S20[illegible]280

LIU, J.

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In the Supreme Court of the State of California

KEVIN MICHAEL REILLY,	
Petitioner,	Case No.
v.	
THE SUPERIOR COURT OF ORANGE COUNTY,	
Respondent,	
THE PEOPLE OF THE STATE OF CALIFORNIA,	
Real Party in Interest.	

Fourth Appellate District, Case No. G045118
Orange County Superior Court, Case No. M11860
The Honorable Richard M. King, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Real Party in Interest, the People, respectfully petitions this Court for review of the published opinion in this case, filed by the California Court of Appeal, Fourth Appellate District in *Reilly v. Superior Court (People)* __ Cal.App.4th __, 139 Cal.Rptr.3d 194, on March 28, 2012. In the opinion the Fourth Appellate District held the pending petition for the recommitment of petitioner, pursuant to the provisions of the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.) [1], must be dismissed in that the current re-evaluations in support of the petition were required to, but did not, both agree that petitioner continued to meet commitment criteria.

A copy of the opinion is attached to this petition as Exhibit A ("Exh. A"). This petition for review is timely. (Cal. Rules of Court, rule 8.500(e)(1).)

ISSUE PRESENTED

Must a pending SVPA civil commitment petition be dismissed when the expert re-evaluations are done pursuant to *In re Ronje* (2009) 179 Cal.App.4th 509, but do not agree the person meets commitment criteria?

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[1] All further references will be to the Welfare and Institutions Code unless noted otherwise.

REASONS FOR REVIEW

Review is necessary to secure uniformity of decision given the conflict in the SVPA law as a result of this decision. (Cal. Rules of Court, rule 8.500(b)(1).) Review is also necessary to settle an important question of law concerning the effect of the post-*Ronje* evaluation process in the context of the SVPA. (Cal. Rules of Court, rule 8.500(b)(1).)

In *Ronje, supra*, this same appellate court held that when it is later determined an invalid assessment standardized protocol had been used to conduct the initial mental evaluation of a person suspected to be an SVP, it constituted an error or irregularity in a commitment proceeding under the SVPA. As a remedy, *Ronje* ruled the trial court must order new evaluations using a valid standardized assessment protocol and conduct a new probable cause hearing. Here, the trial court had found probable cause that petitioner met SVPA commitment criteria but subsequently ordered post-*Ronje* evaluations; the experts changed their conclusions and found petitioner no longer met SVPA commitment criteria. The trial court denied a plea in abatement to dismiss and ordered a new probable cause hearing, but in a published decision the appellate court reversed and dismissed the petition. This decision has created a conflict in the law and wrongly interprets the affect of the post-*Ronje* evaluation process.

In *Davenport v. Superior Court* (2012) 202 Cal.App.4th 665, this Court denied review and let stand a First Appellate District decision that held dismissal of an SVPA petition is not warranted when after post-*Ronje* re-evaluations there is disagreement the person meets SVPA commitment criteria.[2] In other words, the trial retained jurisdiction to proceed on the

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[2] On March 28, 2012, this Court denied review in *Davenport*. (See discussion of *Davenport, post.*) That same day, this Court denied review in an unpublished decision of the Fifth Appellate District which involved (continued...)

petition despite the irregularity that occurred during the initial evaluation process and then the lack of concurrence in the subsequent evaluations the person met SVPA commitment criteria.

Review is therefore needed to secure uniformity of decision and resolve the conflict in the law between *Davenport* and *Reilly,* as well as clarify the affect on pending SVPA petitions where the underlying evaluations are found to be based on an invalid assessment protocol and the proper remedy that then flows from the post-*Ronje* evaluation process.[3]

PROCEDURAL HISTORY[4]

> Reilly was the subject of an SVPA commitment petition filed in July 2000, while he was serving a three-year prison term for engaging in lewd and lascivious conduct. After Reilly completed his prison sentence, and while being held in civil commitment at a state hospital, a recommitment petition against him was filed in July 2008. The 2008 recommitment petition was based on two evaluations that concluded he met the criteria for commitment as a sexually violent predator. Updated evaluations pursuant to section 6603, subdivision (c) were conducted in 2009 and reached the same conclusion. The evaluations supporting the 2008 recommitment petition and the 2009 updated evaluations were conducted according to the invalid assessment protocol.
>
> Following our decision in *Ronje*, the trial court ordered new evaluations of Reilly to be conducted according to a validly

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(...continued)
similar facts but held in a contrary fashion that dismissal of the SVPA petition was warranted. (*Sizneroz v. Superior Court (People)* (F062298).)

[3] The appellate court contemporaneously decided two other published decisions related to this issue - *Boysel v. Superior Court (People)* (2012) 204 Cal.App.4th 854 and *Wright v. Superior Court (People)* (2012) 204 Cal.App.4th 879 – as well as several unpublished decisions. Real Party in Interest anticipates filing grant and hold petitions in these cases.

[4] The Procedural History is adopted from appellate court's "Summary of the Opinion," located at Exhibit A and referenced as *Reilly v. Superior Court* (2012) 139 Cal.Rptr.3d 194.

> approved assessment protocol. Both of those evaluations in 2011 concluded Reilly no longer met the criteria for commitment as a sexually violent predator.
>
> Before a post-*Ronje* probable cause hearing was conducted, Reilly filed a plea in abatement seeking dismissal of the SVPA commitment petition on the ground both post-*Ronje* evaluators concluded he no longer met the criteria for commitment as a sexually violent predator. The trial court denied the plea in abatement, as well as those brought on the same or similar grounds by nine other persons named in SVPA commitment petitions. A different trial court denied a motion to dismiss brought by an 11th person named in an SVPA commitment petition. The court also granted the district attorney's motion to compel Reilly to undergo a mental evaluation by the district attorney's retained mental health professional and to grant that mental health professional access to Reilly's state hospital records.
>
> Reilly and the 10 others brought petitions for writ of mandate or prohibition to overturn the trial court's orders and have their SVPA commitment petitions dismissed. Reilly also challenges the trial court's order compelling him to undergo another mental evaluation and releasing his medical records to the district attorney's chosen evaluator.

(*Reilly v. Superior Court* (2012) __ Cal.App.4th __ 139 Cal.Rptr.3d 194, 196.)[5]

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[5] Before it turned to the substantive issue, the appellate court addressed whether a "plea in abatement" was a proper method to challenge a commitment petition before trial. Based on this Court's *Ghilotti* decision, the appellate court held that a person named in an SVPA commitment petition can file a pleading that challenges the validity of the petition on the ground it is not supported by concurrence of two evaluators. (*Reilly, supra*, 139 Cal.Rptr.3d at pp. 201-203, referring to *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 912–913.)

ARGUMENT

I. WHEN SVPA RE-EVALUATIONS ARE CONDUCTED TO REMEDY THE USE OF AN INVALID ASSESSMENT PROTOCOL, THE CASE DOES NOT REVERT BACK TO THE PRE-FILING STAGE AND COMPEL DISMISSAL WHEN THE EXPERTS DO NOT AGREE THE PERSON MEETS COMMITMENT CRITERIA

A. Overview of the SVPA and the Evaluation Process

When an individual in custody is initially referred for a "full evaluation" whether he meets SVPA commitment criteria, the Department of Mental Health (DMH)

> evaluate[s] the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator . . . .

(§ 6601, subd. (c); *People v. Hurtado* (2002) 28 Cal.4th 1179, 1182–1183.) The Legislature has directed a standardized assessment protocol "shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders." (*Ibid.*) In order to file an SVPA petition and proceed to a facial review of the petition and then a probable cause hearing, two experts must agree at the pre-filing stage that the person meets commitment criteria. (§ 6601, subds. (d), (f) and (i), §6601.5; *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 894.)[6]

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[6] If the initial evaluators disagree, two new independent evaluators conduct assessments. The petition for commitment may then be filed if both concur the person meets commitment criteria:

Welfare and Institutions Code section 6601 provides in pertinent part as follows:

> (d) [A potential SVP] shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and

(continued...)

As relevant here, there are three issues concerning the evaluation process. First, if the initial evaluators do not believe a person meets commitment criteria, the People may still file the SVPA petition if they believe this conclusion was based on "material legal error." (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888.) In that instance, the court conducts a facial review and examines the negative report(s) and if it finds material legal error in the evaluation (i.e., the doctor applied an incorrect legal standard in performing the evaluations), dismissal is not warranted. (*Id.*, at pp. 909, 912.)Second, updated or replacement evaluations are often

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(...continued)

> one practicing psychologist, designated by the Director of Mental Health . . . . If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of Mental Health shall forward a request for a petition for commitment . . . to the [designated] county . . . .
>
> (e) If one of the professionals performing the evaluation pursuant to subdivision (d) does not concur that the person meets the criteria specified in subdivision (d), but the other professional concludes that the person meets those criteria, the
>
> Director of Mental Health shall arrange for further examination of the person by two independent professionals . . . .
>
> (f) If an examination by independent professionals pursuant to subdivision (e) is conducted, a petition to request commitment under this article shall only be filed if both independent professionals who evaluate the person pursuant to subdivision (e) concur that the person meets the criteria for commitment specified in subdivision (d). . . .

