

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Welfare and Institutions Sections 6250 and  
6600 Through 6608, Chapter 762,  
Statutes of 1995, Chapter 763, Statutes  
of 1995, Chapter 4, Statutes of 1996

By the County of Los Angeles

NO. CSM - 4509

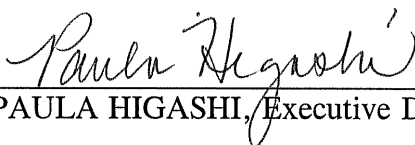
*Sexually Violent Predators*

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

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates was adopted on June 25, 1998.

This Decision shall become effective on June 25, 1998.

  
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PAULA HIGASHI, Executive Director

## ITEM # 4

### PROPOSED STATEMENT OF DECISION

Welfare and Institutions Sections 6250 and 6600 through 6608

Chapter 762, Statutes of 1995

Chapter 763, Statutes of 1995

Chapter 4, Statutes of 1996

County of Los Angeles, Claimant

#### *Sexually Violent Predators*

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#### **Executive Summary**

On May 28, 1998, the Commission approved this test claim with a 7-0 vote.

The test claim legislation establishes *new* civil commitment procedures for the continued detention and treatment of sexually violent predators following completion of prison term for certain sex-related offenses. Before detention and treatment are imposed, the county attorney is required to file a petition for civil commitment. A trial is then conducted to determine if the inmate is a sexually violent predator beyond a reasonable doubt. If the inmate accused of being a sexually violent predator is indigent, the test claim legislation requires counties to provide the indigent with the assistance of counsel and experts necessary to prepare the defense.

The Commission found that the test claim legislation imposes a new program upon counties since the procedures to commit the sexually violent predator are civil, rather than criminal, and is not within the county's preexisting duty to prosecute crime.

The Commission also recognized that the 6th and 14th Amendments of the U.S. Constitution provide that an indigent accused has the right to counsel and expert services necessary to prepare the defense at public expense.

Nonetheless, the Commission found that the test claim legislation is mandated by the state. There is no federal statutory or regulatory scheme requiring the states to keep sexually violent predators confined. The Commission recognized that what sets the 6th and 14th Amendments in motion and causes the public defender to safeguard the rights of the indigent defendant, is the state's enactment of the sexually violent predator legislation. If the state had not created this program, inmates would be released following completion of their prison term, counties would not be compelled to initiate these proceedings and services from defense counsel and experts would not have to be provided to indigent inmates.

Accordingly, the Commission concluded that the test claim legislation imposes a new program or higher level of service upon local agencies within the meaning of article XIII B, section 6, of the California Constitution.

The Commission **approved** the test claim for reimbursement of the following activities:

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

The Commission denied the remaining provisions of the test claim legislation because they do not impose reimbursable state mandated activities upon local agencies.

### **Staff Recommendation**

Based on the foregoing, staff **recommends** that the Commission approve the attached Proposed Statement of Decision which accurately reflects the Commission's decision to approve this test claim.

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Welfare and Institutions Code Sections 6250 and 6600 through 6608 as added by Chapter 762, Statutes of 1995, Chapter 763, Statutes of 1995, and Chapter 4, Statutes of 1996

And filed on May 30, 1996;

By the County of Los Angeles, Claimant.

NO. CSM - 4509

*SEXUALLY VIOLENT PREDATORS*

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

(Presented for adoption on  
June 25, 1998)

**PROPOSED STATEMENT OF DECISION**

The Commission on State Mandates (Commission) on May 28, 1998 heard this test claim, during a regularly scheduled hearing. Mr. Leonard Kaye appeared for the County of Los Angeles. Ms. Marsha A. Bedwell, Deputy Attorney General, represented the Department of Finance, and Mr. James Apps appeared for the Department of Finance. The following persons were witnesses for the County of Los Angeles: Mr. Robert Kalunian, Mr. John Vacca, Mr. Kent Cahill, and Ms. Martha Zavala.

