STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

REPORT TO THE LEGISLATURE: DENIED MANDATE CLAIMS

January 1, 2023 – December 31, 2023

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INTRODUCTION

The Commission on State Mandates (Commission) is required to annually report to the Legislature on the number of claims it denied during the preceding calendar year and the basis on which each of the claims was denied.[1]

This report includes a summary of three test claims that the Commission denied during the period from January 1, 2023, through December 31, 2023. The complete text of the decisions for the denied claims may be found on the Commission's website at https://www.csm.ca.gov/report-denied-mandates.shtml.

The decisions are based on the administrative record of the claims and include findings and conclusions of the Commission as required by the California Code of Regulations, Title 2, section 1187.11.

[1] Government Code section 17601.

SUMMARY OF DENIED CLAIMS

Resentencing to Remove Sentencing Enhancements, 22-TC-02

Penal Code Sections 1171 and 1171.1 as Added by Statutes 2021, Chapter 728, Sections 2 and 3 (SB 483); Effective Date, January 1, 2022 (Renumbered as Penal Code Section 1172.7 and 1172.75 by Statutes 2022, Chapter 58)

County of San Diego, Claimant

Test Claim Filed: December 28, 2022

Decision Adopted: September 22, 2023

This Test Claim alleged new state-mandated activities arising from Penal Code sections 1171 and 1171.1, as added by Statutes 2021, chapter 728 (later renumbered as Penal Code sections 1172.7 and 1172.75).[2] The test claim statute retroactively applied two prior changes in law that eliminated sentence enhancements for certain prior convictions, by declaring any sentence enhancement imposed by the changed laws for prior convictions that do not require sentence enhancements under current law to be legally invalid. To remediate these legally invalid sentences, county correctional administrators are required to identify to the sentencing courts all persons in their custody currently serving a term for a judgment that included the now legally invalid sentence enhancements. The counties are required to identify those individuals who have already served their base term and any other sentence enhancements by March 1, 2022, and then identify all other individuals by July 1, 2022. The Department of Corrections and Rehabilitation (CDCR) is also required to identify those individuals currently in its custody whose terms include the legally invalid sentence enhancements by the same deadlines. The courts are then required to confirm that the judgments of the individuals identified by the State and the county include the legally invalid sentence enhancements and if so, recall the defendant's sentence and hold a resentencing, at which time the defendant is entitled to legal counsel, by October 1, 2022 for defendants who have already served their base term and any other sentence enhancements, and by December 31, 2023 for all other defendants. A resentencing pursuant to the test claim statute is required to result in a lesser sentence by virtue of eliminating the invalid sentence enhancements, "unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety."[3] In addition, the test claim statute requires "a full resentencing, not merely that the trial court strike the newly 'invalid' enhancements."[4] Because the test claim statute requires a full resentencing, the court may also find that changes in law or post-conviction factors warrant reducing the sentence even further.[5]

The Commission found that the test claim statute mandates a new program or higher level of service on county correctional administrators, public defenders to represent the defendants during resentencing, and district attorneys to represent the People during

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[2] The code sections were renumbered by Statutes 2022, chapter 58.

[3] Penal Code section 1171(d)(1) and 1171.1(d)(1) (renumbered as 1172.7(d)(1) and 1172.75(d)(1)).

[4] *People v. Monroe* (2022) 85 Cal.App.5th 393, 402.

[5] Penal Code section 1171(d)(2)-(3) and 1171.1(d)(2)-(3) (renumbered as 1172.7(d)(2)-(3) and 1172.75(d)(2)-(3)).

resentencing. However, there is not substantial evidence of increased costs in the record for county correctional administrators or public defenders to identify incarcerated persons with invalid sentence enhancements, or for district attorneys to represent the People during resentencing. More importantly, even if there were substantial evidence of these increased costs, there are no costs mandated by the state pursuant to Government Code section 17556(g). Government Code section 17556(g) says the Commission shall not find increased costs mandated by the state when it finds that a statute ". . . changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction." The test claim statute removes sentence enhancements from people currently serving prison sentences for a criminal conviction, thereby reducing their sentences and changing the penalty for their crimes. In addition, the activities of identifying inmates who are eligible for resentencing and representing them and the People during resentencing are not administrative in nature, but are indispensable to the scheme by which the Legislature has changed the penalty for the crime and thus, all mandated activities relate directly to the enforcement of the crime.[6] Accordingly, there are no costs mandated by the state pursuant to Government Code section 17556(g).

The Commission found that the test claim statute does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

[6] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 643.

