S225562 COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ORANGE COUNTY SUPERIOR COURT,

Respondent;

RICHARD ANTHONY SMITH,

Real Party in Interest.

No.: _____

Court of Appeal Case No. G050827

Orange County Superior Court Case No. M-9531

Related Cases (S202338 and G045119)

PETITION FOR REVIEW

From the Unpublished Order of the Court of Appeal
Fourth District, Division Three, Case No. G050827

OFFICE OF THE ORANGE COUNTY PUBLIC DEFENDER

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,* v. **ORANGE COUNTY SUPERIOR COURT,** *Respondent;* **RICHARD ANTHONY SMITH,** *Real Party in Interest.*	No.: _____ Court of Appeal Case No. G050827 Orange County Superior Court Case No. M-9531 Related Cases (S202338 and G045119)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(California Rules of Court, Rules 8.208 and 8.488)

The potential interested entities or persons to the Petition are:

Name of Interested Entity or Person	Nature of Interest
Richard Anthony Smith	Respondent in case M-9531 (SVP matter).
Orange County District Attorney	Petitioner in case M-9531 (SVP matter).
Orange County Superior Court Honorable Kimberly Menninger	Issued the orders challenged by the writ petition.
California Department of State Hospitals (formerly Department of Mental Health)	Screened Mr. Smith for SVP commitment.

Dated: April 3, 2015

Respectfully submitted,
FRANK OSPINO
Public Defender
SHARON PETROSINO
Chief Deputy Public Defender
DAN COOK
Senior Assistant Public Defender

MARK S. BROWN
Assistant Public Defender
Writs and Appeals

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,* v. **ORANGE COUNTY SUPERIOR COURT,** *Respondent;* **RICHARD ANTHONY SMITH,** *Real Party in Interest.*	No.: _____ **PETITION FOR REVIEW** From the Unpublished Order of the Court of Appeal, Fourth Appellate District, Division Three, Case No. G050827 Orange County Superior Court Case No. M-9531 Related Cases (S202338 and G045119)

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Real Party in Interest Richard Anthony Smith, by and through counsel, hereby petitions this honorable court for review of the unpublished order of the Court of Appeal, Fourth Appellate District, Division Three, summarily granting the prosecution's Petition for Writ of Mandate / Prohibition. A true copy of the court's unpublished order is attached hereto as Appendix A.

Review is sought to settle an important question of law. (Cal. Rules of Court, rule 8.500(b)(1).) Furthermore, review is sought to secure uniformity of decision given that the Court of Appeal's ruling in this matter is contrary to prior statements made by this court (see *People v. Gonzales* (2013) 56 Cal.4th 353, 379, footnote 11, citing *Albertson v. Superior Court*

(2001) 25 Cal.4th 796, 807) and contrary to the ruling made by the Court of Appeal, Fourth Appellate District, Division Two (see *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 380-381). (Cal. Rules of Court, rule 8.500(b)(1).) In the alternative, review is sought for the purpose of transferring this matter to the Court of Appeal for such proceedings as the Supreme Court may order. (Cal. Rules of Court, rule 8.500(b)(4).)

ISSUES PRESENTED FOR REVIEW

Twice the Court of Appeal, Fourth Appellate District, Division Three (COA) held the Orange County District Attorney (OCDA) may not turn over Mr. Smith's state hospital records to the prosecution's retained expert, Harry Goldberg. On March 28, 2012, the COA (G045119) held OCDA may not turn over Mr. Smith's state hospital records to the prosecution's retained expert, Harry Goldberg. Again, on January 14, 2014 (after remand from the Supreme Court (S202338)), the COA (G045119) ordered the Honorable Richard King to deny the prosecution's motion to allow OCDA to turn over Mr. Smith's state hospital records to the prosecution's retained expert, Harry Goldberg. Then, on September 25, 2014, the prosecution requested that the Honorable Kimberly Menninger allow OCDA to turn over Mr. Smith's state hospital records to its new retained expert, Dr. Dawn Starr. In accordance with the law of the case doctrine, Judge Menninger correctly denied the prosecution's motion. On October 9, 2014, OCDA filed a petition for writ of mandate (which was granted by the COA). Accordingly, the first issue is: **Did the law of the case doctrine compel the COA to adhere to its two prior rulings and deny the prosecution's petition for writ of mandate (or was the COA permitted to ignore its two prior rulings and grant the prosecution's petition for writ of mandate)?**

