ITEM 5

MANDATE REDETERMINATION
SECOND HEARING: NEW TEST CLAIM DECISION

REVISED FINAL STAFF ANALYSIS AND PROPOSED STATEMENT OF DECISION

Welfare and Institutions Code Sections 6601, 6602, 6603, 6604, 6605, and 6608

Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); Statutes 1996, Chapter 4 (AB 1496)

Sexually Violent Predators, (CSM-4509)

As Alleged to be Modified by:

Proposition 83, General Election, November 7, 2006

12-MR-01

Department of Finance, Requester

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Attached is the final proposed statement of decision for this matter. This Executive Summary and final proposed statement of decision also function as the final staff analysis on the issue of whether the Commission shall adopt a new test claim decision.

EXECUTIVE SUMMARY

Overview

On September 27, 2013, the Commission conducted the second hearing, and determined that the state's liability under the test claim statute had been modified by Proposition 83, and that a new test claim decision must be adopted. The Commission determined that six of the eight mandated activities identified in the previously adopted test claim decision are no longer reimbursable because these activities do not impose costs mandated by the state pursuant to Government Code section 17556(f). The Commission further determined that the remaining two activities relating to the probable cause hearing continue to impose costs mandated by the state and, thus, continue to be eligible for reimbursement.

However, a substantive legal issue with respect to the possible retroactive effect of Proposition 83 was raised at the hearing, and the Commission postponed adoption of the full statement of decision pending the resolution of that issue. The County of Los Angeles argued at the September 27, 2013 hearing that reimbursement should continue for the County of Los Angeles based on the California Supreme Court's ruling in *People v. Castillo,* which upheld a stipulation and agreement entered into by the District Attorney, Public Defender, and the Los Angeles County Courts to apply the pre-Proposition 83 law to Sexually Violent Predator (SVP) commitment and recommitment petitions then-pending. The court determined that the agreement was enforceable against the People. The Commission directed staff to consider the Supreme Court's ruling, and what, if any, effect it might have on mandate reimbursement for the County of Los Angeles and other counties similarly situated.

For this hearing, the *only issue before the Commission* is whether the period of reimbursement should end on July 1, 2011 for all counties, for the six activities identified in the statement of decision.

Staff Analysis

Section 17570 provides that a request for adoption of a new test claim decision shall be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year. This request was filed on January 15, 2013, establishing eligibility beginning July 1, 2011. Therefore, as a result of this proposed decision, staff finds that several of the approved activities in the prior test claim decision are no longer reimbursable as of July 1, 2011, and two of the eight original activities remain reimbursable.

As pointed out by representatives of the County of Los Angeles at the September 27, 2013 hearing, while Proposition 83 was pending enactment by the voters, and shortly after SB 1128 had been enacted to make certain changes to the Sexually Violent Predators Act (SVPA), the District Attorney, the Public Defender, and the Presiding Judge of the Superior Court for the County of Los Angeles entered into a stipulation to continue operating under the SVPA as it existed prior to the amendments made by SB 1128 (which, incidentally, were essentially the same amendments that would be enacted by Proposition 83 a few weeks later). The stipulation was entered into "due to uncertainty in the retroactive application of this change," and was held to be enforceable against the People in *People v. Castillo* (2010) 49 Cal.4th 145. At the September 27, 2013 hearing, the County alleged that the California Supreme Court's finding that the stipulation was enforceable should be applied by the Commission to prevent an inappropriate retroactive application of Proposition 83 and, thus, mandate reimbursement should therefore continue for those pending SVP cases in the County that are subject to the stipulation. The County further argued that applying the period of reimbursement of July 1, 2011 to the new test claim decision would essentially nullify the decision of the California Supreme Court.

Staff has since analyzed the stipulation, and the court's opinion in *People v. Castillo*, and determined that while the County may be bound by the terms of the stipulation, to the extent of those cases and individuals to which the stipulation applies, (1) the California Supreme Court's finding does not bind the Commission to deny the request for redetermination, or to limit the applicability of its findings; and (2) this decision is effective on July 1, 2011, pursuant to Government Code section 17570 and, thus reimbursement for six of the eight activities are no longer reimbursable effective July 1, 2011.

Staff Recommendation

Staff recommends that the Commission adopt this analysis as its new test claim decision, ending reimbursement for several of the test claim activities as of July 1, 2011.

Staff further recommends that the Commission authorize staff to make any non-substantive, technical changes to the proposed new test claim decision following the hearing.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION: SECOND HEARING: NEW TEST CLAIM DECISION FOR: Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608; As added or amended by Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); Statutes 1996, Chapter 4 (AB 1496); *Sexually Violent Predators* (CSM-4509), As Modified by: Proposition 83, General Election, November 7, 2006 Filed on January 15, 2013 By the Department of Finance, Requester.	Case No.: 12-MR-01 *Sexually Violent Predators (CSM-4509)* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500, ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. [Gov. Code, § 17570; Cal. Code Regs., tit. 2, § 1190.05] (*Adopted ~~September 27,~~ December 6, 2013*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this mandate redetermination during regularly ~~a~~ scheduled hearings on September 27, 2013, and December 6, 2013, and adopted the new test claim decision on December 6, 2013. [Witness list will be included in the final statement of decision.]

Government Code section 17570 and section 1190 et seq. of the Commission's regulations establish the mandate redetermination process. In addition, the law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., title 2, California Code of Regulations 1181 et seq., and related case law.

The Commission ~~[adopted/modified] the proposed decision as its new test claim decision,~~ granted~~ing~~ the request for redetermination, and partially approved~~ing~~ the request to end reimbursement for the test claim activities by a vote of 4-1, with one member abstaining and one member absent, at the September 27, 2013 hearing. On December 6, 2013, the Commission determined that its findings are effective on July 1, 2011, pursuant to Government Code section 17570 and, thus reimbursement for six of the eight activities are no longer reimbursable effective July 1, 2011. The Commission adopted the statement of decision as its new test claim decision on December 6, 2013.

Summary of the Findings

The Commission finds that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution for the *Sexually Violent Predators*, CSM-4509 mandate has been modified based on a subsequent change in law, and a new test claim decision is required. Specifically, Welfare and Institutions Code sections 6601, 6604, 6605, and 6608, as added or amended by Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); and Statutes 1996, Chapter 4 (AB 1496) impose duties expressly included in Proposition 83, adopted by the voters on November 7, 2006. Additionally the duties imposed by section 6603 are necessary to implement the requirements of Proposition 83. Government Code section 17556(f) provides that the Commission shall not find "costs mandated by the state" for costs incurred as a result of statutes that impose duties that are expressly included in or necessary to implement a ballot measure approved by the voters. Based on the filing date of this request, and pursuant to Government Code section 17570, the following activities are no longer reimbursable beginning July 1, 2011 (the numbering of the activities utilized in DOF's request for redetermination is adopted):

> **Activity 1** – Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
>
> **Activity 2** – Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)
>
> **Activity 3** – Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(j).)
>
> **Activity 5** – Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
>
> **Activity 6** – Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)
>
> **Activity 7** – Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)

However, the preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing (**Activity 4**), and the portion of **Activity 8** that includes transportation of each sexually violent predator from a secured facility to the *probable cause hearing*, remain reimbursable as state-mandated costs, as explained below. The activities related to holding a probable cause hearing are found to be neither expressly included in, nor necessary to implement Proposition 83, but are mandated by the state in section 6602 of the Welfare and Institutions Code.

Therefore, the following activities are required as modified, only for probable cause hearings:

> **Activity 4-** Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)

Activity 8 – Transportation ~~and housing~~ for each potential sexually violent predator from ~~at~~ a secured facility to the probable cause hearing ~~while the individual awaits trial~~ on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

COMMISSION FINDINGS

Chronology

6/25/1998	The Commission adopted the test claim statement of decision for *Sexually Violent Predators*, (CSM-4509), approving reimbursement for certain activities under Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608.[1]
9/24/1998	The Commission adopted parameters and guidelines.[2]
11/08/2006	California voters approved Proposition 83, which amended and reenacted several sections of the Welfare and Institutions Code.[3]
10/30/2009	The Commission adopted amended parameters and guidelines, pursuant to the Controller's request to amend the boilerplate language of a number of existing parameters and guidelines.[4]
1/15/2013	The Department of Finance (DOF) filed a request for redetermination of CSM-4509.[5]
1/24/2013	Commission staff deemed the filing complete.
2/13/2013	The State Controller's Office (SCO) submitted comments.[6]
2/13/2013	The County of Los Angeles requested an extension of time to file comments.
2/13/2013	The California State Association of Counties (CSAC) requested an extension of time to file comments.
2/14/2013	The County of San Diego requested an extension of time to file comments.
2/15/2013	The Executive Director granted an extension of time for the submittal of all comments until March 27, 2013, and set the matter for the first hearing on July 26, 2013.
3/19/2013	California District Attorneys' Association (CDAA) submitted comments on the request for redetermination.[7]
3/22/2013	CSAC submitted comments on the request for redetermination.[8]

[1] Exhibit B, Test Claim Statement of Decision.

[2] Exhibit C, Test Claim Parameters and Guidelines.

[3] See Exhibit A, Request for Redetermination.

[4] Exhibit D, Test Claim Amended Parameters and Guidelines.

[5] Exhibit A, Request for Redetermination.

[6] Exhibit E, SCO Comments on Request for Redetermination.

[7] Exhibit F, CDAA Comments on Request for Redetermination.

3/25/2013	California Public Defenders' Association (CPDA) submitted comments on the request for redetermination.[9]
3/25/2013	District Attorney of San Bernardino County submitted comments on the request for redetermination.[10]
3/25/2013	County of San Bernardino submitted comments on the request for redetermination.[11]
3/26/2013	District Attorney of Sacramento County submitted comments on the request for redetermination.[12]
3/26/2013	District Attorney of Los Angeles County submitted comments on the request for redetermination.[13]
3/27/2013	County of Los Angeles submitted comments on the request for redetermination.[14]
3/27/2013	Alameda County Public Defender submitted comments on the request for redetermination.[15]
3/27/2013	County Counsel of San Diego County submitted comments on the request for redetermination.[16]
3/29/2013	Alameda County District Attorney submitted comments on the request for redetermination.[17]
5/09/2013	Commission staff issued the draft staff analysis and proposed statement of decision.[18]
5/17/2013	DOF submitted comments on the draft staff analysis.[19]

[8] Exhibit G, CSAC Comments on Request for Redetermination.

[9] Exhibit H, CPDA Comments on Request for Redetermination.

[10] Exhibit I, County of San Bernardino District Attorney Comments on Request for Redetermination.

[11] Exhibit J, County of San Bernardino Comments on Request for Redetermination.

[12] Exhibit K, County of Sacramento District Attorney Comments on Request for Redetermination.

[13] Exhibit L, Los Angeles County District Attorney Comments on Request for Redetermination.

[14] Exhibit M, County of Los Angeles Comments on Request for Redetermination.

[15] Exhibit N, Alameda County Public Defender Comments on Request for Redetermination.

[16] Exhibit O, County Counsel of San Diego Comments on Request for Redetermination.

[17] Exhibit P, Alameda County District Attorney Comments on Request for Redetermination.

[18] Exhibit Q, Draft Staff Analysis and Proposed Statement of Decision.

[19] Exhibit R, DOF Comments on Proposed Statement of Decision.

5/28/2013	CPDA submitted comments on the draft staff analysis.[20]
5/31/2013	County of LA submitted late comments on the draft staff analysis.[21]
7/26/2013	The Commission determined that the requester made an adequate showing for redetermination and directed staff to set the matter for a second hearing.[22]
8/02/2013	Commission staff issued the draft staff analysis for the second hearing.[23]
8/22/2913	The County of Orange submitted comments on the draft staff analysis for the second hearing.[24]
8/27/2013	The District Attorney of Orange County submitted comments on the draft staff analysis for the second hearing.[25]
9/05/2013	The Public Defender of San Bernardino County submitted comments on the draft staff analysis for the second hearing.[26]
9/05/2013	The California State Association of Counties submitted comments on the draft staff analysis for the second hearing.[27]
9/05/2013	The County Counsel of San Diego submitted comments on the draft staff analysis for the second hearing.[28]
9/05/2013	The Department of Finance submitted comments on the draft staff analysis for the second hearing.[29]
9/05/2013	The County of Los Angeles submitted comments on the draft staff analysis for the second hearing.[30]
09/27/2013	The Commission approved staff's recommendation to adopt a new test claim decision, ending reimbursement for six of eight activities approved in the prior test claim decision, but postponed the adoption of the test claim decision

[20] Exhibit S, CPDA Comments on Draft Staff Analysis.

[21] Exhibit T, County of LA Comments on Draft Staff Analysis.

[22] Exhibit U, Statement of Decision, First Hearing, July 26, 2013.

[23] Exhibit V, Draft Staff Analysis, Second Hearing, August 2, 2013.

[24] Exhibit W, County of Orange Comments on Draft Staff Analysis, Second Hearing.

[25] Exhibit Y, Orange County District Attorney Comments on Draft Staff Analysis, Second Hearing.

[26] Exhibit Z, San Bernardino County Public Defender Comments on Draft Staff Analysis, Second Hearing.

[27] Exhibit AA, CSAC Comments on Draft Staff Analysis, Second Hearing.

[28] Exhibit BB, County Counsel of San Diego Comments on Draft Staff Analysis, Second Hearing.

[29] Exhibit CC, Finance Comments on Draft Staff Analysis, Second Hearing.

[30] Exhibit DD, County of Los Angeles Comments on Draft Staff Analysis, Second Hearing.

pending resolution of a possible legal issue regarding the period of reimbursement.

10/11/2013 Commission staff issued a revised draft staff analysis addressing the period of reimbursement issue identified at the September 27, 2013 hearing.

I. Background

The Sexually Violent Predators Program and the Subsequent Change in Law

The Sexually Violent Predators (SVP) program established civil commitment procedures for the civil detention and treatment of sexually violent predators (SVPs) following the completion of an individual's criminal sentence imposed for certain sex-related offenses. Before civil detention and treatment are imposed, the county counsel or district attorney is required to file a petition for civil commitment. A trial is then conducted to determine beyond a reasonable doubt if the person is an SVP. If the person alleged to be an SVP is indigent, the county is required to provide the indigent person with the assistance of counsel and experts necessary to prepare the defense.

The Commission concluded, in the CSM-4509 test claim statement of decision, that Welfare and Institutions Code sections 6601(i), 6602, 6603, 6604, 6605(b)-(d), and 6608(a)-(d) as enacted or amended by the 1995 and 1996 test claim statutes, imposed a reimbursable state-mandated program on counties within the meaning of article XIII B, section 6, of the California Constitution.[31]

On November 7, 2006, the voters approved Proposition 83, also known as "Jessica's Law." Proposition 83 effected a number of amendments to the Penal Code, including strengthening penalties for kidnapping and sexual offenses perpetrated upon children, and especially removing the requirement of "force, violence, duress, menace, or fear of immediate and unlawful bodily injury" from the definitional elements of several crimes.[32] Proposition 83 also mandated consecutive sentences for a number of sexual offenses,[33] mandated a minimum 25 year sentence for a "habitual sexual offender," as defined,[34] and required persons released on parole from a "registerable sex offense" to be monitored for the duration of their parole by a global positioning system device, for which the parolee is responsible to pay unless granted a waiver by the Department of Corrections.[35]

As directly relevant here, Proposition 83 also amended and reenacted provisions of the Welfare and Institutions Code, including sections 6601, 6604, 6605, and 6608 which were among the test claim statutes approved by the Commission in CSM-4509.

Section 6601(k) was amended by Proposition 83 to provide that a civil commitment under article 4 *shall toll the term of an existing parole*, where applicable. Under the amended section, if a

[31] Exhibit B, Test Claim Statement of Decision, at p. 12.

[32] See, e.g., Penal Code sections 209, 220, 269, as amended by Proposition 83 (adopted November 7, 2006).

[33] See Penal Code section 667.6, as amended by Proposition 83.

[34] Penal Code section 667.71, as amended by Proposition 83.

[35] Penal Code section 3000.07, as added by Proposition 83.

person were granted parole but subsequently civilly committed, that individual's parole would not run concurrently, but would be "tolled," and the remaining term of parole would be served after the civil commitment ends. The test claim statute, as approved in CSM-4509, provided that a civil commitment "*shall not toll, discharge or otherwise affect* the term of parole," meaning that a term of parole *could* run concurrently with a civil commitment, but that release from civil commitment would not discharge any remaining term of parole. The remainder of section 6601 was reenacted by Proposition 83 without amendment.

Section 6604 was amended by Proposition 83 to provide that if a court or jury determined that a person is a sexually violent predator, the person "shall be committed for an indeterminate term." The test claim statute, as approved in CSM-4509 had provided for a two year civil commitment, with an option for an extended commitment order from the court.

Section 6605 was amended by Proposition 83 to provide that if the Department of Mental Health (DMH) deems that the person's condition has changed, and that unconditional release or a conditional release to a less restrictive environment is appropriate and in the best interests of the person and conditions can be imposed to adequately protect the community, the Director "*shall authorize the person to petition the court*" for conditional release or unconditional discharge. The test claim statute, as approved by the Commission, required an annual notice to the person of his or her right to petition the court for release, and provided for an annual examination of his or her mental condition, but not, as the more recently amended section requires: "consideration of whether the committed person currently meets the definition of a sexually violent predator" and whether conditional release is appropriate in a particular case. Based on the plain language, the prior section 6605 was focused on the right of the individual to be annually evaluated for release, and to petition for release. As the section reads after Proposition 83, the focus is on the Department of State Hospitals making a determination that a person's condition has changed, and "authorizing" that person to petition for release.

And finally, Proposition 83 amended section 6608 to provide that, notwithstanding the provisions of section 6605, a person may petition the court for "*conditional release or an unconditional discharge*" without approval from the director of the DMH. The test claim statute stated "conditional release *and subsequent* unconditional discharge."[36]

On January 15, 2013, DOF filed a request for redetermination of the *Sexually Violent Predator* program based on Proposition 83, arguing that the program no longer imposes costs mandated by the state.

Mandate Redetermination Process under Section 17570

Government Code section 17570 provides a process whereby a test claim decision may be redetermined and superseded by a new test claim decision if a subsequent change in law, as defined, has altered the state's liability for reimbursement. The redetermination process calls for a two stage hearing; at the first stage, the requester must make "an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to

[36] Compare Penal Code sections 6601, 6604, 6605, and 6608 (as added or amended by Stats. 1995, ch. 762; Stats. 1995, ch. 763; Stats. 1996, ch. 4) with Penal Code sections 6601, 6604, 6605, and 6608, as amended by Proposition 83; full text of amended sections found in Exhibit X, 2006 Ballot Pamphlet, at pp. 136-138.

the prior the claim decision, that may modify the state's liability pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution."[37] At the second stage, the Commission shall determine whether a new test claim decision shall be adopted to supersede the previously adopted test claim decision.[38]

A subsequent change in law is defined in section 17570 as follows:

> [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, or a change in mandates law…[39]

On July 26, 2013, the Commission determined, pursuant to a hearing, that DOF had made an adequate showing that the state's liability had been modified based on a subsequent change in law. The Commission directed staff to set the matter for a second hearing to determine whether to adopt a new test claim decision.

On September 27, 2013, the Commission conducted the second hearing, and determined that the state's liability under the test claim statute had been modified by Proposition 83, and that a new test claim decision must be adopted. However, a substantive legal issue with respect to the possible retroactive effect of Proposition 83 was raised at the hearing, and the Commission postponed adoption of the full statement of decision pending the resolution of that issue. The County of Los Angeles argued at the September 27, 2013 hearing that reimbursement should continue for the County of Los Angeles based on the California Supreme Court's ruling in *People v. Castillo* that a stipulation and agreement entered into by the District Attorney, Public Defender, and the Los Angeles County Courts to apply the pre-Proposition 83 law to SVP commitment and recommitment petitions then-pending was enforceable against the People. The Commission continued the hearing on the matter to December 6, 2013, to consider the Supreme Court's ruling, and what, if any, effect it might have on mandate reimbursement for the County of Los Angeles and other counties similarly situated. For the December 6, 2013 hearing, the *only issue before the Commission* is whether the period of reimbursement ends on July 1, 2011 for *all counties*, for the six activities identified in the statement of decision.

II. Positions of the Requester, Test Claimant, and Interested Parties and Persons

A. Department of Finance, Requester

On January 15, 2013, DOF submitted a request to adopt a new test claim decision regarding Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608, pursuant to Government Code section 17570. DOF asserts that Proposition 83 constitutes a subsequent change in the law, as defined in section 17570, which, when analyzed in light of section 17556, results in the state's liability under the test claim statutes being modified. DOF argues that "the state's obligation to reimburse affected local agencies has ceased."[40] Specifically, DOF argues that because sections 6601, 6604, 6605, and 6608 were included in their entirety in Proposition 83, the voters reenacted the entirety of those sections, "including the portions not amended," and

[37] Code of Regulations, Title 2, section 1190.05(a)(1).

[38] Government Code section 17570(d)(4) (as added by Stats. 2010, ch. 719 (SB 856)).

[39] Government Code section 17570(a)(2) (as added by Statutes 2010, chapter 719 (SB 856)).

[40] Exhibit A, Request for Redetermination, at p. 2.

therefore the test claim statutes impose duties expressly included in the voter-enacted ballot measure. DOF also argues that "[t]he remainder of the mandate's Welfare and Institutions Code sections that were not expressly included in the ballot measure are, nevertheless, necessary to implement the ballot measure." DOF concludes that "all activities found to be reimbursable by the Commission in the *Sexually Violent Predator* mandate are no longer reimbursable pursuant to Government Code section 17556, subdivision f, as they are either: (1) expressly included in Prop 83 or, (2) necessary for the implementation of Prop 83."[41]

DOF filed comments on the draft staff analysis for the second hearing, in which DOF responded to the comments from some of the interested parties, as discussed below, and substantially agreed with staff's analysis.[42]

B. County of Los Angeles, Claimant for CSM-4509

LA County filed comments on the redetermination request, summarized as follows:

> The County opposes the DOF's request to adopt a new test claim on the basis that: 1) the extraneous text included in the body of Prop 83 did not constitute a change in the law; 2) Prop 83 did not convert activities identified in the Commission's 1998 Statement of Decision to activities necessary to implement Prop 83, therefore, no longer reimbursable; and 3) Government Code Section 17570 is unconstitutional.[43]

LA County's position relies on its reasoning that Statutes 2006, chapter 337 (SB 1128), enacted as urgency legislation on September 20, 2006, made most of the same substantive amendments to the code that would be enacted by Proposition 83 less than two months later. LA County argues that because the law in effect immediately prior to the passage of Proposition 83 was substantially the same, Proposition 83 cannot constitute a subsequent change in law:

> The changes actually proposed by Prop 83 were few and narrow, particularly in light of revisions to SVP laws that had recently been codified by S8 1128. The Secretary of State's practice of giving textual context to a ballot proposal by including unaffected statutory provisions is a benign protocol intended to fully inform the voters. Affirmation of existing law most certainly does not give rise to the change in law contemplated by Section 17570.[44]

Thus, LA County also implies, in the excerpt above, that sections 6601, 6604, 6605, and 6608 were reproduced in the ballot measure in their entirety as a matter of "protocol," and not because the ballot measure was intended to effect substantive or pervasive changes. Finally, LA County argues that section 17570 is unconstitutional on separation of powers grounds, and because it is "an infringement of article XIII B, section 6, of the California Constitution."[45]

[41] *Ibid*.

[42] Exhibit CC, DOF Comments on Draft Staff Analysis, Second Hearing.

[43] Exhibit M, County of Los Angeles Comments, at p. 1.

[44] Exhibit M, County of Los Angeles Comments, at pp. 1-2.

[45] Exhibit M, County of Los Angeles Comments, at p 5.

In response to the draft staff analysis and proposed statement of decision at the first hearing, LA County argued in late comments that DOF's delay of "nearly six and a half years after the passage of Proposition 83" in bringing this reconsideration request was unreasonable because the Legislature in 2008 directed the Commission to set aside and reconsider the SVPs mandate "upon final resolution of any pending litigation challenging the constitutionality of subdivision (f) of section 17556." LA County also states that the current redetermination process was made effective October 19, 2010, but that DOF "waited until January 2013." Finally, LA County argues that Proposition 83's standards for defining a person as an SVP and for releasing an SVP, once adjudicated, should not be applied to "pre Prop 83 offenders."[46] LA County argues that to end mandate reimbursement for offenders determined to be SVPs prior to the adoption of Proposition 83 would violate the rights of offenders and "nullify judges' sentencing orders." LA County concludes that "[r]etroactive application of the Prop 83 SVP law (a violation of Ex PostFacto Law) would be unconstitutional.

LA County filed comments on the draft staff analysis for the second hearing, in which it expressed disagreement with staff's conclusion that the subsequent change in law ends reimbursement for all but two of the eight original activities approved in the CSM-4509 test claim. The County continues to argue that "Prop. 83 did not convert activities identified in the Commission's 1998 SOD to activities necessary to implement Prop. 83 and therefore, are no longer reimbursable [*sic*]." In addition, the County continues to stress that "even if there was a change in the law, the new law should not be applied retroactively to pre Prop. 83 SVP's."[47]

At the second hearing on September 27, 2013, the County raised for the first time an issue regarding the period of reimbursement that would apply to the new test claim decision, if adopted. As pointed out by representatives of the County of Los Angeles, while Proposition 83 was pending enactment by the voters, and shortly after SB 1128 had been enacted to make certain changes to the Sexually Violent Predators Act, the District Attorney, the Public Defender, and the Presiding Judge of the Superior Court for the County of Los Angeles entered into a stipulation to continue operating under the SVPA as it existed prior to the amendments made by SB 1128 (which were essentially the same amendments that would be enacted by Proposition 83 a few weeks later). The stipulation was entered into "due to uncertainty in the retroactive application of this change," and was held to be enforceable against the People in *People v. Castillo* (2010) 49 Cal.4th 145. The County alleged that the California Supreme Court's finding that the stipulation was enforceable should be applied by the Commission to prevent an inappropriate retroactive application of the Proposition 83 and, thus, mandate reimbursement should therefore continue for those pending SVP cases in the County. The County further argues that applying the period of reimbursement of July 1, 2011 to the new test claim decision would essentially nullify the decision of the California Supreme Court.

C. State Controller's Office

The SCO agrees with DOF "that the eight activities previously determined to be reimbursable in the Statement of Decision adopted on June 25, 1998 cease to be reimbursable."[48]

[46] Exhibit T, County of Los Angeles Comments, at pp. 1-2.

[47] Exhibit DD, County of Los Angeles Comments on Draft Staff Analysis, Second Hearing.

[48] Exhibit E, SCO Comments, at p. 1.

D. Other Interested Parties and Persons

1. California District Attorneys' Association; San Bernardino County District Attorney's Office

The CDAA and the San Bernardino County DA argue that "[t]he application of Government Code § 17556(f) to Proposition 83 in order to terminate state subvention of mandated sexually violent predators is legally incorrect." CDAA continues:

> The Department of Finance contention that the mere recitation of any portion of a statute contained in a proposition, brings it within the "expressly included in" language of Government Code § 17556(f) regardless of whether the sections mandating local activity were amended or not, and whether or not the intent of the initiative and purpose of the initiative was to eliminate the subvention requirements of Article XIII B §6 by operation of Government Code § 17566(f), is not warranted. Such an interpretation would make the application of the statute so over broad and vague that no voter, local official, or legal analyst could accurately predict whether state mandated subvention would cease to exist as they voted to pass any ballot initiative that referenced existing law.[49]

They also argue that there is no evidence, including in the ballot materials, that the voters intended Proposition 83 to terminate the state's liability under article XIII B, section 6, to reimburse the test claim statutes. To support this argument they cite a letter from the Legislative Analyst's Office (LAO) and DOF to then-Attorney General Lockyer, in which "[t]he unequivocal conclusion of both officials is that the costs of the SVP program would remain a reimbursable by the state." They assert that this conclusion should be given great weight, "despite the Department of Finance's now changed opinion."[50]

2. California State Association of Counties

CSAC argues that the state's liability has not been affected by Proposition 83. Specifically, CSAC argues that the California Constitution mandates reimbursement for new programs or higher levels of service, subject to "four exceptions, but none of them are relevant in this case." CSAC argues that "[i]n particular, there is no exception for a ballot measure that voters pass years later that does not substantively amend any of the language that established the mandate in the first place."[51] CSAC further argues that the SVP program was unaffected by the passage of Proposition 83: "[b]ecause the ballot measure made no substantive changes to the reimbursable aspects of the program, the SVP program established by the Legislature would have remained in place whether voters approved or disapproved Proposition 83." CSAC also notes that "SB 1128, by Senator Alquist, amended Sections 6600, 6601, 6604, 6604.1, and 6605 of the Welfare and Institutions Code, among many others," less than two months prior to the election in which Proposition 83 was adopted, and that therefore Proposition 83 made no substantive changes to the law in effect at that time. Finally, CSAC argues that the request should be rejected because

[49] Exhibit F, CDAA Comments, at p. 1; Exhibit I, San Bernardino County DA Comments, at p. 1.

[50] Exhibit F, CDAA Comments, at p. 4; Exhibit I, San Bernardino County DA Comments, at p. 4.

[51] Exhibit G, CSAC Comments, at p. 1.

the Director of DOF "told the voters that counties would be reimbursed." CSAC cites the ballot materials and the analysis published leading up to the election:

> At the time Proposition 83 went to the ballot, the chief analysts representing both the Administration and the Legislature- the Director of Finance and the Legislative Analyst- agreed that all county costs related to the SVP commitment process would be reimbursed by the state. They stated the fact that counties would be reimbursed four times in their official fiscal analysis provided to the Attorney General, and voters decided the outcome of Proposition 83 based in part on that assurance.
>
> In their official fiscal analysis of the ballot measure required by law, the Legislative Analyst and Director of Finance state unequivocally that Proposition 83 would increase state costs to, among other things, "reimburse counties for their costs for participation in the SVP commitment process."[52]

CSAC implies that these analyses constitute evidence of voter intent, which in turn should be given substantial weight in evaluating whether a subsequent change in law has occurred.

CSAC filed further comments in response to the draft staff analysis for the second hearing, in which CSAC continues to argue that the state's liability under the test claim has not been modified. CSAC argues that Proposition 83, "merely amended irrelevant parts to the program the Legislature had long-before mandated." In addition, CSAC argues that based on this redetermination request, "the Department of Finance claims Government Code section 17556(f) applies so broadly as to make it no different than the interpretation already ruled unconstitutional by the courts" in CSBA v. State of California (2009) 171 Cal.App.4th 1183. Finally, CSAC argues that Proposition 83 does not constitute a reenactment of the unaffected portions of the statutes, stating that case law "is clear on the point that the mere recitation of unamended law to give context for proposed amendments does not constitute reenactment." CSAC maintains that Government Code 9605 controls, and that portions of a statute that are not amended are "not to be considered as having been repealed and reenacted in the amended form."[53]

3. California Public Defenders' Association and Alameda County Public Defender's Office

CPDA and Alameda County Public Defender's Office submitted substantially identical comments opposing the request for redetermination, in which they argue:

> (1) The 2012 legislative amendment and re-enactment of the Sexually Violent Predator Act (SVP A) either confirmed the viability of the Sexually Violent Predator Mandate (CSM-4509), or, *arguendo*, superseded any impact that Proposition 83 may have affected on the mandate; (2) Misrepresentation and the doctrines of estoppel and unclean hands bar the DOF's redetermination request; (3) Proposition 83 did not effectuate a "subsequent change in the law" as

[52] Exhibit G, CSAC Comments, at p. 3.

[53] Exhibit AA, CSAC Comments on Draft Staff Analysis, Second Hearing, at pp. 1-3.

> contemplated by Government Code section 17570; and (4) Government Code section17570 is unconstitutional.[54]

The comments note that in 2012, the Legislature enacted substantive amendments to the SVP program, which, it is argued, "superseded any impact" of Proposition 83. CPDA and the Alameda County Public Defender's Office argue that due to the 2012 amendments to the relevant codes sections "Proposition 83 is no longer the statutory authority supporting the SVPA; consequently the cost incurred by local agencies to comply with the 2012 legislatively enacted SVPA is a cost mandated by the state."[55] The comments cite the LAO and DOF analysis of Proposition 83, and argue that DOF should now be estopped from seeking redetermination of the SVP mandate because of the position taken prior to the election on Proposition 83.[56] The comments also focus on the 2006 legislative amendment to the SVP program, arguing that DOF's request for redetermination "is misleading because the statutory language quoted from the SVPA by the DOF's January 15,2013, request, as well as that include [sic] in the actual proposition, was not the statutory language in effect at the time Proposition 83 was passed on November 7, 2006."[57] The comments also assert that section 17570 is unconstitutional, because it is unconstitutionally vague, with respect to the term "subsequent change in law," and because it violates separation of powers doctrine.[58]

Finally, in comments submitted on the draft staff analysis for the first hearing, CPDA argues that prior reconsiderations conducted at the direction of the Legislature with respect to four prior test claims, and ultimately struck down by the court of appeal, demonstrate that a legal process or mechanism for reconsidering a test claim was in effect at the time Proposition 83 was adopted, and that therefore the analysis included in the ballot materials was incorrect and misleading to voters, and that estoppel principles, or unclean hands doctrine, should be applied to bar DOF from bringing its redetermination request under section 17570.[59]

4. County of San Bernardino

The County of San Bernardino argues that DOF's interpretation of section 17556 is legally incorrect. San Bernardino focuses on the intent of the voters in adopting Proposition 83, stating:

> The Department of Finance's flawed interpretation of the "expressly included" language of Government Code Section 17556(f) fails to consider whether the

[54] Exhibit H, CPDA Comments, at p. 1; Exhibit N, Alameda County Public Defender's Comments, at p. 2.

[55] Exhibit H, CPDA Comments, at p. 2; Exhibit N, Alameda County Public Defender's Comments, at p. 3.

[56] Exhibit H, CPDA Comments, at pp. 3-4: Exhibit N, Alameda County Public Defender's Comments, at pp. 4-5.

[57] Exhibit H, CPDA Comments, at p. 4; Exhibit N, Alameda County Public Defender's Comments, at p. 5.

[58] Exhibit H, CPDA Comments, at p. 6; Exhibit N, Alameda County Public Defender's Comments, at p. 7.

[59] Exhibit S, CPDA Comments on Draft Staff Analysis.

ballot language intended to enact or change the state reimbursement of mandated activities.

San Bernardino also implies that no subsequent change in law has occurred, reasoning that "[t]he statutory changes in the initiative did not relieve counties of their preexisting state mandated activities per Welfare and Institutions Code section 6601 through 6604."[60]

5. Sacramento County District Attorney's Office

The Sacramento County DA argues that no subsequent change in law has occurred, and that "the legislature still retains a true choice in whether to have the duties imposed on local government in the statute remain with local governments, or change the statutes so that the mandated duties are performed at the state level." The Sacramento County DA focuses on the fact that Proposition 83 permits the Legislature "to amend, by a statute passed by a roll call vote of two-thirds of each house," and implies that the failure to relieve local agencies of the duties imposed by Proposition 83 constitutes a reimbursable state mandate.

The Sacramento County DA argues further that "[t]he fact that pre-existing law has simply been recited again, either in a statute re-enacted by the legislature, or as part of a new ballot measure…does not amount to a change in the law for § 17570 purposes." The Sacramento County DA focuses on the fact that "the mandated activities at issue here were in place before the initiative was enacted," and concludes that "there has been no change in the applicable law."[61]

Finally, the Sacramento County DA argues that DOF's redetermination request was never intended by the voters, and that a new test claim decision eliminating reimbursement would provide a windfall to the state, and impose a hardship on local governments.[62]

6. Los Angeles County District Attorney's Office

The LA County DA argues that "[t]he activities for which the county is being reimbursed, the basis for the Commission's Statement of Decision, and the need for reimbursement from the State in order to comply with SVP laws have not changed since the Statement of Decision was adopted."

The LA County DA argues that Proposition 83 "simply reaffirmed many of the changes already effectuated by SB 1128," that "the changes actually proposed by Prop 83 were few and narrow," and that "[a]ffirmation of existing law certainly does not give rise to the change in law contemplated by Section 17570."[63] The LA County DA argues that "inclusion, within the text of an initiative, of language that is unaffected by proposed revisions to the law does not constitute a change in the law."[64] The LA County DA further asserts that "[a]n activity may not fairly be recharacterized as "necessary to implement" another activity simply because an antecedent activity may have been affected by a change in the law," and that "a reimbursable activity does

[60] Exhibit J, County of San Bernardino Comments.

[61] Exhibit K, Sacramento County District Attorney's Office Comments, at pp. 1-2.

[62] Exhibit K, Sacramento County District Attorney's Office Comments, at p. 3.

[63] Exhibit L, Los Angeles County District Attorney's Office Comments, at pp. 2-3.

[64] Exhibit L, Los Angeles County District Attorney's Office Comments, at pp. 4-5.

not cease to be a reimbursable activity because it happens to have constitutional implications." And the LA County DA argues that "Prop 83's mere reaffirmation of legislative action does not constitute a change in the law."[65] Additionally, the LA County DA proffers a theory of equitable estoppel, based on the LAO and DOF analysis of Proposition 83 leading up to the election, discussed below, and the conclusion that Proposition 83 would not affect mandates.[66] Finally, LA County DA asserts that section 17570 is unconstitutional, as a violation of separation of powers doctrine.[67]

7. County Counsel of San Diego

The County Counsel of San Diego argues that "Jessica's Law [Proposition 83] did not make any changes material to the relevant statutes as they existed immediately before the adoption of Jessica's Law," that the 2012 reenactment "supersedes any effects that Jessica's Law may have had on the state's obligation," that "DOF's request is based on the unconstitutionally broad language in Section 17556(f) that impermissibly directs the commission to apply the ballot measure exception to previously enacted legislation." The County Counsel of San Diego further argues that "DOF's Request relies on the unconstitutionally broad definition of what constitutes a 'subsequent change in the law' set forth in Section 17570."[68]

The County Counsel filed additional comments in response to the Commission's draft staff analysis for the second hearing, in which the County Counsel continued to stress that Proposition 83 "did not substantively alter any of the provisions of the Welfare and Institutions Code sections containing the mandated activities," and that therefore "Jessica's Law cannot be considered to have affected [*sic*] a subsequent change in law." In addition, the County Counsel argues that the draft staff analysis and proposed statement of decision "correctly concludes that certain costs relating to the probable cause hearing required pursuant to Welfare and Institutions Code section 6602 continue to be reimbursable," but that "the costs the county's designated counsel and indigent defense counsel incur for retention of necessary experts, investigators, and professionals for preparation and appearance at the probable cause hearing" should also be reimbursable. The County Counsel holds that "[e]ven though these costs are not expressly identified as reimbursable costs in the original test claim decision, these costs have been and should continue to be reimbursed to claimants by the state."[69,70]

[65] Exhibit L, Los Angeles County District Attorney's Office Comments, at pp. 4-8.

[66] Exhibit L, Los Angeles County District Attorney's Office Comments, at pp. 8-10.

[67] Exhibit L, Los Angeles County District Attorney's Office Comments, at pp. 11-12.

[68] Exhibit O, County Counsel of San Diego Comments, at p. 2.

[69] Exhibit BB, County Counsel of San Diego Comments on Draft Staff Analysis, Second Hearing, at pp. 2-3.

[70] These costs are not identified as reimbursable in the parameters and guidelines or the test claim decision previously adopted by the Commission. Neither are these costs required by the plain language of the test claim statutes. Therefore the appropriate course of action is for the Commission to address whether these activities are "reasonably necessary," within the meaning of section 17557, when amending the parameters and guidelines. The Commission cannot add reasonably necessary activities of its own motion, and therefore this will require a comment by an eligible claimant asserting that this is a reasonably necessary activity, and including evidence

8. Alameda County District Attorney's Office

The Alameda County DA argues that Proposition 83 did not make any material changes to the responsibilities of county counsel offices or district attorneys' offices; that DOF's interpretation of section 17556(f) "cannot be the correct interpretation;" and that DOF's request "should be rejected on common law principles of laches and estoppel."[71]

9. County of Orange Comments on Draft Staff Analysis, Second Hearing

The County of Orange argues that "[t]he proposed statement of decision will greatly impact Orange County's ability to continue providing the services associated with SVP laws."[72] The County argues that it is "a flawed and legally incorrect premise" that "the mere reiteration and non-substantive amendment in a ballot initiative of an existing statute enacted by the Legislature relieves the state of its constitutional obligation to reimburse the counties for the cost of implementing the statutory scheme." The County further argues restatement of several sections of the Welfare and Institutions Code within Proposition 83 was "meant to provide voters with additional context to inform their decisions," and that "the restatement and amendment of the statutory scheme by a ballot measure did not impact the State's subvention duties."[73] The County of Orange further warns of the "dangerous public policy precedent," in that the Attorney General "could lead the electorate down the primrose path by providing information to the electorate that ultimately results in the passage of a voter initiative." Meanwhile, the County argues, "another body of the state government is lying in wait to seek redetermination of a State Mandate on the basis that the voter initiative caused a change in law and thus the state should no longer be required to reimburse local governments for costs rightfully determined state mandated costs." The County concludes that approving this proposed statement of decision "would be providing the legislature with the ability to avoid previously determined fiscal obligations through by [*sic*] abusing the voter initiative process."[74]

10. District Attorney of Orange County Comments

The Orange County District Attorney argues in comments on the draft that Finance's request to adopt a new test claim decision ending reimbursement "would be inequitable and impose a financial hardship on the county." The District Attorney also argues that Proposition 83 "did not effectuate a 'subsequent change in law,'" as contemplated by section 17570, "because the ballot measure made no substantive changes to the reimbursable component of the program."[75]

in the record to support that assertion. If factual representations are made to support such a claim in written comments, they must be supported with documentary evidence included with the comments must and be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge or information or belief.

[71] Exhibit P, Alameda County District Attorney's Comments, at pp. 2-5.

[72] Exhibit W, County of Orange Comments on Draft Staff Analysis, Second Hearing, at p. 1.

[73] *Id*, at pp. 4-5.

[74] *Id*, at p. 5.

[75] Exhibit Y, Orange County District Attorney Comments on Draft Staff Analysis, Second Hearing, at p. 1.

11. San Bernardino County Public Defender Comments

The Public Defender of San Bernardino County argues that "[s]ince Proposition 83 mirrored many of the same provisions as cited in SB 1128 and effectuated changes that were procedural rather than substantive, its enactment did not constitute a 'subsequent change in law' as required under Government Code [section] 17570." The Public Defender argues also that "mere recitation of an existing law" should not be used "as a shield to negate [the State's] responsibility to reimburse local governments for activities that support a legislatively created state-mandated program." Finally, the Public Defender appeals to public policy:

> The fiscal impact to our county is significant. The Public Defender currently provides representation on 55 outstanding SVP petitions against individuals. A competent defense requires a significant investment of time from attorneys and investigators and the retention of qualified experts and other professionals. The state's reimbursement for services rendered under SVPA for FY 2010-2011 by the Public Defender was $846,339.[76]

III. Discussion

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the increased costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a successful test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[77] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[78] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[79]

Under Government Code section 17570, upon request, the Commission may consider the adoption of a new test claim decision to supersede a prior test claim decision based on a subsequent change in law, as defined, which modifies the state's liability. If the Commission adopts a new test claim decision that supersedes the previously adopted test claim decision, the

[76] Exhibit Z, San Bernardino County Public Defender Comments on Draft Staff Analysis, Second Hearing, at p. 1.

[77] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487; Government Code sections 17551; 17552.

[78] *County of San Diego v. State of California*, (1997) 15 Cal.4th 68, 109.

[79] *County of Sonoma v. Commission on State Mandates*, (2000) 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Commission is required to adopt new parameters and guidelines or amend existing parameters and guidelines.

A. Finance's Argument for the Adoption of a New Test Claim Decision to Supersede the Prior Decision in Test Claim (CSM-4509).

On May 28, 1998, the Commission heard the CSM-4509 test claim on the SVP program. That test claim alleged that the following Welfare and Institutions Code sections imposed reimbursable state-mandates: 6250, and 6600 through 6608, as amended by Statutes 1995, chapter 762; Statutes 1995, chapter 763; and Statutes 1996, chapter 4.[80]

The Commission approved reimbursement only for the following activities under sections 6601, 6602, 6603, 6604, 6605, and 6608:

1. Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
2. Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)
3. Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(i).)[81]
4. Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
5. Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
6. Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)
7. Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)
8. Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

All remaining provisions of the test claim statutes were denied.[82]

[80] Exhibit B, Test Claim Statement of Decision.

[81] The Test Claim Statement of Decision cites subdivision (j), but subdivision (j) addresses time limits, not a petition for commitment. The Commission therefore assumes that this is a typographical error, and that the citation intended is to subdivision (i).

[82] Exhibit B, Test Claim Statement of Decision, at p. 12. The numbers attached to the activities above are assigned by DOF, in its request for redetermination; the same numbering is adopted in

DOF asserts that activities 1, 2, 3, and 6, approved in the test claim statement of decision, were expressly included in Proposition 83. Activities 1, 2, and 3 involve the county's role in filing and litigating a civil commitment hearing on behalf of the state. These activities are required by section 6601(i), and while DOF concedes that Proposition 83 did not make amendments to subdivision (i), specifically, it amended and reenacted the entirety of section 6601, including the activities approved under subdivision (i). Activity 6 is required by sections 6605 and 6608. The sections encompassing these activities were reenacted and amended also by Proposition 83.[83] DOF asserts that the reenactment of sections 6601, 6604, 6605, and 6608 is sufficient to implicate the "expressly included in" limitation of section 17556(f), prohibiting the Commission from finding "costs mandated by the state," and in turn supporting the adoption of a new test claim decision.

DOF asserts as well that Activities 4, 5, 7 and 8 are "necessary to implement" Proposition 83, within the meaning of section 17556(f), and therefore these requirements also have been superseded by the ballot initiative.[84] DOF therefore brings this request to adopt a new test claim decision, in accordance with the provisions of section 17570.

B. Section 17556(f) Prohibits the Commission from Finding Costs Mandated by the State for Most of the Duties Imposed by the Test Claim Statutes Because Those Duties are Necessary to Implement or Expressly Included in a Ballot Measure Approved by the Voters in a Statewide Election.

Government Code section 17556(f) provides that the Commission "shall not find" costs mandated by the state if:

> The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.[85]

CSBA I makes clear that this statutory exclusion from reimbursement is consistent with the subvention requirements of article XIII B, section 6.[86] The court in *CSBA I* reasoned that the subvention requirement applies to mandates imposed by the Legislature, not by the voters; the voters' powers of initiative and referendum are reserved powers, not vested in the Legislature, and are therefore not limited by article XIII B, section 6. *CSBA I* holds that the reimbursement

this analysis, for purposes of expedience and clarity, rather than utilizing the bulleted list adopted by the Commission in the test claim statement of decision.

[83] Exhibit A, Redetermination Request, at pp. 1-2.

[84] See Exhibit A, Redetermination Request, at pp. 2-3, and Exhibit R, DOF Comments on Draft Staff Analysis, at p. 1., wherein DOF corrected the original inadvertent omission of activity number 8.

[85] As amended by Statutes 2010, chapter 719 (SB 856).

[86] *California School Boards Association v. State of California* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, 1206-1207; 1210.

requirement applies only to *state-mandated* costs, not costs incurred by way of "the people acting pursuant to the power of initiative."[87]

"Having established that costs imposed on local governments by ballot measure mandates need not be reimbursed by the state," and thus approving the statutory exclusion to the extent of statutes imposing duties "expressly included in" a ballot measure, the court considered also whether reimbursement is required for activities embodied in a test claim statute that are "necessary to implement" a voter-enacted ballot measure. In *San Diego Unified*, costs that were incidental to a federal mandate were not reimbursable under section 17556(c), because those costs were imposed under Education Code provisions "adopted to implement a federal due process mandate." [88] The *CSBA I* court therefore concluded that "[t]he language of [section 17556(f)] relieving the State of the obligation to reimburse a local government for duties 'necessary to implement' a ballot measure is *unobjectionable* because it corresponds to the Supreme Court's holding in *San Diego Unified* that state statutes codifying federal mandates are not reimbursable."[89] The court rejected, however, the "reasonably within the scope of" test, also provided in subdivision (f) at that time, as being overbroad, and the Legislature amended the code section the following year to excise the offending language.[90]

Section 17556(f) also states that the rule "applies regardless of whether the statute or executive order was adopted prior to or after the date on which the statute or executive order was enacted or issued." This provision, like the "reasonably within the scope of," and "necessary to implement" tests, first appeared in section 17556 in 2005.[91] This last provision, stating that the order of enactment is not material to the analysis under section 17556(f), has not yet been tested in the courts,[92] but the Commission must presume that the statutes enacted by the Legislature are constitutional until the courts declare otherwise.[93]

[87] *Ibid.*

[88] *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859.