At the hearing, evidence both oral and documentary 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 Government Code section 17500 et seq. and section 6, article XIII B of the California Constitution and related case law.

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

## BACKGROUND

In 1995, the Legislature established civil commitment procedures for the continued detention and treatment of sexually violent offenders following their completion of a prison term for certain sex-related offenses through the enactment of Chapters 762 and 763, Statutes of 1995, and Chapter 4, Statutes of 1996.

Section 1 of Chapter 763, Statutes of 1995, reveals the intent of the test claim legislation as follows:

“The Legislature further finds and declares that while these individuals have been duly punished for their criminal acts, they are, if adjudicated sexually violent predators, a continuing threat to society. The continuing danger posed by these individuals and the continuing basis for their judicial commitment is a currently diagnosed mental disorder which predisposes them to engage in sexually violent criminal behavior. It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and *not for any punitive purposes.*” (Emphasis added .)

A sexually violent predator is defined as (1) a person who has been convicted of a sexually violent offense against two or more victims, (2) who has received a determinate sentence for the offense, and (3) who has a diagnosed mental disorder that makes the person a danger to others in that it is likely he or she will engage in sexually violent criminal behavior. (Welf. & Inst., Code § 6600.)<sup>1</sup>

Section 6601, subdivisions (a) through (h) <sup>2</sup>, establishes the process by which the state (through the Department of Corrections, the Board of Prison Terms, and the Department of Mental Health) screens individuals in custody at least six months prior to release for a sex-related offense and determines whether such individuals are sexually violent predators. If the state determines that such individuals are potential sexually violent predators during the screening process, the state may petition the appropriate county for **commitment**.

Section 6601, subdivision (h), provides the following:

“(h) If the State Department of Mental Health determines that the person is a sexually violent predator as defined in this article, the Director of Mental Health shall forward a request for a petition to be filed for commitment under this

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<sup>1</sup> After this test claim was filed, Article 4 of the Welfare and Institutions Code was amended by Chapters 461 and 462, Statutes of 1996. These chapters expanded the class of potential sexually violent predators by including those persons who (1) were found not guilty by reason of insanity for a sexually violent offense, (2) were convicted of a sexually violent offense in another state even if a determinate sentence was not imposed, and (3) were convicted of a sexually violent offense against a victim under the age of 14 and the offending act involved substantial sexual conduct, as specified. (Welf. & Inst. Code, §§ 6600, subd. (a), and 6600.1.) Chapters 461 and 462 are *not* included in the test claim. Accordingly, reimbursement is not required for the class of persons identified above. (However, if the claimant amends this test claim, or files a new test claim on these chapters, on or before December 31, 1998, then the eligible reimbursement period for Chapters 461 and 462 would commence on July 1, 1997. (Gov. Code, § 17557, subd. (c).)

<sup>2</sup> Unless otherwise noted, all references are to the Welfare and Institutions Code.

article to the county designated in subdivision (i). Copies of the evaluation reports and any other supporting documents shall be made available to the *attorney designated by the county pursuant to subdivision (i) who may file a petition for commitment in the superior court.* ”<sup>3</sup> (Emphasis added.)

Once the state requests that a petition be filed, either the district attorney or the county counsel (as designated by the county Board of Supervisors) reviews the records and reports forwarded by the state to determine if they concur with the state’s **recommendation**. If the county’s designated counsel concurs that the person is a sexually violent predator, the county’s designated counsel *must* file a petition for commitment in the superior court. Section 6601, subdivision (i) , specifically provides :

“(i) if the *county ’s designated counsel* concurs with the recommendation, a petition for **commitment** *shall* be filed in the superior court of the county in which the person was convicted of the offense for which he or she is under the jurisdiction of the Department of Corrections. The petition shall be filed, and either the district attorney or the county counsel of that county shall handle the proceedings. The county board of supervisors shall designate either the district attorney or the county counsel to assume responsibility for proceedings under this article. ” (Emphasis added.)