Despite the COA's two prior rulings that prevented OCDA from turning over Mr. Smith's confidential state hospital records to OCDA's retained expert, and despite the law of the case doctrine, on January 22, 2015, the COA issued a "*Palma* Notice."[1] On February 2, 2015, Mr. Smith filed a supplemental informal response opposing the issuance of a preemptory writ in the first instance. On February 24, 2015, the COA issued a preemptory writ in the first instance compelling Judge Menninger to issue an order allowing OCDA to turn over Mr. Smith's state hospital records to its new retained expert, Dr. Dawn Starr. Accordingly, the second issue is: **Given that the COA twice issued written rulings that prevented OCDA from turning over Mr. Smith's confidential state hospital records to OCDA's retained expert, was the COA permitted to change its mind and issue a preemptory writ in the first instance that allows OCDA to turn over Mr. Smith's confidential state hospital records to OCDA's retained expert?**

In its ruling, the COA stated the only issue presented in this proceeding is whether OCDA's retained mental health expert may look at Mr. Smith's confidential state hospital records (and evaluations). To answer this question, the COA solely relied on appellate counsel's erroneous concession in another matter that "an expert retained by the district attorney may review otherwise confidential records and interview an alleged SVP if good cause for the evaluation exists" (citing, *People v. Landau* (2013) 214 Cal.App.4th 1, 24 (*Landau*)). Therefore, the third issue is: **Was the COA permitted to ignore Mr. Smith's assertion that the concession in *Landau* was erroneous and would not be repeated in this matter, and more importantly, was the COA permitted to ignore this court's statement**

[1] *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.

that the Sexually Violent Predator Act specifically "does not authorize disclosure of therapy records directly to the district attorney..., but rather authorizes review of such records only by the independent evaluators and grants a district attorney access to otherwise confidential treatment information concerning an alleged SVP only 'to the extent such information is contained in an updated mental evaluation.' "? (*People v. Gonzales* (2013) 56 Cal.4th 353, 379, footnote 11, citing *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 807; see also *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 380-381.)

NECESSITY FOR REVIEW

Review of the issues presented is necessary to settle important questions of law. (Cal. Rules of Court, rule 8.500(b)(1).) Furthermore, review is necessary to secure uniformity of decision given that the Court of Appeal's ruling in this matter is contrary to prior statements made by this court (see *People v. Gonzales* (2013) 56 Cal.4th 353, 379, footnote 11, citing *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 807) and contrary to the ruling made by the Court of Appeal, Fourth Appellate District, Division Two (see *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 380-381). (Cal. Rules of Court, rule 8.500(b)(1).) In the alternative, review is sought for the purpose of transferring this matter to the Court of Appeal for such proceedings as the Supreme Court may order. (Cal. Rules of Court, rule 8.500(b)(4).)

The issues presented for review implicate significant privacy rights, due process rights, and basic fairness. In addition, an appeal after disclosure of confidential records is an inadequate remedy. "The need for the availability of the prerogative writs in discovery cases where an order of the

trial court granting discovery allegedly violates a privilege of the party against whom discovery is granted, is obvious." (*Roberts v. Superior Court* (1973) 9 Cal. 3d 330, 336.) Accordingly review is necessary to settle important questions of law, secure uniformity of decision, to protect Mr. Smith's privacy rights, to stem future litigation on these issues and to guide trial courts, prosecutors and the defense bar with regard to these important questions.

