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Commission on State Mandates
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Re: Comment and Legal Argument Relating to the
Reconsideration of the Request for Mandate Redetermination on
Remand, 12-MR-01-R, Pursuant to County of San Diego v.
Commission on State Mandates (2018) 6 Cal.5th 196

**Reconsideration of the Request for Mandate Redetermination on
Remand**
Sexually Violent Predators (CMS-4509), 12 MR-01-R
Welfare and Institutions Code Sections 6601 through 6608
Statutes 1995, Chapter 762, Statutes 1995, Chapter 763, Statutes 1996,
Chapter 4
Department of Finance, Requester

Dear Ms. Halsey:

On behalf of the County of Orange and its offices, departments and agencies (the "County"), we hereby present the following comments in response to the Commission's February 8, 2019 Request for Comment and Legal Argument and in opposition to the Department of Finance's ("DOF") request for redetermination.

Background

In 1995, the legislature enacted the Sexually Violent Predators Act (the "SVPA"), Welfare and Institutions Code sections 6600 through 6608, which established comprehensive civil commitment procedures for the detention and treatment of sexually violent offenders whose diagnosed mental disorders predispose them to engage in sexually violent criminal behavior. In 1998, the Commission determined that the SVPA created reimbursable state mandates as to eight duties required by local governments under the SVPA. Years later, in 2013, the Department of Finance for the State of California ("DOF") filed a request for redetermination of this mandate pursuant to Government Code section 17570, asserting that Proposition 83 (also known as "Jessica's Law"), which was adopted by the voters on November 7,

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2006, constituted a subsequent change in the law, eliminating the state's liability under the test claim statutes. The Commission partially approved the DOF's request in late 2013, declaring that six of the eight duties were no longer state mandates and were, instead, mandated by Proposition 83.

Several counties filed a petition for writ of mandate seeking to overturn this decision. Ultimately, on November 19, 2018, the Supreme Court agreed with the counties and determined that the Commission erred in treating Proposition 83 as a basis for terminating the state's obligation to reimburse the counties simply because certain provisions of the SVPA had been restated without substantive change in Proposition 83. (*County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196.) While the Court noted that Proposition 83 expanded the "Sexually Violent Predator" ("SVP") definition, it stressed that the "the current record is insufficient to establish, how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to local governments." (*Id.* at 217.) It continued "under the circumstances, we find it prudent to remand the matter to the Commission to enable it to address these arguments in the first instance." (*Ibid.*)

On February 8, 2019, the Commission sought briefing on "whether [Proposition 83's] expanded SVP definition transformed the test claim statutes as a whole into a voter-imposed mandate or, alternatively, did so to the extent the expanded definition incrementally imposed new, additional duties on the Counties." Informed by the Court's observation that "the current record is insufficient" as to the actual effects of the definition expansion, the Commission specifically requested information regarding "how, if at all, the expanded SVP definition in Proposition 83 affected the number of referral so to local governments." It also noted that Commissions ultimate filings must be supported by "substantial evidence."

On March 26, 2019, the DOF submitted its comments, which cited no evidence regarding whether, and to what extent, the number of referrals to local governments was affected by Proposition 83's expanded SVP definition. (*See* DOF's March 26, 2019 Letter ("DOF letter").)

The DOF Has Not Met Its Burden

In making a request for redetermination, it was the DOF's burden to demonstrate a "subsequent change in law" material to the prior test claim decision. (Cal. Code Regs., tit. 2, § 1190.5, subd. (a)(1); Gov't Code § 17570(b).) Government Code section 17570, subdivision (a)(2) defines a "subsequent change in law" as a "change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556." Given that the Supreme Court has already opined that the current record is insufficient to establish that such a change resulted from the simple expansion of the SVP definition, the DOF needed to create a record and provide evidence of the practical effects and costs flowing from this change. By declining to do so, it failed to meet its burden.

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Instead, in its March 22, 2019 letter, the DOF relied entirely on to Proposition 83's statutory changes, which were part of the record and wholly known to the Supreme Court at the time of its decision. It then asserted that the new SVP definition expanded the "category of people" who could be subject to the SVP protocols and, therefore, the costs relating to previously state-mandated duties now "flow from" this definition. (DOF letter at p. 2.) This assertion is meaningless in the absence of any data demonstrating that the change in definition had anything other than a *de minimus* effect on referrals to local governments. Information about referrals was specifically requested by the Commission and readily available to the DOF through the Department of State Hospitals, a state agency. However, the DOF declined to provide it.¹

Proposition 83's Expanded Definition Of SVP Did Nothing To Transform The Test Claim Statutes Into A Voter-Imposed Mandate

In enacting the SVPA in 1996, the legislature created a robust statutory scheme to address SVPs and imposed significant burdens and costs on local governments. The minor amendment of the statutory scheme by a ballot measure did not impact local government duties or the state's subvention duties. (*See County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 213 ["[N]othing in Proposition 83 focused on duties local governments were already performing under the SVPA. No provision amended those duties in any substantive way."].) Had Proposition 83 failed, the fundamental burdens of the SVPA protocols would still exist as they now exist; Proposition 83's failure would not have changed this. Instead, Proposition 83 merely asked voters whether they wanted to amend the act in a limited manner and recited a large portion of the remaining statutory scheme to provide the voters with context to guide their decision. (For further discussion on this and other points relevant to the Commission's analysis, please see the County of Orange's August 20, 2013 Comments to the Draft Staff Analysis and Proposed Statement of Decision for the Second Hearing as well as the testimony of former Orange County Supervisor Todd Spitzer at the Commission's September 27, 2013 Public Meeting.)

In particular, changes to the SVP definition resulting from Proposition 83 did not require local entities to perform new services or provide a higher level of service. Under the original SVPA, and under Proposition 83, an individual still has to committed a sexually violent offence and must have a "diagnosed mental disorder that makes the person a danger to the health and

¹ Since the DOF has not set forth a factual basis for seeking redetermination as it relates to the expanded SVP definition, the County hereby reserves its right to submit further data should the Commission find that the DOF has met its initial burden. In particular, this office has filed a Public Records Act Request for data from the Department of State Hospitals regarding the number of referrals to for civil commitment proceedings under Welfare and Institutions Code section 6601 from 1996 to present, in Orange County and statewide. We request the opportunity to supplement our comments to the Commission once this data is received.

safety of others in that it is likely that he or she will engage in sexually violent criminal behavior” in order to qualify as an SVP. As the Supreme Court acknowledged, Proposition 83 made only two changes to the definition.² “First, [Proposition 83] reduced the required number of victims, so that an offender need only have been ‘convicted of a sexually violent offense against one or more victims,’ instead of two or more victims Second, [it] eliminated a provision that had capped at one the number of juvenile adjudications that could be considered a prior qualifying conviction. (*County of San Diego v. Commission on State Mandates*, 6 Cal.5th at 216.) (Citations omitted.)

While the Supreme Court acknowledge the *possibility* that the definitional change might, as a practical matter, modify local duties or significantly increase the burdens of those duties, the DOF has presented no evidence that this actually happened. To the contrary, as further addressed below, the evidence suggests that the burdens of the SVP protocols have remained approximately the same, or declined, following the enactment of Proposition 83.

Proposition 83’s Expanded Definition Of SVP Did Not Result In An Increase In Referrals To Local Governments

In its July 2011 report, the California State Auditor explained, “Jessica’s Law has not resulted in what some expected: the commitment as SVPs of many more offenders. Although an initial spike in commitments occurred in 2006 and 2007, this increase has not been sustained.” (California State Auditor Sex Offender Commitment Program July 2011 Report 2010-116, <http://www.bsa.ca.gov/pdfs/reports/2010-116.pdf> at p. 15. A true and correct copy of this report is attached hereto as Exhibit A.) It further noted “Mental Health recommended to the district attorneys or the county counsels responsible for handling SVP cases about the same number of offenders in 2009 as it did in 2005, before the voters passed Jessica’s Law.” (*Ibid.*) In an effort to explain the lack of change, the State Auditor referenced the requirement that SVPs have a diagnosed mental disorder that makes them likely to reoffend. It opined, “the fact that an offender has had more than one victim may correlate to the likelihood that he or she has a diagnosed mental disorder that increases the risk of recidivism.” (*Ibid.*)

² The DOF asserts that “*the voters* expanded the set of crimes that qualify as a ‘sexually violent offence’ citing various penal code sections (Penal Code sections 207 (kidnapping), section 209 (kidnapping for ransom, reward, or extortion, or to commit robbery or rape), or section 220 of the Penal Code (assault to commit mayhem, rape, sodomy, or oral copulation), committed with the intent to commit another enumerated ‘sexually violent offense.’” (DOF letter at p. 1.) (Emphasis added.) However, the inclusion of this language in Welf. & Inst. Code, § 6600 was the result of the *legislature’s* enactment of SB 1128, effective September 20, 2006, before the adoption of Proposition 83. (Leg. Counsel's Dig., Sen. Bill No. 1128 (2005-2006 Reg. Sess.))

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Even though the expanded definition of SVP technically allows first time, single victim, offenders to be committed, the evidence suggests that those cases rarely exist and are rarely pursued. As a practical matter, it appears that the requirement that a SVP have a diagnosed mental disorder making him or her a prone to recidivism, generally limits the implementation of the SVP protocols to those who have more than one victim and would have qualified under the previous definition. For this reason, the duties and burdens imposed by the current SVP protocols in addressing the current SVP definition are nearly identical to the previous duties and burdens.

In fact, the preliminary research from the Orange County District Attorney's office demonstrates an overall average decline in referrals and SVP commitment cases in Orange County following Proposition 83's implementation. (See Declaration of Peter Finnerty attached hereto as Exhibit B.) The office noted that it filed an average of 4.43 commitment cases per year from 2000 through 2006. That number went down to an average of 3.42 commitment cases per year in the years that followed Proposition 83's implementation from 2007 through 2018.

I declare under penalty of perjury that the foregoing, signed on April 10, 2019, is true and correct to the best of my personal knowledge, information or belief.

Very truly yours,

LEON J. PAGE
COUNTY COUNSEL

By 
Suzanne E. Shoai, Deputy County Counsel

SES:ml

Attachments:

Exhibit A - California State Auditor Sex Offender Commitment Program July 2011 Report

Exhibit B - Declaration of Peter Finnerty

Sex Offender Commitment Program

Streamlining the Process for Identifying Potential
Sexually Violent Predators Would Reduce Unnecessary
or Duplicative Work

July 2011 Report 2010-116



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July 12, 2011

2010-116

The Governor of California
President pro Tempore of the Senate
Speaker of the Assembly
State Capitol
Sacramento, California 95814

Dear Governor and Legislative Leaders:

As requested by the Joint Legislative Audit Committee, the California State Auditor presents this audit report concerning the state's Sex Offender Commitment Program (program), which targets a narrow subpopulation of sex offenders (offenders)—those who represent the highest risk to public safety because of mental disorders. Our analysis shows that between 2007 and 2010 less than 1 percent of the offenders whom the Department of Mental Health (Mental Health) evaluated as sexually violent predators (SVPs) met the criteria necessary for commitment.

Our report concludes that the Department of Corrections and Rehabilitation (Corrections) and Mental Health's processes for identifying and evaluating SVPs are not as efficient as they could be and at times have resulted in the State performing unnecessary work. The current inefficiencies in the process for identifying and evaluating potential SVPs stems in part from Corrections' interpretation of state law. These inefficiencies were compounded by recent changes made by voters through the passage of Jessica's Law in 2006. Specifically, Jessica's Law added more crimes to the list of sexually violent offenses and reduced the required number of victims to be considered for the SVP designation from two to one, and as a result many more offenders became potentially eligible for commitment. Additionally, Corrections refers all offenders convicted of specified criminal offenses enumerated in law but does not consider whether an offender committed a predatory offense or other factors that make the person likely to be an SVP, both of which are required by state law. As a result, the number of referrals Mental Health received dramatically increased from 1,850 in 2006 to 8,871 in 2007, the first full year Jessica's Law was in effect. In addition, in 2008 and 2009 Corrections referred 7,338 and 6,765 offenders, respectively. However, despite the increased number of referrals it received, Mental Health recommended to the district attorneys or the county counsels responsible for handling SVP cases about the same number of offenders in 2009 as it did in 2005, before the voters passed Jessica's Law. In addition, the courts ultimately committed only a small percentage of those offenders. Further, we noted that 45 percent of Corrections' referrals involved offenders whom Mental Health previously screened or evaluated and had found not to meet SVP criteria. Corrections' process did not consider the results of previous referrals or the nature of parole violations when re-referring offenders, which is allowable under the law.

