BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:

Penal Code Sections 2970, 2972, and 2972.1,

As Added or Amended by Statutes of 1985, Chapter 1418; Statutes of 1986, Chapter 858; Statutes of 1987, Chapter 687; Statutes of 1988, Chapter 657; Statutes of 1989, Chapter 228; Statutes of 1991, Chapter 435; and Statutes of 2000, Chapter 324;

Filed on November 19, 1998;

By the County of Los Angeles, Claimant.

NO. CSM 98-TC-09

Mentally Disordered Offenders' Extended Commitment Proceedings

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on January 25, 2001)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

This Decision shall become effective on January 29, 2001.

Paula Higashi

Paula Higashi, Executive Director

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(Adopted on January 25, 2001)

STATEMENT OF DECISION

On November 30, 2000, the Commission on State Mandates (Commission) heard this test claim during a regularly scheduled hearing. Mr. Leonard Kaye appeared for the County of Los Angeles. Mr. James Apps appeared for the Department of Finance.

At the hearing, oral and documentary evidence was introduced, the test claim was submitted, and the vote was taken.

The law applicable to the Commission's determination of a reimbursable state mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 and following, and related case law.

The Commission, by a vote of 7 to 0, approved this test claim.

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BACKGROUND

This test claim involves the Mentally Disordered Offender legislation, codified in Penal Code section 2960 et seq., which establishes civil commitment procedures for the continued involuntary treatment of persons with severe mental disorders for one year following their parole termination date.

Since 1969, the Mentally Disordered Offender legislation has required certain offenders who have been convicted of enumerated violent crimes to receive treatment, by the Department of Mental Health as a condition of parole. [1] To impose such a condition, the prospective parolee must have (a) a severe mental disorder that is not in remission or cannot be kept in remission without treatment; (b) the mental disorder was one of the causes of, or was an aggravating factor in, the commission of the crime; (c) the prospective parolee has been in treatment for 90 days or more within the year prior to his or her parole release day; and (d) the prospective parolee has been certified by a designated mental health professional to represent a substantial danger of physical harm to others by reason of the severe mental disorder.[2]

Both the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Mental Health must evaluate the prisoner before a prisoner may be classified as a mentally disordered offender. A chief psychiatrist of the Department of Corrections must then certify to the Board of Prison Terms that the prisoner meets the statutory qualifications of a mentally disordered offender. If the professionals evaluating the prisoner do not agree, further professional examinations are conducted.

A prisoner has the right to a hearing before the Board of Prison Terms to contest a finding that he or she has a severe mental disorder, as defined by the legislation.[3] If dissatisfied with the results of the hearing, the prisoner may petition the superior court for a civil hearing to deterrnine if he or she meets the criteria of a mentally disordered offender.

If the prisoner's severe mental disorder is put into remission during the parole period, and can be kept into remission during the parole period, the Department of Mental Health must discontinue treatment. [4]

Test Claim Legislation

In 1986, the Legislature enacted the test claim statute, Penal Code section 2970, which established, for the first time, procedures to *extend* the involuntary treatment of a mentally disordered offender for one year beyond the offender's parole termination date if the offender's severe mental disorder is not in remission at the end of the parole period or cannot be kept in remission without treatment.

Specifically, Penal Code section 2970 authorizes the district attorney to file a petition with the superior court, following receipt of the state's written evaluation on the status of the offender's

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[1] Penal Code section 2962.

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

[3] Penal Code section 2966.

[4] Penal Code section 2968.

mental disorder, for the continued involuntary treatment of the offender. The petition is required to allege that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental 'disorder, the prisoner represents a substantial danger of physical harm to others. Penal Code section 2970 states the following:

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

After the section 2970 petition has been filed, the court is required by Penal Code section 2972 to conduct a civil hearing on the petition, Penal Code section 2972 also establishes the procedures for the civil hearing on the petition, which includes the following:

- The defendant has the right to a jury trial;[5]
- Both civil and criminal discovery rules apply;[6]
- A public defender shall be appointed to indigent defendants;[7]
- Representation for the People is by the district attorney;[8]
- The standard of proof is beyond a reasonable doubt;[9] and

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[5] Penal Code section 2972, subdivision (a).