(Welf. & Inst. Code, § 6601, subds. (d)-(f).)

required in anticipation of a probable cause hearing or trial.[7] But once a petition is filed, there is no legal requirement that the evaluators continue to believe a person meets commitment criteria. (See *Gray v. Superior Court* (2002) 95 Cal.App.4th 322.) In other words, a change in the expert's conclusion does not affect the continued validity of the SVPA petition or subsequent proceedings. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063 ("rather than demonstrating the existence of the two evaluations, the People are required to show the more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior"); see also *People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1130 ("the statute does not require the People to prove the existence of such evaluations at either the probable cause hearing or at trial").) This is because

> the requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition

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[7] Welfare and Institutions Code section 6603, subdivision (c), provides in pertinent part as follows:

> (c)(1) If the attorney petitioning for commitment under this article determines that updated evaluations are necessary in order to properly present the case for commitment, the attorney may request the State Department of Mental Health to perform updated evaluations. If one or more of the original evaluators is no longer available to testify for the petitioner in court proceedings, the attorney petitioning for commitment under this article may request the State Department of Mental Health to perform replacement evaluations. . . . If an updated or replacement evaluation results in a split opinion as to whether the person subject to this article meets the criteria for commitment, the State Department of Mental Health shall conduct two additional evaluations in accordance with subdivision (f) of Section 6601.

(Welf. & Inst. Code, § 6603, subd. (c)(1).)

> plainly designed to ensure that SVPA proceedings are initiated only when there is a substantial factual basis for doing so.

(*People v. Medina* (2009) 171 Cal.App.4th 805, 814.) "The legal determination that a particular person is an SVP is made during the subsequent judicial proceedings, rather than during the screening process." (*Ibid.*)

Third and as relevant here is the effect of a later determination that the initial pre-filing evaluations were based on an administrative and procedural defect in the standardized assessment protocol used by evaluators. To that end, in 2008 the Office of Administrative Law (OAL) determined the standardized assessment protocol developed by DMH constituted an invalid "underground" regulation under the Administrative Procedures Act (APA).[8] That OAL determination is not binding on the courts but it is entitled to deference. (*People v. Medina* (2009) 171 Cal.App.4th 805, 814.) Nevertheless, in 2009 this same appellate court decided *In re Ronje, supra,* 179 Cal.App.4th 509. *Ronje* agreed with OAL's determination the protocol used was an invalid underground regulation.[9] (*Id.* at p. 517.) *Ronje* ruled, however, that where a pending petition was supported by evaluations prepared pursuant to the invalid protocol, the remedy was not dismissal but, instead, (1) having new

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[8] Evidence Code section 452 permits this Court to take judicial notice of OAL Determination No. 19, which provides the protocol used by the Department for SVP evaluations—the "Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)"—was a regulation and therefore should have been adopted pursuant to the APA. (2008 OAL Determination No. 19, Aug. 15, 2008 (OAL file No. CTU 2008-0129-01); http://www.oal.ca.gov/determinations2008.htm.)

[9] In *Ronje*, the District Attorney represented Real Party in Interest and did not challenge the validity of the OAL determination. Nor did the People ever challenge the OAL determination and in response to the OAL's ruling, DMH adopted a new protocol pursuant to the APA on September 14, 2009. (See, *People v. Medina, supra,* 171 Cal.App.4th at p. 814.)

evaluations using a valid protocol and (2) a new probable cause hearing. (*Id.* at pp. 519, 521.)

B. Dismissal is Not Compelled Where After the Post-*Ronje* Evaluations the Experts Do Not Concur the Person Meets SVPA Commitment Criteria

In *Davenport*, the First Appellate District rejected the proposition—central to the decision of the appellate court here—that pursuant to *Ronje*, the SVPA evaluation process effectively begins anew, as if a commitment petition had never previously been filed. (*Davenport, supra,* 202 Cal.App.4th at pp. 671-673.) Instead, the court held the post-*Ronje* evaluations are comparable to updated evaluations authorized by section 6603, subdivision (c). And, pursuant to *Gray v. Superior Court, supra,* 95 Cal.App.4th 322, if updated or replacement evaluations are prepared before trial, dismissal is not required regardless of whether the original pair of doctors or a subsequently-appointed second set of doctors did not both agree whether the person meets commitment criteria.[10] (*Davenport v. Superior Court, supra*, 202 Cal.App.4th at pp. 671-672. *Davenport* concluded:

> . . . The original petition was properly filed and the superior court obtained jurisdiction. Pursuant to *Ronje* new evaluations were ordered. The effect of that order was not to begin the proceedings anew. Instead the matter may properly proceed to a new probable cause hearing as ordered by the trial court and, if probable cause is found, to trial.

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[10] Like the instant case, the trial court there ordered post-*Ronje* evaluations. (*Davenport, supra,* 202 Cal.App.4th at p. 668.) One evaluator concluded he continued to meet the SVPA commitment criteria and the other concluded he no longer met the criteria. (*Ibid.*) Due to the split of opinion, the DMH appointed two independent mental health professionals to evaluate Davenport. The independent evaluators likewise reached a split decision. (*Ibid.*) Davenport moved to dismiss the SVPA commitment petition on the ground it was not supported by the necessary concurring evaluators. (*Davenport, supra*, 202 Cal.App.4th at p. 668.)

> It is important to keep in mind that neither *Ronje* nor the OAL evaluated the substance of the reliability of the 2007 assessment protocol. (See *Ronje, supra*, 179 Cal.App.4th at p[p]. 515, 520.) Davenport likewise does not point to any substantive defect in the 2007 protocol, or any prior protocol, and there is no evidence here that the use of a procedurally invalid protocol had a material effect on the conclusions in the original evaluations.
>
> Given the substantial risk of serious harm that could result from releasing a potential SVP to the public, dismissal is a drastic step. SVP evaluations may change over time for reasons other than that an individual no longer qualifies as an SVP. For example in *Gray*, the alleged SVP refused to be interviewed after the original set of evaluations, almost certainly rendering the later evaluations less precise. (*Gray, supra,* 95 Cal.App.4th at p. 330.) Given the procedural safeguards in place—a probable cause hearing, a jury trial, a unanimous verdict—there is no need to dismiss the commitment petition and start the SVP evaluation process from the beginning in this case.

(*Davenport, supra*, 202 Cal.App.4th at p. 673, fns. omitted.)

In contrast, the appellate court here held dismissal was compelled because in light of the post-*Ronje* evaluations, the SVPA petition was no longer valid and the court lacked jurisdiction to proceed with a new probable cause hearing. This was an unwarranted extension of *Ronje* and unsupported by the SVPA.

The protocol is statutorily mandated for the administrative evaluations leading up to the filing of an SVPA petition. (§ 6601, subds. (c) & (d).) But the evaluations are a collateral procedural condition designed to ensure SVPA proceedings are initiated only when there is a substantial factual basis for doing so. Once the petition is filed, the only issue becomes whether there is evidence the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior. (*People v. Scott, supra,* 100 Cal.App.4th at p. 1063.)

As a result, "[u]se of the evaluations based on the invalid assessment protocol, though erroneous, does not deprive the trial court of fundamental

jurisdiction over the SVPA commitment petition. The trial court has the power to hear the petition notwithstanding the error in using the invalid assessment protocol. Dismissal therefore is not the appropriate remedy." (*Ronje, supra,* 179 Cal.App.4th at pp. 518-521.) This is particularly true given that

> [t]he 2008 OAL Determination No. 19 does not address the assessment protocol's accuracy or reliability in determining whether the person is an SVP as defined in the SVPA. The 2008 OAL Determination No. 19 made clear the ruling concerned only whether the assessment protocol constituted a regulation under Government Code section 11342.600 and stated, '[n]othing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment.' (2008 OAL Determination No. 19, *supra,* at p. 1.).

(*Ronje, supra,* at p. 520; see also 2008 OAL Determination No. 19, *supra,* at p. 1; http://www.oal.ca.gov/determinations2008.htm.).)

Ronje thus understood the OAL determination was procedural and not substantive defect and there was no evidence it had any effect on the substantive conclusions in the original evaluations.[11] Instead, *Ronje* concluded the remedy was remanded to cure the defect and conduct a new probable cause hearing with new evaluations under the proper protocol. But the court below wrongly extended *Ronje* beyond this limited remedy.[12]

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[11] The same can be said for this case. The re-evaluations at issue here indicated their conclusions were not based on the revised protocol. Instead, they were primarily based on petitioner's progress in his treatment program. (See, Return to Petition for Writ of Mandate/Prohibition, filed August 21, 2011, at p. 21, referring to Exhs. 10 and 11.) Such a conclusion was consistent with what both *Davenport* and *Ronje* recognized: the procedural defect in the protocol did not affect the substance of the assessment process.

[12] Indeed, the remedy articulated in *Ronje* of both re-evaluations and a new probable cause hearing itself goes too far. As shown below, curing the defect with evaluations based on the valid protocol is the proper remedy. When as as here, there is a complete failure to identify any

(continued...)