Our review also found that Mental Health primarily used contracted evaluators to perform its evaluations—which state law expressly permits through the end of 2011. Mental Health indicated that it has had difficulty attracting qualified evaluators to its employment and hopes to remedy the situation by establishing a new position with higher pay that is more competitive with the contractors. However, it has not kept the Legislature up to date regarding its efforts to hire staff to perform evaluations, as state law requires, nor has it reported the impact of Jessica's Law on the program.

Respectfully submitted,



ELAINE M. HOWLE, CPA
State Auditor

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Summary

Results in Brief

The Legislature designed the Sex Offender Commitment Program (program) to target a narrow subpopulation of sex offenders (offenders): those who represent the highest risk to public safety because of mental disorders. However, between 2007 and 2010, very few offenders whom the Department of Mental Health (Mental Health) evaluated as potential sexually violent predators (SVPs) met the criteria necessary for commitment. As a result, the courts ultimately committed only a small percentage as SVPs even though Mental Health received more than 6,000 referrals in each of these years from the Department of Corrections and Rehabilitation (Corrections). Our analysis suggests that Corrections' and Mental Health's processes for identifying and evaluating SVPs are not as efficient as they could be and at times have resulted in the State performing unnecessary work.

The current inefficiencies in the program's process for evaluating potential SVPs are in part the result of Corrections' interpretation of state law. The inefficiencies were compounded by recent changes made by Jessica's Law. Specifically, when California voters passed Jessica's Law (Proposition 83) in 2006, they added more crimes to the list of sexually violent offenses and reduced the number of victims considered for this designation from two to one; therefore, many more offenders became potentially eligible for commitment to the program. Corrections, in consultation with its Board of Parole Hearings (Parole Board), referred *all* offenders who had committed sexually violent offenses to Mental Health for evaluation as potential SVPs without first considering other factors, as required by law. Consequently, the number of referrals Corrections made to Mental Health increased dramatically, from 1,850 in 2006 to 8,871 in 2007, the first full year that Jessica's Law was effective.

However, Corrections' referral of every offender who has committed a sexually violent crime was not the intent of state law, which specifically mandates that Corrections determine when making referrals whether offenders' crimes were predatory and whether the offenders meet other criteria before referring them as potential SVPs. We believe that if Corrections screened offenders more closely before referring them to Mental Health, the number of Corrections' referrals might drop significantly. For example, in our review, we noted several instances in which Corrections referred offenders whose crimes were not predatory under the law's definition. Further, 45 percent of Corrections' referrals since 2005 involved offenders whom Mental Health had previously screened or evaluated and had found not to meet the criteria to recommend commitment as SVPs (SVP criteria). Although state law does

Audit Highlights . . .

Our review of the state's Sex Offender Commitment Program (program) between January 2005 and September 2010 revealed the following:

- » *The Department of Corrections and Rehabilitation (Corrections) sent more than 6,000 referrals each year from 2007 through 2010 to the Department of Mental Health (Mental Health) for evaluation as potential sexually violent predators (SVPs).*
- » *Many more offenders became potentially eligible for commitment to the program when California voters approved Jessica's Law (Proposition 83)—the law added more crimes to the list of sexually violent offenses and reduced the number of victims considered for this designation from two to one.*
- » *Because Corrections referred all offenders who had committed sexually violent offenses to Mental Health for evaluation, this also contributed to the number of referrals increasing from 1,850 in 2006 to 8,871 in 2007, the first full year that Jessica's Law was in effect.*
- *We noted several instances in which Corrections referred offenders whose crimes were not predatory under the law.*
- *Since 2005, 45 percent of the referrals involved offenders whom Mental Health had previously screened or evaluated and had found not to meet the criteria to recommend commitment as SVPs.*
- » *Corrections failed to refer offenders to Mental Health at least six months before their scheduled release dates as required and, thus, shortened the time available for Mental Health to perform reviews and schedule evaluations.*

continued on next page . . .

- » *Although Mental Health's evaluation process appears to have been effective, for a time it sometimes assigned one evaluator, rather than the two required.*
- » *Mental Health used between 46 and 77 contractors each year from 2005 through 2010 to perform evaluations and some clinical screenings, however, the state law that expressly allows Mental Health to use contractors expires in 2012.*
- » *Mental Health did not submit required reports to the Legislature about its efforts to hire staff to evaluate offenders and about the impact of Jessica's Law on the program.*

not specifically require Corrections to consider the outcomes of previous screenings or evaluations when making referrals, the law directs Corrections to refer only those offenders it deems likely to be SVPs, and we believe that it is logical and legal for Corrections to take into account Mental Health's previous conclusions about specific offenders when reaching such determinations. Additionally, Corrections failed to refer offenders to Mental Health at least six months before their scheduled release dates, as required by state law. These late referrals shortened the time available for Mental Health to perform reviews and schedule evaluations.

To handle the high number of offenders referred by Corrections, Mental Health put into place processes that enable it to determine whether offenders are possible SVPs before scheduling full evaluations. We believe that these processes are appropriate given that Corrections refers offenders without first determining whether their crimes were predatory and whether the offenders are likely to be SVPs. Specifically, when Mental Health receives a referral from Corrections, it first conducts an administrative review to ensure that it has all of the information necessary to make a determination. It then conducts a clinical screening—a file review by a psychologist—to rule out any offender who is not likely to meet SVP criteria and thus does not warrant a full evaluation. Between February 2008 and June 2010, Mental Health also used administrative reviews to identify offenders whom it had previously screened or evaluated and whose new offenses or violations were unlikely to change the likelihood that they might be SVPs. Mental Health rescinded this policy in June 2010. We also noted that for a short time, Corrections had a similar policy that it also rescinded. Nonetheless, we believe Mental Health should work with Corrections to reduce unnecessary referrals.

After completing the administrative reviews and clinical screenings, Mental Health conducts full evaluations of potential SVPs, a process that involves face-to-face interviews unless offenders decline to participate. Although we found that in general Mental Health's evaluation process appears to have been effective, we noted that for a time it did not always assign to cases the number of evaluators that state law requires. After the passage of Jessica's Law, Mental Health relied on the opinion of one evaluator rather than two when concluding that 161 offenders did not meet SVP criteria. Mental Health's program manager stated that Mental Health temporarily followed this practice of using just one evaluator because it did not have adequate staff to meet its increased workload. She also indicated that Corrections referred 98 of the offenders again, and Mental Health determined during subsequent screenings and evaluations that they did not meet SVP criteria.

A potential challenge that Mental Health faces in meeting its increased workload involves the mental health care professionals who perform its evaluations. Mental Health used between 46 and 77 contractors each year from 2005 through 2010 to perform evaluations and some clinical screenings. However, when the state law that expressly permits Mental Health to use contractors expires in 2012, Mental Health will need to justify its continued use of contractors, which the State Personnel Board has ruled against in the past.¹ According to a program manager, Mental Health primarily uses contracted evaluators to perform the evaluations because the staff psychologists are still completing the necessary experience and training. Mental Health stated that it has had difficulty attracting qualified evaluators to state employee positions because the compensation is not competitive for this specialized area of forensic mental health clinical work. To remedy the situation, Mental Health is working to establish a new position that will provide more competitive compensation. If Mental Health has not hired sufficient staff by 2012, the program manager stated that it plans to propose a legislative amendment to extend the authority to use contractors.

Finally, Mental Health did not submit to the Legislature required reports about the department's efforts to hire staff to evaluate offenders and the impact of Jessica's Law on the program. Mental Health did not provide us with a timeline indicating the expected dates for completing these reports, nor did the department explain why it had not submitted them. Without the reports, the Legislature may not have the information necessary for it to provide oversight and make informed decisions.

Recommendations

To increase efficiency, Corrections should not make unnecessary referrals to Mental Health. Corrections and Mental Health should jointly revise the referral process to adhere more closely to the law's intent. For example, Corrections should better leverage the time and work it already conducts by including the following steps in its referral process:

- Determining whether the offender committed a predatory offense.

¹ State law requires Mental Health to use contractors for third and fourth evaluations when the first two evaluators disagree. The change of law in 2012 will not affect Mental Health's use of contractors for this purpose.

- Reviewing results from any previous screenings and evaluations that Mental Health completed and considering whether the most recent parole violation or offense might alter the previous decision.
- Assessing the risk that an offender will reoffend.

To allow Mental Health sufficient time to complete its screenings and evaluations, Corrections should improve the timeliness of its referrals. If it does not achieve a reduction in referrals from implementing the previous recommendation, Corrections should begin the referral process earlier before each offender's scheduled release date in order to meet its six-month statutory deadline.

To make certain that it will have enough qualified staff to perform evaluations, Mental Health should continue its efforts to obtain approval for a new position classification for evaluators. If the State Personnel Board approves the new classification, Mental Health should take steps to recruit qualified individuals as quickly as possible.

To ensure that the Legislature can provide effective oversight of the program, Mental Health should complete and submit as soon as possible its reports to the Legislature about Mental Health's efforts to hire state employees to conduct evaluations and the impact of Jessica's Law on the program.

Agency Comments

Mental Health indicated that it is taking actions that are responsive to each of our recommendations. For example, Mental Health stated it is already working with Corrections to streamline the referral process to eliminate duplicate effort and increase efficiency.

Corrections indicated that it agrees that improvements can be made in streamlining the referral process and that it has already implemented steps to improve the timeliness of its referrals to Mental Health. Corrections stated that it would address the specific recommendations in its corrective action plan at 60-day, six-month, and one-year intervals.

Introduction

Background

The Legislature created the Sex Offender Commitment Program (program) in 1996 to target a small but extremely dangerous subset of sex offenders (offenders) who present a continuing threat to society because their diagnosed mental disorders predispose them to engage in sexually violent criminal behavior. State law designates these offenders as sexually violent predators (SVPs).

The Sexually Violent Predator Act (Act) governs the program. The Act lists crimes that qualify as sexually violent offenses and defines *predatory* to mean acts against strangers, persons of casual acquaintance, or persons with whom the offender established relationships primarily for the purposes of victimization. The Act also requires that SVPs have diagnosed mental disorders that make them likely to engage in future sexually violent behavior if they do not receive appropriate treatment and custody. Determining whether offenders are SVPs and committing them for treatment is a civil rather than criminal process. Thus, crimes that offenders committed before passage of the Act can contribute to offenders' commitment as SVPs.

Since the passage of the Act, certain state laws have further amended the program. Specifically, in September 2006, Senate Bill 1128 became law and added more crimes to the list of sexually violent offenses that could cause offenders to qualify as SVPs. More dramatically, on November 7, 2006, California voters passed Proposition 83, also known as Jessica's Law.² In addition to creating residency restrictions and global positioning system monitoring for certain sex offenders, Jessica's Law added more crimes to the list of sexually violent offenses, and it also decreased from two to one the number of victims necessary for the SVP designation. Both Senate Bill 1128 and Jessica's Law abolished the previous two-year term of civil commitment for an SVP and instead established a commitment term of indeterminate length that includes yearly evaluations to determine an SVP's readiness for release.