STATEMENT OF THE CASE AND FACTS

On March 6, 2002, the Orange County District Attorney (OCDA) filed a "Petition for Commitment as a Sexually Violent Predator" (hereinafter referred to as the "SVP Petition") against Mr. Smith under the Sexually Violent Predator Act (Welfare and Institutions Code section 6600 *et seq*; "SVPA" or "SVP Act").[2] OCDA attached to the SVP Petition the evaluations of mental health professionals, Dana Putnam, Ph.D., and Charles Jackson, Ph.D. The evaluators' reports were dated 1/18/2002 and 2/4/2002, respectively.[3]

In light of the ruling in *In re Ronje* (2009) 179 Cal.App.4th 509 by the Court of Appeal, Fourth Appellate District, Division Three (COA), the Department of State Hospitals (formerly the Department of Mental Health)

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[2] All future references to a section are references to the Welfare and Institutions Code unless otherwise noted.

[3] Due to Dr. Jackson's subsequent unavailability, the following updated evaluations were completed pursuant to section 6603(c)(1): Dr. Putnam in 5/2006 (positive); Dr. Schwartz in 5/2006 (negative/non-SVP opinion); Dr. Rueschenberg in 8/2006 (positive); and Dr. Zinik in 8/2006 (negative/non-SVP opinion).

reappointed Dr. Putnam and Dr. Rueschenberg to evaluate Mr. Smith as an SVP pursuant to section 6601(d).[4] In a report dated February 7, 2011, Dr. Putnam opined Mr. Smith did not meet the criteria for an SVP. In a report dated February 2, 2011, Dr. Rueschenberg opined Mr. Smith did not meet the criteria for an SVP.

On April 15, 2011, Judge King issued an order (a) granting OCDA's motion to compel Mr. Smith to submit to a mental health examination conducted by Dr. Harry Goldberg, and (b) granting OCDA's motion to permit Dr. Goldberg to review Mr. Smith's state hospital records.

On March 28, 2012, the COA issued a writ of mandate in *Smith v. Superior Court* (Mar. 28, 2012; G045119) (nonpub.opn) directing Judge King to vacate his previous orders and enter new orders (a) denying OCDA's motion to compel Mr. Smith to submit to a mental health examination conducted by Dr. Harry Goldberg, and (b) denying OCDA's motion to permit Dr. Goldberg to review Mr. Smith's state hospital records.

On June 27, 2012, this court granted the prosecution's petition for review (for issues different from the issues presented for review in this petition) and deferred briefing pending consideration and disposition in *Reilly v. Superior Court* (2013) 57 Cal.4th 641.

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[4] In a memorandum dated February 16, 2010, DSH stated that "only the evaluators who have found the person positive will be scheduled to complete new evaluations. Evaluators who have opined that the person does not meet the criteria will not be assigned new evaluations as the outcome of the negative evaluation(s) is unlikely to change." Thus, DSH tried to "stack the deck" against Mr. Smith by reappointing only the doctors who had previously found Mr. Smith was an SVP (*i.e.*, Dr. Putnam and Dr. Rueschenberg) and did not reappoint the doctors who had previously found Mr. Smith was not an SVP (*i.e.*, Dr. Schwartz and Dr. Zinik).

After remand from the Supreme Court), the COA again issued a writ of mandate in *Smith v. Superior Court* (Jan. 14, 2014; G045119) (nonpub.opn) directing Judge King to vacate his previous orders and enter new orders (a) denying OCDA's motion to compel Mr. Smith to submit to a mental health examination conducted by Dr. Harry Goldberg, and (b) denying OCDA's motion to permit Dr. Goldberg to review Mr. Smith's state hospital records.

On June 17, 2014, the prosecution requested that the Department of State Hospitals (DSH) direct Dr. Putnam to perform an updated evaluation of Mr. Smith pursuant to section 6603(c)(1) of the Welfare and Institutions Code.[5]

On September 25, 2014, OCDA filed a motion requesting that Judge Menninger issue an order permitting Dr. Dawn Starr to review Mr. Smith's state hospital records.