Once a petition for **commitment** is filed with the superior court, the court reviews the petition to determine if probable cause exists that the inmate is likely to engage in sexually violent predatory behavior upon release. Pursuant to section 6602, a probable cause hearing is conducted and the inmate “*shall be entitled to the assistance **of counsel** ” during the hearing. If the court finds that there is probable cause, the inmate *shall* remain in custody in a secured facility until a trial is completed. At trial, the trier of fact (either the court or a jury, if requested) shall determine whether the person, by reason of a diagnosed mental disorder, is likely to engage in acts of sexual violence upon release.*

Section 6603 provides that the inmate is entitled to a trial by jury, the assistance of counsel, and the right to retain experts or professionals to perform an examination on his or her behalf. Section 6603 specifically provides :

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

“(b) The attorney petitioning for **commitment** under this article shall have the right to demand that the trial be before a jury.

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<sup>3</sup> Chapter 4, Statutes of 1996, made a minor amendment to section 6601, subdivision (h), by adding the words “in the superior court” at the end of the subdivision.

“(c) If no demand is made by the person subject to this article or the petitioning attorney, the trial shall be before the court without jury.

“(d) A unanimous verdict shall be required in any jury trial. ” (Emphasis added.)

If the court or jury determines, beyond a reasonable doubt, that the person is a sexually violent predator, the person is committed for two years to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secured facility. (Welf. & Inst. Code, § 6604.) The two-year civil commitment is subject to an annual review by the state and extension of the commitment if the mental disorder and danger to the community continue. (Welf. & Inst. Code, § 6605 .)

With each yearly review, the committed person also has a right to petition the court for conditional release. (Welf. & Inst. Code, § 6605, subd. (b) .) If the committed person affirmatively waives the right to petition the court for conditional release, the committed person remains in custody until the end of the two-year commitment. On the other hand, if the committed person does not affirmatively waive this right, the court “*shall set a show cause hearing to determine whether facts exist to warrant a hearing on whether the person’s condition has changed.*” *The inmate has the right to be present and to have an attorney present at the show cause hearing.*

If the court determines at the show cause hearing that the inmate’s mental condition has changed and that he or she is no longer a danger, the court *shall set a hearing on that issue.* (Welf. & Inst. Code, § 6605, subd. (c) .) At this subsequent hearing, the inmate “*has a right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding.*” (Welf. & Inst. Code, § 6605, subd.(d).)

Section 6605, subdivision (d) further provides that:

“...*The attorney designated by the county pursuant to subdivision (i) of Section 6601 shall represent the state and shall have the right to demand a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person also shall have the right to demand a jury trial and to have experts evaluate him or her on his or her behalf. The court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be on the state to prove beyond a reasonable doubt that the committed person’s diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent criminal behavior if discharged.*” (Emphasis added.)

If the court or jury decides against the committed person at the hearing, the term of commitment of the person runs for an additional period of two years from the date of the ruling. If the court or jury decides in favor of the committed person (i.e, that the committed person no longer presents a danger to society), the committed person is unconditionally released. (Welf. & Inst. Code, § 6605, subd. (e).)

In addition, the sexually violent predator can be released, either unconditionally or on an outpatient basis, with the following procedures:

- At any time, the State Department of Mental Health can seek *judicial review pursuant to the habeas corpus procedure* if the state believes the committed person is no longer a sexually violent predator. (Welf. & Inst. Code, § 6605, subd. (f).)
- The State Department of Mental Health can file a report and recommendation for conditional release if the facts suggest that the committed person is not likely to commit acts of predatory sexual violence while under the supervision and treatment in the community. (Welf. & Inst. Code, § 6607 .) If the court accepts the recommendation from the Department of Mental Health, a *hearing* is held pursuant to section 6608, subdivision (b), (c) and (d), to determine if the person would be a danger if released to the community under supervision. *Notice of the hearing is given to the designated county counsel, the attorney who represented the inmate at the initial commitment proceeding, and the Department of Mental Health.* If the court determines that the committed person continues to pose a threat to others, the committed person remains in custody until the end of the two-year commitment. On the other hand, if the court determines that the committed person no longer poses a threat to the community, the committed person is placed in a state-operated conditional release program. At the end of the conditional release program, the court sets a hearing to determine if the committed person should be unconditionally released. (Welf. & Inst. Code, § 6608, subd. (g).)
- After one year of commitment, the sexually violent predator may petition the court directly for conditional outpatient release. The court may dismiss the petition if it determines the petition is without merit. If the petition is not frivolous, the *court shall set a hearing, with notice to the designated county counsel, defense attorney and Department of Mental Health.* (Welf. & Inst. Code, § 6608, subds. (a) and (b).) If the court determines that the committed person remains a threat to others, the committed person remains in custody until the end of the two-year commitment. If, on the other hand, the court determines that the committed person no longer poses a threat to the community, the court places the committed person in a state-operated conditional release program for one year. Thereafter, another hearing is set by the court to determine if the committed person should be unconditionally released. (Welf. & Inst. Code, § 6608, subd. (g) .)

The test claim legislation is similar to the Mentally Disordered Sex Offenders (MDSO) legislation. (Stats. 1977, ch. 164.) Both programs provide for the civil commitment of persons determined to be a MDSO or sexually violent predator to a state mental facility.

The Legislature appropriated funds to reimburse local governments for the costs associated with the MDSO program. However, in 1981, Chapter 928 repealed the MDSO portion of the statute prospectively (Welf. & Inst. Code, § 63 16.2), and provided that persons committed under section 63 16.2 would remain governed by this section until their commitments are terminated. Thus, counties continue to be reimbursed for the MDSO program.

Under former section 6316.2, a person who *suffers from a mental disease, defect, or disorder, and as result of such mental disease, defect, or disorder, is predisposed to the commission of sexual offenses to such a degree that he or she presents a substantial danger of bodily harm to*



others, may be civilly committed to a state mental facility. The statute further specifies that a patient (alleged MDSO) is entitled to the rights guaranteed under the state and federal Constitutions for criminal proceedings. These rights include the right to counsel, defense witnesses, and examinations.

Reimbursement is still provided for costs of transportation, care and custody of the patient (MDSO), trial costs, juror fees, and prosecuting district attorneys' costs if consent is given by the Attorney General for the district attorney to represent the state in proceedings under former section 63 16 .2. It should also be noted that the State Public Defender may contract with county public defenders to provide indigent legal defense. (Gov. Code, § 15402 .)

## COMMISSION FINDINGS

**Issue 1:** Does the sexually violent predator legislation enacted by Chapters 762 and 763 of Statutes of 1995, and Chapter 4 of Statutes of 1996, impose a new program or higher level of service upon local agencies within the meaning of section 6, article XIII B of the California Constitution?<sup>4</sup>

In order for a statute, which is the subject of a test claim, to impose a reimbursable state mandated program, the statutory language must direct or obligate an activity or task upon local governmental entities. Further, the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated.<sup>5</sup>

As indicated above, the test claim legislation requires a series of activities for the civil commitment of potential sexually violent predators following completion of their criminal sentence. These activities are described below.

### Activities Performed by Counties

The Commission found that the test claim legislation obligates counties to complete the following activities for the civil commitment of sexually violent predators:

- ⚡ Designate counsel to handle sexually violent predator cases referred by the state. (Welf. & Inst. Code, § 6601, subd. (i).)

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<sup>4</sup> Section 6, article XIII B states: "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; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975. "

<sup>5</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

- Review cases referred by the state to determine if county counsel concurs with the state's recommendation to proceed with civil commitment procedures. (Welf. & Inst. Code, § 6601, subd. (i).<sup>6</sup>)
- File petitions for civil commitment with the superior court. (Welf. & Inst. Code, § 6601, subd. (i) .)
- Represent the State of California and the indigent inmate in the civil commitment probable cause hearing, trial and all subsequent hearings and reviews. (Welf. & Inst. Code, §§ 6601, subd. (i), 6602, 6603, 6605, subds. (b) through (d), and 6608, subds. (a) through (d).)
- Provide the indigent inmate with necessary experts and investigation to prepare the defense for trial and subsequent hearings. (Welf. & Inst. Code, §§ 6603 and 6605, subd. (d).)
- Transport and house the inmate during the civil commitment proceedings. (Welf. & Inst. Code, § 6602.)

