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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEFFREY WALKER, Petitioner, v. **SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN FRANCISCO,** Respondent, **PEOPLE OF THE STATE OF CALIFORNIA,** Real Party in Interest.	No._____ Court of Appeal No. A159563 (San Francisco County Superior Court Nos. 2219428 (195989)

PETITION FOR REVIEW

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PETITION FOR REVIEW

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of California:

Petitioner, Jeffrey Walker, represented by attorney Erwin F. Fredrich, petitions this Court for Review of a decision, certified for publication, issued on June 30, 2020 by the Court of Appeal, First Appellate District, Division Four (A159563) denying Petitioner's request for a Petition for a Writ of Mandate for a violation of his rights at a probable cause hearing in a Sexually Violent Predator (SVP) case. (Attachment 1, copy of opinion in A159563)

A Petition for Rehearing was filed on July 13, 2020 that directed the appellate court's attention to various facts and issues omitted in the

appellate court's opinion. (California Rules of Court 8.500(c) (2)).

The Petition for Rehearing was summarily denied in an Order filed on July 16, 2020. (Attachment 2, copy of order denying Rehearing in A159563)

I. INTRODUCTION

Petitioner Jeffrey Walker hereby files this Petition for Review of the appellate court's decision of June 30, 2020.

The appellate court's decision (*Walker*) rules that *People v. Sanchez* (2016) 63 Cal. 4th 665 (*Sanchez*) restrictions on expert testimony are inapplicable in sexually violent predator (SVP) probable cause hearings. The decision opines that two cases that extended *Sanchez* to SVP probable cause hearings cases were incorrectly decided. (*Bennett v. Superior Court* (9/11/2019) B292368; Second Appellate District, Division 2; 39 Cal. App. 5th 862 (*Bennett*) [Review Denied, California Supreme Court S258639**]** [1] and *People v. Superior Court (Couthren)* (11/7/2019) A155969; First Appellate District, Division 1; 41 Cal. App. 5th 1001 (*Couthren*))[2]

The *Bennett* case was on this court's calendar for several months in late 2019 pending decision of the government's Petition for Review in that case. This court denied review of *Bennett* on January 2, 2020. This court also did not order *Bennett* depublished. (California Rules of Court 8.1125)

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[1] The *Walker* appellate court decision did refer to and took judicial notice of the Petition for Review of *Bennett* that was filed by the government and was denied by The California Supreme Court on January 2, 2020 - S258639. (Slip Opinion page 24, Footnote 4.)

[2] No Rehearing or Petition for Review was sought by the government in *Couthren*.

A. APPROPRIATENESS OF GRANTING REVIEW

The Supreme Court may order review of a Court of Appeal decision when necessary to secure uniformity of decision or to settle an important question of law. (California Rules of Court 8.500(b)(1))

There is now a direct conflict between the *Sanchez, Bennett* and *Couthren* decisions and the court of appeal in the *Walker* case. *Bennett* and *Couthren* specifically do not allow an expert to use and publish case-specific evidence from non-qualifying offenses at SVP probable cause hearings. The *Walker* court rejects *Bennett* and *Couthren* and rules that anything included in an expert's report is admissible at the probable cause hearing.

Petitioner Walker's position is that the *Bennett* and *Couthren* cases were correctly decided; the *Walker* decision is not supported by legislative history or case law and that Walker deserves the same relief as granted in *Bennett* and *Couthren* – dismissal of the SVP Petition..

Review is thus essential to provide a clear cut ruling on whether *Sanchez* restrictions on expert testimony apply in sexually violent predator (SVP) probable cause hearings. Now trial judges and litigants have conflicting court of appeal decisions on this issue. Not only does *Bennett* from District 2 disagree with *Walker*, but *Couthren* (from the same District as *Walker)* also disagrees with *Walker*. The entire state should have a uniform ruling on this issue. Only this court, by granting review, can accomplish this goal.

Because the First Appellate District, Division Four in its opinion in *Walker* did not discuss in detail facts from Petitioner's probable cause hearing, this Petition for Review briefly summarizes pertinent facts in this Petition and provides some details of legal issues not discussed in the

Walker opinion.