To compel dismissal of SVPA proceedings based on evaluations which were designed to cure an administrative violation that had resulted in a procedural defect, places too much faith in evaluators rather than the courts and represents an unsound decision.

As this Court recognized in cases involving violations of the APA, important societal interests must be considered in fashioning a remedy for procedural administrative defects. In *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, this Court found a Department of Toxic Substances Control policy for assessing hazardous material fees to state corporations should be subjected to the APA. (*Id.* at p. 334.) This Court ordered the State Board of Equalization to re-assess Morning Star Company's request for a fee refund without reference to the invalid policy. However, this Court further ordered:

> To avoid significant disruption of the fee scheme, however, upon remand the superior court shall issue an order staying these proceedings before the Board and otherwise maintaining the fee system as presently interpreted and implemented by the agencies, an order to remain in effect until such time as the Department has had a reasonable opportunity to promulgate valid regulations under the APA.

(...continued)
substantive defect in the assessment protocol and the lack of evidence the protocol had any material effect on the conclusions in the prior evaluations, *Ronje* prematurely erred by holding a new probable cause hearing must always be conducted. That remedy is required only in the limited instance where post-*Ronje* evaluations determine the new protocol affected the conclusions. Otherwise, re-evaluations serve no different purpose than that of post-probable cause updated evaluations. In other words, this Court should find that when new evaluations are ordered to cure procedurally defective pre-filing evaluations, if a probable cause finding had been made it need not be vacated unless the experts determine the revised protocol itself would have affected the conclusions. Absent that, the probable cause finding should be reinstated and the matter should proceed to trial.

> Our instructions here derive from the court's inherent power to issue orders preserving the status quo. (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 216 [157 Cal. Rptr. 840, 599 P.2d 31].) In *California Hotel*, we concluded that a minimum wage order promulgated by the IWC pursuant to various sections of the Labor Code was invalid because it lacked an adequate 'statement of basis' as required by statute. (*Ibid.*) But we further concluded that the order was of 'critical importance to significant numbers of employees' who bore 'no responsibility for the deficiencies of' the order. (*Ibid.*) We therefore exercised 'our inherent power to make an order appropriate to preserve the status quo pending correction of deficiencies,' directing the issuance of a writ of mandate to compel the IWC to correct the deficiencies 'within 120 days of the finality of the opinion.' (*Ibid.*)
>
> So, too, in the present case, the continued viability of the hazardous materials fee program is of critical importance to the State of California, as determined by the Legislature, and any disruption in collection of the fee would seriously undermine the program. With these considerations in mind, as in *California Hotel* we will allow the Department a reasonable opportunity to correct the deficiency in its hazardous material fee regulations by subjecting them to APA procedures, while maintaining the current system in the interim. [Citations.] . . . . Once the Department has complied with the APA, Morning Star's administrative proceedings may resume, with these proceedings and the Department's schedules generally being governed by any properly adopted regulations.

(*Morning Star Co. v. State Bd. of Equalization, supra,* 38 Cal.4th at pp. 341-342.)

SVPA proceedings are also of "critical importance" to the public, which has an interest in being protected from dangerous sexual predators and having those predators treated rather than released because administrative procedures (which did not materially affect the evaluation process) were not followed. Analogously, this Court has recognized the validity of continued SVPA proceedings despite a later finding that custody had been based on the erroneous revocation of parole and an instance where

"the constable has blundered." (See, *In re Smith* (2008) 42 Cal.4th 1251, 1261, and *In re Lucas* (2011) 53 Cal.4th 839, 853, referring to Assem. Com. on Public Safety, Republican Analysis of Sen. Bill No. 11 (1999–2000 Reg. Sess.) as amended Apr. 6, 1999, p. 1 ("sexually violent predators are not to be unleashed on society simply because 'the constable has blundered'").)

Certainly, the public bears "no responsibility" for the DMH's failure to adopt an APA compliant protocol. *Davenport* understood the remedy articulated in *Ronje* was limited to evaluations that cured the improper procedural assessment protocols, and that it would contravene the SVPA to dismiss a petition merely when those re-evaluations did not both agree the person continued to meet commitment criteria.

The court below disagreed and concluded the reevaluation process was not analogous for updated or replacement evaluations under section 6603, subdivision (c). Instead, the court below found both the SVPA and this Court's decision in *Ghilotti* compelled dismissal because the reevaluations failed to produce the concurrence otherwise required to support an initial filing of an SVPA commitment petition. (*Reilly, supra,* 139 Cal.Rptr.3d at pp. 208-209.)

That conclusion was flawed. As in *Davenport* and *Ronje*, there was a complete failure to identify any substantive defect in the assessment protocol and the lack of evidence the protocol had any material effect on the conclusions in the prior evaluations. (*Davenport, supra*, at p. 673; *Ronje, supra*, 179 Cal.App.4th at p. 516.) Indeed, while the protocol may dictate the scope, methodology, and relevant considerations of an assessment prior to filing a commitment petition, it does not dictate the evaluator's findings and conclusions whether a person meets SVPA commitment criteria. This is particularly true given the purpose of the reevaluations was simply designed to cure a procedural defect in the

assessment protocol rather than any substantive affect on the evaluation process itself. To that end, petitioner still had the ability to challenge the petition at the probable cause hearing and at trial. But to preclude further court proceedings and order release here of an already adjudicated sexually violent predator without the credibility of the evaluations being tested by the judicial process, was an unwarranted extension of *Ronje,* in conflict with the reasoning of *Davenport*, and inconsistent with the SVPA itself.

CONCLUSION

Based on the foregoing, review must be granted.

Dated: May 4, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3297 words.

Dated: May 4, 2012

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EXHIBIT A

204 Cal.App.4th 829
Court of Appeal, Fourth District, Division 3, California.

Kevin Michael REILLY, Petitioner,
v.
The SUPERIOR COURT of
Orange County, Respondent;
The People, Real Party in Interest.

No. G045118. | March 28, 2012.

Synopsis

Background: Defendant filed plea in abatement, seeking dismissal of Sexually Violent Predator Act (SVPA) commitment petition on the ground two initial evaluators had not concurred he met the criteria for commitment as a sexually violent predator. The Superior Court, Orange County, No. M11860, Richard M. King, J., denied the plea, and defendant petitioned for writ relief.

[Holding:] The Court of Appeal, Fybel, J., held that initial evaluators' conclusion that defendant did not meet commitment criteria required dismissal of petition.

Petition granted.

West Headnotes (10)

[1] **Mental Health**
Persons and offenses included

The Sexually Violent Predator Act (SVPA) provides for involuntary civil commitment of an offender immediately upon release from prison if the offender is found to be a sexually violent predator. West's Ann.Cal.Welf. & Inst.Code § 6600.

[2] **Mental Health**
Persons and offenses included

Mental Health
Treatment

Mental Health
Discharge or continued commitment

The Sexually Violent Predator Act (SVPA) was enacted to identify incarcerated individuals who suffer from mental disorders that predispose them to commit violent criminal sexual acts, and to confine and treat such individuals until it is determined they no longer present a threat to society. West's Ann.Cal.Welf. & Inst.Code § 6600.

[3] **Mental Health**
Nature of proceeding

Mental Health
Petition and application

A Sexually Violent Predator Act (SVPA) commitment proceeding is a special proceeding of a civil nature, because it is neither an action at law nor a suit in equity, but instead is a civil commitment proceeding commenced by petition independently of a pending action. West's Ann.Cal.Welf. & Inst.Code § 6600.

[4] **Mental Health**
Petition and application

A petition seeking the commitment or recommitment of a person as a sexually violent predator cannot be filed unless two mental health professionals, specifically designated by the Director of Corrections under statutory procedures of the Sexually Violent Predator Act (SVPA) to evaluate the person for this purpose, have agreed, by correct application of the statutory standards, that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody. West's Ann.Cal.Welf. & Inst.Code § 6601(b, c).

[5] **Mental Health**
Petition and application

Defendant could challenge Sexually Violent Predator Act (SVPA) commitment petition, on the ground of lack of concurring evaluators, by means of a plea in abatement prior to probable cause hearing. West's Ann.Cal.Welf. & Inst.Code § 6600.

[6] **Mental Health**
⇐ Petition and application

The person named in the Sexually Violent Predator Act (SVPA) commitment petition may file a pleading to challenge the validity of the petition on the ground it is not supported by the concurrence of two evaluators. West's Ann.Cal.Welf. & Inst.Code § 6600.

[7] **Mental Health**
⇐ Petition and application

Without the concurrence of two evaluators, as set forth in the Sexually Violent Predator Act (SVPA), no commitment petition may be filed, and the person must be unconditionally released without further proceedings to determine if he or she is a sexually violent predator. West's Ann.Cal.Welf. & Inst.Code § 6601(d).

2 Cases that cite this headnote

[8] **Mental Health**
⇐ Discharge or continued commitment

A petition for commitment under the Sexually Violent Predator Act (SVPA) may be filed only if both initial evaluators or both independent evaluators conclude the person named in the petition meets the criteria for commitment as a sexually violent predator. West's Ann.Cal.Welf. & Inst.Code § 6601.