Sex Offenders Registration: Petitions for Termination, 21-TC-03

Penal Code Section 290.5, as Amended by Statutes 2017, Chapter 541, Section 12 (SB 384); Effective Date January 1, 2018, Operative Date July 1, 2021

County of Los Angeles, Claimant

Test Claim Filed: June 29, 2022

Decision Adopted: October 27, 2023

The test claim statute amended the Sex Offender Registration Act to create a three-tiered system for classifying sex offenders based on the severity of the offense and the individual's likelihood for reoffending. Primarily at issue in this claim was a new procedure in Penal Code section 290.5, as amended by the test claim statute, which allows tier one or tier two sex offenders to petition the superior court in the county where they currently reside to terminate their duty to register as a sex offender after completing a mandatory minimum registration period. Under prior law, the duty to register as a sex offender persisted for life with rare exceptions,[7] but now a duty to register may be terminated 10 or 20 years after release from incarceration, placement, commitment or release on probation or other supervision.[8]

The petition to terminate the duty to register as a sex offender is served on the law enforcement agency and district attorney of the county where the petitioner currently resides, as well as the law enforcement agency and district attorney of the county where the petitioner was convicted for their registering offense if different from their county of residence. The law enforcement agencies of both counties (assuming the conviction was in a county other than the county of residence) determine whether the petitioner has satisfied their mandatory minimum registration period, and report their findings to the court and district attorney of the county where the petitioner resides, as well as to the Department of Justice if it is discovered that previously unknown registerable convictions occurred outside the state. The district attorney of the county where the petitioner resides may request the court hold a hearing on the petition if the petitioner did not complete the minimum mandatory registration period or if community safety would be significantly enhanced by the petitioner's continued registration. The district attorney is entitled to present evidence at the hearing as to why community safety would be significantly enhanced by the petitioner's continued registration. If the district attorney does not request a hearing, the court may either approve or summarily deny the petition based on whether the petitioner meets all the statutory requirements for approval and service and filing requirements. If the petition is denied, the court must set a time period of a minimum one year but not to exceed five years before the petitioner is allowed to petition again.

The Commission found that the Test Claim was timely filed.

The Commission further found that the test claim statute imposes state-mandated activities on law enforcement agencies and on district attorneys, but not on public defenders, who are not specifically required by the test claim statute to represent petitioners in this post-conviction civil proceeding. Law enforcement agencies must

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[7] Former Penal Code section 290(b), as added by Statutes 2007, chapter 579, and last amended by Proposition 35, section 9, approved November 6, 2012.

[8] Penal Code section 290(d), as added by Statutes 2017, chapter 541.

determine whether a petitioner has actually completed their mandatory minimum registration period, and are required to report their findings to the court, the registering county's district attorney, and the Department of Justice as necessary. District attorneys are authorized by the statute to challenge a petition by requesting the court hold a hearing and presenting evidence at the hearing, if the mandatory minimum registration period was not met or if community safety would be significantly enhanced by the petitioner's continued registration, and have a duty to exercise this ability to protect public safety.[9] Although the test claim statute phrases the district attorney's activities permissively with language like "may request a hearing" or "be entitled to present evidence," case law suggests that a local decision is not truly voluntary for the purposes of article XIII B, section 6 if it is, as a practical matter, constrained by duty.[10] In contrast, the test claim statute imposes no duties on public defenders, there is no constitutional right to the effective assistance of counsel in state post-conviction proceedings, and there is no evidence in the record or support in the law to suggest that counsel is required to be appointed in these cases.[11]

The Commission further found that the mandated activities imposed on law enforcement agencies and district attorneys are new in comparison to prior law, and constitute a new program or higher level of service. The ability to petition to terminate a duty to register as a sex offender after completing a mandatory minimum registration period did not exist under prior law and, thus, the required activities are new. The activities required of law enforcement agencies and district attorneys serve the functional purpose of ensuring that registration continues when appropriate for individual sex offenders who still pose a risk to community safety. This carries out a governmental function of protecting and enhancing community safety, and provides a governmental service to the public. Moreover, the duties are unique to local government.

However, the Commission found these state-mandated activities do not impose costs mandated by the state because the test claim statute eliminates a crime within the meaning of article XIII B, section 6 and Government Code section 17556(g). Government Code section 17556(g) provides that the Commission "shall not find costs mandated by the state" when "the statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction." The Sex Offender Registration Act is enforced by Penal Code section 290.018, which makes it either a misdemeanor or felony to fail to register as required by the Act, depending on whether the person's original offense that requires registration was itself a misdemeanor or felony. For each day that the offender fails to register, it is considered a continuing

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[9] See *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1367-1368.

[10] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1367-1368.

