Supervisors. The agenda item made it clear that the board was to hear and consider an offer to supply ***120** public defender services to the county. There is no evidence that the agenda was not properly posted as required by Government Code section 25151 and it must be thus presumed that the county clerk duly performed his duty. (Evid. Code, § 664.)

The subject matter and contract were not of such nature as to require special statutory notice. Plaintiffs' reliance on *Carlson v. Paradise Unified Sch. Dist.* (1971) 18 Cal.App.3d 196 [95 Cal.Rptr. 650], is misplaced. (13) In *Carlson*, we stated at page 199: "There has been a long and vigorous battle fought against secrecy in government. [Citations.] It is now the rule that local governing bodies, elected by the people, exist to aid in the conduct of the people's business, and thus their deliberations should be conducted openly and with due notice with a few exceptions not applicable here. (See Gov. Code, § 54950 et seq.; cf. 3 Witkin, Summary of Cal. Law (1960) Constitutional Law, § 116, p. 1919; 70 Ops.Cal.Atty.Gen. 113.)"

We strongly reaffirm the foregoing rule, with the observation that where the subject matter is sufficiently defined to apprise the public of the matter to be considered and notice has been given in the manner required by law, the governing body is not required to give further special notice of what action it might take. (12b) The agenda item made it clear that under the heading of public defender there had been an offer to supply public defender services to the county by Jerome Warren and John Schroder, two local lawyers who were interested in supplying such services to the county. We hold that the definition of the subject matter and notice given were sufficient to meet due process standards.

Judgment affirmed.

Richardson, P. J., and Janes, J., concurred.

A petition for a rehearing was denied November 29, 1974, and appellants' petition for a hearing by the Supreme Court was denied January 8, 1975. Richardson, J., did not participate therein. *121

Cal.App.3.Dist.,1974.

Phillips v. Seely

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C

JOHN WALTZ, Petitioner,
v.
ROBERT D. ZUMWALT, as County Clerk, etc., Respondent; SAN DIEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, Real Party in Interest.
No. D002407.

Court of Appeal, Fourth District, Division 1, California.

May 2, 1985.

SUMMARY

A county clerk refused to prepare and certify a record of public conservatorship proceedings for an indigent, who wanted to appeal the imposition of a conservatorship and his confinement to a mental health facility, until the indigent paid for the transcript. The indigent told the clerk by letter he would present a forma pauperis to the court to get the fee waived, but the clerk refused to give him the time to make his request by not extending the time for fees to be deposited and instead entered a default.

The Court of Appeal issued a peremptory writ of mandate directing the county clerk to vacate its notice of default and to prepare a record for appeal at county expense. The court held that although involuntary commitment proceedings under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.) are civil in nature, the possibility of confinement, perhaps for life, invokes due process and equal protection guarantees which require that indigent persons appealing grave disability proceedings be furnished with the necessary record for appeal free of charge. (Opinion by Brown (Gerald), P. J., with Wiener and Work, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Incompetent Persons § 4--Determination of Status--Proceedings--Appeal-- Right of Indigent to Free Transcript.
An indigent person found to be "gravely disabled" and involuntarily committed to a mental hospital under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.) was entitled to a free transcript of the public conservatorship proceedings for purposes of appeal, at county expense. Although proceedings under the act are civil in nature, a person may be *836 involuntarily committed to a mental hospital, perhaps for the rest of his life. Accordingly, due process and equal protection guarantees require such a person to be furnished with a complete and adequate record on appeal. There is no state interest in not providing a free transcript to an indigent conservatee.

[See Cal.Jur.3d, Incompetent, Addicted, and Disordered Persons, § 113; Am.Jur.2d, Incompetent Persons, § 25.]

COUNSEL

Sharron Voorhees, under appointment by the Court of Appeal, for Petitioner.

Lloyd M. Harmon, Jr., County Counsel, Howard P. Brody, Chief Deputy County Counsel, and Thomas E. Montgomery, Deputy County Counsel, for Respondent and for Real Party in Interest.

BROWN (Gerald), P. J.