[89] *California School Boards Association v. State, supra,* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, at p. 1213 [emphasis added], citing *San Diego Unified, supra,* (2004) 33 Cal.4th 859.

[90] Government Code section 17556(f) (Stats. 2010, ch. 719 (SB 856) [amended to remove "reasonably within the scope of," as an alternative test to "expressly included in," or "necessary to implement," consistent with the court's decision in *CSBA I, supra*]).

[91] As discussed above, the "reasonably within the scope of" test has been disapproved by the courts and removed from the code; compare Statutes 2004, chapter 895 (AB 2855) to Statutes 2005, chapter 72 (AB 138).

[92] The constitutionality of Government Code sections 17570, in conjunction with section 17556, is being challenged in *California School Boards Assoc., et al. v. State of California, Commission on State Mandates, John Chiang, as State Controller, and Ana Matosantos, as Director of the Department of Finance,* Alameda County Superior Court, Case No. RG11554698.

[93] *California School Boards Association v. State of California,* (*CSBA II*) (Cal. Ct. App. 4th Dist. 2011) 192 Cal.App.4th 770, 795; *Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 837.

For the following reasons, the Commission finds that section 17556(f) applies in this case to end reimbursement for most of the activities, as specified, beginning July 1, 2011.

1. The Test Claim Statutes Impose Duties that are Expressly Included in Proposition 83

The original test claim decision assumed jurisdiction over Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608, as amended by Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); and Statutes 1996, Chapter 4 (AB 1496).[94] Here, the Commission's jurisdiction is confined to the statutes pled in the original test claim, and any effect that the alleged subsequent change in law, Proposition 83, may have had on those original test claim statutes, as pled in CSM-4509.[95] Proposition 83 amended and reenacted, wholesale, sections 6601, 6604, 6605, and 6608 of the Welfare and Institutions Code, and made other changes which likely impact the operation of the remaining sections. By amending the code sections, Proposition 83 does not *expressly include the test claim statutes* exactly as amended by Statutes 1995, chapters 762 and 763, and Statutes 1996, chapter 4; but the focus of Government Code section 17556(f) is not whether *the test claim statute* is expressly included in a ballot measure, but whether the *duties imposed by the test claim statute* are expressly included in a voter-enacted ballot measure.[96] Therefore it is incumbent upon the Commission to consider the activities approved (duties imposed by the statute) in the earlier test claim, and whether those activities have been subsumed within the requirements of Proposition 83. If so, then the *duties imposed by the test claim statute*, as determined in the original test claim decision, are *expressly included* in the approved ballot measure. All of the local government commenters have challenged this theory; many have argued that "recitation" of the code sections in a ballot measure does not constitute a subsequent change in law because the law was not amended. But the issue is not whether the statutes in the original test claim have been changed substantively, but *whether the test claim statutes, as those statutes were pled in the original test claim, impose duties that are necessary to implement or expressly included in a voter-enacted ballot measure*.

In the original test claim statement of decision, the Commission approved reimbursement for the following activities, numbered one through eight for purposes of this analysis:

> **Activity 1** – Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
>
> **Activity 2** – Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)
>
> **Activity 3** – Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(j).)
>
> **Activity 4** – Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)

[94] Exhibit B, Test Claim Statement of Decision.

[95] Exhibit A, Redetermination Request.

[96] Government Code section 17556(f).

Activity 5 – Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)

Activity 6 – Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)

Activity 7 – Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)

Activity 8 – Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)[97]

Activities 1, 2, and 3 derive from section 6601, as amended by Statutes 1995, chapter 762 (SB 1143); Statutes 1995, chapter 763 (AB 888); and Statutes 1996, chapter 4 (AB 1496), and are expressly included in section 6601, as amended by Proposition 83. Section 6601, as amended, provides, in pertinent part:

> (h) If the State Department of Mental Health determines that the person is a sexually violent predator as defined in this article, the Director of Mental Health shall forward a request for a petition to be filed for commitment under this article to the county designated in subdivision (i). Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county pursuant to subdivision (i) who may file a petition for commitment in the superior court.
>
> (i) If the county's designated counsel concurs with the recommendation, a petition for commitment shall be filed in the superior court of the county in which the person was convicted of the offense for which he or she was committed to the jurisdiction of the Department of Corrections. The petition shall be filed, and the proceedings shall be handled, by either the district attorney or the county counsel of that county. The county board of supervisors shall designate either the district attorney or the county counsel to assume responsibility for proceedings under this article.[98]

Section 6601(i) requires the county board of supervisors to designate counsel to assume responsibility for proceedings "under this article." Activity 1 is the requirement that the county designate counsel to assume responsibility for civil commitment proceedings.[99] Activity 1 is thus expressly included in Proposition 83. Sections 6601(h) and 6601(i) provide for a recommendation to be made by DMH, and copies of mental health evaluations and other documents to be made available to the designated counsel, who, if he or she concurs with the recommendation, shall file a petition.[100] Activity 2 is the requirement that the designated

[97] Exhibit B, Test Claim Statement of Decision, at p. 13.

[98] Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

[99] Exhibit B, Test Claim Statement of Decision, at p. 13.

[100] Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

counsel review the reports and records to determine whether he or she agrees with the recommendation of DMH.[101] Activity 2 is thus expressly included in the provisions of Proposition 83. Section 6601(i) requires the designated counsel to file a petition and "assume responsibility for proceedings." Activity 3 is the requirement that designated counsel prepare and file a petition for civil commitment.[102] Thus, Activity 3 is expressly included in Proposition 83.

Activities 6 and 7 are also expressly included in the provisions of Proposition 83. Activity 6 requires "[p]reparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator."[103] Sections 6605 and 6608, as amended by Proposition 83, provide for a subsequent hearing to determine whether a person continues to fit the definition of a sexually violent predator, and whether release to a less-restrictive environment is appropriate. That hearing is triggered in one of two ways: either by a petition from the person committed, or by the recommendation of DMH. In either case, the designated counsel identified in section 6601(i) is required to represent the state, and the committed person is entitled to the assistance of counsel.

Section 6605, as amended by Proposition 83, provides, in pertinent part:

> (b) If the Department of Mental Health determines that either: (1) the person's condition has so changed that the person no longer meets the definition of a sexually violent predator, or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the director shall authorize the person to petition the court for conditional release to a less restrictive alternative or for an unconditional discharge.
>
> ¶…¶
>
> (d) *At the hearing, the committed person shall have the right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding. The attorney designated by the county pursuant to subdivision (i) of Section 6601 shall represent the state and shall have the right to demand a jury trial and to have the committed person evaluated by experts chosen by the state.* The committed person also shall have the right to demand a jury trial and to have experts evaluate him or her on his or her behalf. The court shall appoint an expert if the person is indigent and requests an appointment...[104]

And section 6608, as amended by Proposition 83, provides:

> Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release or an unconditional discharge without the recommendation or concurrence of the

[101] Exhibit B, Test Claim Statement of Decision, at p. 13.

[102] Ibid.

[103] Exhibit B, Test Claim Statement of Decision, at p. 13.

[104] Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

> Director of Mental Health…The person petitioning for conditional release and unconditional discharge under this subdivision shall be entitled to assistance of counsel.
>
> ¶…¶
>
> The court shall give notice of the hearing date to the attorney designated in subdivision (i) of Section 6601, the retained or appointed attorney for the committed person, and the Director of Mental Health at least 15 court days before the hearing date.[105]

Thus Activity 6, as approved in the original test claim decision, is expressly included in Proposition 83: the preparation and attendance of both the county's designated counsel and indigent defense counsel are expressly included in the voter-approved ballot measure.

Activity 7 includes "[r]etention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator."[106] Activity 7 is expressly included in Proposition 83 *to the extent* of retaining experts for *subsequent hearings* recommended by DMH, or requested by an indigent SVP. Section 6605, as amended by Proposition 83, provides:

> At the hearing, the committed person shall have the right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding. The attorney designated by the county pursuant to subdivision (i) of Section 6601 shall represent the state and shall have the right to demand a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person also *shall have the right* to demand a jury trial and *to have experts evaluate him or her on his or her behalf*. The court *shall appoint an expert if the person is indigent* and requests an appointment.[107]

Similar language regarding the appointment of an expert to evaluate the person on his or her behalf is not found in section 6608, with respect to a hearing initiated on petition of the committed person. But the California Supreme Court held, in *People v. McKee*, that "[w]e do not believe, however, that the statute needs to be interpreted in this narrow manner." The court held that "[a]lthough section 6605, subdivision (a) does not explicitly provide for the appointment of the expert in conjunction with a section 6608 petition, such appointment may be reasonably inferred."[108] The court concluded that "[t]here is no indication that the Legislature that authorized these expert appointments on behalf of an indigent SVP believed that such experts should be disallowed from testifying at an SVP's section 6608 hearing, nor that an SVP's indigence should serve as an obstacle to such testimony."[109] Therefore, to the extent of retaining

[105] Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 138.

[106] Exhibit B, Test Claim Statement of Decision, at p. 13.

[107] Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

[108] *People v. McKee* (2010) 47 Cal.4th 1172, at p. 1192.

[109] *Id*, at p. 1193.

experts *for subsequent hearings only*, activity 7, as approved in the original test claim decision, is expressly included in the provisions of Proposition 83.

Based on the foregoing, the Commission finds that the following requirements of the test claim statutes are expressly included in Proposition 83, and therefore do not constitute a reimbursable state mandate within the meaning of article XIII B, section 6 and Government Code section 17556(f), beginning July 1, 2011:

- Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings.[110]
- Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation.[111]
- Preparation and filing of the petition for commitment by the county's designated counsel.[112]
- Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator.[113]
- Retention of necessary experts, investigators, and professionals for preparation *for subsequent hearings* regarding the condition of the sexually violent predator.[114]

2. Civil Commitments Provided for Under Proposition 83 Implicate Significant Due Process Considerations, and to the Extent the Test Claim Statutes Satisfy Due Process Requirements Triggered by Proposition 83, Those Statutes Impose Duties That are Necessary to Implement a Voter-Enacted Ballot Measure

Activities 4, 5, 8, and the remaining elements of activity 7, above, are not expressly included in Proposition 83, but some of these activities are necessary to implement Proposition 83.

Activities 4 and 5, as approved in the original test claim decision, require the preparation and attendance of counsel designated by the county pursuant to section 6601(i), and of indigent defense counsel, at the probable cause hearing and at trial. These activities were found to arise from Welfare and Institutions Code sections 6602, 6603, and 6604, as amended by Statutes 1995, chapter 762 (SB 1143); Statutes 1995, chapter 763 (AB 888); and Statutes 1996, chapter 4 (AB 1496).[115] Activity 8, as approved in the original test claim decision, requires the local government to provide "[t]ransportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a

[110] Welfare and Institutions Code section 6601(i) (as amended by Proposition 83 (2006)).

[111] Welfare and Institutions Code section 6601(i) (as amended by Proposition 83 (2006)).

[112] Welfare and Institutions Code section 6601(i) (as amended by Proposition 83 (2006)).

[113] Welfare and Institutions Code sections 6605(b-d); 6608(a-b) (as amended by Proposition 83 (2006)).

[114] Welfare and Institutions Code section 6605(d) (as amended by Proposition 83 (2006)).

[115] Exhibit B, Test Claim Statement of Decision, at p. 13.

sexually violent predator." That activity was found by the Commission to arise from section 6602, as amended by Statutes 1995, chapters 762 and 763, and Statutes 1996, chapter 4.[116] And the portion of activity 7 not expressly included in Proposition 83, as discussed above, requires local government to retain experts, investigators, and professionals for trial to testify on the issue of whether an individual is or is not a sexually violent predator. That activity is attributed, in the test claim statement of decision, to section 6603, as amended by Statutes 1995, chapters 762 and 763.

Welfare and Institutions Code section 6602, as amended by Statutes 1995, chapter 763 (AB 888) and Statutes 1996, chapter 4 (AB 1496), provides:

> A judge of the superior court shall review the petition and shall determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. The person named in the petition shall be entitled to assistance of counsel at the probable cause hearing. If the judge determines there is not probable cause, he or she shall dismiss the petition and any person subject to parole shall report to parole. If the judge determines that there is probable cause, the judge shall order that the person remain in custody in a secure facility until a trial is completed and shall order that a trial be conducted to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release from the jurisdiction of the Department of Corrections or other secure facility.

And Section 6603, as amended by Statutes 1995, chapters 762 and 763, provides:

> A person subject to this article shall be entitled to a trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and have access to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

These sections were not amended and reenacted by Proposition 83, and therefore continue to provide a statutory requirement that a person alleged to be a sexually violent predator be accorded a probable cause hearing, and trial by jury, and shall be entitled to the assistance of counsel. Section 6603 also requires that the person alleged to be a sexually violent predator is entitled to experts or professional persons to perform an examination on his or her behalf.

The issue is whether those requirements, as approved in the test claim statement of decision, constitute duties *necessary to implement* Proposition 83, or are additional requirements imposed as a matter of policy by the Legislature, thus requiring a finding that the requirements remain reimbursable under article XIII B, section 6. As discussed above, where mandated activities are imposed by the voters, not the Legislature, the courts have held that those activities are not

[116] *Ibid.*

reimbursable under article XIII B, section 6.[117] In this context, reimbursement is required, consistent with article XIII B, section 6, only if the requirements of the test claim statutes go beyond what is necessary to implement the ballot initiative.

The due process clause of the United States Constitution provides that the state shall not "deprive any person of life, liberty, or property without due process of law."[118] When an individual's liberty or property interest is impacted by governmental action, due process protections attach, and require that certain procedural safeguards be provided to the individual. Although the SVPs program entails a *civil* commitment, not a *criminal conviction*, the person identified as a sexually violent predator is subject to a deprivation of liberty. And under Proposition 83, that deprivation is highly significant, being of indeterminate duration, rather than a two year commitment as provided under the prior statutes. Proposition 83 provides for indeterminate civil commitment of a person found to be a sexually violent predator, as follows:

> The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct that the person be released at the conclusion of the term for which he or she was initially sentenced, or that the person be unconditionally released at the end of parole, whichever is applicable. *If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health.* The facility shall be located on the grounds of an institution under the jurisdiction of the Department of Corrections.[119]

It is well-settled law that even temporary deprivations of an individual's liberty or property interest trigger due process protections. The length or severity of the deprivation must be weighed in determining what kind of process is due—not *whether* process is due.[120]

In *San Diego Unified*,[121] the California Supreme Court addressed whether procedures instituted to provide a hearing and some modicum of due process to public school students under threat of

[117] *California School Boards Association v. State of California* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, 1206-1207; 1210.

[118] U.S. Constitution, 5th and 14th Amendments; see also, due process provisions in the California Constitution, article 1, sections 7 and 15.

[119] Welfare and Institutions Code section 6604, as amended by Proposition 83 (2006); Exhibit X, Ballot Pamphlet, at p. 137.

[120] See *Fuentes v. Shevin* (1972) 407 U.S. 67, p. 86 ("The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property"); *Goss v. Lopez* (1975) 419 U.S. 565, p. 576 (holding that a 10-day suspension from school is a cognizable deprivation of liberty and property). Note that due process standards apply equally to liberty and property deprivations. See *Wolff v. McDonnell* (1974) 418 U.S. 539, p. 558 and *Zinermon v. Burch* (1990) 494 U.S. 113, p. 131.

[121] *San Diego Unified School District v. Commission on State Mandates, supra*, (2004) 33 Cal.4th 859.

expulsion constituted a reimbursable state mandate, or merely codified federal law, rendering such procedures not subject to reimbursement under article XIII B, section 6. The court reasoned as follows:

> [T]he Legislature, in adopting specific statutory procedures to comply with the general federal mandate [to provide due process protections], reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. The Court of appeal in *County of Los Angeles II*[122] concluded that, for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code, section 17556, subdivision (c).

Also in *San Diego Unified*, *supra*, the California Supreme Court considered whether due process procedures involved in a *state-mandated* pre-expulsion hearing were fully reimbursable, or whether the procedures merely implemented federal due process requirements.[123] The court held that even though some of the requirements of the test claim statute, "the parties agree, codif[ied] requirements of federal due process,"[124] " a school district would not automatically incur the due process hearing costs that are mandated by federal law" in the absence of the test claim statute triggering the due process requirements.[125] The court therefore concluded that all hearing costs associated with the mandatory expulsion provisions of the test claim statutes were state-mandated, as follows:

> Because it is state law,…and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows, contrary to the view of the Commission and the Department, that we cannot characterize any of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable).[126]

The court concluded that: "state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate."[127] *CSBA I*[128] "established that costs imposed on local

[122] *County of Los Angeles v. Commission on State Mandates* (Cal. Ct. App. 2d Dist. 1995) 32 Cal.App.4th 805.

[123] *San Diego Unified*, *supra*, 33 Cal.4th 859.

[124] Id, at p. 868.

[125] Id, at p. 880.

[126] Id, at p. 881.

[127] Id, at p. 890.

governments by ballot measure mandates need not be reimbursed by the state," and concluded that the "necessary to implement" test of section 17556(f) is "even more restrictive" than the "adopted to implement" language of *San Diego Unified, supra*.[129]

Therefore, the analysis that results from the two findings in *San Diego Unified, supra*, and the holding in *CSBA I, supra*, that section 17556(f) is applied similarly to, if more restrictively than, section 17556(c), is as follows: if costs incurred to satisfy due process protections are triggered by a state statute or executive order, reimbursement is required, whether or not the due process protections exceed federal due process requirements; but if costs incurred to satisfy due process protections are triggered by other than a state statute or executive order (such as a voter-enacted ballot measure), then reimbursement is required only if the state's due process requirements truly exceed federal due process requirements and are not part and parcel of the federal requirements.

Activities 4, 5, 7, and 8, discussed below, were determined to be imposed by state law in the prior test claim decision.[130] However, elements of these activities may also be required to satisfy the due process protections implicated by Welfare and Institutions Code sections 6601, 6604, 6605, and 6608, as those sections were adopted by the voters in Proposition 83. This is so because even due process protections expressly included in the test claim statutes intended to satisfy federal due process requirements were triggered, prior to Proposition 83, entirely by a state-mandated local program. Thus, requirements of the code sections not expressly included in Proposition 83 may nevertheless be "necessary to implement" the provisions of Proposition 83 to the extent that due process protections must be satisfied in order to validly enforce and administer the voter-approved SVP program consistently with the Constitution.

a. Activity 4, preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing, is not necessary to implement Proposition 83, and is therefore reimbursable.

Penal Code section 6602 establishes a probable cause hearing requiring the court to determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. The person named in the petition shall be entitled to assistance of counsel at the probable cause hearing.

As discussed above, the liberty interest at stake in implementing the SVP program triggers due process protections; but what process is due can vary depending on the importance of the governmental interest, and the severity of the deprivation. The Supreme Court of California has held that "[t]here is no question that civil commitment itself is constitutional so long as it is accompanied by the appropriate constitutional protections."[131] In criminal cases, the appropriate constitutional protections have been explored and defined through decades of case law, but in the case of a civil commitment for the safety of the public and treatment of the committed person,

[128] *California School Boards Association v. State of California, supra,* (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183.

[129] Id, at pp. 1210; 1214.

[130] Exhibit B, Test Claim Statement of Decision, at p. 13.

[131] *People v. McKee* (2010) 47 Cal.4th 1172, at p. 1188 [internal citations and quotations omitted].

due process requirements remain less defined. In *People v. Dean*,[132] the court of appeal articulated the appropriate constitutional protections, holding that due process in proceedings under the Sexually Violent Predators Act (SVPA) requires application of a balancing test, rather than strict adherence to the constitutional rights commonly afforded criminal defendants:

> The measure of due process that is due in civil proceedings, including proceedings under the SVPA, is a complex determination that depends upon several factors: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." [133]

Activity 4, as cited above, requires the "[p]reparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing." A probable cause hearing is required by Welfare and Institutions Code section 6602, one of two sections of the test claim statutes *not adopted by the voters in Proposition 83*. Proposition 83 makes *no other reference to a probable cause hearing*, such as would render such a hearing necessary to implement the program. In addition, no case law on point, nor any other reference to state or federal due process jurisprudence, provides a clear and unambiguous statement that a probable cause hearing is required to satisfy due process in this context.

Applying the balancing test above, the liberty interest at stake is significant, but the risk of an erroneous deprivation of that liberty is less so, given that each person held must be screened and evaluated at several levels before a petition is filed,[134] and the process is required to begin before an individual's prison term is expired; moreover, the deprivation of liberty absent a probable cause hearing would be of limited duration, because a trial would still follow after, pursuant to section 6604, as amended by Proposition 83 (2006); furthermore, the government's interest in holding persons suspected to be SVPs is compelling, and the administrative burdens involved in providing a due process hearing and counsel for that hearing are significant: counsel must be appointed, and the county's designated counsel must prepare for and attend the hearing. Finally, the "dignitary interest in informing individuals of the nature, grounds, and consequences of the

[132] *People v. Dean* (Cal. Ct. App. 4th Dist. 2009) 174 Cal.App.4th 186.

[133] 174 Cal.App.4th 186, at p. 204 [citing *People v. Otto* (2001) 26 Cal.4th 200].

[134] Welfare and Institutions Code section 6601, as amended by Proposition 83 (2006) [Director of Corrections refers a person for evaluation who may be a sexually violent predator; person is "screened by the Department of Corrections and the Board of Prison Terms," the screening instrument to be "developed and updated by the State Department of Mental Health;" Department of Mental Health "shall evaluate the person in accordance with a standardized assessment protocol;" two practicing psychiatrists or psychologists must concur, or further evaluation must be ordered by independent professionals, who must also concur, or a petition cannot be filed; county's designated counsel only files the petition "[i]f the county's designated counsel concurs with the recommendation."].

action and in enabling them to present their side of the story before a responsible government official" will be fully vindicated at trial, and does not necessitate substantial consideration. This balancing test shows that whether a probable cause hearing is required by due process is a close issue.

A number of cases of the California courts of appeal and the Supreme Court address due process requirements of providing counsel and expert witnesses, furnished at the state's expense, to indigent persons alleged to be sexually violent predators.[135] Another slate of precedents address the due process requirements of analogous civil commitment programs, such as committing persons who are "mentally disordered" for treatment and confinement in a secured mental health facility.[136] But in none of those cases is there any direct statement that the probable cause hearing provided for under section 6602 is necessary to satisfy due process.[137] Given the lack of precedent supporting a probable cause hearing as an essential feature of due process, and the fact that the activity is not part and parcel of either the federal mandate or the voter-enacted ballot measure or that the costs would most obviously not be "de minimis," the Commission must conclude that provision of a probable cause hearing is not necessary to implement the civil commitment procedures outlined in Proposition 83.

Based on the foregoing, the Commission finds that Activity 4, preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing, is not necessary to implement Proposition 83, and remains reimbursable state-mandated cost.

In addition to seeking reimbursement for the express requirements of activity 4, the County Counsel of San Diego argues that "[t]he same rationale should apply to the costs the county's designated counsel and indigent defense counsel incur for retention of necessary experts, investigators, and professionals for preparation and appearance at the probable cause hearing." The County Counsel argues that probable cause hearings require thorough preparation, "which includes in many cases the retention of experts, investigators and/or other professionals, necessary to provide individuals with an adequate defense." The County Counsel maintains that "[e]ven though these costs are not expressly identified as reimbursable costs in the original test claim decision, these costs have been and should continue to be reimbursed to claimants by the state."

[135] E.g., *People v. Otto* (2001) 26 Cal.4th 200, at p. 210 [outlining four part test of due process applicable to Sexually Violent Predators Act proceedings]; *People v. Fraser* (Cal. Ct. App. 6th Dist. 2006) 138 Cal.App.4th 1430, at pp. 1449-1451 [assuming, without deciding, that SVPs have a right to counsel pursuant to the four part test of *Otto*, *supra*, but holding that there is no right to self-representation]; *People v. Dean*, *supra*, 174 Cal.App.4th 186, at p. 204 [Based on balancing test concluding: "Here, even though an SVPA proceeding is a civil proceeding, due process requires the provision of a qualified expert for defendant."];

[136] E.g., *People v. McKee* (2010) 47 Cal.4th 1172, at pp. 1188-1192 [SVP determination "functional equivalent" of not guilty by reason of insanity commitment, for due process purposes]; *Vitek v. Jones* (1980 445 U.S. 480, at pp. 494-495 [United States Supreme Court found a right to counsel for mentally disordered offenders, furnished by the state.]

[137] See *Cooley v. Superior Court* (2002) 29 Cal.4th 228, at p. 246 [discussing standards of proof for probable cause hearing under section 6602, but relying only on section 6602, and not federal or state due process jurisprudence].

However, as the County Counsel acknowledges, retention of experts or investigators was not an approved activity in the original test claim decision or parameters and guidelines. Nor is the retention of experts an activity required by the plain language of the statutes. The retention of experts or investigators is an issue for the parameters and guidelines, and will require further evidence and legal argument at that stage to show that those costs are "reasonably necessary" under section 17557 to comply with the mandate related to probable cause hearings. If factual representations are made to support such a claim in written comments, they must be supported with documentary evidence included with the comments must and be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge or information or belief. Government Code section 17570(i) requires the Commission to amend existing parameters and guidelines if a new test claim decision is adopted. Therefore the Commission declines to make findings at this stage regarding the retention of experts or investigators for probable cause hearings.

b. Activity 5, preparation and attendance by the county's designated counsel and indigent defense counsel at trial, is necessary to implement Proposition 83.

Penal Code section 6603, as amended by Statutes 1995, chapter 762 and 763, provides:

> A person subject to this article shall be entitled to a trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and have access to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

In the test claim statement of decision, the Commission attributed activity 5, the preparation and attendance by the county's designated counsel and indigent defense counsel at trial, and activity 7, the retention of necessary experts, investigators, and professionals for preparation for trial, to section 6603, as amended by Statutes 1995, chapters 762 and 763. However, there is precedent indicating that the provision of counsel and of an expert to assist a person alleged to be an SVP is required in order to satisfy due process.

The involuntary civil commitment of a person determined to be a sexually violent predator, as defined, is not meaningfully distinct from involuntary detention for medical treatment, insofar as the liberty interests thereby imperiled. The United States Supreme Court has held, in cases involving the involuntary detention for medical treatment, that due process requires the individual be given written notice; an opportunity to be heard before a neutral decision maker; the ability to review and challenge the evidence supporting the action; a written statement of reasons for the decision; the availability of legal counsel, furnished by the state if the individual is indigent; and timely notice of these rights.[138] This finding applies equally to commitments under the SVPA; the indeterminate civil commitments provided for by Proposition 83 implicate significant due process protections including the right to counsel, furnished by the state if a

[138] *Vitek v. Jones* (1980) 445 U.S. 480, 494-495. See also, *People v. Hayes* (Cal. Ct. App. 1st Dist. 2006) 137 Cal.App.4th 34, at pp. 42-44 [describing probable cause hearing as "mandatory," but relying only on section 6602].

person is indigent.[139] Therefore, the provision of indigent defense counsel is required to satisfy federal due process requirements, as those requirements are triggered by the voter-enacted Proposition 83.

Furthermore, Proposition 83 provides specifically that a "court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator,"[140] and requires the county to designate counsel to "assume responsibility for proceedings under this article."[141] Thus the county's designated counsel is clearly expected to prepare for and attend the trial that is necessary to "determine whether, beyond a reasonable doubt, the person is a sexually violent predator." Although there is no apparent *due process* consideration met by requiring that the state's representative prepare for and attend the trial, that requirement is "necessary to implement" other express provisions of Proposition 83.

The County of Los Angeles argues that "Proposition 83 did not amend the trial provisions of the prior SVP Act." The County argues that the amendment made by Proposition 83 should be held in isolation: the change from two year terms to a possible indeterminate term of commitment if a person is adjudged an SVP: "[a] trial is not necessary to implement the indeterminate provisions of Proposition 83."[142] This argument is without foundation. The courts have clearly established that commitment under the SVPA implicates due process concerns, due to the serious deprivation of liberty; a trial, conducted with all the trappings of due process, and all reasonable protections owed to the person alleged to be a sexually violent predator, is clearly required to satisfy due process. Moreover, section 6604, which requires that a "court or jury" determine beyond a reasonable doubt whether a person is a sexually violent predator, was amended by Proposition 83, and it is immaterial to the analysis under section 17556 how narrow that amendment may have been; the only consideration for purposes of activity 5 is whether a trial, and accordingly preparation and attendance of counsel, is expressly included in or necessary to implement Proposition 83.

Based on the foregoing, Activity 5, preparation and attendance by the county's designated counsel and indigent defense counsel at trial, is necessary to implement Proposition 83, and is not reimbursable.

c. Activity 7, retention of necessary experts, investigators, and professionals for preparation for trial regarding the condition of the sexually violent predator, is necessary to implement Proposition 83.

In *People v. Dean, supra*, the court of appeal articulated the appropriate constitutional protections, holding:

> Here, *even though an SVPA proceeding is a civil proceeding, due process requires the provision of a qualified expert for defendant*. An SVP commitment

[139] See *People v. Fraser* (Cal. Ct. App. 6th Dist. 2006) 138 Cal.App.4th 1430, at pp. 1449-1451 [assuming, without deciding, that SVPs have a right to counsel pursuant to the four part test of *Otto, supra*, but holding that there is no right to self-representation].

[140] Section 6604, as amended by Proposition 83 (2006).

[141] Section 6601(i), as amended by Propostion 83 (2006).

[142] Exhibit DD, County of Los Angeles Comments, at p. 3.

> *directly affects a defendant's liberty interest*. The provision of an expert allows a defendant the opportunity to present his side of the story before the trier of fact, which in turn reduces the risk of an erroneous deprivation of defendant's liberty. (Emphasis added.)[143]

The court thus held, pursuant to the balancing test borrowed from *People v. Otto*,[144] that an expert witness, furnished by the state, is required to satisfy due process in conducting proceedings under the SVP program.

As discussed above, the portion of Activity 7 that requires experts, investigators, and professionals for "subsequent hearings" is expressly included in section 6605, as amended by Proposition 83. The remaining portion of the approved Activity 7 under consideration here is only the provision of experts or investigators for trial, which is not expressly provided for in any of the provisions amended and reenacted by Proposition 83, but which has been clearly held by the courts to be necessary to satisfy due process.

The County of Los Angeles seizes upon this analysis to argue that due process requirements should remain reimbursable:

> CSM staff argues that providing constitutional right to SVPs is a necessary component to the implementation of Prop. 83 and is thus not reimbursable. Department of Finance also insists that this activity, which pertains exclusively to trials and subsequent hearings (Welf. & Inst. Code, § 6602), is no longer reimbursable because Prop. 83 amended a code section (Welf. & Inst. Code, § 6604) that changed commitment terms from renewable two year periods to indeterminate terms.
>
> The need for the County to provide constitutional protections was the basis of the Commission's 1998 finding that State reimbursement was necessary and appropriate. As noted by the Commission, "case law is clear that where there is a right to representation by counsel, necessary ancillary services, such as experts and investigative services, are within the scope of that right." (Statement of Decision, at p. 11, Citing Mason v. State of Arizona (9th Cir. 1974) 504 F.2d 1345; People v. Worthy (1980) 109 Cal.App.3d 514). The Commission continued: "[L]ocal agencies would not be compelled to provide defense and ancillary services to indigent persons accused of being a sexually violent offender following completion of their prison term if the new program had not been created by the state." Therefore, this activity should be reimbursable.[145]

However, what the County fails to acknowledge here is that the program triggering the due process requirements is now a *voter-enacted* program. With respect to Activity 7 specifically, due process requires provision of an expert for the SVP trial, according to *People v. Dean*, *supra*, and conduct of the trial itself is a duty expressly included in the provisions approved by the voters in Proposition 83. Specifically, section 6604 of the Welfare and Institutions Code was

[143] *People v. Dean*, *supra* (Cal. Ct. App. 4th Dist. 2009) 174 Cal.App.4th 186.

[144] *People v. Otto* (2001) 26 Cal.4th 200, at p. 210.

[145] Exhibit DD, County of Los Angeles Comment on Draft Staff Analysis, Second Hearing, at pp. 2-3.

amended by the voters, and provides that a "court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." Therefore, a trial is implicated, and the courts have held that that trial necessarily includes the provision of experts in order to satisfy due process.[146] All of this is now triggered by the voter-enacted program, which calls for a trial, and therefore Activity 7, as approved in the original test claim, is necessary to implement the ballot measure.

In addition, the County of Los Angeles argues that Activity 7 is "necessary for performing Activity 4," which the Commission found, as discussed above, remains reimbursable. However, the plain language of section 17556 holds that the Commission "shall not find" costs mandated by the state if the duties imposed by the test claim statute are necessary to implement or expressly included in a ballot measure. There is no reason to read into that language a limitation if the duties are also necessary to implement a statutory program, or, in other words, a Legislative mandate rather than a voter-enacted mandate. Even if, as the County suggests, Activity 7 is an essential component of both Activity 4 and the trial required by section 6604, as amended by Proposition 83, the fact of that activity's dual origin does not preserve reimbursement with respect to preparation for trial.

Based on the foregoing, the Commission finds that Activity 7, retention of necessary experts, investigators, and professionals for preparation for trial regarding the condition of the sexually violent predator, is necessary to implement Proposition 83, and is not reimbursable.

d. Activity 8, transportation and housing of each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator, is necessary to implement Proposition 83.

The purpose and intent of Proposition 83 is to protect the public from dangerous felony offenders with mental disorders and to provide mental health treatment for their disorders.[147] The efficient operation of the program requires therefore that persons must be held in custody while awaiting trial to determine whether long-term (or permanent) commitment is appropriate. To release persons alleged to be dangerous and unable to control their violent sexual impulses would seriously blunt the effectiveness of the program. Accordingly, a more recent addition to the chapter (over which the Commission does not have jurisdiction) provides that if a judge of the superior court determines that the petition supports a finding of probable cause, the judge "shall order that person be detained in a secure facility until a hearing can be completed pursuant to section 6602" (the probable cause hearing). The same section also provides that the probable cause hearing "shall commence within 10 calendar days," in respect of a person's right to a speedy trial.[148] And, because persons so situated generally have a right to be present at trial and other hearings,[149] they must be transported to and from the courthouse. Given the dual purpose

[146] *People v. Dean, supra* (Cal. Ct. App. 4th Dist. 2009) 174 Cal.App.4th 186.

[147] *People v. McKee* (2010) 47 Cal.4th 1172, at p. 1203.

[148] See Welfare and Institutions Code section 6601.5 (added, Stats. 1998, ch. 19 (SB 536); amended, Stats. 2000, ch. 41 (SB 451)).

[149] Section 6605, as amended by Proposition 83 ["the committed person shall have the right to be present at the [subsequent] hearing"]; California Constitution, article 1, section 15 ["defendant in a criminal case has the right to…be personally present with counsel"]. As discussed above, the

of Proposition 83, to provide mental health treatment to SVPs, and to protect the public, there is ample reason to hold individuals awaiting trial, rather than releasing those individuals to parole.

However, as discussed above, holding a probable cause hearing for each alleged SVP is a requirement mandated by the Legislature, and not necessary to implement Proposition 83. Therefore, while holding an individual pending trial is considered necessary to implement Proposition 83, and transportation to and from the court for trial is necessary as well, transportation to and from the court for a *state-mandated probable cause hearing* is not necessary to implement the ballot measure approved by the voters, and must remain a reimbursable state-mandated cost.

Based on the foregoing, the Commission finds that Activity 8, the transportation and housing of each potential sexually violent predator at a secured facility *while the individual awaits trial* on the issue of whether he or she is a sexually violent predator, is necessary to implement Proposition 83, and is not reimbursable; but transportation to and from the courthouse *for a probable cause hearing* required by the statute remain reimbursable state-mandated costs.

C. The Comments of Parties, Interested Parties, and Interested Persons have not Raised Adequate Grounds to Deny this Request.

As discussed at length in the statement of decision on the first hearing, the original test claimant, the County of Los Angeles, joined by numerous other counties, public defenders' offices, district attorneys' offices, and county counsels' offices, raised a number of arguments against approving this request for redetermination. Most of the legal arguments raised are not applicable to mandates law, and several commenters misapplied or misconstrued the plain language of section 17570. The comments on this request are addressed below, but none provide adequate grounds to deny Finance's request for redetermination.

1. Changes to the Test Claim Statutes Enacted Before or After Voter Approval of the Subject Ballot Measure are Not Relevant to the Determination Whether Proposition 83 is Modifies the State's Liability as Determined in CSM-4509

   a. Statutory Changes Prior to the Ballot Measure (SB 1128)

As discussed in the statement of decision for the first hearing,[150] several commenters argue that most of the amendments to the Welfare and Institutions Code outlined by Proposition 83 were earlier enacted by SB 1128 (Statutes 2006, chapter 337), which was enacted September 20, 2006. The commenters maintain that Proposition 83 therefore does not constitute a "subsequent change in the law" in accordance with section 17570:

> S.B. 1128 contained many of the same or substantially similar amendments to the SVPA as did Proposition 83, for example, providing for indeterminate commitments and expansion of the list of qualifying offenses. Therefore,

Sexually Violent Predators Act provides for civil commitments, not criminal conviction, but the due process protections are nearly as strong under the balancing test.

[150] Exhibit U, First Hearing Statement of Decision, at p. 18, and following.

> Proposition 83 does not constitute a "subsequent change in the law" as contemplated by Government Code section 17570.[151]

The LA County District Attorney's Office's comments are representative, stating that "[i]n 2006, the legislature passed Senate Bill 1128 (SB 1128), urgency legislation that went into effect on September 20, 2006…[l]ess than two months later, the electorate passed Prop 83, commonly known as "Jessica's Law"…[which] simply reaffirmed many of the changes already effectuated by SB 1128." And, the District Attorney of Orange County made similar comments, also representative of the recurring theme: "[t]he SVP reimbursement program should not have been affected by Prop 83 because the ballot measure made no *substantive changes* to the reimbursable component of the program."[152] In addition, CSAC continues to stress, in its comments on the draft staff analysis for the second hearing, that the mandated activities under the SVPA were unaffected by Proposition 83:

> Of the fourteen sections and subsections that formed the basis of the Commission's 1998 Statement of Decision, Proposition 83 purported to amend only three, although even in these three cases the Legislature had already made substantially the same changes in the months prior to the ballot measure's passage (SB 1128).[153]

Accordingly, the Public Defender for the County of San Bernardino argues in comments submitted on the draft staff analysis for the second hearing that because "Proposition 83 mirrored many of the same provisions as cited in SB 1128 and effectuated changes that were procedural rather than substantive, its enactment did not constitute a subsequent change in law, as required under Government Code [section] 17570."[154]

However, it is irrelevant to the analysis of Proposition 83 whether there were *substantive changes to the law in effect immediately prior to its enactment*, or whether Proposition 83 made any substantive changes at all to the SVP code sections. The analysis of whether a subsequent change in law has occurred turns on whether, under 17556(f), there are now any costs mandated by the state, where a ballot measure expressly includes some of the same activities as the test claim statutes that were found to impose a reimbursable mandate in CSM-4509. Or, to consider the issue in the alternative: do the test claim statutes, as pled (in the CSM-4509 test claim) impose duties that are necessary to implement or expressly included in a voter-enacted ballot measure? Here, with respect to the code sections reenacted in Proposition 83, it must be said that the test claim statutes, *as those statutes were pled in the earlier test claim decision*, impose duties that are expressly included in a voter-enacted ballot measure.[155] The text of the Welfare and Institutions Code immediately prior to the adoption of Proposition 83 is immaterial, as is the extent and degree of substantive amendments made by Proposition 83. The only issue is whether the activities imposed by the test claim statutes, as pled, are expressly included in or necessary to

[151] Exhibit H, CPDA Comments, at p. 4. See also, Exhibit G, CSAC Comments, at pp. 2-3; Exhibit AA, CSAC Comments on Draft Staff Analysis, Second Hearing, at p. 2.

[152] Exhibit Y, Orange County District Attorney Comments, at p. 1 [emphasis added].

[153] Exhibit AA, CSAC Comments on Draft Staff Analysis, Second Hearing, at p. 2.

[154] Exhibit Z, San Bernardino County Public Defender Comments, at p. 1.

[155] See Government Code section 17556(f).

implement Proposition 83. Given that Proposition 83 amended and reenacted wholesale most of the code sections that gave rise to the mandated activities found in the CSM-4509 test claim (section 6601, requiring the county's designated counsel to file a petition for commitment if he or she agrees with the recommendation of the Department of Mental Health; section 6604, requiring a court or jury to determine whether a person is a sexually violent predator; section 6605, requiring annual reevaluation and possible subsequent hearing if recommended by the Department; and section 6608, providing for a subsequent hearing at the request of the person adjudged to be a sexually violent predator), it must be said that most of the activities activities approved in the test claim are expressly included in or necessary to implement the voter-enacted ballot measure.

b. Statutory Changes After Approval of the Ballot Measure (2012 Legislative Reenactment)

In a line of argument similar to that discussed above, CPDA asserts that the 2012 statutes superseded the ballot proposition, as follows:

> The enactment of A.B. 1488, A.B. 1470, and S.B. 760 in 2012 pertaining to the SVPA result in a cost mandated by the state as defined by Government Code section 17514. The entire text of the sections amended by legislation in 2012, including the portions not amended, was reenacted by the Legislature pursuant to Article IV, section 9, of the California Constitution. The remainder of the SVPA sections that were not expressly included in the 2012 legislation are, nevertheless, necessary to implement the 2012 legislation under Government Code section 17556, subdivision (f), and therefore are mandated by statute and thus reimbursable under California Constitution Article XIII B, section 6. Therefore, Proposition 83 is no longer the statutory authority supporting the SVPA; consequently the cost incurred by local agencies to comply with the 2012 legislatively enacted SVPA is a cost mandated by the state.[156]

The CPDA comments demonstrate a misunderstanding of the operation of section 17556. There is no indication from the plain language, or from the broader statutory framework, that section 17556 is meant to operate in this alternative respect; where a ballot measure removes a mandate from the reimbursement requirement, a subsequent statute on the same program can only be subject to the reimbursement requirement if it imposes duties *beyond* those which are expressly included in or necessary to implement the ballot measure. An enactment of the voters may trigger the exclusionary provisions of section 17556(f), but subsequent amendment and reenactment by the *Legislature* does not defeat the application of section 17556(f) in the same manner. The analysis turns on only whether the test claim *statute* imposes duties expressly included in or necessary to implement the *ballot measure*. If so, those duties are not reimbursable, irrespective of any subsequent reenactment.

2. Equitable Defenses Raised are not Applicable to this Request for Redetermination

a. Misrepresentation, Unclean Hands, Equitable Estoppel

Several comments have raised equitable defenses against Finance's request, suggesting that because Finance's analysis of Proposition 83 leading up to the election on the measure gave no

[156] Exhibit H, CPDA Comments, at p.2.

indication that mandate reimbursement would be in peril, Finance's request for a new decision on the SVP mandate should be rejected.

CPDA argues that "misrepresentation, unclean hands, and estoppel bar the DOF's redetermination request." CPDA cites "a letter dated September 2, 2005, addressed to the honorable Bill Lockyer, California Attorney General, issued pursuant to Elections Code section 9005, authored by Elizabeth G. Hill, Director of the Legislative Analyst's Office (LAO) and Tom Campbell, Director of the DOF," in which it is stated that Proposition 83 would have no effect on state reimbursement." CPDA argues that "[g]iven the DOF's stated position that the passage of Proposition 83 would not affect state reimbursement to counties, the DOF has "unclean hands" and should be estopped from currently asserting the Sexually Violent Predator mandate (CSM-4509) is no longer a cost mandated by the state." CPDA concludes that the voters were misled by the ballot pamphlet, prepared in reliance on the letter cited.[157]

The LA County DA argues, for its part, that "the Legislative Analyst's Office (LAO), in association with the Department of Finance, sent California Attorney General Bill Lockyer a fiscal analysis of the initiative eventually known as Prop 83," in which the LAO stated that there would be no impact on state reimbursement. The LA County DA argues that "[a]s the electorate is presumed to have relied upon the state's broadly publicized assurances regarding the state's assumption of the fiscal costs associated with Prop 83 were it to pass, the state is foreclosed from using Prop 83 as the basis of its invocation of Section 17570 and request for a new test claim decision."[158]

The defenses of unclean hands and misrepresentation are not neatly applied in this case. Unclean hands doctrine in this context assumes that the alleged "misrepresentation" induced the electorate to adopt Proposition 83, which is now alleged to impose harm upon the claimants, or to have conferred a benefit upon Finance. There is, obviously, no evidence as to what voters might have chosen had they been given different information with respect to mandate reimbursement in the voter information pamphlet. More importantly, there is no evidence that local government officials would have had any impact on the outcome, had they not "been lulled into a false sense of security."[159]

CPDA's argument also assumes that Finance, as the requesting party, should be barred from "relief." But unclean hands, as an equitable doctrine, should not be applied where another injustice would result; moreover, "[i]t is well settled that public policy may favor the nonapplication of the doctrine as well as its application."[160] Here, the denial of Finance's request on the basis of unclean hands could result in the imposition of a subvention requirement, even if no state-mandated program exists. Article XIII B, section 6 requires reimbursement for state-mandated new programs or higher levels of service that impose *costs mandated by the state*, as defined. To deny "relief" to DOF on the basis of an unclean hands defense would be to

[157] Exhibit H, CPDA Comments, at pp. 3-4.

[158] Exhibit L, LA County DA Comments, at pp. 8-10. See also, Exhibit F, CDAA Comments, at p. 4

[159] Exhibit H, CPDA Comments, at pp. 3-4.

[160] *Health Maintenance Network v. Blue Cross of Southern California* (Cal. Ct. App. 2d Dist. 1988) 202 Cal.App.3d 1043, at p. 1061.

ignore article XIII B, section 6 of the California Constitution and the implementing statutes of the Government Code.

Additionally, what all of the above comments fail to acknowledge is that in 2006 the conclusion that Proposition 83 would have no fiscal effect on local government was correct, and was not a misrepresentation of the facts as they existed at that time. When Proposition 83 was enacted, there was no process for redetermining a test claim; thus there would have been no effect on mandate reimbursement. Only after the mandate redetermination process embodied in section 17570 was *added to the code in 2010* was there any possibility of utilizing Proposition 83 to change a prior mandate finding.[161] Therefore, any representation that might be alleged to have misled the voters was provided in good faith, and cannot now support a defense of 'unclean hands.'

In comments filed in response to the draft staff analysis in the first hearing, CPDA strenuously disputes this point, arguing that the draft "erroneously rejects the equitable defense of unclean hands," and that the draft "incorrectly states" that when Proposition 83 was adopted, no mechanism or process for redetermination existed." CPDA argues that "[d]uring the relevant periods surrounding the passage of Proposition 83 (2005 through 2006), [former] Government Code sections 17570 and 17556, subdivision (f), *expressly provided* for the redetermination of test claims."[162] CPDA cites to former Government Code section 17570, as that section appeared in 1986, which provided:

> On November 30 of each year the Legislative Analyst shall submit a report to the Legislature regarding each unfunded statutory or regulatory mandate for which claims have been approved by the Legislature pursuant to a claims bill during the preceding fiscal year. The *Legislative Analyst shall review* each such statute or regulation in light of its estimated future costs recoverable through the claims process *and recommend, in each case, whether the Legislature should reconsider its original enactment of that statute or the state agency should reconsider its adoption of the regulation to repeal, modify, or make permissive its provisions*. The Legislative Analyst shall submit the report to the Joint Legislative Budget Committee, the chairs of the fiscal committees, and the chairs of the policy committees in each house which have jurisdiction over the subject matter of these statutes or regulations.[163]

CPDA's argument presumes that former section 17570 might be read to provide for a process of reconsideration or redetermination of a prior test claim decision; but nothing in the language of former section 17570 provides authority for the Commission to reconsider a test claim. Former section 17570 only required the Legislative Analyst's Office to *provide recommendations* to the Legislature regarding possible amendments to the underlying test claim statutes or regulations. It did not provide authority for the Commission to reconsider a prior final test claim decision based on a subsequent change in the law.

[161] Statutes 2010, chapter 719 (SB 856).