2 Cases that cite this headnote

[9] **Mental Health**
⇐ Petition and application

Conclusion of both initial evaluators, using valid assessment protocol, that defendant did not meet criteria for commitment as sexually violent predator (SVP) precluded appointment of independent evaluators and required dismissal of commitment petition. West's Ann.Cal.Welf. & Inst.Code § 6601.

See Annot., Statutes relating to sexual psychopaths (1952) 24 A.L.R.2d 350; Cal. Jur. 3d, Incompetent Persons, § 16 et seq.; 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 195.

[10] **Mental Health**
⇐ Records and confidential communications

Mental Health
⇐ Petition and application

In light of required dismissal of Sexually Violent Predator Act (SVPA) commitment petition, based on conclusion of both evaluators that defendant did not meet the criteria for commitment as a sexually violent predator, defendant could not be required to undergo further mental evaluations, nor was access to his state hospital records justified. West's Ann.Cal.Welf. & Inst.Code § 6601.

2 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

OPINION

FYBEL, J.

INTRODUCTION

In *In re Ronje* (2009) 179 Cal.App.4th 509, 101 Cal.Rptr.3d 689 (*Ronje*), we held the use of an invalid assessment protocol in conducting mental evaluations of a person suspected to be a sexually violent predator constituted an error or irregularity in a commitment proceeding under the Sexually Violent Predator Act, Welfare and Institutions Code

section 6600 et seq. (SVPA).[1] As a remedy, we directed the trial court to order new evaluations pursuant to section 6601 using a valid assessment protocol.

In three related cases, we address the effect of post-*Ronje* evaluations in different scenarios. In this case, the two initial post-*Ronje* evaluators under section 6601 agreed Kevin Michael Reilly, the person named in the SVPA commitment petition, no longer met the criteria for commitment as a sexually violent predator. We are, therefore, compelled by the SVPA to grant Reilly's petition for writ of mandamus/ prohibition ***196** and direct the trial court to dismiss the SVPA commitment petition.

In *Boysel v. Superior Court* (2012) —— Cal.App.4th ——, 139 Cal.Rptr.3d 241, the two initial post-*Ronje* evaluators disagreed whether the person named in the SVPA commitment petition met the criteria for commitment as a sexually violent predator. Although two independent post-*Ronje* evaluators had been appointed pursuant to section 6601, subdivision (e), their reports were not before the trial court when it denied the challenge to the SVPA commitment petition. In *Wright v. Superior Court* (2012) ——Cal.App.4th ——, 139 Cal.Rptr.3d 257, the two initial post-*Ronje* evaluators likewise disagreed whether the person named in the SVPA commitment petition met the criteria for commitment as a sexually violent predator, but there is no evidence in the record that two independent post-*Ronje* evaluators have been appointed. In those two cases, we deny the petitions for writ of mandamus/prohibition without prejudice to later renewing the challenge to the SVPA commitment petitions.

SUMMARY OF OPINION

Reilly was the subject of an SVPA commitment petition filed in July 2000, while he was serving a three-year prison term for engaging in lewd and lascivious conduct. After Reilly completed his prison sentence, and while being held in civil commitment at a state hospital, a recommitment petition against him was filed in July 2008. The 2008 recommitment petition was based on two evaluations that concluded he met the criteria for commitment as a sexually violent predator. Updated evaluations pursuant to section 6603, subdivision (c) were conducted in 2009 and reached the same conclusion. The evaluations supporting the 2008 recommitment petition and the 2009 updated evaluations were conducted according to the invalid assessment protocol.

Following our decision in *Ronje,* the trial court ordered new evaluations of Reilly to be conducted according to a validly approved assessment protocol. Both of those evaluations in 2011 concluded Reilly no longer met the criteria for commitment as a sexually violent predator.

Before a post-*Ronje* probable cause hearing was conducted, Reilly filed a plea in abatement seeking dismissal of the SVPA commitment petition on the ground both post-*Ronje* evaluators concluded he no longer met the criteria for commitment as a sexually violent predator. The trial court denied the plea in abatement, as well as those brought on the same or similar grounds by nine other persons named in SVPA commitment petitions. A different trial court denied a motion to dismiss brought by an 11th person named in an SVPA commitment petition. The court also granted the district attorney's motion to compel Reilly to undergo a mental evaluation by the district attorney's retained mental health professional and to grant that mental health professional access to Reilly's state hospital records.

Reilly and the 10 others brought petitions for writ of mandate or prohibition to overturn the trial court's orders and have their SVPA commitment petitions dismissed. Reilly also challenges the trial court's order compelling him to undergo another mental evaluation and releasing his medical records to the district attorney's chosen evaluator.

The express language of the SVPA and the California Supreme Court's decision in *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 912–913, 119 Cal.Rptr.2d 1, 44 P.3d 949 (*Ghilotti*) compel us to grant Reilly's writ petition. In so doing, we address two issues: (1) whether, before the probable cause hearing, a person ***197** named in an SVPA commitment petition may challenge the petition on the ground of lack of concurring evaluators by means of a plea in abatement, nonstatutory motion to dismiss, or nonstatutory pleading; and (2) whether the SVPA commitment petition must be dismissed based on the results of the post-*Ronje* evaluations.

On the first issue, in *Ghilotti, supra,* 27 Cal.4th at pages 912–913, 119 Cal.Rptr.2d 1, 44 P.3d 949, the California Supreme Court authorized the use of a nonstatutory pleading to challenge an SVPA commitment proceeding, before the probable cause hearing, on the ground of lack of the required concurring evaluations. We deem Reilly's plea in abatement to have constituted such a nonstatutory pleading.

On the second issue, the SVPA permits a commitment petition to be filed only if both of the initial evaluators or both of the independent evaluators concur the person named in the petition meets the criteria for commitment as a sexually violent predator. (§ 6601, subds. (d), (f), (i).) "Without the concurrence of two evaluators, as set forth in the statute, no such petition may be filed, and the person must be unconditionally released without further proceedings to determine if he or she is an SVP." (*Ghilotti, supra,* 27 Cal.4th at p. 910, 119 Cal.Rptr.2d 1, 44 P.3d 949.)

In this case, the prefiling requirements had not been met because the evaluations supporting the 2008 recommitment petition and the 2009 updated evaluations were based on invalid assessment protocols. The two post-*Ronje* evaluators concluded Reilly no longer met the criteria for commitment as a sexually violent predator. Section 6601, subdivision (e) does not authorize independent evaluations in this situation. A commitment petition under the SVPA may not be filed when both initial evaluators conclude the criteria for commitment are not met, and, therefore, the SVPA commitment petition against Reilly now must be dismissed without further evaluations. Reilly long ago completed the prison sentences for the sexually violent crimes he committed and, since the SVPA commitment petition was filed in 2000, has been held in a state hospital.

Accordingly, we grant Reilly's petition for writ of mandate and will direct the trial court to dismiss the SVPA commitment petition, to deny the district attorney's motion to compel Reilly to undergo a mental evaluation by the district attorney's retained mental health professional, and to deny the district attorney's motion to allow access to Reilly's state hospital records.

OVERVIEW OF THE SVPA

[1] [2] [3] The SVPA provides for involuntary civil commitment of an offender immediately upon release from prison if the offender is found to be a sexually violent predator. (*People v. Yartz* (2005) 37 Cal.4th 529, 534, 36 Cal.Rptr.3d 328, 123 P.3d 604.) The SVPA "was enacted to identify incarcerated individuals who suffer from mental disorders that predispose them to commit violent criminal sexual acts, and to confine and treat such individuals until it is determined they no longer present a threat to society." (*People v. Allen* (2008) 44 Cal.4th 843, 857, 80 Cal.Rptr.3d 183, 187 P.3d 1018; see *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1171, 81 Cal.Rptr.2d 492, 969 P.2d 584 [SVPA proceedings are designed "to provide 'treatment' to mentally disordered individuals who cannot control sexually violent criminal behavior"].) " '[A]n SVPA commitment proceeding is a special proceeding of a civil nature, because it is neither an action at law nor a suit in equity, but instead is a civil commitment proceeding commenced by petition independently of a pending action.' " (*People* ***198** *v. Yartz, supra,* 37 Cal.4th at p. 536, 36 Cal.Rptr.3d 328, 123 P.3d 604.)

A sexually violent predator is defined as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) A "diagnosed mental disorder" is defined to include "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).)

The procedure for determining whether a convicted sex offender is a sexually violent predator typically begins when an inmate is scheduled to be released from custody. (*Turner v. Superior Court* (2003) 105 Cal.App.4th 1046, 1054, 130 Cal.Rptr.2d 300.) " 'Under section 6601, whenever the Director of Corrections determines that a defendant serving a prison term may be a sexually violent predator, the Department of Corrections and the Board of Prison Terms undertake an initial screening "based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history." (§ 6601, subd. (b).)' " (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1182–1183, 124 Cal.Rptr.2d 186, 52 P.3d 116.)