[11] See *Pennsylvania v. Finley*, (1987) 481 U.S. 551, 555; *People v. Delgadillo*, (2022) 14 Cal.5th 216, 226; and *People v. Mary H.* (2016) 5 Cal.App.5th 246, 263 (finding that a right to appointed counsel generally has been recognized to exist only where the litigant's physical liberty is in jeopardy).

offense: "A defendant does not commit the crime only at the particular moment the obligation arises, but every day it remains unsatisfied."[12]

Under prior law, the requirement to register annually and any time the offender moved existed for life.[13] But as a direct result of the test claim statute, a sex offender is no longer required to register under the Act once the offender has successfully petitioned to terminate their duty to register, as early as ten or 20 years after release. This means that once the duty to register is terminated, the offender is no longer subject to the requirements of the Sex Offender Registration Act, and any criminal penalties under Penal Code section 290.018 for failing to register or to otherwise comply for life are eliminated.

This finding is consistent with the recent published decision of the Fourth District Court of Appeal in *County of San Diego v. Commission on State Mandates*, which addressed the Commission's Decision denying the *Youth Offender Parole Hearings,* 17-TC-29 Test Claim based on Government Code section 17556(g). There, the court found that Government Code section 17556(g) applied because "as a direct result" of the test claim statutes, penalties of the crimes were changed - most youth offenders are now statutorily eligible for parole years earlier than their original sentence.[14] The court rejected arguments from the County that the test claim statutes do not change the penalties for crimes under section 17556(g) because they do not vacate the youth offender's original sentence, but simply implement procedural and administrative changes.[15] This argument is similar to the claimant's argument here, that the test claim statute does not eliminate a crime within the meaning of Government Code section 17556(g) since Penal Code section 290.018, which makes it a crime for failing to register, still exists, and the statute simply implements a procedure.[16] The crime for failing to register does still exist in statute, but that does not mean that the test claim statute effects no change.[17] As a direct result of the test claim statute, a successful petition to terminate registration, just like a successful youth offender following a parole

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[12] *Wright v. Superior Court* (1997) 15 Cal.4th 521, 528.

[13] Former Penal Code section 290(b), as added by Statutes 2007, chapter 579, and last amended by Proposition 35, section 9, approved November 6, 2012; Penal Code section 290.012, as originally enacted by Statutes 2007, chapter 579, and as last amended by Statutes 2016, chapter 772; and Penal Code section 290.015 as originally enacted by Statutes 2007, chapter 579, and as last amended by Statutes 2016, chapter 772.

[14] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 640.

[15] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 642.

[16] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 2.

[17] See, *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641, where the court agreed that the original sentences imposed on the juvenile offenders in the *Youth Offender Parole Hearings* program still exist, "[b]ut these facts do not mean the Test Claim Statutes effect no change on the penalties suffered by youth offenders."

hearing, means that the offender is no longer subject to the requirements of the Sex Offender Registration Act, and any criminal penalties under Penal Code section 290.018 for failing to register or to otherwise comply for life are eliminated.

Thus, the test claim statute has eliminated a crime within the meaning of Government Code section 17556(g), and, therefore, there are no costs mandated by the state.

Accordingly, the Commission denied this Test Claim.

Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03-R

On Remand from *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-80003169-CU-WM-GDS; Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System; No. 3710020, effective January 18, 2017

City of San Diego, Claimant

Test Claim Filed: January 11, 2018

Decision Adopted: December 1, 2023

This Test Claim alleged new state-mandated activities and costs arising from a permit amendment issued by the State Water Resources Control Board (State Board) to the City of San Diego's public water system, Order No. 2017PA-SCHOOLS. The test claim order is one of over 1,100 permit amendments simultaneously issued to privately- and publicly-owned public water systems, *which is applicable to the City of San Diego only*.[18, 19]

The test claim order newly requires the claimant's public water system, beginning January 18, 2017, to submit to the State Board's Division of Drinking Water a list of all public and private K-12 schools it serves and to sample and test drinking water in any K-12 school it serves for the presence of lead, upon the request of a school representative made prior to November 1, 2019 with the following limitation: Beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227, and not by the test claim order.[20]

On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion in *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800, finding that the test claim order imposes a new program or higher level of service in that "the provision of drinking water to schools is a peculiarly governmental function and the mandated testing of this water for lead is plainly a

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[18] This is unusual in that, generally, a test claim functions similarly to a class action and there are approximately 1,200 public water systems subject to the same exact requirements in separate amendments to their own permits, but no test claims were filed on those other permits. This decision applies only to the San Diego permit.

[19] These systems are also known as "community water systems" which are public water systems that supply water to the same population year-round. (See Health and Safety Code section 116275(i).) The reader may find these two terms used interchangeably in some of the supporting documentation in the record.