[162] Exhibit S, CPDA Comments on Draft Staff Analysis, at p. 2 [emphasis added].

[163] Statutes 1986, chapter 879, section 13 [emphasis added].

Additionally, CPDA argues that the "regardless of…before or after" language of section 17556, as amended by AB 138 in 2005, evidences inherent authority for the Commission to reconsider a test claim. CPDA argues that "[p]ursuant to Legislative directive [*sic*] contained in A.B. 138 the CSM redetermined and set aside the 'Open Meetings Act' and 'Brown Reform Act' test claims in September, 2005."[164] CPDA also cites the reconsideration of "School Accountability Report Cards" in 2005,[165] and concludes:

> When Proposition 83 took effect on November 8, 2006, the CSM had completed reconsideration of the foregoing three test claim redeterminations. The assertion that there was "no process or mechanism by which to redetermine a test claim" during the time period of 2005 through 2006 is disingenuous. Although the court in California School Boards reversed these redeterminations, the ruling was not handed down until March 9, 2009, nearly three years after the passage of Proposition 83. Therefore, the Draft Staff Analysis erroneously and inaccurately portrayed the state of the law vis-a-vis redetermination of test claims during the relevant period of 2005 through 2006 surrounding the passage of Proposition 83.[166]

CPDA implies that the fact of these other test claims being reconsidered shows that a process or mechanism existed when Proposition 83 was adopted and, thus, statements that Proposition 83 would have no fiscal effect on local government was either in error or constituted an intentional misrepresentation.

CPDA's conclusion falters, however, because in the case of each of the mandates that CPDA cites, the Legislature *directed the Commission* (i.e., expressly required the Commission) to reconsider those specific test claims by statute.[167] AB 138 amended section 17556 to include the "before or after" language regarding a test claim statute implementing a ballot measure mandate, as discussed above, and also directed the Commission to reconsider three mandates decisions, in light of the amended Government Code provisions.[168] Absent such action by the Legislature, the Commission did not have authority to reconsider a prior decision. However, as CPDA points out, the court of appeal eventually rejected the actions of the Commission, on the ground that the Legislature's directive to the Commission to reconsider these prior claims was not consistent with separation of powers principles.[169]

[164] Exhibit S, CPDA Comments on Draft Staff Analysis, at p. 2. See also, Statutes 2005, chapter 72 (AB 138) section 17 [directing the Commission to set aside and reconsider Open Meeting Act (CSM-4257) , and Brown Act Reform (CSM-4469)].

[165] See Statutes 2004, chapter 895 (AB 2855) section 18 [directing the Commission to reconsider School Accountability Report Cards (97-TC-21)].

[166] Exhibit S, CPDA Comments on Draft Staff Analysis, at p. 3.

[167] See Statutes 2005, chapter 72 (AB 138) section 17; Statutes 2004, chapter 895 (AB 2855) section 18.

[168] Statutes 2005, chapter 72 (AB 138) section 17 [directing the Commission to reconsider Mandate Reimbursement Process (CSM-4202)].

[169] *California School Boards Association v. State of California* (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183.

As discussed at length above, section 17556 is not self executing; it requires some process or mechanism by which the test claim can come before the Commission. In the case of a ballot measure adopted after the test claim decision addressing a particular program, the proper mechanism is the mandate redetermination process provided in section 17570. It is well-settled that administrative agencies, such as the Commission, are entities of limited jurisdiction. Administrative agencies have only the powers that have been conferred on them, expressly or by implication, by statute or constitution. An administrative agency may not substitute its judgment for that of the Legislature. When an administrative agency acts in excess of the powers conferred upon it by statute or constitution, its action is void.[170] The Government Code gives the Commission jurisdiction only over those statutes or executive orders pled by an eligible claimant in a test claim and grants the Commission a single opportunity to make a final decision on the test claim. Government Code section 17559 grants the Commission statutory authority to reconsider prior final decisions, if a request to reconsider is made within 30 days after the Statement of Decision is issued based on an error of law, but no other section, until the addition of section 17570 in 2010, provided standing authority and a process to redetermine a prior final Commission decision.

The Alameda County District Attorney's Office argues that "[t]he Department of Finance request for a new test claim, filed some six and one-half years after the passage of Proposition 83, is untimely and should be rejected on common law principles of laches and estoppel."[171] The doctrine of estoppel is misplaced in this case. The essence of an estoppel, "if it is applicable at all in these circumstances, is that the party to be estopped has by false language or conduct led another to do that which he would not otherwise have done and as a result thereof that he has suffered injury."[172] Estoppel is applied "where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts."[173] Estoppel generally binds "not only the immediate parties but also those in privity with them;" and as applicable here, agents of the same government are held to be in privity with one another.[174] And, estoppel is available against the government, but "estoppel will not be applied against the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public or to contravene directly any statutory or constitutional limitations."[175]

[170] *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

[171] Exhibit P, Alameda County DA Comments, at p. 5.

[172] *In re Lisa R.* (1975) 13 Cal.3d 636, at p. 645.

[173] *Nicolopulos v. Superior Court* (Cal. Ct. App. 2d Dist. 2003) 106 Cal.App.4th 304, at p. 311 [citing *Brookview Condominium Owners' Ass'n v. Heltzer Enterprises-Brookview* (Cal. Ct. App. 4th Dist. 1990) 218 Cal.App.3d 502, at p. 512.

[174] *Hartway v. State Board of Control*, (Cal. Ct. App. 1st Dist. 1976) 69 Cal.App.3d 502 See also *Carmel Valley Fire Protection Dist. v. State of California* (Cal. Ct. App. 2d Dist. 1987) 190 Cal.App.3d 521, at p. 535 [citing *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, at p. 398].

[175] *Transamerica Occidental Life Insurance Co. v. State Board of Equalization* (Cal. Ct. App. 2d Dist. 1991) 232 Cal.App.3d 1048, at p. 1054 [internal citations omitted].

As discussed above, whatever representations were made regarding the effect on mandate reimbursement prior to the adoption of Proposition 83, and however local governments might have detrimentally relied on those representations, they were *true when made*, and only later did the circumstances allow for mandate reimbursement to be modified. Moreover, to apply estoppel against DOF in this case would "contravene directly" the statutory and constitutional limitations on reimbursement, and would effectively "nullify" the mandate redetermination process created in the Government Code.[176] Furthermore, the premise that counties have detrimentally relied upon reimbursement is tenuous at best. Even if this redetermination results in discontinuance of mandate reimbursement, the activities required under the test claim statutes will continue to be required. There cannot be detrimental reliance unless a party alters its behavior; here, the existence of the required activities, and the counties' acquiescence, does not turn on whether those activities are reimbursed.

Accordingly, the arguments alleging misrepresentation, unclean hands, and equitable estoppel do not apply in this case.

b. Laches, or Unreasonable Delay of Cause of Action

The Alameda County District Attorney's Office and LA County also argue that DOF was not required to delay this request for reconsideration "nearly six and a half years after the passage of Proposition 83." During this time, counties relied on mandate reimbursement from the state to perform the required duties. As a result, the counties argue that the DOF's request is untimely and that under the equitable doctrine of laches, the claim should be denied.

As raised by the Alameda County DA, the defense of laches is based on an assertion that the plaintiff unreasonably delayed bringing an action, and that the defendant has been prejudiced by the delay, such that granting relief would be inequitable. The Alameda County DA asserts that a delay of more than six years after the passage of Proposition 83 is unreasonable. But as discussed above, the mandate redetermination process was only added to the Government Code in 2010.[177] Prior to that, even if Proposition 83 were *known* to have undermined the 1998 mandate finding regarding the SVP program, there was no mechanism in place to bring the issue before the Commission. Therefore, any delay that might be attributed to DOF cannot be said to begin until such mechanism was provided, in Government Code section 17570, as added by Statutes 2010, chapter 719 (SB 856).

In comments filed in response to the draft staff analysis, LA County disputes this conclusion. LA County argues that a mechanism or process was put in place by Statutes 2008, chapter 751, section 75 (AB 1389), which directed the Commission to reconsider the Sexually Violent Predators test claim (CSM-4509). However, the 2008 statute that County of LA cites clearly and unambiguously directed the Commission to wait until the *CSBA* decision was finalized:

> Notwithstanding any other provision of law, the Commission on State Mandates, *upon final resolution of any pending litigation* challenging the constitutionality of subdivision (f) of Section 17556 of the Government Code, shall reconsider its test claim statement of decision in CSM-4509 on the Sexually Violent Predator Program to determine whether Chapters 762 and 763 of the Statutes of 1995 and

[176] *Ibid.*

[177] Government Code section 17570 (Stats. 2010, ch. 719 (SB 856)).

> Chapter 4 of the Statutes of 1996 constitute a reimbursable mandate under Section 6 of Article XIIIB of the California Constitution in light of ballot measures approved by the state's voters, federal and state statutes enacted, and federal and state court decisions rendered since these statutes were enacted.[178]

This statute was enacted as an urgency statute on September 30, 2008. The *CSBA* decision was handed down March 9, 2009, and addressed both the constitutionality of section 17556(f), and the statutes that directed the Commission to reconsider the prior test claim decisions in *Open Meetings Act, Brown Act Reform* and *School Accountability Report Cards*. Because the statute cited above directed the Commission to reconsider the SVP mandate only after final resolution of the *CSBA* matter, which ultimately declared that the Legislature's attempt to force a reconsideration of a final decision of the Commission, on a case by case basis, violates separation of powers principles,[179] no "mechanism and process"[180] to reconsider this particular test claim existed at any time prior to the enactment of section 17570 in Statutes 2010, chapter 719 (SB 856).[181]

LA County also points out that the *current* statute providing a process for redetermination was enacted, in response to *CSBA*, in Statutes 2010, chapter 719 (SB 856). The County *implies*, but does not clearly state, that failing to take advantage of that process until January of 2013 constitutes an unreasonable delay.[182] A new *test claim* must be filed by June 30 of the fiscal year following the year in which the test claim statute at issue became effective, or the year in which the claimant first incurred costs under the statute. But section 17570 only requires that a redetermination request be filed "on or before June 30 following a fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that fiscal year."[183] It does not contain a statute of limitations.

Moreover, laches requires, in addition to an unreasonable delay in bringing an action, either acquiescence or prejudice to the other party resulting from the delay. Here, it is difficult to identify any prejudice that results from DOF's delay. As discussed, DOF would have had no right or ability to bring this matter before 2010. And from the effective date of section 17570 to the time of filing this request, in the intervening two years and three months, the claimants have continued to receive reimbursement. The statute provides that if DOF prevails, reimbursement will be ended beginning in the 2011-2012 fiscal year, based on the filing date of this redetermination request.[184] Had DOF filed this request two years earlier, the potential reimbursement period affected would have begun in the 2009-2010 fiscal year. Therefore,

[178] Statutes 2008, chapter 751 (AB 1389) section 75 [emphasis added].

[179] *CSBA v. State of California* (2009), 171 Cal.App.4th 1183, p.p. 1202-1203.

[180] Exhibit T, County of LA Comments on Draft Staff Analysis, at p. 2.

[181] Government Code section 17570 (Stats. 2010, ch. 719 (SB 856)).

[182] Exhibit T, County of LA Comments on Draft Staff Analysis, at p. 2.

[183] Government Code section 17570(f) (Stats. 2010, ch. 719 (SB 856)).

[184] Section 17570(f) (Stats. 2010, ch. 719 (SB 856)) ["A request for adoption of a new test claim decision shall be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that fiscal year."]

eligible claimants for the CSM-4509 mandate have not been harmed by DOF's delay in filing this request for redetermination, and may have, in fact, benefited from it.

c. Equitable defenses are not applicable to mandates law

Ultimately, the proffered equitable arguments of misrepresentation, unclean hands, equitable estoppel, laches, and unreasonable delay, are inapplicable to this case. The Commission is vested, pursuant to the Government Code, with sole and exclusive jurisdiction to determine mandates claims. Whether a statute requires reimbursement is a question of law, to be decided by the Commission, or the courts on review, and "legislative disclaimers, findings, and budget control language are not determinative."[185] Thus the question of reimbursement must be evaluated by the Commission, exclusively, pursuant to article XIII B, section 6 of the California Constitution, on the basis of the statutes and case law that guide Commission decisions generally, and legislative declarations are irrelevant to the Commission's determination of whether a state mandate exists.[186] The Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state-mandate exists.[187]

As has been said by the courts of appeal, "[i]n making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[188] The purpose of the mandates process is to enforce the Constitution, by way of its implementing statutes, including Government Code section 17556. If a local government is not entitled to reimbursement pursuant to the operation of the statutes and the Constitution, public policy cannot support application of equitable defenses or remedies.

3. Retroactivity of Proposition 83

In *People v. Litmon,*[189] the court reversed an order imposing an indeterminate term of commitment *retroactive to the date appellant was first committed* as an SVP under the pre-Proposition 83 SVPA. Addressing the retroactivity issue, the court held that "Proposition 83's declaration of intent does not explicitly make indeterminate terms retroactive and is equally consistent with the intent to impose indeterminate terms of commitment in future commitment proceedings."[190] The court concluded that "the most reasonable interpretation … is that an indeterminate term of commitment may be ordered only following a trial in which a person is

[185] *County of Los Angeles v. Commission on State Mandates*, (Cal. Ct. App. 2d Dist. 2003) 110 Cal.App.4th 1176, 1186; 1194. See also, Government Code section 17552, which states that "This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution."

[186] *CSBA v. State of California* (2009), 171 Cal.App.4th 1183, p. 1203; see also, *County of Los Angeles v. Commission on State Mandates, supra., p.* 1194.

[187] *Id*.

[188] *City of San Jose v. State of California (1996)* 45 Cal.App.4th 1802.

[189] (Cal. Ct. App. 6th Dist. 2008) 162 Cal.App.4th 383.

[190] *Id.*, at p. 410.

determined to be an SVP and that term commences on the date upon which the court issues its order pursuant to this current version of section 6604."[191]

LA County argues in its comments on the draft staff analysis for the second hearing that Proposition 83's amendments to the SVP program should be applied prospectively only, as follows:

> Under the SVP law, individuals were subject to a 2-year commitment. When SB1128 and Prop. 83 passed, the recommitment provisions of Welf. & and [*sic*] Inst. Code § 6604 were deleted. Currently, under Prop. 83, there is no provision to recommit someone after the 2-year term. Thus recommitments are not mandated by Prop. 83. Recommitments would thus be mandated under the SVP Law. SVP should not be applied to the pre Prop. 83 offenders until they leave the program.
>
> Retroactive application of Prop. 83 (a violation of Ex Post facto Law) [*sic*] to pre Prop. 83 SVP's would be unconstitutional. In adopting new Parameters and Guidelines for Chapter 641, Statutes of 1995, CSM stated:
>
> Chapter 641/95, eliminated diversion as a domestic violence sentencing for those arrested on or after January 1, 1996, under prior law, (Chapter 221/93, and Chapter 1158/80) was not terminated by chapter 641/95 and continues until the period of diversion has been completed. Such completion and resultant closeout costs, for the period January 1, 1996 through June 30, may be claimed as provided. CSM-4447A. Page 1
>
> To eliminate the right of the pre Prop. 83 SVP's from the pre Prop. 83 (2006) applicable laws would be *nullifying the sentencing judges' orders.* Our interpretation of statutes declares all laws are to commence in the future and operate prospectively. Therefore, reimbursement should continue on all pre Prop. 83 SVP's in accordance with the SVP Law until jurisdiction is terminated.[192]

LA County raises several distinct issues in these few sentences: first, the concept of "Ex Post Facto Law" is raised, but ex post facto is not a singular law to be violated; it is a proscription found in Article I, section 10 of the United States Constitution against the states passing laws that have an effect of retroactively altering the consequences of a criminal act or omission.[193] The United States Supreme Court has held that the prohibition against the enactment of ex post facto laws applies only in the realm of *crimes* and *criminal sanctions*.[194] In the case of SVP commitment, the California Supreme Court has held that "the commitment authorized by the Act is not excessive and is designed to last only as long as that person meets the definition of an

[191] *Id.*, at p. 412.

[192] Exhibit DD, County of LA Comments, at p. 4 [emphasis in original].

[193] Article I, section 9 prohibits Congress from doing the same.

[194] *Calder v. Bull* (1798) 3 U.S. 386 [Ex post facto laws, prohibited by the Constitution, are "only those that create, or aggravate, the crime; or encrease [*sic*] the punishment, or change the rules of evidence, for the purpose of conviction." Emphasis added.]

SVP," and that therefore the SVPA is "essentially nonpunitive."[195] Therefore, because the SVPA is a civil commitment, not a criminal punishment, and is held not to be punitive, the proscription of ex post facto laws in Article I, section 10 is not applicable.

With respect to retroactivity generally, the courts have held that an indeterminate commitment may not be made retroactive to an individual's *initial* commitment, but that any pending or new petitions for commitment or recommitment may be treated as petitions for indeterminate commitment.

In *People v. Litmon*,[196] the individual at the center of the case had been committed as an SVP on May 2, 2000, and recommitted effective May 2, 2002, but when the trial court ordered an additional recommitment on March 15, 2007, it determined that the recommitment under Proposition 83 should be retroactive to the initial date of commitment. The appellate court concluded that amended sections 6604 and 6604.1 "did not authorize an order imposing an indeterminate term of commitment retroactive to the date upon which appellant was first committed as an SVP under predecessor law."[197]

However, in *Borquez v. Superior Court*[198]the appellate court found "application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was completed before the law's effective date." The court continued: "Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date." For purposes of determining whether a person is an SVP, "the last event necessary is the person's mental state *at the time of the commitment*." (Emphasis added.) Therefore, "[b]ecause a proceeding to extend commitment under the SVPA focuses on the person's current mental state, applying the indeterminate term of commitment of Proposition 83 does not attach new legal consequences to conduct that was completed before the effective date of the law."[199]

Then, in *People v. Taylor*[200] the court of appeal held that because a petition to extend commitment "requires a new determination of the individual's status as a SVP, [section 6604, as amended by Proposition 83] it may be applied prospectively to all pending and future commitment proceedings." At the same time, the court concluded that an automatic retroactive conversion of the defendants commitments from renewable two year terms to indeterminate commitment terms without a hearing "was erroneous, and that the proper procedure is to impose the indeterminate term in conjunction with the initiation of proceedings to extent a SVP commitment."[201]

[195] *People v. McKee* (2010) 47 Cal.4th at pp. 1193; 1195 [internal citation omitted].

[196] *People v. Litmon* (Cal. Ct. App. 6th Dist. 2008) 162 Cal.App.4th 383.

[197] *Id*, at p. 412.

[198] *Borquez v. Superior Court* (Cal. Ct. App. 3d Dist. 2007) 156 Cal.App.4th 1275.

[199] *Id*, at pp. 1288-1289.

[200] *People v. Taylor* (Cal. Ct. App. 4th Dist. 2009) 174 Cal.App.4th 920.

[201] *Id*, at pp. 932-933.

Based on the foregoing case law, the Commission finds that the indeterminate commitment provisions of section 6604, as amended by Proposition 83, may be applied to all pending and future commitment or recommitment petitions without violating the prohibition against ex post facto laws in the United States Constitution, or the due process rights of individuals determined to be SVPs, and without violating principles of retroactivity generally.

Finally, there is no evidence that "sentencing orders" are affected by the application of Proposition 83 in any way. The result of a commitment petition under SVPA is not a "sentence," in the criminal sense, and the "order" that an individual be committed, at least prior to Proposition 83, was designed to expire in two years. The courts have held that each recommitment petition is a new cause of action, and requires the People to meet their burden of proving a person is an SVP, independent of any prior findings.[202] Accordingly, any new petition for a commitment order under Proposition 83 must be considered in isolation from any earlier commitment order issued under prior law, and the courts have held that pending or new petitions for commitment may be treated as petitions for indeterminate commitment.[203]

However, as discussed above, the County raised at the September 27, 2013 hearing an issue regarding a stipulation entered into by the District Attorney, the Public Defender, and the Presiding Judge of the Superior Court for the County of Los Angeles, which had been held enforceable by the California Supreme Court in *People v. Castillo* (2010) 49 Cal.4th 145. The County alleged that because the stipulation and order of the court upholding the stipulation required the County to apply the provisions of the pre-Proposition 83 SVPA to all individuals subject to SVP petitions prior to the date the amendments were enacted, the activities performed in accordance with the test claim statutes should remain reimbursable. Based on the following analysis, the Commission finds that (1) the California Supreme Court's finding does not bind the Commission to deny the request for redetermination, or to limit the applicability of its findings; and (2) this decision is effective on July 1, 2011, pursuant to Government Code section 17570 and, thus reimbursement for six of the eight activities are no longer reimbursable effective July 1, 2011.

SB 1128 (Stats. 2006, ch. 337), was enacted as urgency legislation on September 20, 2006, several weeks prior to the November 7, 2006 general election in which Proposition 83 would be adopted, and made most, if not all, of the same substantive changes.[204] SB 1128 and Proposition 83 both enacted reforms to the SVPA that would bring the state's program in line with other states, including changing two year commitments to indeterminate commitments, and thus eliminating the need for re-commitment procedures. But neither addressed how the new law should apply to persons who were currently being held on a two year commitment, and would have to be re-committed, or persons subject to *pending* petitions for initial two year commitments or re-commitments.[205] Due to the absence of any language regarding retroactive

[202] See. *Borquez, supra,* at pp. 1288-1289; *Taylor, supra,* at p. 932.

[203] *Ibid.*

[204] See, e.g., Exhibit G, CSAC Comments on Request for Redetermination; Exhibit H, CPDA Comments on Request for Redetermination; Exhibit K, Sacramento County DA Comments on Request for Redetermination.

[205] *People v. Castillo* (2010) 49 Cal.4th 145, at pp. 148-150.

application of the law to pending petitions, or any reference to recommitment under the new indeterminate-commitment regime, the Attorney General of California issued a memorandum to district attorneys' offices, stating that "[i]n our opinion, the indeterminate term language applies to any *verdict or court finding rendered after September 20, 2006*." This memorandum was dated September 26, 2006.[206]

On October 11, 2006 the District Attorney, the Public Defender, and the Presiding Judge of the Superior Court for the County of Los Angeles entered into a stipulation, which stated that "[d]ue to uncertainty in the retroactive application of this change, it is the intention of the Los Angeles County District Attorney's Office to apply the current two year commitment period to all currently pending initial commitment petitions…" The stipulation stated that the District Attorney's Office "will apply the two year commitment period to pending initial petitions for 24 months [after the effective date of SB 1128]," and that "[c]ases which are pending for initial commitment or are evaluated for recommitment prior to the effective date of the legislation and/or initiative will be evaluated based upon criteria *currently present* in the SVP statutes."[207]

The California Supreme Court considered this stipulation in *People v. Castillo*.[208] Castillo had been determined to be an SVP, and ordered committed on August 10, 2007 "for three consecutive two-year periods – one for each of the three consolidated [petitions]" that had been pending at the time SB 1128 and Proposition 83 were enacted.[209] Castillo appealed the commitment order, and on appeal the People were represented by the Attorney General, who "sought to contravene the contentions raised in Castillo's brief," but also "argued that the court's order, committing Castillo to a series of two year terms ending October 2007 (consistently with the stipulation signed by the parties and the superior court), *was invalid because it was in derogation of the indeterminate commitment term specified by [SB 1128] and Proposition 83*."[210] The court of appeal sided with the Attorney General and modified the commitment order to reflect an indeterminate commitment.[211] The California Supreme Court thereafter granted review, at the urging of the Public Defender and the District Attorney of the County of Los Angeles, both of whom filed amicus curiae briefs supporting Castillo's position that the stipulation should be enforced.[212]

The court found that "[a]s alluded to in the stipulation itself…and, indeed, continuing until at least early 2008 – there existed substantial legal uncertainty concerning the status of, and procedures to be employed in, proceedings (such as the one here at issue) to extend the commitment of a person already adjudged to be an SVP."[213] Citing *People v. Shields*,[214]

[206] *Id*, at p. 153, Fn 7 [emphasis added].

[207] *Id*, at pp. 150-152 [emphasis added].

[208] *People v. Castillo* (2010) 49 Cal.4th 145.

[209] *Id*, at p. 153.

[210] *Id*, at pp. 153-154 [emphasis added].

[211] *Id*, at p. 154.

[212] *Ibid*.

[213] *Id*, at p. 159

[214] (2007) 155 Cal.App.4th 559.

Borquez v. Superior Court,[215] *People v. Carroll*,[216] *People v. Whaley*,[217] and *People v. Taylor*,[218] the court explained:

> Eventually, of course, appellate decisions, construing over the course of the years the 2006 amendments, have resolved these problems and uncertainties. But at the time the stipulation was negotiated and signed in 2006…no one could predict with any degree of certainty how the amendments would be construed as applied to persons in Castillo's circumstances. It was simply uncertain, and unknowable, how courts eventually would resolve these and related questions.[219]

And, "in addition to the legal uncertainties created by the 2006 amendments to the SVPA, at the same time there existed a reasonable possibility that Castillo and others who were being represented by the Public Defender, and who were subject to pending SVP trials, might succeed in having their petitions dismissed – hence releasing these individuals from the strictures of the SVPA – based upon the state's failure to bring the matters to trial in a reasonably timely fashion."[220] "Furthermore," the court stated, "unlike the more typical cases involving stipulations, in this case the trial court did not merely accept and enforce a stipulation agreed to by the parties; the court actually signed the stipulation as a participant in the agreement." Therefore, the California Supreme Court in *People v. Castillo* concluded that the stipulation entered into by the District Attorney of the County of Los Angeles, the Public Defender for the County of Los Angeles, and the Presiding Judge of the Superior Court for the County of Los Angeles should be enforceable by its terms. The Supreme Court therefore reinstated the two-year commitment order of the trial court.

As discussed above, in *Borquez v. Superior Court*[221] the appellate court found that "the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date." For purposes of determining whether a person is an SVP, "the last event necessary is the person's mental state *at the time of the commitment*."[222] The California Supreme Court in *Castillo*, *supra*, cited *Borquez* as one of several appellate cases handed down after the stipulation at issue was negotiated and signed, but which would come to aid in clarifying the "legal uncertainties created by the 2006 amendments to the SVPA."[223] However, ultimately the court in *Castillo* held that despite *Borquez's* conclusion that no retroactivity problem in fact existed, the stipulation was

[215] (2007) 156 Cal.App.4th 1275.

[216] (2007) 158 Cal.App.4th 503.

[217] (2008) 160 Cal.App.4th 779.

[218] (2009) 174 Cal.App.4th 920.

[219] *Castillo*, *supra*, at pp. 161-162; Fn. 17.

[220] *Id*, at p. 163 [citing *People v. Litmon* (2008) 162 Cal.App.4th 383, which held that the SVPA does not attach a "speedy trial" right, but a person alleged by petition to be an SVP has a right to be heard at a meaningful time.]

[221] *Borquez v. Superior Court* (Cal. Ct. App. 3d Dist. 2007) 156 Cal.App.4th 1275.

[222] *Id*, at pp. 1288-1289 [emphasis added].

[223] *Castillo*, *supra*, at p. 163.

enforceable against the County of Los Angeles because the stipulation was entered into in good faith, and reflected a then-existing uncertainty in the application of the law. Therefore, despite the holding in *Borquez*, the County of Los Angeles is bound by the stipulation to apply two year commitment terms for those individuals subject to SVP petitions pending at the time the changes were enacted, and for 24 months thereafter, based on the plain language of the stipulation.

People v. Castillo makes clear that the County is bound by the terms of the stipulation in any remaining SVP cases that were pending at the time the changes to the SVPA were enacted. However, the court's finding that the stipulation is binding on the County has no effect on the Commission's determination of whether reimbursement is required pursuant to article XIII B, section 6. The related doctrines of res judicata and collateral estoppel may bind a later court, or in this context, the Commission, if certain elements are met, and injustice would not result. The California Supreme Court has described the elements of res judicata and collateral estoppel as follows:

> As generally understood, the doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy…The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.[224]

In this case, the doctrine is asserted against, to the best that the situation can be analogized, the Department of Finance, as the real party in interest representing the state. In *Castillo*, which the County would hold to be "the prior proceeding," the Attorney General was a party. The courts have long held that "the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government."[225] Therefore, the element of privity is established, with respect to the party against whom collateral estoppel is now asserted, the state.

However, the issue raised in the present action is not identical to the issue litigated in the prior proceeding, and, accordingly, the prior proceeding did not result in a judgment on the merits of whether reimbursement was required pursuant to article XIII B, section 6 of the California Constitution. In *People v. Castillo* there was no discussion of mandate reimbursement, and no finding that the stipulation constituted a reimbursable state-mandate. Accordingly, the judgment in *People v. Castillo* was limited to approving and deeming enforceable against the County and the state the stipulation entered into by the District Attorney, the Public Defender, and the Presiding Judge of the Superior Court, and only then to the extent of persons subject to SVP petitions filed prior to the effective date of SB 1128, as specified in the stipulation.

[224] *Boeken v. Phillip Morris USA* (2010) 48 Cal.4th 788, at p. 797 [internal quotations and citations omitted] [Citing *People v. Barragan* (2004) 32 Cal.4th 236, 252–253].

[225] *Carmel Valley Fire Protection Dist. v. State of California* (Cal. Ct. App. 2d Dist. 1987) 190 Cal.App.3d 521, at p. 535 [citing *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, at p. 398].

Therefore, collateral estoppel does not control the Commission's finding on this request for redetermination. The California Supreme Court ruling at issue does not touch on mandate reimbursement, and therefore the period of reimbursement applicable to the County of Los Angeles for this mandate redetermination request is not an issue foreclosed by the court's prior determination in *Castillo*; as discussed above, the County is bound by the terms of the stipulation, but reimbursement is not required. Rather, the period of reimbursement must be analyzed and determined based on an analysis grounded purely in mandates law, including section 17570 of the Government Code. Government Code section 17570 establishes the period of reimbursement, based on the January 15, 2013 filing date, as the beginning of the prior fiscal year, or July 1, 2011. That period of reimbursement is unaffected by the Supreme Court's holding in *Castillo*, *supra*.

Based on the foregoing, the Commission finds that that (1) the California Supreme Court's finding does not bind the Commission to deny the request for redetermination, or to limit the applicability of its findings; and (2) this decision is effective on July 1, 2011, pursuant to Government Code section 17570 and, thus reimbursement for six of the eight activities are no longer reimbursable effective July 1, 2011.

4. Constitutionality of Section 17570

Several comments have raised the constitutionality of section 17570.[226] In particular, the County Counsel of San Diego argues that "[t]he overly broad definition of subsequent change in law contained in Section 17570 is contrary to the purpose and intent of Article XIII B, section 6."[227] CSAC, in turn, maintains that the Constitution "requires, regardless of any contradicting statute, that the Legislature must either appropriate fund [*sic*] the mandate in the Budget Act or suspend its operation."[228]

The Commission, however, must presume that the Government Code statutes pertaining to the Commission's processes are constitutional, including section 17570, pursuant to article III, section 3.5 of the California Constitution.[229] The Commission therefore finds that the redetermination statutes are presumed constitutional and declines to address the specific constitutional concerns of the interested parties and persons.

IV. CONCLUSION

Based on the foregoing, the Commission partially approves the request for redetermination and concludes that the following activities do not constitute reimbursable state-mandated activities within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17556(f), beginning July 1, 2011:

[226] See Exhibit M, County of LA Comments, at p. 5; Exhibit H, CPDA Comments at p. 6; Exhibit N, Alameda County Public Defender's Comments; Exhibit L, LA County DA Comments, at pp. 11-12; and Exhibit O, County Counsel of San Diego Comments at p. 2.

[227] Exhibit BB, County Counsel of San Diego Comments at p. 2.

[228] Exhibit AA, CSAC Comments on Draft Staff Analysis, Second Hearing, at p. 3.

[229] *CSBA II, supra,* 192 Cal.App.4th 770, 795; *Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 837.

- Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
- Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)
- Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(i).)[230]
- Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
- Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)
- Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)
- Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

The Commission further finds that the activity of preparation and attendance of county's designated counsel and indigent defense counsel at the probable cause hearing is not expressly included in or necessary to implement Proposition 83, and therefore remains a reimbursable state-mandated activity. Additionally, the transportation to and from court *for a probable cause hearing* on whether the person is a sexually violent predator is not expressly included in or necessary to implement Proposition 83, and remains a reimbursable state-mandated activity.

Therefore the following activities, required for purposes of probable cause hearings, remain reimbursable state-mandated costs.

- Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
- Transportation for each potential sexually violent predator to and from a secured facility only to the *probable cause hearing* on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

  This activity does not include transportation for purposes other than the probable cause hearing for potential sexually violent predators awaiting trial.

[230] The Test Claim Statement of Decision cites subdivision (j), but subdivision (j) addresses time limits, not a petition for commitment. The Commission therefore assumes that this is a typographical error, and that subdivision (i) was the intended citation for this activity.

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-3873
PHONE: (213) 974-8301 FAX: (213) 626-5427

WENDY L. WATANABE
AUDITOR-CONTROLLER

September 5, 2013

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Halsey:

LOS ANGELES COUNTY'S COMMENTS ON COMMISSION ON STATE MANDATES' DRAFT STAFF ANALYSIS AND STATEMENT OF DECISION FOR SEXUALLY VIOLENT PREDATORS ("SVP") REDETERMINATION

The County of Los Angeles respectfully submits its comments on the Commission on State Mandates' draft staff analysis issued on August 2, 2013 for the SVP's Redetermination Process, *Second Hearing: New Test Claim Decision*.

We are e-filing our comments pursuant to Section 1181.2, subd. (c)(1)(E) of the California Code of Regulations, "Documents e-filed with the Commission need not be otherwise served on the persons that have provided an e-mail address for the mailing list."

If you have any questions, please contact Hasmik Yaghobyan at (213) 893-0792 or hyaghobyan@auditor.lacounty.gov.

Very truly yours,

Wendy L. Watanabe
Auditor-Controller

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Attachment

LOS ANGELES COUNTY'S COMMENTS ON COMMISSION ON STATE MANDATES' DRAFT STAFF ANALYSIS AND STATEMENT OF DECISION FOR SEXUALLY VIOLENT PREDATORS ("SVP") REDETERMINATION

The County of Los Angeles ("the County, we, our") disagrees with the CSM's draft staff analysis and Statement of Decision ("SOD"), recommending that the Commission adopt a new test claim allowing reimbursement for only two of the eight activities mandated by the SVP Law: these are: 1) probable cause hearing, and 2) transportation of the SVP's to the probable cause hearing.

Our disagreements are based on the following: 1) Prop. 83 did not convert activities identified in the Commission's 1998 SOD to activities necessary to implement Prop. 83 and therefore, are no longer reimbursable, and 2) even if there was a change in the law, the new law should not be applied retroactively to pre Prop. 83 SVP's.

Prop. 83 did not convert activities identified in the SVP Law to " Necessary to implement" Prop. 83

The CSM staff recommends CSM to adopt a new SOD, allowing reimbursement for following activities:

> **Activity 4:** ***Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code § 6602.)***
>
> ***Activity 8: Transportation for each potential sexually violent predator to and from a secured facility only to the probable cause hearing on the issue of whether he or she is a sexually violent predator (Welf. & Inst. Code § 6602)***

The remaining six activities, the CSM staff concludes, are either ***"expressly"*** included in the Prop. 83, or are ***"necessary to implement"*** Prop. 83.

We disagree. Activity 7 is necessary for performing Activity 4, and Activities 5 and 6 are not necessary for the implementation of Prop. 83:

Activity 7: Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, § 6603, 6604.)

CSM staff argues that providing constitutional rights to SVPs is a necessary component to the implementation of Prop. 83 and is thus not reimbursable. Department of Finance also insists that this activity, which pertains exclusively to trials and subsequent hearings (Welf. & Inst. Code, § 6602), is no longer reimbursable because Prop. 83 amended a code section (Welf. & Inst. Code, § 6604) that changed commitment terms from renewable two year periods to indeterminate terms.

The need for the County to provide constitutional protections was the basis of the Commission's 1998 finding that State reimbursement was necessary and appropriate. As noted by the Commission, "case law is clear that where there is a right to representation by counsel, necessary ancillary services, such as experts and investigative services, are within the scope of that right." (Statement of Decision, at p.11, Citing *Mason v. State of Arizona* (9th Cir.1974) 504 F.2d 1345; *People v. Worthy* (1980) 109 Cal.app.3d 514). The Commission continued: "[L]ocal agencies would *not* be compelled to provide defense and ancillary services to indigent persons accused of being a sexually violent offender following completion of their prison term if the new program had not been created by the state." Therefore, this activity should be reimbursable.

Activity 5: Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, § 6603 and 6604.)

This activity concerns the need for prepared counsel to participate in SVP's trial and is analogous to the Commission's recognition of the mandate to reimburse services provided at probable cause hearings.

Proposition 83 did not amend the trial provisions of the prior SVP Act (Welf. & Inst. Code § 6603). The Commission staff contends that this activity is "necessary to implement" Proposition 83's amendment to Welf. & Inst. Code § 6604 which made commitments indeterminate. In other words, the staff implies that in order to have an indeterminate term for an SVP, a trial is needed.

A trial is not necessary to implement the indeterminate provisions of Proposition 83. SB1128 (which preceded Prop. 83) had already made SVP commitments indeterminate. In other words, a trial is not necessary to implement an indeterminate term under Prop. 83 because the law already required an indeterminate term.

In addition, a mandated service may not fairly be re-characterized as "necessary to implement" another activity simply because an antecedent activity may have been affected by a change in the law. Further, in some cases an individual may choose to admit his/her petition and thus not have a trial. So trials under 6603 are not necessarily "necessary" to implement Prop. 83 and therefore, this activity should be reimbursable.

Activity 6: Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, § 6605, subds. (b) through (d) and Welf. & Inst. Code, § 6608, subds. (a) through (d).)

Prop 83 did not affect the need for the prosecution and appointed defense counsel to prepare for and attend hearings regarding the condition of an SVP. Again, a reimbursable activity does not cease to be a reimbursable activity because it happens to have constitutional implications.

Prop. 83 law should be applied prospectively to Post Prop. 83 SVP's only

Under the SVP law, individuals were subject to a 2-year commitment. When SB1128 and Prop. 83 passed, the recommitment provisions of Welf. & and Inst. Code § 6604 were deleted. Currently, under Prop. 83, there is no provision to recommit someone after the 2-year term. Thus recommitments are not mandated by Prop. 83. Recommitments would thus be mandated under the SVP Law. SVP should not be applied to the pre Prop. 83 offenders until they leave the program.

Retroactive application of Prop. 83 (a violation of Ex Post facto Law) to pre Prop. 83 SVP's would be unconstitutional. In adopting new Parameters and Guidelines for Chapter 641, Statutes of 1995, CSM stated:

> Chapter 641/95, eliminated diversion as a domestic violence sentencing for those arrested on or after January 1, 1996, under prior law, (Chapter 221/93, and Chapter 1158/80) was not terminated by chapter 641/95 and continues until the period of diversion has been completed. Such completion and resultant closeout costs, for the period January 1, 1996 through June 30, may be claimed as provided. CSM-4447A, Page 1

To eliminate the right of the pre Prop. 83 SVP's from the pre Prop. 83 (2006) applicable laws would be ***nullifying the sentencing judges' orders***. Our interpretation of statutes declares all laws are to commence in the future and operate prospectively. Therefore, reimbursement should continue on all pre Prop. 83 SVP's in accordance with the SVP Law until jurisdiction is terminated.

Conclusion

Based on the foregoing analysis, the County respectfully urges the CSM to deny the CSM staff's recommendation for adopting a new SOD.

CALIFORNIA
GENERAL ELECTION

Tuesday,
NOVEMBER 7, 2006

CERTIFICATE OF CORRECTNESS

I, Bruce McPherson, Secretary of State of the State of California, do hereby certify that the measures included herein will be submitted to the electors of the State of California at the General Election to be held throughout the State on November 7, 2006, and that this guide has been correctly prepared in accordance with the law.

Witness my hand and the Great Seal of the State in Sacramento, California, this 14th day of August, 2006.

Bruce McPherson
Secretary of State

SECRETARY OF STATE

Dear California Voter,

There is no greater right than the right to vote — to participate in the electoral process, to elect responsible leaders, and to make your voice heard. As the general election nears, I urge you to exercise this fundamental right on Tuesday, November 7th.

In this Voter Information Guide, you will find information to assist you in making informed choices on Election Day. Impartial analyses, arguments in favor and against thirteen measures, statements from candidates, and other useful information is presented here as your one-stop educational point of reference. These materials are also available on the Secretary of State's website at *www.ss.ca.gov.* The website also provides a link to campaign finance disclosure information (*http://cal-access.ss.ca.gov*) so you can learn who is funding each of the campaigns.

To prepare for Election Day, please carefully review the material in this Voter Information Guide. As a registered voter, you have the opportunity to further strengthen the foundation of our democracy by exercising your right to vote.

Please let my office or your local elections official know if you have questions, ideas, or concerns about registering to vote or voting. To contact the office of the Secretary of State, call our toll-free number—1-800-345-VOTE or visit our website at *www.ss.ca.gov* to find contact information for your local elections official.

Thank you for being a part of California's future by casting your vote in the November 7th General Election.

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Should any candidate or ballot measure information be incorrect or change after the printing of this Voter Information Guide, please rely on the information provided in the Sample Ballot provided by your county elections official.

PROPOSITION
83

SEX OFFENDERS. SEXUALLY VIOLENT PREDATORS. PUNISHMENT, RESIDENCE RESTRICTIONS AND MONITORING. INITIATIVE STATUTE.

OFFICIAL TITLE AND SUMMARY ★★★

Prepared by the Attorney General

SEX OFFENDERS. SEXUALLY VIOLENT PREDATORS. PUNISHMENT, RESIDENCE RESTRICTIONS AND MONITORING. INITIATIVE STATUTE.

- Increases penalties for violent and habitual sex offenders and child molesters.
- Prohibits registered sex offenders from residing within 2,000 feet of any school or park.
- Requires lifetime Global Positioning System monitoring of felony registered sex offenders.
- Expands definition of a sexually violent predator.
- Changes current two-year involuntary civil commitment for a sexually violent predator to an indeterminate commitment, subject to annual review by the Director of Mental Health and subsequent ability of sexually violent predator to petition court for sexually violent predator's conditional release or unconditional discharge.

83

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Net state prison, parole, and mental health program costs of several tens of millions of dollars initially, growing to a couple hundred million dollars annually within ten years.
- Potential one-time state mental hospital and prison capital outlay costs eventually reaching several hundred million dollars.
- Net state and local costs for court and jail operations are unknown.

ANALYSIS BY THE LEGISLATIVE ANALYST

BACKGROUND

Definition of Sex Offenses. Sex offenses are crimes of a sexual nature. They vary in type and can be misdemeanors or felonies. For example, distribution of obscene material is a misdemeanor and rape is a felony sex offense. Felony offenses are more serious crimes than misdemeanors.

Punishment for Committing Sex Offenses. Current law defines the penalties for conviction of sex-related crimes. The punishment depends primarily on the type and severity of the specific offense. Conviction of a misdemeanor sex offense is punishable by up to a year in county jail, probation, fines, or a combination of the three. Conviction of a felony sex offense can result in the same penalties as a misdemeanor or a sentence to state prison for up to a life term. The penalty assigned by the court for a felony conviction depends on the specific crime committed, as well as other factors such as the specific circumstances of the offense and the criminal history of the offender. There are about 8,000 persons convicted of a felony sex offense in California each year. Of these, about 39 percent are sent to state prison. Most of the rest are supervised on probation in the community (5 percent), sentenced to county jail (1 percent), or both (53 percent).

Sex Offender Registration, Residency Requirements, and Monitoring. Current law requires offenders convicted of specified felony or misdemeanor sex crimes to register with local law enforcement officials. There are approximately 90,000 registered sex offenders in California.

Current law bars parolees convicted of specified sex offenses against a child from residing within one-quarter or one-half mile (1,320 or 2,640 feet, respectively) of a school. The longer distance is for those parolees identified as high risk to reoffend by the California Department of Corrections and Rehabilitation (CDCR).

★ ★ ★ ANALYSIS BY THE LEGISLATIVE ANALYST (CONTINUED)

The CDCR utilizes Global Positioning System (GPS) monitoring devices to track the location of some sex offenders on parole. Currently, this monitoring is limited to about 1,000 sex offenders who have been identified as high risk to reoffend. Some county probation departments also use GPS to monitor some sex offenders on probation.

Sexually Violent Predators (SVP). Specified sex offenders who are completing their prison sentences are referred by CDCR to the Department of Mental Health (DMH) for screening and evaluation to determine whether they meet the criteria for an SVP. Under current law, an SVP is defined as "a person who has been convicted of a sexually violent offense against two or more victims and who 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." Those offenders who are found to meet the criteria are referred to district attorneys. District attorneys then determine whether to pursue their commitment by the courts to treatment in a state mental hospital as an SVP.

Offenders subject to SVP proceedings are often represented by public defenders. While these court proceedings are pending, offenders who have not completed their prison sentences continue to be held in prison. However, if an offender's prison sentence has been completed, he or she may be held either in county custody or in a state mental hospital. Offenders designated as SVPs by the courts are committed to a state mental hospital for up to two years. An offender can be recommitted by the courts in subsequent court proceedings.

As noted above, state mental hospitals hold sex offenders who have been committed as SVPs. State mental hospitals also hold some sex offenders who have completed their prison sentences, but are still undergoing SVP evaluations or commitment proceedings. As of June 2006, 456 sex offenders were being held in state hospitals with a commitment by a court as an SVP. In addition, 188 sex offenders were being held in state mental hospitals, and 81 were in county custody pending the completion of commitment proceedings.

PROPOSAL

Increase Penalties for Sex Offenses. This measure increases the penalties for specified sex offenses. It does this in several ways. In some cases:

- ***It broadens the definition*** of certain sex offenses. For example, the measure expands the definition of aggravated sexual assault of a child to include offenders who are at least seven years older than the victim, rather than the ten years required under current law.
- ***It provides for longer penalties*** for specified sex offenses. For example, it expands the list of crimes that qualify for life sentences in prison to include assault to commit rape during the commission of a first degree burglary.
- ***It prohibits probation*** in lieu of prison for some sex offenses, including spousal rape and lewd or lascivious acts.
- ***It eliminates early release credits*** for some inmates convicted of certain sex offenses (for example, habitual sex offenders who have multiple convictions for specified felony sex offenses such as rape).
- ***It extends parole*** for specified sex offenders, including habitual sex offenders.

These changes would result in longer prison and parole terms for the affected offenders.

Finally, this measure increases court-imposed fees currently charged to offenders who are required to register as sex offenders.

Require GPS Devices for Registered Sex Offenders. Generally under this measure, individuals who have been convicted of a felony sex offense that requires registration and have been sent to prison would be monitored by GPS devices while on parole and for the remainder of their lives.

The CDCR would be authorized to collect fees from affected sex offenders to cover the costs of GPS monitoring. The amount of fees collected from individual offenders would vary depending on their ability to pay.

For text of Proposition 83 see page 127.

ANALYSIS BY THE LEGISLATIVE ANALYST (CONTINUED)

Limit Where Registered Sex Offenders May Live. This measure bars any person required to register as a sex offender from living within 2,000 feet (about two-fifths of a mile) of any school or park. A violation of this provision would be a misdemeanor offense, as well as a parole violation for parolees. The longer current law restriction of one-half mile (2,640 feet) for specified high-risk sex offenders on parole would remain in effect. In addition, the measure authorizes local governments to further expand these residency restrictions.

Change SVP Law. This measure generally makes more sex offenders eligible for an SVP commitment. It does this by (1) reducing from two to one the number of prior victims of sexually violent offenses that qualify an offender for an SVP commitment and (2) making additional prior offenses—such as certain crimes committed by a person while a juvenile—"countable" for purposes of an SVP commitment. The measure also requires that SVPs be committed by the court to a state mental hospital for an undetermined period of time rather than the renewable two-year commitment provided for under existing law. As under current law, once an offender had received a commitment as an SVP, he or she could later be released from a state hospital by the courts if (1) DMH determined the individual should no longer be held or (2) the offender successfully petitioned a court for release.

The measure also changes the standard for release of SVPs from a state mental hospital. For example, current law generally requires DMH to examine the mental condition of a sex offender each year. This measure specifically requires DMH, as part of this annual review, to examine whether a person being held in a state hospital as an SVP still meets the definition of an SVP, whether release is in the best interest of the person, and whether conditions could be imposed at time of release that would adequately protect the community. The impact of these changes on the number of SVPs is unknown.