The screening is conducted in accord with an assessment protocol developed by the State Department of Mental Health (DMH). (*People v. Hurtado, supra,* 28 Cal.4th at p. 1183, 124 Cal.Rptr.2d 186, 52 P.3d 116.) " 'If that screening leads to a determination that the defendant is likely to be a sexually violent predator, the defendant is referred to the Department of Mental Health for an evaluation by two psychiatrists or psychologists. (§ 6601, subds. (b) & (c).) If both find that the defendant "has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody" (§ 6601, subd. (d)), the department forwards a petition for commitment to the county of the defendant's last conviction (*ibid.*). If the county's designated

counsel concurs with the recommendation, he or she files a petition for commitment in the superior court. (§ 6601, subd. (i).)' " (*Ibid.*)

[4] "[A] petition seeking the commitment or recommitment of a person as a sexually violent predator cannot be filed unless two mental health professionals, specifically designated by the Director under statutory procedures to evaluate the person for this purpose, have agreed, by correct application of the statutory standards, that the person 'has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody.' " (*Ghilotti, supra,* 27 Cal.4th at p. 894, 119 Cal.Rptr.2d 1, 44 P.3d 949.)

If one of the two professionals performing the evaluation does not conclude the person meets the criteria for commitment as a sexually violent predator, and the other concludes the person does meet those criteria, then the DMH "shall arrange for further examination of the person by two independent professionals selected in accordance with subdivision (g)." (§ 6601, subd. (e).) If an evaluation by two independent professionals is conducted, a petition for commitment may be filed only if both concur the person meets the criteria for commitment as a sexually violent predator. (§ 6601, subd. (f).)

Upon filing of the SVPA commitment petition, the superior court must review ***199** the petition and determine "whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." (§ 6601.5.) If the court determines the petition on its face supports a finding of probable cause, then it orders the person named in the petition to be kept in a secure facility until a probable cause hearing under section 6602 is conducted. (§ 6601.5.) The probable cause hearing must be conducted within 10 calendar days of the issuance of the order finding the petition would support a finding of probable cause. (*Ibid.*)

The purpose of the probable cause hearing is to determine whether "there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." (§ 6602, subd. (a).) The probable cause hearing is an adversarial hearing where the person named in the petition has the right to counsel. (*Ibid.*) If the court finds probable cause, it orders a trial to determine whether the person is a sexually violent predator under section 6600. (§ 6602, subd. (a).) The person named in the petition must remain in a secure facility between the time probable cause is found and the time trial is completed. (*Ibid.*)

The person named in the petition is entitled to a trial by jury, and the jury's verdict must be unanimous. (§ 6603, subds. (a) & (f).) The person named in the petition also is entitled to retain experts or professional persons to perform an examination on his or her behalf. (§ 6603, subd. (a).) At trial, the trier of fact determines whether, beyond a reasonable doubt, the person named in the petition is a sexually violent predator. (§ 6604.) If the trier of fact determines the person named in the petition is a sexually violent predator, the person is committed for an indefinite term to the custody of the DMH for appropriate treatment and confinement in a secure facility. (*Ibid.*)

ALLEGATIONS OF THE PETITION AND THE RETURN

In July 2000, the Orange County District Attorney filed a petition for commitment as a sexually violent predator, alleging Reilly was a sexually violent predator under the SVPA. Reilly was committed that year to a state hospital. In July 2008, a recommitment petition (the SVPA Petition) was filed based on an evaluation from Clark Clipson, Ph.D., dated June 20, 2008, and an evaluation from Nancy Webber, Ph.D., dated January 14, 2008.

In July 2008, Judge Stephen Sillman reviewed the SVPA Petition and found it stated sufficient facts which, if true, would constitute probable cause to believe Reilly was likely to engage in sexually violent predatory criminal behavior on his release from commitment. As a consequence, Judge Sillman ordered Reilly to continue to be detained pursuant to section 6601.5 in a secured facility until the probable cause hearing.

The probable cause hearing was conducted by Judge Robert R. Fitzgerald in March 2009. Judge Fitzgerald reviewed Dr. Clipson's evaluation and Dr. Webber's evaluation and found, pursuant to section 6602, probable cause existed to believe Reilly met the criteria for commitment as a sexually violent predator. Judge Fitzgerald set a trial for April 2009. Trial was thereafter continued several times and has not been conducted.

In August 2009, Dr. Webber prepared an updated evaluation of Reilly, conducted pursuant to section 6603, subdivision (c)(1), and concluded he continued to meet the criteria

for commitment as a sexually violent *200 predator. In September 2009, Dr. Clipson prepared an updated evaluation of Reilly, conducted pursuant to section 6603, subdivision (c)(1), and also concluded he continued to meet those criteria.

In August 2008, the state Office of Administrative Law (OAL) issued 2008 OAL Determination No. 19, in which the OAL determined the 2007 version of the DMH's assessment protocol amounted to an "underground regulation" because portions of the assessment protocol, though regulatory in nature, had not been adopted pursuant to the Administrative Procedure Act, Government Code section 11340.5. (See *Ronje, supra,* 179 Cal.App.4th at p. 515, 101 Cal.Rptr.3d 689.) In *Ronje, supra,* 179 Cal.App.4th at pages 516–517, 101 Cal.Rptr.3d 689, we agreed with the OAL and likewise concluded the 2007 assessment protocol was invalid as an underground regulation.

In 2009, the DMH drafted a new standardized assessment protocol for SVPA evaluations. Pursuant to Government Code section 11349.6, subdivision (d), the OAL approved the new assessment protocol in September 2009.

In March 2010, Reilly filed a motion requesting, among other things, that, in light of *Ronje,* the trial court order new evaluations to be conducted to determine whether he is a sexually violent predator. In November 2010, Judge James P. Marion granted the motion and ordered new evaluations of Reilly, pursuant to section 6601, and a new probable cause hearing pursuant to *Ronje* based on the new evaluations.

In compliance with the court order, the DMH reassigned Dr. Clipson and Dr. Webber to evaluate Reilly. In a report dated February 25, 2011, Dr. Webber concluded Reilly no longer met the criteria for commitment as a sexually violent predator. In a report dated February 26, 2011, Dr. Clipson also concluded Reilly no longer met those criteria.

Just before the pretrial hearing for Reilly in March 2011, the court conducted the pretrial hearing for Richard Anthony Smith, who was represented by the same counsel as Reilly. The court denied Smith's request to set a probable cause hearing within 10 calendar days and ruled that good cause existed to continue the probable cause hearing to provide time for Smith to be evaluated by the district attorney's retained expert. In light of the court's ruling as to Smith, Reilly agreed to have his probable cause hearing conducted on May 6, 2011.

In March 2011, Reilly filed a plea in abatement seeking dismissal of the SVPA Petition based on the post-*Ronje* evaluation reports of Dr. Webber and Dr. Clipson. The district attorney filed opposition and filed a motion for an order compelling Reilly to undergo a mental examination by the district attorney's retained expert, Dawn Starr, Ph.D., and a motion for an order granting Dr. Starr access to Reilly's state hospital records. In a supplemental memorandum of points and authorities, Reilly requested that his plea in abatement also be considered a demurrer under Code of Civil Procedure section 430.10, subdivision (a) and a nonstatutory motion to dismiss.

In April 2011, Judge Richard M. King issued an order denying the pleas in abatement filed by Reilly and nine others. Judge King also granted the district attorney's motion, compelling Reilly to undergo a mental evaluation and granting Dr. Starr access to his state hospital records. Later that month, Reilly filed his petition for writ of mandate/prohibition. We issued an order to show cause and stayed the trial court proceedings.

*201 DISCUSSION

I.

An SVPA Commitment Petition May Be Challenged Before the Probable Cause Hearing by a Nonstatutory Pleading Authorized by *Ghilotti.*

[5] Reilly argues a person named in an SVPA commitment petition may challenge the validity of the petition, on the ground of lack of concurring evaluators, by means of a plea in abatement, a nonstatutory motion to dismiss, or a pleading challenging the validity of the petition. The district attorney argues the person named in the petition cannot challenge the validity of the petition based on the lack of concurring evaluators until the probable cause hearing.

A. *Plea in Abatement, Motion to Dismiss, Statutory Motions*

The SVPA does not expressly provide a means to challenge a commitment petition, either before or at the probable cause hearing, for defects in or lack of evaluations. Several cases nonetheless have authorized motions or pleadings to challenge an SVPA commitment petition.

In *People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1125, 1127–1128, 105 Cal.Rptr.2d 159, the person named in the SVPA commitment petition moved to dismiss the petition on the ground it was filed without the

required concurrence of two evaluators. The Court of Appeal concluded the person named in the petition could challenge the petition on that ground by means of a plea in abatement. (*Id.* at pp. 1128–1129, 105 Cal.Rptr.2d 159.) The *Preciado* court stated the defect in lack of concurring evaluators "was not one going to the substantive validity of the complaint, but rather was merely in the nature of a plea in abatement, by which a defendant may argue that for collateral reasons a complaint should not proceed. [Citation.]" (*Id.* at p. 1128, 105 Cal.Rptr.2d 159.)