[6] *Id.*

[7] Penal Code section 2972, subdivision (b).

[8] *Id.*

- The jury's verdict must be unanimous .[10]

If the court or jury finds that the offender has a severe mental disorder, that the offender's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the offender represents a substantial danger of physical harm to others, the court is required to order the offender committed to either an inpatient or outpatient program for one year. [11]

If an offender is committed to an outpatient program, the outpatient status can be revoked if the district attorney believes that the offender cannot be safely and effectively treated on an outpatient basis. In such a case, the district attorney files a petition for revocation with the court and a hearing is conducted. If the court agrees that the offender cannot be safely and effectively treated on an outpatient basis, the court is required to order that the offender be treated in a state hospital or other treatment facility as an inpatient. [12]

A new petition and civil trial for reconunitment may be filed and conducted each successive year in accordance with Penal Code section 2970 and 2972 as long as the offender's severe mental disorder still presents a substantial danger of physical harm to others. [13]

On September 7, 2000, the Legislature enacted Assembly Bill 1881, which added Penal Code section 2972.1 and amended Penal Code section 2972 to change the recommitment procedures for mentally disordered offenders receiving *outpatient* treatment following parole.

Under Assembly Bill 188 1, the community program director of the outpatient facility is required to furnish a yearly report and recommendation to the court, the district attorney, the defense counsel, the offender, and the medical director of the facility that is treating the offender. The report shall recommend whether the outpatient offender should be discharged from commitment, ordered to an inpatient facility, or renewed as an outpatient for another year.

If the recommendation is that the offender continue on outpatient status or be confined to an inpatient treatment facility, the defense counsel is required to meet and confer with the outpatient offender and explain the recommendation. Under these circumstances, the outpatient offender has the right to a jury trial under Penal Code section 2972 before the offender can be recommitted. The offender also has the option of accepting the recommendation of continued involuntary treatment and waiving the right to a trial under Penal Code section 2972. Thus, under Assembly Bill 1881, the district attorney is no longer required to annually re-litigate mentally disordered offender cases to extend treatment for an additional year when the outpatient offender affirmatively waives the right to trial and accepts the recommendation.

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9 Penal Code section 2972, subdivision (a).

10 *Id.*

11 Penal Code section 2972, subdivision (c).

12 Penal Code section 2972, subdivision (d).

13 Penal Code section 2972, subdivision (e).

The amendments imposed 'by Assembly Bill 1881 become operative on January 1, 2001 .[14]

Claimant% Position

The claimant contends. that the test claim statutes constitute a reimbursable state mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant submits that the test claim statutes are similar to the *Sexually Violent Predator* (CSM 4509) and *Not Guilty by Reason of Insanity* (CSM 2753) extended commitment legislation, both of which were approved by the Cornmission as reimbursable state mandated programs. Similar to these approved programs, the claimant is seeking reimbursement for the following activities:

- Review, preparation, and attendance at the civil trial and hearings on the petition by the district attorney, indigent defense counsel, support staff, experts, and investigators;
- Retention of necessary experts, investigators, and professionals to prepare for the civil trial;
- Travel to and from state hospitals where detailed medical records and case files are maintained; and
- Transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County's Sheriff Department. [15]

Position of the Department of Finance

On February 1, 1999, the Department of Finance filed comments to the test claim agreeing that the test claim statutes constitute a reimbursable state mandated program. The Department stated the following:

> "As a result of our review, we have concluded that the statute has resulted in a reimbursable state mandate as it requires the district attorney to review cases submitted to extend mentally disordered offenders' (MDO) commitments, petition the court for the commitment, provide legal counsel to MDOs that are indigent, and provide transportation and housing during court proceedings. "

On November 6, 2000, the Department of Finance filed comments on the Draft Staff Analysis changing their position. The Department now contends that the test claim should be denied pursuant to article XIII B, section 6, and Government Code section 17556, subdivision (a),

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[14] See, Bill Analyses for Assembly Bill 1881.

