



March 25, 2009

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**COMMISSION ON
STATE MANDATE**

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

Dear Ms. Higashi:

As requested in your letter of February 10, 2009, the Department of Finance (Finance) has reviewed the test claim, Claim No. CSM-08-TC-03 "State Authorized Risk Assessment Tool for Sex Offenders (SARATSO)," submitted by Los Angeles County (claimant). The claimant asserts that the Sex Offender's Punishment, Control, and Containment Act of 2006 (Act) and the Department of Mental Health's Executive Order (executive order) imposed reimbursable state mandated costs on local agencies. The claimant has identified the following new duties which, it asserts, are reimbursable state mandates on county probation offices and district attorney offices:

- Administering the SARATSO program.
- Training on the SARATSO program.
- Providing intensive specialized probation supervision for high risk sex offenders.
- Compiling reports for other agencies.
- Performing investigative duties.
- Providing electronic monitoring for sex offenders on probation.
- Providing services to an increased sexual offender population.
- Treating registered transients.
- Providing record retention for 75 years.

As a result of our review, Finance finds that the Act and the executive order could result in a reimbursable state mandate; however, the reimbursement may be limited based on the statutory exception specified in subdivision (g) of Government Code Section 17556 and pending litigation.

Finance believes the activities related to completing the SARATSO are subject to subdivision (g) of Government Code Section 17556. The results of the SARATSO are required for the court to make a determination on the probation conditions of a convicted sex offender. Therefore, the results affect the sex offender's penalty after he/she has been convicted of the crime. In the *County of Orange v. State Board of Control* (1985) 167 Cal.App.3d 660, 663, probation was found to be a penalty for conviction of a crime because it is an "alternative sentencing device imposed after conviction."

Ms. Paula Higashi
March 25, 2009
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If a sex offender violates the probation conditions, then subdivision (a) of Penal Code Section 1203.2 provides the authority to revoke probation and impose additional penalties, including incarceration. Consequently, the Commission on State Mandates (Commission) is prohibited from finding costs mandated by the state because the SARATSO program is part of the sentencing process that affects the penalty for a crime or infraction (probation) within the meaning of Section 6, Article XIII B of the California Constitution.

Finance also finds that prior law required county probation offices to perform investigative duties to complete reporting requirements under the Penal Code Section 1203. The alleged investigative duties are not new under the SARATSO program. Similarly, the reporting conditions for treating registered transients is not a new duty imposed on the county probation offices within the meaning of Section 6, Article XIII B of the California Constitution, as noted on page 38 of the test claim.

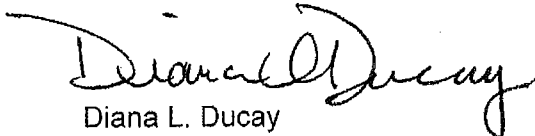
Additionally, the findings on the requirement to provide the monitoring may be affected by the outcome of *The People v. Milligan* (2008) which is pending a rehearing in the Fourth District Court of Appeal, Division 3, Case No. G039546. The case seeks clarification as to whether monitoring devices may be required for persons who committed a sex offense before November 2006.

As a result of our review, we have concluded that the Act and the executive order may have resulted in a partial reimbursable state mandate for some of the activities identified by the claimant. If the Commission reaches the same conclusion at its hearing on the matter, the nature and extent of the specific activities required can be addressed in the parameters and guidelines, which will then have to be developed for the program. Furthermore, Finance may submit additional comments when relevant information becomes available.

As required by the Commission's regulations, a "Proof of Service" has been enclosed indicating that the parties included on the mailing list which accompanied your February 10, 2009 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Carla Castañeda, Principal Program Budget Analyst at (916) 445-3274.

Sincerely,



Diana L. Ducay
Program Budget Manager

Enclosures

Attachment A

DECLARATION OF CARLA CASTAÑEDA
DEPARTMENT OF FINANCE
CLAIM NO. CSM-08-TC-03

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.
2. We concur that the sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.
3. We declare that the attached opinions of the court cases are authentic and can be retrieved by accessing either the California Courts' website, <http://www.courtinfo.ca.gov>, or the Westlaw's website, <http://web2.westlaw.com>.

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

Maul 25/2009
at Sacramento, CA

Carla Castañeda
Carla Castañeda

PROOF OF SERVICE

Test Claim Name: State Authorized Risk Assessment Tool for Sex Offenders (SARATSO)
Test Claim Number: CSM-08-TC-03

I, the undersigned, declare as follows:

I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 12 Floor, Sacramento, CA 95814.