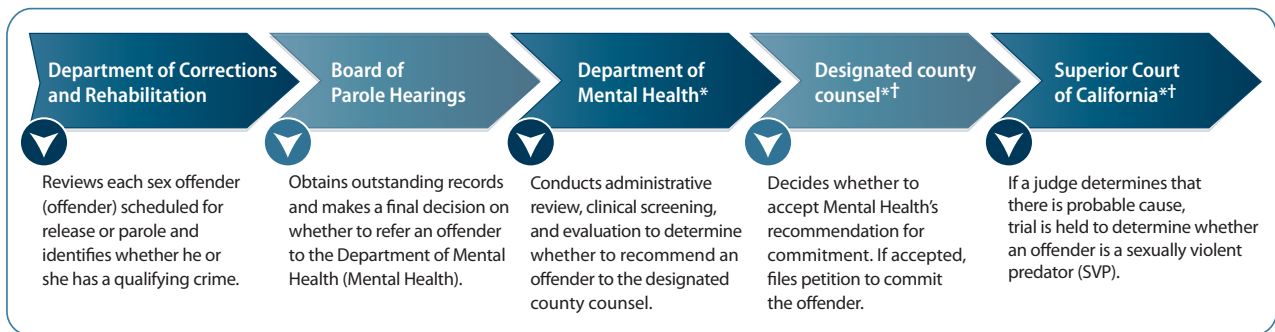
The Process for Identifying, Evaluating, and Committing SVPs

The Department of Mental Health (Mental Health) and the Department of Corrections and Rehabilitation (Corrections), including its Board of Parole Hearings (Parole Board), play critical roles in identifying, evaluating, and recommending the commitment of an offender as an SVP. However, a judge or jury

² The law was named in memory of Jessica Lunsford, a nine-year-old girl from Florida who died in 2005 as a result of a violent sexual crime committed by a previously convicted sex offender.

at a California superior court makes the final determination of an offender's SVP status. Figure 1 shows the relationships among the steps in the process. If at any point in this process an offender fails to meet SVP criteria, the offender completes the term of his or her original sentence or parole.

Figure 1
The Multiagency Process for Committing a Sexually Violent Predator



Sources: Mental Health, Department of Corrections and Rehabilitation, Board of Parole Hearings, and California Welfare and Institutions Code, Section 6600 et seq.

* During this phase of the process, the agency may find that the offender does not meet SVP criteria, in which case the offender completes the term of his or her original sentence or parole.

† Recommendation is made to the designated counsel in the county where the offender was convicted most recently. The designated counsel files the request to commit in the same county.

Corrections' Identification of Potential SVPs

State law requires Corrections and its Parole Board to screen offenders based on whether they committed sexually violent predatory offenses and on reviews of their social, criminal, and institutional histories. To complete these screenings, the law requires Corrections to use a structured screening instrument developed and updated by Mental Health in consultation with Corrections. According to state law, when Corrections determines through this screening process that offenders may be SVPs, it must refer the offenders to Mental Health for further evaluation at least six months before the offenders' scheduled release dates.³

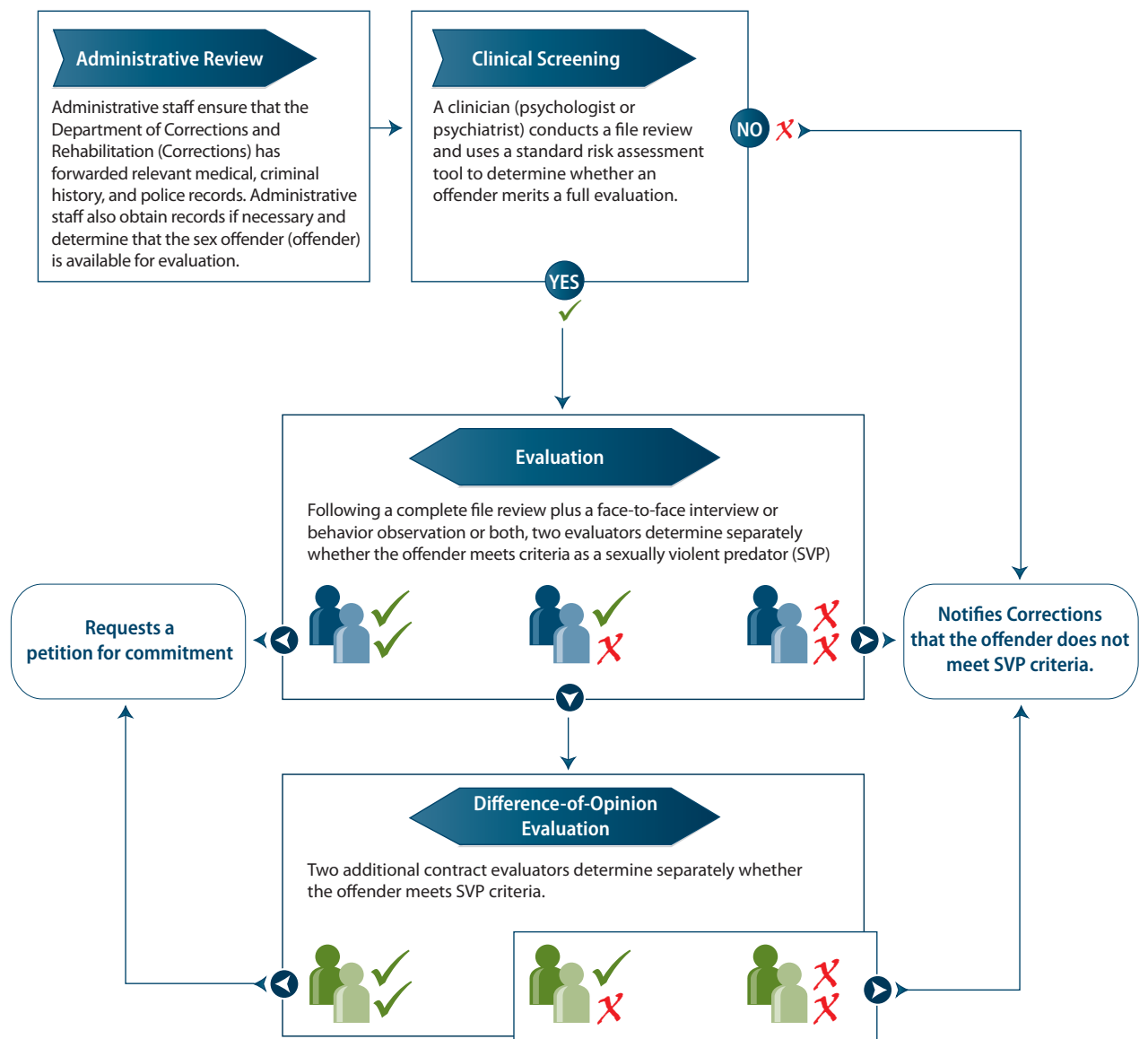
Mental Health's Evaluation of Potential SVPs

State law requires that Mental Health evaluate as potential SVPs any offenders whom Corrections refers to Mental Health. It specifies that for each of these offenders, Mental Health must conduct a full evaluation consisting of assessments by two mental health professionals who must be psychiatrists or psychologists. However, in practice, Mental Health does not conduct an evaluation of every offender

³ If the offender has been in Corrections' custody for less than nine months or if judicial or administrative action modified his or her release date, the sixth-month timeline does not apply.

referred by Corrections; rather, it first conducts an administrative review and then a clinical screening to determine whether an offender merits an evaluation. We discuss these administrative reviews and clinical screenings in more detail later in the report. Figure 2 illustrates the process that Mental Health uses to determine whether it should recommend to the district attorneys or the county counsels responsible for handling SVP cases (designated counsels) the offenders referred by Corrections for commitment to the program.

Figure 2
Department of Mental Health's Process for Reviewing, Screening, and Evaluating a Sex Offender



Sources: California Welfare and Institutions Code, Section 6601 et seq. and program manager for the Department of Mental Health's Sex Offender Commitment Program.

Indicators That a Sex Offender Is a Sexually Violent Predator

The Department of Mental Health (Mental Health) uses the following criteria defined in state law and clarified by court decisions to determine whether a sex offender is a sexually violent predator (SVP):

- The individual has been convicted of a sexually violent offense, such as rape when committed with force, threats, or other violence.
- The offender suffers from a diagnosed mental disorder.
 - The law defines *diagnosed mental disorder* as including conditions affecting the emotional and volitional capacity that predispose the person to committing criminal sexual acts to a degree that the person is a menace to the health and safety of others.
 - Most diagnoses involve paraphilia or related disorders—sexual behavior that is atypical and extreme and that causes distress to the individual or harm to others. However, other disorders may qualify under the law.
- The diagnosed mental disorder makes the person likely to engage in sexually violent, predatory criminal behavior in the future without treatment and custody.
 - The law defines *predatory* offenses as acts against strangers, persons of casual acquaintance, or persons with whom the offender established relationships primarily for the purpose of victimization.
 - Regulations require evaluators to use standardized risk assessment tools and to consider various risk factors to determine the likelihood that an offender will commit future crimes.

Sources: Bureau of State Audits' review of case files, interviews of Department of Mental Health staff and evaluators, analysis of California Welfare and Institutions Code, Section 6600 et seq., Title 9 of the California Code of Regulations, and California Supreme Court decisions.

State law requires Mental Health's evaluators to determine whether the offender meets the criteria for the SVP designation (SVP criteria), which the text box describes in more detail. If the first two evaluators agree that the offender meets the criteria, Mental Health must request a petition for civil commitment, as discussed in the next section. If the first two evaluators disagree, the law requires that Mental Health arrange for two additional evaluators to perform evaluations. The two additional evaluators must meet certain professional criteria and cannot be employees of the State. If the two additional evaluators agree that the offender meets the criteria, Mental Health must request a commitment. If the two additional evaluators disagree or if they agree that the offender has not met the criteria, Mental Health generally cannot request a commitment unless it believes the evaluator applied the law incorrectly.

The Court's Commitment and the State's Treatment of SVPs⁴

When Mental Health's evaluators conclude that an offender meets SVP criteria, state law requires that Mental Health request that the designated counsel of the county in which the offender was most recently convicted file a petition in court to commit the offender. If the county's designated counsel agrees with Mental Health's recommendation, he or she must file in superior court a petition for commitment of the offender. If a judge finds probable cause that the offender is an SVP, he or she orders a trial for a final determination of whether the offender is an SVP. If the offender or petitioning attorney does not demand a jury trial, the judge conducts the trial without a jury. During the court proceedings, offenders are entitled to representation by legal counsel and medical experts. Each county's board of supervisors appoints a designated counsel, the district attorney or county counsel responsible for handling SVP cases.

⁴ We did not audit the designated counsels, the courts, or the actual treatment programs because they were outside the scope of our review.

The court commits offenders it finds are SVPs to secure facilities for treatment, and these commitments have indeterminate terms. According to Mental Health's program manager, in May 2011 there were 521 male SVPs and one female SVP committed to state hospitals. State law requires that Mental Health examine the mental condition of committed SVPs at least once a year. If Mental Health determines that offenders either no longer meet SVP criteria or that less restrictive treatment would better benefit them yet not compromise the protection of their communities, Mental Health must ask a court to review their commitments for unconditional discharge or for conditional release.⁵ If the court grants conditional releases to committed SVPs, they will enter community treatment and supervision under the Conditional Release Program, which Mental Health operates. According to Mental Health's program manager, the department has eight SVPs in the Conditional Release Program as of May 2011.

Scope and Methodology

The Joint Legislative Audit Committee (audit committee) directed the Bureau of State Audits (bureau) to review the process that Corrections and its Parole Board use to refer offenders to Mental Health as well as Mental Health's process for evaluating these offenders to determine whether they qualify as SVPs. Specifically, the audit committee directed us to determine whether Mental Health's process includes a face-to-face interview for every sex offender referred by Corrections, whether Mental Health uses staff or contractors to perform the evaluations, and whether the evaluators' qualifications meet relevant professional standards and laws and regulations. If we determined that Mental Health uses contractors, the audit committee directed us to determine when the practice began and whether using contractors is allowable under state law. To understand the impact of Jessica's Law on the program, the audit committee directed us to identify the number of offenders that Corrections and its Parole Board referred to Mental Health in each year since 2006. The audit committee also asked us to identify the number of referred offenders who received an in-person screening by Mental Health, the number screened by Mental Health through case-file review only, the number of offenders that ultimately received a civil commitment to the program, and the number of offenders released who then reoffended. Finally, the audit committee asked us to determine whether Mental Health submitted reports mandated by the Legislature. Table 1 lists the methods we used to answer these audit objectives.

⁵ Nothing in the Act prohibits committed SVPs from asking courts to release them even if the SVPs do not have a recommendation from Mental Health.

The scope of the audit did not include reviews of the designated counsels' efforts or the courts' processes for committing offenders as SVPs. The scope also did not include the treatment provided to offenders at state hospitals or through the Conditional Release Program.