FISCAL EFFECTS

This measure would have a number of significant fiscal effects on state and local agencies. The major fiscal effects are discussed below.

State Prison Costs. This measure would increase the prison population, resulting in a significant increase in prison operating costs. In particular, increasing sentences for sex offenders would result in some sex offenders being sentenced to and remaining in prison for longer periods, resulting in a larger prison population over time. This would result in costs of unknown magnitude, but likely to be in the tens of millions of dollars annually once fully implemented in less than ten years. It is also possible that this measure could eventually result in significant additional capital outlay costs to accommodate the increase in the inmate population.

The impact on the prison population of requiring sex offenders to wear GPS devices is unclear. On the one hand, GPS monitoring could increase the number of offenders who are identified and returned to prison for violating the conditions of their parole or committing new crimes. On the other hand, GPS monitoring could act as a deterrent for some offenders from committing new violations or crimes, hence reducing the likelihood that they return to prison. Whatever net impact GPS does have on returns to prison will also affect parole, court, and local law enforcement workloads and associated costs.

State Parole and GPS Monitoring Costs. The initiative's provisions requiring specified registered sex offenders to wear GPS devices while on parole and for the remainder of their lives would result in additional costs for GPS equipment, as well as for supervision staff to track offenders in the community. These costs are likely to be in the several tens of millions of dollars annually within a few years. These costs would grow to about $100 million annually after ten years, with costs continuing to increase significantly in subsequent years.

Because the measure does not specify whether the state or local governments would be responsible for monitoring sex offenders who have been discharged from state parole supervision, it is unclear whether local governments would bear some of these long-term costs. These costs likely would be partially offset by several million dollars annually in court and parolee fees authorized by the measure, though the exact amount would largely depend on offenders' ability to pay.

★ ★ ★ ANALYSIS BY THE LEGISLATIVE ANALYST (CONTINUED)

State SVP Program Costs. By making more sex offenders eligible for SVP commitments, this measure would result in increased state costs generally in the following categories:

- ***Referral and Commitment Costs.*** These costs are mainly associated with screening sex offenders referred by CDCR to DMH to determine if they merit a full evaluation, performing such evaluations, and providing expert testimony at court commitment hearings. This measure would increase these state costs probably by the low tens of millions of dollars annually. These costs would begin to occur in the initial year of implementation.
- ***State Hospital Costs.*** State costs to staff, maintain, and operate the mental hospitals could reach $100 million annually within a decade and would continue to grow significantly thereafter. These costs would result from additional SVP commitments to state mental hospitals, as well as holding some sex offenders—who have completed their prison sentences—in state mental hospitals while they are being evaluated to determine whether they should receive an SVP commitment. (Some of the sex offenders undergoing evaluation as SVPs might also be held in county jails.)

  Additional SVP commitments could eventually result in one-time capital outlay costs of up to several hundred million dollars for the construction of additional state hospital beds.

  The additional operational and capital outlay costs would be partly offset in the long term. This is because the longer prison sentences for certain sex crimes required by this measure would delay SVP referrals and commitments to state mental hospitals. These costs would also be partly offset because the change from two-year commitments to commitments for an undetermined period of time is likely to reduce DMH's costs for SVP evaluations and court testimony. However, our analysis indicates that on balance the operating and capital outlay costs to the state are likely to be substantially greater than the savings.

Court and Jail Fiscal Impacts. This measure would also affect state and local costs associated with court and jail operations. For example, the additional SVP commitment petitions resulting from this measure would increase court costs for hearing these civil cases. Also, county jail operating costs would increase to the extent that offenders who have court decisions pending on their SVP cases were held in county jail facilities. The provision making it unlawful for sex offenders to reside within 2,000 feet of a school or park could result in additional court and jail costs to prosecute violations of this provision.

Other provisions of this measure could result in savings for court and jail operations. The measure's provisions providing for the indeterminate commitment of SVPs, instead of the current two-year recommitment process, would reduce county costs for SVP commitment proceedings. Provisions of this measure would increase the length of time that some sex offenders spend in prison or mental hospitals. To the extent that this occurs, these offenders would likely commit fewer crimes in the community, resulting in some court and local criminal justice savings.

Given the potential for the factors identified above to offset each other, the net fiscal impact of this measure on state and local costs for the court and jail operations cannot be determined at this time.

Other Impacts on State and Local Governments. There could be other savings to the extent that offenders imprisoned for longer periods require fewer government services, or commit fewer crimes that result in victim-related government costs. Alternatively, there could be an offsetting loss of revenue to the extent that offenders serving longer prison terms would have become taxpaying citizens under current law. The extent and magnitude of these impacts is unknown.

For text of Proposition 83 see page 127.

PROP 83 SEX OFFENDERS. SEXUALLY VIOLENT PREDATORS. PUNISHMENT, RESIDENCE RESTRICTIONS AND MONITORING. INITIATIVE STATUTE. ★ ★ ★

ARGUMENT IN FAVOR OF PROPOSITION 83

Proposition 83—JESSICA'S LAW—will protect our children by keeping child molesters in prison longer; keeping them away from schools and parks; and monitoring their movements after they are released.

A rape or sexual assault occurs *every two minutes.* A child is abused or neglected *every 35 seconds.*

Over 85,000 registered sex offenders live in California. Current law does not provide Law Enforcement with the tools they need to keep track of these dangerous criminals. *Secrecy is the child molester's biggest tool.* How can we protect our children if we don't even know where the sex offenders are?

Proposition 83 is named after Jessica Lunsford, a 9-year-old girl who was kidnapped, assaulted, and buried alive by a convicted sex offender who had failed to report where he lived.

Proposition 83 will:

Electronically monitor, through GPS tracking, dangerous sex offenders for life once they finish their prison terms.

Require dangerous sex offenders to *serve their entire sentence* and not be released early for any reason.

Create PREDATOR FREE ZONES *around schools and parks* to prevent sex offenders from living near where our children learn and play.

Protect children from INTERNET PREDATORS by cracking down on people who use the Internet to sexually victimize children.

Require MANDATORY MINIMUM PRISON SENTENCES for dangerous child molesters and sex criminals.

Allow prosecutors to charge criminals who possess *child pornography with a felony.* (Current law treats child porn like trespassing or driving on a suspended license!)

Crime Victims and Law Enforcement leaders urge you to pass this much needed reform. Jessica's Law is supported by:

• California State Sheriffs Association • California District Attorneys Association • California Organization of Police and Sheriffs • California Police Chiefs Association • Crime Victims United of California • California Women's Leadership Association • California Sexual Assault Investigators Association • Women Prosecutors of California • Mothers Against Predators • Mark Lunsford, father of Jessica Lunsford • Numerous cities, counties, and local sheriffs, police chiefs, and elected officials.

Law enforcement professionals know there is a high risk that a sexual predator will commit additional sex crimes after being released from prison. Prop. 83 keeps these dangerous criminals in prison longer and keeps track of them once they are released.

Proposition *83 means safer schools*, safer parks, and safer neighborhoods.

Proposition *83 means dangerous child molesters will be kept away from our children* and monitored for life.

Proposition *83 means predatory sex criminals will be punished* and serve their full sentence in every case.

Our families deserve the protection of a tough sex offender punishment and control law. The State Legislature has failed to pass Jessica's Law time and time again. WE CANNOT WAIT ANOTHER DAY TO PROTECT OUR KIDS.

Vote YES on Proposition 83—JESSICA'S LAW—to protect our families and make California a safer place for all of us.

For more information, please visit *www.JessicasLaw2006.com.*

GOVERNOR ARNOLD SCHWARZENEGGER
DISTRICT ATTORNEY BONNIE DUMANIS
San Diego County
HARRIET SALARNO, President
Crime Victims United of California

REBUTTAL TO ARGUMENT IN FAVOR OF PROPOSITION 83

The argument in favor of Proposition 83 ignores the sad lessons learned by other states. For example, the leading prosecutors' association in Iowa, which once urged the adoption of laws similar to Proposition 83, now argues that those laws be repealed because they have proven to be *ineffective, a drain on crucial law enforcement resources, and far too costly to taxpayers.* California cannot afford to repeat that mistake.

The Proponents claim that the law is directed at "child molesters" and "dangerous sex offenders," but *its most punitive and restrictive measures would apply far more broadly: even to those convicted of misdemeanor, nonviolent offenses.* They would also apply to people who have long led law-abiding lives for years after completing their sentences. More specifically, the Proposition would:

— Prohibit thousands of *misdemeanor offenders* from living near a school or park for the rest of their lives.

— Impose lifetime GPS monitoring on first-time offenders convicted of nonviolent offenses. *For example, a 19-year-old boy could be subjected to lifetime monitoring after a conviction for having sexual contact with his 17-year-old girlfriend.*

— Impose both lifetime residence restrictions and lifetime GPS monitoring on thousands of people who have lived law abiding lives for years or even decades.

These results are simply wrong.

Here's the bottom line. California has laws that protect us from Sexually Violent Predators, and this Initiative could have focused on such dangerous persons. But, it does not! *Don't be fooled.* VOTE NO ON PROPOSITION 83.

CARLEEN R. ARLIDGE, President
California Attorneys for Criminal Justice

ARGUMENT AGAINST PROPOSITION 83

Proposition 83 would cost taxpayers an estimated $500 million but would not increase our children's safety. Instead, by diluting law enforcement resources, the initiative would actually reduce most children's security while increasing the danger for those most at risk:

—First, the initiative proposes to "monitor" *every* registered sex offender, on the misguided theory that each is likely to reoffend against "strangers." But law enforcement experience shows that when sex registrants reoffend, their targets are *usually members of their own household. This Proposition would do nothing to safeguard children in their own homes, even though they are most at risk.*

—Second, the Proposition would not focus on the real problem—dangerous sex offenders—but would instead waste limited resources tracking persons who pose no risk. *The new law would create an expensive tracking system for thousands of registrants who were convicted of minor, nonviolent offenses, perhaps years or decades ago.* Law enforcement's resources should be directed toward high risk individuals living in our neighborhoods.

Proposition 83 would have other dangerous, unintended consequences. The Proposition's monitoring provisions would be least effective against those posing the greatest danger. Obviously, dangerous offenders would be the least likely to comply, so the proposed law would push the more serious offenders underground, where they would be *less effectively monitored by police.* In addition, by prohibiting sex offenders from living within 2,000 feet of a park or school, the initiative would force many offenders from urban to rural areas with smaller police forces. *A high concentration of sex offenders in rural neighborhoods will not serve public safety.*

Prosecutors in the State of Iowa know from sad experience that this type of residency restriction does not work. In 2001, Iowa adopted a similar law, but the association of county prosecutors that once advocated for that law now say that it *"does not provide the protection that was originally intended and that the cost of enforcing the requirement and unintended effects on families of offenders warrant replacing the restriction with more effective protective measures."* (February 14, 2006, "Statement on Sex Offender Residency Restrictions in Iowa," Iowa County Attorneys Association.) (To see the full Statement, go to: *www.iowa-icaa.com/index.htm* or *www.cacj.org.*)

A summary of the Iowa prosecutors' findings shows why the Iowa law was a disaster and why Proposition 83 must be rejected:

- Residency restrictions do not reduce sex offenses against children or improve children's safety.
- Residency restrictions will not be effective against 80 to 90% of sex crimes against children, because those crimes are committed by a relative or acquaintance of the child.
- Residency restrictions cause sex registrants to disappear from the registration system, harming the interest of public safety.
- Enforcing the residency restrictions is expensive and ineffective.
- The law also caused unwarranted disruption to the innocent families of ex-offenders.

For all of these reasons, vote "No" on Proposition 83!

CARLEEN R. ARLIDGE, President
California Attorneys for Criminal Justice

REBUTTAL TO ARGUMENT AGAINST PROPOSITION 83

Don't be fooled by the false arguments the group of lawyers against Proposition 83 is making. They represent criminal defense attorneys who make their living defending criminals. Of course they don't want tougher laws!

Let's consider the FACTS:

- EVERY major POLICE, SHERIFF, and DISTRICT ATTORNEY organization in California strongly supports Jessica's Law.
- EVERY major CRIME VICTIM organization in California strongly supports Jessica's Law.
- Thousands of dangerous sexual predators are living in our communities and neighborhoods, and police do not have the tools they need to track them down.
- Jessica's Law will KEEP TRACK OF FELONY SEX OFFENDERS after their release from prison by requiring them to wear a GPS tracking device at all times.
- Jessica's Law will STOP dangerous sex offenders from living near schools and parks where they can stalk and prey on our children.

Your YES vote on Proposition 83—Jessica's Law—will give law enforcement the tools they need to stop sexual predators before they strike again.

The man who confessed to murdering nine-year-old Jessica Lunsford was a convicted sex offender who failed to register with local police. He took Jessica from her bedroom window, assaulted her for three days, and buried her alive only a few doors from her home.

GPS MONITORING COULD HAVE SAVED JESSICA'S LIFE! Tragically, it's too late to save Jessica Lunsford. But it's not too late to prevent countless other children from being attacked and murdered by sexual predators.

Vote YES on 83—Jessica's Law.

MONTY HOLDEN, Executive Director
California Organization of Police and Sheriffs (COPS)

STEVE IPSEN, President
California Deputy District Attorneys Association

SHERIFF GARY PENROD, President
California State Sheriffs Association

include a bond counsel opinion to the effect that the interest on the bonds is excluded from gross income for federal tax purposes under designated conditions, the Treasurer may maintain separate accounts for the bond proceeds invested and for the investment earnings on those proceeds, and may use or direct the use of those proceeds or earnings to pay any rebate, penalty, or other payment required under federal law or take any other action with respect to the investment and use of those bond proceeds, as may be required or desirable under federal law in order to maintain the tax-exempt status of those bonds and to obtain any other advantage under federal law on behalf of the funds of this state.

5096.963. For the purposes of carrying out this chapter, the Director of Finance may authorize the withdrawal from the General Fund of an amount or amounts not to exceed the amount of the unsold bonds that have been authorized by the committee to be sold for the purpose of carrying out this chapter. Any amounts withdrawn shall be deposited in the fund. Any money made available under this section shall be returned to the General Fund, with interest at the rate earned by the money in the Pooled Money Investment Account, from proceeds received from the sale of bonds for the purpose of carrying out this chapter.

5096.964. All money deposited in the fund that is derived from premium and accrued interest on bonds sold pursuant to this chapter shall be reserved in the fund and shall be available for transfer to the General Fund as a credit to expenditures for bond interest.

5096.965. Pursuant to Chapter 4 (commencing with Section 16720) of Part 3 of Division 4 of Title 2 of the Government Code, the cost of bond issuance shall be paid out of the bond proceeds. These costs shall be shared proportionally by each program funded through this bond act.

5096.966. The bonds issued and sold pursuant to this chapter may be refunded in accordance with Article 6 (commencing with Section 16780) of Chapter 4 of Part 3 of Division 4 of Title 2 of the Government Code, which is a part of the State General Obligation Bond Law. Approval by the electors of the state for the issuance of the bonds under this chapter shall include approval of the issuance of any bonds issued to refund any bonds originally issued under this chapter or any previously issued refunding bonds.

5096.967. The Legislature hereby finds and declares that, inasmuch as the proceeds from the sale of bonds authorized by this chapter are not "proceeds of taxes" as that term is used in Article XIII B of the California Constitution, the disbursement of these proceeds is not subject to the limitations imposed by that article.

PROPOSITION 83

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends and adds sections to the Penal Code and amends sections of the Welfare and Institutions Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. SHORT TITLE

This Act shall be known and may be cited as "The Sexual Predator Punishment and Control Act: Jessica's Law."

SEC. 2. FINDINGS AND DECLARATIONS

The People find and declare each of the following:

(a) The State of California currently places a high priority on maintaining public safety through a highly skilled and trained law enforcement as well as laws that deter and punish criminal behavior.

(b) Sex offenders have very high recidivism rates. According to a 1998 report by the U.S. Department of Justice, sex offenders are the least likely to be cured and the most likely to reoffend, and they prey on the most innocent members of our society. More than two-thirds of the victims of rape and sexual assault are under the age of 18. Sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon.

(c) Child pornography exploits children and robs them of their innocence. FBI studies have shown that pornography is very influential in the actions of sex offenders. Statistics show that 90% of the predators who molest children have had some type of involvement with pornography. Predators often use child pornography to aid in their molestation.

(d) The universal use of the Internet has also ushered in an era of increased risk to our children by predators using this technology as a tool to lure children away from their homes and into dangerous situations. Therefore, to reflect society's disapproval of this type of activity, adequate penalties must be enacted to ensure predators cannot escape prosecution.

(e) With these changes, Californians will be in a better position to keep themselves, their children, and their communities safe from the threat posed by sex offenders.

(f) It is the intent of the People in enacting this measure to help Californians better protect themselves, their children, and their communities; it is not the intent of the People to embarrass or harass persons convicted of sex offenses.

(g) Californians have a right to know about the presence of sex offenders in their communities, near their schools, and around their children.

(h) California must also take additional steps to monitor sex offenders, to protect the public from them, and to provide adequate penalties for and safeguards against sex offenders, particularly those who prey on children. Existing laws that punish aggravated sexual assault, habitual sexual offenders, and child molesters must be strengthened and improved. In addition, existing laws that provide for the commitment and control of sexually violent predators must be strengthened and improved.

(i) Additional resources are necessary to adequately monitor and supervise sexual predators and offenders. It is vital that the lasting effects of the assault do not further victimize victims of sexual assault.

(j) Global Positioning System technology is an useful tool for monitoring sexual predators and other sex offenders and is a cost effective measure for parole supervision. It is critical to have close supervision of this class of criminals to monitor these offenders and prevent them from committing other crimes.

(k) California is the only state, of the number of states that have enacted laws allowing involuntary civil commitments for persons identified as sexually violent predators, which does not provide for indeterminate commitments. California automatically allows for a jury trial every two years irrespective of whether there is any evidence to suggest or prove that the committed person is no longer a sexually violent predator. As such, this act allows California to protect the civil rights of those persons committed as a sexually violent predator while at the same time protect society and the system from unnecessary or frivolous jury trial actions where there is no competent evidence to suggest a change in the committed person.

SEC. 3. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that person for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b)(1) Any person who kidnaps or carries away any individual to commit robbery, rape, spousal rape, oral copulation, sodomy, or ~~sexual penetration in~~ *any* violation of Section *264.1, 288, or* 289, shall be punished by imprisonment in the state prison for life with *the* possibility of parole.

(2) This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.

(c) In all cases in which probation is granted, the court shall, except in unusual cases where the interests of justice would best be served by a lesser penalty, require as a condition of the probation that the person be confined in the county jail for 12 months. If the court grants probation without requiring the defendant to be confined in the county jail for 12 months, it shall specify its reason or reasons for imposing a lesser penalty.

(d) Subdivision (b) shall not be construed to supersede or affect

Section 667.61. A person may be charged with a violation of subdivision (b) and Section 667.61. However, a person may not be punished under subdivision (b) and Section 667.61 for the same act that constitutes a violation of both subdivision (b) and Section 667.61.

SEC. 4. Section 220 of the Penal Code is amended to read:

220. ~~Every~~ *(a) Except as provided in subdivision (b), any* person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 ~~is punishable~~ *shall be punished* by imprisonment in the state prison for two, four, or six years.

(b) Any person who, in the commission of a burglary of the first degree, as defined in subdivision (a) of Section 460, assaults another with intent to commit rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 shall be punished by imprisonment in the state prison for life with the possibility of parole.

SEC. 5. Section 269 of the Penal Code is amended to read:

269. (a) Any person who commits any of the following acts upon a child who is under 14 years of age and ~~10~~ *seven* or more years younger than the person is guilty of aggravated sexual assault of a child:

(1) ~~A~~ *Rape, in* violation of paragraph (2) *or (6)* of subdivision (a) of Section 261.

(2) ~~A~~ *Rape or sexual penetration, in concert, in* violation of Section 264.1.

(3) Sodomy, in violation of *paragraph (2) or (3) of subdivision (c), or subdivision (d), of* Section 286~~, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person~~.

(4) Oral copulation, in violation of *paragraph (2) or (3) of subdivision (c), or subdivision (d), of* Section 288a~~, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person~~.

(5) ~~A~~ *Sexual penetration, in* violation of subdivision (a) of Section 289.

(b) Any person who violates this section is guilty of a felony and shall be punished by imprisonment in the state prison for 15 years to life.

(c) The court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6.

SEC. 6. Section 288.3 is added to the Penal Code, to read:

288.3. (a) Every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section 207, 209, 261, 264.1, 273a, 286, 288, 288a, 288.2, 289, 311.1, 311.2, 311.4 or 311.11 involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense.

(b) As used in this section, "contacts or communicates with" shall include direct and indirect contact or communication that may be achieved personally or by use of an agent or agency, any print medium, any postal service, a common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications device or system.

(c) A person convicted of a violation of subdivision (a) who has previously been convicted of a violation of subdivision (a) shall be punished by an additional and consecutive term of imprisonment in the state prison for five years.

SEC. 7. Section 290.3 of the Penal Code is amended to read:

290.3. (a) Every person who is convicted of any offense specified in subdivision (a) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for ~~violation~~ *commission* of the underlying offense, be punished by a fine of ~~two~~ *three* hundred dollars ~~($200)~~ *($300)* upon the first conviction or a fine of ~~three~~ *five* hundred dollars ~~($300)~~ *($500)* upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine.

An amount equal to all fines collected pursuant to this subdivision during the preceding month upon conviction of, or upon the forfeiture of bail by, any person arrested for, or convicted of, committing an offense specified in subdivision (a) of Section 290, shall be transferred once a month by the county treasurer to the Controller for deposit in the General Fund. Moneys deposited in the General Fund pursuant to this subdivision shall be transferred by the Controller as provided in subdivision (b).

(b) ~~Out~~ *Except as provided in subdivision (d), out* of the moneys deposited pursuant to subdivision (a) as a result of second and subsequent convictions of Section 290, one-third shall first be transferred to the Department of Justice Sexual Habitual Offender Fund, as provided in paragraph (1) of this subdivision. Out of the remainder of all moneys deposited pursuant to subdivision (a), 50 percent shall be transferred to the Department of Justice Sexual Habitual Offender Fund, as provided in paragraph (1), 25 percent shall be transferred to the Department of Justice DNA Testing Fund, as provided in paragraph (2), and 25 percent shall be allocated equally to counties that maintain a local DNA testing laboratory, as provided in paragraph (3).

(1) Those moneys so designated shall be transferred to the Department of Justice Sexual Habitual Offender Fund created pursuant to paragraph (5) of subdivision (b) of Section 11170 and, when appropriated by the Legislature, shall be used for the purposes of Chapter 9.5 (commencing with Section 13885) and Chapter 10 (commencing with Section 13890) of Title 6 of Part 4 for the purpose of monitoring, apprehending, and prosecuting sexual habitual offenders.

(2) Those moneys so designated shall be directed to the Department of Justice and transferred to the Department of Justice DNA Testing Fund, which is hereby created, for the exclusive purpose of testing deoxyribonucleic acid (DNA) samples for law enforcement purposes. The moneys in that fund shall be available for expenditure upon appropriation by the Legislature.

(3) Those moneys so designated shall be allocated equally and distributed quarterly to counties that maintain a local DNA testing laboratory. Before making any allocations under this paragraph, the Controller shall deduct the estimated costs that will be incurred to set up and administer the payment of these funds to the counties. Any funds allocated to a county pursuant to this paragraph shall be used by that county for the exclusive purpose of testing DNA samples for law enforcement purposes.

(c) Notwithstanding any other provision of this section, the Department of Corrections or the Department of the Youth Authority may collect a fine imposed pursuant to this section from a person convicted of a violation of any offense listed in subdivision (a) of Section 290, that results in incarceration in a facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority. All moneys collected by the Department of Corrections or the Department of the Youth Authority under this subdivision shall be transferred, once a month, to the Controller for deposit in the General Fund, as provided in subdivision (a), for transfer by the Controller, as provided in subdivision (b).

(d) An amount equal to one hundred dollars for every fine imposed pursuant to subdivision (a) in excess of one hundred dollars shall be transferred to the Department of Corrections and Rehabilitation to defray the cost of the global positioning system used to monitor sex offender parolees.

SEC. 8. Section 311.11 of the Penal Code is amended to read:

311.11. (a) Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a ~~public offense~~ *felony* and shall be punished by imprisonment in the *state prison, or a* county jail for up to one year, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both the fine and imprisonment.

(b) ~~If a~~ *Every* person *who commits a violation of subdivision (a), and who* has been previously convicted of a violation of this section, ~~or of a violation of subdivision (b) of Section 311.2, or subdivision (b) of Section 311.4, he or she~~ *an offense described in subparagraph (A) of paragraph (2) of subdivision (a) of Section 290, or an attempt to commit any of the above-mentioned offenses,* is guilty of a felony and shall be punished by imprisonment *in the state prison* for two, four, or six years.

(c) It is not necessary to prove that the matter is obscene in order to establish a violation of this section.

(d) This section does not apply to drawings, figurines, statues, or any film rated by the Motion Picture Association of America, nor does it apply to live or recorded telephone messages when transmitted, disseminated, or distributed as part of a commercial transaction.

SEC. 9. Section 667.5 of the Penal Code is amended to read:

667.5. Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows:

(a) Where one of the new offenses is one of the violent felonies specified in subdivision (c), in addition to and consecutive to any other prison terms therefor, the court shall impose a three-year term for each prior separate prison term served by the defendant where the prior offense was one of the violent felonies specified in subdivision (c). However, no additional term shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

(b) Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

(c) For the purpose of this section, "violent felony" shall mean any of the following:

(1) Murder or voluntary manslaughter.

(2) Mayhem.

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

(4) Sodomy ~~by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person~~ *as defined in subdivision (c) or (d) of Section 286.*

(5) Oral copulation ~~by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person~~ *as defined in subdivision (c) or (d) of Section 288a.*

(6) Lewd ~~acts on a child under the age of 14 years~~ *or lascivious act* as defined in *subdivision (a) or (b) of* Section 288.

(7) Any felony punishable by death or imprisonment in the state prison for life.

(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7*, 12022.8,* or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in *subdivision (a) of Section 12022.3, or* Section 12022.5 or 12022.55.

(9) Any robbery.

(10) Arson, in violation of subdivision (a) or (b) of Section 451.

(11) ~~The offense~~ *Sexual penetration as* defined in subdivision (a) *or (j)* of Section 289 ~~where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person~~.

(12) Attempted murder.

(13) A violation of Section 12308, 12309, or 12310.

(14) Kidnapping.

(15) Assault with the intent to commit ~~mayhem, rape, sodomy, or oral copulation~~ *a specified felony*, in violation of Section 220.

(16) Continuous sexual abuse of a child, in violation of Section 288.5.

(17) Carjacking, as defined in subdivision (a) of Section 215.

(18) ~~A~~ *Rape, spousal rape, or sexual penetration, in concert, in* violation of Section 264.1.

(19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code.

(20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code.

(21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.

(22) Any violation of Section 12022.53.

(23) A violation of subdivision (b) or (c) of Section 11418. The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

(d) For the purposes of this section, the defendant shall be deemed to remain in prison custody for an offense until the official discharge from custody or until release on parole, whichever first occurs, including any time during which the defendant remains subject to reimprisonment for escape from custody or is reimprisoned on revocation of parole. The additional penalties provided for prior prison terms shall not be imposed unless they are charged and admitted or found true in the action for the new offense.

(e) The additional penalties provided for prior prison terms shall not be imposed for any felony for which the defendant did not serve a prior separate term in state prison.

(f) A prior conviction of a felony shall include a conviction in another jurisdiction for an offense which, if committed in California, is punishable by imprisonment in the state prison if the defendant served one year or more in prison for the offense in the other jurisdiction. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense which includes all of the elements of the particular felony as defined under California law if the defendant served one year or more in prison for the offense in the other jurisdiction.

(g) A prior separate prison term for the purposes of this section shall mean a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration.

(h) Serving a prison term includes any confinement time in any state prison or federal penal institution as punishment for commission of an offense, including confinement in a hospital or other institution or facility credited as service of prison time in the jurisdiction of the confinement.

(i) For the purposes of this section, a commitment to the State Department of Mental Health as a mentally disordered sex offender following a conviction of a felony, which commitment exceeds one year in duration, shall be deemed a prior prison term.

(j) For the purposes of this section, when a person subject to the custody, control, and discipline of the Director of Corrections is incarcerated at a facility operated by the Department of the Youth Authority, that incarceration shall be deemed to be a term served in state prison.

(k) Notwithstanding subdivisions (d) and (g) or any other provision of law, where one of the new offenses is committed while the defendant is temporarily removed from prison pursuant to Section 2690 or while the defendant is transferred to a community facility pursuant to Section 3416, 6253, or 6263, or while the defendant is on furlough pursuant to Section 6254, the defendant shall be subject to the full enhancements provided for in this section.

This subdivision shall not apply when a full, separate, and consecutive term is imposed pursuant to any other provision of law.

SEC. 10. Section 667.51 of the Penal Code is amended to read:

667.51. (a) Any person who is ~~found guilty~~ *convicted* of violating Section 288 *or 288.5* shall receive a five-year enhancement for a prior conviction of an offense ~~listed~~ *specified* in subdivision (b)~~, provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the defendant remained free of both prison custody and the commission of an offense that results in a felony conviction~~.

(b) Section 261, *262,* 264.1, *269,* 285, 286, 288, 288a, 288.5, or 289, or any offense committed in another jurisdiction that includes all of the elements of any of the offenses ~~set forth~~ *specified* in this subdivision.

(c) ~~Section 261, 264.1, 286, 288, 288a, 288.5, or 289, or any offense committed in another jurisdiction that includes all of the elements of any of the offenses set forth in this subdivision.~~

~~(d)~~ A violation of Section 288 *or 288.5* by a person who has been

previously convicted two or more times of an offense ~~listed~~ *specified* in subdivision ~~(c) is punishable as a felony~~ *(b) shall be punished* by imprisonment in the state prison for 15 years to life. ~~However, if the two or more prior convictions were for violations of Section 288, this subdivision is applicable only if the current violation or at least one of the prior convictions is for an offense other than a violation of subdivision (a) of Section 288. For purposes of this subdivision, a prior conviction is required to have been for charges brought and tried separately. The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply to reduce any minimum term in a state prison imposed pursuant to this section, but that person shall not otherwise be released on parole prior to that time.~~

SEC. 11. Section 667.6 of the Penal Code is amended to read:

667.6. (a) Any person who is ~~found guilty of violating paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261, paragraph (1), (4), or (5) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, Section 288.5 or subdivision (a) of Section 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person~~ *convicted of an offense specified in subdivision (e) and* who has been convicted previously of any of those offenses shall receive a five-year enhancement for each of those prior convictions ~~provided that no enhancement shall be imposed under this subdivision for any conviction occurring prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction. In addition to the five-year enhancement imposed under this subdivision, the court also may impose a fine not to exceed twenty thousand dollars ($20,000) for anyone sentenced under these provisions. The fine imposed and collected pursuant to this subdivision shall be deposited in the Victim Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs established pursuant to Section 13837.~~

(b) Any person *who is* convicted of an offense specified in subdivision ~~(a)~~ *(e) and* who has served two or more prior prison terms as defined in Section 667.5 for any ~~offense specified in subdivision (a),~~ *of those offenses* shall receive a 10-year enhancement for each of those prior terms ~~provided that no additional enhancement shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction. In addition to the 10-year enhancement imposed under this subdivision, the court also may impose a fine not to exceed twenty thousand dollars ($20,000) for any person sentenced under this subdivision. The fine imposed and collected pursuant to this subdivision shall be deposited in the Victim Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs established pursuant to Section 13837.~~

(c) In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of ~~Section 220, other than an assault with intent to commit mayhem, provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem, paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261, paragraph (1), (4), or (5) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, Section 288.5 or subdivision (a) of Section 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person whether or not the crimes were committed during a single transaction~~ *an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e).* If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.

(d) A full, separate, and consecutive term shall be ~~served~~ *imposed* for each violation of ~~Section 220, other than an assault with intent to commit mayhem, provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem, paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261, paragraph (1), (4), or (5) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, subdivision (a) of Section 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person~~ *an offense specified in subdivision (e)* if the crimes involve separate victims or involve the same victim on separate occasions.

In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.

The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.

(e) *This section shall apply to the following offenses:*

(1) Rape, in violation of paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261.

(2) Spousal rape, in violation of paragraph (1), (4), or (5) of subdivision (a) of Section 262.

(3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.

(4) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 286.

(5) Lewd or lascivious act, in violation of subdivision (b) of Section 288.

(6) Continuous sexual abuse of a child, in violation of Section 288.5.

(7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 288a.

(8) Sexual penetration, in violation of subdivision (a) or (g) of Section 289.

(9) As a present offense under subdivision (c) or (d), assault with intent to commit a specified sexual offense, in violation of Section 220.

(10) As a prior conviction under subdivision (a) or (b), an offense committed in another jurisdiction that includes all of the elements of an offense specified in this subdivision.

(f) In addition to any enhancement imposed pursuant to subdivision (a) or (b), the court may also impose a fine not to exceed twenty thousand dollars ($20,000) for anyone sentenced under those provisions. The fine imposed and collected pursuant to this subdivision shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs established pursuant to Section 13837. If the court orders a fine to be imposed pursuant to *this* subdivision ~~(a) or (b)~~, the actual administrative cost of collecting that fine, not to exceed 2 percent of the total amount paid, may be paid into the general fund of the county treasury for the use and benefit of the county.

SEC. 12. Section 667.61 of the Penal Code is amended to read:

667.61. (a) ~~A~~ *Any* person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for *25 years to* life ~~and shall not be eligible for release on parole for 25 years~~

~~except as provided in subdivision (j)~~.

(b) Except as provided in subdivision (a), ~~a~~ *any* person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for *15 years to* life ~~and shall not be eligible for release on parole for 15 years except as provided in subdivision (j)~~.

(c) This section shall apply to any of the following offenses:

(1) ~~A~~ *Rape, in* violation of paragraph (2) *or (6)* of subdivision (a) of Section 261.

(2) ~~A~~ *Spousal rape, in* violation of paragraph (1) *or (4)* of subdivision (a) of Section 262.

(3) ~~A~~ *Rape, spousal rape, or sexual penetration, in concert, in* violation of Section 264.1.

(4) ~~A~~ *Lewd or lascivious act, in* violation of subdivision (b) of Section 288.

(5) ~~A~~ *Sexual penetration, in* violation of subdivision (a) of Section 289.

(6) ~~Sodomy or oral copulation~~ *Sodomy,* in violation of *paragraph (2) or (3) of subdivision (c), or subdivision (d), of* Section 286~~ or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person~~.

(7) ~~A~~ *Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a.*

(8) Lewd or lascivious act, in violation of subdivision (a) of Section 288~~, unless the defendant qualifies for probation under subdivision (c) of Section 1203.066~~.

(9) Continuous sexual abuse of a child, in violation of Section 288.5.

(d) The following circumstances shall apply to the offenses specified in subdivision (c):

(1) The defendant has been previously convicted of an offense specified in subdivision (c), including an offense committed in another jurisdiction that includes all of the elements of an offense specified in subdivision (c).

(2) The defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense in subdivision (c).

(3) The defendant inflicted aggravated mayhem or torture on the victim or another person in the commission of the present offense in violation of Section 205 or 206.

(4) The defendant committed the present offense during the commission of a burglary *of the first degree*, as defined in subdivision (a) of Section 460, with intent to commit an offense specified in subdivision (c).

(5) The defendant committed the present offense in violation of Section 264.1, subdivision (d) of Section 286, or subdivision (d) of Section 288a, and, in the commission of that offense, any person committed any act described in paragraph (2), (3), or (4) of this subdivision.

(e) The following circumstances shall apply to the offenses specified in subdivision (c):

(1) Except as provided in paragraph (2) of subdivision (d), the defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5.

(2) Except as provided in paragraph (4) of subdivision (d), the defendant committed the present offense during the commission of a burglary~~, as defined in subdivision (a) of Section 460, or during the commission of a burglary of a building, including any commercial establishment, which was then closed to the public,~~ in violation of Section 459.

(3) The defendant personally inflicted great bodily injury on the victim or another person in the commission of the present offense in violation of Section 12022.53, 12022.7, or 12022.8.

(4) The defendant personally used a dangerous or deadly weapon or *a* firearm in the commission of the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53.

(5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim.

(6) The defendant engaged in the tying or binding of the victim or another person in the commission of the present offense.

(7) The defendant administered a controlled substance to the victim ~~by force, violence, or fear~~ in the commission of the present offense in violation of Section 12022.75.

(8) The defendant committed the present offense in violation of Section 264.1, subdivision (d) of Section 286, or subdivision (d) of Section 288a, and, in the commission of that offense, any person committed any act described in paragraph (1), (2), (3), (4), (6), or (7) of this subdivision.

(f) If only the minimum number of circumstances specified in subdivision (d) or (e) ~~which~~ *that* are required for the punishment provided in subdivision (a) or (b) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) or (b)*, whichever is greater,* rather than being used to impose the punishment authorized under any other *provision of* law, unless another *provision of* law provides for a greater penalty *or the punishment under another provision of law can be imposed in addition to the punishment provided by this section.* However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a), and any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other *provision of* law.

(g) Notwithstanding *Section 1385 or* any other *provision of* law, the court shall not strike any *allegation, admission, or finding of any* of the circumstances specified in subdivision (d) or (e) *for any person who is subject to punishment under this section.*

~~(g) The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable.~~

(h) ~~Probation~~ *Notwithstanding any other provision of law, probation* shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is subject to punishment under this section ~~for any offense specified in paragraphs (1) to (6), inclusive, of subdivision (c)~~.

(i) For ~~the~~ *any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6.*

(j) The penalties provided in this section ~~to~~ *shall* apply~~,~~ *only if* the existence of any ~~fact required under~~ *circumstance specified in* subdivision (d) or (e) ~~shall be~~ *is* alleged in the accusatory pleading *pursuant to this section,* and *is* either admitted by the defendant in open court or found to be true by the trier of fact.

~~(j) Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply to reduce the minimum term of 25 years in the state prison imposed pursuant to subdivision (a) or 15 years in the state prison imposed pursuant to subdivision (b). However, in no case shall the minimum term of 25 or 15 years be reduced by more than 15 percent for credits granted pursuant to Section 2933, 4019, or any other law providing for conduct credit reduction. In no case shall any person who is punished under this section be released on parole prior to serving at least 85 percent of the minimum term of 25 or 15 years in the state prison.~~

SEC. 13. Section 667.71 of the Penal Code amended to read:

667.71. (a) For the purpose of this section, a habitual sexual offender is a person who has been previously convicted of one or more of the offenses ~~listed~~ *specified* in subdivision (c) and who is convicted in the present proceeding of one of those offenses.

(b) A habitual sexual offender ~~is punishable~~ *shall be punished* by imprisonment in the state prison for 25 years to life. ~~Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply to reduce any minimum term of 25 years in the state prison imposed pursuant to this section. However, in no case shall the minimum term of 25 years be reduced by more than 15 percent for credits granted pursuant to Section 2933, 4019, or any other law providing for conduct credit reduction. In no case shall any person who is punished under this section be released on parole prior to serving at least 85 percent of the minimum term of 25~~

~~years in the state prison.~~

(c) This section shall apply to any of the following offenses:

(1) ~~A~~ *Rape, in* violation of paragraph (2) *or (6)* of subdivision (a) of Section 261.

(2) ~~A~~ *Spousal rape, in* violation of paragraph (1) *or (4)* of subdivision (a) of Section 262.

(3) ~~A~~ *Rape, spousal rape, or sexual penetration, in concert, in* violation of Section 264.1.

(4) ~~A~~ *Lewd or lascivious act, in* violation of subdivision (a) or (b) of Section 288.

(5) ~~A~~ *Sexual penetration, in* violation of subdivision (a) *or (j)* of Section 289.

(6) ~~A~~ *Continuous sexual abuse of a child, in* violation of Section 288.5.

(7) ~~A~~ *Sodomy, in* violation of subdivision (c) *or (d)* of Section 286 ~~by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person~~.

(8) ~~A violation of subdivision (d) of Section 286.~~

~~(9) A~~ *Oral copulation, in* violation of subdivision (c) or (d) of Section 288a ~~by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person~~.

~~(10) A~~ *(9) Kidnapping, in* violation of subdivision (b) of Section 207.

~~(11) A~~ *(10) Kidnapping, in* violation of former subdivision (d) of Section 208 (kidnapping to commit specified sex offenses).

~~(12)~~ *(11)* Kidnapping, in violation of *subdivision (b) of* Section 209 with the intent to commit ~~rape, spousal rape, oral copulation, or sodomy or sexual penetration in violation of Section 289~~ *a specified sexual offense.*

~~(13) A~~ *(12) Aggravated sexual assault of a child, in* violation of Section 269.

~~(14)~~ *(13)* An offense committed in another jurisdiction that ~~has~~ *includes* all *of* the elements of an offense specified in ~~paragraphs (1) to (13), inclusive, of~~ this subdivision.

(d) *Notwithstanding Section 1385 or any other provision of law, the court shall not strike any allegation, admission, or finding of any prior conviction specified in subdivision (c) for any person who is subject to punishment under this section.*

(e) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is subject to punishment under this section.

(f) This section shall apply only if the defendant's status as a habitual sexual offender is alleged in the ~~information~~ *accusatory pleading*, and either admitted by the defendant in open court, or found to be true by the ~~jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by trial by court sitting without a jury~~ *trier of fact.*

SEC. 14. Section 1203.06 of the Penal Code is amended to read:

1203.06. ~~Notwithstanding Section 1203:~~

(a) ~~Probation~~ *Notwithstanding any other provision of law, probation* shall not be granted to, nor shall the execution or imposition of sentence be suspended for, *nor shall a finding bringing the defendant within this section be stricken pursuant to Section 1385 for,* any of the following persons:

(1) Any person who personally used a firearm during the commission or attempted commission of any of the following crimes:

(A) Murder.

(B) Robbery, in violation of Section 211.

(C) Kidnapping, in violation of Section 207, *209, or 209.5*.

(D) ~~Kidnapping in violation of Section 209~~ *Lewd or lascivious act, in violation of Section 288*.

(E) Burglary of the first degree, as defined in Section 460.

(F) ~~Except as provided in Section 1203.065, rape~~ *Rape,* in violation of ~~paragraph (2) of subdivision (a) of~~ Section 261*, 262, or 264.1.*

(G) Assault with intent to commit ~~rape or sodomy~~ *a specified sexual offense*, in violation of Section 220.

(H) Escape, in violation of Section 4530 or 4532.

(I) Carjacking, in violation of Section 215.

(J) ~~Any person convicted of aggravated~~ *Aggravated* mayhem, in violation of Section 205.

(K) Torture, in violation of Section 206.

(L) ~~Kidnapping, in violation of Section 209.5~~ *Continuous sexual abuse of a child, in violation of Section 288.5*.

(M) A felony violation of Section 136.1 or 137.

(N) Sodomy, in violation of Section 286.

(O) Oral copulation, in violation of Section 288a.

(P) Sexual penetration, in violation of Section 289 or 264.1.

(Q) Aggravated sexual assault of a child, in violation of Section 269.

(2) Any person previously convicted of a felony specified in ~~subparagraphs (A) to (L), inclusive, of~~ paragraph (1), or assault with intent to commit murder under former Section 217, who is convicted of a subsequent felony and who was personally armed with a firearm at any time during its commission or attempted commission or was unlawfully armed with a firearm at the time of his or her arrest for the subsequent felony.

(3) Aggravated arson, in violation of Section 451.5.

(b)(l) The existence of any fact ~~which~~ *that* would make a person ineligible for probation under subdivision (a) shall be alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the ~~jury trying the issue of guilt, by the court where guilt is established by plea of guilty or nolo contendere, or by trial by the court sitting without a jury~~ *trier of fact.*

(2) ~~This subdivision does not prohibit the adjournment of criminal proceedings pursuant to Division 6 (commencing with Section 6000) of the Welfare and Institutions Code.~~

~~(3)~~ As used in subdivision (a), "used a firearm" means to display a firearm in a menacing manner, to intentionally fire it, ~~or~~ to intentionally strike or hit a human being with it*, or to use it in any manner that qualifies under Section 12022.5.*

~~(4)~~ *(3)* As used in subdivision (a), "armed with a firearm" means to knowingly carry *or have available for use* a firearm as a means of offense or defense.

SEC. 15. Section 1203.065 of the Penal Code is amended to read:

1203.065. (a) Notwithstanding any other *provision of* law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is convicted of violating paragraph (2) *or (6)* of subdivision (a) of Section 261, Section 264.1, 266h, 266i, ~~or~~ 266j, *or 269, paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286, paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a,* subdivision (a) of Section 289, ~~of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person,~~ or ~~of violating~~ subdivision (c) of Section 311.4.

(b)*(1)* Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person who is convicted of ~~a violation of~~ *violating* paragraph (7) of subdivision (a) of Section 261, subdivision (k) of Section 286, subdivision (k) of Section 288a, *subdivision (g) of Section 289,* or Section 220 for assault with intent to commit ~~any of the following: rape, sodomy, oral copulation, or any violation of Section 264.1, subdivision (b) of Section 288, or Section 289~~ *a specified sexual offense.*

(2) When probation is granted, the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by the disposition.

SEC. 16. Section 1203.075 of the Penal Code is amended to read:

1203.075. ~~Notwithstanding the provisions of Section 1203:~~

(a) ~~Probation~~ *Notwithstanding any other provision of law, probation* shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within this section be stricken pursuant to Section 1385 for, any person who~~, with the intent to inflict the injury,~~ personally inflicts great bodily injury*, as defined in Section 12022.7,* on the person of another in the commission or attempted commission of any of the following crimes:

(1) Murder.

(2) Robbery, in violation of Section 211.

(3) Kidnapping, in violation of Section 207*, 209, or 209.5.*

(4) ~~Kidnapping, in violation of Section 209~~ *Lewd or lascivious act, in violation of Section 288*.

(5) Burglary of the first degree, as defined in Section 460.

(6) Rape, in violation of ~~paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of~~ Section *261,* 262*, or 264.1.*

(7) Assault with intent to commit ~~rape or sodomy~~ *a specified sexual offense*, in violation of Section 220.

(8) Escape, in violation of Section 4530 or 4532.

(9) ~~A~~ *Sexual penetration, in* violation of ~~subdivision (a) of~~ Section 289 *or 264.1.*

(10) Sodomy, in violation of Section 286.

(11) Oral copulation, in violation of Section 288a.

(12) Carjacking, in violation of Section 215.

(13) ~~Kidnapping, in violation of Section 209.5~~ *Continuous sexual abuse of a child, in violation of Section 288.5.*

(14) Aggravated sexual assault of a child, in violation of Section 269.

(b)~~(1)~~ The existence of any fact ~~which~~ *that* would make a person ineligible for probation under subdivision (a) shall be alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the ~~jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by a trial by the court sitting without a jury~~ *trier of fact.*

~~(2) This subdivision does not prohibit the adjournment of criminal proceedings pursuant to Division 3 (commencing with Section 3000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code.~~

~~(3) As used in subdivision (a), "great bodily injury" means "great bodily injury" as defined in Section 12022.7.~~

SEC. 17. Section 3000 of the Penal Code is amended to read:

3000. (a)(l) The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees, including the judicious use of revocation actions, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge. A sentence pursuant to Section 1168 or 1170 shall include a period of parole, unless waived, as provided in this section.

(2) The Legislature finds and declares that it is not the intent of this section to diminish resources allocated to the Department of Corrections for parole functions for which the department is responsible. It is also not the intent of this section to diminish the resources allocated to the Board of Prison Terms to execute its duties with respect to parole functions for which the board is responsible.

(3) The Legislature finds and declares that diligent effort must be made to ensure that parolees are held accountable for their criminal behavior, including, but not limited to, the satisfaction of restitution fines and orders.

(4) ~~Any finding made pursuant to Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code, that a person is~~ *The parole period of any person found to be* a sexually violent predator shall ~~not toll, discharge, or otherwise affect that person's~~ *be tolled until that person is found to no longer be a sexually violent predator, at which time the* period of parole*, or any remaining portion thereof, shall begin to run.*

(b) Notwithstanding any provision to the contrary in Article 3 (commencing with Section 3040) of this chapter, the following shall apply:

(1) At the expiration of a term of imprisonment of one year and one day, or a term of imprisonment imposed pursuant to Section 1170 or at the expiration of a term reduced pursuant to Section 2931 or 2933, if applicable, the inmate shall be released on parole for a period not exceeding three years, except that any inmate sentenced for an offense specified in paragraph (3), (4), (5), (6), (11), (16), or (18) of subdivision (c) of Section 667.5 shall be released on parole for a period not exceeding five years, unless in either case the parole authority for good cause waives parole and discharges the inmate from the custody of the department.