On September 29, 2014, the Honorable Kimberly Menninger correctly denied the prosecution's motion. Judge Menninger correctly found that she was bound by the COA's prior rulings in this matter pursuant to the law of the case doctrine. (See, for example, *People v. Alexander* (2010) 49 Cal.4th 846, 870.)

On October 9, 2014, OCDA filed a petition for writ of mandate (G050827).

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[5] Dr. Rueschenberg was no longer available to perform an updated SVP evaluation. In addition, because Dr. Rueschenberg had previously opined Mr. Smith is not an SVP, the prosecution was prohibited by section 6603(c)(2)(D) from requesting a replacement SVP evaluation.

On January 22, 2015, the COA issued a "*Palma* Notice."[6] On February 2, 2015, Mr. Smith filed a supplemental informal response opposing the issuance of a preemptory writ in the first instance.

On February 24, 2015, the COA issued a preemptory writ in the first instance compelling Judge Menninger to issue an order allowing OCDA to turn over Mr. Smith's state hospital records to its new retained expert, Dr. Dawn Starr.

ARGUMENT

I. THE LAW OF THE CASE DOCTRINE COMPELLED THE COA TO ADHERE TO ITS TWO PRIOR RULINGS AND DENY THE OCDA'S PETITION FOR WRIT OF MANDATE.

The law of the case doctrine states that when, in deciding an appeal, an appellate court states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal ..., and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular. (See, for example, *People v. Alexander* (2010) 49 Cal.4th 846, 870.) Accordingly, the law of the case doctrine compelled the COA to adhere to its two prior rulings and deny the prosecution's petition for writ of mandate – even if the COA was clearly of the opinion that the former decisions were erroneous in that particular.

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[6] *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.

II. GIVEN THAT THE COA TWICE ISSUED WRITTEN RULINGS PREVENTING OCDA FROM TURNING OVER MR. SMITH'S CONFIDENTIAL STATE HOSPITAL RECORDS TO OCDA'S RETAINED EXPERT, THE COA WAS NOT PERMITTED TO CHANGE ITS MIND AND ISSUE A PREEMPTORY WRIT IN THE FIRST INSTANCE THAT ALLOWS OCDA TO TURN OVER MR. SMITH'S CONFIDENTIAL STATE HOSPITAL RECORDS TO OCDA'S RETAINED EXPERT.

A court may issue a peremptory writ in the first instance " 'only when petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue — for example, when such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts — or where there is an unusual urgency requiring acceleration of the normal process....' [Citation.]" (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1223; disapproved on another ground by *Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709; see also, *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1242 and *Banning Ranch Conservancy v. Superior Court* (2011) 193 Cal.App.4th 903, 919.) Given that the COA twice issued written rulings preventing OCDA from turning over Mr. Smith's confidential state hospital records to OCDA's retained expert, OCDA's entitlement to relief was certainly not obvious. Nor was OCDA's entitlement to relief conceded by Mr. Smith. Accordingly, the COA was not permitted to change its mind and issue a preemptory writ in the first instance that allows OCDA to turn over Mr. Smith's confidential state hospital records to OCDA's retained expert.

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III. THE SEXUALLY VIOLENT PREDATOR ACT DOES NOT EVEN AUTHORIZE OCDA TO HAVE A COPY OF MR. SMITH'S CONFIDENTIAL STATE HOSPITAL RECORDS.