A full record of facts and legal issues omitted or only partially addressed in the *Walker* opinion are contained in Petitioner's Petition for Rehearing filed in the appellate court that was summarily denied. (California Rules of Court 8.500(c) (2))

The *Walker* decision's rejection of *Sanchez*, *Bennett* and *Couthren* is not consistent with due process and related constitutional protections. The *Walker* decision is not supported by the authorities cited within and does not adequately state or consider the facts and evidence at Petitioner Walker's probable cause hearing. Petitioner provides the following for this court's consideration in granting review.

II. BRIEF SUMMARY OF OPINION

The *Walker* decision creates a new hearsay exception in Welf. & Inst. Code section[3] 6602(a). The decision indicates that 6602 directs the judge to "review the petition". Although the decision admits that the SVP Act does not address what the petition must include (Slip Opinion page 14), the decision then "understand[s]" (Slip Opinion page 16) that the petition includes the expert reports. And, that this creates a hearsay exception that makes *Sanchez* inapplicable to SVP probable cause hearings and that then anything in the expert reports is admissible. (Slip Opinion page 13)

The *Walker* decision invokes a "Parker/Cooley Rule"[4] (Slip Opinion at page 10) for support of the decision's rejection of *Sanchez*, *Bennett* and *Couthren.* The *Walker* decision, however, admits that both *Parker* and *Cooley* indicated that 6602 did not specify procedural requirements for probable cause hearings. (Slip Opinion pages 8,10)

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[3] Statutory references are to the Welfare . & Institutions Code unless otherwise indicated.

[4] *In re Parker* (1998) 60 Cal.App.4th 1453 and *Cooley v. Superior Court (2002)29 Cal. 4th 228*

The *Sanchez*, *Bennett* and *Couthren* cases prohibited experts from publishing allegations of "case – specific" facts from non-qualifying alleged offenses at SVP probable cause hearings.

The *Walker* decision also speculates about what the legislature intended in 6602.

III. PROBABLE CAUSE HEARING RECORD

Although the *Walker* decision does not include any details of the exhibits (mainly expert reports) and testimony from the probable cause hearing, the *Walker* court in connection with issuing its Order to Show Cause on March 6, 2020 ordered Petitioner to lodge with the court copies of transcripts and expert reports from the probable cause hearing. Petitioner lodged the documents with the appellate court on March 12, 2020. A short summary of pertinent details from the probable cause hearing testimony and evidence indicated that:

Walker, at the start of the probable cause hearing in February 2016, objected to evidence of details of allegations of non-qualifying offenses introduced through the government experts' reports and testimony. The objection was based on 6600(a)(3), People v. *Otto* (2001) 26 Cal. 4th 200 and that the evidence was unreliable. This objection was denied. Walker renewed this objection and moved to strike this information after the defense case established that the information based on non-qualifying offense allegations used by the experts was unreliable - the initial allegations were not true. That objection and motion were also denied.

Government experts MacSpeiden and Karlsson[5] relied on case-

[5] MacSpeiden and Karlsson were appointed after Yanofsky, one of the initial two state appointed evaluators, found Walker to not qualify for SVP status. The split findings of the two state experts initially appointed resulted in the appointments of MacSpeiden and Karlsson. See 6601(e). Walker called Yanofsky as a defense witness at the probable cause hearing.

specific hearsay regarding non qualifying alleged offenses in their reports and testimony at the probable cause hearing from a San Francisco and a San Jose case.

A jury found Walker "not guilty" of the allegation of Walker committing a sexually violent offense (rape) in a San Francisco criminal case. Walker was only convicted of pandering (a non-qualifying offense) in that case. The complaining witness in that case (after the criminal trial) told her then boyfriend that she had lied about being raped by Walker.

A Judge in connection with a court trial, dismissed a charge of rape in a San Jose case. The complaining witness in the San Jose case admitted to Walker's public defender's investigator before trial that, contrary to her initial complaint of forcible rape, there actually had not been any force and that she did not verbally or physical resist. Walker was convicted by the Judge of unlawful sexual intercourse (a non-qualifying offense) because the complaining witness was under 18.

