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**Commission on
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April 10, 2019

Via Drop Box

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**RE: Request for 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, et al. v.
Commission on State Mandates, et al.* (2018) 6 Cal.5th 196**

**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

Dear Ms. Halsey:

The County of San Diego, on behalf of the San Diego County Office of the Public Defender, the San Diego District Attorney's Office and the San Diego County Sheriff (collectively referred to as the "County"), hereby submits the following comments in response to the Commission's February 8, 2019 letter.

The Supreme Court directed the court of appeal to remand this matter to the Commission to "determine, *in the first instance*, whether and how the expanded definition of a sexually violent predator (SVP) may affect the state's obligation to reimburse the Counties for implementing the amended statute."¹ By "expanded definition" the Supreme Court referred to the modifications Proposition 83 made to

¹ *County of San Diego et al. v. Commission on State Mandates, et al.*, 6 Cal. 5th 196, 201 (2018) (emphasis added).

Welfare and Institutions Code § 6600, subdivisions (a)(1) and (g).² These changes reduced the number of victims needed to qualify an individual as an SVP from two victims to one, and removed the limitation that only one prior juvenile adjudication of a sexually violent offense could be used as a qualifying conviction.³

Whether the “expanded definition” of SVP in Proposition 83 changes the State’s duty to reimburse the counties, and if so, how it changes those duties, are questions not previously considered by the Commission.⁴ The Supreme Court recognized the current record lacks information to answer these questions:

Unfortunately, the Commission never considered whether the expanded SVP definition in Proposition 83 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. Its ruling granting the State respondents’ request for mandate redetermination instead rested entirely on grounds that we now disapprove. Moreover, the parties admit—and the Court of Appeal found—that 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.⁵

The Commission should therefore handle these questions as it would any other similar request in the first instance – as a request for mandate redetermination under Government Code §17570.

The Department of Finance (DOF) Has Failed to Meet Its Burden to Demonstrate the Expanded Definition of Sexually Violent Predator Constitutes a Subsequent Change in Law that Modifies the State’s Obligation to Reimburse Counties Under the Test Claim Statutes

Government Code §17570(b) states: “[t]he commission may adopt a new test claim decision to supersede a previously adopted test claim decision only upon a showing that the state’s liability for the test claim decision . . . has been modified based on a subsequent change in law.”⁶ In order to prevail, the moving party must provide “[a]

² *Id.* at 205, fn. 2.

³ *Id.* The DOF contends that the Proposition also expanded the set of crimes that qualify as a sexually violent offense. (Welf. & Inst. Code § 6600(b).) But those changes were signed into law by the Governor on September 20, 2006 through Senate Bill 1128, not through Jessica’s Law.

⁴ *County of San Diego v. Commission on State Mandates*, 6 Cal. 5th at 205, 217.

⁵ *Id.* at 217.

⁶ *See also*, 2 C.C.R. §1190.1(a).

detailed analysis of how and why the state’s liability for mandate reimbursement has been modified . . . based on a subsequent change in law.”⁷ The detailed analysis must be signed under penalty of perjury⁸ and “requires more than a written narrative or simple statement of the facts and law. It requires the application of the law [...] to the facts (i.e. the alleged subsequent change in law) discussing, for each activity addressed in the prior test claim decision, how and why the state’s liability for the activity has been modified.”⁹

The question presented in the DOF’s 2013 request – whether the *reenactment* of SVPA provisions in Proposition 83 constituted a “subsequent change in law” as defined in Government Code section 17570 – was resolved by the Supreme Court in 2018. The Court found: “[the] ‘ruling granting the State respondents’ request for mandate redetermination . . . rested *entirely* on grounds we now disapprove.”¹⁰ Because the Supreme Court rejected the only basis asserted by the DOF in its request for redetermination, its pending request is facially deficient. Accordingly, the DOF, as an initial matter, should be required to provide a “detailed analysis of how and why” a mandate redetermination is appropriate.