[15] *The Sexually Violent Predator* test claim (CSM 4509) involved legislation establishing new civil commitment procedures for the continued detention and treatment of sexually violent predators following completion of the prison term for certain sexually-related offenses. In *Sexually Violent Predators,* the Commission approved reimbursement for the activities requested by the claimant here.

The *Not Guilty by Reason of Insanity* test claim (CSM 2753) involved legislation establishing civil commitment procedures extending the commitment of individuals found not guilty by reason of insanity in state institutions. The Commission also approved reimbursement for the activities requested by the claimant here.

since the District Attorney for the County of Los Angeles, acting on behalf of the County of Los Angeles as a whole, sponsored the test claim legislation.

FINDINGS

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

In addition, the required activity or task must constitute a new program or create an increased or higher level of service over the former required level of service. The California Supreme Court has defined the word "program" subject to article XIII B, section 6, of the California Constitution as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the new program or increased level of service must impose "costs mandated by the state" pursuant to Government Code section 175 14, [16]

This test claim presents the following issues:

- Are Penal Code sections 2970, 2972, and 2972; 1 subject to article XIII B, section 6 of the California Constitution?
- Do Penal Code sections 2970, 2972, and 2972.1 constitute a new program or higher level of service?
- Do Penal Code sections 2970, 2972, and 2972.1 impose "costs mandated by the state" under article XIII B, section 6, of the California Constitution and Government Code section 175 14?

These issues are addressed below.

Issue 1: Are Penal Code sections 2970, 2972, and 2972.1 subject to article XIII B, section 6 of the California Constitution?

Article XIII B, section 6 of the California Constitution states that "whenever the Legislature or any state agency *mandates* a new program or higher level of service *on any local government,* the state shall provide a subvention of funds. " (Emphasis added.)

Thus, in order for a test claim statute to impose a reimbursable state mandated program under article XIII B, section 6 of the California Constitution, the statutory language must first direct

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[16] Article XIII B, section 6 of the California Constitution; *County of Los Angeles v. State of California, supra, 43* Cal.3d at *56; Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, *66; Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; Government Code section 17514.

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

In the present case, the extended involuntary treatment proceedings begin when the county's district attorney receives the state's written evaluation alleging that the offender's mental disorder is not in remission. The district attorney may request, from the state, affidavits supporting the evaluation. If the state's written evaluation and supporting affidavits support extending the offender's involuntary treatment, "the district attorney may then file a petition with the superior court for continued involuntary treatment for one year." (Emphasis added.)

Despite the use of the word "may" in the statute, the Commission finds that counties are mandated by the state to comply with the test claim statutes for the reasons stated below.

The Legislature declared the following in the Mentally Disordered Offender legislation: "if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, *there is a danger to society, and the state has a compelling interest in protecting the public.*" (Emphasis added.)[17] The courts have further noted that the fundamental purpose of this legislation is to protect the public from dangerous mentally disordered prisoners. [18]

Thus, in order to protect the public, the district attorney has no choice but to review the state's evaluation, request supporting affidavits if necessary, and then file a petition for continued involuntary treatment when the state's evaluation and affidavits reveal that the offender's mental disorder is not in remission and that, as a result, the offender presents a danger of physical harm to others.

Accordingly, the Commission finds that the test claim statutes are subject to article XIII B, section 6 of the California Constitution.

Issue 2: Do Penal Code sections 2970, 2972, and 2972.1 constitute a new program or higher level of service?

The test claim statutes require counties to initiate court proceedings to commit mentally disordered offenders to continued involuntary treatment for one year beyond the parole termination date. In this regard, counties, through the district attorney and indigent defense counsel, are required to perform the following activities:

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

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[17] Government Code section 2960.

[18] ***People v. Femandez*** (1999) 70 Cal.App.4th 117.

- Represent the state and theindigent offender in civil hearings on the petition and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972 and 2972.1).

The purpose of the test claim legislation is to protect the public from mentally disordered offenders whose mental disorder is not in remission or cannot be kept in remission without continued treatment. Thus, the Cornrnission finds that the test claim statutes carry out a governmental function of providing a service to the public. Moreover, the test claim statutes impose unique requirements on counties to initiate court proceedings to commit mentally disordered offenders to continued involuntary treatment. Such activities do not apply generally to all residents and entities of the state. Therefore, the Commission finds that the test claim statutes constitute a "program" within the meaning of article XIII B, section 6 of the California Constitution.