On 3/25/2009, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 12 Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

Ms. Karen Pank
Chief Probation Officers of California
921 11th Street
Sacramento, CA 95814

Ms. Hasmik Yaghobyan
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

B-08
Ms. Ginny Brummels
State Controller's Office
Division of Accounting and Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

A-15
Ms. Carla Castaneda
Department of Finance
915 L Street, 12th Floor
Sacramento, CA 95814

Mr. Dick Reed
Peace Officer Standards and Training
Administrative Services Division
1601 Alhambra Boulevard
Sacramento, CA 95816-7083

A-31
Ms. Cynthia Rodriguez
Department of Mental Health
1600 9th Street, Room 153
Sacramento, CA 95814

Ms. Brenda Lewis, Attorney
Department of Corrections
Legal Affairs Division
P.O. Box 942883
Sacramento, CA 94283-0001

Ms. Annette Chinn
Cost Recovery Systems, Inc.
705-2 East Bidwell Street, #294
Folsom, CA 95630

Ms. Harmeet Barkschat
Mandate Resource Services LLC
5325 Elkhorn Boulevard, #307
Sacramento, CA 95842

A-15

Ms. Susan Geanacou
Department of Finance
915 L Street,, Suite 1280
Sacramento, CA 95814

Mr. J. Bradley Burgess
Public Resource Management Group
895 La Sierra Drive
Sacramento, CA 95864

Mr. Glen Everroad
City of Newport Beach]
3300 Newport Boulevard, P.O. Box 1768
Newport Beach, CA 92659-1768

Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor /Controller-Recorder
222 West Hospitality Lane
San Bernardino, CA 92415-0018

Mr. Louie Martinez
Alameda County
1221 Oak Street, Suite 555
Oakland, CA 94612

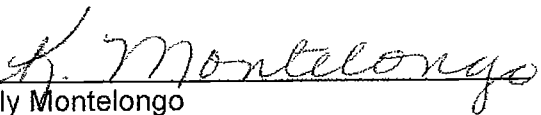
Mr. Allan Burdick, Director
CSAC and CA Cities SB90 Services
3130 Kilgore Road, Suite 400
Rancho Cordova, CA 95670

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

Mr. Leonard Kaye
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Ms. Sharon Stevenson
Department of Health Care Services
1501 Capitol Avenue, MS 0010
P.O. Box 997413
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on 3/25/2009 at Sacramento, California.


Kelly Montelongo

COUNTY OF ORANGE, Plaintiff and Respondent,
 v.
 STATE BOARD OF CONTROL, Defendant and Appellant.
 No. G000401.

Court of Appeal, Fourth District, Division 3, California.
 Apr 30, 1985.

SUMMARY

Respondent County of Orange filed a claim for reimbursement from the State Board of Control for increased probation department expenses incurred as a result of mandatory domestic violence diversion legislation (Pen. Code, §§ 1000.6-1000.11). Asserting that the legislation changed the penalty for a crime and that Rev. & Tax. Code, § 2253.2, precluded consideration of a local agency's claim in such a case, the board refused to consider the claim. The superior court issued a writ of mandate compelling consideration of the claim. (Superior Court of Orange County, No. 401300, Philip Edgar Schwab, Jr., Judge.)

The Court of Appeal affirmed, holding that pretrial diversion programs could be distinguished from probation following conviction by the fact that diversion affects the decision to prosecute-not any sentence after successful prosecution-while probation means suspension of imposition or execution of a sentence. Because a device intended to avoid prosecution altogether thus has no effect on punishment for the diverted offense, the provision cited by the board was inapplicable and the board would be compelled to consider the claim. (Opinion by Wallin, J., with Sonenshine, Acting P. J., and Crosby, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Criminal Law § 149--Discharge or Holding to Answer--Pretrial Diversion--Domestic Violence. Pen. Code, §§ 1000.6 through 1000.11, establish a

program under which persons accused of domestic violence can be diverted, following an investigation of the accused's suitability for diversion, into education, treatment, and rehabilitative programs while criminal proceedings are suspended, with charges dismissed and arrest records expunged upon successful completion of the program under probation department supervision.

(2) Criminal Law § 514--Punishment--Pretrial Diversion Distinguished.

Although an accused who is diverted for domestic violence under Pen. Code, §§ 1000.6 through 1000.11, is subject to a penal statute, criminal judicial proceedings, and supervision by the probation department, diversion is an alternative to prosecution and punishment and not a form of punishment for the diverted offense.

(3) Counties § 15--Fiscal Matters--Claim for Increased Expenses Due to Mandatory Domestic Violence Diversion Program--Change of Penalty for Crime.

Because probation is the suspension of imposition or execution of a sentence and an order of conditional and revocable community release following conviction for an offense, while diversion is a pretrial program of attempted rehabilitation designed to avoid conviction, the Board of Control could not, under Rev. & Tax. Code, § 2253.2, avoid consideration of a county's claim for increased probation department costs resulting from mandatory domestic violence diversion on the ground that the diversion statute constituted only a change in punishment for crime, notwithstanding similarities between probation and diversion.

[Pretrial diversion: statute or court rule authorizing suspension or dismissal of criminal prosecution on defendant's consent to noncriminal alternative, note, 4 A.L.R.4th 147. See also Cal.Jur.3d, State of California, § 120; Am.Jur.2d, Criminal Law, § 408.]
 COUNSEL

John K. Van de Kamp, Attorney General, Richard D. Martland, Chief Assistant Attorney General, N. Eugene Hill, Assistant Attorney General, and Melvin R. Segal, Deputy Attorney General, for Defendant and Appellant.

Adrian Kuyper, County Counsel, and Daniel J. Didier, Deputy County Counsel, for Plaintiff and Respondent.