Table 1
Methods of Addressing Audit Objectives

AUDIT OBJECTIVE	METHOD
Understand the criteria for committing sexually violent predators (SVPs) under the Sex Offender Commitment Program (program).	Reviewed relevant laws, regulations, and other background materials.
Review the process at the Department of Corrections and Rehabilitation (Corrections) and the Board of Parole Hearings for identifying and referring potential SVPs to the Department of Mental Health (Mental Health).	<ul style="list-style-type: none"> • Interviewed key officials from the Classification Services Unit of Corrections' Division of Adult Institutions and from the Board of Parole Hearings. • Reviewed Corrections' policy manuals.
Understand the process at Mental Health for screening and evaluating potential SVPs.	<ul style="list-style-type: none"> • Interviewed key officials at Mental Health's Long-Term Care Services Division. • Interviewed evaluators under contract to Mental Health. • Reviewed Mental Health's policy manuals.
Assess the effectiveness of Corrections' and Mental Health's processes for referring, screening, and evaluating offenders.	Reviewed Mental Health's case files, clinical screening forms, and written evaluations of sex offenders (offenders). Review of case files included Corrections' referral packets.
Determine the extent to which contractors perform evaluations. Assess the qualifications of contractors who conduct evaluations and of state employees who could also conduct evaluations.*	<ul style="list-style-type: none"> • Reviewed bidding documentation, contracts, and relevant supporting documents, as well as personnel files. • Reviewed the qualifications required by law. • Analyzed data from Mental Health's Sex Offender Commitment Program Support System (Mental Health's database).[†]
Identify the number of offenders whom Corrections referred to Mental Health. Determine the number of assessments, screenings, and evaluations that Mental Health performed. Identify the number of offenders whom courts ultimately committed as SVPs. Determine the recidivism rate of those not committed as SVPs. Assess the impact of Jessica's Law on the program.	Analyzed data from Mental Health's database and from Corrections' Offender Based Information System. [†]
Determine whether Mental Health complied with the requirement to report to the Legislature the status of its efforts to hire state employees to replace contractors. Determine whether Mental Health complied with the requirement to report to the Legislature the impact of Jessica's Law on the program.	Requested copies of required reports. Interviewed key officials at Mental Health and at the California Health and Human Services Agency.

Sources: Joint Legislative Audit Committee audit request #2010-116 for audit objectives, Bureau of State Audits' planning and scoping documents, and analysis of information and documentation identified in the table column titled Method above.

* We did not note any reportable exceptions related to the qualifications of the contractors who conduct evaluations or the state employees who could also conduct evaluations. The contractors met the qualifications required of them by state law as well as the more stringent requirements that Mental Health imposed through its competitive contracting process. As the Audit Results section of this report discusses, state employees have rarely conducted evaluations to date. However, all of the program's state-employed consulting psychologists who conduct clinical screenings met the minimum qualifications specified by the Department of Personnel Administration for their positions.

[†] We assessed the reliability of the data in these systems and reported our results beginning on page 11.

To address several of the audit objectives approved by the audit committee, we relied on data provided by Mental Health and Corrections. The U.S. Government Accountability Office, whose standards we follow, requires us to assess the sufficiency and appropriateness of computer-processed information. To comply with this standard, we assessed each system for the purpose for which we used the data in this report. We assessed the reliability of Mental Health's Sex Offender Commitment Program Support System (Mental Health's database) for the purpose of identifying the number of referrals made by Corrections to Mental Health, the number of referrals at each step in the SVP commitment process (as displayed in Table 3 on page 14), and the extent to which contractors perform evaluations (as displayed in Figure 5 on page 31). Specifically, we performed data-set verification procedures and electronic testing of key data elements, and we assessed the accuracy and completeness of Mental Health's database. In performing data-set verification and electronic testing of key data elements, we did not identify any issues. For completeness testing, we haphazardly sampled 29 referrals and tested to see if these referrals exist in the database and found no errors. For accuracy testing, we selected a random sample of 29 referrals and tested the accuracy of 21 key fields for these referrals. Of the 21 key fields tested we found three errors in six key fields. Based on our testing and analysis, we found that Mental Health's database is not sufficiently reliable for the purpose of identifying the number of referrals made by Corrections to Mental Health, the number of referrals at each step in the SVP commitment process, and the extent to which contractors perform evaluations. Nevertheless, we present these data as they represent the best available source of information.

In addition, we assessed the reliability of Corrections' Offender Based Information System (Corrections' database) for the purpose of identifying the number of referrals that ultimately resulted in an offender's being committed as an SVP, and the recidivism rate of those not committed as SVPs. Specifically, we performed data-set verification procedures and electronic testing of key data elements, and we assessed the accuracy of Corrections' database. We did not perform completeness testing because the documents needed are located at the 33 correctional institutions located throughout the State, so conducting such testing is impractical. In performing data-set verification and electronic testing of key data elements, we did not identify any issues. For accuracy testing, we selected a random sample of 29 offenders and tested the accuracy of 12 key fields related to these offenders and found eight errors. Based on our testing and analysis, we found that Corrections' database is of undetermined reliability to be used for the purpose of identifying the number of referrals that ultimately resulted in an offender being committed as an SVP, and to calculate the recidivism rate of those not committed as SVPs.

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Audit Results

Although the Department of Mental Health Evaluates Thousands of Offenders Each Year, the Courts Commit Only a Tiny Percentage as Sexually Violent Predators

As the Introduction explains, the passage of Jessica’s Law in 2006 resulted in significantly more sex offenders (offenders) becoming potentially eligible for commitment as sexually violent predators (SVPs) under the Sex Offender Commitment Program (program). However, the courts have committed very few of the thousands of offenders whom the Department of Corrections and Rehabilitation (Corrections) referred to the Department of Mental Health (Mental Health) for evaluation. In fact, as Table 2 shows, the actual number of offenders whom the courts committed between 2007 and 2010 represent less than 1 percent of Corrections’ referrals to Mental Health. Even if the courts committed all of the offenders still awaiting trial, these offenders would represent less than 2 percent of all referrals. Due to the limitations of its database, Mental Health did not track the specific reasons why referred offenders did not meet the criteria for commitment as SVPs (SVP criteria). Such tracking could help Mental Health better identify trends.

Table 2
Number of Program Referrals and Commitments
2005 Through 2010

	2005	2006	2007	2008	2009	2010*
Total referrals	512	1,850	8,871	7,338	6,765	6,126
Total commitments [†]	15	27	43	16	3	0
Commitments as a percentage of total referrals each year	2.93%	1.46%	0.48%	0.22%	0.04%	-

Source: Bureau of State Audits’ analysis of data collected from the Department of Mental Health’s (Mental Health) Sex Offender Commitment Program Support System (Mental Health’s database) for 2005 through 2010.

Note: As discussed in the Scope and Methodology section of this report, data from Mental Health’s database are not sufficiently reliable. However, it is the best available source of this information.

* These figures represent data for a partial year—January 2010 through September 2010.

† These numbers could increase; according to Mental Health’s program manager, about 300 offenders are still awaiting trial.

Jessica’s Law Has Not Resulted in the Commitment of Many More Offenders

As the Introduction discusses, Jessica’s Law expanded the population of offenders eligible for the program and thus substantially increased the number of evaluations that

Mental Health has performed each year. Table 3 shows that since the passage of Jessica’s Law, the total number of Corrections’ referrals of offenders to Mental Health ballooned from 1,850 in 2006 to 8,871 in 2007. As a result, the number of offenders whom Mental Health reviewed or evaluated at each stage of its process also increased from 2006 to 2007. Mental Health completed administrative reviews for nearly 96 percent of the referrals it received from Corrections.⁶ Mental Health then forwarded about half of these cases to clinical screenings in which clinicians determined whether the offenders merited full evaluations.⁷ The number of these evaluations that Mental Health performed rose from 594 in 2006 to 2,406 in 2007. Although the number of evaluations dropped from its high point in 2007, the number was still four times higher in 2010 than in 2005, the year before Jessica’s Law took effect.

Table 3
Number of Referrals in Each Step of the Sexually Violent Predator Commitment Process
2005 Through 2010

ENTITY	STEP IN THE COMMITMENT PROCESS	2005	2006	2007	2008	2009	2010*	TOTAL	PERCENTAGE OF TOTAL REFERRALS
Department of Corrections and Rehabilitation	Referrals to Mental Health	512	1,850	8,871	7,338	6,765	6,126	31,462	100.0%
Department of Mental Health (Mental Health)	Administrative reviews	509	1,448	8,230	7,137	6,738	6,013	30,075	95.6
	Clinical screenings [†]	1	304	4,400	3,537	3,470	3,823	15,535	49.4
	Evaluations	217	594	2,406	1,366	966	887	6,436	20.5
	Recommendations to designated counsel	48	92	181	99	52	51	523	1.7
The Court System	Designated counsel petitions	46	88	169	92	39	23	457	1.5
	Probable cause hearings	46	88	169	92	38	23	456	1.4
	Trials	37	77	150	72	22	4	362	1.2
	Offenders committed [‡]	15	27	43	16	3	0	104	0.3

Source: Bureau of State Audits’ analysis of data collected from Mental Health’s Sex Offender Commitment Program Support System (Mental Health’s database) for 2005 through 2010.

Note: As discussed in the Scope and Methodology section of this report, data from Mental Health’s database are not sufficiently reliable. However, it is the best available source of this information.

* These figures represent data for a partial year—January 2010 through September 2010.

† According to Mental Health’s program manager, Mental Health did not implement clinical screenings until sometime in 2006.

‡ These numbers could increase; according to Mental Health’s program manager, about 300 offenders are still awaiting trial.

⁶ The total number of referrals to Mental Health does not agree with the number of referrals that Mental Health reviewed in part because the department did not consistently record in its database that it had completed reviews.

⁷ According to Mental Health’s program manager, the department introduced the clinical screening into its process specifically to address the dramatic rise in referred offenders that Jessica’s Law prompted. We discuss these screenings in more depth later in the report.

Despite the increased number of referrals, as of September 2010, the relative percentage of offenders whom the courts committed as SVPs declined each year after the first full year that Jessica's Law was in effect. According to Mental Health's program manager, about 300 offenders are still awaiting trial. Nevertheless, even if the courts committed all of those awaiting trial, the total number committed would still represent a tiny fraction of all referrals from Corrections. As Table 3 shows, Mental Health screened a large number of offenders referred by Corrections, indicating that neither department displayed a lack of effort in identifying eligible SVPs. However, despite the increased number of evaluations, Mental Health recommended to the district attorneys or the county counsels responsible for handling SVP cases (designated counsels) about the same number of offenders in 2009 as it did in 2005, before the voters passed Jessica's Law.

Thus, Jessica's Law has not resulted in what some expected: the commitment as SVPs of many more offenders. Although an initial spike in commitments occurred in 2006 and 2007, this increase has not been sustained. By expanding the population of potential SVPs to include offenders with only one victim rather than two, Jessica's Law may have unintentionally removed an indirect but effective filter for offenders who do not qualify as SVPs because they lack diagnosed mental disorders that predispose them to criminal sexual acts. In other words, the fact that an offender has had more than one victim may correlate to the likelihood that he or she has a diagnosed mental disorder that increases the risk of recidivism. Additionally, Mental Health's program manager provided an analysis it performed of the types of crimes offenders committed who it recommended for commitment to designated counsels since Jessica's Law took effect. This analysis found that, for every recommendation associated with an offender who committed one of the new crimes added by Jessica's Law, Mental Health made four recommendations related to offenders who committed crimes that would have made them eligible for commitment before the passage of Jessica's Law. This disparity could suggest that crimes added under Jessica's Law as sexually violent offenses correlate less with the likelihood that offenders who commit such crimes are SVPs than do the crimes designated in the original Sexually Violent Predator Act.

Jessica's Law may have unintentionally removed an indirect but effective filter for offenders who do not qualify as SVPs because they lack diagnosed mental disorders that predispose them to criminal sexual acts.