The Commission further finds that the activities performed by the district attorney to review the state's evaluation, to prepare and file the petition for continued involuntary treatment, and to represent the state in all subsequent proceedings regarding the continued treatment of the mentally disordered offender were not previously imposed on counties and, thus, constitute a new program within the meaning of article XIII B, section 6 of the California Constitution.

The Commission recognizes, however, that there is a connection between the indigent's right to counsel to defend the petition and subsequent requests for continued involuntary treatment, and the requirements *previously* imposed by the United States Constitution. Since the hearing on the petition can result in the continued involuntary commitment and treatment of the offender for an additional year beyond the final parole tertnination date, the Sixth Amendment (right to counsel) and Fourteenth Amendment (due process clause) of the U.S. Constitution are implicated.

Although the Mentally Disordered Offender legislation is in the Penal Code, the court has held that the petition for continued involuntary treatment is a civil proceeding. [19] In this regard, the US. Supreme Court has repeatedly found that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.[20]

When analyzing the rights of an individual during civil commitment proceedings, some federal courts have determined that the assistance of counsel is required to meet federal due process standards. [21] Moreover, California courts recognize that legal services for indigent persons at public expense are mandated in civil proceedings relating to mental health matters where restraint of liberty is possible.[22] Finally, case law is clear that where there is a right to

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[19] *People* v. *Williams* (1999) 77 Cal.App.4th 436.

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

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

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

representation by counsel, necessary ancillary services, such as experts and investigative services, are within the scope of that right.[23]

Thus, indigent persons defending a petition and subsequent requests for, continued involuntary treatment under the test claim statutes have a constitutional right to counsel and ancillary services. Nevertheless, for the reasons stated below, the Cornmission finds that the activities performed by the indigent defense counsel under the test claim statutes constitute a new program or higher level of service.

In *County of Los Angeles v. Commission on State Mandates,* the court analyzed the federal constitutional requirements under the Sixth and Fourteenth Amendments in relation to test claim legislation requiring counties to pay for investigators and experts in preparation of the defense for indigent defendants in death penalty cases. [24] The court denied the test claim and concluded that the test claim legislation merely implemented the indigent defendant's preexisting rights under the U.S. Constitution and that the legislation did not impose any *new* requirements on counties. Thus, the court determined that even in the absence of the state law', counties are still compelled to provide defense services under the Sixth and Fourteenth Amendments to indigents facing the death penalty.

Unlike the test claim legislation in the *County* of *Los Angeles* case, however, there is *no* pre-existing federal statutory or regulatory scheme requiring the states to implement civil commitment proceedings for mentally disordered offenders. Rather, this program is brand new. Therefore, counties would not be compelled to provide defense and ancillary services to indigent persons facing a petition for continued involuntary treatment if the new program had not been created by the state.

Accordingly, the Commission finds that the activities performed by indigent defense counsel, investigators and experts to defend the first civil hearing on the petition and any subsequent petitions for recommitment constitutes a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Issue 3: Do Penal Code sections 2970, 2972, and 2972.1 impose "costs mandated by the state" under article XIII B, section 6, of the California Constitution and Government Code section 175 14?

As indicated above, the Department of Finance now contends that the test claim should be denied pursuant to article XIII B, section 6, and Government Code section 17556, subdivision (a), since the District Attorney for the County of Los Angeles, acting on behalf of the County of Los Angeles as a whole, sponsored the test claim legislation. The Department contends that these authorities specifically provide that no reimbursement is required for a local agency that requests legislative authority to implement a mandated program.

For the reasons stated below, the Commission disagrees with the Department of Finance.

Article XIII B, section 6, states in relevant part the following:

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[23] *People* v. *Worthy* (1980) 109 Cal.App.3d 514.

[24] *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805.

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:
>
> (a) *Legislative mandates requested by the local agency affected; . . . .* (Emphasis added.)

In 1984, the Legislature implemented article XIII B, section 6, by enacting Government Code section 17500 and following .[25] As part of that implementation, Governrnent Code section 17514 was enacted to define "costs mandated by the state" as any increased costs that a local agency is required to incur as a result of any statute that mandates a new program or higher level of service.