(2) In the case of any inmate sentenced under Section 1168, the period of parole shall not exceed five years in the case of an inmate imprisoned for any offense other than first or second degree murder for which the inmate has received a life sentence, and shall not exceed three years in the case of any other inmate, unless in either case the parole authority for good cause waives parole and discharges the inmate from custody of the department. This subdivision shall also be applicable to inmates who committed crimes prior to July 1, 1977, to the extent specified in Section 1170.2.

(3) Notwithstanding paragraphs (1) and (2), in the case of any offense for which the inmate has received a life sentence pursuant to Section 667.61 or 667.71, the period of parole shall be ~~five~~ *10* years. ~~Upon the request of the Department of Corrections, and on the grounds that the paroled inmate may pose a substantial danger to public safety, the Board of Prison Terms shall conduct a hearing to determine if the parolee shall be subject to a single additional five-year period of parole. The board shall conduct the hearing pursuant to the procedures and standards governing parole revocation. The request for parole extension shall be made no less than 180 days prior to the expiration of the initial five-year period of parole.~~

(4) The parole authority shall consider the request of any inmate regarding the length of his or her parole and the conditions thereof.

(5) Upon successful completion of parole, or at the end of the maximum statutory period of parole specified for the inmate under paragraph (1), (2), or (3), as the case may be, whichever is earlier, the inmate shall be discharged from custody. The date of the maximum statutory period of parole under this subdivision and paragraphs (1), (2), and (3) shall be computed from the date of initial parole ~~or from the date of extension of parole pursuant to paragraph (3)~~ and shall be a period chronologically determined. Time during which parole is suspended because the prisoner has absconded or has been returned to custody as a parole violator shall not be credited toward any period of parole unless the prisoner is found not guilty of the parole violation. However, ~~in no case, except~~ *the period of parole is subject to the following:*

(A) Except as provided in Section 3064, *in no case* may a prisoner subject to three years on parole be retained under parole supervision or in custody for a period longer than four years from the date of his or her initial ~~parole, and, except~~ *parole.*

(B) Except as provided in Section 3064, in no case may a prisoner subject to five years on parole be retained under parole supervision or in custody for a period longer than seven years from the date of his or her initial parole ~~or from the date of extension of parole pursuant to paragraph (3)~~.

(C) Except as provided in Section 3064, in no case may a prisoner subject to 10 years on parole be retained under parole supervision or in custody for a period longer than 15 years from the date of his or her initial parole.

(6) The Department of Corrections shall meet with each inmate at least 30 days prior to his or her good time release date and shall provide, under guidelines specified by the parole authority, the conditions of parole and the length of parole up to the maximum period of time provided by law. The inmate has the right to reconsideration of the length of parole and conditions thereof by the parole authority. The Department of Corrections or the Board of Prison Terms may impose as a condition of parole that a prisoner make payments on the prisoner's outstanding restitution fines or orders imposed pursuant to subdivision (a) or (c) of Section 13967 of the Government Code, as operative prior to September 28, 1994, or subdivision (b) or (f) of Section 1202.4.

(7) For purposes of this chapter, the Board of Prison Terms shall be considered the parole authority.

(8) The sole authority to issue warrants for the return to actual custody of any state prisoner released on parole rests with the Board of Prison Terms, except for any escaped state prisoner or any state prisoner released prior to his or her scheduled release date who should be returned to custody, and Section 3060 shall apply.

(9) It is the intent of the Legislature that efforts be made with respect to persons who are subject to subparagraph (C) of paragraph (1) of subdivision (a) of Section 290 who are on parole to engage them in treatment.

SEC. 18. Section 3000.07 is added to the Penal Code, to read:

3000.07. (a) Every inmate who has been convicted for any felony violation of a "registerable sex offense" described in subparagraph (A) of paragraph (2) of subdivision (a) of Section 290 or any attempt to commit any of the above-mentioned offenses and who is committed to prison and released on parole pursuant to Section 3000 or 3000.1 shall be monitored by a global positioning system for the term of his or her parole, or for the duration or any remaining part thereof, whichever period of time is less.

(b) Any inmate released on parole pursuant to this section shall be required to pay for the costs associated with the monitoring by a global positioning system. However, the Department of Corrections shall waive any

or all of that payment upon a finding of an inability to pay. The department shall consider any remaining amounts the inmate has been ordered to pay in fines, assessments and restitution fines, fees, and orders, and shall give priority to the payment of those items before requiring that the inmate pay for the global positioning monitoring. No inmate shall be denied parole on the basis of his or her inability to pay for those monitoring costs.

SEC. 19. Section 3001 of the Penal Code is amended to read:

3001. (a) Notwithstanding any other provision of law, when any person referred to in paragraph (1) of subdivision (b) of Section 3000 who was not imprisoned for committing a violent felony, as defined in subdivision (c) of Section 667.5, has been released on parole from the state prison, and has been on parole continuously for one year since release from confinement, within 30 days, that person shall be discharged from parole, unless the Department of Corrections recommends to the Board of Prison Terms that the person be retained on parole and the board, for good cause, determines that the person will be retained. Notwithstanding any other provision of law, when any person referred to in paragraph (1) of subdivision (b) of Section 3000 who was imprisoned for committing a violent felony, as defined in subdivision (c) of Section 667.5, has been released on parole from the state prison for a period not exceeding three years and has been on parole continuously for two years since release from confinement, or has been released on parole from the state prison for a period not exceeding five years and has been on parole continuously for three years since release from confinement, the department shall discharge, within 30 days, that person from parole, unless the department recommends to the board that the person be retained on parole and the board, for good cause, determines that the person will be retained. The board shall make a written record of its determination and the department shall transmit a copy thereof to the parolee.

(b) Notwithstanding any other provision of law, when any person referred to in paragraph (2) ~~or (3)~~ of subdivision (b) of Section 3000 has been released on parole from the state prison, and has been on parole continuously for three years since release from confinement ~~or since extension of parole~~, the board shall discharge, within 30 days, the person from parole, unless the board, for good cause, determines that the person will be retained on parole. The board shall make a written record of its determination and the department shall transmit a copy thereof to the parolee.

(c) *Notwithstanding any other provision of law, when any person referred to in paragraph (3) of subdivision (b) of Section 3000 has been released on parole from the state prison, and has been on parole continuously for six years since release from confinement, the board shall discharge, within 30 days, the person from parole, unless the board, for good cause, determines that the person will be retained on parole. The board shall make a written record of its determination and the department shall transmit a copy thereof to the parolee.*

(d) In the event of a retention on parole, the parolee shall be entitled to a review by the parole authority each year thereafter until the maximum statutory period of parole has expired.

~~(d)~~ *(e)* The amendments to this section made during the 1987–88 Regular Session of the Legislature shall only be applied prospectively and shall not extend the parole period for any person whose eligibility for discharge from parole was fixed as of the effective date of those amendments.

SEC. 20. Section 3003 of the Penal Code is amended to read:

3003. (a) Except as otherwise provided in this section, an inmate who is released on parole shall be returned to the county that was the last legal residence of the inmate prior to his or her incarceration.

For purposes of this subdivision, "last legal residence" shall not be construed to mean the county wherein the inmate committed an offense while confined in a state prison or local jail facility or while confined for treatment in a state hospital.

(b) Notwithstanding subdivision (a), an inmate may be returned to another county if that would be in the best interests of the public. If the Board of Prison Terms setting the conditions of parole for inmates sentenced pursuant to subdivision (b) of Section 1168, as determined by the parole consideration panel, or the Department of Corrections setting the conditions of parole for inmates sentenced pursuant to Section 1170, decides on a return to another county, it shall place its reasons in writing in the parolee's permanent record and include these reasons in the notice to the sheriff or chief of police pursuant to Section 3058.6. In making its decision, the paroling authority shall consider, among others, the following factors, giving the greatest weight to the protection of the victim and the safety of the community:

(1) The need to protect the life or safety of a victim, the parolee, a witness, or any other person.

(2) Public concern that would reduce the chance that the inmate's parole would be successfully completed.

(3) The verified existence of a work offer, or an educational or vocational training program.

(4) The existence of family in another county with whom the inmate has maintained strong ties and whose support would increase the chance that the inmate's parole would be successfully completed.

(5) The lack of necessary outpatient treatment programs for parolees receiving treatment pursuant to Section 2960.

(c) The Department of Corrections, in determining an out-of-county commitment, shall give priority to the safety of the community and any witnesses and victims.

(d) In making its decision about an inmate who participated in a joint venture program pursuant to Article 1.5 (commencing with Section 2717.1) of Chapter 5, the paroling authority shall give serious consideration to releasing him or her to the county where the joint venture program employer is located if that employer states to the paroling authority that he or she intends to employ the inmate upon release.

(e)(l) The following information, if available, shall be released by the Department of Corrections to local law enforcement agencies regarding a paroled inmate who is released in their jurisdictions:

(A) Last, first, and middle name.

(B) Birth date.

(C) Sex, race, height, weight, and hair and eye color.

(D) Date of parole and discharge.

(E) Registration status, if the inmate is required to register as a result of a controlled substance, sex, or arson offense.

(F) California Criminal Information Number, FBI number, social security number, and driver's license number.

(G) County of commitment.

(H) A description of scars, marks, and tattoos on the inmate.

(I) Offense or offenses for which the inmate was convicted that resulted in parole in this instance.

(J) Address, including all of the following information:

(i) Street name and number. Post office box numbers are not acceptable for purposes of this subparagraph.

(ii) City and ZIP Code.

(iii) Date that the address provided pursuant to this subparagraph was proposed to be effective.

(K) Contact officer and unit, including all of the following information:

(i) Name and telephone number of each contact officer.

(ii) Contact unit type of each contact officer such as units responsible for parole, registration, or county probation.

(L) A digitized image of the photograph and at least a single digit fingerprint of the parolee.

(M) A geographic coordinate for the parolee's residence location for use with a Geographical Information System (GIS) or comparable computer program.

(2) The information required by this subdivision shall come from the statewide parolee database. The information obtained from each source shall be based on the same timeframe.

(3) All of the information required by this subdivision shall be provided utilizing a computer-to-computer transfer in a format usable by a desktop computer system. The transfer of this information shall be continually available to local law enforcement agencies upon request.

(4) The unauthorized release or receipt of the information described in this subdivision is a violation of Section 11143.

(f) Notwithstanding any other provision of law, an inmate who is released on parole shall not be returned to a location within 35 miles of the actual residence of a victim of, or a witness to, a violent felony as defined in paragraphs (1) to (7), inclusive, of subdivision (c) of Section 667.5 or a

felony in which the defendant inflicts great bodily injury on any person other than an accomplice that has been charged and proved as provided for in Section 12022.53, 12022.7, or 12022.9, if the victim or witness has requested additional distance in the placement of the inmate on parole, and if the Board of Prison Terms or the Department of Corrections finds that there is a need to protect the life, safety, or well-being of a victim or witness.

(g)~~(1) Notwithstanding any other law, an inmate who is released on parole for any violation of Section 288 or 288.5 shall not be placed or reside, for the duration of his or her period of parole, within one quarter mile of any public or private school, including any or all of kindergarten and grades 1 to 8, inclusive.~~

Notwithstanding any other law, an inmate who is released on parole for a violation of Section 288 or 288.5 whom the Department of Corrections and Rehabilitation determines poses a high risk to the public shall not be placed or reside, for the duration of his or her parole, within one-half mile of any public or private school including any or all of kindergarten and grades 1 to 12, inclusive.

~~(h)~~ Notwithstanding any other law, an inmate who is released on parole for an offense involving stalking shall not be returned to a location within 35 miles of the victim's actual residence or place of employment if the victim or witness has requested additional distance in the placement of the inmate on parole, and if the Board of Prison Terms or the Department of Corrections finds that there is a need to protect the life, safety, or well-being of the victim.

~~(i)~~ *(h)* The authority shall give consideration to the equitable distribution of parolees and the proportion of out-of-county commitments from a county compared to the number of commitments from that county when making parole decisions.

~~(j)~~ *(i)* An inmate may be paroled to another state pursuant to any other law.

~~(k)~~ *(j)*(1) Except as provided in paragraph (2), the Department of Corrections shall be the agency primarily responsible for, and shall have control over, the program, resources, and staff implementing the Law Enforcement Automated Data System (LEADS) in conformance with subdivision (e).

(2) Notwithstanding paragraph (1), the Department of Justice shall be the agency primarily responsible for the proper release of information under LEADS that relates to fingerprint cards.

SEC. 21. Section 3003.5 of the Penal Code is amended to read:

3003.5. *(a)* Notwithstanding any other provision of law, when a person is released on parole after having served a term of imprisonment in state prison for any offense for which registration is required pursuant to Section 290, that person may not, during the period of parole, reside in any single family dwelling with any other person also required to register pursuant to Section 290, unless those persons are legally related by blood, marriage, or adoption. For purposes of this section, "single family dwelling" shall not include a residential facility which serves six or fewer persons.

(b) Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.

(c) Nothing in this section shall prohibit municipal jurisdictions from enacting local ordinances that further restrict the residency of any person for whom registration is required pursuant to Section 290.

SEC. 22. Section 3004 of the Penal Code is amended to read:

3004. *(a)* Notwithstanding any other law, the parole authority may require, as a condition of release on parole or reinstatement on parole, or as an intermediate sanction in lieu of return to prison, that an inmate or parolee agree in writing to the use of electronic monitoring or supervising devices for the purpose of helping to verify his or her compliance with all other conditions of parole. The devices shall not be used to eavesdrop or record any conversation, except a conversation between the parolee and the agent supervising the parolee which is to be used solely for the purposes of voice identification.

(b) Every inmate who has been convicted for any felony violation of a "registerable sex offense" described in subparagraph (A) of paragraph (2) of subdivision (a) of Section 290 or any attempt to commit any of the above-mentioned offenses and who is committed to prison and released on parole pursuant to Section 3000 or 3000.1 shall be monitored by a global positioning system for life.

(c) Any inmate released on parole pursuant to this section shall be required to pay for the costs associated with the monitoring by a global positioning system. However, the Department of Corrections shall waive any or all of that payment upon a finding of an inability to pay. The department shall consider any remaining amounts the inmate has been ordered to pay in fines, assessments and restitution fines, fees, and orders, and shall give priority to the payment of those items before requiring that the inmate pay for the global positioning monitoring.

SEC. 23. Section 12022.75 of the Penal Code is amended to read:

12022.75. ~~Any~~ *(a) Except as provided in subdivision (b), any* person who, for the purpose of committing a felony, administers by injection, inhalation, ingestion, or any other means, any controlled substance listed in Section 11054, 11055, 11056, 11057, or 11058 of the Health and Safety Code, against the victim's will by means of force, violence, or fear of immediate and unlawful bodily injury to the victim or another person, shall, in addition and consecutive to the penalty provided for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of three years.

(b)(1) Any person who, in the commission or attempted commission of any offense specified in paragraph (2), administers any controlled substance listed in Section 11054, 11055, 11056, 11057, or 11058 of the Health and Safety Code to the victim shall be punished by an additional and consecutive term of imprisonment in the state prison for five years.

(2) This subdivision shall apply to the following offenses:

(A) Rape, in violation of paragraph (3) or (4) of subdivision (a) of Section 261.

(B) Sodomy, in violation of subdivision (f) or (i) of Section 286.

(C) Oral copulation, in violation of subdivision (f) or (i) of Section 288a.

(D) Sexual penetration, in violation of subdivision (d) or (e) of Section 289.

(E) Any offense specified in subdivision (c) of Section 667.61.

SEC. 24. Section 6600 of the Welfare and Institutions Code is amended to read:

6600. As used in this article, the following terms have the following meanings:

(a)(1) "Sexually violent predator" means a person who has been convicted of a sexually violent offense against ~~two~~ *one* or more victims and who 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.

(2) For purposes of this subdivision any of the following shall be considered a conviction for a sexually violent offense:

(A) A prior or current conviction that resulted in a determinate prison sentence for an offense described in subdivision (b).

(B) A conviction for an offense described in subdivision (b) that was committed prior to July 1, 1977, and that resulted in an indeterminate prison sentence.

(C) A prior conviction in another jurisdiction for an offense that includes all of the elements of an offense described in subdivision (b).

(D) A conviction for an offense under a predecessor statute that includes all of the elements of an offense described in subdivision (b).

(E) A prior conviction for which the inmate received a grant of probation for an offense described in subdivision (b).

(F) A prior finding of not guilty by reason of insanity for an offense described in subdivision (b).

(G) A conviction resulting in a finding that the person was a mentally disordered sex offender.

(H) A prior conviction for an offense described in subdivision (b) for which the person was committed to the Department of the Youth Authority pursuant to Section 1731.5.

(I) A prior conviction for an offense described in subdivision (b) that resulted in an indeterminate prison sentence.

(3) Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an

offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health. Jurors shall be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a currently 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.

(4) The provisions of this section shall apply to any person against whom proceedings were initiated for commitment as a sexually violent predator on or after January 1, 1996.

(b) "Sexually violent offense" means the following acts when committed by force, violence, duress, menace, ~~or~~ fear of immediate and unlawful bodily injury on the victim or another person, *or threatening to retaliate in the future against the victim or any other person,* and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as ~~provided~~ *defined* in subdivision (a): a felony violation of ~~paragraph (2) of subdivision (a) of~~ Section 261, ~~paragraph (1) of subdivision (a) of Section~~ 262, ~~Section~~ 264.1, *269, 286,* ~~subdivision (a) or (b) of Section~~ 288, *288a, 288.5,* or ~~subdivision (a) of Section~~ 289 of the Penal Code, or ~~sodomy or oral copulation in violation of Section 286 or 288a of the Penal Code~~ *any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code.*

(c) "Diagnosed mental disorder" includes a congenital or acquired condition 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.

(d) "Danger to the health and safety of others" does not require proof of a recent overt act while the offender is in custody.

(e) "Predatory" means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.

(f) "Recent overt act" means any criminal act that manifests a likelihood that the actor may engage in sexually violent predatory criminal behavior.

(g) Notwithstanding any other provision of law and for purposes of this section, ~~no more than one~~ *a* prior juvenile adjudication of a sexually violent offense may constitute a prior conviction for which the person received a determinate term if all of the following ~~applies~~ *apply*:

(1) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(2) The prior offense is a sexually violent offense as specified in subdivision (b). ~~Notwithstanding Section 6600.1, only an offense described in subdivision (b) shall constitute a sexually violent offense for purposes of this subdivision.~~

(3) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 because of the person's commission of the offense giving rise to the juvenile court adjudication.

(4) The juvenile was committed to the Department of the Youth Authority for the sexually violent offense.

(h) A minor adjudged a ward of the court for commission of an offense that is defined as a sexually violent offense shall be entitled to specific treatment as a sexual offender. The failure of a minor to receive that treatment shall not constitute a defense or bar to a determination that any person is a sexually violent predator within the meaning of this article.

SEC. 25. Section 6600.1 of the Welfare and Institutions Code is amended to read:

6600.1. ~~(a)~~ If the victim of an underlying offense that is specified in subdivision (b) of Section 6600 is a child under the age of 14 ~~and the offending act or acts involved substantial sexual conduct~~, the offense shall constitute a "sexually violent offense" for purposes of Section 6600.

~~(b) "Substantial sexual conduct" means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.~~

SEC. 26. Section 6601 of the Welfare and Institutions Code is amended to read:

6601. (a)(l) Whenever the Director of Corrections determines that an individual who is in custody under the jurisdiction of the Department of Corrections, and who is either serving a determinate prison sentence or whose parole has been revoked, may be a sexually violent predator, the director shall, at least six months prior to that individual's scheduled date for release from prison, refer the person for evaluation in accordance with this section. However, if the inmate was received by the department with less than nine months of his or her sentence to serve, or if the inmate's release date is modified by judicial or administrative action, the director may refer the person for evaluation in accordance with this section at a date that is less than six months prior to the inmate's scheduled release date.

(2) A petition may be filed under this section if the individual was in custody pursuant to his or her determinate prison term, parole revocation term, or a hold placed pursuant to Section 6601.3, at the time the petition is filed. A petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law. This paragraph shall apply to any petition filed on or after January 1, 1996.

(b) The person shall be screened by the Department of Corrections and the Board of Prison Terms based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history. This screening shall be conducted in accordance with a structured screening instrument developed and updated by the State Department of Mental Health in consultation with the Department of Corrections. If as a result of this screening it is determined that the person is likely to be a sexually violent predator, the Department of Corrections shall refer the person to the State Department of Mental Health for a full evaluation of whether the person meets the criteria in Section 6600.

(c) The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder.

(d) Pursuant to subdivision (c), the person shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of Mental Health. If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of Mental Health shall forward a request for a petition for commitment under Section 6602 to the county designated in subdivision (i). Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county pursuant to subdivision (i) who may file a petition for commitment.

(e) If one of the professionals performing the evaluation pursuant to subdivision (d) does not concur that the person meets the criteria specified in subdivision (d), but the other professional concludes that the person meets those criteria, the Director of Mental Health shall arrange for further examination of the person by two independent professionals selected in accordance with subdivision (g).

(f) If an examination by independent professionals pursuant to subdivision (e) is conducted, a petition to request commitment under this article shall only be filed if both independent professionals who evaluate the person pursuant to subdivision (e) concur that the person meets the criteria for commitment specified in subdivision (d). The professionals selected to evaluate the person pursuant to subdivision (g) shall inform the person that the purpose of their examination is not treatment but to determine if the person meets certain criteria to be involuntarily committed pursuant to this article. It is not required that the person appreciate or understand that information.

(g) Any independent professional who is designated by the Director of Corrections or the Director of Mental Health for purposes of this section shall not be a state government employee, shall have at least five years of experience in the diagnosis and treatment of mental disorders, and

shall include psychiatrists and licensed psychologists who have a doctoral degree in psychology. The requirements set forth in this section also shall apply to any professionals appointed by the court to evaluate the person for purposes of any other proceedings under this article.

(h) If the State Department of Mental Health determines that the person is a sexually violent predator as defined in this article, the Director of Mental Health shall forward a request for a petition to be filed for commitment under this article to the county designated in subdivision (i). Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county pursuant to subdivision (i) who may file a petition for commitment in the superior court.

(i) If the county's designated counsel concurs with the recommendation, a petition for commitment shall be filed in the superior court of the county in which the person was convicted of the offense for which he or she was committed to the jurisdiction of the Department of Corrections. The petition shall be filed, and the proceedings shall be handled, by either the district attorney or the county counsel of that county. The county board of supervisors shall designate either the district attorney or the county counsel to assume responsibility for proceedings under this article.

(j) The time limits set forth in this section shall not apply during the first year that this article is operative.

(k) If the person is otherwise subject to parole, a finding or placement made pursuant to this article shall ~~not~~ toll~~, discharge, or otherwise affect~~ the term of parole pursuant to Article 1 (commencing with Section 3000) of Chapter 8 of Title 1 of Part 3 of the Penal Code.

(*l*) Pursuant to subdivision (d), the attorney designated by the county pursuant to subdivision (i) shall notify the State Department of Mental Health of its decision regarding the filing of a petition for commitment within 15 days of making that decision.

SEC. 27. Section 6604 of the Welfare and Institutions Code is amended to read:

6604. The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct that the person be released at the conclusion of the term for which he or she was initially sentenced, or that the person be unconditionally released at the end of parole, whichever is applicable. If the court or jury determines that the person is a sexually violent predator, the person shall be committed for ~~two years~~ *an indeterminate term* to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health~~, and the person shall not be kept in actual custody longer than two years unless a subsequent extended commitment is obtained from the court incident to the filing of a petition for extended commitment under this article or unless the term of commitment changes pursuant to subdivision (c) of Section 6605. Time spent on conditional release shall not count toward the two-year term of commitment, unless the person is placed in a locked facility by the conditional release program, in which case the time in a locked facility shall count toward the two-year term of commitment~~. The facility shall be located on the grounds of an institution under the jurisdiction of the Department of Corrections.

SEC. 28. Section 6604.1 of the Welfare and Institutions Code is amended to read:

6604.1. (a) The ~~two-year~~ *indeterminate* term of commitment provided for in Section 6604 shall commence on the date upon which the court issues the initial order of commitment pursuant to that section. ~~The initial two-year term shall not be reduced by any time spent in a secure facility prior to the order of commitment. For any subsequent extended commitments, the term of commitment shall be for two years commencing from the date of the termination of the previous commitment.~~

(b) The person shall be evaluated by two practicing psychologists or psychiatrists, or by one practicing psychologist and one practicing psychiatrist, designated by the State Department of Mental Health. The provisions of subdivisions (c) to (i), inclusive, of Section 6601 shall apply to evaluations performed for purposes of extended commitments. The rights, requirements, and procedures set forth in Section 6603 shall apply to ~~extended~~ *all* commitment proceedings.

SEC. 29. Section 6605 of the Welfare and Institutions Code is amended to read:

6605. (a) A person found to be a sexually violent predator and committed to the custody of the State Department of Mental Health shall have a current examination of his or her mental condition made at least once every year. *The annual report shall include consideration of whether the committed person currently meets the definition of a sexually violent predator and whether conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and conditions can be imposed that would adequately protect the community. The Department of Mental Health shall file this periodic report with the court that committed the person under this article. The report shall be in the form of a declaration and shall be prepared by a professionally qualified person. A copy of the report shall be served on the prosecuting agency involved in the initial commitment and upon the committed person.* The person may retain, or if he or she is indigent and so requests, the court may appoint, a qualified expert or professional person to examine him or her, and the expert or professional person shall have access to all records concerning the person.

(b) ~~The director shall provide the committed person with an annual written notice of his or her right to petition the court for conditional release under Section 6608. The notice shall contain a waiver of rights. The director shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive his or her right to petition the court for conditional release, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she would not be a danger to the health and safety of others if discharged. The committed person shall have the right to be present and to have an attorney represent him or her at the show cause hearing.~~ *If the Department of Mental Health determines that either: (1) the person's condition has so changed that the person no longer meets the definition of a sexually violent predator, or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the director shall authorize the person to petition the court for conditional release to a less restrictive alternative or for an unconditional discharge. The petition shall be filed with the court and served upon the prosecuting agency responsible for the initial commitment. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall order a show cause hearing at which the court can consider the petition and any accompanying documentation provided by the medical director, the prosecuting attorney or the committed person.*

(c) If the court at the show cause hearing determines that probable cause exists to believe that the committed person's diagnosed mental disorder has so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior if discharged, then the court shall set a hearing on the issue.

(d) At the hearing, the committed person shall have the right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding. The attorney designated by the county pursuant to subdivision (i) of Section 6601 shall represent the state and shall have the right to demand a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person also shall have the right to demand a jury trial and to have experts evaluate him or her on his or her behalf. The court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be on the state to prove beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent criminal behavior if discharged.

(e) If the court or jury rules against the committed person at the hearing conducted pursuant to subdivision (d), the term of commitment of the person shall run for ~~a~~ *an indeterminate* period ~~of two years~~ from the date of this ruling. If the court or jury rules for the committed person, he or she shall be unconditionally released and unconditionally discharged.

(f) In the event that the State Department of Mental Health has reason to believe that a person committed to it as a sexually violent predator is no longer a sexually violent predator, it shall seek judicial review of the person's commitment pursuant to the procedures set forth in Section 7250 in the superior court from which the commitment was made. If the superior court determines that the person is no longer a sexually violent predator, he

or she shall be unconditionally released and unconditionally discharged.

SEC. 30. Section 6608 of the Welfare and Institutions Code is amended to read:

6608. (a) Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release ~~and subsequent~~ *or an* unconditional discharge without the recommendation or concurrence of the Director of Mental Health. If a person has previously filed a petition for conditional release without the concurrence of the director and the court determined, either upon review of the petition or following a hearing, that the petition was frivolous or that the committed person's condition had not so changed that he or she would not be a danger to others in that it is not likely that he or she will engage in sexually violent criminal behavior if placed under supervision and treatment in the community, then the court shall deny the subsequent petition unless it contains facts upon which a court could find that the condition of the committed person had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from a committed person without the concurrence of the director, the court shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing. The person petitioning for conditional release and unconditional discharge under this subdivision shall be entitled to assistance of counsel.

(b) The court shall give notice of the hearing date to the attorney designated in subdivision (i) of Section 6601, the retained or appointed attorney for the committed person, and the Director of Mental Health at least 15 court days before the hearing date.

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(c) No hearing upon the petition shall be held until the person who is committed has been under commitment for confinement and care in a facility designated by the Director of Mental Health for not less than one year from the date of the order of commitment.

(d) The court shall hold a hearing to determine whether the person committed would be 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 due to his or her diagnosed mental disorder if under supervision and treatment in the community. If the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community, the court shall order the committed person placed with an appropriate forensic conditional release program operated by the state for one year. A substantial portion of the state-operated forensic conditional release program shall include outpatient supervision and treatment. The court shall retain jurisdiction of the person throughout the course of the program. At the end of one year, the court shall hold a hearing to determine if the person should be unconditionally released from commitment on the basis that, by reason of a diagnosed mental disorder, he or she is not a danger to the health and safety of others in that it is not likely that he or she will engage in sexually violent criminal behavior. The court shall not make this determination until the person has completed at least one year in the state-operated forensic conditional release program. The court shall notify the Director of Mental Health of the hearing date.

(e) Before placing a committed person in a state-operated forensic conditional release program, the community program director designated by the State Department of Mental Health shall submit a written recommendation to the court stating which forensic conditional release program is most appropriate for supervising and treating the committed person. If the court does not accept the community program director's recommendation, the court shall specify the reason or reasons for its order on the record. The procedures described in Sections 1605 to 1610, inclusive, of the Penal Code shall apply to the person placed in the forensic conditional release program.

(f) If the court determines that the person should be transferred to a state-operated forensic conditional release program, the community program director, or his or her designee, shall make the necessary placement arrangements and, within 21 days after receiving notice of the court's finding, the person shall be placed in the community in accordance with the treatment and supervision plan unless good cause for not doing so is presented to the court.

(g) If the court rules against the committed person at the trial for unconditional release from commitment, the court may place the committed person on outpatient status in accordance with the procedures described in Title 15 (commencing with Section 1600) of Part 2 of the Penal Code.

(h) If the court denies the petition to place the person in an appropriate forensic conditional release program or if the petition for unconditional discharge is denied, the person may not file a new application until one year has elapsed from the date of the denial.

(i) In any hearing authorized by this section, the petitioner shall have the burden of proof by a preponderance of the evidence.

(j) If the petition for conditional release is not made by the director of the treatment facility to which the person is committed, no action on the petition shall be taken by the court without first obtaining the written recommendation of the director of the treatment facility.

(k) Time spent in a conditional release program pursuant to this section shall not count toward the term of commitment under this article unless the person is confined in a locked facility by the conditional release program, in which case the time spent in a locked facility shall count toward the term of commitment.

SEC. 31. Intent Clause

It is the intent of the People of the State of California in enacting this measure to strengthen and improve the laws that punish and control sexual offenders. It is also the intent of the People of the State of California that if any provision in this act conflicts with any other provision of law that provides for a greater penalty or longer period of imprisonment the latter provision shall apply.

SEC. 32. Severability Clause

If any provision of this act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

SEC. 33. Amendment Clause

The provisions of this act shall not be amended by the Legislature except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters. However, the Legislature may amend the provisions of this act to expand the scope of their application or to increase the punishments or penalties provided herein by a statute passed by majority vote of each house thereof.

PROPOSITION 84

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8, of the California Constitution.

This initiative measure adds sections to the Public Resources Code; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Division 43 is added to the Public Resources Code, to read:

DIVISION 43. THE SAFE DRINKING WATER, WATER QUALITY AND SUPPLY, FLOOD CONTROL, RIVER AND COASTAL PROTECTION BOND ACT OF 2006

CHAPTER 1. GENERAL PROVISIONS

75001. This Division shall be known and may be cited as the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006.

75002. The people of California find and declare that protecting the state's drinking water and water resources is vital to the public health, the state's economy, and the environment.

75002.5. The people of California further find and declare that the state's waters are vulnerable to contamination by dangerous bacteria, polluted runoff, toxic chemicals, damage from catastrophic floods and the demands of a growing population. Therefore, actions must be taken to ensure safe drinking water and a reliable supply of water for farms, cities and businesses, as well as to protect California's rivers, lakes, streams, beaches, bays and coastal waters, for this and future generations.

75003. The people of California further find and declare that it is

Supreme Court of California
The PEOPLE, Plaintiff and Respondent,
v.
Javier CASTILLO, Defendant and Appellant.

No. S171163.
May 24, 2010.

Background: Defendant was committed following a jury trial in the Superior Court, Los Angeles County, Nos. ZM009280, ZM006562, ZM004837 and B202289,Stephen A. Marcus, J., to the Department of Mental Health for a two-year period after a jury found him to be a sexually violent predator (SVP). Defendant and State both appealed. The Court of Appeal affirmed as modified. Defendant petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holding: The Supreme Court, George, C.J., held that district attorney's stipulation to seek two-year rather than indeterminate recommitment was binding on Attorney General.

Reversed with directions.

Opinion, 89 Cal.Rptr.3d 71, superseded.

West Headnotes

[1] Estoppel 156 68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim inconsistent with previous claim or position in general. Most Cited Cases

Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position, and is intended to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies.

[2] Estoppel 156 68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim inconsistent with previous claim or position in general. Most Cited Cases

Application of the judicial estoppel doctrine is discretionary.

[3] Estoppel 156 68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim inconsistent with previous claim or position in general. Most Cited Cases

The judicial estoppel doctrine applies when: (1) the same party has taken two positions; (2) the posi-

tions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

[4] Estoppel 156 52(1)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(1) k. In general. Most Cited Cases

The doctrine of equitable estoppel provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment.

[5] Estoppel 156 52.15

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52.15 k. Essential elements. Most Cited Cases

The elements of the doctrine of equitable estoppel are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.

[6] Estoppel 156 85

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future events; promissory estoppel. Most Cited Cases

Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise; the remedy granted for breach may be limited as justice requires.

[7] Estoppel 156 68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim inconsistent with previous claim or position in general. Most Cited Cases

Doctrine of judicial estoppel is designed to protect the integrity of the legal system as a whole, and does not require a showing of detrimental reliance by a party.

[8] Estoppel 156 68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim inconsistent with previous claim or position in general. Most Cited Cases

Courts do not invariably enforce the judicial estoppel doctrine merely because all of its elements are met.

[9] Estoppel 156 68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim inconsistent with previous claim or position in general. Most Cited Cases

Cautions apply with respect to application of judicial estoppel, even if all elements of that doctrine are met, related to the cautions against the application of equitable or promissory estoppel against the government when doing so would defeat a strong public policy.

[10] Mental Health 257A 467

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak467 k. Appeal. Most Cited Cases

Although Supreme Court could take judicial notice of the existence, content, and authenticity of letters from district attorney and one of his head deputies to the Attorney General, doing so would not establish the truth of critical factual matters asserted in those documents. West's Ann.Cal.Evid.Code § 452(c).

[11] Evidence 157 48

157 Evidence
157I Judicial Notice
157k48 k. Official proceedings and acts. Most Cited Cases

Supreme Court properly may take notice of official letters sent by a county entity to a state constitutional officer. West's Ann.Cal.Evid.Code § 452(c).

[12] Evidence 157 48

157 Evidence
157I Judicial Notice
157k48 k. Official proceedings and acts. Most Cited Cases

The taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom.

[13] Mental Health 257A 467

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak467 k. Appeal. Most Cited Cases

Supreme Court lacked authority to augment the record on appeal by accepting or assuming the truth of assertions regarding district attorney's motivation in entering into stipulation with public defender's office and superior court regarding sexually violent predator (SVP) commitments, which were set forth in the briefs and in letters from district attorney and one of his head deputies to the Attorney General, even though the

letters had been appended to the public defender's brief in the Court of Appeal and the Attorney General failed to object to those exhibits.

[14] Estoppel 156 68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim inconsistent with previous claim or position in general. Most Cited Cases

Under doctrine of judicial estoppel, stipulation signed by representatives of district attorney, public defender, and superior court, requiring district attorney to seek two-year sexually violent predator (SVP) recommitments for offenders whose recommitment petitions were filed before effective date of Sexually Violent Predator Act (SVPA) amendments requiring indefinite commitments, precluded Attorney General from challenging superior court's failure to impose indefinite commitment, in light of uncertain state of the law when the stipulation was signed and enforced, and the parties' evident intent to avoid unwarranted dismissal of long-pending SVP petitions; amended SVPA contained no express statutory provision authorizing recommitment, and stipulation ensured that each potential SVP being represented by public defender would not demand immediate trial. West's Ann.Cal.Welf. & Inst.Code §§ 6601(a)(2), 6604.
See Annot., Statutes relating to sexual psychopaths (1952) 24 A.L.R.2d 350; Cal. Jur. 3d, Incompetent Persons, § 29; Cal. Jur. 3d, Statutes, § 33; 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 198; 3 Witkin & Epstein, Cal. Criminal Law (2009 supp.) Punishment, § 197A.

[15] Mental Health 257A 466

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak466 k. Discharge or continued commitment. Most Cited Cases

Trial courts retained jurisdiction over petitions seeking to recommit persons as sexually violent predators (SVP) after Sexually Violent Predator Act (SVPA) amendments requiring indefinite commitments, even though the amended SVPA contained no express statutory provision authorizing recommitment. West's Ann.Cal.Welf. & Inst.Code §§ 6601(a)(2), 6604.

[16] Mental Health 257A 433(2)

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak433 Constitutional and Statutory Provisions
257Ak433(2) k. Sex offenders. Most Cited Cases

After Sexually Violent Predator Act (SVPA) amendments requiring indefinite commitments, the litigants on recommitment petitions pending prior to the amendments were subject to the indeterminate term authorized by the amendments. West's Ann.Cal.Welf. & Inst.Code § 6604.

*****348** Rudy Kraft, San Luis Obispo, under appointment by the Supreme Court, for Defendant and Appellant.

Michael P. Judge, Public Defender (Los Angeles), Albert J. Menaster and Jack T. Weedin, Deputy Public Defenders, for Public Defender of Los Angeles County as Amicus Curiae on behalf of Defendant and

Appellant.

Steve Cooley, District Attorney (Los Angeles), Irene Wakabayashi, Head Deputy District Attorney, and Jennifer C. McDonald, Deputy District Attorney, for District Attorney of Los Angeles County as Amicus Curiae on behalf of Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. *****349** Daniels,Susan Sullivan Pithey and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

GEORGE, C.J.

***147 **1134** We granted review to determine whether the Court of Appeal erred by modifying the term of appellant's civil commitment as a sexually violent predator from *two years*—the term agreed to by the Los Angeles County District Attorney, the Los Angeles County Public Defender, and the Presiding Judge of the Los Angeles County Superior Court, pursuant to a signed stipulation—to an *indeterminate term*, as provided by Proposition 83's amendments to Welfare and Institutions Code section 6604. We reverse the judgment rendered by the Court of Appeal, and enforce the stipulation.

I.

A.

In 1985, Javier Castillo was convicted of two counts of committing lewd acts upon a child under the age of 14 years by use of force, violence, or fear ***148** (Pen.Code, § 288, subd. (b)), and was sentenced to a six-year term in state prison. In 1992, he was convicted of an additional charge of committing lewd acts upon a child under the age of 14 years (*id.*, subd. (a)), and was sentenced to an eight-year term in prison. Thereafter, in October 1999, Castillo was committed to Coalinga State Hospital as a sexually violent predator (SVP) as defined under the Sexually Violent Predators Act (SVPA) (Welf. & Inst.Code, §§ 6600–6609.3; see generally *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1143, 1147, 81 Cal.Rptr.2d 492, 969 P.2d 584 [confirming the constitutionality of the SVPA as a civil commitment program]).[FN1]

FN1. All further statutory references are to the Welfare and Institutions Code, unless otherwise noted. Section 6600, subdivision (a)(1), provides: " 'Sexually violent predator' means a person who has been convicted of a sexually violent offense against one or more victims and who 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."

In August 2001, the Los Angeles County District Attorney's Office (District Attorney) filed a petition seeking to extend Castillo's commitment for a two-year period. (Welf. & Inst. Code, former § 6604, added by Stats.1995, ch. 763, § 3, pp. 5925–5926 [setting forth a two-year term for extension of commitment].) Apparently, Castillo, through his counsel, stipulated to continuance of trial on the commitment extension, and no such trial was held. Thereafter, in October 2003, the District Attorney filed a second petition to extend Castillo's commitment for another successive two-year period. Again, apparently, trial on the commitment extension was continued, and no trial was held. Eventually, the two cases were consolidated. Subsequently, in September 2005, the District Attorney filed a third petition to extend Castillo's commitment for yet another successive two-year period, to October 5, 2007. In January 2006, the three cases were consolidated for belated trial.

B.

By mid-April 2006, the initiative measure subsequently denominated Proposition 83 (The Sexual Predator Punishment and Control Act: Jessica's Law)

had qualified for the November 2006 ballot. That measure proposed to amend the SVPA, and other related statutes, in numerous and wide-ranging ways. (See Voter Information Guide, Gen. Elec. (Nov. 7, 2006) analysis by Legis. Analyst of Prop. 83, pp. 43–44, *id.*, text of Prop. 83, at pp. 127–138.) ***350** As relevant here, Proposition 83 proposed to adopt the approach followed by all other states with SVP civil commitment laws, by providing that a person found to be an SVP would be involuntarily committed, not for a term of two years, but instead indefinitely. (Voter Information Guide, text of Prop. 83 § 2, subd. (k), at p. 127, *id.*, § 27, at p. 137 [describing the indeterminate-term procedures of other states]; *id.*, § 27, at p. 137 [setting forth an indeterminate**1135** term, in revised **149** § 6604].) Even before Proposition 83 officially qualified for the ballot, but in light of that impending initiative measure, Senate Bill No. 1128 (2005–2006 Reg. Sess.), the Sex Offender Punishment, Control, and Containment Act of 2006 (Senate Bill No. 1128), was introduced in the Legislature as urgency legislation—meaning that if passed by both houses of the Legislature by a two-thirds vote, it would become effective upon signature of the Governor, prior to the November election. As amended in early March 2006, Senate Bill No. 1128 proposed numerous amendments to various statutes and to the existing SVPA, including the change described immediately above: it proposed to provide that a person found to be an SVP be committed, not for a term of two years, but indefinitely. (Sen. Bill No. 1128, § 63, as amended Mar. 7, 2009, pp. 104–105.)

The Legislature passed Senate Bill No. 1128, and the Governor signed it as urgency legislation, effective September 20, 2006, thereby amending the SVPA in the same manner then proposed by Proposition 83—that is, providing for indefinite commitment of a person determined to be an SVP. (Stats.2006, ch. 337, § 55 [amending § 6004].) [FN2]

FN2. Section 6604, as amended by Senate Bill No. 1128 (and subsequently by Prop. 83), provides in relevant part: "If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health." Section 6604.1, as amended by Senate Bill No. 1128 (and subsequently by Prop. 83), states, in subdivision (a): "The indeterminate term of commitment provided for in Section 6604 shall commence on the date upon which the court issues the initial order of commitment pursuant to that section."

In *People v. McKee* (2010) 47 Cal.4th 1172, 104 Cal.Rptr.3d 427, 223 P.3d 566, we considered due process, ex post facto, and equal protection challenges to these amendments. We rejected the defendant's due process and ex post facto challenges. Concerning the equal protection challenge, we concluded that "the state has not yet carried its burden of demonstrating why SVP's, but not any other ex-felons subject to civil commitment, such as mentally disordered offenders, are subject to indefinite commitment." (*Id.*, at p. 1184, 104 Cal.Rptr.3d 427, 223 P.3d 566.) Accordingly, we remanded "to the trial court to permit the People the opportunity to justify the differential treatment in accord with established equal protection principles." (*Ibid.*)

As recently observed in *People v. Taylor* (2009) 174 Cal.App.4th 920, 933, 94 Cal.Rptr.3d 756 (*Taylor*), the SVPA, as amended by Senate Bill No. 1128 and subsequently by Proposition 83, "is not a model of legislative drafting." Neither Senate Bill No. 1128 nor Proposition 83 amended section 6601, subdivision (a)(2) of the SVPA. That subdivision, which expressly

authorizes the commitment of persons who are "in custody" pursuant to a prison term, a parole revocation term, or a temporary custody "hold" pending further evaluation, specifies who may be committed for treatment by the State Department of Mental Health in a manner that implicitly *excludes* those ***150** persons who currently are committed as SVP's.[FN3] Moreover, nowhere in *****351** the statutes as amended by Senate Bill No. 1128, and subsequently by Proposition 83, is there any mention of *recommitment* petitions—that is, proceedings to extend the terms of individuals currently committed as SVP's; both Senate Bill No. 1128 and Proposition 83 were silent concerning the applicability of these measures to petitions pending on the date those changes became effective. Indeed, both Senate Bill No. 1128 and Proposition 83 amended former section 6604 to *delete* any reference to recommitments or extension of commitments, or related procedures.[FN4] As a result, after the 2006 amendments enacted by Senate Bill No. 1128 and Proposition 83, the SVPA no longer contains any express statutory provision authorizing recommitment of a person previously committed****1136** to the State Department of Mental Health for treatment as an SVP.

FN3. Section 6601, subdivision (a)(2), provides that a petition to commit a person as an SVP may be filed "if the individual was in custody pursuant to his or her determinate prison term, parole revocation term, or a hold placed pursuant to Section 6601.3, at the time the petition is filed."

FN4. Former section 6604 provided, in relevant part, that a person found to be an SVP, and committed for treatment for two years in the custody of the State Department of Mental Health, "shall not be kept in actual custody longer than two years unless a subsequent extended commitment is obtained from the court incident to the filing of a petition for extended commitment under this article...." (As amended by Stats.2000, ch. 420, § 3.) This language was deleted by the 2006 amendments made to section 6604.

C.

On October 11, 2006, the District Attorney, the Los Angeles County Public Defender (Public Defender), and the Los Angeles County Superior Court entered into a stipulation. It read as follows:

"On September 20, 2006 Senate Bill 1128, urgency legislation, was signed into law by the Governor. Additionally a ballot initiative commonly known as 'Jessica's Law' is on the ballot in November of 2006. The legislation and the initiative include language which would lengthen the term of commitment for a SVP from two years to an indeterminate term. Due to uncertainty in the retroactive application of this change, it is the intention of the Los Angeles County District Attorney's Office to apply the current [FN5] two year commitment period to all currently pending initial commitment petitions, as limited below, for cases in which the trial and commitment occur after the effective date of the legislation or the initiative[,] whichever occurs first, hereafter ***151** 'effective date.' For all cases in which an initial commitment petition is filed after the effective date of the legislation, the District Attorney's office will seek the indeterminate term.

FN5. Although the stipulation characterized a two-year commitment term as the "current" law, in fact the current law as of October 11, 2006, was reflected in Senate Bill No. 1128, which had removed the two-year commitment term and replaced it with an indeterminate term. The characterization in the stipulation apparently reflects the circumstance that the document was substantially negotiated and drafted prior to September 20, 2006, the effective date of Senate Bill No. 1128 (Stats.2006, ch. 337, § 55).

"*24 Month Time Limit*

"The District Attorney's Office will apply the two year commitment period to pending initial petitions for 24 months after the effective date. For cases in which the initial order of commitment is issued 24 months or more after the effective date, the District Attorney's Office will seek an indeterminate commitment. The Public Defender's Office does not waive its right to challenge either SB1128 or 'Jessica's Law,' assuming that the latter is passed in November 2006.

*****352** "*Recommitment Petitions*

"For SVPs who have been committed and currently have a pending re-commitment petition for an extended commitment, the District Attorney's Office will file additional petitions for extended commitments as they become timely pursuant to Welfare and Institutions Code § 6604.1. *The District Attorney's office will use the* filing criteria and *commitment period in effect at the time of filing the re-commitment petitions.* If a pending 2 year re-commitment petition filed prior to the effective date of the bill and/or initiative has not been tried prior to the expiration of the two-year commitment period and a new petition is timely filed after the effective date, the District Attorney's Office will pursue an indeterminate term.