Expert MacSpeiden used the forcible sex allegations from both San Jose and San Francisco (combined with the information from the qualifying offense) to establish a modus operandi "MO" of Petitioner and the "MO' was a central/essential part of his opinion. MacSpeiden, who classified the San Francisco complainant as a "pathological liar", could not with any great deal of certainty say whether she lied about being raped or lied about not being raped, but speculated and still accepted and used the rape allegation as a basis of his opinion.

Expert Karlsson was unaware of the not guilty verdict in the San Francisco case and indicated that the not guilty verdict might change his opinion but he would have to return to the quiet of his office to consider whether his opinion would change. The probable cause hearing Judge later

denied a motion to recall Karlsson to determine whether he had changed his opinion after getting back to his office.

There was simply no basis other than speculation upon which to assume that Walker had committed a qualifying sex offense in either the San Francisco or San Jose cases and use it as a basis of expert opinion.

IV. THE *WALKER* DECISION'S USE OF 6602 AND A "PARKER/COOLEY RULE" TO CREATE A NEW HEARSAY EXCEPTION

The *Walker* decision uses 6602 to create a new hearsay rule by speculating what the legislature was thinking about 6602 when it passed or later amended 6602.

6601.5 indicates that the Judge should review the "petition on its face" and requires the probable cause hearing to be within 10 days of that review. The *Walker* decision then takes speculative steps and elaborate leaps in logic to find that the review of the petition in 6602 includes the state expert evaluations (even if they were not attached to the Petition) and thus there is a hearsay exception for anything and everything in the evaluator's reports or testimony at a SVP probable cause hearing. The decision concludes the probable cause hearing has different evidentiary rules than at trial.

The opinion indicates that a "Parker/Cooley Rule"[6] is settled law. (Slip Opinion pp10-11) and supports its interpretation of 6602. These cases were before *Sanchez*. *Cooley* only mentions *Parker,* in dicta, in a footnote (as the *Walker* opinion acknowledges at pages 10, 13 and 21). *Parker* was decided in 1998 and *Cooley* in 2002.

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[6] The phrase is used several times in the *Walker* opinion (Slip opinion pages 10, 11, 22) but a Google Scholar search of California cases for the phrase indicates only one case has used the phrase – this case -- the *Walker* court of appeal opinion.

The *Cooley* court however disagrees with the *Walker* opinion, with *Cooley* finding that the scope of a SVP probable cause hearing and the trial should not be any different:

> "…we do not believe that the difference in language used in section 6602, subdivision (a) and section 6604 signifies an intention by the Legislature that the scope of the probable cause hearing should be more limited than the scope of the trial." *Cooley, supra,* at p 247

The *Cooley* court also sent the case back for a new probable cause hearing.

The *Walker* decision also does not explain how the *Parker* and *Cooley* decisions (some 18 and 14 years prior) somehow became a "Rule" that overrules the *Sanchez* decision of 2016 --at least as far as *Sanchez* applying to SVP probable cause hearings. *Sanchez* was a decision that interpreted what evidence an expert (Evid Code 801 - 803) could publish to the fact finder and *Sanchez* applies to all cases – as Evidence Code section 300 directs.

The *Walker* decision several times speculates what the legislature was thinking when considering 6602. The *Walker* decision indicates that even if 6602 may be ambiguous, when the statute mentions for the judge to review the petition, it also includes review of the expert reports. (Slip Opinion p 16) The *Walker* opinion cites no legislative history to support its speculation and turns to an analysis of the SVP Act's "structure and purpose" (Slip Opinion p 16).

Speculative aspects of the *Walker* opinion include:

" We find it highly unlikely the Legislature intended" (Slip Opinion p 19); "The Legislature clearly intended for evaluators to rely on hearsay sources in their evaluations" (Slip Opinion p 16) and "the Legislature must have intended the trial judge to review this hearsay in reviewing the reports." (Slip Opinion p 17)

Whatever the legislature intended or was thinking about 6602 in 1995 or at last amendment in 2012 would not have been with input from the *Sanchez* decision decided in 2016. 6601.5 and 6602 are statutes that are meant to make sure that the potential SVP candidate is not released from custody (before a probable cause hearing ruling) even if parole and other deadlines are or will be exceeded. (see *Stats. 2000, Ch. 41,(S.B. 451) Sec. 2. Effective June 26, 2000.)* 6602 has never delineated evidentiary rules for conducting probable cause hearings.