The DOF’s March 22, 2019 submission falls woefully short of providing the required detailed analysis. Rather, the DOF’s position can be summarized as follows:

- (1) Prop 83 expanded the definition of SVP.¹¹
- (2) Costs to local jurisdictions flow from the definition of SVP because local jurisdictions won’t incur costs for carrying out the SVPA process unless state officials determine the offender meets the definition of SVP.¹²
- (3) Because the costs “flow” from the definition – “the question of whether the State must reimburse turns on whether or not the Legislature is the source of that definition. Before Proposition 83, it was. After Proposition 83, the voters are the source of the expanded definition of ‘sexually violent predator.’”¹³
- (4) Because “[t]he Legislature can no longer repeal or narrow that definition through normal legislative process. . . the State is no longer financially responsible for reimbursing such costs.”¹⁴

⁷ Gov’t Code §17570(d)((1)(B). See also, 2 C.C.R. §1190.1(b).

⁸ Gov’t Code §17570(d)(1)(E).

⁹ 2 C.C.R. §1190.1(c).

¹⁰ *County of San Diego et al. v. Commission on State Mandates, et al.*, 6 Cal. 5th at 217. (Italics added.)

¹¹ DOF March 22, 2019 letter (“3/22/19 letter”) at p. 1, ¶ 4.

¹² *Id.* at p. 2, ¶¶ 4-5.

¹³ *Id.* at p. 2, ¶ 5.

¹⁴ *Id.*

The DOF's first two points don't offer the Commission anything new. The Supreme Court itself recognized "whether a county has a duty to act (and, if so, what it must do) depends on the SVP definition."¹⁵

The DOF's third point is a conclusion that is unsupported by any factual analysis. The Supreme Court ordered this matter be remanded to the Commission to "determine, *in the first instance*, whether and how the expanded definition of a sexually violent predator (SVP) may affect the state's obligation to reimburse the Counties for implementing the amended statute."¹⁶ At the heart of this analysis, as explained by the Supreme Court, is the question of "how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to local governments."¹⁷ Instead of answering this question with factual data, however, the DOF, in its March 22, 2019 letter, simply argues that the actual numbers are irrelevant:

"Regardless of the number of offenders processed by local governments in a particular year, it is not disputed that the voters expanded the category of offenders who 'shall' be referred to local governments as part of the SVPA process when they adopted Proposition 83 and altered the definition of 'sexually violent predator.'"

The DOF's position ignores the fact that a referral is only made if, in addition to existence of the requisite predicate sexually violent offense, the State determines the offender has a diagnosed mental disorder that makes it likely that he or she will engage in sexually violent criminal behavior.¹⁸ So, while *in theory*, the expanded definition could result in more referrals, as further discussed below, the actual facts presented in the State's own audit demonstrates that, *in reality*, the "expanded definition" has not resulted in a sustained number of higher referrals being made to local governments.

¹⁵ *County of San Diego et al. v. Commission on State Mandates, et al.*, 6 Cal. 5th at 216-17.

¹⁶ *Id.* at 201 (emphasis added).

¹⁷ *Id.* at 217.

¹⁸ Both before and after the adoption of Proposition 83, before an individual can be found to be a sexually violent predator there must also be a finding that the individual "has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." Welf. & Inst. Code § 6600(a)(1). The requisite "diagnosed mental disorder" includes any condition, congenital or acquired, "affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." Welf. & Inst. Code § 6600(c).

The State's own audit indicates that the "expanded definition" of SVP has had, at most, a nominal effect on the number of referrals to counties, and thus it can't be said that the definitional changes so altered the duties imposed on local governments that the source of all those duties now derives from the voters as opposed to the Legislature. Additionally, as noted by the Sacramento County District Attorney's Office in its March 26, 2013 letter to the Commission: "The legislature chose to have these civil proceedings handled by the local entities. It can remove that requirement from the local entities if it so chooses. . ." The fact that there may be limits on the Legislature's ability to narrow the definition of an SVP in a manner that is inconsistent with Proposition 83 is of no moment.