The Commission recognized that the activities listed above are performed by counties who carry out a basic governmental function by providing a service to the public. Such activities are not imposed on state residents generally. Therefore, the first requirement necessary to determine whether the Legislature has imposed a reimbursable state mandated program is satisfied.

Moreover, the Commission found that the provisions of the test claim legislation impose new requirements, not previously imposed, upon the counties to implement civil commitment procedures for sexually violent predators following the completion of a criminal sentence. Although the MDSO program imposed similar activities upon counties, that program was repealed before the sexually violent predator legislation was enacted. Additionally, the procedure is civil, rather than criminal. Therefore, the test claim legislation imposes duties on counties that are not within their preexisting duty to prosecute crime relating to sexually violent predators.<sup>7</sup>

Accordingly, the Commission found that the test claim legislation constitutes a new program by satisfying two of the requirements necessary to determine whether legislation imposes a reimbursable state mandated program.

However, the Commission continued its analysis to determine whether the sexually violent predator legislation is state mandated, or merely implements a federal law. Since the finding

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<sup>6</sup> Section 6601, subdivision (i), provides that “if the county’s designated counsel concurs with the recommendation, a petition for commitment shall be filed in the superior court. ..”. Despite the use of the word “if” in the statute, the Commission found that the designated county attorney does not have discretion to file a petition for civil commitment. Rather, the county’s attorney simply determines if he or she agrees with the state’s recommendation based on the file and records of the inmate. If there is agreement, the county has no choice but to proceed with the filing of the petition. Accordingly, the Commission found this requirement mandatory.

<sup>7</sup> The Commission noted that the sexually violent predator legislation is *not* subject to the “crimes and infractions” exception to reimbursement under Government Code section 17556, subdivision (g). The US. Supreme Court held that similar sexually violent predator legislation in Kansas did not establish “criminal” proceedings and the involuntary confinement under the legislation was not punitive. (*Hendricks v. Kansas* (1997) 117 S .Ct. 2072.)

that the inmate is a sexually violent predator results in commitment of the person to the custody of the Department of Mental Health and confinement in a locked facility, the 6th Amendment (right to counsel) and 14th Amendment (due process clause) of the U.S. Constitution are implicated.

**Issue 2:** Is the sexually violent predator legislation state mandated?

The U.S. Supreme Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. (*Addington v. Texas* (1979) 441 U.S. 418, 425, 99 S.Ct. 1804, 1809.) Accordingly, the Commission recognized that the test claim legislation implicates federal due process concerns requiring consideration of due process procedures, including the right to counsel, before one is deprived of liberty.

The Department of Finance asserted that the indigent defense provisions of the test claim legislation merely implements federal law through the 6th and 14th Amendments to the U.S. Constitution and do not impose a reimbursable state mandated program. The Department contended that although they have found no definitive United States Supreme Court authority regarding a right to counsel in civil commitment proceedings, California courts have recognized that legal services for indigent persons at public expense are mandated in mental health matters where a restraint of liberty is possible. Furthermore, where there is a right to counsel, ancillary services, such as experts and investigative services are also provided. The Department stated: “It appears that the requirements of federal due process and equal protection require that indigents subject to the sexually violent predator proceedings be provided counsel and ancillary services, and to that extent, these aspects of the statute are ‘required by federal law’.” (Citing *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 816.)

The claimant, California Public Defenders Association, the County of Monterey, the City and County of San Francisco, the Alameda County Public Defender’s Office and the County of San Joaquin contended that federal law does not require the state to implement the civil commitment of sexually violent predators and, thus, a reimbursable state mandated program exists.