The legislature did not pass any legislation to change the *Sanchez* holding or pass any legislation since *Sanchez* to amend sections 801 - 803 of the Evidence Code to allow experts to use improper case-specific hearsay in any case.

The legislature, however, did clearly delineate in 6600(a)(3) in 1996 what hearsay evidence could be introduced in a SVP case. 6600(a)(3) was passed by the legislature in 1996 because prosecutors had complained about having to bring victims where there were convictions [but only those of qualified offenses] back to court under the original legislation of 1995. (Stats 1996, ch 462, § 4) (*Otto*, supra, at p. 208). It would be incongruous for the Legislature to have already enacted a hearsay exception under section 6602, one which allows the use of multiple-level hearsay in an expert evaluation for *any* purpose, if such an exception already existed by virtue of the statutory indication to "review the petition" in 6602. There would have been no need to pass section 6600 (a)(3) in 1996. The *Walker* decision cites with approval the 2001 case of *Otto,supra,at p 208* as indicating that 6600(a)(3) [passed in 1996] "applies at SVP probable cause hearings but also extends to SVP trials." (Slip Opinion p 23)

The legislature is aware it can limit the applicability of the rules of evidence and can adopt special rules of evidence to govern commitment proceedings – and particularly it has done so in SVP cases. (*In re Kirk,* (1999) 74 Cal.App.4th 1066, 1072-73 and *People v. Stevens* (2015) 62 Cal.4th 325,338

Certainly if the legislature had wanted to create completely different evidentiary standards for SVP probable cause hearings under 6602 it would have done so.

A. AB 1983

The legislature (after *Bennett and Couthren* became final in early January 2020) introduced a bill adding a hearsay exception for SVP probable cause hearings. Assembly Bill 1983 would add language to section 6602 allowing prior sexual offenses (those that are now considered non qualifying ones) to be proven by hearsay evidence at the probable cause hearing. (2019-2020), Reg. Sess., as amended Mar. 11, 2020; filed January 23, 2020.) Under the *Walker* decision's view of the law, there would be no need for the legislature to add this hearsay exception, because a broad hearsay exception already existed at SVP probable cause hearings in 6602. But the legislature knows what the *Bennett* and *Couthren* courts recognized (and this bill is in response to), and what the *Walker* appellate court should have similarly recognized: the rules of evidence (including the rule from *Sanchez*) apply at SVP probable cause hearings.

Beyond due process concerns, a crucial problem with the *Walker* court's created hearsay exception is that "*<u>any information</u>"* in the expert report is admissible. (emphasis added, Slip Opinion page 16) The accused at the probable cause hearing under the *Walker* opinion has no remedy to stop the improper unreliable evidence from coming into evidence. The list is endless of what improper material a state evaluator could put in the

report. Then the evaluator could also use that information in testimony on which to base his or her opinion. Under the *Walker* opinion, this would be permissible under 6602 and "*indeed requires"* (Slip Opinion p 13) the probable cause hearing Judge to review the improper material and there is no prohibition in *Walker* of the Judge then using that improper material in the Judge's probable cause decision.

The *Walker* decision paradoxically relies mainly on *Parker* in support of its creation of a new hearsay rule it claims was hidden in 6602 for SVP probable cause hearings. However, the *Walker* decision effectively eviscerates the right to challenge the Petition at SVP probable cause hearings. The *Walker* decision, if allowed to stand, will effectively return SVP probable cause hearings to a pre *Parker* state – a mere paper review that *Parker* held was not permissible.

V. THE *WALKER* DECISION OMITS DISCUSSION OF DUE PROCESS AND IGNORES THAT THE CONTESTED NON QUALIFYING OFFENSE ALLEGATIONS WERE UNRELIABLE

A. DUE PROCESS ANALYSIS

There can be no doubt that due process protections extend to SVP proceedings.