In *Peters v. Superior Court* (2000) 79 Cal.App.4th 845, 847, 94 Cal.Rptr.2d 350, the person named in the SVPA recommitment petition moved to dismiss it on the ground the evaluation under section 6601 was made by only one mental health evaluator. The trial court denied the motion to dismiss. (*Peters v. Superior Court, supra,* at p. 847, 94 Cal.Rptr.2d 350.) The Court of Appeal issued a peremptory writ of mandate directing the trial court to dismiss the SVPA recommitment petition. (*Id.* at p. 851, 94 Cal.Rptr.2d 350.)

In *Butler v. Superior Court* (2000) 78 Cal.App.4th 1171, 1174, 1177–1178, 93 Cal.Rptr.2d 468, the persons named in the SVPA recommitment petitions moved at the probable cause hearing to dismiss the petition on the ground each was supported by a single evaluation. The trial court denied the motions and found probable cause. (*Id.* at p. 1178, 93 Cal.Rptr.2d 468.) The persons named in the petitions sought writs of mandate to overturn the probable cause orders. (*Ibid.*) The district attorney argued the procedures specified in section 6601 do not apply to recommitment petitions and therefore a recommitment petition may be filed without a full evaluation by two mental health professionals. (*Butler v. Superior Court, supra,* at pp. 1180–1181, 93 Cal.Rptr.2d 468.) The Court of Appeal rejected that argument and concluded the DMH must conduct a full evaluation under section 6601 before a petition for recommitment may be filed. (*Butler v. Superior Court, supra,* at pp. 1181–1182, 93 Cal.Rptr.2d 468.) The Court of Appeal issued peremptory writs of mandate directing the trial court to vacate the probable cause orders and dismiss the petitions. (*Id.* at p. 1182, 93 Cal.Rptr.2d 468.)

***202** Arguably contrary to those cases is *Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677, 3 Cal.Rptr.3d 292 (*Bagration*), in which the court concluded Code of Civil Procedure section 437c does not operate in SVPA proceedings. In *Bagration,* the person named in the SVPA commitment petition brought a motion for summary judgment asserting his criminal convictions did not qualify as sexually violent offenses necessary to file a commitment petition. (*Bagration, supra,* at p. 1681, 3 Cal.Rptr.3d 292.) After the trial court denied the summary judgment motion, the person named in the petition sought a writ of a mandate. (*Id.* at p. 1682, 3 Cal.Rptr.3d 292.)

Denying the writ petition, the Court of Appeal explained that Code of Civil Procedure section 437c is located in part 2 of the Code of Civil Procedure which, as the California Supreme Court had held, did not generally extend to a special proceeding (such as an SVPA commitment proceeding) unless expressly incorporated by the statutes establishing the special proceeding. (*Bagration, supra,* 110 Cal.App.4th at p. 1685, 3 Cal.Rptr.3d 292.) The SVPA did not expressly incorporate part 2 of the Code of Civil Procedure; therefore, summary judgment was not permitted in an SVPA commitment proceeding. (*Bagration, supra,* at pp. 1685–1686, 3 Cal.Rptr.3d 292.) Although Code of Civil Procedure section 437c, subdivision (a) provides that summary judgment is available in "any ... proceeding," the *Bagration* court concluded section 437c "is inherently inconsistent with the SVP Act because the *mutual* summary procedures set forth in Code of Civil Procedure section 437c, if applied to SVP Act proceedings, would allow an individual to be adjudicated a sexually violent predator without benefit of the required beyond a reasonable doubt burden of proof and, in the case of a jury trial, a unanimous verdict—impairing the requirements that are at the heart of the statute's due process protections." (*Bagration, supra,* at pp. 1688–1689, 3 Cal.Rptr.3d 292.)

B. *Nonstatutory Pleading Under* Ghilotti

While *Bagration* in effect holds statutory motions and pleadings under part 2 of the Code of Civil Procedure are not applicable to SVPA commitment proceedings, the California Supreme Court in *Ghilotti, supra,* 27 Cal.4th at page 893, 119 Cal.Rptr.2d 1, 44 P.3d 949, authorized a *nonstatutory* pleading to challenge a commitment proceeding before the probable cause hearing. In *Ghilotti,* the district attorney filed a petition under the SVPA seeking the recommitment of Patrick Henry Ghilotti even though both designated evaluators concluded he no longer met the statutory criteria for commitment. (*Ghilotti, supra,* at pp. 893–894, 119 Cal.Rptr.2d 1, 44 P.3d 949.) The district attorney did not attach the evaluators' reports to the petition and did not ask the trial court to review the reports; instead, the district attorney argued the director of the DMH may disregard the evaluators' recommendations and request the filing of a commitment

petition if the director independently concludes the candidate meets the SVPA commitment criteria. (*Id.* at p. 894, 119 Cal.Rptr.2d 1, 44 P.3d 949.) The trial court expressed concern the designated evaluators had incorrectly applied the statutory criteria, but rejected the district attorney's argument and dismissed the SVPA petition for recommitment. (*Ibid.*) The Court of Appeal summarily denied the district attorney's request for a writ of mandamus and temporary stay. (*Ibid.*)

The California Supreme Court concluded an SVPA commitment or recommitment petition cannot be filed unless, pursuant to section 6601, two mental health professionals ***203** agree the person qualifies as a sexually violent predator. (*Ghilotti, supra,* 27 Cal.4th at pp. 894, 905, 119 Cal.Rptr.2d 1, 44 P.3d 949.) The trial court may review an evaluator's assessment report for legal error and, if the court finds material legal error on the face of the report, must direct that the "erring evaluator prepare a new or corrected report applying correct legal standards." (*Id.* at p. 895, 119 Cal.Rptr.2d 1, 44 P.3d 949.) The Supreme Court remanded the matter to the Court of Appeal with directions to issue a writ of mandamus vacating the trial court's order dismissing the recommitment petition and to remand the matter to the trial court. (*Ibid.*) On remand, the trial court was directed to review the designated evaluators' reports for material legal error and, if necessary, direct the evaluators to prepare new or corrected reports under the correct standard. (*Id.* at pp. 895, 929, 119 Cal.Rptr.2d 1, 44 P.3d 949.)

The Supreme Court set forth the following procedure for challenging commitment petitions on the ground of lack of evaluations recommending commitment: "Thus, in future cases like this one, when the Director [of the DMH] (1) receives one or more formal evaluations that recommend against commitment or recommitment, (2) disagrees with those recommendations, (3) believes they may be infected with material legal error, and (4) does not choose, or is not permitted within the statutory scheme, to seek additional evaluations, he may nonetheless forward a request that an SVPA commitment or recommitment petition be filed, and the county's attorney may submit such a petition for filing, with copies of the evaluators' reports attached. [Citation.] *The person named in the petition may then file a pleading challenging the validity of the petition on grounds that it is not supported by the concurrence of two evaluators under section 6601, subdivisions (d) through (f).* In response, the petitioning authorities may defend the petition by asserting that one or more nonconcurring reports are infected by legal error." (*Ghilotti, supra,* 27 Cal.4th at pp. 912–913, 119 Cal.Rptr.2d 1, 44 P.3d 949, italics added.)

[6] Therefore, *Ghilotti,* a Supreme Court decision, permits the person named in the SVPA commitment petition to file a pleading to challenge the validity of the petition on the ground it is not supported by the concurrence of two evaluators. *Ghilotti* does not explain the name and nature of that pleading, which we will refer to as a *Ghilotti* pleading. Apparently following *People v. Superior Court (Preciado),* Reilly challenged the SVPA Petition by plea in abatement. We treat the plea in abatement as an authorized *Ghilotti* pleading.

II.

The Trial Court Erred by Denying Reilly's Plea in Abatement Because the Post-*Ronje* Evaluations Did Not Satisfy the Statutory Requirement of Concurring Evaluators.

Having concluded Reilly could challenge the validity of the SVPA Petition before the probable cause hearing, we address whether the trial court erred to the extent it denied his *Ghilotti* pleading on the merits. Reilly argues the trial court erred and the SVPA Petition must be dismissed because both post-*Ronje* independent evaluators concluded he no longer met the statutory requirements for commitment as a sexually violent predator. The district attorney argues the trial court was correct in ordering Reilly to submit to an evaluation by the district attorney's retained mental health professional.

***204** A. *SVPA Screening and Evaluation Requirements*

We start by reviewing the screening and evaluation requirements of the SVPA. The commitment proceeding begins when a defendant is screened while in prison. If the initial screening leads to a determination the defendant is likely to be a sexually violent predator, the defendant is referred to the DMH for evaluation by two psychiatrists or psychologists, or one psychiatrist and one psychologist. (§ 6601, subds. (b) & (c).) These evaluations lead to one of three results: (1) both evaluators conclude the defendant is a sexually violent predator, (2) both evaluators conclude the defendant is not a sexually violent predator, or (3) one evaluator concludes the defendant is a sexually violent predator and the other evaluator concludes the defendant is not a sexually violent predator.

In the first case, when both evaluators conclude the defendant is a sexually violent predator, the DMH forwards a petition

for commitment to the district attorney of the county of the defendant's last conviction. (§ 6601, subd. (d).) If the district attorney agrees with the recommendation, the district attorney may file a petition for commitment in the superior court. (§ 6601, subds. (d) & (i).)