"*Evaluation Criteria*

"Cases which are pending for initial commitment or are evaluated for re-commitment prior to the effective date of the legislation and/or initiative will be evaluated based upon criteria currently present in the SVP statutes. Any initial petition or re-commitment petition filed on or after the effective date of the legislation and/or initiative will be evaluated based upon the language of the legislation or initiative as passed.

"*Tolling of Parole*

"Provisions of the legislation tolling the period of parole until after the SVP completes the term of commitment or recommitment will be applied to a pending petition immediately following the effective date which might result from the passage of either legislation or the initiative." (Italics added.)

The stipulation concluded: "Because it is impossible to predict all implications of the legislation and initiative, it is not the intent of this agreement to ***152** address all potential issues involving changes in the law. [¶] A copy of this agreement is to be filed in every SVP ****1137** case in which a petition or re-petition is pending prior to the effective date of the legislation and/or initiative." The document was signed by Jane Blissert as "Representative—District Attorney," Robert A. Fefferman as "Representative—Public Defender," and David Wesley as "Judge of the Superior Court." It was dated October 11, 2006.

The stipulation affected scores of persons who were facing an SVP trial and who were represented by the Public Defender. On October 31, 2006—a week prior to the November election, at which the voters would consider whether to enact Proposition 83—the parties in this case filed a stipulation identical to the one described immediately above.

At the November 2006 General Election, the voters adopted Proposition 83, which, as stated earlier (and as relevant here), enacted the same changes to sections 6604 and 6604.1 that had been made by Senate Bill No. 1128. [FN6]

> FN6. We observe that, as amended by Proposition 83, section 6604.1, subdivision (b)—which addresses evaluations by mental health experts designated by the State Department of Mental Health—refers to "evaluations performed for purposes of *extended commitments.*" (Italics added.) This same language had been in the subdivision prior to the amendment made by Senate Bill No. 1128, but was eliminated by that bill's amendment to the statute, and hence was not operative at the time the stipulation at issue in this case was signed. Moreover, and most

significantly, as observed *ante*, 109 Cal.Rptr.3d pages 350–351, 230 P.3d pages 1135–1136, *both* 2006 amendments deleted former language providing expressly for extension of commitments; accordingly, after the 2006 amendments, there existed no statutory provision expressly authorizing recommitment of a person previously committed to the State Department of Mental Health for treatment as an SVP.

*****353** D.

The jury trial to determine whether Castillo continued to qualify as an SVP during the three two-year periods commencing in October 2001 finally began in late July 2007.[FN7] Because the facts adduced at trial are not relevant to the issues presented on this appeal, we note simply that the evidence recounted Castillo's history of illegal sexual activities involving children, and showed that, throughout his SVP commitment, Castillo essentially refused treatment and remained focused upon creating numerous photographic collages of ***153** children—items that he hid within the covers of magazines. Two psychologists testified that Castillo suffered from "exclusive" pedophilia, meaning that he did not engage in age-appropriate sexual activity and was sexually attracted to both male and female children, and that he posed a high risk of violently reoffending if released.

FN7. In a memorandum captioned "Advisory to all California District Attorneys," dated September 26, 2006, the Attorney General of California explained that "[i]n our opinion, the indeterminate term language applies to any jury verdict or court finding rendered after September 20, 2006," and counseled all district attorneys as follows: "For all cases pending trial, amend the petition to indicate that the term will be for an indeterminate term. This measure will help us fend off arguments claiming lack of notice/unfair surprise." Despite this advice, but consistent with the stipulation, immediately prior to trial, on July 30, 2007, the parties refiled the stipulation originally filed on October 31, 2006, calling for a two-year commitment for any person covered by the stipulation.

On August 10, 2007, the jury returned a verdict sustaining the People's "petition alleging that ... Javier Castillo has a currently diagnosed mental disorder and that this disorder makes him a danger to the health and safety of others in that it is likely that he will engage in sexually violent predatory criminal behavior."

Consistent with the stipulation described above, the trial court immediately ordered Castillo committed to the State Department of Mental Health for three consecutive two-year periods—one for each of the three consolidated matters, running from October 5, 2001, through October 5, 2007. The trial court also immediately arraigned Castillo on a new SVP petition (case No. ZM011971), and found probable cause to proceed (on a new commitment, this one for an indeterminate term) " 'based on the trial that was just completed and the evidence that was taken in that trial as well as the documents filed by the [District Attorney] in this petition.' " As observed by the appellate court below, "[t]here is no indication in the record that a ****1138** new commitment has been imposed in case No. ZM011971."

Castillo filed a timely appeal from the commitment order, raising various evidentiary objections and other claims. The People, represented by the Attorney General, did not appeal from the judgment, but sought to contravene the contentions raised in Castillo's brief. The Attorney General further argued that the court's order, ***154** committing Castillo to a series of two-year terms ending October, 2007 (consistently with the stipulation signed by the parties and the superior court), was invalid because it was in derogation of the indeterminate commitment term specified by Senate Bill No. 1128 and Proposition 83—both of which were enacted (and became effective) prior to Castillo's

jury trial and commitment. Los Angeles County Public Defender Michael P. Judge filed an amicus curiae brief in the Court of Appeal, attaching as exhibits copies of two letters, dated June 2, 2008 (by L.A. County District Attorney Steve Cooley) and August 25, 2008 (by Jane Blissert, head deputy district attorney, sex crimes div. in Cooley's office), ***354** each addressed to the Honorable Edmund G. Brown, Jr., Attorney General, State of California. In these letters, the authors made various factual assertions concerning the background of and motivation for the stipulation.

The Court of Appeal rejected Castillo's contentions. The appellate court then addressed the Attorney General's assertion that the trial court's order committing Castillo to a series of two-year terms was invalid in light of the indeterminate commitment period specified by Senate Bill No. 1128 and Proposition 83. The court first observed that, although the most recent of the three two-year terms covered by the trial court's commitment order had expired on October 5, 2007 (within a few weeks of the trial on the consolidated commitment proceedings), the matter was not moot.[FN8] Thereafter, the Court of Appeal rejected Castillo's argument that the Attorney General was estopped from taking a position contrary to that advanced by the District Attorney in the stipulation below. The Court of Appeal concluded: "[E]stoppel does not apply when enforcement of the stipulation would be contrary to the Legislature's plain directive, would entail a serious risk to public safety, and where the party seeking estoppel did not detrimentally rely on the position advanced by the public entity below." The appellate court also concluded that even when, as here, "the prosecution has broken its promise, specific performance" is neither a favored nor required remedy. The Court of Appeal modified Castillo's commitment order "to reflect the indeterminate term mandated by the SVPA as modified by [Sen. Bill No. 1128 and] Proposition 83."

FN8. The Court of Appeal explained: "The underlying order involved three consolidated petitions seeking separate two-year recommitments—case Nos. ZM004837, ZM006562, and ZM009280. The commitment order was issued on August 10, 2007, with the third two-year commitment period running from October 5, 2005, to October 5, 2007. That period expired prior to the filing of the opening brief in this appeal. However, on the date of his recommitment on the consolidated petitions, Castillo was arraigned on a new SVP petition, case No. ZM011971. He denied the new allegations, but the trial court found probable cause to proceed 'based on the trial that was just completed and the evidence that was taken in that trial as well as the documents filed by the [district attorney] in this petition.' There is no indication in the record that a new commitment has been imposed in case No. ZM011971 which might render this appeal moot. To the contrary, this record establishes only that Castillo's current commitment is a function of the underlying [multiple two-year] commitment order, and the issue of that order's validity is [therefore] not moot."

In response to Castillo's petition for review, both the Public Defender and the District Attorney urged us to grant review. After we granted review, both the Public Defender and the District Attorney filed amicus curiae briefs supporting Castillo's position that the stipulation should be enforced, contrary to the position taken by the Attorney General.

II.

Castillo asserts that the Attorney General should be estopped from taking a position contrary to that stipulated to by the District Attorney below. He relies first and primarily upon the doctrine of judicial estoppel.[FN9]

FN9. Castillo also relies upon the doctrines of equitable estoppel (see *post,* fn. 10) and

promissory estoppel (see *post,* fn. 11).

****1139** [1][2][3] ***155** " ' "Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] *The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties* ******355*** *from opponents' unfair strategies.* [Citation.] Application of the doctrine is discretionary." ' [Citation.] The doctrine applies when ' (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citations.]" (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986–987, 12 Cal.Rptr.3d 287, 88 P.3d 24, italics added (*Aguilar*); see also *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422, 30 Cal.Rptr.3d 755, 115 P.3d 41 (*MW Erectors*).)

Castillo asserts that each of these five elements is met: (1) the People have taken two different positions—the District Attorney, representing the People at trial, signed the stipulation; the Attorney General, representing the People on appeal, argues that the stipulation is invalid and unenforceable; (2) these positions have been taken in judicial proceedings; (3) the People successfully asserted in the trial court that the stipulation should be enforced; (4) the two positions taken by the People are wholly inconsistent with each other; and finally (5) the People did not agree to the stipulation as a result of ignorance, fraud, or mistake; instead, the decision apparently was an informed and considered one.

[4][5][6][7] The Attorney General does not contest Castillo's assertion that all five elements of the judicial estoppel doctrine are met in this case. Instead, the Attorney General focuses much of his brief upon the proposition that, as held by the Court of Appeal below, Castillo cannot satisfy the "detrimental reliance" requirement for application of *equitable estoppel* [FN10] or the "induced action or forbearance" requirement of *promissory estoppel.*[FN11] Castillo advances colorable arguments to the contrary. But regardless of whether, on the ***156** facts of this case, detrimental reliance or induced forbearance can be established for purposes of equitable estoppel or promissory estoppel, that question simply has no relevance to application of judicial estoppel. The doctrine of judicial estoppel is designed to protect the integrity of the legal system as a whole, and does not require a showing of detrimental reliance *****356** by a party. (*Aguilar, supra,* 32 Cal.4th 974, 986–987, 12 Cal.Rptr.3d 287, 88 P.3d 24; *MW Erectors, supra,* 36 Cal.4th 412, 422, 30 Cal.Rptr.3d 755, 115 P.3d 41.)

FN10. " 'The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' " (*City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279, 52 Cal.Rptr.3d 114, 147 P.3d 1037 (*Goleta*), quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488, 91 Cal.Rptr. 23, 476 P.2d 423 (*Mansell*).)

FN11. Under the doctrine of promissory estoppel, " '[a] promise which the promisor should reasonably expect to induce action or

> forbearance on the part of the promisee ... and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for the breach may be limited as justice requires.' [Citations.] Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' " (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310, 96 Cal.Rptr.2d 747, 1 P.3d 63.)

III.

[8][9] We do not invariably enforce the judicial estoppel doctrine merely because all ****1140** of its elements are met. "[N]umerous decisions have made clear that judicial estoppel [like the other forms of estoppel] *is an equitable doctrine,* and its application ... is discretionary. [Citations.]" (*MW Erectors, supra,* 36 Cal.4th 412, 422, 30 Cal.Rptr.3d 755, 115 P.3d 41.) For example, we held in *MW Erectors* that judicial estoppel cannot be invoked to contravene the "strong and clear statutory mandate" against collection of compensation for the performance of an act for which a contractor's license was required but not possessed. (*Id.*, at p. 423, 30 Cal.Rptr.3d 755, 115 P.3d 41.) [FN12]

> FN12. As the Attorney General observes, in the related context of *equitable estoppel,* we have held that such an estoppel may apply against a governmental body (see *Mansell, supra,* 3 Cal.3d 462, 488, 91 Cal.Rptr. 23, 476 P.2d 423), but only " 'in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy.' " (*Goleta, supra,* 40 Cal.4th 270, 279, 52 Cal.Rptr.3d 114, 147 P.3d 1037; accord, *Mansell, supra,* 3 Cal.3d at p. 493, 91 Cal.Rptr. 23, 476 P.2d 423 [it is "well-established ... that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public' "].) Likewise, we similarly have held that promissory estoppel will not be applied against the government if doing so would effectively nullify a strong rule of public policy, adopted for the benefit of the public. (*San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154, 167–168, 228 Cal.Rptr. 47, 720 P.2d 935.) Related cautions apply with respect to application of judicial estoppel, even if all elements of that doctrine are met. (See *MW Erectors, supra,* 36 Cal.4th 412, 422–423, 30 Cal.Rptr.3d 755, 115 P.3d 41.)

A.

Before considering whether judicial estoppel *should* apply in this case, we address initially a procedural matter concerning the record in this appeal. As the Attorney General observes in his answer brief, the two "background information" letters that we noted earlier (from the District Attorney and one of his head deputies, addressed to the Atty. Gen.; see *ante,* 109 Cal.Rptr.3d pp. 353–354, 230 P.3d pp. 1137–1138), postdate the trial in this case and have not been made part of the record on appeal. ***157** Moreover, neither the Court of Appeal below, nor this court, has been asked by Castillo (or either of the two amici curiae who have filed briefs on his behalf in this court) to take judicial notice of those letters. Instead, Castillo and the amici curiae on his behalf simply recite and submit for our consideration various facts asserted in those letters.[FN13]

> FN13. The brief filed by amicus curiae District Attorney does not cite to or quote from the letters. It instead simply reasserts (without citation to the record) various facts initially asserted in those letters.

[10][11][12] Although we could take judicial no-

tice of the existence, content, and authenticity of such letters,[FN14] doing so would not establish the *truth* of critical factual matters asserted in those documents. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, 31 Cal.Rptr.2d 358, 875 P.2d 73.) As we observed *****357** in *Mangini*, although "courts may notice official acts and public records, 'we do not take judicial notice of the truth of all matters stated therein.' [Citations.] '[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom.' " (*Id.*, at pp. 1063–1064, 31 Cal.Rptr.2d 358, 875 P.2d 73.)

> FN14. We properly may take notice of official letters sent by a county entity to a state constitutional officer. (See *Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134, 219 Cal.Rptr. 661 [action taken pursuant to a customary practice of county agency constitutes an "official act" of which judicial notice may be taken under Evid.Code, § 452, subd. (c)].)

In essence, by relying in part, in their briefs, upon factual assertions contained in the two letters, defendant and the amici curiae who have filed briefs on his behalf in this court seek to augment the record on appeal "in contravention of the general rule that an appellate court generally is not the forum in which to develop an additional factual record." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207, 73 Cal.Rptr.2d 865, 953 P.2d 1212 [rejecting defendant's attempts in the appellate****1141** court to present evidence of widespread police misconduct]; see *People v. Jones* (1997) 15 Cal.4th 119, 171, fn. 17, 61 Cal.Rptr.2d 386, 931 P.2d 960 [record on appeal will not be augmented to add material not a proper part of the record in the trial court]; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1, 151 Cal.Rptr. 837, 588 P.2d 1261 ["As a general rule, documents not before the trial court cannot be included as a part of the record on appeal"].)

[13] Castillo asserts in his brief, and emphasized at oral argument, that "when the proceedings that would ultimately become the record on appeal were being conducted, no one had any reason ... to make a clear record" concerning matters such as the background facts that motivated the parties ***158** and the superior court to enter into the stipulation. That may be true—and perhaps especially so because a representative of the presiding judge of the superior court was a signatory to the document—but that circumstance still leaves this court without authority to augment the record on appeal by accepting or assuming the truth of assertions set forth in the letters and briefs but not reflected in the record.[FN15]

> FN15. Nor can we accept the suggestion of amicus curiae in this court, the Public Defender, that merely because the two letters were appended to the brief it filed in the Court of Appeal below, and the Attorney General failed to object to those exhibits, these documents have become part of the record on appeal and thus this court may *accept as true* the factual assertions set out in the letters.

Accordingly, in resolving this appeal, we do not rely upon—nor do we accept as true—the background factual assertions contained in the letters and the briefs but not reflected in the record. We instead confine ourselves to the record on appeal—that is, the proceedings conducted in this case and the stipulation itself.

B.

[14] *Should* judicial estoppel apply to enforce the stipulation and bar the imposition of an indeterminate

term of civil commitment in place of the two-year term imposed by the trial court? Bearing in mind that the " ' "doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies" ' " (*Aguilar, supra,* 32 Cal.4th 974, 986, 12 Cal.Rptr.3d 287, 88 P.3d 24), as explained below we conclude that, in light of the uncertain state of the law at the time the stipulation was signed and enforced in the present case and the parties' evident intent, in *****358** signing the agreement, to avoid the unwarranted dismissal of long-pending SVP petitions, the stipulation should be enforced under the judicial estoppel doctrine, and that the contrary judgment rendered by the Court of Appeal should be reversed.

1.

We address initially the first of the dual goals of the judicial estoppel doctrine—to " ' "maintain the integrity of the judicial system." ' " (*Aguilar, supra,* 32 Cal.4th 974, 986, 12 Cal.Rptr.3d 287, 88 P.3d 24.) Achieving this goal appears to require that any stipulation entered into, in apparent good faith, by the legal representatives of both parties *as well as the presiding judge of the superior court,* should—if at all possible—be honored. To do otherwise would risk impairing the integrity of the judicial system.

We proceed to consider, as best we can based upon the limited record before us (see *ante,* pt. III.A.), the circumstances confronting the parties at ***159** the time the stipulation was negotiated and then eventually signed on October 11, 2006, three weeks after the effective date of Senate Bill No. 1128. As alluded to in the stipulation itself ("[d]ue to uncertainty in the retroactive application of this change ...") and explained, *post,* in part III.B.1.a., during this period—and, indeed, continuing until at least early 2008—there existed substantial legal uncertainty concerning the status of, and procedures to be employed in, proceedings (such as the one here at issue) to *extend* the commitment of a person already adjudged to be an SVP. Moreover, as explained *post,* in part III.B.1.b., in addition to the legal uncertainty created by the 2006 amendments to the SVPA, with regard to Castillo and others who were being represented by the Public ****1142** Defender and were subject to pending SVP trials, there existed the possibility that the petitions to extend the respective commitments might be dismissed—hence releasing these individuals from the strictures of the SVPA—based upon the state's failure to bring the matters to trial in a reasonably timely fashion.

a.

As observed earlier, the SVPA, in section 6601, subdivision (a)(2)—which was not altered by the 2006 amendments—specifies those persons who are subject to involuntary treatment as an SVP and authorizes their commitment, but that statute does not authorize recommitment of a person previously committed to a term of confinement as an SVP. Indeed, as noted *ante,* 109 Cal.Rptr.3d at pages 350–351, 230 P.3d at pages 1135–1136, nowhere in the statutory scheme as amended in 2006 is there any mention of or provision for *recommitment* petitions or proceedings to extend existing commitments. Senate Bill No. 1128 and Prop. 83 each was silent concerning its applicability to petitions that were pending at the time of the effective date of those changes, and each amended former section 6604 to *delete* any reference to recommitment or extension of existing commitments, or to procedures relating thereto.[FN16] This statute, as amended in 2006 by Senate Bill No. 1128 (and subsequently by Prop. 83), simply provides in relevant part that a person found to be an SVP "shall be committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health." Section 6604.1, as amended by Senate Bill No. 1128 and Proposition 83, provides in relevant part *****359** that "[t]he indeterminate term of commitment provided for in Section 6604 shall commence on the date upon which the court issues the initial order of commitment pursuant to that section." (§ 6604.1, subd. (a).) Accordingly, after the 2006

amendments, the SVPA contained no express statutory provision authorizing recommitment of a person previously committed to a term of confinement as an SVP.

> FN16. As observed *ante,* footnote 4, former section 6604 provided for extension of commitments, but that language was deleted by the 2006 amendments to that statute.

***160** It therefore is apparent that when the stipulation was negotiated—and even when it was signed on October 11, 2006, after the effective date of Senate Bill No. 1128—there existed substantial legal uncertainties concerning the status of, and procedures to be employed in, proceedings to extend the existing commitment of a person adjudged to be an SVP.

Specifically, seen from the perspective of Castillo's position, it was possible courts might conclude that in light of the narrow authorization for commitments set out in section 6601, subdivision (a)(2), and because all references to extension of an existing SVP commitment had been removed from section 6604, the SVPA as amended in 2006 contained no express statutory provision authorizing recommitment of a person previously committed to a term of confinement as an SVP—and hence the statutory scheme did not permit *recommitment* (or extension of commitment) proceedings at all. In other words, it could be argued that, under the statutes as amended, there could be no extension of any existing SVP term, to an indeterminate term or otherwise. Alternatively, from that perspective, it also was possible a court might conclude, by analogy to the decision in *Baker v. Superior Court* (1984) 35 Cal.3d 663, 200 Cal.Rptr. 293, 677 P.2d 219 (holding that despite the Legislature's repeal of Mentally Disordered Sex Offender laws, persons already committed under those provisions were subject to recommitment under the repealed laws), that although the amendments removed references to and procedures for extension of commitment, the deleted two-year extension aspects of the former statute would be revived and remain effective for all persons in Castillo's situation—that is, persons who had been initially committed, and whose recommitment petitions were awaiting trial prior to the effective dates of the amendments.

From the perspective of the District Attorney's position, it was possible courts might ****1143** conclude that pursuant to amended section 6604.1, every " initial" order of commitment as an SVP for a two-year term, issued prior to the 2006 amendments, would convert retroactively into an order of commitment for an indeterminate term, thereby avoiding the need for any subsequent recommitment trial. Alternatively, from the perspective of the District Attorney, it was possible that the 2006 amendments would be construed as subjecting to an indeterminate term any person whose SVP trial (whether resulting in an initial commitment or a recommitment) occurred after the effective date of the 2006 amendments.

[15][16] ***161** Eventually, of course, appellate decisions, construing over the course of the years the 2006 amendments, have resolved these problems and uncertainties.[FN17] But at ****1144** the time the stipulation was *****361** negotiated and signed in 2006 (and ***162** continuing until at least early 2008—see *ante,* fn. 17), no one could predict with any degree of certainty how the amendments would be construed as applied to persons in Castillo's circumstances. It was simply uncertain, and unknowable, how courts eventually would resolve these and related questions.[FN18]

> FN17. On September 21, 2007, the Court of Appeal, Fourth District, decided *People v. Shields* (2007) 155 Cal.App.4th 559, 65 Cal.Rptr.3d 922 (*Shields*). The appellate court noted in its decision that prior to trial, which was held after the enactment of Senate Bill No. 1128 but before the effective date of Proposition 83, the People amended the petition, so as to seek an indeterminate term instead of a two-year term. (155 Cal.App.4th

at p. 562, 65 Cal.Rptr.3d 922.) The appellate court rejected an argument that the literal language of the 2006 amendments left courts without authority to order the recommitment of a person who already was committed as an SVP at the time of the amendment (*id.*, at pp. 563–564, 65 Cal.Rptr.3d 922), and concluded that enforcing the plain language of the statutes would, in this instance, " ' "result in [an] absurd consequence[ ] which the Legislature did not intend." ' " (*Id.*, at p. 564, 65 Cal.Rptr.3d 922.) Finally, the appellate court summarily determined that "the indeterminate term provisions of section 6604 apply" to persons who are recommitted as SVP's. (*Id.*, at p. 564, 65 Cal.Rptr.3d 922.)

On November 14, 2007, the Court of Appeal, Third District, decided *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 68 Cal.Rptr.3d 142 (*Bourquez*). Prior to trial, the People had notified the SVP's of the People's intent to apply Proposition 83 (and the new indeterminate term provision) to the pending petitions at issue. (*Id.*, at p. 1282, 68 Cal.Rptr.3d 142.) The appellate court agreed with the jurisdictional conclusion reached in *Shields*, albeit based upon a more probing analysis (*Bourquez*, at pp. 1283–1288, 68 Cal.Rptr.3d 142), and further concurred that in trials conducted after the effective dates of the 2006 amendments, the new indeterminate term of commitment should be imposed. (*Id.*, at pp. 1288–1289, 68 Cal.Rptr.3d 142.) The court rejected a claim that doing so would constitute a retroactive application of the law: "Because a proceeding to extend commitment under the SVPA focuses on the person's current mental state, applying the indeterminate term of commitment of Proposition 83 does not attach new legal consequences to conduct that was completed before the effective date of the law." (*Id.*, at p. 1289, 68 Cal.Rptr.3d 142.)

On December 27, 2007, the Court of Appeal, Fifth District, decided *People v. Carroll* (2007) 158 Cal.App.4th 503, 69 Cal.Rptr.3d 816 (*Carroll*). The court noted that immediately prior to trial, the prosecutor, with apparent acquiescence by the defendant, struck the petition's language seeking a two-year term, and substituted language seeking an indeterminate term. (*Id.*, at pp. 507–508, 69 Cal.Rptr.3d 816.) Thereafter the appellate court rejected an argument that "the law in effect at the time the petition was filed should control, so that the trial court was authorized to recommit [the defendant] only for a two-year, not an indeterminate term." (*Id.*, at pp. 508–509, 69 Cal.Rptr.3d 816.) The court further agreed with the conclusion reached in *Shields*, *supra*, 155 Cal.App.4th 559, 65 Cal.Rptr.3d 922, and *Bourquez*, *supra*, 156 Cal.App.4th 1275, 68 Cal.Rptr.3d 142, that despite the 2006 amendments' removal of express authority for recommitments, courts nevertheless retained authority to order the recommitment of a person who was then currently already committed as an SVP (*Carroll*, at pp. 508–510, 69 Cal.Rptr.3d 816), and it agreed with the conclusion in *Bourquez* that in a trial held after the effective dates of the 2006 amendments, imposition of the new *indeterminate* term does not constitute a retroactive application of the statute (*Carroll*, at pp. 512–515, 69 Cal.Rptr.3d 816).

On March 3, 2008, the Court of Appeal, Sixth District, decided *People v. Whaley* (2008) 160 Cal.App.4th 779, 73

Cal.Rptr.3d 133 (*Whaley*). The court reversed a trial court's order that retroactively converted a two-year SVP commitment, rendered prior to the effective dates of the 2006 amendments, into an indeterminate term of commitment. The appellate court explained that such retroactive application of the amendments was not intended by the voters. (*Whaley*, at pp. 794–804, 73 Cal.Rptr.3d 133.) In reaching that conclusion, the court rejected the People's argument that the language of section 6604.1, subdivision (a) ("[t]he indeterminate term of commitment provided for in Section 6604 *shall commence on the date upon which the court issues the initial order of commitment* pursuant to that section" [italics added]) indicated intent to reach back and retroactively convert into indeterminate commitments the terms of those persons who already had been committed under the SVPA. (160 Cal.App.4th at p. 798, 73 Cal.Rptr.3d 133.) Instead, the court held, "we construe the reference to an 'initial' order in section 6604.1, subdivision (a), as reflecting *when* the commitment term begins for a person *first* committed to an *indeterminate* term, rather than demonstrating intent by the voters to retroactively apply an indeterminate term to those already committed." (*Ibid.*) The court concluded: "[T]he provisions of amended sections 6604 and 6604.1 may be applied prospectively to *all* pending and future commitment proceedings." (*Id.*, at p. 799, 73 Cal.Rptr.3d 133, original italics.)

Most recently, in June 2009, the Court of Appeal, Fourth District, decided *Taylor, supra*, 174 Cal.App.4th 920, 94 Cal.Rptr.3d 756. Consistently with *Whaley, supra*, 160 Cal.App.4th 779, 73 Cal.Rptr.3d 133, the appellate court reversed trial court orders that retroactively had converted two-year SVP commitments, rendered prior to the effective dates of the 2006 amendments, into indeterminate terms of commitment, and the court remanded the case for new trials at which, consistent with *Shields, supra*, 155 Cal.App.4th 559, 65 Cal.Rptr.3d 922, and *Bourquez, supra*, 156 Cal.App.4th 1275, 68 Cal.Rptr.3d 142, the defendants would be subject to indeterminate terms of commitment. (*Taylor*, at pp. 932–934, 94 Cal.Rptr.3d 756.) The court also rejected due process, equal protection, and ex post facto challenges to the imposition of indeterminate terms, while at the same time noting that such issues were pending before us—see *People v. McKee, supra*, 47 Cal.4th 1172, 104 Cal.Rptr.3d 427, 223 P.3d 566, briefly discussed *ante*, footnote 2. (*Taylor, supra*, 174 Cal.App.4th at pp. 928–931, 934–937, 94 Cal.Rptr.3d 756.)

FN18. Castillo urges that *Shields, supra*, 155 Cal.App.4th 559, 65 Cal.Rptr.3d 922, *Carroll, supra*, 158 Cal.App.4th 503, 69 Cal.Rptr.3d 816, *Bourquez, supra*, 156 Cal.App.4th 1275, 68 Cal.Rptr.3d 142, and *Whaley, supra*, 160 Cal.App.4th 779, 73 Cal.Rptr.3d 133 (see *ante*, fn. 17), all were wrongly decided insofar as they hold that (1) trial courts retained jurisdiction over petitions seeking to recommit persons as SVP's after the 2006 amendments, and (2) the litigants in those cases whose petitions were pending prior to the 2006 amendments were subject to the indeterminate term authorized by the 2006 amendments. We perceive no basis for questioning these legal conclusions reached in those cases, or for questioning the propriety of recommitment proceedings instituted after the amendments took effect.

In summary, in the summer of 2006, the following scenarios were possible with respect to Castillo and the scores of persons subject to pending recommitment trials, represented by the Public Defender. Many if not all of these SVP's might have successfully advanced the argument that, in light of section 6601, subdivision (a)(2) and the 2006 amendments, there could be no extension of any currently existing SVP term. Although, in retrospect, it may seem apparent such an argument was unlikely to prevail, there were other options and arguments that posed a greater chance of success for Castillo and those in his position. Some persons might have been accorded prompt trials, and in turn some of them would have received either two-year SVP commitments or indeterminate terms, depending upon when the trial occurred and how the amended statutes would be construed. Alternatively, some of these persons might have been found to no longer qualify as SVP's, and hence would have been released from the strictures of the SVPA. Still others might ***163** have had their trials continued yet again, possibly for good cause.[FN19] In any event, it is apparent that, at the time the stipulation was negotiated and then finally signed on October 11, 2006—and until at least early 2008—there existed substantial legal uncertainty concerning how the 2006 amendments would apply to Castillo and to others similarly situated.

FN19. Yet others might have had their trials continued *without* good cause, as discussed in part III.B.1.b., *post,* triggering the possibility of meritorious due process claims.

b.

In addition to the legal uncertainties created by the 2006 amendments to the SVPA, at the same time there existed a reasonable possibility that Castillo and others who were being represented by the Public Defender, and who were subject to pending SVP trials, might succeed in having their petitions dismissed—hence securing*****362** release from the strictures of the SVPA—based upon the state's failure to bring cases to trial in a reasonably timely fashion. In this latter respect—the prospect of outright *dismissal* of long-pending SVP petitions—the decision in *People v. Litmon* (2008) 162 Cal.App.4th 383, 76 Cal.Rptr.3d 122 (*Litmon*) is instructive in assessing the situation faced by the parties ****1145** and the court at the time the stipulation was negotiated and signed, and hence we describe that case in some detail.

Litmon, the appellant, was found in mid–2000 to qualify as an SVP, and thereafter petitions were filed to extend his commitment for a series of two-year terms. A trial concerning Litmon's first extended two-year term (May 2002 to May 2004) was not held until September 2005, when he belatedly was found to have continued to qualify as an SVP during the May 2002 to May 2004 period. In March 2006, Litmon faced trial on consolidated petitions seeking two-year commitments for the periods from May 2004 to May 2006, and from May 2006 to May 2008. The jury deadlocked, and the court declared a mistrial. In April 2006, the court discussed scheduling a new trial, noting that the prosecutor's trial schedule reflected his unavailability until January 2007, but that counsel for the appellant had announced readiness to proceed "next week," stressing that this was her client's desire. (*Litmon, supra,* 162 Cal.App.4th 383, 391–392, 76 Cal.Rptr.3d 122.)[FN20] The court proceeded to continue the trial until January 2007. (*Id.*, at p. 392, 76 Cal.Rptr.3d 122.)

FN20. As explained in *Litmon, supra,* 162 Cal.App.4th 383, 392, 76 Cal.Rptr.3d 122, counsel also brought to the trial court's attention language in a prior case involving her client, *Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156, 21 Cal.Rptr.3d 21, in which the appellate court had suggested that Code of Civil Procedure section 36, subdivision (e), might support the expeditious scheduling of SVP trials "well before the expiration of the ... two-year commitment

period at issue in the trial." (*Litmon v. Superior Court*, *supra*, 123 Cal.App.4th 1156, 1172, 21 Cal.Rptr.3d 21.)

In August 2006, Litmon filed a motion to dismiss, citing, among other cases, *Barker v. Wingo* (1972) 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 ***164** (*Barker*) (addressing the Sixth Amend. right to a speedy trial), and arguing that postponement of the retrial from April 2006 until January 2007 violated his due process right to a hearing within a "meaningful time." (*Litmon*, *supra*, 162 Cal.App.4th 383, 392, 76 Cal.Rptr.3d 122.) The People urged in opposition that the delay was reasonable and observed that, in any event, the SVPA provided no speedy-trial guarantee. The trial court refused to dismiss the case, stating that (1) there was no right to a speedy trial in SVPA cases, (2) " 'the Court does not have the authority to dismiss the case based upon the premise that you put forth in your motion to dismiss,' " and (3) both counsel were engaged in other SVPA trials " 'and we can only do so many at a time and therefore [January 2007] is the next available date....' " (*Litmon*, *supra*, 162 Cal.App.4th 383, 393, 76 Cal.Rptr.3d 122.)

Thereafter, as noted above, in September 2006 the Legislature enacted Senate Bill No. 1128, and in November 2006 the voters enacted Proposition 83—both of which amended section 6604 to provide for an indeterminate commitment rather than a two-year commitment.

In early January 2007, the People again moved to continue Litmon's rescheduled SVP trial, on the ground that their expert witnesses would not be available as originally planned. (*Litmon*, *supra*, 162 Cal.App.4th 383, 393, 76 Cal.Rptr.3d 122.) Litmon opposed the continuance and again *****363** moved to dismiss, advancing in essence the same arguments he had made in his earlier motion. The trial court again found good cause to continue the proceedings, denied the renewed motion to dismiss, and set trial for mid-March 2007.

In early March 2007, the People moved to impose retroactively an indeterminate term under the amended provisions of the SVPA. In other words, they sought to *convert* Litmon's *initial* order of commitment—from mid–2000, for a two-year term—into a new *indeterminate* term of commitment. The trial court granted the motion, ordering that Litmon's " 'term of commitment is indeterminate retroactive to his initial order of commitment' " in mid–2000. (*Litmon*, *supra*, 162 Cal.App.4th 383, 394, 76 Cal.Rptr.3d 122.) [FN21]

FN21. As observed *ante*, footnote 17, until this aspect of the 2006 amendments eventually was clarified in early March 2008 (in *Whaley*, *supra*, 160 Cal.App.4th 779, 73 Cal.Rptr.3d 133), other trial courts erroneously had entered similar orders, retroactively converting initial two-year commitment terms into indeterminate terms.

****1146** On appeal, the court in *Litmon* held the trial court had erred in (1) failing to grant Litmon's January 2007 motion to dismiss the consolidated petitions (*Litmon*, *supra*, 162 Cal.App.4th at pp. 394–406, 76 Cal.Rptr.3d 122) and (2) retroactively converting Litmon's term of commitment into an indeterminate term (*id.*, at pp. 407–412, 76 Cal.Rptr.3d 122). We focus here on the first of these holdings.

***165** The appellate court in *Litmon* first reviewed long-established procedural due process decisions of the United States Supreme Court. Those cases explain that substantive rights relating to "life, liberty, and property ... cannot be deprived except pursuant to constitutionally adequate procedures" (*Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494)—and they enforce, in various settings, the fundamental due process right to be heard " 'at a meaningful time and in a meaningful manner.' " (*Mathews v. Eldridge* (1976)

424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 [process required prior to termination of disability benefits] (*Mathews*); see also *Barker, supra,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101.) As observed in *Fuentes v. Shevin* (1972) 407 U.S. 67, 81, 92 S.Ct. 1983, 32 L.Ed.2d 556, regarding the process required concerning prejudgment replevin statutes: "If the right to notice and a hearing is to serve its full purpose, ... it must be granted at a time when the deprivation can still be prevented." The high court has explained: "We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in ' "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." ' " (See also *United States v. James Daniel Good Real Property* (1993) 510 U.S. 43, 53, 114 S.Ct. 492, 126 L.Ed.2d 490.) Indeed, even when a postdeprivation hearing is justified, "[a]t some point, a delay in the ... hearing would become a constitutional violation." (*Loudermill, supra,* 470 U.S. 532, 547, 105 S.Ct. 1487, 84 L.Ed.2d 494.)

Based upon this authority, and other high court cases applying these principles in the context of involuntary civil commitment and treatment (see *Heller v. Doe* (1993) 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257 [concerning procedures relating to involuntary commitment of mentally retarded persons]; *Washington v. Harper* (1990) 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 [state prison inmate has no right to a judicial hearing prior to being forcibly medicated with antipsychotic drugs]; *Addington v. Texas* (1979) 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 *****364** [concerning standard of proof in an involuntary civil commitment proceeding]), the appellate court in *Litmon* concluded that although a person alleged by petition to be an SVP has no statutory "speedy trial" right, such a person nevertheless has a federal due process right "to be heard at a 'meaningful time.' " (*Litmon, supra,* 162 Cal.App.4th 383, 399, 76 Cal.Rptr.3d 122; see also *People v. Otto* (2001) 26 Cal.4th 200, 209, 109 Cal.Rptr.2d 327, 26 P.3d 1061 ["Because civil commitment involves a significant deprivation of liberty, a defendant in an SVP proceeding is entitled to due process protections"].) Applying the three-part balancing test set out in *Mathews, supra,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, the court in *Litmon* determined that (1) forced civil confinement for mental health treatment constitutes " ' "a massive curtailment of liberty," ' " requiring due process protection (*Litmon, supra,* 162 Cal.App.4th at p. 400, 76 Cal.Rptr.3d 122); (2) " 'the risk of an erroneous deprivation of such interest through the procedures used [citation], ***166** is considerable' " (*ibid.*); [FN22] and (3) although the state's interest in confinement and treatment of SVP's is very substantial, the state also has an interest in avoiding the unjustified commitment of persons who do not qualify as SVP's (*Litmon,* at p. 401, 76 Cal.Rptr.3d 122). The court concluded that "[g]iven these competing****1147** factors"—and because "under California law, the individual alleged to be an SVP is confined pending final determination of an SVP petition"—it follows that the "*norm to comport with the demands of procedural due process in the context of involuntary SVP commitments must be a trial in advance of the potential commitment term.*" (*Ibid.*, italics added.) The court added: "A predeprivation trial is certainly feasible since persons potentially subject to commitment as an SVP are identified while incarcerated in prison or confined under a prior SVP commitment." (*Id.*, at p. 402, 76 Cal.Rptr.3d 122.)

FN22. In this regard, the court observed: "Appellant has already experienced an extended confinement without any determination that he was an SVP under the second and third recommitment petitions. The loss of liberty following May 2, 2004, the date his last order of commitment expired, is irretrievable regardless of the outcome of trial. The risk of error is highlighted here by the mistrial declared more than two years ago, in March 2006, after jurors could not reach a decision." (*Litmon, supra,* 162 Cal.App.4th at p. 400, 76 Cal.Rptr.3d 122.)

The court in *Litmon* recognized that the appellant in that case did not claim "that he was constitutionally entitled to a trial prior to expiration of his last ordered term of commitment on May 2, 2004 and he is not complaining about the delay prior to the trial-setting hearing in April 2006. *While we focus on the months of delay following that hearing, it is significant that at the time of that hearing appellant's last order of recommitment had expired almost two years earlier and the first of the two recommitment terms at issue was about to expire on May 2, 2006.* Further, the March 2006 mistrial as the result of a hung jury emphasized the possibility that appellant might not be determined to be an SVP at trial. In considering the constitutionality of the challenged delay, the fact [that] appellant continued in confinement pending trial under the consolidated second and third petitions is highly relevant and necessarily informs our due process analysis." (*Litmon, supra,* 162 Cal.App.4th 383, 402–403, 76 Cal.Rptr.3d 122, italics added.) The appellate court next considered the People's argument that the delay of 11 months was not undue, " '[g]iven the need for updated evaluations to ascertain appellant's current mental condition, the complexity involved in incorporating past testimony into legal strategy and *****365** the time it takes to ensure the presence for trial of both state evaluators [FN23] and defense experts at trial....' " (*Id.*, at p. 403, 76 Cal.Rptr.3d 122.) The ***167** appellate court responded brusquely to this argument: "This proffered justification reflects a 'business as usual' approach to trial scheduling despite the ongoing deprivation of personal liberty that was occurring." (*Ibid.*)

FN23. With regard to the state's problem of obtaining mental-health expert evaluations in SVP cases—a concern that has been exacerbated by the expanded pool of inmates subject to such evaluations under the 2006 amendments to the SVPA—see Statutes 2008, chapter 601, section 1, which sets forth the following legislative declaration: "(a) There is within the State Department of Mental Health the Sex Offender Commitment Program (SOCP). The SOCP exists to implement the provisions of the sexually violent predator civil commitment program (Article 4 (commencing with Section 6600) of Part 2 of Division 6 of the Welfare and Institutions Code). [¶] (b) The sexually violent predator civil commitment program requires clinical evaluations of potential sexually violent predators for possible commitment in order to provide treatment, as well as to protect California's citizens from possible victimization by sexually violent predators. [¶] (c) Persons referred to the SOCP by the Department of Corrections and Rehabilitation as possible sexually violent predators and who meet the preliminary screening criteria must undergo precommitment evaluations by at least two professionals who meet the requirements specified in Section 6601 of the Welfare and Institutions Code. [¶] (d) *It is difficult for the state to recruit and retain individuals with the required expertise within the civil service.* [¶] (e) Evaluations must be conducted in a timely manner to avoid the release into society of possible sexually violent predators. [¶] (f) It is the intent of the Legislature to ensure the protection of California's residents by providing the State Department of Mental Health with the necessary flexibility in obtaining experienced professionals, both within the civil service and through contracts, so that sexually violent predator evaluations can occur within the statutory timeframe." (Italics added; see also Stats.2008, ch. 601, § 2 [amending § 6601 and adding subd. (m), requiring a report concerning the state's efforts to hire qualified state employees to conduct the evaluations required by the SVPA]; Piller & Romney, *Jessica's Law Pays Dividend for Some* (Aug. 10, 2008) L.A. Times [describing fees paid to

private-contractor mental-health experts in order to evaluate the expanded pool of inmates under Prop. 83].)

The court in *Litmon* observed: "[*C*]*hronic, systematic postdeprivation delays in SVP cases that only the government can rectify must be factored against the People.* While delays based upon the uncontrollable unavailability of a critical witness may be justifiable [citation], postdeprivation delays due to the unwillingness or inability of the government to dedicate the resources necessary to ensure a prompt SVPA trial may be unjustifiable. Just as 'unreasonable delay in run-of-the-mill ****1148** criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that that each case must await its turn' [citation], postdeprivation pretrial delays in SVPA proceedings cannot be routinely excused by systemic problems, such as understaffed public prosecutor or public defender offices facing heavy caseloads, underdeveloped expert witness pools, or insufficient judges or facilities to handle overcrowded trial dockets." (*Litmon, supra*, 162 Cal.App.4th 383, 403, 76 Cal.Rptr.3d 122, italics added, quoting *Barker, supra*, 407 U.S. 514, 538, 92 S.Ct. 2182, 33 L.Ed.2d 101 (conc. opn. of White, J.); cf. *People v. Sutton* (2010) 48 Cal.4th 533, 106 Cal.Rptr.3d 883, 227 P.3d 437 [concluding similarly with regard to a determination of good cause under Pen.Code § 1382 for continuing a criminal trial].)

The appellate court in *Litmon* concluded that "[e]ven if the initial delay in setting trial for January 2007 comported with principles of procedural due process, the *****366** postponement of the trial until mid-March 2007 cannot be reconciled with those principles given appellant's complete loss of liberty ***168** awaiting trial. By January 2007, appellant had already been confined throughout the entire first 'potential' two-year term and well into the second 'potential' two-year term sought by the consolidated recommitment petitions.... [T]he People knew the difficulties of scheduling the state's experts at least since the April 2006 trial-setting hearing and had nine months to secure their attendance. Putting off trial for another two months would mean a continued loss of liberty without any determination that appellant was in fact an SVP. Consequently, the proffered justification is inadequate to excuse a further delay of retrial given the magnitude of the liberty interest at stake, the serious harm to this interest already occasioned by the protracted delay, and the possibility that interim decisions (the probable cause hearings on the second and third recommitment petitions) may have been mistaken." (*Litmon, supra*, 162 Cal.App.4th 383, 404–405, 76 Cal.Rptr.3d 122.) [FN24]

FN24. The court added: "We arrive at the same due process conclusion under a *Barker* type analysis. The extensive pretrial delay following the filing of the petitions certainly creates a presumption of prejudice that triggers a *Barker* type of balancing test. (See *Doggett* [*v. United States* (1992)] 505 U.S. [647,] 652, fn. 1 [112 S.Ct. 2686, 120 L.Ed.2d 520] ['lower courts have generally found postaccusation delay "presumptively prejudicial" at least as it approaches one year'].) The second recommitment petition was filed February 23, 2004, and the third recommitment petition was filed September 29, 2005. For all the reasons stated above, the government's proffered justification for continuance of the January trial date must be weighed against it." (*Litmon, supra*, 162 Cal.App.4th 383, 405, 76 Cal.Rptr.3d 122.)

The court in *Litmon*, observing that " ' "oppressive pretrial incarceration" ' " is one of the facets of "fundamental unfairness that procedural due process is aimed at preventing," concluded: "In our view, lengthy postdeprivation pretrial delay in an SVP proceeding is oppressive. *In this case, we cannot turn a blind eye to the years of pretrial confinement that have elapsed following expiration of the last ordered term*

of commitment." (*Litmon, supra*, 162 Cal.App.4th 383, 405–406, 76 Cal.Rptr.3d 122, italics added.)

In closing, the court in *Litmon* stressed again that "[t]he ultimate responsibility for bringing a person to trial on an SVP petition at a 'meaningful time' rests with the government. Appellant's fundamental liberty interest outweighed the state's countervailing interests in postponement of the trial set for January 2007. The approximate two-month delay of retrial until March 2007, although only incremental, meant the cumulative loss of a whole year in custody after mistrial.... *If the constitutional right to procedural due process is not to be an empty concept in the context of involuntary SVP proceedings, it cannot be dispensed with so easily.* The court should have granted appellant's January 2007 motion to dismiss the consolidated petitions." (*Litmon, supra*, 162 Cal.App.4th 383, 406, 76 Cal.Rptr.3d 122, italics added.) [FN25]

> FN25. The court was careful to specify that its conclusion that the trial court should have dismissed the consolidated SVP petitions "of course [ ] does not preclude other civil commitment proceedings against appellant if appropriate. Appellant might still be involuntarily committed and treated under the [Lanterman–Petris–Short] Act. (§ 5000 et seq.)" (*Litmon, supra*, 162 Cal.App.4th at p. 406, 76 Cal.Rptr.3d 122; cf. *People v. Allen* (2007) 42 Cal.4th 91, 105–108, 64 Cal.Rptr.3d 124, 164 P.3d 557 [although commitment as a mentally disordered offender was precluded, the defendant might be committed under the Lanterman–Petris–Short Act].)

*****367 *169 **1149** c.

Although *Litmon, supra*, 162 Cal.App.4th 383, 76 Cal.Rptr.3d 122, was decided after the stipulation at issue was negotiated and signed, the principles articulated in that opinion were derived from long-established precedent rendered by the United States Supreme Court. Accordingly, it was reasonably clear that, at the time the stipulation in the present case was negotiated and signed, there existed a possibility of eventual dismissal based upon the state's failure to allocate sufficient resources to provide a timely trial—perhaps with respect to Castillo's case, or with respect to some of the scores of other pending SPV petitions covered by the stipulation. At the same time, moreover, as observed *ante*, part III.B.1.a., substantial legal uncertainties, not resolved until at least early 2008, existed with respect to application of the 2006 amendments to petitions that were pending prior to the effective dates of the amendments. Furthermore, unlike the more typical cases involving stipulations, in this case the trial court did not merely accept and enforce a stipulation agreed to by the parties; the court actually signed the stipulation as a participant in the agreement—and in doing so, conveyed its support and endorsement concerning the legal propriety of the agreement. In this setting, in which it is apparent that the stipulation was entered into in good faith by the District Attorney, the Public Defender, and the Presiding Judge of the Los Angeles County Superior Court, we conclude that enforcement of the stipulation indeed would promote the first goal of the judicial estoppel doctrine, that of maintaining the integrity of the judicial system.