Because Mental Health Has Not Tracked the Reasons Offenders Did Not Qualify as SVPs, It Cannot Effectively Identify Trends and Implement Changes to Increase Efficiency

Although analyzing Mental Health's data allowed us to determine the number of referrals at each step of the process, the data lack sufficient detail for us to determine why specific offenders' cases did not progress further in that process. For example, the data did

Mental Health could not identify trends throughout the program indicating why referred offenders did not meet SVP criteria because it did not use codes for its database consistently.

not show the number of offenders that Mental Health declined to forward to evaluations because the offenders did not have mental disorders rather than because they did not commit predatory crimes. Although the database includes a numeric code that can identify Mental Health's detailed reason for determining why an offender does not meet SVP criteria, Mental Health did not use these codes for the results of its clinical screenings. Instead, when a clinician determined that the offender did not meet SVP criteria, the numeric code used indicated only that the result was a negative screening and was not specific to the clinician's conclusions recorded on the clinical screening form. For offenders whom Mental Health determines do not meet SVP criteria based on evaluations, Mental Health's database has detailed codes available that convey the specific reasons for its decisions on cases. However, for the period under review, Mental Health did not consistently use the codes. According to the program manager, in January 2009 Mental Health stopped using the detailed codes because it determined that the blend of codes used to describe a full evaluation were too confusing and did not result in meaningful data. Because Mental Health did not use the codes consistently, it could not identify trends throughout the program indicating why referred offenders did not meet SVP criteria.

We examined some of the conclusions recorded by Mental Health's psychologists on their clinical screening forms, and we found that the psychologists provided specific reasons for their conclusions that offenders did not meet SVP criteria. For example, some offenders did not meet the criteria because they were not likely to engage in sexually violent criminal behavior, while in other cases the offenders lacked diagnosed mental disorders. Because clinicians do identify the specific reasons for their conclusions on their screening forms, Mental Health should capture this information in its database so that it can inform itself and others about the reasons offenders throughout the program do not meet SVP criteria.

Additionally, although the documented reasons why individual offenders are in Corrections' custody are available to Mental Health, the department cannot summarize this information across the program. This situation prevents Mental Health from tracking the number of offenders that Corrections referred because of parole violations as opposed to new convictions. According to the program manager, Mental Health cannot summarize these data because some of the information appears in the comments or narrative case notes boxes in Mental Health's database. As a result, we used Corrections' data, not Mental Health's, to provide the information in this report about the reasons that offenders were in Corrections' custody during the period that we reviewed. By improving its ability to summarize this type of data, Mental Health could better inform itself and Corrections about trends in the

reasons offenders do not qualify for the program. Mental Health could then use its knowledge of these trends to improve the screening tool that Corrections uses to identify potential SVPs. As of June 2011, Mental Health's program manager indicated that the program is submitting requests to the department's information technology division to upgrade the database to track this type of information.

Few Offenders Have Been Convicted of Sexually Violent Offenses Following a Decision Not to Commit Them

To take one measure of the effectiveness of the program's referral, screening, and evaluation processes, we analyzed data from Corrections and Mental Health to identify offenders who were not committed as SVPs but who carried out subsequent parole violations and felonies. In particular, we looked for instances in which these offenders later perpetrated sexually violent offenses. As Table 4 on the following page shows, 59 percent of these offenders whom Corrections released between 2005 and 2010 subsequently violated the conditions of their paroles. To date, only one offender who did not meet SVP criteria after Corrections had referred him to Mental Health was later convicted of a sexually violent offense during the nearly six-year period we reviewed. Although higher numbers of offenders were subsequently convicted of felonies that were not sexually violent offenses, even those numbers were relatively low.

Only one offender who did not meet SVP criteria after Corrections had referred him to Mental Health was later convicted of a sexually violent offense during the nearly six-year period we reviewed.

Corrections' Failure to Comply With the Law When Referring Offenders Has Significantly Increased Mental Health's Workload

State law outlines Corrections' role in referring offenders to Mental Health for evaluation as potential SVPs. Specifically, Section 6601(b) of the California Welfare and Institutions Code mandates that Corrections and its Board of Parole Hearings (Parole Board) screen offenders based on whether they committed sexually violent predatory offenses and on reviews of their social, criminal, and institutional histories and then determine if they are likely to be SVPs. However, in referring offenders, Corrections and the Parole Board did not screen offenders based on all of these criteria. As a result, Corrections referred many more offenders to Mental Health than the law intended. Moreover, Corrections' process resulted in a high number of re-referrals, or referrals of offenders that Mental Health previously concluded were not SVPs. State law does not prevent Corrections from considering the results of past evaluations, and we believe that revisiting the results of offenders' earlier screenings and evaluations is reasonable even if the law does not explicitly require Corrections to do so. According to

Mental Health, for fiscal year 2009–10, the State paid \$75 for each clinical screening that its contractors completed and an average of \$3,300 for each evaluation. By streamlining its process, Corrections could reduce unnecessary referrals and the associated costs.

Table 4
Reasons for Sex Offenders' Return to the Department of Corrections and Rehabilitation After a Referral to the Department of Mental Health 2005 Through 2010

	2005	2006	2007	2008	2009	2010*	TOTAL
Number of offenders with first time referrals who the Department of Corrections and Rehabilitation (Corrections) subsequently released	231	1,407	5,780	2,834	2,023	1,237	13,512
Sex Offenders (offenders) who later violated parole [†]	92	987	4,212	1,434	868	318	7,911
Percentage of total offenders	40%	70%	73%	51%	43%	26%	59%
Offenders who were later convicted of a new felony [†]	1	39	89	4	1	0	134
Percentage of total offenders	0%	3%	2%	0%	0%	0%	1%
Offenders who were later convicted of a new sexually violent offense [‡]	0	0	1	0	0	0	1
Percentage of total offenders	0%	0%	0%	0%	0%	0%	0%

Sources: Bureau of State Audits' analysis of data collected from the Department of Mental Health's Sex Offender Commitment Program Support System (Mental Health's database) and from Corrections Offender Based Information System (OBIS) for 2005 through 2010.

Note: As discussed in the Scope and Methodology section of this report, data from Mental Health's database are not sufficiently reliable. Also, data from Corrections' OBIS are of undetermined reliability. However, these are the best available sources of this information.

* These figures represent data for a partial year—January 2010 through September 2010.

† Some overlap may exist among these categories because it is possible for an offender to return to Corrections' custody more than once and for a different reason each time.

‡ The offender in this category is also represented in the *New Felony* category.

In addition, Corrections and the Parole Board frequently did not meet the statutory deadline for referring offenders to Mental Health at least six months before the offenders' scheduled release from custody. In 2009 and 2010, the median amount of time for a referral that Corrections and the Parole Board made to Mental Health was less than two months before the scheduled release date of the offender. Because Corrections and its Parole Board referred many offenders with little time remaining before their scheduled release dates, Mental Health may have had to rush its clinical screening process and therefore may have caused it to evaluate more offenders than would have otherwise been necessary.

Corrections Refers Offenders to Mental Health Without First Determining Whether They Are Likely to Be SVPs

As discussed previously, state law defines the criteria that Corrections and its Parole Board must use to screen offenders to determine if they are likely to be SVPs before referring the offenders to Mental Health. Specifically, state law mandates that Corrections must consider whether an offender committed a sexually violent predatory offense, and the law defines *predatory* acts as those directed toward a stranger, a person of casual acquaintance, or a person with whom an offender developed a relationship for the primary purpose of victimizing that individual. The law also specifies that Corrections and the Parole Board must use a structured screening instrument developed and updated by Mental Health in consultation with Corrections to determine if an offender is likely to be an SVP before referring him or her. Further, state law requires that when Corrections determines through the screening that the person is likely to be an SVP, it must refer the offender to Mental Health for further evaluation.

However, during the time covered by our audit, Corrections and its Parole Board referred all offenders convicted of sexually violent offenses to Mental Health without assessing whether those offenses or any others committed by the offender were *predatory* in nature or whether the offenders were likely to be SVPs based on other information that Corrections could consider. Instead, it left these determinations solely to Mental Health. Moreover, although Corrections and Mental Health consulted about the referral process, the process Corrections used fell short of the structured screening instrument specified by law. According to the chief of the classification services unit (classification unit chief) for Corrections' Division of Adult Institutions and the former program operations chief deputy for the Parole Board (parole board deputy),⁸ Corrections and the Parole Board did not determine if a qualifying offense or any other crime was predatory when they made a referral. Our legal counsel advised us that according to the plain language of Section 6601(b) of the California Welfare and Institutions Code, Corrections and the Parole Board must determine whether the person committed a predatory offense and whether the person is likely to be an SVP before his or her referral to Mental Health.

Because Corrections did not consider whether offenders' crimes were predatory and whether the offenders were likely to be SVPs, it referred many more offenders to Mental Health than the law intended. This high number of referrals unnecessarily

Although Corrections and Mental Health consulted about the referral process, the process Corrections used fell short of the structured screening instrument specified by law.

⁸ Subsequent to our interview, this official moved to Corrections' Division of Adult Institutions.

increased Mental Health's workload at a cost to the State. We found several referrals in our sample involving offenders who did not commit predatory offenses. For example, we reviewed cases in which Corrections referred an offender for a sexual crime against his own child, and another for a sexual crime committed against the offender's own grandchild. Although these crimes were serious, they did not meet the law's definition of *predatory* because the victims were not strangers or mere acquaintances.

Mental Health and Corrections' current processes also miss an opportunity to make the referral process more efficient by eliminating duplicate efforts. When considering whether an offender requires an evaluation, Mental Health's clinical screeners use a risk assessment tool—California's State Authorized Risk Assessment Tool for Sex Offenders (STATIC-99R)—as part of determining the individual's risk of reoffending. Corrections uses this same tool in preparation for an adult male offender's release from prison. According to the parole board deputy, Corrections' Division of Adult Parole Operations completes a STATIC-99R assessment approximately eight months before the offender's scheduled parole. Although state law does not specifically require Corrections to consider the STATIC-99R scores as part of its screening when making referrals to Mental Health, doing so would eliminate duplicate efforts and reduce Mental Health's workload because Corrections would screen out, or not refer, those offenders it determines have a low risk of reoffending. This type of screening would reduce costs at Mental Health because fewer clinical screenings would be necessary.

Although Corrections is not required to consider risk assessment scores to determine an offender's likelihood of reoffending when making referrals, doing so would eliminate duplicate efforts and reduce Mental Health's workload.

When we discussed the possibility of Corrections using the STATIC-99R as part of its screening of offenders before it refers them to Mental Health, the parole board deputy stated that he was unaware that Corrections ever considered this approach. However, the California High Risk Sex Offender and Sexually Violent Predator Task Force—a gubernatorial advisory body whose membership included representatives from Corrections, Mental Health, and local law enforcement, among others—recommended in a December 2006 report that Corrections incorporate STATIC-99R into its process. According to the classification unit chief, Corrections is researching the status of its efforts regarding the task force's recommendation.

Many of Corrections' Referrals Involve Offenders Whom Mental Health Has Already Determined Do Not Qualify as SVPs

One of the most useful actions Corrections could take to increase its efficiency when screening offenders for possible referral to Mental Health is to consider the outcome of previous referrals.

Corrections’ screening process does not consider whether Mental Health has already determined that an offender does not meet the criteria to be an SVP. As a result, these re-referrals significantly affect Mental Health’s caseload. As Table 5 shows, 45 percent of Corrections’ referrals to Mental Health since 2005 were for offenders whom it had previously referred and whom Mental Health had concluded did not meet SVP criteria. Many of these cases had progressed only as far as the clinical screenings before Mental Health determined that the offenders did not meet SVP criteria. Table 5 also shows that for 18 percent, or 5,772, of these re-referral cases, Mental Health had previously performed evaluations and concluded that the offenders did not qualify as SVPs. For these 5,772 re-referral cases, Mental Health’s previous evaluations occurred within one year for 39 percent, or 2,277, of the cases. Another 30 percent took place within two years.