In its ruling, the COA stated the only issue presented in this proceeding is whether OCDA's retained mental health expert may review Mr. Smith's confidential state hospital records (and evaluations). To answer this question, the COA solely relied on appellate counsel's erroneous concession in another matter that "an expert retained by the district attorney may review otherwise confidential records and interview an alleged SVP if good cause for the evaluation exists" (citing, *People v. Landau* (2013) 214 Cal.App.4th 1, 24 (*Landau*)). The COA ignored Mr. Smith's assertion that appellant counsel's concession in *Landau* was erroneous and would not be repeated in this matter. Furthermore, and more importantly, the COA ignored this court's statement that the SVPA specifically "does not authorize disclosure of therapy records directly to the district attorney..., but rather authorizes review of such records only by the independent evaluators and grants a district attorney access to otherwise confidential treatment information concerning an alleged SVP only 'to the extent such information is contained in an updated mental evaluation.' " (*People v. Gonzales* (2013) 56 Cal.4th 353, 379, footnote 11, citing *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 807; see also *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 380-381.) Accordingly, since OCDA is not permitted to have Mr. Smith's confidential state hospital records, the COA should not have issued a preemptory writ in the first instance that permits OCDA to turn over Mr. Smith's confidential state hospital records to OCDA's retained expert.

A. The SVPA expressly permits the dissemination of Mr. Smith's CDCR records to the district attorney.

Under the SVPA, a person is an SVP if he "has been convicted of a sexually violent offense against one or more victims and ... 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." (Welf. & Inst. Code, § 6600(a).) A person deemed an SVP is indefinitely committed to a state hospital for treatment for his disorder. (Welf. & Inst. Code, § 6604.)

The SVP evaluation process starts in prison. If the Secretary of the Department of Corrections and Rehabilitation determines that a prisoner may be an SVP, the Secretary refers the prisoner for an initial screening before the prisoner's scheduled release date. (Welf. & Inst. Code, § 6601(a) & (b).) If, as a result of this initial screening, it is determined that the prisoner is likely to be an SVP, the Secretary refers the prisoner to the Department of State Hospitals for a full evaluation as an SVP. (Welf. & Inst. Code, § 6601(b).) DSH appoints two psychiatrists or psychologists to evaluate the prisoner. (Welf. & Inst. Code, § 6601(d).) If the two initial evaluators agree that the prisoner is an SVP, DSH must request a commitment petition from the district attorney. (Welf. & Inst. Code, § 6601(d).) "**Copies of the evaluation reports and any other supporting documents shall be made available to the [district attorney].**" (Welf. & Inst. Code, § 6601(d); emphasis added.) Thus, the SVPA expressly permits the dissemination of Mr. Smith's CDCR records to the district attorney.

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B. However, section 5328 prohibits the dissemination of Mr. Smith's confidential state hospital records to the district attorney.

Although the SVPA expressly permits the dissemination of Mr. Smith's CDCR records to the district attorney (Welf. & Inst. Code, § 6601(d).), section 5328 provides that all information and records obtained in the course of providing services to either voluntary or involuntary recipients of services under the SVPA shall be confidential. (*Gilbert v. Superior Court* (2014) 224 Cal. App. 4th 376, 380.) Section 5328 generally prohibits the dissemination of Mr. Smith's confidential state hospital records to anyone (including the district attorney).

However, in June 2000, the legislature enacted section 6603(c), which creates an exception to section 5328's general rule of confidentiality. (See *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 805-807 for a detailed description of the legislative history of section 6603(c).) Section 6603(c) sets out express authority for the district attorney to request updated evaluations. This provision specifies that if the district attorney determines that new or replacement evaluations are necessary "to update one or more of the original evaluations or to replace the evaluation of an evaluator that is no longer available for testimony," the district attorney may request that DSH perform such updated or replacement evaluations, and, upon such request, DSH "shall perform the requested evaluations." (Welf. & Inst. Code, § 6603(c).) "These updated or replacement evaluations shall include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews of the person being evaluated..." (*Id.*) Thus, this legislative exception permits the DSH evaluators to review Mr. Smith's confidential state hospital records. This exception also permits the DSH evaluators to include information from Mr. Smith's confidential state hospital records in the evaluators' reports. And this exception permits

the district attorney to read about Mr. Smith's confidential state hospital records "to the extent such information is contained in an updated mental evaluation." (*Albertson v. Superior Court, supra,* 25 Cal.4th 796, 807.)[7] **This exception "does not authorize disclosure of therapy records directly to the district attorney..., but rather authorizes review of such records only by the independent evaluators and grants a district attorney access to otherwise confidential treatment information concerning an alleged SVP only 'to the extent such information is contained in an updated mental evaluation.' "** (*People v. Gonzales* (2013) 56 Cal.4th 353, 379, footnote 11, emphasis added, citing *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 807; see also *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 380.) Accordingly, since OCDA is not permitted to have Mr. Smith's confidential state hospital records, the COA should not have issued a preemptory writ in the first instance permitting OCDA to turn over Mr. Smith's confidential state hospital records to OCDA's retained expert.