2.

We also conclude that enforcement of the stipulation would promote the second of the dual goals of the judicial estoppel doctrine—protection of parties such as Castillo, and others similarly situated, from "opponents' unfair strategies." (*Aguilar, supra*, 32 Cal.4th at p. 986, 12 Cal.Rptr.3d 287, 88 P.3d 24.) In this respect, even though detrimental reliance need not be shown in order to establish judicial estoppel, it is clear there was general reliance of this sort in the present case on the part of Castillo and others. Castillo, whose three prior SVP recommitment petitions had, by mid–2006, been pending trial for nearly *six years*, might have demanded trial or dismissal and thereafter pressed a potentially meritorious due pro-

cess claim if not afforded a trial within a meaningful time. (See *Litmon, supra*, 162 Cal.App.4th 383, 394–406, 76 Cal.Rptr.3d 122.) Moreover, even if, on the facts of his case, Castillo could not assert a successful due process challenge, it is quite possible that one or more of the scores of others similarly situated might eventually have been able to do so.

***170** The Attorney General observes that the record fails to demonstrate that Castillo, personally or through his counsel, demanded trial during the spring or summer of 2006. Castillo, in turn, asserts that he had no incentive or reason to press such a demand, in light of the impending stipulation. As summarized by Castillo in his brief, he "had every right to insist upon a prompt and immediate trial. He chose not to do so because he was promised by his attorney, the trial court, and the district attorney, that he would not suffer any adverse consequences" from further delay even when the law changed to provide for an indeterminate commitment. The People, at the same time, received the benefit that they apparently sought in the stipulation—neither Castillo's case, nor apparently any other, was dismissed for delay in conducting a SVP trial.[FN26]

> FN26. Moreover, the People avoided the protracted litigation that would have been triggered by demands for prompt trials, including proceedings contesting the propriety of the continuances and the effect of the 2006 amendments.

*****368** It is immaterial whether the Attorney General's subsequent decision on appeal not to honor the stipulation and to argue against it, after having received the benefit of it, properly might be denominated a "strategy" or something else, for the result is the same: ****1150** under the circumstances, that course of action, considered from the standpoint of its impact on Castillo and those similarly situated, simply is "unfair." As amicus curiae Los Angeles County District Attorney observes, "Castillo should not be penalized because he trusted the legal analysis of the District Attorney, Public Defender and Superior Court of Los Angeles County." We conclude that enforcement of the stipulation would promote the second goal of the judicial estoppel doctrine, that of protecting parties such as Castillo and others similarly situated from "opponents' unfair strategies."

3.

The Court of Appeal below observed that estoppel does not apply when enforcement of that doctrine "would entail a serious risk to public safety." On the facts of this case, however, it seems doubtful that any substantial risk to public safety would be posed by enforcement of the stipulation under the judicial estoppel doctrine. As noted above, it appears that all parties, including the court, entered into the stipulation in order to preserve, and not to endanger, public safety. As amicus curiae Los Angeles County Public Defender observes, "[p]ursuant to the terms of the Stipulation, no individual who was pending trial was subject to release during the pendency of commitment proceedings. Nor does the fact that said individual is subject to ***171** recommitment proceedings in two years endanger public safety because as long as the individual has a mental disorder that makes it likely he or she will engage in sexually violent criminal behavior, said individual will be subject to recommitment for an indefinite term."

4.

Finally, as the Court of Appeal observed, "estoppel does not apply when enforcement of the stipulation would be contrary to the Legislature's plain directive." Similarly, the Attorney General stresses that a stipulation is unenforceable if it is based upon an erroneous rule of law. In support, the Attorney General relies upon cases such as *San Francisco Lumber Co. v. Bibb* (1903) 139 Cal. 325, 73 P. 864, in which this court declined to give effect to a stipulation, entered into by litigating parties, agreeing in essence to limit the legal issues that could be considered by the court. (*Id.*, at p. 326, 73 P. 864.) We stated broadly that

"[c]ounsel ... may agree as to the facts, but they cannot control this court by stipulation as to the sole, or any, question of law to be determined under them. [¶] When a particular legal conclusion follows from a given state of facts, no stipulation of counsel can prevent the court from so declaring it." *(Ibid.;* see also, e.g., *California State Auto. Assn. Inter–Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664, 268 Cal.Rptr. 284, 788 P.2d 1156 [a court may reject a stipulation that "incorporates an erroneous rule of law"]; *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 128, 12 Cal.Rptr.3d 737 ["An agreement of the parties does not bind the court if it is contrary to law or public policy"]; *****369***Western Pioneer Ins. Co. v. Estate of Taira* (1982) 136 Cal.App.3d 174, 182, 185 Cal.Rptr. 887 ["interpretation of statutes or law is normally not a proper subject for stipulation of the parties, but is a matter for the courts"]; *In re Marriage of Fithian* (1977) 74 Cal.App.3d 397, 403, 141 Cal.Rptr. 506 ["A stipulation is not binding if, as a matter of law, it is clearly erroneous"]; *Oakland Raiders v. City of Berkeley* (1976) 65 Cal.App.3d 623, 629, 137 Cal.Rptr. 648 [stipulation that a city tax ordinance constituted a "regulatory measure" was ineffective, because the "interpretation of the Constitution, statutes, and ordinances is a subject within the authority of the courts, not the parties.... The matters normally subject to stipulation relate to pleadings, issues, evidence, liability, procedure, and damages, but not to interpretation of the law."].)

The Attorney General concludes that in the present circumstances, "the amended version of section 6604 applied to [Castillo's] case because his trial and [re]commitment as an SVP occurred in August 2007, ... more than nine ***172** months after the effective date of Proposition 83. Section 6604 therefore required the trial court to commit [Castillo] 'for an indeterminate term,' and the court's imposition of a two-year term was an *unauthorized act in excess of its jurisdiction.*" (Italics added.) The Attorney General concludes: ****1151** "As the Court of Appeal correctly explained, 'In light of the jury's verdict, an indeterminate term was the *sole remedy available,* and the legislative scheme authorizing commitment afforded the court no discretion in formulating alternative commitment terms or to delay the effective date of the modifications effected by Proposition 83.' [Citation.] Accordingly, in light of the plain terms of section 6604, the Court of Appeal properly increased the term of commitment from the unauthorized two-year term to the correct indeterminate term." (Italics added.)

Unlike the stipulations involved in decisions upon which the Attorney General relies, the stipulation here at issue was entered into not by the parties acting alone, but by the parties and the court. More significantly, unlike the decisions upon which the Attorney General relies, as explained *ante* (pt. III.B.1.a.), the stipulation reflected the substantial legal uncertainties that existed at the time it was negotiated and signed. The stipulation expressly referred to the "uncertainty" concerning application of the 2006 amendments to the SVPA, and provided that despite those uncertainties—including whether recommitments even were permissible under the amended statutory scheme—each potential SVP being represented by the Public Defender who faced a pending trial would indeed be subject to recommitment, for a two-year term. Furthermore, the stipulation clarified that after any such two-year recommitment, the person would be subject to subsequent recommitment for an indeterminate term. Accordingly—and in light of the circumstance that the 2006 amendments to section 6604 made no provision concerning recommitments (and, indeed, *deleted* language authorizing recommitments)—we reject the Attorney General's premise that the stipulation at issue was "clearly erroneous as a matter of law," and "unenforceable," *at the time it was signed and at the time it was enforced in this case.*

Nor do we agree with the Attorney General's related premise that an indeterminate term was "the *only* legally authorized term" in the present case. For this proposition the Attorney General relies upon the ap-

pellate courts' subsequent clarifying holdings concerning the 2006 amendments (see *ante*, fn. 17), but we do not view those decisions, in what would amount to reaching well beyond the facts presented in those matters, as establishing a broad rule that would preclude the enforceability in ***370** the present case of a ***173** stipulation dissimilar to anything considered in any of those prior decisions. None of the cases cited by the Attorney General (*Shields, supra*, 155 Cal.App.4th 559, 65 Cal.Rptr.3d 922, *Carroll, supra*, 158 Cal.App.4th 503, 69 Cal.Rptr.3d 816, *Bourquez, supra*, 156 Cal.App.4th 1275, 68 Cal.Rptr.3d 142, and *Whaley, supra*, 160 Cal.App.4th 779, 73 Cal.Rptr.3d 133) concerned a stipulation comparable to the one at issue in this case, and none held broadly that indefinite commitments are mandatory in all situations. [FN27]

> FN27. We also observe that, in contrast to the present case, in all of the cited cases in which an indeterminate term was imposed upon a person whose trial was pending prior to the 2006 amendments, the petition had been amended to seek an indeterminate term. (See *ante*, fn. 17.)

Moreover, as explained *ante* (pt. III.B.1.b.), it is apparent from the *Litmon* decision and the principles derived from United States Supreme Court cases cited by *Litmon* that, at the time the stipulation was negotiated and signed, a realistic possibility existed that due process principles would require the dismissal of Castillo's case, or of at least some of the scores of other pending SVP petitions covered by the stipulation. Apparently, the stipulation was designed in part to avoid this highly undesirable prospect—it ensured that each potential SVP being represented by the Public Defender would not demand an immediate trial, a development that in turn successfully foreclosed the possibility of dismissal of those cases based upon a violation of due process, as occurred in *Litmon, supra*, 162 Cal.App.4th 383, 76 Cal.Rptr.3d 122.

The circumstance that subsequent appellate decisions have clarified the law and removed many of the uncertainties that existed until at least early 2008—and the additional circumstance that we know *today*, with the benefit of such subsequent clarification, that a stipulation similar to the one we consider in the present case *now* could not properly be negotiated, entered into, and enforced—does **1152** not diminish the reality that such uncertainties did indeed exist at the time the stipulation at issue was implemented upon the conclusion of Castillo's trial in mid-August 2007. For these reasons it would be inappropriate for us, with the benefit of hindsight, to condemn the stipulation as having been unauthorized or unenforceable at the time of Castillo's trial. The highly distinctive circumstances of the present case militate in favor of enforcing the stipulation now, in the cases of Castillo and others similarly situated, as urged by amici curiae Los Angeles County District Attorney and Los Angeles County Public Defender.

***174** IV.

We reverse the judgment rendered by the Court of Appeal, with directions to reinstate the judgment of the trial court committing Castillo to a two-year term. In any future SVP proceeding, Castillo—pursuant to the stipulation, and under section 6604, as amended by Senate Bill No. 1128 and Proposition 83—will be subject to commitment for an indeterminate term.

WE CONCUR: KENNARD, BAXTER, WERDEGAR, CHIN, MORENO and CORRIGAN, JJ.

Cal.,2010.
People v. Castillo
49 Cal.4th 145, 230 P.3d 1132, 109 Cal.Rptr.3d 346, 10 Cal. Daily Op. Serv. 6339, 2010 Daily Journal D.A.R. 7543

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PUBLIC MEETING

COMMISSION ON STATE MANDATES

TIME: 10:00 a.m.

DATE: Friday, September 27, 2013

PLACE: State Capitol, Room 447
Sacramento, California

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Reported by:
Daniel P. Feldhaus
California Certified Shorthand Reporter #6949
Registered Diplomate Reporter, Certified Realtime Reporter

Daniel P. Feldhaus, C.S.R., Inc.
Certified Shorthand Reporters
8414 Yermo Way, Sacramento, California 95828
Telephone 916.682.9482 Fax 916.688.0723
FeldhausDepo@aol.com

A P P E A R A N C E S

COMMISSIONERS PRESENT

ERAINA ORTEGA
(Commission Chair)
Chief Deputy Director
Department of Finance

KEN ALEX
Director
Office of Planning & Research

RICHARD CHIVARO
Representative for JOHN CHIANG
State Controller

M. CARMEN RAMIREZ
Oxnard City Council Member

ANDRÉ RIVERA
Representative for BILL LOCKYER
State Treasurer

SARAH OLSEN
Public Member

COMMISSION STAFF PRESENT

HEATHER HALSEY
Executive Director
(Item 11)

JASON HONE
Assistant Executive Director

CAMILLE SHELTON
Chief Legal Counsel
(Item 10)

TYLER ASMUNDSON
Commission Counsel
(Item 4)

A P P E A R A N C E S

PARTICIPATING COMMISSION STAFF
continued

MATTHEW JONES
Commission Counsel
(Item 3 and Item 5)

KERRY ORTMAN
Program Analyst
(Item 9)

PUBLIC TESTIMONY

Appearing Re Item 3:

For Requestor Department of Finance:

SUSAN GEANACOU
Senior Staff Attorney
Department of Finance
915 L Street
Sacramento, California 95814

MICHAEL BYRNE
Department of Finance
915 L Street
Sacramento, California 95814

For County of Los Angeles:

HASMIK YAGHOBYAN
SB 90 Administration
County of Los Angeles Auditor Controller's Office
500 West Temple, Room 525
Los Angeles, California 90012

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 3: *continued*

For California State Association of Counties:

GEOFFREY NEILL
Senior Legislative Analyst
Revenue & Taxation
California State Association of Counties
1100 K Street, Suite 101
Sacramento, California 95814

Appearing Re Item 4:

For the County of Orange:

JAMES C. HARMAN
Deputy County Counsel
County of Orange
P.O. Box 1379
Santa Ana, California 92702

KIM PEARSON, R.N.
Deputy Agency Director
Correctional Health Services Division
County of Orange
405 West Fifth Street
Santa Ana, California 92701

For Department of Finance:

SUSAN GEANACOU
Senior Staff Attorney
Department of Finance

MICHAEL BYRNE
Department of Finance

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 5:

For Requestor Department of Finance:

SUSAN GEANACOU
Senior Staff Attorney
Department of Finance

MICHAEL BYRNE
Department of Finance

For County of Los Angeles:

HASMIK YAGHOBYAN
SB 90 Administration
County of Los Angeles Auditor Controller's Office

CRAIG OSAKI
Los Angeles Public Defender's Office
210 West Temple Street
Los Angeles, California 90012

For San Diego County Sheriff, P.D., and D.A.:

TIMOTHY BARRY
County of San Diego
County Counsel's Office
1600 Pacific Highway, Room 355
San Diego, California 92101

For Orange County:

TODD SPITZER
Orange County Supervisor
Orange County Board of Supervisors
333 W. Santa Ana Blvd.
Santa Ana, California 92701

ERRATA SHEET

Page	Line	Correction
49	25	The last word should read "infirm" not "infirmed".

I N D E X

I N D E X

I N D E X

BE IT REMEMBERED that on Friday, September 27, 2013, commencing at the hour of 10:00 a.m., thereof, at the State Capitol, Room 447, Sacramento, California, before me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the following proceedings were held:

--oOo--

CHAIR ORTEGA: Good morning, everyone.

I would like to call the Commission on State Mandates meeting to order.

If you could please call the roll.

MS. HALSEY: Mr. Alex?

MEMBER ALEX: Here.

MS. HALSEY: Mr. Chivaro?

MEMBER CHIVARO: Here.

MS. HALSEY: Ms. Olsen?

MEMBER OLSEN: Here.

MS. HALSEY: Ms. Ortega?

CHAIR ORTEGA: Here.

MS. HALSEY: Ms. Ramirez?

MEMBER RAMIREZ: Here.

MS. HALSEY: Mr. Rivera?

MEMBER RIVERA: Here.

MS. HALSEY: Mr. Saylor is absent today. He has a fire in his district, and was not able to come.

CHAIR ORTEGA: Thank you.

The first item on the agenda is the minutes from July 26th.

Are there any objections or corrections to the minutes?

(No response)

CHAIR ORTEGA: No?

MEMBER CHIVARO: Move.

CHAIR ORTEGA: A motion.

MEMBER RAMIREZ: Second.

CHAIR ORTEGA: A second.

All those in favor?

(A chorus of "ayes" was heard.)

CHAIR ORTEGA: Any opposed?

(No response)

CHAIR ORTEGA: Okay, thank you.

MS. HALSEY: And now we'll take public comment for matters not on the agenda. Please note the Commission cannot take action on items not on the agenda. However, it can schedule issues raised by the public for consideration at future meetings.

CHAIR ORTEGA: Any public comment?

(No response)

CHAIR ORTEGA: No?

Thank you.

MS. HALSEY: Next, we have a proposal to add

another item to the Consent Calendar.

After the agenda for this hearing was released, the parties agreed to place Item 6, consolidated parameters and guidelines amendments on *Habitual Truants*, on consent.

CHAIR ORTEGA: Any objections to adding Item Number 6 to the Consent Calendar?

(No response)

CHAIR ORTEGA: Any comments from the public?

(No response)

CHAIR ORTEGA: Okay, are there any questions, generally, about the Consent Calendar?

(No response)

CHAIR ORTEGA: If not, do we have a motion?

MEMBER OLSEN: So moved.

CHAIR ORTEGA: It's moved.

MEMBER CHIVARO: Second.

CHAIR ORTEGA: Second.

MS. HALSEY: The Consent Calendar consists of Items 6 and 7.

CHAIR ORTEGA: All those in favor?

(A chorus of "ayes" was heard.)

CHAIR ORTEGA: Any objections?

(No response)

CHAIR ORTEGA: Abstentions?

(No response)

CHAIR ORTEGA: Thank you.

MS. HALSEY: Let's move to the Article 7 portion of the hearing.

Will the parties and witnesses for Items 2, 3, 4, and 5 please rise?

(Parties and witness stood.)

MS. HALSEY: Do you solemnly swear or affirm that the testimony you are about to give is true and correct based on your personal knowledge, information, or belief?

(Chorus of "I dos" was heard.)

MS. HALSEY: Thank you.

Item 2 is reserved for appeals of the Executive Director decisions. There are no appeals to consider under Item 2.

Item 3, Commission Counsel Matt Jones will present a test claim on *Accounting for Local Revenue Realignments.*

MR. JONES: Good morning.

This test claim alleges reimbursable state-mandated increased costs incurred by counties as a result of the administrative activities required to implement three revenue-shifting programs instituted by the Legislature: The educational revenue augmentation

fund shift, the vehicle license fee swap, and the triple flip.

The proposed statement of decision approves reimbursement for administrative functions of county auditor/controller offices to create new accounts and shift funds between school districts and local agencies as directed by statute.

Some of the revenue-shifting activities state that they're only meant to occur during fiscal years 2004-05 and 2005-06, while some are ongoing.

In addition, the statutes provide authority for counties to charge cities for the costs of the ongoing mandated activities after the first two years. Therefore, for all counties except the City and County of San Francisco, which has no subordinate city against which to levy the fees, reimbursement is capped in the 2006-2007 fiscal year.

Staff recommends that the Commission adopt the staff analysis and proposed statement of decision as its test-claim statement of decision, approving reimbursement for counties for the costs of administrative activities required by the test-claim statutes for two years, and approving reimbursement for the City and County of San Francisco on an ongoing basis.

Staff further recommends that the Commission

authorize staff to make any non-substantive technical changes to the proposed statement of decision following the hearing.

Will the parties and witnesses please state your names for the record?

MS. YAGHOBYAN: Hasmik Yaghobyan on behalf of County of Los Angeles.

MR. NEILL: Geoffrey Neill on behalf of the California State Association of Counties.

MR. BYRNE: Michael Byrne, Department of Finance.

MS. GEANACOU: Susan Geanacou, Department of Finance.

CHAIR ORTEGA: Ms. Yaghobyan?

MS. HALSEY: Excuse me, Mr. Neill, is your microphone working?

MR. NEILL: I don't know.

CHAIR ORTEGA: It is.

MS. YAGHOBYAN: I just would like to thank the staff, and we concur with their recommendation.

MR. NEILL: I actually -- we filed late comments, and we knew they wouldn't be entered into the analysis. But the proposal before the Commission says that because there's fee authorities, it's not a mandate except in the City and County of San Francisco; but

allowing one level of government to charge another level of local government for a charge doesn't mean it's not a mandate, it just shifts the costs onto different local agency. So cities ought to be able to claim their costs under this mandate.

Furthermore, the counties still retains a share of the mandated costs because counties can only bill out to cities the portion that benefits those cities. Because a portion of the benefit remains with the county for these tax allocations, the county still retains a share of the cost. So counties ought to be able to claim that share of the cost. Since they only have partial fee authority, they still have to pay for some of the administrative actions. Even the fee authority that they do have is just on cities, so the cities ought to be able to claim those costs.

MR. BYRNE: Michael Byrne, Department of Finance.

Finance concurs with the Commission's draft analysis recommendation.

CHAIR ORTEGA: Okay, thank you.

Are there any questions from the Members?

MEMBER OLSEN: I'd like to hear staff's response to CSAC.

MR. JONES: Well, if I understand CSAC's

comment and their comments today correctly, they are essentially arguing that the fee authority that is written into the statute in this case, which allows county auditors to charge the cities -- the subordinate cities within their county for the costs of the revenue-shifting activities, which are the entire scope of this mandate.

The fee authority that is granted to counties, they're essentially arguing it's just a revenue shift -- it's just a cost shift to the cities and that the cities should then be reimbursed.

There are a couple problems with that.

One is that the cities have not filed any test claim on these statutes. The counties were the only claimant.

And then the other problem is that the cities don't have any activities under these statutes. The cities only are, you can say, subject to or burdened by the costs, and it's the counties that are the ones performing the activities.

You know, we've got case law that's pretty clear on that point, that costs alone are not a mandate. And, in fact, you can look, for example, at, I believe, Redevelopment Agency of San Marcos, which shifted money away from school districts in the first *ERAF*. And that's

related to this because this is *ERAF* Number 3. This is the third time we've taken money from school districts and moved it somewhere else.

And in that case -- or, actually, excuse me, in that case it was from the redevelopment agencies to the school districts. And the redevelopment agencies were held not to be reimbursable claimants -- or eligible claimants for reimbursement there, in part, because there wasn't any activity. It was just basically pulling funds away from them.

And so in the same vein here, you've got cities that are, yes, losing some revenue, arguably, but it's been done by the county. Number one, it's not forced but it's authorized for the county to charge the cities. And then secondly, the cities do not have any activities. And then finally, as I said, the cities haven't filed a test claim. This is a county test claim.

MEMBER OLSEN: Correct me if I'm wrong, but I think there is one other issue; and that is that counties are only able to charge the cities in their jurisdiction proportionately for the amount of the shift that affected the cities themselves, and that there's a residual portion that continues to affect the counties; is that correct?

MS. HALSEY: I do want to -- I'm sorry for

interrupting. I just want to point out this is the first time this argument is being raised. It wasn't even raised in the late comments.

MR. NEILL: It was.

MS. HALSEY: I have them.

MEMBER OLSEN: Yes, it's in the late comments.

MS. HALSEY: Was it?

The part about it being a burden on the counties?

MEMBER OLSEN: Yes.

MR. NEILL: Yes.

MS. HALSEY: I'm sorry then.

MR. JONES: The statute isn't that specific.

The statute merely says that the counties can charge the cities with the costs of the administrative activities -- or the costs of the services provided, or something along those lines. I don't remember the exact language.

But in any case, it's pretty clear that the plain language of the statute allows the counties to charge cities for the costs incurred by the county auditor/controller's office to move this money around as directed by the statute.

We have, you know, more case law on fee authority -- *Connell*, for example, and *Clovis*, both of

which suggest that whatever practical limitations there are to exercising that fee authority, are not relevant to the question under section 17556(d), of whether there is fee authority and whether there should be costs mandated by the state.

So it may be that the cities are not able to pay the costs of this program. It may be that the counties can ask for that money and they're not going to get it, and they're not going to get blood from a stone. But the point is that the case law doesn't really permit us to consider those factors; it's just a question of whether there is authority in the statute. And, as a matter of law, there is in this case.

MR. NEILL: Can I ask a clarifying question?

So if the state imposed a mandate on counties and said that we could charge -- say, it was a -- say, it was a big public-safety mandate, large dollars, and it said that we could charge each offender $1 for this big mandate. Say, the mandate costs tens of thousands of dollars per offender.

You're saying that because there's fee authority for the $1, we couldn't claim the rest of the costs? Because you're saying that --

MR. JONES: Not at all.

MR. NEILL: -- the partial fee authority that

we have to charge cities, it would be illegal for us to charge the cities more than their proportionate share? And because -- even though the fee authority doesn't grant us the authority to charge the full cost of the program, we still can't claim the remainder of the costs?

MR. JONES: First of all, the statute in this case isn't limited to a dollar amount. And I'm not sure where you're getting the idea that it's proportionate to anything other than the services actually provided to the city. And then the language of this --

MR. NEILL: Because a fee -- the specific -- a fee is defined in the Constitution as only being the charge. You can only charge a fee in proportion to the benefit received.

MS. SHELTON: Could I? Let me clarify the general rules on fee authority under 17556(e).

Basically, if there's a fee established that is sufficient to pay for the cost of the state-mandated activities, there are no costs mandated by the state. It is a question of law, and it depends on the language of the fee authority authorized by the statute.

Here, the fee authority applies to all services that we have found to be mandated and to be a new program or higher level of service. So by law, they're allowed to charge a fee for all costs incurred for those

services.

If there was a statute that you suggested that had a cap, then certainly there is an argument to be made that our costs are higher than the cap. And here, there's no cap.

If there were a cap, you would need to file evidence in the record to show that your costs exceed the amount that you're able to charge. But that's not the situation here. There is no cap. By law, the authority allows you to charge fees for all services performed.

MEMBER OLSEN: So if I could be indulged here.

CHAIR ORTEGA: Yes, and then I'd like to hear from Mr. Byrne who also wants to make a comment.

MEMBER OLSEN: Okay, I'm going to go to the CSAC late filing here, and under point one, the second main paragraph -- and I just want somebody to tell me if this is -- you know, if the Commission has a different point of view, if Commission staff has a different point of view.

"However, counties are only authorized to charge fees on a city in proportion to that city's share of increased revenue. This leaves a portion of the increased costs still imposed on the county, since the county also receives a share of the increased revenue. In many counties, if not every county, the county

receives more property taxes than any single city within its jurisdiction. This leaves the largest portion of the administrative costs still a burden to the county."

MS. SHELTON: I'm going to let Matt respond to that. Because it sounds like what the CSAC letter is doing, is interpreting the plain language of the fee-authority statute here. And it sounds like there may be a difference of opinion on that, on that interpretation.

CHAIR ORTEGA: Can I go to Mr. Byrne, please?

MR. BYRNE: Yes. The actual language of Rev. and Tax Code 9775 states, "For the 2006-07 fiscal year, and each fiscal year thereafter, a county may impose a fee, charge, or other levy on a city for these services, but the fee, charge, or other levy shall not exceed the actual cost of providing these services."

MS. SHELTON: And that is typical language of 17556(e), fee authority, that by law, it means there are no costs mandated by the state.

CHAIR ORTEGA: Mr. Jones?

MR. JONES: It sounds to me, actually, like Mr. Neill is suggesting that the definition of "fee" and "assessment" and "tax" that we have recently added to Article XIIID might be coming into play.

But I wonder if there's anything to the idea

that this all happened in 2004-2005, 2005-2006, which is prior to Prop. 218 and Prop. 26.

So the definitions of “fee,” “assessment,” and “tax” that are currently in XIIID I’m not certain would apply in this case to the fee authority that we have in Revenue and Tax 9775.

And maybe Camille can speak to that.

MS. SHELTON: I think that’s a little bit of a red herring, only because Prop. 218 and Article XIIIC and D really defined more things -- more fees to be taxes. And here, it is truly a fee. And no court has come out and said it was a tax. So until you have a court decision on that ruling, it’s the plain language we have is controlling. And it’s a fee.

CHAIR ORTEGA: Ms. Yaghobyan?

MS. YAGHOBYAN: Actually, what Mr. Geoffrey Neill is suggesting -- he had already spoke with me -- it’s not that the fee be charged to the cities for the services we do, because there is other costs that we have to endure for our portion.

He is talking about that portion of the costs. But after I spoke with our people, that costs is not material, we decided not to claim that or to not include that in our test claim. But that doesn’t mean no other local agencies or counties would not have costs.

So the costs he is referring is not the fee that is charged to the others. It's the cost for ourselves, for our portion. But we just didn't want to do.

MR. NEILL: If we're going with the specific language of the statute, it actually only authorizes -- if we're just reading it as plainly as possible, it only authorizes us to charge a city. It only allows each county to charge one city the fee.

I mean, as long as -- if we're going to be this strict about it, it says that we can charge a city the costs -- our costs.

MR. JONES: That's a pretty strained interpretation, I think.

MR. NEILL: I think yours is, too. I think saying that -- I mean, it's long established that taxing agencies, whether it's the Board of Equalization, whether it's counties -- whoever it is -- they can only charge the fees to the people who get the benefit, in proportion to that benefit.

MR. JONES: We need to be careful about using the word "benefit" there.

We're talking services provided by the county which -- let's be honest, these are services that -- the county is taking money from the cities. The cities

aren't going to consider it a benefit under any circumstances under this statute. So the word "benefit" is also a red herring there.

But you're talking about -- the statute that Mr. Byrne just read says specifically that counties can charge the subordinate cities the fee for the cost of the services administered to the cities. And the services administered under section 97.68, and I think 97.70 is the other one, which are the VLF swap and the triple-flip swap, both of those statutes discuss creating these accounts for shifting money. They talk about shifting money from one place to another, and then back to a third place. And clearly, there are some activities on the county.

But if you're suggesting that the fee authority is somehow going to fall short of that, you're going to have to submit some evidence in the record -- which there isn't any, up to this point -- that there are other reimbursable activities that aren't covered by that fee authority.

And so far, there has been nothing submitted that suggests that.

CHAIR ORTEGA: Ms. Olsen?

MS. SHELTON: Just one more point to add: That what -- what CSAC is suggesting that there is going to be

other ancillary activities that are tied to these mandated activities, and they are suggesting that the fee does not attach to that.

Mandates law is very strictly legal. You have to apply the fees strictly to those activities that are mandated. And if that applies, then there are no costs mandated by the State.

So by the plain -- you have to interpret the plain language of the statute and pull the activities from the plain language of the statute.

And our interpretation of the fee authority for those services means the fee applies to those activities that are required.

MEMBER OLSEN: I get that.

I don't think I've heard anybody address really specifically this issue of this residual cost that cannot be shifted through fees to the local governments that receive a benefit from this activity; that there is some residual cost to at least some counties, if not all counties, because they, too, were affected by these shifts.

MS. SHELTON: But the point I was trying to make, when you say a "residual cost," that's not how the fee authority in 17556(e) works. There's no -- you have to point, you have to tag the fee authority to the

mandated activity. Those are the only activities that we're talking about.

Any residual activity that's not required by the plain language of the statute is not relevant for this issue.

MEMBER OLSEN: So you're saying that for this issue, the counties have -- all the counties, with the exception of the City and County of San Francisco -- have the ability to charge fee authority for their full costs of administering this program, even --

MS. SHELTON: For administering the required activities, yes.

MEMBER OLSEN: And they could charge cities in their jurisdiction, fees that would cover the full cost, even though there is a portion of the program that benefits counties as opposed to cities?

MR. JONES: As a matter of law, yes, that's correct.

MEMBER OLSEN: Okay.

CHAIR ORTEGA: Any other comments from the commissioners?

(No response)

CHAIR ORTEGA: From the public?

(No response)

CHAIR ORTEGA: Do we have a motion on this

item?

MEMBER CHIVARO: Move staff recommendation.

MEMBER RAMIREZ: May I just add this? I am going to abstain from this because my city is dealing with it now. So I'll be abstaining.

CHAIR ORTEGA: Thank you.

We have a motion.

Do we have a second?

MEMBER ALEX: Second.

CHAIR ORTEGA: Okay, please call the roll.

MS. HALSEY: Mr. Alex?

MEMBER ALEX: Aye.

MS. HALSEY: Mr. Chivaro?

MEMBER CHIVARO: Aye.

MS. HALSEY: Ms. Olsen?

MEMBER OLSEN: Aye.

MS. HALSEY: Ms. Ortega?

CHAIR ORTEGA: Aye.

MS. HALSEY: Ms. Ramirez is abstaining.

MEMBER RAMIREZ: Abstain.

MS. HALSEY: And Mr. Rivera?

MEMBER RIVERA: Aye.

MS. HALSEY: The motion carries.

Moving on to Item 4, Senior Commission Counsel Tyler Asmundson will present a claim on *General Health*

Care Services for Inmates.

This item was postponed from the July 26th hearing at the request of claimant.

MR. ASMUNDSON: Good morning.

This test claim requests reimbursement for costs incurred by local law-enforcement agencies for treatment of law-enforcement patients receiving emergency medical care. Staff recommends that the Commission deny this test claim.

As amended by the test-claim statute, Penal Code section 4011.10 authorizes local agencies, including county sheriffs, police chiefs, and directors or administrators of local detention facilities to contract with hospitals, providing emergency health-care services for law-enforcement patients.

It also sets statutory limits on the amount that hospitals that do not contract with local agencies may charge for emergency health-care services at a rate equal to 110 percent of the hospital's actual cost, or 10 percent above their actual costs.

The test-claim statutes were enacted to save taxpayer dollars by enabling county sheriffs and police chiefs reasonable control over medical costs for inmates, suspects, and victims of crime.

Although the claimant has filed a declaration

showing that it has incurred increased costs as a result of the test-claim statutes, they do not impose any mandated activities on the claimant or mandate the county to increase its level of service provided to the public.

A statute that simply results in increased costs without mandating local agencies to perform new activities or a higher level of services does not require reimbursement under the Constitution.

Staff recommends that the Commission adopt the proposed decision to deny the test claim.

Will the parties and witnesses please state your names for the record?

MR. HARMAN: Good morning, Members of the Commission. James Harman, Deputy County Counsel, County of Orange.

And I'm joined by Kim Pearson, registered nurse, who is the division director for the Orange County Health Care Agency's Correctional Health Services Division.

Members of the Commission, thank you very much for the opportunity to speak this morning, and thank you for allowing the continuance, for my father to have his surgery and have me there for him. I do appreciate your indulgence.

We're presenting our case this morning because

4011.10 of the Penal Code provides a new program for the County of Orange to pay for emergency medical services for its inmates that didn't exist before its enactment.

The Orange County Health Care Agency provides health-care services for inmates booked into Orange County jails. That hasn't changed from before Penal Code section 4011.10 was enacted or after. We provide that care.

But before the Penal Code provision was enacted, the County had the power to negotiate rates for emergency medical services with its providers.

We negotiated and paid for those services at what we call our "MSI rates," our medical services for indigents rates. And the providers agreed to those. They provided the service; we paid for it. And that was the system we had in place in Orange County. That was the program we had.

But once the Penal Code provision that's the subject of this hearing was passed, Orange County now had to have a new program. And that new program requires the County to pay for those medical services at 110 percent of the claimed costs that those providers have. So Orange County can no longer have, at our previous arrangement, our previous program of MSI rates. Now, we're under a new program mandated by the State to pay at

110 percent of those costs.

Now, the statute does say in its plain language, the counties have the power to negotiate rates with their providers. But it's an illusory power. It's an illusory promise that the Legislature gives to the County of Orange. Because essentially that's the least that the providers can get, is 110 percent. What incentive do the providers have to contract for anything less than that? For instance, MSI rates, or something in between MSI rates and 110 percent.

Now, this test claim was filed in 2008 before Ms. Pearson's time and mine. But in that year alone, it was calculated that these costs, these mandated costs were $1.8 million.

Our estimate at this point is, the County of Orange has lost $15 million out of its general fund, keeping in mind the County of Orange is a "donor county," who receives less property-tax revenue out of the property-tax dollar than any other county in the state. So when it hits us, it hits us hard.

Without this financial incentive -- or without the incentive to contract with providers, the County is left powerless to be able to negotiate a lower rate for providing emergency inmate medical care. If we had

those dollars and we could negotiate those rates, and if the state were to reimburse us of those funds, imagine what we could do for correctional medical care. We wouldn't necessarily have a Cadillac program for our inmates, but Ms. Pearson's team would be able to provide enhanced services for things like diabetes control or HIV care. Those kinds of things that would not only help the public fisc in providing medical services for inmates while they're in jail, but would also enhance their health benefits, so that once they're released, they're less of a burden on the public health system.

This is part of a larger context of mandates that are going back and forth between Sacramento and counties, along with AB 109 and some of the other things that local entities are suffering from. And, for instance, with AB 109 and PC 4011.10, there is like a multiplier effect now for the County of Orange, because now with more inmates, more emergency medical care, being forced to pay at 110 percent, it really squeezes the County when it come to our general fund in providing these inmate medical services.

Members of the Commission, we have detailed our position clearly here. I would note one distinction in this mandate, and to demonstrate how it's a new and different program for the County versus the State itself.

As the Commission pointed out, when the State has on its books providing medical care for its inmates, it allows the State, or requires that the State pay at Medicare rates. So it's essentially a floor, which would provide an incentive for providers to maybe negotiate something better with the State.

For us, it's exactly the opposite. The State has imposed a minimum that the providers will get. That they're going to get, at a minimum, 110 of costs. And so they have no reason to negotiate for anything less from us, for emergency medical care services; keeping in mind that maybe not all providers want inmates and providing medical care. So we're already starting, you know, at a step behind.

So this is the position, that 4011.10, which has many good public policy benefits behind it. And we certainly don't dispute that; and we don't dispute the wisdom of the Legislature in passing this. But the Legislature also said that if this Commission finds that it's a state mandate, then those mandates should be reimbursed. And that's what the County is asking for.

And what we're also asking for is that the Commission review our position in light of the proposed statement of decision that staff has written up. And we'd ask you to exercise your independent judgment and

sustain the County's test claim and direct that a new proposed judgment be drafted for this Commission.

Thank you.

MR. BYRNE: Michael Byrne, Department of Finance.

Finance concurs with the staff recommendation that the claim be denied.

MEMBER RIVERA: A question. The providers, have they refused to negotiate with you since this provision has been in place?

MR. HARMAN: I'm not aware that they've refused to negotiate, but they certainly have no incentive to negotiate at this point.

MEMBER RIVERA: I understand. Yes, I understand they have no incentive. But have you reached out to them and asked them if they're willing to have a different contract with you?

MR. HARMAN: Under the statute, we have to pay them at that rate.

MEMBER ALEX: So I'm looking at the statute -- and, obviously, you have more specific experience with it; but, there are situations where emergency services could be provided by a particular hospital or trauma center or whatever. And you could conceivably have a contract for those services, that you will take inmates

from “X” or “Y” facility to that particular center. And it does strike me that that does create some ability to negotiate.

Have you explored that at all?

MR. HARMON: Well, I think when it comes to -- and I’ll ask Ms. Pearson to explain better the idea of what really are the realities of being able to transport inmates to one particular facility, keeping in mind that Orange County has five different facilities, one of which is -- or, actually, two of which are geographically distinct. And so you couldn’t just simply say: there is one central hospital for the County of Orange. And also keeping in mind the County of Orange does not have a county hospital.

But I would leave it to Ms. Pearson to describe how inmate emergency medical care is provided in the County.

MS. PEARSON: So in terms of the emergency department, there are various hospitals with different levels of care, as trauma center Level 1, Level 2, et cetera. So depending on what the nature of the injury is or the nature of the condition, that helps mandate which hospital that they go to.

Particularly in the jail situation, we end up frequently with inmate-upon-inmate assaults, and there

are head and neck injuries. Well, those individuals must go to a trauma center that has a neurosurgeon. So it's not an issue of, do we have a contract with them or not. They are possibly the closest facility, as well as the facility that has the level of service that's needed. And based on EMTALA, they take those patients and they do stabilize them because they have to do that. It has nothing to do with the contract with us or not. They just charge us 110 percent at that point.

And as to the other question, we have put out an RFP for services, and we do not get responses.

CHAIR ORTEGA: Are there any other questions?

Yes?

MS. GEANACOU: If I may.

Susan Geanacou, Department of Finance.

I just want to stress here that the test-claim statute does not require the counties to perform any new program or higher level of service. To the extent the test-claim statute has had a cost or revenue alone impact on the counties, that is cost or revenue alone is the sole impact, to the extent there's been a loss of negotiating advantage here, which may or may not have happened. It will reflect in costs or revenue loss alone, and no new program or higher level of service required -- is not required.

CHAIR ORTEGA: Thank you.

Anything else from the Members?

Ms. Olsen?

MEMBER OLSEN: Well, it seems to me that this is a real issue, but it's not a real issue for the Commission. It seems to me, from what I've heard, it's an issue for the Legislature, and that the issue before the Commission today is fairly clear, which is that there is no new program, no higher level of service. And that's really what we have to make our judgment on.

I'm really sympathetic to the problems it's caused for you, but I don't see that this is the right venue for solving that problem.

CHAIR ORTEGA: Any additional comments?

(No response)

CHAIR ORTEGA: Anything from the public?

(No response)

CHAIR ORTEGA: Do we have a motion?

MEMBER OLSEN: I'll move the staff recommendation.

CHAIR ORTEGA: Thank you.

MEMBER CHIVARO: Second.

CHAIR ORTEGA: We have a motion and a second to approve the staff recommendation.

Please call the roll.

MS. HALSEY: Mr. Alex?

MEMBER ALEX: Aye.

MS. HALSEY: Mr. Chivaro?

MEMBER CHIVARO: Aye.

MS. HALSEY: Ms. Olsen?

MEMBER OLSEN: Aye.

MS. HALSEY: Ms. Ortega?

CHAIR ORTEGA: Aye.

MS. HALSEY: Ms. Ramirez?

MEMBER RAMIREZ: Aye.

MS. HALSEY: Mr. Rivera?

MEMBER RIVERA: Aye.

MS. HALSEY: The motion carries.

Item 5, Matt Jones, Commission Counsel, will present this item. It's a request for mandate redetermination on *Sexually Violent Predators*.

MR. JONES: Item 5. The Commission conducted the first hearing of the two-step hearing process on the redetermination request on July 26th, 2013. It found that the requester, the Department of Finance, had made an adequate showing that the request had a substantial possibility of prevailing at the second hearing.

At this second hearing, the issue before the Commission is whether to adopt the new test-claim decision to supersede the previously adopted test-claim

decision based on a subsequent change in law.

Staff finds that Proposition 83 constitutes a subsequent change in law that modifies the State's liability for the test claim. However, staff finds that Proposition 83 does not eliminate all liability under the program, and staff therefore identifies two activities that remain reimbursable.

Staff recommends that the Commission adopt the staff analysis and proposed statement of decision as its new test-claim decision, ending reimbursement for most of the test-claim activities as of July 1, 2011.

Staff also recommends that the Commission direct staff to prepare new expedited parameters and guidelines to reflect the State's modified liability under the new test-claim decision.

And staff further recommends that the Commission authorize staff to make any non-substantive technical changes to the proposed new test-claim decision following the hearing.

Will the parties and witnesses please state your names for the record?

MS. YAGHOBYAN: Hasmik Yaghobyan on behalf of County of Los Angeles.

MR. SPITZER: Todd Spitzer, Orange County Supervisor and former member of the State Legislature.

MR. OSAKI: Craig Osaki, Deputy Public Defender, from the Los Angeles County Public Defender's Office.

MR. BARRY: Timothy Barry, Office of County Counsel, on behalf of the County of San Diego.

MR. NEILL: Geoffrey Neill, CSAC.

MS. GEANACOU: Thank you. Susan Geanacou, Department of Finance.

MR. BYRNE: Michael Byrne, Department of Finance.

CHAIR ORTEGA: And since the Department of Finance is the claimant here, we'll start with Mr. Byrne or Ms. Geanacou.

MS. GEANACOU: Yes, I'll start.

Thank you.

This is Finance's request for a new test-claim decision on the *Sexually Violent Predators* mandate.

Finance's request asserted that the duties comprising the *Sexually Violent Predators* mandate were all either expressly included in Proposition 83 or necessary to implement it.

Commission staff now agrees with Finance on six of eight of those activities in that they are no longer reimbursable by the State, and recommends that two of eight of those activities remain reimbursable

mandates.

Finance accepts that recommendation and urges the Commission to adopt the final staff analysis.

I will just recite briefly a chronology of the events here, hopefully to make your decision more clear.

In 1998, the statement of decision adopted by the Commission established this as a reimbursable mandate.

In 2006, the voters approved Proposition 83.

Four years later, in 2010, the Legislature enacted a process, now in Government Code section 17570, to allow for a new test-claim decision following a subsequent change in law, affecting state liability for mandate reimbursement. Here, that subsequent change in law is Proposition 83 approved by the voters.

Government Code section 17556(f) says that: "The Commission shall find no costs mandated by the State if the statute or executive order imposes duties that are necessary to employment or are expressly included in a ballot measure approved by the voters in a statewide or local election."

And based on the voters' approval of Proposition 83, Finance continues to assert that many of the *Sexually Violent Predators* mandated activities identified by the Commission staff are no longer

reimbursable based on Government Code sections 17556(f) and 17570.

Finance has considered the comments filed following the first hearing in July, and believes, in light of our filing for a new decision, there is no legal basis on which to continue the State's liability for the six *Sexually Violent Predators* activities identified by the Commission staff.

The staff's recommendation should be approved.

CHAIR ORTEGA: Thank you.

MS. YAGHOBYAN: Hasmik Yaghobyan, on behalf of County of Los Angeles.

As we have been expressing our disagreement, we disagree with the staff's recommendation for many reasons, one of which is just not being fair. Because we believe the reason the Commission was put in place to resolve the issue between the state and the locals were, the Commission was supposed to be partial *[sic].*

But we don't believe that we see that here because when the Department of Finance initiated this redetermination process, our first comment was: Well, this has been -- it's been almost seven years. Even if there was a change in law, which we don't believe there was, still, Department of Finance, why did they wait seven years, or six and a half years?

The Commission responded, “Well, there was no mechanism.”

Okay, we said, “Well, there was mechanism, at least after 2010, Government code section 17570. Still they didn’t do anything. They still waited ‘10, ‘11, ‘12, and ‘13, January.”

And then the Commission responded, “Okay, even if they came late, what is your loss?”

Well, our loss is here. It’s like almost $12 million a year for just the County of L.A. alone for this program.

We don’t think we would have even a good society if there was no such statute of limitation for any crimes or anything. People would be worried about being sued for the rest of their lives. And a code section which applies to the past, present, and future on its face, if it’s not unconstitutional, we don’t believe -- we don’t know what else it is.

Because the Commission goes on and on for some of the activities and refers them as being constitutionally required. But when it come to the code section itself, they say, we don’t know if it’s constitutional or not, we just have to take it on its face until the court -- a judge rules whether it’s constitutional or not; which it is clear, like I said, if

the law applies to the past, the present, and the future, if it's not unconstitutional, what else is it?

The second thing that we think is not fair is just that we as locals, we have 12 months or one year after the incurrence of the cost of new statute of law to file a test claim. And even if we file a test claim, it is very particular to just the word by word, what is necessary. Or not even necessary, what is new? And there could be pages of code sections that we recited from previous law, we cannot claim anything.

But, on the other hand, in this case, even a recitation of other codes that there were no changes. Even as the Commission said, there was not even a comma change, still they are considered to be new laws. However, we have one year. But the Department of Finance, they just initiated this process in January. And we are in September, and we are getting almost final decision.

The County of L.A. has a test claim which was filed in 2000, *ICAN.* It's been 13 years. We have no resolution yet. So we don't know what the Commission's responsibilities are in this process.

So for the same reason, my colleague is going to explain more about the necessity of activities that the Commission rule is not necessary in order to have a

probable cause. However, for the reason I stated, we urge the Commission to deny the recommendation that the staff is making.

Thank you.

CHAIR ORTEGA: Thank you.

MR. OSAKI: Good morning. My name is Craig Osaki. I'm the deputy in charge of the SVP branch in Los Angeles County with the Public Defender's office.

I currently practice in the field. I supervise 20 lawyers in the field. I've also conducted trainings across the state for the past few years now.

Today, I'm here to speak to a few issues regarding the practice that may have an impact on your decision.

First, I want to address the reimbursement for retaining the experts, investigators, and professionals for the preparation of a probable-cause hearing.

In an SVP case, there are three things or three elements that must be proven: There has to be evidence of a conviction of a qualifying sexually violent offense; there has to be a diagnosed mental disorder as defined in the code; and then also the individual has to be likely to commit another SVP-type offense again. And that's been defined as, they have to have a serious and well-founded risk of re-offending.

Now, these SVP cases are very expert-driven. The psychologists often testify, and they have to look at the facts of the case, they do a clinical interview, they have to look into a person's background, review thousands of pages, conduct multiple actuarial -- there are multiple actuarial tools that are administered. And at a probable-cause hearing, the D.A. must prove by way of a strong suspicion that the individual meets these three elements.

