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September 5, 2013

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

Re: County of San Diego's Comments to Draft Staff Analysis and Proposed Statement of Decision re Second Hearing: New Test Claim Decision Mandate Redetermination Request 12-MR-01
Sexually Violent Predators, (CSM 4509)
Welfare and Institutions Code Sections 6601 through 6608
Statutes 1995, Chapter 762; Statutes 1995, Chapter 763;
Statutes 1996, Chapter 4
Requestor: California Department of Finance

Dear Ms. Halsey:

The County of San Diego, on behalf of the San Diego County Office of the Public Defender, the San Diego District Attorney's Office and the San Diego County Sheriff (collectively referred to as the "County"), hereby submits the following comments in response to the Draft Staff Analysis and Proposed Statement of Decision re Second Hearing: New Test Claim Decision, filed August 2, 2013 ("Proposed SOD").

The State's Liability Pursuant to Article XIII B, Section 6, Subdivision (a) of the California Constitution has Not Been Modified Based on a Subsequent Change in Law.

The Department of Finance ("DOF") has the burden to prove that the "state's liability pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution has been modified based on [a] subsequent change in the law" Cal. Code of Regs. tit. 2, § 1190.05(b)(1). The DOF has failed to meet this burden.

As noted in the Commission's Statement of Decision adopted July 26, 2013, the primary focus of Jessica's Law was to amend provisions of the Penal Code to strengthen penalties for certain crimes against children, expand the definitions of certain sexual offenses, mandate a minimum 25 year sentence for habitual sexual offenders, and require certain sex offenders who are released on parole to be monitored, while on parole, by a global positioning system device. (Statement of Decision adopted July 26, 2013, p. 8.) Jessica's Law did not enact any changes to the activities that were previously found by the Commission to be reimbursable mandates. (See County Counsel of San Diego Comments filed March 27, 2013, AR 204-206, 211-216, summarizing the law as it existed immediately before and immediately after the adoption of Jessica's Law.) Those activities remained exactly the same, before and after the adoption of Jessica's Law. So, while there was a change in the form of the law, there was no change in the substance of the law as it relates to the mandated activities.

As articulated by the Honorable Shawn Nelson in the comments submitted by the Orange County Board of Supervisors, the mere reiteration or restatement of an existing statute in a ballot measure does not mean that it has been reenacted. (Orange County Board of Supervisors Comments dated August 20, 2013, pp. 3-5.) "The portions [of a statute] which are not altered are to be considered as having been the law from the time when they were enacted" Gov't Code § 9605.¹ Because Jessica's Law did not substantively alter any of the provisions of the Welfare & Institutions Code sections containing the mandated activities, those provisions must be considered as having been the law of the land from the time when they were enacted, and Jessica's Law cannot be considered to have affected a subsequent change in the law.

The logic of this argument demonstrates the illogical and overly broad nature of the definition of "subsequent change in law" set forth in Section 17570 that includes provisions expressly included in a ballot measure approved by the voters notwithstanding the fact that there was no actual change in the existing statutory language that originally created the mandated activities. The 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, which requires the state to provide a subvention of funds for the activities the Commission has previously found to be reimbursable.

The Commission can only set aside a prior test claim decision and adopt a new one upon a showing that the state's liability "has been modified based on a subsequent change in the law." Section 17570(b). The DOF has the burden to show that "the state's liability pursuant to Article XIII B, section 6, subdivision (a) has been modified based on

¹ Unless otherwise stated, all section references are to the Government Code.

a subsequent change in law” Cal. Code of Regs. tit. 2, § 1190.05(b)(1). Jessica’s Law did not affect a change in the law with respect to the mandated activities and the DOF’s request should be denied in its entirety.

Costs Related to the Retention of Necessary Experts, Investigators, and Professionals for Preparation for the Probable Cause Hearing Should Continue to be Reimbursable.

The Proposed SOD correctly concludes that certain costs relating to the probable cause hearing required pursuant to Welfare & Institution Code section 6602 continue to be reimbursable. This includes the cost of transporting each potential sexually violent predator to and from a secured facility to the probable cause hearing on the issue of whether he or she is a sexually violent predator, notwithstanding that this activity was not previously expressly found by the Commission to be reimbursable

The 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. As set forth in the declaration of Michael F. Ruiz submitted herewith (see ATTACHMENT A), 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. Even 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.

Recognizing that the retention of qualified experts, investigators and professionals for probable cause hearings is critical to the prosecution and defense of individuals at the probable cause hearing, the County requests that the Commission specifically find that these costs continue to be reimbursable to local agencies pursuant to the SVP mandate.

Conclusion

The Commission can only adopt a new test claim decision upon a showing that the state’s liability for that test claim under the Constitution “has been modified based on a subsequent change in the law.” The DOF has failed to meet its burden of proof by demonstrating the existence of “... a subsequent change in law ... *material to the prior test claim decision* that” modified the state’s liability pursuant to Article XIII B, section 6.

Ms. Halsey

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In addition, the Commission should expressly find that the costs incurred by the county's designated counsel and defense counsel for the retention of necessary experts, investigators, and professionals for preparation and appearance at the probable cause hearing continue to be reimbursable.