### **Right to Counsel, Experts and Investigative Services in Civil Commitment Proceedings**

The Commission found no United States Supreme Court authority specifically holding that a defendant in a civil commitment proceeding has the right to counsel. However, the United States Supreme Court has recently analyzed similar sexually violent predator legislation enacted in Kansas and recognized that an individual’s constitutionally protected interest in avoiding physical restraint may be overridden in the civil context provided the civil confinement takes place pursuant to “proper procedural and evidentiary standards.” (*Hendricks v. Kansas, supra*, 117 S.Ct. at 2079.)<sup>8</sup>

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<sup>8</sup> The Kansas Sexually Violent Predator Act established procedures for the civil commitment of persons who, due to a “mental abnormality” or a “personality disorder,” are likely to engage in predatory acts of sexual violence. Unlike the test claim legislation, the Kansas statute requires the state attorney general, rather than the local district attorney or county counsel, to initiate commitment procedures.

In addition, some federal courts have found that the assistance of counsel in civil proceedings is *required* to meet federal due process standards. The court in *Heyford v. Parker* (10th Cir. 1968) 396 F.2d 393, held that a civil proceeding resulting in involuntary incarceration for treatment commands observance of the constitutional safeguards of due process, including the right to counsel. (But see *Rud v. Dahl* (7th Cir. 1978) 578 F.2d 674, 678, which held that the Supreme Court has never specifically found that a civil proceeding requires the presence of the respondent as an element of due process.)

California courts have also recognized 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. (*Phillips v. Seely* (1974) 43 Cal.App.3d 104, 113; *Waltz v. Zumwalt* (1985) 167 Cal.App.3d 835, 838.)

Finally, case law is clear that where there is a right to representation by counsel, necessary ancillary services, such as experts and investigative services, are within the scope of that right. (*Mason v. State of Arizona* (9th Cir. 1974) 504 F.2d 1345; *People v. Worthy* (1980) 109 Cal.App.3d 514.)

Based on the foregoing authorities, the Commission found that the 6th Amendment right to counsel and the 14th Amendment due process clause of the U.S. Constitution require legal counsel, experts and investigative services be provided to indigent potential sexually violent predators throughout the civil commitment proceedings. Nevertheless, for the reasons stated below, the Commission determined that the test claim legislation represents a state mandated program.

### **Federal Law Does Not Require the Civil Confinement of Sexually Violent Predators**

The court addressed the issue of federal constitutional requirements under the 6th and 14th Amendments in relation to a test claim filed by the County of Los Angeles on Penal Code section 987.9 (CSM-4411) in *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal. App. 4th 805. The test claim legislation in *County of Los Angeles* required counties to pay for investigators and experts in preparation of the defense for indigent defendants in death penalty cases.

The court in *County of Los Angeles* affirmed the Commission's decision to deny the test claim. The court held that Penal Code section 987.9 merely implemented the guarantees under the U.S. Constitution. The court further held that the statute did *not* impose any *new* requirements upon local governmental entities. Accordingly, the court found that counties are still compelled to provide defense services under the 6th and 14th Amendments to indigents facing the death penalty even in the absence of state law.

However, unlike the test claim legislation in *County of Los Angeles*, there is no federal statutory or regulatory scheme mandating the states to implement civil commitment proceedings for sexually violent offenders. Therefore, the Commission recognized that local agencies would *not* be compelled to provide defense and ancillary services to indigent persons accused of being a sexually violent offender following completion of their prison term if the new program had not been created by the state.

Accordingly, the Commission found that the test claim legislation constitutes a state mandated program.

## CONCLUSION

Based on the foregoing, the Commission concluded that the test claim legislation imposes a new program or higher level of service upon local agencies within the meaning of article XIII B, section 6, of the California Constitution.

The Commission **approved** the test claim for reimbursement of the following activities:

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

The Commission denied the remaining provisions of the test claim legislation because they do not impose reimbursable state mandated activities upon local agencies.