[7] In the second case, when both evaluators conclude the defendant is not a sexually violent predator, a petition for commitment may not be filed. (§ 6601, subd. (d).) "Without the concurrence of two evaluators, as set forth in the statute, no such petition may be filed, and the person must be unconditionally released without further proceedings to determine if he or she is an SVP." (*Ghilotti, supra,* 27 Cal.4th at p. 910, 119 Cal.Rptr.2d 1, 44 P.3d 949.)

In the third case, when there is a split decision between the evaluators, the next step in the proceedings is to appoint two independent professional evaluators to evaluate the defendant in accordance with the standardized assessment protocol. (§ 6601, subds. (c) & (e).) If independent evaluators are appointed, an SVPA commitment petition may be filed only if both of the independent evaluators conclude the defendant is a sexually violent predator. (§ 6601, subd. (f).) Section 6601, subdivision (f) states: "If an examination by independent professionals pursuant to subdivision (e) is conducted, a petition to request commitment under this article shall only be filed if both independent professionals who evaluate the person pursuant to subdivision (e) concur that the person meets the criteria for commitment specified in subdivision (d)." (See *Ghilotti, supra,* 27 Cal.4th at p. 907, 119 Cal.Rptr.2d 1, 44 P.3d 949 ["[i]f these independent professionals also do not concur that the person meets the criteria for commitment, the Director *may not* request the filing of a petition"].)

[8] Thus, a petition for commitment under the SVPA may be filed only if both initial evaluators or both independent evaluators conclude the person named in the petition meets the criteria for commitment as a sexually violent predator. The following table displays the possible outcomes when the evaluations are conducted pursuant to a valid assessment protocol:

Yes = Evaluator concludes the person named in the petition meets the criteria for commitment under the SVPA

No = Evaluator concludes the person named in the petition does not meet the criteria for commitment under the SVPA

Evaluator 1	Evaluator 2	Independent Evaluator 1	Independent Evaluator 2	Result
1. Yes	Ye	Not Required	Not Required	Petition may be filed
2. No	No	Not permitted	Not permitted	Petition may not be filed
3. Yes	No	Yes	Yes	Petition may be filed
4. Yes	No	No	No	Petition may not be filed
5. Yes	No	Yes	No	Petition may not be filed

*205 By statute, a petition for commitment may only be filed under categories 1 and 3.

B. *The Post*–Ronje *Evaluations of Reilly*

[9] The post-*Ronje* evaluations in this case fall within category 2. Both post-*Ronje* evaluators concluded Reilly no longer met the criteria for commitment as a sexually violent predator. Appointment of independent evaluators was not authorized by section 6601, subdivision (e). The SVPA Petition could not have been filed based on the two post-*Ronje* evaluations, and therefore, we conclude, now must be dismissed.

C. Ronje, Gray, *and* Davenport

To reach that decision, we discuss our decision in *Ronje,* the earlier Court of Appeal opinion in *Gray v. Superior Court* (2002) 95 Cal.App.4th 322, 115 Cal.Rptr.2d 477 (*Gray*), and the recent opinion in *Davenport v. Superior Court* (2012) 202 Cal.App.4th 665, 135 Cal.Rptr.3d 239 (*Davenport*).

1. *Ronje*

The district attorney argues the statutory prefiling requirements of section 6601 were met when the SVPA Petition was filed because two evaluators had concluded Reilly met the criteria for commitment as a sexually violent

predator. The post-*Ronje* evaluations, the district attorney argues, cured the procedural defect in the initial evaluations and satisfied the statutory prefiling requirements of section 6601. Under the district attorney's interpretation of *Ronje,* the SVPA Petition must proceed to the probable cause hearing regardless of the results of the post-*Ronje* evaluations.

In *Ronje, supra,* 179 Cal.App.4th at page 516, 101 Cal.Rptr.3d 689, the person named in the SVPA commitment petition had been evaluated under the 2007 assessment protocol that the OAL later determined to be invalid. We agreed with the OAL and concluded the 2007 assessment protocol was invalid as an underground regulation and "[u]se of the invalid assessment protocol therefore constitutes an error or irregularity in the SVPA proceedings." (*Ronje, supra,* at pp. 516–517, 101 Cal.Rptr.3d 689.) We also concluded the use of invalid assessment protocols did not deprive the trial court of fundamental jurisdiction; that is, the " 'legal power to hear and determine a cause' " and, therefore, outright dismissal was not the appropriate remedy. (*Id.* at p. 518, 101 Cal.Rptr.3d 689.) Instead, the remedy we prescribed for this irregularity in proceedings was to prepare *new evaluations* in ***206** accordance with valid assessment protocols and to conduct another probable cause hearing under section 6602, subdivision (a) based on the new evaluations. (*Ronje, supra,* at p. 519, 101 Cal.Rptr.3d 689.)

The prefiling requirements had not been met in *Ronje* because the initial evaluations were made in accordance with an invalid assessment protocol. The new evaluations based on the valid assessment protocol were intended to fulfill the statutory prerequisite for filing the SVPA commitment petition. New evaluations, conducted according to the valid assessment protocol, would not be a meaningful remedy if the only purpose of the exercise was to legitimize the conclusions reached by prior evaluations made in accordance with the invalid assessment protocol. Indeed, under the district attorney's theory, the new evaluations under valid assessment protocols would serve no purpose at all.

In this case, the prefiling requirements had not been met when the SVPA Petition was filed in July 2008, because the evaluations supporting the SVPA Petition were based on an invalid assessment protocol. It was therefore necessary to complete a new evaluation process under section 6601, as required by *Ronje.* Both initial post-*Ronje* evaluators concluded Reilly did not meet the criteria for commitment as a sexually violent predator. A commitment petition could not be filed based on those evaluations, and appointment of independent evaluators would not be permitted.

2. *Gray*

The district attorney argues the holding and analysis of *Gray, supra,* 95 Cal.App.4th 322, 115 Cal.Rptr.2d 477, are instructive on the issue whether the SVPA Petition should be dismissed in light of the post-*Ronje* evaluations. As we discuss, *Gray* supports our analysis.

In *Gray,* an SVPA commitment petition was brought against Samuel Lee Gray in 1996, based on two evaluations concluding he met the criteria for commitment as a sexually violent predator. (*Gray, supra,* at p. 324, 115 Cal.Rptr.2d 477.) In 1999, three new evaluations of Gray were conducted, two of which concluded he no longer met those criteria. (*Ibid.*) In 2001, four more evaluations were conducted, two of which concluded Gray met the criteria for commitment, and two of which concluded he did not meet those criteria. (*Ibid.*) Gray moved for summary judgment on the ground the postpetition evaluations created a split of evaluators. (*Id.* at pp. 324–325, 115 Cal.Rptr.2d 477.) The trial court denied the motion, and Gray challenged the court's decision by a petition for writ of mandate. (*Id.* at p. 325, 115 Cal.Rptr.2d 477.)

In the writ proceeding, Gray argued that one of the 1999 evaluators who concluded he was not a sexually violent predator was a replacement for an initial evaluator under section 6603, subdivision (c), thereby creating a split of opinion requiring additional evaluations. (*Gray, supra,* 95 Cal.App.4th at pp. 325–326, 115 Cal.Rptr.2d 477.) Gray argued the other two 1999 evaluations constituted those additional evaluations. (*Id.* at p. 326, 115 Cal.Rptr.2d 477.) Because the opinions of the other two evaluators differed, Gray argued the SVPA commitment petition no longer was viable. (*Ibid.*)

The Court of Appeal rejected this argument based on its interpretation of sections 6603, subdivision (c) and 6601, subdivision (f). (*Gray, supra,* 95 Cal.App.4th at pp. 327–329, 115 Cal.Rptr.2d 477.) Section 6603, subdivision (c) states that if a replacement or updated evaluation results in a split decision, then "the [DMH] shall conduct two additional evaluations in accordance with ***207** subdivision (f) of Section 6601." The court concluded this passage meant the additional evaluations mandated by section 6603, subdivision (c) must be conducted in the manner provided by section 6601, subdivision (f), but section 6603, subdivision (c) "does not, on its face, provide any consequences for a split of opinion between the second set of evaluators." (*Gray, supra,* at p. 328, 115 Cal.Rptr.2d 477.) Neither section 6601, subdivision (f) nor section 6603, subdivision (c) states

a petition must be dismissed if updated or replacement evaluations create a split of opinion as to whether the person in the petition meets the criteria for commitment as a sexually violent predator. (*Gray, supra,* at p. 328, 115 Cal.Rptr.2d 477.)

In *Gray,* the SVPA commitment petition was properly filed because it was based on two concurring evaluations meeting statutory requirements. Later updated and replacement evaluations ended the concurrence. The *Gray* court reasoned that because conditions to filing the petition were already met with two concurring evaluations, the petition could not be dismissed when those conditions later ceased to exist. (*Gray, supra,* 95 Cal.App.4th at p. 328, 115 Cal.Rptr.2d 477.)