Declaration

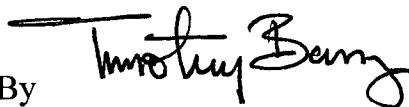
I, Timothy Barry declare that I am employed as a Senior Deputy County Counsel for the County of San Diego; that I am familiar with the facts and issues presented in this matter; and that I am authorized to make this declaration on behalf of the County of San Diego.

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

Executed this 5th day of September, in San Diego, California.

Very truly yours,

THOMAS E. MONTGOMERY, County Counsel

By 

TIMOTHY BARRY, Senior Deputy

Cc: Ms. Laura Arnold
Mr. John Rice
Mr. Ronald Lane
13-90066

ATTACHMENT A

DECLARATION OF MICHAEL F. RUIZ
IN SUPPORT OF COUNTY OF SAN DIEGO'S COMMENTS TO DRAFT STAFF
ANALYSIS AND PROPOSED STATEMENT OF DECISION
RE SECOND HEARING: NEW TEST CLAIM DECISION

I, Michael F. Ruiz, declare as follows:

1. I make this declaration based on my own personal knowledge, except for matters set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify herein, I could and would competently testify to the following.
2. I am an attorney authorized to practice law in the State of California. I am employed as a Deputy Public Defender IV by the County of San Diego Department of Public Defender.
3. My employment responsibilities include litigating cases pursuant to Welfare & Institutions Code ("W&I Code") sections 6600 *et. seq.*, at all stages of the proceedings.
4. Our office represents individuals as respondent (defense) counsel at probable cause hearings held pursuant to W&I Code § 6602 and at the trials of such individuals and any subsequent hearings held pursuant to W&I Code §§ 6603, 6604, 6605 and 6608.
5. Our office is also responsible for the retention of necessary experts, investigators, and professionals for preparation for the probable cause hearings as well as for trial and any subsequent hearings for such individuals.
6. I am informed and believe that the Draft Staff Analysis and Proposed Statement of Decision re: Second Hearing: New Test Claim Decision ("Proposed SOD") proposes to allow local governmental entities to continue to recover costs related to the preparation and attendance of the county's designated counsel and indigent defense counsel at probable cause hearing as well as the costs of transporting and housing each potential sexually violent predator at a secured facility while the individual awaits the probable cause hearing on the issue of whether he or she is a sexually violent predator.
7. I am also informed and believe that the Proposed SOD is silent with respect to whether the costs that either the county's designated counsel or indigent defense counsel incur for the retention of necessary experts, investigators, and professionals for preparation for the probable cause hearing continue to be reimbursable.
8. The retention of necessary experts, investigators and professionals for purposes of preparing for a probable cause hearing can be critical to the defense of individual.

9. The probable cause hearing is a critical stage of any SVP civil commitment proceeding. It is the hearing at which the court makes a determination whether sufficient evidence exists to continue to detain an individual (who would otherwise be released on parole) in a confined setting and set a matter for trial.
10. The burden is on the government to prove, by probable cause, that three statutory requirements are met: i.e. (1) that the Respondent has been convicted of a “sexually violent offense”; (2) that the Respondent currently suffers from a mental disorder which predisposes him to the commission of sexually violent predatory offenses; and (3) that there is a serious and well-founded risk that the Respondent will commit another sexually violent predatory offense unless he is treated in a confined setting in the custody of the Department of State Hospitals and subsequently beyond a reasonable doubt, at trial.
11. While the first requirement is strictly a matter of law, the second and third requirements require that the attorney designated by the county (in San Diego, the District Attorney) and Respondent’s counsel (in San Diego, the Public Defender) have a working knowledge not only of the statutory terms and case law construing those terms, but also of psychiatric diagnoses and actuarial and dynamic risk assessment.
12. SVP litigation is a high-end forensic practice. The areas of diagnosis and risk assessment are ever-changing and the assistance of qualified professionals is critical to the preparation of these cases.
13. At the probable cause stage of SVP proceedings, practitioners for both sides must be able to independently assess both the diagnostic and the relative risk conclusions reached by the designated DSH evaluators. For instance, just last year in San Diego County, in the case of *People v. Alfredo Mejia*, a W&I Code § 6600 petition was dismissed at the probable cause hearing, because mistakes had been made in the scoring of the actuarial instruments by the DSH evaluators, elevating the Respondent’s *actual* relative risk category (S99R score of -1) from extremely low to extremely high. Had Respondent’s counsel not had the ability to consult with a qualified expert and present his testimony at the probable cause hearing, the case would have proceeded to trial at great and unnecessary taxpayer expense.
14. In another case in this County, *People v. Mark McKinney*, investigation conducted by Respondent’s counsel in preparation for the probable cause hearing revealed that the Respondent was approximately twenty years older than his documented age, that a victim's date of birth from a decades-old out-of-state conviction had been incorrectly documented by law enforcement at the

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time of arrest, making her appear younger than she actually was. Additional investigation also revealed that a second victim was, potentially, four years older than had been documented by the records available to the DSH evaluators. This information discovered by our investigator and subsequently consulted with the appropriate experts prior to the probable cause hearing was extremely significant to the issues related to diagnoses.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of September, 2013 at San Diego, California.



MICHAEL F. RUIZ