John Waltz wants to appeal the imposition of a conservatorship and his confinement in a county mental health facility. We determined he is indigent and we appointed appellate counsel for him. The county clerk, however, refused to prepare and certify the record until Waltz paid $634 (Cal. Rules of Court, rule 5(c)). Waltz told the clerk by letter he would present a forma pauperis to the court to get the fee waived. The clerk refused to give him the time to make his request by not extending the time for fees to be deposited and instead entered a default. [FN1]

FN1 Waltz was foreclosed by the clerk's entry of default from seeking relief in superior court. Thus, the court is not joined as a party in these proceedings.

(1)Waltz petitioned this court for a writ of mandate. He claims a public conservatorship proceeding is criminal in nature and he is entitled to free transcripts as well as appointed counsel. Recognizing Waltz is representative of a class of persons similarly situated,

we issued an alternative writ. After further briefing and argument, we issue the peremptory writ.

The clerk's contentions assume proceedings under the Lanterman-Petris-Short Act are civil in nature and any appeal must follow the rules for civil appeals. In civil appeals, costs must be deposited in advance or waived by *837 the court (Cal. Rules of Court, rule 4(c)). Waltz wanted to request a waiver of costs but was foreclosed by the clerk's entering the default. The clerk argues the superior court cannot authorize a waiver of fees and this court cannot order the superior court directly to provide a free transcript; although we might under ordinary circumstances order the superior court to waive fees, we cannot do so here, says the clerk, because the superior court has not been joined as an indispensable party (Code Civ. Proc., § 389).

In addition, the clerk argues if this court were to order free transcripts be prepared, we would have no authority to order payment for their preparation since only the Legislature can authorize the expenditure of public funds for indigent civil litigants (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 920 [132 Cal.Rptr. 405, 553 P.2d 565]). The fact the Legislature provides payment by the county for transcript costs in criminal cases (Pen. Code, § 1246.5) and fails to do so for proceedings under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.) shows the intent of the Legislature that these costs not be borne by the county. Counsel have in some civil cases been appointed for indigent litigants even after the court found the county could not pay them because attorneys have a professional responsibility to accept "the cause of the defenseless or the oppressed" (Bus. & Prof. Code, § 6068, subd. (h)). Court reporters are not subject to such legislation and cannot be required to absorb the cost of preparing free transcripts for the indigent.

Although proceedings under the Lanterman-Petris-Short Act are civil in nature (see Welf. & Inst. Code, § 5118), Waltz, or any person similarly situated, may be involuntarily committed to a mental hospital. If he is found to be "gravely disabled" (Welf. & Inst. Code, § § 5352.1, 5353), this confinement may continue for a year with the possibility of additional year-long extensions (Welf. & Inst. Code, § § 5358, 5361), perhaps for the rest of his life. Persons confined in mental hospitals are deprived of their personal freedom (*In re Roger S.* (1977) 19 Cal.3d 921, 929 [141 Cal.Rptr. 298, 569 P.2d 1286]; *People v. Burnick* (1975) 14 Cal.3d 306, 323 [121 Cal.Rptr. 488, 535 P.2d 352]; see *People v. Olivas* (1976) 17 Cal.3d 236, 244-245 [131 Cal.Rptr. 55, 551 P.2d 375]). It is no less incarceration because it is called civil or because it is deemed to be remedial or beneficial (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225 [152 Cal.Rptr. 425, 590 P.2d 1]; see *Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 811 [210 Cal.Rptr. 204, 693 P.2d 789]). Because of the potential for loss of liberty and the social stigma associated with such commitments, a jury determining whether a person is gravely disabled must consist of 12 jurors and arrive at a unanimous verdict (*Conservatorship of Roulet, supra.*, 23 Cal.3d at p. 230). The standard of proof at such a hearing is that of beyond *838 a reasonable doubt (*People v. Thomas* (1977) 19 Cal.3d 630, 638 [139 Cal.Rptr. 594, 566 P.2d 228]).