CONCLUSION

The issues presented for review implicate significant privacy rights, due process rights, and basic fairness. Thus, Mr. Smith respectfully requests this court grant review to settle these important questions of law and to secure uniformity of decision. In the alternative, Mr. Smith requests this court transfer this matter to the Fourth District Court of Appeal, Division Three,

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[7] If the prosecution believes DSH evaluators committed an error in the updated evaluations, the prosecution may ask the trial court to review the evaluations for material legal error. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888.)

with instructions to conduct such proceedings as the Supreme Court deems necessary.

Dated: April 3, 2015

Respectfully submitted,
FRANK OSPINO
Public Defender
SHARON PETROSINO
Chief Deputy Public Defender
DAN COOK
Senior Assistant Public Defender

MARK S. BROWN
Assistant Public Defender
Writs and Appeals

WORD COUNT

(California Rules of Court, Rules 8.204(c)(1) and 8.504(d)(1))

I, Mark S. Brown, declare as follows:

I represent Real Party in Interest on the matter pending in this court. This Petition for Review was prepared in Microsoft Word, and according to that program's word count, it contains 4,039 words.

I declare under penalty of perjury the above is true and correct. Executed on April 3, 2015, in Santa Ana, California.

MARK S. BROWN
Assistant Public Defender

DECLARATION OF SERVICE

People of the State of California v. Orange County Superior Court
Court of Appeal Case No. G050827; O.C. Sup. Ct. No. M-9531

STATE OF CALIFORNIA)
)ss
COUNTY OF ORANGE)

Angela Friedlander declares that she is a citizen of the United States, over the age of 18 years, not a party to the above-entitled action and has a business address at 14 Civic Center Plaza, Santa Ana, California 92701.

That on the 3rd day of April 2015, I served a copy of the **Petition For Review** in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelopes were addressed (without the telephone numbers) as follows:

Orange County District Attorney
Attn: Elizabeth Molfetta
401 Civic Center Drive
Santa Ana, CA 92701
(714)347-8781

Deputy County Clerk
Attn: Hon. Kimberly Menninger
Orange County Sup.Ct.,Dept C-38
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92702
(657)622-5229

Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

Clerk of the Court
California Court of Appeal
4th Appellate District, Division 3
601 West Santa Ana Blvd.
Santa Ana, CA 92701

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 3rd day of April 2015, at Santa Ana, California.

Angela Friedlander
Secretary

APPENDIX A
(Court of Appeal Unpublished Order)

Filed 2/24/15 P. v. Superior Court CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; RICHARD ANTHONY SMITH, Real Party in Interest.	G050827 (Super. Ct. No. M9531) O P I N I O N

Original proceedings; petition for a writ of mandate and/or prohibition to challenge an order of the Superior Court of Orange County, Kimberly Menninger, Judge. Petition granted.

Tony Rackauckas, District Attorney, and Elizabeth Molfetta, Deputy District Attorney, for Petitioner.

No appearance for Respondent.

Frank Ospino, Public Defender, Sharon Petrosino, Chief Deputy Public Defender, and Mark S. Brown, Assistant Public Defender, for Real Party in Interest.

* * *

INTRODUCTION

The issue presented by this writ proceeding is whether a mental health expert retained by the petitioner in an action brought under the Sexually Violent Predator Act, Welfare and Institutions Code section 6600 et seq. (SVPA),[1] may review the lawfully obtained evaluations of the alleged sexually violent predator and the mental health records and documents supporting those evaluations. Under the facts presented here, we resolve that issue in the affirmative.