The post-*Ronje* evaluations in this case were new evaluations under section 6601, not updated or replacement evaluations under section 6603, subdivision (c), as in *Gray.* Acknowledging this distinction, the district attorney argues several legal principles enunciated in *Gray* are applicable to this case and support the trial court's decision to deny the request to dismiss the SVPA Petition. First, the *Gray* court stated, in rejecting Gray's interpretation of section 6601, subdivision (f): "To say that a petition may not be filed unless certain conditions are met is not the same as to say that proceedings 'may not go forward' if those conditions cease to exist." (*Gray, supra,* 95 Cal.App.4th at p. 328, 115 Cal.Rptr.2d 477.) Second, the *Gray* court concluded: "Once a petition under the [SVPA] has been filed, and the trial court (as here) has found probable cause to exist, the matter should proceed to trial. In other words, once a petition has been properly filed and the court has obtained jurisdiction, the question of whether a person is a sexually violent predator should be left to the trier of fact *unless* the prosecuting attorney is satisfied that proceedings should be abandoned." (*Id.* at p. 329, 115 Cal.Rptr.2d 477.)

Although these principles do apply here, they support our decision to grant the writ petition. Here, in sharp contrast to *Gray,* the "certain conditions" (*Gray, supra,* 95 Cal.App.4th at p. 328, 115 Cal.Rptr.2d 477) to filing the SVPA Petition were not met because the initial evaluations were conducted under an invalid assessment protocol. Hence, the SVPA Petition here was not "properly filed" (*Gray, supra,* at p. 329, 115 Cal.Rptr.2d 477) in the first instance. While the defect did not deprive the trial court of fundamental jurisdiction—meaning the power to hear the case—the defect had to be cured for the SVPA Petition to be viable under section 6601.

We concluded in *Ronje* the remedy for the error in use of the invalid assessment protocol included a new probable cause hearing based on the new evaluations. Implicit in that conclusion, however, was that the new evaluations would produce the concurrence of evaluators required by the SVPA and *Ghilotti* to permit the filing of a commitment petition. Both section 6601 and *Ghilotti* stress that a commitment petition may not be filed unless both the initial evaluators or both the independent evaluators conclude the person suspected to be a sexually violent predator ***208** meets the criteria for commitment as a sexually violent predator. Without the required concurrence of one pair of evaluators, a probable cause hearing would not be statutorily authorized because the SVPA commitment petition could not have been filed in the first place.

3. *Davenport*

In *Davenport, supra,* 202 Cal.App.4th 665, 135 Cal.Rptr.3d 239, Division Four of the First District Court of Appeal interpreted the SVPA and *Ronje* and applied them to issues similar to those presented here. The facts of *Davenport* also were similar to those of this case. While Roger Davenport was serving a prison term, a petition under the SVPA was filed against him. (*Davenport, supra,* at p. 667, 135 Cal.Rptr.3d 239.) The petition was supported by two evaluations concluding he met the criteria for commitment as a sexually violent predator. (*Ibid.*) After the trial court found probable cause, and while the matter awaited trial, we issued our opinion in *Ronje.* (*Davenport, supra,* at p. 667, 135 Cal.Rptr.3d 239.) The evaluations of Davenport had been conducted under the assessment protocol we concluded in *Ronje* to be invalid. (*Davenport, supra,* at p. 668, 135 Cal.Rptr.3d 239.)

In light of *Ronje,* the trial court ordered new evaluations of Davenport. (*Davenport, supra,* 202 Cal.App.4th at p. 668, 135 Cal.Rptr.3d 239.) One evaluator concluded he continued to meet the criteria for commitment as a sexually violent predator; the other concluded he no longer met those criteria. (*Ibid.*) Due to the split of opinion, the DMH appointed two independent mental health professionals to evaluate Davenport. The independent evaluators likewise reached a split decision. (*Ibid.*)

Davenport moved to dismiss the SVPA commitment petition on the ground it was not supported by the necessary concurring evaluators. (*Davenport, supra,* 202 Cal.App.4th at p. 668, 135 Cal.Rptr.3d 239.) The trial court denied the motion and ordered a new probable cause hearing, and

Davenport challenged the court's order by a petition for writ of mandate. (*Ibid.*) The Court of Appeal summarily denied the petition, but the Supreme Court granted review and transferred the case back to the Court of Appeal with directions to issue an order to show cause. (*Ibid.*)

After issuing an order to show cause, the Court of Appeal denied Davenport's writ petition. (*Davenport, supra,* 202 Cal.App.4th at p. 667, 135 Cal.Rptr.3d 239.) The Court of Appeal assumed the OAL assessment protocol used to evaluate Davenport was invalid, but interpreted *Ronje* as not permitting dismissal in this situation because use of the invalid assessment protocol did not deprive the trial court of jurisdiction over the SVPA commitment petition. (*Davenport, supra,* at pp. 670–671, 135 Cal.Rptr.3d 239.)

The Court of Appeal in *Davenport* concluded the new evaluations prepared pursuant to *Ronje* were comparable to updated or replacement evaluations under section 6603, subdivision (c). (*Davenport, supra,* 202 Cal.App.4th at p. 671, 135 Cal.Rptr.3d 239.) Although updated or replacement evaluations might result in a lack of concurring evaluations, the court followed *Gray, supra,* 95 Cal.App.4th 322, 115 Cal.Rptr.2d 477, which held that neither section 6601, subdivision (f) nor section 6603, subdivision (c) states an SVPA commitment petition must be dismissed if updated or replacement evaluations create a split of opinion as to whether the person in the petition meets the criteria for commitment as a sexually violent predator. ***209** (*Davenport, supra,* at pp. 671–672, 135 Cal.Rptr.3d 239.)

Finding *Gray* persuasive, the court in *Davenport* concluded the SVPA commitment petition was properly filed and the effect of the post-*Ronje* evaluations "was not to begin the proceedings anew." (*Davenport, supra,* 202 Cal.App.4th at p. 673, 135 Cal.Rptr.3d 239.) Important to the court's conclusion was Davenport's failure to identify any substantive defect in the assessment protocol found to be invalid in *Ronje* and the lack of evidence the use of that protocol had any material effect on the conclusions in the original evaluations. (*Davenport, supra,* at p. 673, 135 Cal.Rptr.3d 239.) The court also found persuasive *People v. Superior Court (Salter)* (2011) 192 Cal.App.4th 1352, 121 Cal.Rptr.3d 873, a case decided under the Mentally Disordered Offender Act, Penal Code section 2960 et seq. Although, as *Davenport* notes, the SVPA and the Mentally Disordered Offender Act have similar purposes, they are different statutory schemes, with differing procedures and requirements.

We respectfully must conclude our colleagues in *Davenport* misinterpreted the SVPA and *Ronje* in several important respects. *Davenport* states that in *Ronje,* we did not intend to start the evaluation process anew because we concluded dismissal was not an appropriate remedy. We did intend to start the evaluation process anew. In *Ronje,* we concluded only that use of the invalid assessment protocol did not deprive the trial court of *fundamental jurisdiction,* and, therefore, dismissal outright before new evaluations could be conducted was not an appropriate remedy. (*Ronje, supra,* 179 Cal.App.4th at p. 518, 101 Cal.Rptr.3d 689.) The remedy we expressly ordered in *Ronje* to cure the underlying error was new evaluations under section 6601 including, if required, evaluations conducted by two independent evaluators, not updated or replacement evaluations under section 6603, subdivision (c). (*Ronje, supra,* at p. 519, 101 Cal.Rptr.3d 689.) The express words of the SVPA and *Ghilotti* require dismissal of the SVPA commitment petition if the new evaluations failed to produce the concurrence required to support the filing of an SVPA commitment petition.

III.

The Trial Court Erred by Ordering Reilly to Undergo an Additional Mental Evaluation.

[10] Because the SVPA Petition must be dismissed, Reilly cannot be compelled to undergo another mental evaluation. Evaluations by independent professionals under section 6601, subdivision (e) are not authorized because the initial two post-*Ronje* evaluators concluded Reilly did not meet the criteria for commitment as a sexually violent predator. For the same reason, allowing access to Reilly's state hospital records would not be justified.

DISPOSITION AND ORDER

The petition for writ of mandate/prohibition is granted. Let a writ of mandate issue directing the trial court to vacate its order (1) denying Reilly's plea in abatement, (2) granting the district attorney's motion to compel Reilly to undergo a mental examination, and (3) granting the district attorney's motion to allow access to Reilly's state hospital records, and directing the trial court to enter a new order (1) dismissing the petition seeking commitment of Reilly under the SVPA, (2) denying the motion to compel Reilly to undergo a mental examination, and (3) denying the ***210** motion to allow access to Reilly's state hospital records.

WE CONCUR: RYLAARSDAM, Acting P.J., and BEDSWORTH, J.

Parallel Citations

204 Cal.App.4th 829, 12 Cal. Daily Op. Serv. 3636, 2012 Daily Journal D.A.R. 4085

Footnotes

1 Further code references are to the Welfare and Institutions Code unless otherwise indicated.

End of Document

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: ***Reilly v. Superior Court (Orange County)***
No.: **G045118**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **May 4, 2012**, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **May 4, 2012**, to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 4, 2012**, at San Diego, California.

S. McBrearty
Declarant

S. McBrearty
Signature

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