Governrnent Code section 17556 was also enacted to provide seven exceptions to reimbursement. Government Code section 17556, subdivision (a), states the following:

> The commission shall not find costs mandated by the state, as defined in Section 175 14, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:
>
> (a) The claim is submitted by a local agency or school district which requested legislative authority for *that* local agency or school district to implement the program specified in the statute, and *that statute imposes costs upon that local agency* or school district requesting the legislative authority. *A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a . request within the meaning of this paragraph.* (Emphasis added.)

Thus, in order for Government Code section 17556, subdivision (a), to apply, evidence must be presented to show the following:

- That the local agency filing the test claim requested legislative authority to implement the program. Such a request shall be evidenced by either a resolution from the governing body or a letter from a delegated representative of the governing body; and
- That the statute imposes costs upon that local agency.

In the present case, the Department of Finance has submitted the Department of Finance's Enrolled Bill Report for Assembly Bill 188 1, enacted on September 7, 2000, which reveals that the sponsor of Assembly Bill 1881 was the Los Angeles County District Attorney. The

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[25] Government Code section 17500 states in relevant part the following: "It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution."

Department also cites the case of *Pitts* v. *County of Kern*[26] for the proposition that when the District Attorney sponsored the legislation, he acted on behalf of the County of Los Angeles.

The Commission finds that the evidence submitted by the Department of Finance does not satisfy the requirements of Government Code section 17556, subdivision (a), to deny the test claim, and that the case of *Pitts* v. *County of Kern* does not apply here.

First, the evidence presented by the Department of Finance reveals that the District Attorney for the County of Los Angeles sponsored *only* Assembly Bill 188 1. Assembly Bill 1881, enacted on September 7, 2000, added Penal Code section 2972.1 and amended Penal. Code section 2972 to amend the recommitment procedures of mentally disordered offenders receiving *outpatient* treatment following parole.

AB 1881 did *not* amend or affect the following required activities imposed by other statutes included in this test claim:

- Review the state's initial written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970);
- Prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, § 2970); and
- Represent the state and the indigent offender in the first civil hearing on the petition and any subsequent petitions or hearings regarding the recommitment of an *inpatient* offender (Pen. Code, §§ 2972).

Thus, there is no evidence in the record that the Los Angeles County District Attorney, or the County of Los Angeles, requested legislative authority to perform the above activities required by Penal Code sections 2970 and 2972. Accordingly, the Commission finds that Government Code section 17556, subdivision (a), does not apply to the activities listed above, and that there are costs mandated by the state for these activities.

The Commission further finds that Government Code section 17556, subdivision (a), does not apply to deny this test claim for the activities imposed by Assembly Bill 1881.

The amendments enacted by Assembly Bill 1881 allow the outpatient offender to affirmatively agree to continued treatment and waive the right to trial when there is a recommendation that the offender continue receiving outpatient or inpatient care for another year. Thus, as a result of Assembly Bill 188 1, the district attorney may perform a *lower* level of service since they are no longer required to retain experts, prepare for, or attend a civil trial on the issue of recommitment when the outpatient offender agrees to continued treatrnent for another year and waives the right to trial. Accordingly, the Cornmission finds that there is no evidence that Assembly Bill 1881 imposes any increased costs on the Los Angeles County District Attorney, as required for Government Code section 17556, subdivision (a), to apply.

Assembly Bill 1881 may, however, increase the costs of the defense attorney retained by the county for the indigent outpatient offender that receives a recommendation for continued

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[26] *Pitts v. County of Kern* (1998) 17 Cal.4th 340.

treatment. Under these circumstances, Assembly Bill 1881 imposed a new requirement on the defense counsel to meet and confer with the outpatient offender and explain the recommendation. Following the meeting, both the defense counsel and the outpatient offender are required to sign and return to the court a form indicating whether the offender demands a jury trial or accepts the recommendation and waives the right to trial. If the outpatient offender waives the right to trial under Assembly Bill 1881, then the costs imposed on the county under the Mentally Disordered Offender program are reduced since, like the district attorney, the defense attorney is not required to retain experts, prepare for, or attend a civil trial to defend the matter. If, on the other hand, the outpatient offender demands a jury trial, then the meeting between the defense counsel and the outpatient offender, and their completion of the form described above, will impose additional costs on the county.