[20] Beginning January 1, 2018, Health and Safety Code section 116277 required a community water system, which includes the claimant's public water system, serving any public school constructed or modernized *before* January 1, 2010, that did not previously request lead testing, to test for lead in the school's potable water system by July 1, 2019. Section 116277 does not require a school to first submit a written request to trigger the duty to test a school's drinking water for lead.

service to the public."[21] The Court directed the Commission to set aside its original Decision and to issue a new Decision consistent with its ruling, and remanded the claim back to the Commission to determine the remaining mandate issues.

The Commission finds that the test order does not impose a reimbursable state-mandated program pursuant to article XIII B, section 6. Although a test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[22]

The claimant is not legally compelled to comply with the test claim order since the claimant's participation in the underlying program to provide water service is not mandated by state law.[23] Under Article XI, section 9(a) of the California Constitution, a "municipal corporation" *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of communication.[24] The courts have interpreted article XI, section 9 (previously section 19) as granting authority rather than imposing a duty.[25] Government Code section 38742 also provides that the legislative body of any city "may" contract for supplying the city with water for municipal purposes; or "may" "[a]cquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes of the city."

The courts have acknowledged the possibility that a state mandate may be found in the absence of legal compulsion when a statute or executive order induces compliance through the imposition of certain and severe, or other draconian consequences that leave the local entity no reasonable alternative but to comply.[26] The claimant argues that it is practically compelled and, thus, mandated by the state to comply with the test claim order for the following reasons:

- The claimant cannot take back a decision made more than 120 years ago to provide water because "[c]ities must provide for the health, safety, and welfare of their residents, and simply put, people cannot survive without water."

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[21] Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 13.

[22] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731.

[23] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10 ("the City is not legally obligated to provide water service under State law"); Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 2 ("the City is not legally compelled to comply with the lead testing requirements in [the test claim order]").

[24] California Constitution, article XI, section 9(a).

[25] *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274.

[26] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816; see also *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 754; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1367.

- If the claimant ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars.
- If the claimant fails to comply with the test claim order, the State Board could suspend or revoke its operating permit, which would prevent the claimant from operating its water system and leave 1.3 million residents without water service.[27]

The Commission finds that the record does *not* contain substantial evidence showing that the claimant will face certain and severe penalties or other draconian consequences, as is required for a finding of practical compulsion, if it decides not to participate in the underlying program and provide water service to City residents. While a long history of operating a public water system is a factor that supports a finding of practical compulsion under *City of Sacramento v. State of California*, the duration of participation in a voluntary program is just one factor and is insufficient on its own to establish that the claimant is practically compelled to comply with the test claim order.[28]

Moreover, the record does not support the claimant's assertion that if it ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars. In *Kern High School Dist*., the Supreme Court described the financial consequences to the state and its residents in *City of Sacramento* as "so onerous and punitive" that they amounted to "certain and severe federal penalties…including double taxation and other draconian measures."[29] The penalties in that case, double taxation on all of the State's businesses, were immediate and "draconian," that "the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses.[30]

The evidence does not support that finding here. As explained in the Decision, the claimant is not the debt-holder on the bond funds, and the funds received from the bonds and the Drinking Water State Revolving Fund loans for the improvements to its water system are paid from the Water Utility Fund and, thus, the claimant's general fund is generally not at risk.[31] In the event of default, the principal amount of the debt owing

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[27] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 9-11; Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

[28] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76 (a finding of practical compulsion "must depend on such factors as the nature and purpose of the…program; whether its design suggests an intent to coerce; *when state and/or local participation began*; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal," emphasis added). See also, *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[29] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 749 (internal quotation marks omitted).

[30] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 74.

[31] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 111-114, 118, 121, 190 (Official Statement), 672 (Master

may come immediately due, but that is not certain to occur.[32] The State, as the holder of the senior debt from the Drinking Water State Revolving Fund, has priority over the bond debt holders, and is not required to make such a demand. And the bond debt holders have discretion whether to vote collectively to have the debt declared immediately due and payable.[33] Furthermore, the claimant has express contractual discretion to transfer the water system to another water supplier for fair market value, the proceeds of which are used to pay off the debt.[34]

And finally, while Health and Safety Code section 116625 gives the State Board the authority to suspend or revoke the claimant's operating permit for noncompliance with the test claim order, the statute is permissive not mandatory, meaning that the State Board is authorized but not required to enforce a permit violation.

Accordingly, the Commission found that the test claim order does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 and denies the Test Claim.

Agreement, section 5.02); Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 12, 13, 36, 38.

[32] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 684 (Master Agreement); Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 15, 31-32.

[33] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 684-685.

[34] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 678 (Master Agreement).