Table 5
Number of Referrals to the Department of Mental Health for Sex Offenders Who Previously Did Not Meet Sexually Violent Predator Criteria
2005 Through 2010

	2005	2006	2007	2008	2009	2010*	TOTAL
Total referrals	512	1,850	8,871	7,338	6,765	6,126	31,462
Number of referrals of sex offenders (offenders) whom the Department of Mental Health (Mental Health) had previously found did not qualify as sexually violent predators (SVPs) without evaluations	31	53	1,254	2,306	2,511	2,382	8,537
Percentage of total referrals	6%	3%	14%	31%	37%	39%	27%
Number of referrals of offenders who previously received evaluations and did not qualify as SVPs	164	167	721	1,448	1,640	1,632	5,772
Percentage of total referrals	32%	9%	8%	20%	24%	27%	18%
Total number of referrals of offenders who previously did not meet SVP criteria	195	220	1,975	3,754	4,151	4,014	14,309
Percentage of total referrals	38%	12%	22%	51%	61%	66%	45%

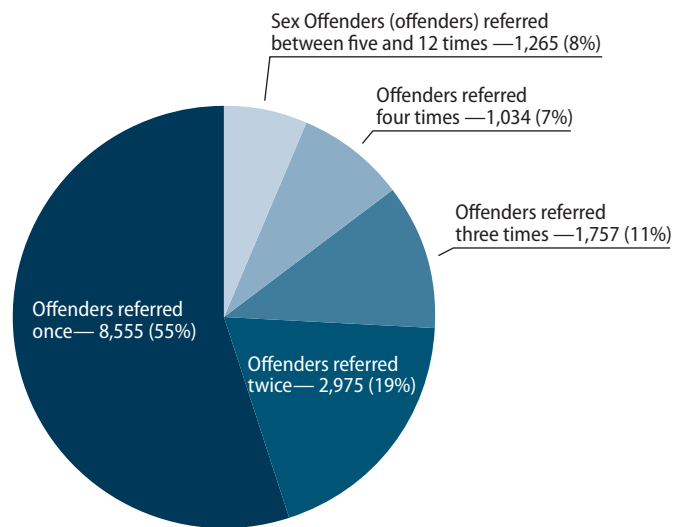
Sources: Bureau of State Audits’ analysis of data collected from the Department of Mental Health’s Sex Offender Commitment Program Support System (Mental Health’s database) for 2005 through 2010.

Note: As discussed in the Scope and Methodology section of this report, data from Mental Health’s database are not sufficiently reliable. However, it is the best available source of this information.

* These figures represent numbers for a partial year—January 2010 through September 2010.

To illustrate the magnitude of this re-referral problem, we noted that Corrections’ approximately 31,500 referrals to Mental Health for the period under review represented nearly 15,600 offenders. Of these individuals, Corrections referred almost half, or 7,031 offenders, to Mental Health on at least two occasions. In fact, Figure 3 on the following page shows that Corrections referred 8 percent of offenders between five and 12 times between 2005 and 2010.

Figure 3
Number of Times the Department of Corrections and Rehabilitation Referred Sex Offenders to the Department of Mental Health 2005 Through 2010



Sources: Bureau of State Audits' analysis of data collected from the Department of Mental Health's Sex Offender Commitment Program Support System (Mental Health's database) for 2005 through 2010.

Notes: The data for 2010 represent figures for a partial year—January 2010 through September 2010.

As discussed in the Scope and Methodology section of this report, data from Mental Health's database are not sufficiently reliable. However, it is the best available source of this information.

Although the law does not specifically require Corrections to consider the outcome of offenders' previous referrals in its screening process, we believe it is reasonable in these cases for Corrections to consider whether the nature of a parole violation or a new crime might modify an evaluator's opinion. This consideration would be in line with the law's direction that Corrections refer only those offenders likely to be SVPs based on their social, institutional, and criminal histories. Many previously referred offenders are, in fact, unlikely to be SVPs given Mental Health's past assessments that they did not meet SVP criteria. By considering whether previously referred offenders warrant new referrals, Corrections could eliminate duplicate efforts and reduce unnecessary workload and costs.

Among all referrals made during the period we reviewed, 63 percent involved offenders in Corrections' custody due to parole violations. Although not all parole violators could be screened out of re-referral through a process that considers the nature of the parole violations, many could be. When we discussed with Mental Health whether it had asked Corrections to cease making re-referrals in those instances in which parole violations were not new sex-related offenses, Mental Health provided us

with a copy of a September 2007 Corrections' memorandum to its staff stating that Mental Health and Corrections had agreed to streamline the referral procedures for parole violators. The memorandum instructed Corrections' staff not to refer offenders if Mental Health had previously determined that the offenders were not SVPs and if the offenders were currently in custody for specified parole violations that Mental Health's psychologists had determined from a clinical standpoint would not change the offenders' risk of committing new sexual offenses. However, five months later, another Corrections' memorandum rescinded these revised procedures. Corrections' classification unit chief told us that although she was not with the program at the time, she believed that the former Governor's Office had instructed the departments to discontinue using the streamlined process because it did not comply with the law. We asked Corrections for more details about this legal determination, but Corrections could not provide any additional information. According to our legal counsel, a streamlined process that includes consideration of the outcomes of previous referrals and the nature of parole violations is allowed under state law.

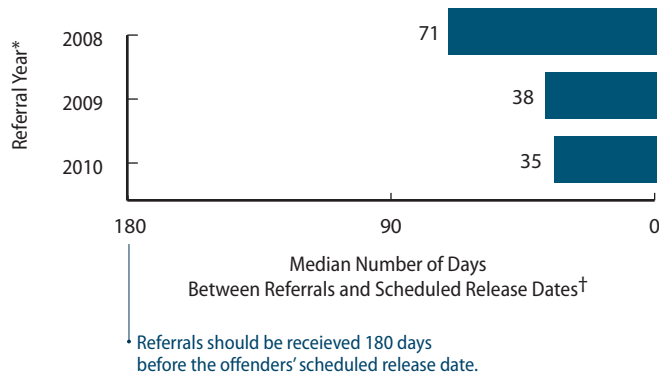
According to our legal counsel, a streamlined process that includes consideration of the outcomes of previous referrals and the nature of parole violations is allowed under state law.

Corrections' Failure to Refer Offenders Within Statutory Time Frames May Force Mental Health to Rush Its Screening Process

State law requires that Corrections refer offenders to Mental Health at least six months before their scheduled release dates. However, according to the median amount of time for referrals displayed in Figure 4 on the following page, Corrections did not meet this deadline for a significant portion of referrals during the three years for which Corrections and Mental Health were able to provide data to us.⁹ Corrections' procedure manual states that it will screen offenders nine months before their scheduled release dates unless it receives them with less than nine months to their release, in which case the department has alternate procedures. This policy, if followed, should ensure that Corrections forwards cases to Mental Health at least six months before the offenders' release, as required by law. However, the parole board deputy noted that issues such as workload and missing documents can prevent Corrections from making these referrals in a timely manner.

⁹ State law does not apply this requirement for offenders whose release dates are changed by judicial or administrative actions or for offenders in Corrections' custody for less than nine months. Although we could not exclude from our data analysis those offenders whose release dates were altered by judicial or administrative actions, our review of case files at Mental Health revealed no obvious instances in which such alterations occurred. This observation suggests that judicial or administrative actions were not the primary cause of Corrections' lack of timeliness. We excluded from our analysis those offenders who, as of the date of their referral, had been in Corrections' custody for less than nine months.

Figure 4
Median Number of Days Between the Department of Corrections and Rehabilitation’s Referrals to the Department of Mental Health and Sex Offenders’ Scheduled Release Dates at Time of Referral



Sources: Bureau of State Audits’ analysis of data collected from the Department of Mental Health’s Sex Offender Commitment Program Support System (Mental Health’s database) and the Offender Based Information System (OBIS) from the Department of Corrections and Rehabilitation (Corrections) for 2008 through 2010.

Note: As discussed in the Scope and Methodology section of this report, data from Mental Health’s database are not sufficiently reliable. Also, data from Corrections’ OBIS are of undetermined reliability. However, these are the best available sources of this information.

* Data analysis September 16, 2008, through September 2010.

† Analysis does not include sex offenders who were in Corrections’ custody for less than nine months as of the date of their referral.

Late referrals shorten the amount of time available for Mental Health to evaluate offenders properly. In fact, in one case we reviewed, Mental Health received the referral one day before the offender’s scheduled release. In another case, Mental Health received a referral for an offender 11 days before his scheduled release. Although Mental Health can request that the Parole Board place a temporary hold on an offender’s release to extend the amount of time that Mental Health has to evaluate him or her, state law requires that the Parole Board have good cause for extending the offender’s stay in custody. Mental Health’s program manager stated that in practice, Mental Health requests a hold from the Parole Board when it determines that it cannot complete an evaluation by the offender’s scheduled release date. The program manager also stated that sometimes the time remaining before an offender’s release is so short that the department must rush an offender through a clinical screening in order to ensure that it can request a hold.

Although Mental Health Did Not Conduct Full Evaluations of All Referred Offenders, It Generally Ensured That Offenders Were Properly Screened and Evaluated

Our review indicated that Mental Health’s process for determining whether it should perform full evaluations of referred offenders has been generally effective and appropriate. As discussed earlier,

the number of offenders whom Corrections referred to Mental Health increased significantly after the passage of Jessica's Law. To manage this workload, Mental Health used the administrative reviews to ensure that it has all of the information necessary to perform clinical screenings, which it uses to determine whether offenders warrant full evaluations. Between February 2008 and June 2010, Mental Health also used the administrative reviews as opportunities to identify offenders who did not warrant clinical screenings because Mental Health had evaluated these offenders previously and had determined that they did not meet SVP criteria. Mental Health rescinded this policy, and, as previously discussed, Corrections also rescinded its similar policy for screening out certain offenders from re-referral. However, we believe that Mental Health should work with Corrections to reduce unnecessary referrals.

We believe that Mental Health should work with Corrections to reduce unnecessary referrals.

Mental Health has for the most part conducted evaluations of offenders effectively; however, for a time, it did not always assign the required number of evaluators to cases. Specifically, Mental Health's data indicates that it did not arrange for two evaluators to conduct the evaluations for 161 offenders, as state law directs. In addition, for at least a year prior to August 2008, Mental Health did not assign a fourth evaluator to each case in which the first two evaluators disagreed as to whether the offender met SVP criteria and in which the third evaluator also did not believe that the offender met SVP criteria. In cases requiring a third and fourth evaluator to determine whether an offender meets SVP criteria, state law may need clarification. Nonetheless, we believe that the selective use of a fourth evaluator in those instances when the third evaluator concludes the offender meets SVP criteria is a cost-effective approach. Because the third and fourth evaluators must both agree that the offender meets SVP criteria, the conclusion of the fourth evaluation is relevant only if the third evaluator concludes that the offender meets SVP criteria.

Mental Health's Administrative Review and Clinical Screening Processes Appear Prudent

As the Introduction discusses, state law specifies that Mental Health must conduct a full evaluation of every offender Corrections refers to it. However, in practice, Mental Health conducts an administrative review and clinical screening before performing a full evaluation. Although state law does not specify that Mental Health should perform these preliminary processes, doing so appears to save the State money without unduly affecting public safety because these procedures allow Mental Health to save the cost of evaluations for offenders who do not meet SVP criteria.

According to Mental Health's program manager, when Corrections began referring more offenders in response to Jessica's Law, the number of incomplete and invalid referrals also increased.

The program manager stated that Mental Health implemented the administrative reviews and clinical screenings as quality improvement measures. Specifically, the administrative review ensures that each referral includes all the necessary documentation, including police records, and that the offender is available for evaluation. During the clinical screening, a clinician reviews the offender's file and determines whether the offender merits an evaluation. This screening is necessary because Corrections neither assesses whether an offender committed a predatory offense or is likely to re-offend, nor evaluates the nature of an offender's parole violation before it makes a referral.

Additionally, Mental Health implemented a streamlined process for addressing re-referred offenders. As directed in Mental Health's policy that was in effect between February 2008 and June 2010, Mental Health's case managers could decline to schedule clinical screenings for offenders whom Mental Health had previously screened or evaluated and determined did not meet SVP criteria if the case managers determined the offenders had not committed new crimes, sex-related parole violations, or any other offenses that might contribute to a change in their mental health diagnoses. The policy provided screening guidelines for staff to consider and examples of factors that demonstrated when a case did not warrant a clinical screening and for which Mental Health—after its administrative review—could notify Corrections that the offender did not meet SVP criteria.