Richard Anthony Smith is the subject of a commitment petition filed pursuant to the SVPA. The district attorney brought a motion seeking an order to allow a retained expert to review evaluations of Smith conducted under section 6603, subdivision (c)(1) (section 6603(c)(1)) and to review the records and documents supporting those evaluations. Based on a prior unpublished opinion in this matter, the respondent court denied the motion. The respondent court stated, "the district attorney will not be able to hire an expert and will not be able to utilize the documents that are subpoenaed for the expert's independent review."

The district attorney brought a petition for writ of mandate and/or prohibition to overturn the respondent court's order. In January 2015, we issued a notice pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 (*Palma*) and invited Smith to file a supplemental informal response to address the advisability of issuing a peremptory writ in the first instance. Smith filed a supplemental informal response. We grant the petition and direct the issuance of a peremptory writ of mandate in the first instance.

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[1] Code references are to the Welfare and Institutions Code unless otherwise indicated.

DISCUSSION

In *Smith v. Superior Court* (Mar. 28, 2012, G045119) (nonpub. opn.), review granted June 27, 2012, S202338 (*Smith I*), we granted Smith's petition for writ of mandate and directed the respondent court to dismiss the SVPA commitment petition because the two post-*Ronje*[2] evaluators concluded Smith no longer met the criteria for commitment as a sexually violent predator. (*Smith I, supra*, G045119.) Because we directed the dismissal of the SVPA commitment petition, we also directed the respondent court to vacate its order compelling Smith to undergo a mental evaluation by the district attorney's retained expert—a mental examination made irrelevant by the dismissal. (*Ibid.*) We also concluded: "Smith cannot be compelled to undergo another mental evaluation because the SVPA Petition must be dismissed. Evaluations by independent mental health professionals under section 6601, subdivision (e) are not authorized because the initial two post-*Ronje* evaluators concluded Smith no longer met the criteria for commitment as a sexually violent predator." (*Ibid.*) The retained expert could not have access to Smith's state hospital records because they were sought as part of the prohibited mental examination. (*Ibid.*)

The California Supreme Court granted review of *Smith I*, then, after issuing its decision in *Reilly v. Superior Court, supra*, 57 Cal.4th 641, transferred the matter to us for reconsideration in light of that decision. In *Smith v. Superior Court* (Jan. 14, 2014, G045119) (nonpub. opn.) (*Smith II*), we concluded, "[u]nder the Supreme Court's opinion in *Reilly*, we must deny Smith's writ petition requesting that we direct the respondent court to grant his plea in abatement." We granted a writ of mandate as to the respondent court's order granting the district attorney's motion to compel Smith to undergo a mental examination and to allow access to Smith's state hospital records.

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[2] *In re Ronje* (2009) 179 Cal.App.4th 509, 516-517, disapproved in *Reilly v. Superior Court* (2013) 57 Cal.4th 641, 655.

(*Ibid.*) We explained: "The district attorney's motion to compel Smith to undergo a mental examination and to give the district attorney's retained expert access to Smith's state hospital records was prompted by the post-*Ronje* evaluations and was not authorized under the SVPA. Smith and the People retain their rights to obtaining further examinations and evaluations permitted by the SVPA." (*Ibid.*) The district attorney maintained the right to obtain updated or replacement evaluations under section 6603(c)(1).

Our conclusions in *Smith I* and *Smith II* were narrow. In neither *Smith I* nor *Smith II* did we address whether the district attorney could retain a mental health expert under the Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.), nor did we address whether the district attorney could subpoena Smith's section 6603(c)(1) evaluations and supporting records and documents for review by that expert. We concluded only that Smith could not be *compelled* to undergo an evaluation by that expert. For that reason, no purpose would have been served at that time by permitting the expert to review Smith's evaluations and mental health records. The final sentence in *Smith II* was: "Our decision is without prejudice to Smith and the People exercising their statutory rights." (*Smith II, supra*, G045119.)