The defense is allowed to confront and cross-examine these experts and provide additional information to challenge the allegations. But we would not be able to do so if we weren't provided with the experts and the necessary professionals to do so.

I know that the staff has allowed for the reimbursement of probable-cause hearings because there is a right-to-counsel at these hearings. But these individuals also have a right to competent counsel; and having competent counsel requires the retention of experts and professional services.

And I would urge that at least those additional -- at least reimbursement for those things also be included for consideration.

Another issue that I do wish to discuss is the 6603 trial provisions. My understanding of the staff

analysis is that preparation and attendance in trial is not reimbursable because the trial is necessary to implement Prop. 83. I don't deal with mandates a lot too often, but I understand that that was the position.

But I wanted to advise the Commission and staff members that there are circumstances when a trial is not necessary. We have had cases where the district attorney, the defense attorney, the Court, through consultation with the psychologist -- we all kind of get together, and we conduct a form of plea bargain. And sometimes we say -- the district attorney will say, "You know what? Your client has been doing really well. We don't think he should be released now. But, you know, if he does well in treatment for another year, perhaps we'll consider releasing him in one or two years, say."

And the individual will admit to the petition, and then we will -- and a trial is waived at that point in time.

We also have an unfortunate situation that we find occurring more and more often. You have to remember that in these SVP cases, these individuals have served a significant amount of prison time, and that right when they're about to be released, that's when they file these petitions.

Many of these individuals are old and infirmed.

They have health issues. They have no support, no money. And for some of these individuals, we are finding individuals who will just voluntarily waive their right to a trial, you know, in these cases, and just voluntarily submit to commitment in these cases.

I provide these examples to show that -- I understand what the staff was acknowledging, that there are significant due-process protections; and if an individual wants a trial, there's a lot of due-process protections.

But I just wanted to make sure that the staff and the Commission were aware that there are situations where a trial is not necessary. And if a trial is not necessary, then I believe that preparation and attendance for a trial would still be reimbursable as well, and also the retention of experts and investigators and so forth should be reimbursable as well.

Finally, I do wish to address one issue that's specific to L.A. County. Prior to the passage of SB 1128 and Prop. 83, the District Attorney, the Public Defender, and the L.A. Superior Court agreed and stipulated that cases filed prior to the passage of the law will still be governed under the old law for the two-year term.

In addition, in this agreement, once the individual finished that two-year term, the District

Attorney would be allowed to file a recommitment petition if the individual still qualified as an SVP.

Now, the validity of this agreement was litigated in the California Supreme Court. In 2010, they reached the decision in *People v. Castillo*, 49 Cal.4th 145. It's the validity of this agreement was upheld and the terms of its agreement were enforced.

Also, I wanted to inform this Commission as well, with respect to this agreement, there was a 24-month limitation on this agreement. There was a subsequent agreement that lifted that 24-month agreement. And so we still have a few cases, still around, that are still pursuant to this agreement.

Also, for those individuals that are subject to recommitment petitions, we believe that those cases also are subject to the old law; and, thus, those cases would still be reimbursable to L.A. County as well.

So I'd be happy to answer any questions at this time. Otherwise, I thank you for your time and attention.

MR. BARRY: Good morning. Timothy Barry, Office of County Counsel on behalf of the County of San Diego, including the Office of the Public Defender, the D.A.'s Office, and the Sheriff.

We had raised arguments with respect to the

constitutionality of the applicable statutory provisions in our original comments. And I understand that it is the Commission's position that it doesn't have the authority to address the constitutionality of those statutes in this forum. And so I will yield to that position and not raise those arguments here again.

The proposed statement of decision correctly concludes that certain costs related to the probable-cause hearing required by Welfare and Institutions Code section 6602 continue to be reimbursable.

This includes the cost of transporting each sexually violent predator to and from the facility, the secured facility, to the probable-cause hearing on the issue of whether or not he or she is a sexually violent predator.

This is notwithstanding the fact that that particular activity was not previously expressly found by the Commission to be reimbursable.

The same rationale that the staff has applied to the reimbursement for that activity, should apply to the costs that the counties incur -- the county's designated counsel and the indigent defense counsel incur in the retention of experts, investigators, and professionals in the preparation for the probable-cause hearing.

We have submitted a declaration, which is at pages 344 through 346 from Michael Ruiz, setting forth how essential it is for counsel, both the prosecutor and defense counsel, to have the availability of experts, investigators, and professionals at the probable cause hearing.

As Mr. Osaki pointed out, the individual who is essentially on trial, has the right to competent counsel. And part of the competent counsel is that the counsel be able to retain experts to educate himself or herself with respect to the nuances and the issues that confront his or her client.

So I would urge -- I understand that in the staff analysis that's indicated, that this would be more appropriately raised at the parameters and guidelines time; but I do think -- I do not see the difference in the rationale for the activity of transporting prisoners to and from the probable-cause hearing, how that is materially different from this other issue with respect to the retention of professionals, experts, and investigators for the probable-cause hearing.

So I'd urge the Commission to -- again, we oppose the elimination of the six activities from reimbursement. But to the extent that you are going to approve the staff analysis, we would also request that

the activities for those probable-cause hearings be included as a -- continue to be included as a reimbursable mandate.

CHAIR ORTEGA: Ms. Shelton?

MS. SHELTON: Just to clarify that point while we're on it.

The reason why -- we're not disagreeing with the arguments that are made with respect to probable-cause hearing. The reason why we can't address them now is because the original parameters and guidelines did not identify those costs as reasonably necessary or necessary to comply with the mandate.

So we don't have jurisdiction to add things in right yet. It would have to be after -- when the Commission does have jurisdiction, to address those P's & G's. And that's the difference between the transportation and the probable-cause hearing, where transportation was explicitly provided in the parameters and guidelines, but the experts and investigators for the probable-cause hearing was not. We're not disagreeing substantively.

Do you see what I'm saying?

CHAIR ORTEGA: Are we ready to move on?

MS. SHELTON: Yes, it just needed more. We had nothing in there -- I'm not disagreeing with it, other

than I don't want to tweak the parameters and guidelines until we get to the parameters and guidelines.

MS. HALSEY: All we have before us currently, is the current decision that exists. And it doesn't address this issue.

MR. BARRY: I'm hesitant to argue the point. But I don't know that the original parameters and guidelines approves -- expressly approved transportation costs for prisoners to the probable-cause hearing.

MS. HALSEY: It didn't.

MR. BARRY: Okay, now, I was under the impression it didn't. That's why I'm saying the argument should apply to this position.

MR. JONES: Actually, Heather, I think the original P's and G's identified transportation generally, and I think it just meant to and from the courthouse for all of the proceedings.

We had to carve-out probable cause in this case, which seemed reasonable, since we were determining staff has concluded that the probable-cause hearing should remain reimbursable. So we carved out the transportation element for a probable-cause hearing specifically. It's a little bit different than adding an entire new activity which, from our perspective, based on the P's and G's and based on the test-claim SOD,

providing expert witnesses for a probable-cause hearing would be a new activity.

I believe the comments that were filed that suggested that these things have been reimbursed and that the Controller has been allowing reimbursement for those activities, but they're simply not spelled out in the SOD or the P's & G's previously. And again, we do -- I can definitely see the argument that those should be added in as reasonably necessary activities in the P's & G's phase. I just don't think we should be doing it here.

MS. HALSEY: Yes. The only thing before the Commission right now is whether the State's liability has been modified based on a subsequent change in law. And so if the answer is "yes" and there is a next hearing on parameters and guidelines, then it's appropriate to talk about the scope of what those approved activities would be.

CHAIR ORTEGA: Mr. Spitzer.

MR. SPITZER: Thank you, Madam Chair.

It is really an honor to be here. The intellectual discussion far exceeds anything that I experienced in my six years in the Legislature. So I just want you to know that I appreciate this discussion very, very much.

I think it's important just to tell you just a

little bit about why I'm here.

I was the statewide co-chair of Prop. 83, with Senator George Runner, who was in the Senate at the time. I was also Governor Schwarzenegger's co-chair with Rudy Bermudez at the time of the first High-Risk Sex Offender Task Force. I was also the co-chair or the principal author with Judy Chu. When she was in the Assembly, before she went to Congress, we created the first Sex Offender Management Board here in the state of California. I was also the statewide co-chair and co-author of Marsy's Law, the Victim's Bill of Rights which amended the California Constitution.

I've been a prosecutor, police officer -- I've been in law enforcement for two decades. I've worked with a lot of your bosses, and we've been all this together, on this whole issue of public safety.

And what bothers me about this discussion, the staff analysis, is we have to remind ourselves who these individuals are that will be affected by this change today.

These are sexually violent predators. There are real people who are evil, who commit heinous, horrible crimes that affect people's lives forever, who are incarcerated; and then because they are deemed so dangerous, we don't want them back on the street because

as indicated by the Public Defender, it has been proven in a court of law that they have a high propensity -- like Mr. Gardner who killed Chelsea King and Amber Dubois in San Diego -- that they have the highest propensity to go out and commit another sexually violent act.

So there are real, real dangerous people who are going to be impacted by your vote today; and there are real victims, people who are dead, who knew laws had been created, like Chelsea King, as a result of being murdered by Mr. Gardner who was deemed and is a sexually violent predator.

So this is an incredibly serious decision today. And it goes way beyond the paper.

And I respect the staff work, because I work with staff as an elected official all the time; and I respect the Department of Finance's position. But we need to go back and look at the record.

There was a letter transmitted -- and it's in the supporting documents but it needs to be highlighted. As part of the legal -- you know, when I ran Marsy's Law, I had to meet with LAO, and go through all the legal requirements that LAO is deemed and is necessary to get the ballot initiative prepared.

The Attorney General's office has to prepare legal documents for this to go into the ballot statement.

And when you look at the letter that was transmitted by Liz Hill -- and let me tell you, when I was in the Legislature, Liz Hill -- so many of us as partisan advocates try to manipulate the LAO's office our way, every six ways to Sunday. But if there's any institution here in Sacramento, which I think is above reproach, whether it was Mr. Hamm or any of his predecessors, that LAO's office is here to be right down the middle and to call it like they see it.

And Ms. Hill wrote a letter to then Attorney General Bill Lockyer, signed by the Department of Finance, who is now the dean of the Chapman Law School, Mr. Campbell. That letter was the premise for the assumption of how -- what the legal issues were that was going to be represented of the voter and who was going to pay for it.

And in the letter of September 2nd -- and I'm trying to be respectful to this gentleman who has to take down everything we say, because I'm very sensitive to court reporters, having been a prosecutor; so I'll try to, in my exuberance, speak more slowly.

In the September 2nd, 2005, letter to Mr. Lockyer from Ms. Hill and Mr. Campbell, in their respective positions, in the fiscal impact on local government section, they represented, quote, "to the

extent that this occurs" -- that is, changes to criminal penalties, and supervision -- "local governments would likely experience some criminal justice savings." Specifically, they delineated, when they talked about the *Sexually Violent Predator* program, quote, "The provisions of this measure related to the SVP program could increase county costs. The additional SVP commitment petitions that are likely to result from this measure would increase costs for district attorneys and public defenders to handle these civil cases. Also, county jail operating costs would increase to the extent that offenders who have court decisions pending on their SVP cases were held in local jail facilities instead of state mental health facilities."

Important part, the last sentence: "Counties would be reimbursed in full for all of these costs after they had filed and processed claims with the state."

In the summary of fiscal effect, there's three bullets. And when they delineated to the Attorney General, quote, "Unknown, but potentially significant net operating costs or savings to counties for jail, probation supervision, district attorneys, and public defenders. The portion of costs related to changes -- to changes -- in the *Sexually Violent Predators* program would be reimbursed by the state."

Okay, look, I've been doing this for twenty years as an elected official. At some point, we have got to have an understanding -- and as all the lawyers in the room, we all know about this -- about detrimental reliance and understanding. It's when people make promises and make representations in their official capacity, we have to respect that.

More to the point, when that letter got transmitted to the analysis that went in the official voter handbook to the voters for Prop. 83, it was unequivocally clear, as represented to the voters, in the section on page 45 of Prop. 83, that analysis, under "Other impacts on state and local governments," it's represented that, quote, "There could be other savings to the extent that offenders in prison for longer periods require fewer government services or commit fewer crimes that result in victim-related government costs. Alternatively, there could be an offsetting loss of revenue to the extent that offenders serving longer prison terms would have become tax-paying citizens under current law."

I think that's a stretch, but that's my own parenthetical comment.

"The extent and magnitude of these impacts is unknown."

My point in sharing the letter from Ms. Hill and Mr. Campbell to the Attorney General has a legal duty to incorporate the legislative analysts and the ballot title, so that the voters know what they're voting on, did not say in any way whatsoever, that any of the changes that were either approved by the Legislature in the Alquist bill -- because I was in the Legislature when Elaine carried that bill, and I testified when she was the chairman of the Senate Public Safety Committee, and then what we put on the ballot to corroborate and re-mention, if you will, and talk about some of those provisions, which you needed to mention so that the voters would understand the totality of what you were trying to convey, and then the analysis by all the players that we rely on -- the Attorney General, the Legislative Analyst, and the Department of Finance -- all indicated there was no fiscal impact.

CHAIR ORTEGA: Mr. Spitzer, can I interrupt for just a minute?

MR. SPITZER: Yes, of course.

CHAIR ORTEGA: Isn't it the case that the law has changed since 2005 regarding the reimbursement question?

MR. SPITZER: Right.

CHAIR ORTEGA: With the mechanism that's being

created to bring the claim today, I don't think we would ever look at past ballot write-ups or letters from the LAO on initiative measures and assume that everything they were saying at that time was still accurate today, when there could have been thousands of state statutes changed, and who knows how many initiatives since then.

MR. SPITZER: Right.

CHAIR ORTEGA: So that, I think, is pretty relevant to the point that you're making.

MR. SPITZER: That's my third point.

So the change in state law that your staff is relying on, the Government -- the code section that they're now saying that you can now reevaluate this scenario, essentially, was incorporated in Senate Bill 856. So I pulled the Senate Rules Committee analysis.

That bill was a fifty-plus-page trailer bill, where the language that your staff is now relying on was inserted amongst numerous provisions. The Senate Rules Committee analyzed this now new law that everybody is relying on to not have to fund this anymore, in one paragraph.

Now, I just have to submit to you, as a former legislator: A trailer bill, one paragraph? Trailer bills are constructed in the dark of night. They're

rushed through as part of a budget. Legislators may or may not understand or see the significance or magnitude of something slipping in.

And when you want to rely on something that went in as a trailer bill as opposed to what we're used to, a separate piece of legislation that people know about, it goes through all the committee processes -- in fact, if you look at the Senate analysis from the Rules Committee, there is no analysis from what this bill -- what happened on the Assembly floor. And I'm trusting, because it was probably a gut-and-amend.

My point is this: The reason this Commission is comprised of elected officials and public members and other people is because that's why we do what we do in our capacity as electeds. We take all the information that comes to us, and then we make decisions about, given the totality of these circumstances, is it now right, after this went on the ballot, after it was fully disclosed, and after the voters voted on it and understood there would be no additional costs to local government; and if there were, it would be fully reimbursed by the State of California, just like it was before Prop. 83. In fact, if Prop. 83 hadn't passed, it would still be a state mandate.

So now we're going to say, "But we have this

law that was passed in a trailer bill, fifty-plus pages, with a paragraph this big in the analysis, and say, 'We can now wipe out the entire record of that reliance in that arena.'" I think that's just wrong.

And so I'm requesting, respectfully, that we understand the magnitude of this vote. We will cripple local governments' ability to prosecute sexually violent predators.

The other thing that the Public Defender argument, I think -- it's not an argument you'll normally hear from me as a former prosecutor. But we did this with the DNA initiative, Prop. 69. It was important to release innocent people who were exonerated because DNA exonerated them, they were not the perpetrator of the crime.

We have a duty to provide the Public Defender with the resources they need to ensure that if somebody doesn't meet the definition of a sexually violent predator, they shouldn't be incarcerated for the rest of their life.

So we could potentially ruin future victims' lives by putting these perpetrators on the street, and we could ruin an individual's life who is not a sexually violent predator.

I am respectfully urging you not to support

your staff recommendation.

CHAIR ORTEGA: Mr. Neill?

MR. NEILL: I would like to speak on the law, on the Department of Finance's claim. The claim is based on the statute that Assembly Member Spitzer was referring to, Government Code section 15570.

MR. BARRY: 15570.

MR. NEILL: 15570, which says that the Commission can adopt a new test claim only upon a showing that a subsequent change in law has modified the State's liability.

So we're relying on their having been a subsequent change in law. Specifically -- not just any law, it has to be a subsequent change in law to the laws that impose the mandates.

The main statute that this mandate relies on is Welfare and Institutions Code 6601 that has the bulk of the -- that has the kernel of this mandate. It has the bulk of the mandate in it. Most of the other stuff flows from 6601.

So the Department of Finance's claim is that there was a subsequent change in law to Welfare and Institutions Code 6601 made by Proposition 83.

In the analysis that staff has provided for you on page 11, it says that the change to 6601 -- nobody's

arguing that the change was relevant to the mandate, by the way. The change in 6601 had nothing to do with mandated activities. That's not at issue here. What's at issue is, they're saying that if there is any amendment to that law, then the whole law is reenacted as amended.

But there was no change to 6601 because of Prop. 83. The language in statute before Prop. 83 passed and the language in statute after Prop. 83 passed were exactly the same.

The change that staff puts on page 11 is that it changed the words to "shall toll the term of an existing parole." That was already the law. In exactly the same words before voters passed Prop. 83.

A subsequent change in law is defined in 15570 as -- and common sense also dictates this, that a subsequent change in law includes a change in law. There was no change to this law.

The Commission can only adopt a new test claim upon a showing that a subsequent change in law changes State's liability. Without a subsequent change in law, you cannot make that finding. That law was not changed.

Likewise, the change to 6604 was not made by Prop. 83. It was made by SB 1128, which passed and went into effect before Prop. 83. Prop. 83 did not change

that law. Therefore, the Commission can't find that the subsequent change in law modified the State's liability.

Department of Finance's claim also is reliant on the fact that an amendment to an irrelevant subsection reenacts -- repeals and reenacts the entire section of law.

But it wasn't amended. It can only be reenacted as amended if it was amended. Section 6601 and section 6604 were not amended by Prop. 83. Therefore, Prop. 83 did not reenact section 6601 and 6604. So the Commission can't find that the State's liability has changed because of those sections.

Activities 1, 2, and 3, as numbered in the analysis and in the Department of Finance's claim, flowed directly from section 6601. The activities found to be necessary to implement also flow directly from section 6601. So the State's liability can't have changed based on this subsequent change in law because there was no change in law.

Furthermore, courts, both in California and across the country, have regularly found that this interpretation of full reenactment of an entire statute, because of a change in one portion of it, is not the case.

The best example I found is *County of*

Sacramento v. Pfund. It's "Pfund," but I think the "P" is silent. And in that, the Court faced a decision that was almost exactly like this one, where there was a change to an irrelevant section of statute, and somebody was claiming that because of that, the whole thing was reenacted. And what the Court found was that considering the entire statute as having been wholly reenacted, quote, *"is to do violence to the code and all canons of construction."*

So this idea that an amendment to an irrelevant piece of the law reenacts the whole thing would do that. And I don't think any of you came here today to do violence to all the canons of construction.

To the constitutionality, Commission analysis asserts that the Commission must presume that the statutes enacted by the Legislature are constitutional. And they cite a couple of cases. But the cases don't say that -- the cases in those courts -- the courts are actually referring to themselves. And I don't think the courts would ever find that courts must presume that statutes enacted by the Legislature are constitutional. The court's most important duty is to determine when statutes are not constitutional.

Instead, what those court cases and the entire chain of court cases behind them, what they do is, they

describe the circumstances where that's not the case. You do have to begin from an assumption of validity, of constitutionality. But when the court cases go on to describe the circumstances, what they say is that you must interpret it so that it harmonizes. You don't just assume it at face value. You interpret it to harmonize with the Constitution. And when a statute clearly and unquestionably conflicts with a constitutional prohibition, it must be voided on its face, it must not be upheld.

In this case, Section 6 of Article XIII B, which is the basis of all of the proceedings here, says that whenever the Legislature mandates a new program, the State shall provide funds to reimburse.

There's no question in any of the filings that the State mandated this new program.

There's a statement of decision that shows -- that says that the State mandated this new program. There is no exception in the Constitution for later irrelevant amendments to those statutes.

If voters had rejected Proposition 83, the mandates here would have remained exactly the same. So to assert that the voters established this mandate, when their actions could not have affected it, is absurd. You can't say that voters did something, when whether

they did do it or didn't do it, the actions remain the same.

But all of that is secondary to the fact that the Department's claim relies on a subsequent change in law, and based on the passage of Prop. 83, and Prop. 83 did not change the law. The Commission cannot find that the State's liability has changed for this mandate.

CHAIR ORTEGA: Any comments from Members?

MEMBER OLSEN: With all due respect to Mr. Spitzer, especially his passion about the *Sexually Violent Predators* law, I actually think the principle and the issue here goes well beyond that.

I cut my teeth at the LAO, so I'm happy that you think that's a great office. But my concern here is the sort of meta-principle, and that is that as an informed voter, when I'm faced with a proposition, I want to know the context of the law that I'm voting on. And I actually read the language of the law. I don't just read the LAO's advice about it or anything else. I go in and look at the actual text of the law.

And so we're getting into a situation here where if we're not able to have the context of the law -- that is, the law that existed beforehand -- restated in the new law, I, as a voter, lose a great deal of information in terms of making an independent decision.

And I think that is a really scary thing that we're talking about today.

So I felt really strongly that we need to be able to have the context of the old law reenacted, and to be able to know what we're doing in the new stuff we're putting in on top. That's the first thing.

The second thing is, I'd like to know if there's anybody from the LAO here to testify today? Because we are hearing a lot about the joint letter from the LAO and the Department of Finance. And I would -- since the Department of Finance is now the person requesting this change, I'd certainly like to hear from the LAO about whether their view about Prop. 83, whether their view is that something has changed since they wrote that letter.

Is there anybody here who can speak to that?

(No response)

MEMBER OLSEN: So in the absence of that being able to be addressed, I don't think I can get to "yes" on this today, just so you know.

CHAIR ORTEGA: Anyone else?

Ms. Ramirez?

MEMBER RAMIREZ: Thank you.

And I do appreciate the passion of our counsel here. Speaking about what this law means to society,

though, I think that our role here is a little bit more narrow than solving these -- the funding issues of our justice system. I know it's very challenging to be either a prosecutor or a defense counsel in these situations. But that might be an issue for the whole Legislature and the society, is how to properly fund the things we need to have done to protect the public.

But I'd really like to ask our staff comments about the issue that Mr. Spitzer raised of detrimental reliance.

MR. JONES: So I'm sure you all remember, we discussed this a little bit in the last hearing because several of the commenters had raised arguments relating to detrimental reliance, misrepresentation, unclean hands -- a bunch of different kind of equitable arguments that are all legal terms of art and so forth.

First of all, you all know that this Commission is not designed to, nor is it really equipped to practice equity. Your role is merely to follow the law. And in this case, the law is unfortunately pretty clear, and it's not on the side of those that are raising these arguments.

But in terms of the misrepresentations specifically that's been addressed by several of the commenters -- not just Mr. Spitzer today, but several of

the commenters have raised the letter that was sent to the then Attorney General Lockyer, by the LAO and Department of Finance, and have raised the ballot pamphlet materials.

And while it's true that at the time those things were written, all the parties expected reimbursement to continue, and, in fact, expected reimbursement to increase because they thought that this would be a more expensive program, one of the changes that was made, for example, to the code -- and we can quibble over whether it was done by SB 1128 on September 20th, 2006, or whether the change was made by Prop. 83 in November of 2006. But one of the changes that was made, was the definition of an SVP was taken from one -- or from "two underlying crimes" that were necessary to "one underlying crime." So in theory, you have an increase in the volume of these cases because the definition was loosened, essentially; and then the other most significant change, perhaps, is changing the commitment term from two years to indeterminate which, in the long-term, should taper off that increase in volume you would expect.

But at the time that the Prop. 83 ballot materials were written, SB 1128 had not been enacted. That is one point that I think is worth mentioning.

At the time that the letter was written from the LAO and Department of Finance to the Attorney General, there was no mechanism for mandate redetermination in the law. And that's a point that's been argued based on some of the prior reconsideration actions that this Commission has taken, which have been found to be unconstitutional and a violation of separation-of-powers principles. But there was no redetermination mechanism at the time. And so when those assertions were made regarding mandate reimbursement continuing -- and, in fact, increasing -- those assertions were true. And that's essential to a misrepresentation that it has to be in some way a misrepresentation of a material fact. And in this case, those things were true when they were said.

Ms. Ortega has pointed out that the legal landscape has since changed, obviously, because now we do have a mandate redetermination procedure. And because of the legal landscape has changed in that way, that's why we're able to -- that's why the Department of Finance is able to bring this claim.

MEMBER RAMIREZ: Additionally, could you comment on Mr. Neill's discussion of the subsequent irrelevant non-material change to the law?

MR. JONES: Certainly.

First of all, Mr. Neill is, I think, conflating the term "subsequent change in law" with the idea of a "substantive change in law." The words don't mean the same thing; and in this case, "subsequent change in law" is defined very clearly in the Government Code.

In section 17570 -- which I happen to have right in front of me -- "A subsequent change in law is defined 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, or a change in mandates law."

Now, that definition doesn't say anything about the change in law having to relate to the test-claim statute at issue. And that is, unfortunately, where Mr. Neill's argument falls off the rails because he is arguing that because Proposition 83 didn't make a substantive change to the language or the effect or the text of the test-claim statute as it was pled in 1995, and as it was approved by the Commission in 1998, or alternatively, that it didn't make a substantive change to the test-claim statute as it read on the day before the election, he is arguing that you can't find a subsequent change in law.

But that's not the meaning of "subsequent

change in law," that's not the definition that you have to work with in the Government Code of the phrase "subsequent change in law." It has absolutely nothing to do with the test-claim statute itself, and it need not -- you need not even move a comma or change a verb or anything in the test-claim statute.

MEMBER RAMIREZ: Thank you very much.

MR. NEILL: May I respond?

I think you were misrepresenting my point, because you were conflating two separate points that I was making.

One point: As you read the definition, the first --

MEMBER ALEX: Can you address your comments to us?

MR. NEILL: Yes, absolutely. I apologize.

MEMBER ALEX: Thank you.

MR. NEILL: I believe staff was misrepresenting my comments.

My main point is that a subsequent change in law -- as staff read, the primary, before anything else, what a subsequent change in law requires is a change in law. And my argument is that section -- the law, called Welfare and Institutions Code section 6601, was not changed by Prop. 83.

The Department of Finance's claim is based -- you can -- I mean, it's there. What they claim is that Proposition 83 counts as a subsequent change in law for, among other things, section 6601.

However, a subsequent change in law requires a change in law that it has to fulfill certain other requirements. And section 6601 was not changed. It fails the very first test of a subsequent change in law.

So all of the other things -- whether it fulfills all the rest of the requirements falls by the wayside because the law was not changed.

MEMBER ALEX: Let me ask you this: There are consequences to an initiative voted on by the people.

MR. NEILL: Yes.

MEMBER ALEX: And one of them, conceivably -- I mean, we have to work this through -- is that it changes the nature of the mandate.

MR. NEILL: It can. Absolutely.

MEMBER ALEX: So even without any change, if a statute then goes in front of the voters as an initiative, there may be consequences to that, and I wonder if --

MR. NEILL: It could. But the statutory basis for this Commission's decision today says -- it says, "The Commission may adopt a new test-claim decision only

upon a showing that a subsequent change in law modifies the State's liability."

And in this case -- so you have to have a subsequent change in law.

MEMBER ALEX: Okay, I've got it.

MR. NEILL: A subsequent change in law has to change the law, and section 6601 wasn't changed.

MEMBER ALEX: Thank you.

CHAIR ORTEGA: Ms. Shelton?

MS. SHELTON: I think it might be helpful at this point just to describe the history of this whole statutory authority for a mandate redetermination.

Back in 2004, 2005, and 2006, the Legislature directed the Commission to reconsider a number of prior Commission mandate decisions. Several of them were on the ground that there was a subsequent federal law that imposed the same requirements as state statutes.

Others, like Open Meetings, for example, there now was an initiative that required all meetings to be open to the public; and, therefore, the argument that the Legislature wanted us to accept, was that there was no reimbursable state-mandated program because now there was an initiative.

Those cases went to court. The *California School Boards Association* challenged, on constitutional

grounds, that those statutes directing the Commission to reconsider were unconstitutional. And they won on that point.

In the Court's finding and judgment, they said, if the Legislature had a statutory scheme for the Commission to be able to reconsider a prior final decision, then maybe it would have some merit. Then there wouldn't be a separation-of-powers violation.

So this bill, even though it was a budget trailer bill, and it was lengthy, the stakeholders absolutely knew what was going on, because the bill was enacted as a direct result of the *CSBA* language and the Court's language, saying you just need a statutory process to redetermine.

Once that was done, it came into existence in 2010, that allowed the Department of Finance, and likewise, the claimant community, if it went the other direction, to file a request for redetermination.

The second point is that, yes, by law, the Commission is required to presume that 17570 is constitutional because there is a provision in the California Constitution, and Article III, section 3.5, directing administrative agencies to presume that a statutory scheme is constitutional, unless otherwise determined by a court.

Here, we have to presume it's constitutional. It is being challenged. CSBA has brought another challenge to 17570. That action remains pending in the Alameda County Superior Court, and hasn't gone anywhere yet. And so until -- and there is no stay for the Commission to continue with this process. So at this point, you're required to presume it's constitutional.

MS. HALSEY: And I just wanted to add one thing. I think Mr. Neill is confusing two things, and that's why we're having this kind of cross-wise discussion.

But "subsequent change in law" is defined specifically in 17570 as a change in law that requires a finding that incurred costs as mandated by the State as defined by section 17514 is not a cost mandated by the State pursuant to 17556, or changes to mandates law.

And I think the rule he is thinking of is, there is also a rule of statutory construction that if a -- for instance, when you do a cleanup of a code and you move a code section from one part of the code to another part of the code, but you don't change the language, it continues, in effect, as though it was never reenacted.

And so those are two separate rules and two separate definitions.

MR. NEILL: Can I -- go ahead.

MR. SPITZER: I just want to say a couple things, if I could respond to Commissioner Ramirez's point.

You know, I was a high-school teacher a long time ago, and I used to teach Luis Valdez's as a migrant farm-worker plays in the field, acted out to the migrant farm workers.

And there's a lot of principles here that are at stake, in my opinion. And I really appreciate Commissioner Olsen's point about reading the ballot measure in totality.

People have a right to look at the Attorney General's summary -- I mean, it's the Attorney General of the State of California, you've got to give that some weight. I mean, I've known Bill Lockyer for a long time. He is one of the most honorable elected officials I have ever met and will ever know again.

When I know Bill Lockyer, when he puts his name on this and says "net, net," which means after reimbursement, unknown -- I mean, in other words, this is going to be reimbursed -- I would expect him, and would think that he would uphold that representation to the voters.

This law change is being interpreted and

challenged in the courts.

I could understand prospectively initiatives that came after. But what I learned in law school was that we could rely on what the state of the law was and what the rules of engagement and games were at that time.

That's what I taught my kids when I was a teacher, and that's what I think we have an obligation to do.

You want to change the rules prospectively given this statute; but to go back and reconstruct voter-approved initiatives, I think that's a territory I'm asking this Commission not to go to.

I know the staff is saying it's arguable, but we know we're going to end up in court on it, we know it's pending in the jurisdiction that staff has recommended. Why don't we let that case get played out? Why would we jeopardize *Sexually Violent Predators* in the interim?

I would argue, keep the status quo, see what the outcome is of that case, see if that code section is interpreted a certain way. But put this off to another day then. Deny the claim at this point in time and say, "It's inappropriate until we get a settlement on that legal issue of whether it should be only prospective." But to jeopardize and potentially allow sexually violent

predators back onto the street is a big risk.

Oh, last thing, just real quick. Senator Runner, I think you all know, he was the motivator behind Prop. 83. He was completely unaware of this proceeding. And I don't know -- I would respectfully request, just as part of the record -- I'm not going to read it because I'm not going to take up time -- if I could just submit his comments so that if the Commissioners were to consider it, they can do so.

MEMBER OLSEN: We have them.

MS. HALSEY: They have been submitted and received by the Commissioners.

MR. SPITZER: I did not know that.

Thank you very much.

CHAIR ORTEGA: Mr. Neill?

MR. NEILL: I just want to clarify because, once again, somebody tried to say what I was saying. I don't think it was what I was trying to say.

I'm not arguing any rules of statutory construction. What I'm arguing is whether there was a change in the law.

Proposition 83, nothing that -- I'm not saying it wasn't substantive, I'm not saying whether it was relevant to the mandate. Section 6601 was not changed in any way -- no word of 6601 was changed by Prop. 83.

The words in Welfare and Institutions Code 6601 were exactly the same the day before Prop. 83 was passed and the day after. There was no change in law.

I'm not saying it wasn't substantive. There's no rules of statutory construction. A subsequent change in law requires the change in law; and this law was not changed.

MEMBER ALEX: Okay, not to be argumentative, but I just want to give you an example of where there may be -- without changing a word, you could have a very significant change in consequence.

If you moved a provision from a statute into the State Constitution -- which is, itself, fairly massive -- it could change the meaning and the purpose of those exact, same words.

MR. NEILL: I agree.

MEMBER ALEX: So there are situations, just to --

MR. NEILL: But that's not what happened here.

MEMBER ALEX: Okay.

MR. NEILL: There was a statute, that was Welfare and Institutions Code 6601, it remains Welfare and Institutions Code 6601, the language remains exactly the same before and after. And we have to -- with the Department -- you're going to be deciding on what the

Department of Finance has claimed. And what they have claimed is that Proposition 83 effected a subsequent change in law to, among other things, section 6601. And that is not the case. It did not effect a change to section 6601.

MS. HALSEY: The change, actually, is that now it's a requirement of a proposition of the voters, and it can't be eliminated by the Legislature. That's the change in law.

CHAIR ORTEGA: Mr. Jones?

MR. JONES: Just to add to what Heather just said, if you look at section 33 of Proposition 83, which is on page 492 of your exhibits -- I apologize for the length, we've got lot of comments on this one.

On page 492 of your exhibits, section 33 of Prop. 83 states that "The provisions of this act shall not be amended by the Legislature except by a statute passed in each house by a roll-call vote entered in the journal, two-thirds of the membership of each house concurring."

So one change that I think is not insignificant is that Proposition 83 made sections 6601 and 6604 and 6605, and I think also 6608 -- essentially made it a lot harder for the Legislature to repeal those provisions.

And in addition to which, the purpose of

mandate reimbursement has always been, and will always be, to reimburse the local government for actions of the State Legislature, not for actions of the voters.

And if the Legislature were to -- well, so the Legislature did, actually. The Legislature created this program. The Legislature always had the ability to repeal this program if it didn't want to pay for it. It no longer has that ability, to an extent.

And certainly, it doesn't have that ability to the same extent that it did when the Legislature created the program.

Section 17556 is very clear, Article XIIIB is very clear, when the voters enact a statute or a program, it is not reimbursable by the Legislature. And the reason for that is quite simply because the Legislature doesn't have the power to overrule the voters. The Legislature's power is limited, the voter's power is very much not.

CHAIR ORTEGA: And I think Mr. Jones' point goes directly to the question that is before the Commission, which is: Did the State's liability change as a result of Prop. 83?

So, Mr. Barry, you had something else?

MR. BARRY: I just wanted to refer, for your reference, that we've detailed, at pages 204 through 206

of the exhibits, each code section, and the fact, whether there has been any change to any of the applicable code sections; and if so, what those changes were.

There were no substantive changes to the law. I understand that we're talking about substantive as opposed to changes in form rather than substance. That's effectively what we have here.

And the only way you get to this decision today is because of the addition, I think, of the sentence to 17556(f), in 2005, which says that it shall apply, regardless of whether the statute was enacted before or after the date on which the ballot measure was approved by the voters.

Very clearly -- and I think that's where we're going -- I mentioned this at the last hearing -- that you can't have a statute that has -- that's so overly broad and inclusive, that it does harm and is contrary to the purpose and intent of Article XIIIB, Section 6, that the State be required to provide a subvention of funds for these activities.

And I think that provision, especially that sentence, goes beyond the constitutional bounds, and does violate that provision of the Constitution.

MS. SHELTON: I was going to say on that point, in this current *CSBA* lawsuit, they are also challenging

all the before-and-after sentences in 17556. So, again, that is pending.

MR. BARRY: And Mr. Spitzer's comment, why not let that play out in the courts? Until we have a decision as to the viability of those code sections, it would seem to make sense to allow these mandates to continue to be reimbursable.

And if the courts find that they're constitutional, there is no reason that this couldn't be revisited by the Commission at a later time.

CHAIR ORTEGA: I don't think that's our charge to wait and see what happens in the court.

MS. SHELTON: There is no stay on the process. That case has been sitting there for three and a half, four years now, and it keeps getting amended every time the budget changes. And this is a challenge from schools, so they may be affected a little bit differently than local agencies.

So, you know, I don't have a legal reason to stay it. It would be your decision.

MS. GEANACOU: I'd also like to make an observation, please. Susan Geanacou for Finance.

I just observed that the Commission staff analysis on page 25, about a third of the way down the page, notes that Proposition 83 amended and reenacted

wholesale sections 6601, 6604, 6605, and 6608 of the Welfare and Institutions Code. So just to note that, that is consistent with what we're arguing, and is in contrast to some of the testimony you've heard over the last few minutes.

CHAIR ORTEGA: Any other comments from Members?

MS. SHELTON: But just a concern -- is it Mr. Osaki raised issues with respect to a California Supreme Court decision dealing with the retroactive effect of Prop. 83 --

MS. HALSEY: The *Castillo* case.

MS. SHELTON: -- the *Castillo* case. That's new, a new argument. And it might change the period of reimbursement recommended for -- in this proposed statement of decision.

We had case law, different Court of Appeal decisions, finding that Prop. 83 took effect once the two-year term was over, so that the next -- under prior law, so that the next petition filing would be operated under Prop. 83. Is that correct?

MR. JONES: Actually, it was even broader than that. Some of the case law that we found when addressing the retroactivity issues raised primarily by L.A. County actually suggest that -- in fact, clearly state that the indeterminate sentencing rule, specifically of Prop. 83

,can be applied without retroactivity issues to all pending and future SVP cases.

So even an SVP who was -- whose petition was filed on November 4th, 2006, the Court clearly states that retroactivity is not a problem by changing the petition from a two-year commitment to, ultimately, finding for an indeterminate commitment for that individual.

And the reason for that is because retroactivity is based on the last act or event that occurs before the law takes -- before the impact of the law, essentially. And the last event or act in this case is the mental state of the defendant on the day he is committed.

So on the date of the determination made by the Court, the Court can determine that this person is an SVP, fits the definition of an SVP. So even if the petition was filed the day before Proposition 83, that person can still be committed to an indeterminate sentence.

So whatever stipulation the County of L.A. made between defense and prosecution, I'm not certain that it's consistent with the case law, and I'm not sure that it really affects mandate reimbursement at all.

MS. SHELTON: And I know we're just talking

about this for the first time, so kind of indulge me just for a second.

I think when you have a Supreme Court ruling in a particular jurisdiction, though, it might become the law of the case for that jurisdiction. And so I'm thinking, with that jurisdiction, their period of reimbursement may be different, but…

MR. OSAKI: Yes, and I wanted to clarify, the staff analysis, when they were discussing this issue, where we're referencing Court of Appeal decisions. What I was referencing was *People v. Castillo*, a California Supreme Court case, that specifically dealt with an agreement in L.A. County, because we were dealing with various issues at that time. And that each party had reasons for entering into such an agreement.

Now, it was challenged at the Court of Appeal, and we actually lost. L.A. County did lose at the Court of Appeal, and then that was taken up to the Supreme Court. And the Supreme Court said, "No, this is an enforceable agreement and a valid agreement."

And so to the extent that we still have these cases that are still pursuant to the stipulation, I do believe that those are still reimbursable. And we do have published case -- a published California Supreme Court case to that effect.

MR. JONES: Staff hasn't really had much time to address this, but this sounds an awful lot like a current issue to me, that the County made a decision to make an agreement between prosecutor and --

MS. HALSEY: Matt, may I interrupt?

We have not analyzed this, and we have not talked about this in our office.

I do think if the members are concerned about this, we might want to take it back to analyze this point.

CHAIR ORTEGA: And can you say what that would mean in terms of the staff recommendation today?

MS. HALSEY: It would mean that we would recommend that you defer your decision until next hearing for the vote. We've done that before.

MS. SHELTON: She means substantively.

Substantively, right now, the period of reimbursement that is affected by the filing of the request is July 1, 2011, by statute.

If potentially the court order is binding and becomes a law of the case for a particular jurisdiction, if it were to go that way, then that date may not apply to the County of L.A. only.

MS. HALSEY: For those cases subject to that.

CHAIR ORTEGA: Could we take action, should

there be a motion, take action today, and then address this --

MS. HALSEY: This is a mandate issue, so it's not a P's & G's issue.

CHAIR ORTEGA: I'm not suggesting that we would defer it to the P's & G's; but that if there needs to be some modification of today's action, to address this issue that needs to come before us?

MS. SHELTON: You could bifurcate your ruling, and not adopt a -- I mean, you could make findings on issues in this proposed decision and defer your ruling on this particular issue to the next hearing, in which case we would present another proposed statement of decision just on the period of reimbursement and the issue of retroactivity.

CHAIR ORTEGA: For Los Angeles?

MS. SHELTON: For Los Angeles, right. Or if there's any other jurisdiction, I don't know.

CHAIR ORTEGA: Okay.

MEMBER RAMIREZ: I have a question.

CHAIR ORTEGA: Yes, Ms. Ramirez.

MEMBER RAMIREZ: Actually, of Commissioner Olsen.

You seemed to earlier be interested in seeing whether or not the LAO had something to offer.

MEMBER OLSEN: Yes.

MEMBER RAMIREZ: So is there a procedure for us to do that?

MS. SHELTON: They receive notice of all of our hearings. And they have in the past sometimes come to testify. And so they just are not here today.

MS. HALSEY: But the Commission could request them to appear, though.

MEMBER ALEX: Can I ask, Camille, is there any legal implication -- you know, if the LAO says A or anti-A, does it have any effect on our obligation in making a determination as to what the mandate is?

MS. SHELTON: No.

MEMBER ALEX: Thank you.

CHAIR ORTEGA: Okay, any other comments?

(No response)

CHAIR ORTEGA: Is there a motion?

MEMBER RAMIREZ: I'll move the bifurcation as stated.

MS. SHELTON: Can I help phrase that motion?

MEMBER RAMIREZ: Yes, please. Thank you.

MS. SHELTON: Is your motion to adopt the findings in the proposed statement of decision, all except the period of reimbursement and the issue of retroactivity with respect to the County of Los Angeles

or any other county that has a binding order?

MEMBER RAMIREZ: Yes, that's what I wanted to say.

MR. SPITZER: It was very eloquent.

MEMBER RAMIREZ: As usual.

MR. SPITZER: As usual.

CHAIR ORTEGA: Is there a second?

MEMBER ALEX: I'll second.

CHAIR ORTEGA: Please call the roll.

MS. HALSEY: Mr. Alex?

MEMBER ALEX: Aye.

MS. HALSEY: Mr. Chivaro?

MEMBER CHIVARO: Aye.

MS. HALSEY: Ms. Olsen?

MEMBER OLSEN: No.

MS. HALSEY: Ms. Ortega?

CHAIR ORTEGA: Aye.

MS. HALSEY: Ms. Ramirez?

MEMBER RAMIREZ: Aye.

MS. HALSEY: Mr. Rivera?

MEMBER RIVERA: Abstain.

CHAIR ORTEGA: Is that four?

MS. HALSEY: Yes.

The motion carries.

CHAIR ORTEGA: Thank you, everyone, for being

here today.

MR. SPITZER: Thank you for your time.

CHAIR ORTEGA: Items 6 and Item 7 were on the consent agenda?

MS. HALSEY: Yes. Item 8 is reserved for county applications for a finding of significant financial distress or SB 1033 applications. No SB 1033 applications have been filed.

Item 9, Commission staff member Kerry Ortman will present the Legislative Update.

MS. ORTMAN: Good morning. Commission staff has been following these two bills related to the mandates process.

AB 392: Existing law requires the Controller to prorate claims at the amount appropriated for reimbursement is not sufficient to pay all of the claims approved by the Controller. Existing law also requires the Controller to report to the Department of Finance and various legislative entities when it is necessary to prorate claims. This bill deleted that reporting requirement, and requires the Controller to determine the most cost-effective allocation method if $1,000 or less is appropriated for a program. On August 12th, 2013, this bill was chaptered by the Secretary of State.

AB 1292 is a spot bill that we've been

following. We have contacted the author's office and were told that they have no plans to propose changes to the mandate process. We will continue to monitor that legislation.

CHAIR ORTEGA: Thank you.

MS. HALSEY: Item 10, which Chief Legal Counsel Camille Shelton will present the Chief Legal Counsel report.

MS. SHELTON: I don't have anything new to report. We're still waiting for the Second District Court of Appeal decision in the *Municipal Stormwater Urban Runoff Discharge* case. They have until October 22 to issue their decision.

CHAIR ORTEGA: Thank you.

MS. HALSEY: And Item 11 is Executive Director's report on workload, meeting calendar, and tentative agenda items for the next meeting.

After today's hearing, we'll have ten test claims, four P's & G's, three PGAs, eight statewide cost estimates, and 81 IRCs, and three-point-something mandate redeterminations pending.

We're making good progress towards eliminating the backlog and hearing claims in a timely manner.

I do anticipate that we will hear all of our 2012 claims in early 2014. So it's getting much shorter.

For an action item today, we have the meeting calendar for 2014.

Commission meetings have traditionally been held on the fourth Friday of odd months for many years. The November meeting is usually set for the first Friday in December to avoid holidays, and the fourth Friday of May 2014 is May 23rd, which is Memorial Day weekend -- or the beginning of Memorial Day weekend, and may be a conflict for parties and members. And, therefore, staff proposes holding the May meeting on the following Friday, May 30th.

So with that, we have our proposed calendar for fourth Fridays except for what would be the November hearing and the May hearing.

CHAIR ORTEGA: Do we have a motion on the 2014 calendar?

MEMBER OLSEN: I'll move it.

MEMBER CHIVARO: Second.

CHAIR ORTEGA: Thank you.

All those in favor?

(A chorus of "ayes" was heard.)

CHAIR ORTEGA: Opposed?

(No response)

CHAIR ORTEGA: Okay.

MS. HALSEY: Great. And then we have tentative

agenda items listed on the Executive Director's report.

There is a lot coming up. I know we lost a lot of our audience; but please take a look and see if these are your items because we have a pretty heavy agenda anticipated for December, and then also maybe January. So time to get comments in.

And that's it for me.

CHAIR ORTEGA: Okay, so we are going to recess to closed executive session.

The Commission will meet in closed executive session pursuant to Government Code section 11126(e) to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and to confer with and receive advice from legal counsel regarding potential litigation.

The Commission will also confer on personnel matters pursuant to Government Code section sections 11126(a)(1).

We will reconvene in open session in approximately 15 minutes. So if we can ask all the public to exit.

(The Commission met in closed executive session from 11:48 a.m. to 11:52 a.m.)

CHAIR ORTEGA: We are returning to open

session. The Commission met in closed executive session pursuant to Government Code section 11126(e)(2) to confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and to confer with and receive advice from legal counsel regarding potential litigation, and pursuant to Government Code 11126(a)(1)to confer on personnel matters.

And no action was taken in the closed session.

And with no further business to discuss, I believe I can take a motion to adjourn.

MEMBER OLSEN: So moved.

MEMBER CHIVARO: Second.

CHAIR ORTEGA: All in favor?

(A chorus of "ayes" was heard.)

CHAIR ORTEGA: Thank you, everyone.

(The meeting concluded at 11:53 a.m.)

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REPORTER'S CERTIFICATE

I hereby certify:

That the foregoing proceedings were duly reported by me at the time and place herein specified; and

That the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting by computer-aided transcription.

In witness whereof, I have hereunto set my hand on the 21st of October 2012.

Daniel P. Feldhaus
California CSR #6949
Registered Diplomate Reporter
Certified Realtime Reporter