Our analysis of Mental Health's data showed that between 2005 and 2010, Mental Health decided that half of the roughly 31,500 referrals did not warrant clinical screenings. Our review of six specific cases suggests that Mental Health followed its own policy and notified Corrections that the offenders did not meet SVP criteria when case managers determined that the nature of the parole violations would not change the outcomes of previous screenings or the evaluations of re-referred offenders. For example, in three of these cases, Mental Health's case managers noted that parole violations were not related to sexual behavior and would not change the most recent evaluations' results. These evaluations had concluded that each of these offenders lacked an important element of SVP criteria: a diagnosable mental disorder or the likelihood that the offender would engage in sexually violent criminal behavior. When we asked Mental Health why it had developed the policy allowing case managers to decide that some re-referred cases did not warrant clinical screenings, the program manager explained that clinical determinations are highly unlikely to alter if there are no new issues that are substantive or related to sexual offenses.

Therefore, to streamline the already overburdened process, Mental Health believed it was within the law and in the public interest to conduct only administrative reviews for certain offenders. However, according to the program manager, Mental Health implemented a more in-depth review due to several high-profile sexual assault cases.

As explained previously, for a brief time Corrections and Mental Health had an agreement that they designed to eliminate unnecessary re-referrals. However, apparently in response to concerns from the former Governor's Office, Corrections stopped using this agreement. Although Mental Health could reinstitute its administrative review policy, we believe the better course of action is for Mental Health to work with Corrections to revise its current screening and referral process so that Corrections considers STATIC-99R scores, previous clinical screening and evaluation results, and the nature of any parole violations before referring cases to Mental Health. Moreover, our legal counsel believes that the law allows such a process. In light of the volume of referrals to Mental Health, such revisions to the screening and referral process would be a reasonable, responsible way to reduce the costs and duplicative efforts associated with these referrals.

Although Mental Health Did Not Always Assign the Required Number of Evaluators, It Properly Recommended Offenders to Designated Counsels When Warranted

Our review of 30 cases in which Mental Health completed evaluations of offenders found that Mental Health generally followed its processes for conducting evaluations and asked the designated counsels to request commitments when warranted. Mental Health based its requests to the designated counsels on its evaluators' thorough assessments, which included face-to-face interviews with offenders unless they declined to participate. The evaluators also conducted extensive record reviews and used evaluation procedures that applied industry standard diagnostic criteria to decide whether mental disorders were present and employed risk assessment tools to determine the offenders' risk of re-offending.

Although Mental Health properly recommended that designated counsels request commitments when warranted, Mental Health's data show that it did not always assign the proper number of evaluators to assess offenders. As the Introduction explains, state law requires Mental Health to designate two evaluators to evaluate offenders likely to be SVPs. When two evaluators disagree about whether an offender meets the criteria for the program, state law requires Mental Health to arrange for two additional evaluators

Mental Health's data show that it did not always assign the proper number of evaluators to assess offenders.

We found that in 161 instances Mental Health arranged for only one initial evaluator—rather than the required two—to assess each offender before notifying Corrections that the offender did not meet SVP criteria.

to assess the offender. However, when we examined some case files and analyzed Mental Health's data for January 2005 through September 2010, we found that in 161 instances Mental Health arranged for only one initial evaluator to assess each offender before notifying Corrections that the offender did not meet SVP criteria. The data are also supported by our case file reviews, in which we found one instance where Mental Health notified Corrections that an offender did not meet SVP criteria based on a single evaluator's assessment, which found that the offender did not have a diagnosable mental disorder.

When we asked Mental Health about these 161 referrals, the program manager indicated that for a short time after the passage of Jessica's Law, Mental Health implemented a process stipulating that if the first evaluator determined that the offender did not have a diagnosable mental disorder, Mental Health did not refer the offender to a second evaluator. The program manager stated that the passage of Jessica's Law had not allowed Mental Health sufficient time to put in place the infrastructure and resources needed to respond to the magnitude of referrals it received from Corrections during the period that we reviewed. Mental Health acknowledged that this process, which it communicated to staff verbally, began in October 2006 and ended in June 2007, after it had obtained and trained a sufficient number of evaluators. The program manager provided a list of offenders and indicated that Corrections later re-referred 98 of the 161 offenders that had previously received only one evaluation. She indicated that Mental Health determined either during subsequent clinical screenings or during evaluations that these 98 offenders did not meet SVP criteria and that the remaining offenders have not been referred to Mental Health again.

We also found that Mental Health did not always assign two additional evaluators to resolve differences of opinion between the first two evaluators about referred offenders; however, we believe that this practice had no impact on public safety. Specifically, our analysis of Mental Health's data shows that in 254 closed referrals, Mental Health arranged for a third evaluator only and not for a fourth. According to e-mail correspondence provided by the program manager, for at least a year before August 2008, Mental Health's practice was to assign a fourth evaluator to a case only if a third evaluator concluded that the offender met SVP criteria. According to the program manager, the former chief of the program rescinded this practice in August 2008 after verbal consultation with the department's assistant chief counsel. E-mail correspondence from the former chief of the program to staff indicates that this practice did not comply with state law.

From both a legal and budgetary perspective, we believe that the practice of obtaining a fourth evaluation only if a third evaluator concludes that the offender is an SVP is a practical way to manage the program. If the third evaluator believes the offender is not an SVP, state law generally would not allow Mental Health to recommend the offender for commitment even if the fourth evaluator concludes that the offender meets the necessary criteria. According to Mental Health's own analysis, the average cost of an evaluation completed by a contractor for fiscal year 2009–10 was \$3,300; therefore, the department's avoiding unnecessary fourth evaluations could result in cost savings. Our legal counsel advised us that the law is open to interpretation on this issue. Thus, we suggest that Mental Health reinstitute this practice of preventing unnecessary fourth evaluations either by issuing a regulation or by seeking a statutory change to clarify the law.

We suggest that Mental Health reinstitute the practice of preventing unnecessary fourth evaluations either by issuing a regulation or by seeking a statutory change to clarify the law.

Mental Health Has Used Contractors to Perform Its Evaluations Due to Limited Success in Increasing Its Staff

Because it has made limited progress in hiring and training more staff, Mental Health has used contractors to complete the evaluations of sex offenders whom it has considered for the program. According to the program manager, the evaluation of sex offenders is a highly specialized field, and Mental Health believes it has not had staff with the skills and experience necessary to perform the evaluations. Mental Health reported to us that as a result, for fiscal years 2005–06 through 2009–10, it paid nearly \$49 million to contractors who performed work related to its evaluations of offenders. Although current state law expressly authorizes Mental Health to use contractors for all types of evaluations, this permission will expire on January 1, 2012.¹⁰ Because Mental Health has had difficulty in hiring staff, acquiring a sufficient work force to conduct its evaluations is likely to pose a significant challenge when the law expires.

In April 2007 an employee union requested that the State Personnel Board review Mental Health's evaluator contracts for compliance with the California Government Code, Section 19130(b), which allows contracting only when those contracts meet certain conditions, such as that state employees cannot perform the work. The State Personnel Board ruled against Mental Health, finding that Mental Health had not adequately demonstrated that state employees could not perform the tasks that it had assigned

¹⁰ Although express permission for contractors to perform all types of evaluations expires on January 1, 2012, state law will continue to require that Mental Health use contractors to perform the difference-of-opinion evaluations. As the Introduction details, state law specifically mandates that these evaluators cannot be employees of the State.

to contractors. Because of the ruling, the State Personnel Board disapproved Mental Health's contracts effective 90 days after its March 2008 decision.¹¹ In September 2008, to provide Mental Health with the capacity to perform the required evaluations, the Legislature amended state law to give the department express permission to use contractors for all types of evaluations until January 1, 2011. The Legislature later extended this authorization until January 1, 2012.¹²

According to the program manager, Mental Health believes that no current state employee position requires minimum qualifications sufficient to perform the function of the SVP evaluator. As evidenced by Mental Health's requirements for its contract evaluators, the department believes evaluators need specific experience in diagnosing the sexually violent population and at least eight hours of expert witness testimony related to SVP cases. Currently, as the program manager explained, Mental Health does not consider state-employed consulting psychologists qualified to perform evaluations, although it has provided two employees with additional training, mentoring, and experience to prepare them to perform evaluations. These two employees have completed three evaluations but have yet to provide expert witness testimony. The program manager also stated that Mental Health has had difficulty hiring consulting psychologists with qualifications similar to those of the contracted evaluators because the compensation for the consulting psychologist positions is not competitive with what is available to psychologists in private practice for this specialized area of forensic mental health clinical work. Mental Health completed a salary analysis in March 2010 that found that the average hourly pay for the contractors to perform evaluations and clinical screenings is approximately \$124 per hour, compared to the \$72 per hour—including benefits—that state-employed consulting psychologists earn.

Mental Health's reliance on contractors has led to costs that are higher than if it had been able to hire and use its own staff.

Mental Health's reliance on contractors has led to costs that are higher than if it had been able to hire and use its own staff. As Figure 5 indicates, from January 2005 through September 2010, Mental Health used between 46 and 77 contractors each year to complete its workload of evaluations and clinical screenings, while some or all of its seven positions for state-employed consulting psychologists were at times vacant. Mental Health reported to us that for fiscal years 2005–06 through 2009–10, it spent nearly \$73 million on the contractors. This amount is equivalent

¹¹ The State Personnel Board's decision said that it is permissible for Mental Health to use contractors to perform difference-of-opinion evaluations.

¹² If the director of Mental Health notifies the Legislature and the Department of Finance that it has hired a sufficient number of state employees before this date, the express permission will end earlier than January 1, 2012.

to an average of roughly \$188,000 per year per contractor. By comparison, for fiscal year 2009–10, each consulting psychologist earned \$110,000 (excluding benefits). The \$73 million included payments for activities that the contractors performed separate from the initial screening and evaluation process, such as providing expert witness testimony in court and updating evaluations for offenders awaiting trial or already committed as SVPs. The amount also included approximately \$49 million related to the evaluation of offenders whom Corrections referred to Mental Health. The reported estimate of costs for clinical screenings performed by contractors during the same period was almost \$169,000.¹³

Figure 5
Number of Contractors and State-Employed Consulting Psychologists Used by the Department of Mental Health 2005 Through 2010

	2005	2006	2007	2008	2009	2010				
Contractors who complete evaluations	46	48	77	75	75	68*				
Authorized consulting psychologist positions	1		7							
Filled consulting psychologist positions	1	0		1	3	4	5	6	5	7

Sources: Bureau of State Audits' analysis of data collected from the Department of Mental Health's Sex Offender Commitment Program Support System (Mental Health's database); summary of the number of authorized positions for the consulting psychologist classification and the number of employees filling those positions by year provided by the program manager of the Sex Offender Commitment Program.

Note: As discussed in the Scope and Methodology section of this report, data from Mental Health's database are not sufficiently reliable. However, it is the best available source of this information.

* The data for 2010 contractors represents a partial year—January 2010 through September 2010.

To address the difficulty in hiring qualified evaluators as state employees, Mental Health is working to establish a new evaluator classification. The proposed position is a permanent-intermittent position—a state classification in which the employee works periodically or for a fluctuating portion of a full-time work schedule and is paid by the hour. Mental Health plans for these employees to work as its caseload requires. This proposed new classification offers a more competitive compensation than does the standard consulting psychologist position, so Mental Health believes that it will now attract more individuals as potential employees. The qualifications for the new classification are similar to the requirements placed on Mental Health's current contractors who perform evaluations. Mental Health anticipates that the State

¹³ Contractors were paid \$75 per clinical screening. This cost does not cover the screenings performed by the state-employed consulting psychologists.

Personnel Board will consider its request for the new position classification in August 2011. If the State Personnel Board approves the classification, Mental Health plans initially to seek authority for 10 positions and then increase its positions by 10 in each subsequent fiscal year until eventually it can rely completely on employees to perform the evaluations. The only exceptions to Mental Health's reliance on state-employed evaluators will occur when it must use contractors to provide difference-of-opinion evaluations, as required by law. If it has not hired sufficient staff by 2012, the program manager stated that Mental Health plans to propose a legislative amendment to extend its authorization to use contractors.

Mental Health Has Not Reported to the Legislature About Its Efforts to Hire State Employees as Evaluators or About the Impact of Jessica's Law on the Program

Mental Health has not submitted required reports about its efforts to hire qualified state employees to conduct evaluations of potential SVPs and about the impact of Jessica's Law on the program. State law requires Mental Health to report semiannually to the Legislature on its progress in hiring qualified state employees to complete evaluations. Although the first of these reports was due by July 10, 2009, Mental Health has yet to submit any reports. In addition, state law required Mental Health to provide a report to the Legislature by January 2, 2010, on the effect of Jessica's Law on the program's costs and on the number of offenders evaluated and committed for treatment. However, Mental Health also failed to submit this report. In May 2011 Mental Health's external audit coordinator stated that the reports were under development or review. Mental Health did not explain why the reports were late or specify a time frame for the reports' completion.