Thus, with regard to the activities imposed on the county's defense attorney, the issue is whether the Los Angeles County District Attorney acted on behalf of the County of Los Angeles as a whole when he sponsored Assembly Bill 1881.

In this regard, the Department of Finance relies on *Pitts v. County of Kern.* In *Pitts,* the plaintiffs, whose convictions for child molestation were reversed on appeal, brought actions seeking damages against the county, the district attorney and the district attorney's employees asserting numerous civil rights violations based on alleged misconduct during the criminal prosecution. The issue presented in the case was whether, for purposes of local government damages liability, a district attorney acts on behalf of the state or the county when prosecuting criminal violations of state law, and when establishing policy and training employees in such areas.[27] The court recognized that the district attorney may act on behalf of the county when performing administrative functions that are unrelated to the prosecution of state criminal laws .[28] The court concluded, however, that the district attorney acted on behalf of the state when prosecuting criminal violations of state law, and when establishing policy and training employees in such areas. Thus, the county was not liable for damages.

Using the *Pitts* case, the Department of Finance contends that the District Attorney acted on behalf of the county since "sponsoring legislation concerning the extended civil commitment of mentally disordered offenders neither prepares for prosecution and prosecutes violations of state criminal law, nor establishes policy and trains employees in these areas. "

The Cornmission finds that the Department's reliance on *Pitts* is misplaced. First, the *Pitts* case does not address the issue of reimbursement of state mandated programs under article XIII B, section *6.* Second, the *Pitts* case does not discuss Government Code section 26500.5, which expressly authorizes the district attorney, on his or her own, to *sponsor* any project or program to improve the administration of justice, as is the case here when the Los Angeles County District Attorney sponsored Assembly Bill 188 1. In this regard, the courts, including the court in *Pitts,* have consistently held that the county board of supervisors does not have the power to direct the manner in which the district attorney's statutory duties are performed.[29]

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[27] *Pitts, supra, 17* Cal.4th 340, 345.

[28] *Id.* at 363.

[29] *Id.* at *358. See* also, *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 242.

Accordingly, the Commission finds that when the Los Angeles County District Attorney sponsored Assembly Bill 1881, he did not sponsor that legislation on behalf of the County of Los Angeles as a whole.

Moreover, there is no evidence in the record that the County of Los Angeles itself requested legislative authority to change the Mentally Disordered Offender program, Government Code section 17556, subdivision (a); requires that such a request be evidenced by a resolution from the governing body or a letter from a delegated representative of the governing body of a local agency requesting authorization for that local agency to implement the program. Such documents have not been presented here.

Accordingly, the Cornmission finds that Government Code section 17556, subdivision (a), does not apply to the recorrnnitment procedures imposed by Assembly Bill 1881 for mentally disordered offenders receiving outpatient treatment, and that such activities impose costs mandated by the state on counties.

The Commission further finds that the activities requested by the claimant to (1) retain necessary experts, investigators, and professionals to prepare for the civil trial and subsequent proceedings; (2) travel to and from state hospitals where detailed medical records and case files are maintained; and (3) provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County's Sheriff Department, are reasonably necessary to comply with the test claim statutes and, thus, constitute reimbursable state mandated activities .[30]

CONCLUSION

Based on the foregoing, the Comrnission concludes that Penal Code sections 2970, 2972, and 2972.1 impose a reimbursable state mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 175 14 for the following activities:

- Review the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970);
- Prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code,' § 2970);
- Represent the state and the indigent offender in civilhearings on the petition and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972, **2972.1);**
- Retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions for recommitment;

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[30] Section 1183.1, subdivision (l)(C)(4) of the Commission's regulations authorizes the Commission to include in the parameters and guidelines, as reimbursable state mandated activities, a description of the most reasonable methods of complying with the mandate.

- Travel to and from state hospitals where detailed medical records and case files are maintained; and
- Provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County's Sheriff Department.