George Agnost, City Attorney (San Francisco), Burk E. Delventhal and Thomas J. Owen, Deputy City Attorneys, as Amici Curiae on behalf of Plaintiff and Respondent. *662

WALLIN, J.

Respondent County of Orange (County) filed a claim for reimbursement from appellant State Board of Control (Board) for the increased costs of its probation department incurred by County in implementing mandatory domestic violence diversion legislation. (Rev. & Tax. Code, § 2250 et seq.) The Board refused to hear the claim because it determined the legislation changed the penalty for a crime and therefore it lacked jurisdiction. (Rev. & Tax. Code, § 2253.2.)^{FN1}The County sought review of the Board's decision by writ of mandate in the superior court. The court found the law establishing the diversion program did not change the penalty for a crime and issued a writ compelling the Board to exercise its jurisdiction over the claim. The Board appeals. We agree with the court below and affirm the judgment.

FN1 Revenue and Taxation Code section 2253.2, subdivision (c)(2) provides: "The Board of Control shall not consider ... any claims submitted by a local agency ... if: ... (2) The chaptered bill created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction"

(1)In 1979, the Legislature enacted a diversion program for persons arrested for acts of domestic violence. (Pen. Code, §§ 1000.6-1000.11.)^{FN2}Under the program, an accused who meets certain criteria can be diverted into a community program of education, treatment or rehabilitation while the criminal proceedings against him are suspended. The accused must consent to participation and waive his right to a speedy trial (§ 1000.7, subd. (b)), but no admission of guilt is required of him (§ 1000.6, subd. (c)). Upon the accused's successful completion of the diversion program, the charges against him are dropped and his arrest is deemed never to have occurred. (§§ 1000.9,

1000.10.) If he is unsuccessful, however, he is returned to the court for resumption of the criminal proceedings. (§ 1000.9.)

FN2 All statutory references hereafter are to the Penal Code.

Before diversion can be ordered, the court must refer potential cases to the probation department for an investigation to determine if the accused is one who would benefit from diversion and into which community program he should be placed. (§ 1000.7, subd. (b).) The probation department is also required to monitor the progress of the diverted person and to return him to court if he is not benefiting from the program or if he is convicted of any violent crime. (§ 1000.9.)

(2)The Board argues that diversion constitutes an alternate penalty to the crime of domestic violence. It points out a diverted defendant is subjected to a penal statute and criminal judicial proceedings, and is placed under the supervision of the probation department with certain restrictions *663 on his behavior. We disagree with the Board and conclude the diversion program creates an alternative to criminal prosecution and conviction rather than changing the penalty. No person can be punished for a crime unless he has been found guilty by a court or jury, or has entered a guilty plea. (§§ 681, 689; *People v. Clapp* (1944) 67 Cal.App.2d 197, 200 [153 P.2d 758].) Consequently, since participation in the program occurs prior to a determination of guilt or innocence, it cannot be considered a penalty.

(3)However, the Board stresses the similarity between diversion and probation, arguing both constitute the imposition of a penalty. For this proposition, the Board cites *People v. Superior Court (On Tai Ho)* (1974) 11 Cal.3d 59 [113 Cal.Rptr. 21, 520 P.2d 405], where the court held the act of ordering an accused to a drug diversion program was a judicial act and did not require the consent of the prosecutor. In this context, the court stated: "[D]iversion may also be viewed as a specialized form of probation, available to a different class of defendants but sharing many similarities with general probation and commitment for addiction." (*Id.*, at p. 66.)The existence of some similarities between probation and diversion does not affect the basic distinction between the two. Probation means "the suspension of the imposition or

execution of a *sentence* and the order of conditional and revocable release in the community under the supervision of the probation officer." (Italics added.) (§ 1203, subd. (a).) Diversion, on the other hand, can only be ordered prior to trial. (See *Morse v. Municipal Court* (1974) 13 Cal.3d 149, 156 [118 Cal.Rptr. 14, 529 P.2d 46].) Thus, probation is an alternative sentencing device imposed after conviction, while diversion is a pretrial program designed to avoid conviction.

We conclude the domestic violence diversion legislation did not change the penalty for a crime, and the Board is thus required to hear the County's claim for reimbursement. The judgment is affirmed.

Sonenshine, Acting P. J., Crosby, J., concurred. *664

Cal.App.4.Dist.
County of Orange v. State Bd. of Control
167 Cal.App.3d 660, 213 Cal.Rptr. 440

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C A L I F O R N I A D E P A R T M E N T O F
Mental Health

1600 Ninth Street
Sacramento, CA 95814
916-654-4027

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MAR 12 2009

**COMMISSION ON
STATE MANDATES**

March 12, 2009

To: The Commission On State Mandates
980 9th St.
Sacramento, Ca.
95814

From: Kristopher Kent
Staff Counsel
The Department Of Mental Health

Re: State Authorized Risk of Assessment Tool for Sex Offenders (SARATSO) Test Claim.

After reviewing the Test Claim brought by the County of Los Angeles, the Department of Mental Health has no comments for the Commission.