Those statutory rights include the right to retain an expert witness and the right to subpoena documents. (See Code Civ. Proc., §§ 1985-1985.8 [subpoena duces tecum], 2034.210-2034.310 [exchange of expert witness information].) The Civil Discovery Act applies to SVPA proceedings "on a case-by-case basis" (*People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 994), and, in this case, there was good cause for the district attorney to retain a mental health expert and to subpoena Smith's mental health records.[3] The evaluators who conducted the section 6603(c)(1)

[3] The respondent court commented the district attorney would not be able to hire an expert, but the district attorney's motion raised only the issue whether the retained expert could look at Smith's evaluations and the supporting documents.

evaluations used those same documents and records in preparing their evaluations of Smith, as did Smith's own retained experts. As the district attorney asserts, "the documents upon which Mr. Smith's experts relied upon are in the lawful possession of the People obtained pursuant to sections 6603, subdivision (c)(1) and 6601, subdivision (h)."

Although Smith has a privacy interest in the section 6603(c)(1) evaluations and his mental health records, his interest is not absolute. (*People v. Martinez* (2001) 88 Cal.App.4th 465, 478.) Smith's privacy interest must be balanced against the government's interest in protecting the public from sexually violent predators (*People v. Allen* (2008) 44 Cal.4th 843, 866) and the interest of the justice system in providing reliable information to assist the trier of fact in determining whether the person being tried is a sexually violent predator (see *People v. Leonard* (2000) 78 Cal.App.4th 776, 792-793). Balancing those interests leads us to conclude the district attorney's retained expert should be able to review Smith's section 6603(c)(1) evaluations and the mental health records and documents relied upon by the evaluators and Smith's retained experts.

Smith argues our decisions in *Smith I* and *Smith II* are inconsistent with *People v. Landau* (2013) 214 Cal.App.4th 1, 24-26, in which a panel of this court concluded that under the Civil Discovery Act an alleged sexually violent predator may be compelled to undergo an examination by the district attorney's retained mental health expert. We need not address whether there is a conflict because the district attorney is not seeking to compel Smith to submit to another examination: The only issue presented in *this* proceeding is whether the district attorney's retained mental health expert may look at Smith's section 6603(c)(1) evaluations and supporting records and documentation lawfully obtained through discovery. In *People v. Landau, supra*, 214 Cal.App.4th at page 24, counsel for the alleged sexually violent predator conceded the district attorney's retained expert "may review otherwise confidential records and interview an alleged [sexually violent predator] if good cause for the evaluation exists."

DISPOSITION AND ORDER

Having complied with *Palma*, we conclude the petition and the opposition adequately address the issue, no factual disputes exist, and additional briefing following the issuance of an alternative writ would be unnecessary to disposition of the petition. (*Palma*, *supra*, 36 Cal.3d at p. 178.) The petition for writ of mandate/prohibition is granted. Let a peremptory writ of mandate in the first instance issue directing the respondent court to (1) vacate its order denying the district attorney's motion for court order to release records to retained expert and protective order and (2) enter a new order granting that motion. This court's stay order of October 10, 2014, is lifted upon finality of this opinion as to this court.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.

DECLARATION OF SERVICE

People of the State of California v. Orange County Superior Court
Court of Appeal Case No. G050827; O.C. Sup. Ct. No. M-9531

STATE OF CALIFORNIA)
)ss
COUNTY OF ORANGE)

Angela Friedlander declares that she is a citizen of the United States, over the age of 18 years, not a party to the above-entitled action and has a business address at 14 Civic Center Plaza, Santa Ana, California 92701.

That on the 3rd day of April 2015, I served a copy of the **Petition For Review** in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelopes were addressed (without the telephone numbers) as follows:

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Clerk of the Court
California Court of Appeal
4th Appellate District, Division 3
601 West Santa Ana Blvd.
Santa Ana, CA 92701

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 3rd day of April 2015, at Santa Ana, California.

Angela Friedlander
Angela Friedlander
Secretary