The Legislature and other interested parties may have been unaware that Mental Health has made little progress in hiring state employees as evaluators of offenders and how profoundly Jessica's Law has affected Mental Health's workload.

Because Mental Health has not submitted the required reports, the Legislature and other interested parties may have been unaware that Mental Health has made little progress in hiring state employees as evaluators of offenders. The Legislature and other interested parties may also have been unaware of how profoundly Jessica's Law has affected Mental Health's workload. As a result, the Legislature may not have had the information necessary to provide appropriate oversight and to make informed decisions.

Recommendations

To enable it to track trends and streamline processes, Mental Health should expand the use of its database to capture more specific information about the offenders whom Corrections refers to it and the outcomes of the screenings and evaluations that it conducts.

To eliminate duplicative effort and increase efficiency, Corrections should not make unnecessary referrals to Mental Health. Corrections and Mental Health should jointly revise the structured screening instrument so that the referral process adheres more closely to the law's intent. For example, Corrections should better leverage the time and work it already conducts by including the following steps in its referral process:

- Determining whether the offender committed a predatory offense.
- Reviewing results from any previous screenings and evaluations that Mental Health completed and considering whether the most recent parole violation or offense might alter the previous decision.
- Using STATIC-99R to assess the risk that an offender will reoffend.

To allow Mental Health sufficient time to complete its screenings and evaluations, Corrections should improve the timeliness of its referrals. If it does not achieve a reduction in referrals from implementing the previous recommendation, Corrections should begin the referral process earlier than nine months before offenders' scheduled release dates in order to meet its six-month statutory deadline.

To reduce costs for unnecessary evaluations, Mental Health should either issue a regulation or seek a statutory amendment to clarify that when resolving a difference of opinion between the two initial evaluators of an offender, Mental Health must seek the opinion of a fourth evaluator only when a third evaluator concludes that the offender meets SVP criteria.

To ensure that it will have enough qualified staff to perform evaluations, Mental Health should continue its efforts to obtain approval for a new position classification for evaluators. If the State Personnel Board approves the new classification, Mental Health should take steps to recruit qualified individuals as quickly as possible. Additionally, Mental Health should continue its efforts to train its consulting psychologists to conduct evaluations.

To ensure that the Legislature can provide effective oversight of the program, Mental Health should complete and submit as soon as possible its reports to the Legislature about Mental Health's efforts to hire state employees to conduct evaluations and about the impact of Jessica's Law on the program.

We conducted this audit under the authority vested in the California State Auditor by Section 8543 et seq. of the California Government Code and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives specified in the scope section of the report. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Respectfully submitted,



ELAINE M. HOWLE, CPA
State Auditor

Date: July 12, 2011

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For questions regarding the contents of this report, please contact Margarita Fernández, Chief of Public Affairs, at 916.445.0255.

(Agency response provided as text only.)

California Department of Mental Health
1600 9th Street
Sacramento, CA 95814

June 21, 2011

Elaine M. Howle, CPA
Bureau of State Audits
555 Capitol Mall, Suite 300
Sacramento, CA 95814

Dear Ms. Howle:

The California Department of Mental Health (DMH) has prepared its response to the draft report entitled "Department of Mental Health and Corrections and Rehabilitation: Streamlining the Process for Identifying Potential Sexually Violent Predators Would Reduce Unnecessary or Duplicative Work". The DMH appreciates the work performed by the Bureau of State Audits and the opportunity to respond to the draft report.

Please contact Vallery Walker, Internal Audits, at (916) 651-3880 if you have any questions.

Sincerely,

(Signed by: Cliff Allenby)

CLIFF ALLENBY
Acting Director

Enclosure

**Response to the Bureau of State Audits
Draft Report Entitled**

“Department of Mental Health and Corrections and Rehabilitation: Streamlining the Process for Identifying Potential Sexually Violent Predators Would Reduce Unnecessary or Duplicative Work”

Recommendation: To enable it to track trends and streamline processes, the Department of Mental Health (Mental Health) should expand the use of its database to capture more specific information about the offenders the Department of Corrections and Rehabilitation (Corrections) refers to it and the outcomes of the screenings and evaluations it conducts.

Response: Mental Health has identified database enhancements that will enable the Sex Offender Commitment Program (SOCP) to track more specific information related to victims, offenders, offenses, screening results, evaluations results, referral decisions and actions taken by the District Attorneys and the courts. These changes will enable Mental Health to track trends and streamline processes.

Recommendation: To eliminate duplicative effort and increase efficiency, Corrections should not make unnecessary referrals to Mental Health. Corrections and Mental Health should jointly revise the structured screening instrument so that the referral process adheres more closely to the law’s intent. For example, Corrections should better leverage the time and work it already conducts by including the following steps in its referral process:

- Determine whether the offender committed a predatory offense.
- Review the result of any previous screenings and evaluations Mental Health completed and consider whether the most recent parole violation or offense might alter the previous decision.
- Use the State Authorized Risk Assessment Tool for Sex Offenders to assess the risk that an offender will reoffend.

Response: Mental Health and Corrections are already working together to further streamline the referral process to eliminate duplicative effort and increase efficiency.

Recommendation: To ensure that it will have enough qualified staff to perform evaluations, Mental Health should continue its efforts to obtain approval of a new position classification for SVP evaluators. If the State Personnel Board (SPB) approves the classification, Mental Health should take steps to recruit qualified individuals as quickly as possible. Additionally, Mental Health should continue its efforts to train its consulting psychologists to conduct evaluations.

Response: Mental Health has submitted its SVP Evaluator classification proposal to the Department of Personnel Administration. It is anticipated that the SPB will hear the proposal in the month of August 2011. SOCP will immediately recruit SVP Evaluators once this classification is approved by SPB and position authority has been granted. SOCP Consulting Psychologists currently attend trainings on legal and clinical practices related to full evaluations and trends in the forensics field. Efforts to train consulting psychologists to conduct evaluations will continue.

In addition, Mental Health plans to propose legislative amendments to extend its authorization to use contractors for all types of evaluations prior to the expiration of its current authorization of January 1, 2012.

Recommendation: To reduce costs for unnecessary evaluations, Mental Health should either issue a regulation or seek a statutory amendment to clarify that, when resolving a difference of opinion between the first set of evaluators, Mental Health must only seek the opinion of a fourth evaluator when a third evaluator concludes that the offender meets the SVP criteria.

Response: Mental Health is evaluating options to reduce costs for unnecessary evaluations.

Recommendation: To ensure the Legislature can provide effective oversight, Mental Health should complete and submit reports to the Legislature on its efforts to hire state employees and on the impact of Jessica's Law on the program as soon as possible.

Response: The Administration is in the process of finalizing these reports.

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(Agency response provided as text only.)

California Department of Corrections and Rehabilitation
P.O. Box 942883
Sacramento, CA 94283-0001

June 21, 2011

Ms. Elaine M. Howle, State Auditor
Bureau of State Audits
555 Capitol Mall, Suite 300
Sacramento, CA 95814

Dear Ms. Howle:

The California Department of Corrections and Rehabilitation (CDCR) is submitting this letter in response to the Bureau of State Audits' report (BSA) entitled *Departments of Mental Health and Corrections and Rehabilitation: Streamlining the Process for Identifying Potential Sexually Violent Predators Would Reduce Unnecessary or Duplicative Work*.

The Legislature created the Sex Offender Commitment Program to target sex offenders who present the highest risk to public safety due to their diagnosed mental disorders which predisposes them to engage in sexually violent criminal behavior. As such, CDCR is committed to adhering to the statutory law governing this program and will always err on the side of caution in regards to public safety when making sex offender referrals to the Department of Mental Health (DMH). CDCR appreciates the thoughtful review conducted by BSA and the concerns for duplicate work and potential savings for the state of California. CDCR notes the current screening process developed collaboratively by both departments provides the ability for the State to meet the intent of the Sexually Violent Predator statute in screening and identifying offenders without requiring duplicative mental health assessments by both departments, which would have a negative fiscal impact on the State. We agree that improvements can be made in streamlining the process and have already implemented steps to improve the timeliness of our referrals to DMH. We look forward to carefully reviewing the recommendations in this report and will continue our work with DMH to increase efficiency.

We would like to thank BSA for their work on this report and will address the specific recommendations in a corrective action plan at 60-day, six-month, and one-year intervals. If you have further questions, please contact me at (916) 323-6001.

Sincerely,

(Signed by: Scott Kernan)

SCOTT KERNAN
Undersecretary, Operations (A)

cc: Members of the Legislature
Office of the Lieutenant Governor
Milton Marks Commission on California State
Government Organization and Economy
Department of Finance
Attorney General
State Controller
State Treasurer
Legislative Analyst
Senate Office of Research
California Research Bureau
Capitol Press

Declaration of Peter Finnerty

I, Peter F. Finnerty, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration. If called as a witness, I could and would testify competently to such facts under oath. Where statements are made on information and belief, I believe these statements to be true.

2. I am employed as a Senior Deputy District Attorney by the Orange County District Attorney's Office ("OCDA"). I have worked as a deputy at the OCDA since July of 2005, and have been assigned to the Sexually Violent Predators ("SVP") unit since September of 2011. I am currently the most senior SVP prosecutor at the OCDA.

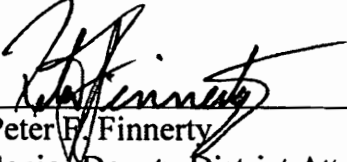
3. In an effort to provide the Commission on State Mandates with information regarding the frequency with which SVP commitment proceedings have been initiated in Orange County, both before and after the implementation of Jessica's Law, my office undertook a review of its files. Based upon this review, we determined that from January 1, 2000, through December 31, 2006, the OCDA filed 31 initial SVP commitment petitions. We also determined that from January 1, 2007, through December 31, 2018, the OCDA filed 41 initial SVP commitment proceedings. Therefore, from 2000 through 2006, the OCDA filed an average of 4.43 SVP petitions per year and from 2007 through 2018, the OCDA filed an annual average of 3.42 SVP petitions per year.

4. The OCDA does not separately track the number of referrals we receive each year from the Department of State Hospitals ("DSH"). However, in my experience, the number of referrals tends to broadly correspond to the number of SVP petitions that

we file. For example, since I joined the OCDA SVP Unit in September, 2011, every referral received from DSH has been filed as an SVP petition by the OCDA.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 10th day of April, 2019, in Santa Ana, California.



Peter F. Finnerty
Senior Deputy District Attorney

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

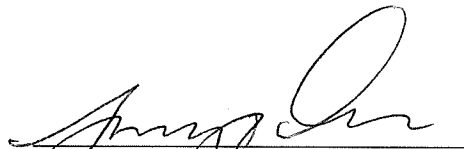
On April 11, 2019, I served the:

- **County of Los Angeles District Attorney's Office's Late Comments on the Mandate Redetermination on Remand filed April 10, 2019**
- **County of Los Angeles's Comments on the Mandate Redetermination on Remand filed April 10, 2019**
- **County of Orange's Comments on the Mandate Redetermination on Remand filed April 10, 2019**
- **County of Sacramento's Comments on the Mandate Redetermination on Remand filed April 10, 2019**
- **County of San Bernardino's Comments on the Mandate Redetermination on Remand filed April 10, 2019**
- **County of San Diego's Comments on the Mandate Redetermination on Remand filed April 10, 2019**

Reconsideration of the Request for Mandate Redetermination on Remand
Sexually Violent Predators (CSM-4509), 12-MR-01-R
Welfare and Institutions Code Sections 6601 through 6608
Statutes 1995, Chapter 762; Statutes 1995, Chapter 763; Statutes 1996, Chapter 4
Department of Finance, Requester

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 11, 2019 at Sacramento, California.



Lorenzo Durán
Commission on State Mandates
980 Ninth Street, Suite 300
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 4/5/19

Claim Number: CSM-4509 (12-MR-01-R)

Matter: Sexually Violent Predators

Requester: Department of Finance

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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