The Changes to the Definition of Sexually Violent Predator in Proposition 83 Did Not Affect the State's Obligation to Reimburse Counties

A. The Changes to the Definition of SVP Did Not Result In a Greater Number of Referrals To Local Designated Counsel¹⁹

In July 2011, the California State Auditor issued a report on its audit of the "Sex Offender Commitment Program."²⁰ The Report concluded that while there was a dramatic increase in the number of referrals from the Department of Corrections ("Corrections") to the state Department of Mental Health ("Mental Health") after Senate Bill 1128 became law and the voters passed Prop. 83, there was only a brief uptick in the number of referrals to local designated counsel in 2006 through 2008, after which the number of referrals dropped to the pre-Proposition 83 levels.²¹ Specifically, the Report found that "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."²²

The Report also included the following finding:

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

¹⁹ "Designated Counsel" is "either the district attorney or the county counsel" as designated by the board of supervisors of each county. Welf. & Inst. Code § 6601(i).

²⁰ The *Sex Offender Commitment Program*, July 2011 Report 2010-116 ("2011 Audit Report") may be found at <https://www.bsa.ca.gov/pdfs/reports/2010-116.pdf>

²¹ 2011 Audit Report, p. 14, Table 3.

²² *Id.* at p. 15.

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.²³

Because the DOF declined to provide any factual data regarding the number of referrals to local designated counsel, the County has requested this data from the Department of State Hospitals for the years 1996 through 2018 for the County of San Diego and Statewide. Additionally, the County is in the process of collecting and analyzing data related to its SVP cases for presentation to the Commission. Since the DOF has not set forth a factual basis for seeking redetermination, the County hereby reserves the right to submit further data should the Commission find that DOF has met its initial burden.

B. The Changes to the Definition of SVP Did Not Transform the Test Claim Statutes into a Voter Imposed Mandate

As noted by the Supreme Court, it is undisputed that “nothing in Proposition 83 focused on duties local governments were already performing under the SVPA.”²⁴ “No provision amended those duties in any substantive way. Nor did any aspect of the initiative’s structure or other indicia of its purpose suggest that the listed duties merited special protection from alternation by the Legislature.”²⁵ The SVP program, and the duties it imposes on local governments, would have remained in place whether or not Proposition 83 had been approved by the voters. Thus Proposition 83 could only be said to have “transformed” these duties from obligations imposed by the State to obligations imposed by the voters, if the definitional changes to SVP fundamentally changed the operation of the SVP program as it pertains to local governments. This is not the case. As noted above, the available factual data indicates Proposition 83 has had little effect on referrals to local governments.

To the extent there exists a small population of offenders who would not have otherwise been eligible for commitment under the SVPA but for Jessica’s Law, the County contends the added costs incurred by the County in fulfilling its duties with respect to these offenders should nonetheless be reimbursed as part of the SVP program

²³ *Id.*

²⁴ *County of San Diego et al. v. Commission on State Mandates, et al.*, 6 Cal. 5th at 213. (Italics added.)

²⁵ *Id.*

established by the Legislature.²⁶ As noted in the California District Attorney's Association's March 19, 2013 letter to the Commission: "It is the mandate to represent that was created in the original legislation and remains unchanged in Proposition 83...The legal representation is necessary to implement the original and continuing Sexually Violent Predator Act passed by the legislature, not to specifically implement Proposition 83."

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.

Respectfully Submitted,

THOMAS E. MONTGOMERY, County Counsel

By


STEPHANIE A. KARNAVAS, Senior Deputy

14-90097

²⁶ The County refers the Commission to the California Public Defender's Association March 18, 2013 letter to the Commission and incorporates the arguments therein by reference, particularly that which demonstrates Proposition 83 did not effectuate a subsequent change in law as contemplated by Government Code section 17570.

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.

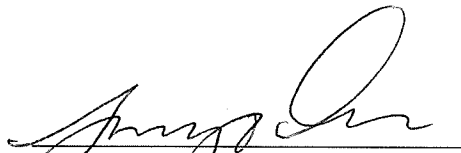
On April 11, 2019, I served the:

- **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**

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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.



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Last Updated: 4/5/19

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

Matter: Sexually Violent Predators

Requester: Department of Finance

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