In *Griffin v. Illinois* (1956) 351 U.S. 12 [100 L.Ed. 891, 76 S.Ct. 585, 55 A.L.R.2d 1055] the United States Supreme Court held "a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. There, as in *Draper v. Washington* [(1963) 372 U.S.]487 [9 L.Ed.2d 899, 83 S.Ct. 774], the right to a free transcript on appeal was in issue. [In *Douglas v. California*] the issue is whether ... an indigent shall be denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' *Griffin v. Illinois, supra.*, [351 U.S.] at p. 19." (*Douglas v. California* (1963) 372 U.S. 353, 355 [9 L.Ed.2d 811, 813-814, 83 S.Ct. 814, 815-816].)

Against this criminal law background, it is not surprising Waltz received the benefit of appointed trial counsel (Welf. & Inst. Code, § 5111; Gov. Code, § 27706; Pen. Code, § 1240). This court appoints counsel for indigent persons wishing to appeal grave disability proceedings under the Lanterman-Petris-Short Act (Gov. Code, § 15421). Common sense dictates appointed appellate counsel cannot act on Waltz's behalf without a transcript of the trial proceedings. Waltz's constitutional right to effective counsel includes the right to reasonably necessary ancillary services (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320 [204 Cal.Rptr. 165, 682 P.2d 360]). Indigent persons appealing grave disability proceedings must be provided with the necessary record for appeal free of charge.

Welfare and Institutions Code section 5305, concerning postcertification proceedings for imminently dangerous persons, provides for

constitutional due process guarantees as set out in California Constitution, article I, section 15. That constitutional section relates to various safeguards in criminal proceedings such as speedy trial and assistance of counsel. It has been held to apply to proceedings for the gravely disabled as well, at least as to the requirement of a unanimous jury. [FN2] In addition, it states no person may be deprived of his liberty without due process of law. Due process includes the right to a complete and adequate record on appeal. Waltz is in danger of losing his liberty. To deny him a record is to deny him access to the courts at a time when the state is prepared to confine him involuntarily. To threaten to do so is a threat to violate Waltz's rights to due process and *839 equal protection (see *In re James R.* (1978) 83 Cal.App.3d 977, 980 [148 Cal.Rptr. 145]; *In re Armstrong* (1981) 126 Cal.App.3d 565, 570 [178 Cal.Rptr. 902]). He is entitled to a complete transcript of the proceedings free of cost.

> FN2 The proposed conservatee does not, however, have the right not to testify nor may he assert the defense of double jeopardy in instances where a petition to reestablish the conservator can be filed. (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 550 [200 Cal.Rptr. 262].)

Closely aligned with the concept of due process is that of equal protection. Waltz is unable to have appellate review of the court's determination to deprive him of his freedom because he lacks the funds to have a proper transcript prepared. Where one's liberty is at stake application of the strict scrutiny test is required. It then becomes the government's burden to justify the procedure by showing it has a compelling interest which is furthered by the procedure in question. Since Waltz did not present the argument of equal protection, the county has, quite properly, not attempted to justify its practice. However, in light of the potential of keeping Waltz in custody involuntarily for the remainder of his life, this court is unable to discern any possible state interest in not providing a transcript to counterbalance Waltz's position. At the court's request, the county provided information from 1981 to the present on appeals of mental health proceedings. These data show there were less than five requests for transcripts per year at a total cost of less than $1, 000 per year. Equal protection demands that Waltz be provided a free transcript.

The county suggests if Waltz is entitled to a free record, it should be under the conditions set out in *Crespo v. Superior Court* (1974) 41 Cal.App.3d 115, 119-120 [115 Cal.Rptr. 681] where the superior court was instructed to determine whether a complete or partial transcript was necessary or whether a settled statement would suffice. However, *Crespo* is a case where free transcripts on appeal were granted to indigent parents seeking custody of their children. Here, we deal with persons threatened with loss of liberty and exposure to social stigma, persons similarly situated to defendants in criminal matters. As such, they must be granted the same benefits as if the proceedings were truly criminal.

Let a peremptory writ of mandate issue directing the county clerk to vacate its notice of default. In that petitioner has been found indigent by this court and counsel has been appointed, the county is ordered to prepare a record for appeal, the expense to be borne by the county.

Wiener, J., and Work, J., concurred. *840

Cal.App.4.Dist.,1985.

Conservatorship of Waltz

END OF DOCUMENT