In *Crawford v. Washington* (2004) 541 U.S. 36, the United States Supreme Court held that, in all criminal prosecutions, where "testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford*, *supra*, 541 U.S. 36, 68-69.) In so holding, *Crawford* explicitly rejected the confrontation test set forth in *Ohio v. Roberts* (1980) 448 U.S. 56, 66, which previously allowed for the admission of an unavailable witness' statement against a criminal defendant so long as the statement fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."

People v. Sanchez (2016) 63 Cal.4th 665 discussed *Crawford* and

explained the two-step analysis that should inform all Confrontation Clause inquiries.

People v. Burroughs (2016) 6 Cal.App.5th 378 then left no doubt that *Sanchez* applies outside the context of criminal cases.

> "Although *Sanchez* was a criminal case, the Court stated its intention to 'clarify the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony,' generally. ([Citation].) Those code sections govern the admission of expert testimony in civil cases as well, and nothing in *Sanchez* indicates that the Court intended to restrict its holdings regarding hearsay evidence to criminal cases." (*Id*. at p. 405, fn. 6.)

Parker, supra, indicated that: Deprivation of a proper, adversarial probable cause hearing is a denial of procedural due process. (*Parker, supra,* pp. 1462-1463, 1469-1470.)

B. UNRELIABILITY OF HEARSAY AND SPECULATION OF EXPERTS IN *WALKER*'S PROBABLE CAUSE HEARING

In its Petition for Review to this court in *Bennett,* the government indicated:

> "And ultimately any facts upon which an expert relies must still be *reliable*. Nothing in *Parker* altered the rule that experts may not rely on speculative or irrelevant material. (page 28, *Bennett* case government Petition for Review, filed in S258639 on October 18, 2019.)

In the *Walker* case, the government made no attempt at the appellate court level to argue that the non-qualifying case-specific offense allegations from the San Francisco and San Jose cases were reliable. The government's "Return" in the *Walker* appellate court below, however, did concede, while attacking *Bennett* and *Couthren,* that hearsay must be reliable for admissibility*:*

> "Reliable hearsay is admissible at an SVP probable cause hearing. Such hearsay includes expert reports and reliable hearsay

contained therein." (Emphasis added, Return at page 20)

Several pre-*Sanchez* courts also had concluded that an expert testifying at an SVP trial may not relate incompetent hearsay under the guise of explaining his or her reasoning if such testimony is unreliable, irrelevant, or its potential for prejudice out-weighs its probative value. (See e.g. *People v. Dean* (2009) 174 Cal.App.4th 186, 197)

The *Walker* opinion completely ignores that reliability is a basic bedrock requirement for all hearsay. In the opinion, the word reliable is used only to refer to statutory directives that allow, for example, hearsay into evidence at sentencing in criminal or juvenile ["disposition"] hearings, parole hearings, restitution hearings and in other proceedings. (Slip Opinion pp17-19) Where a hearsay exception has been applied in other contexts cited by the *Walker* court, the statutory language at issue has specifically referenced the documentary evidence the court is permitted to review.

The word unreliable only appears at the end of the *Walker* opinion in that the opinion concedes that a prospective SVP can attack the reliability of content of an expert report or testimony at the probable cause hearing – but cannot keep out the unreliable hearsay. According to the *Walker* opinion, there is absolutely no reliability test or gatekeeper function the probable cause hearing judge can apply to any contents of an expert report or testimony at a SVP probable cause hearing.

People v. Otto (2001) 26 Cal.4th 200 (*Otto*) was cited by the *Walker* court in its opinion (Slip Opinion pages 23 and 24) and by Walker at the probable cause hearing.

Otto, supra, noted, in evaluating 6600(a)(3), that the categories of hearsay exceptions have been limited to predicate offenses per 6600(a)(3) and that Evidence Code section 1200, subdivision (b)provides,

"Except as provided by law, hearsay evidence is inadmissible."

Otto, supra, at 206-214 in permitting use of these usually multiple hearsay documents in SVP proceedings noted that: By its terms section 6600(a)(3) authorizes the use of hearsay in presentence reports to show the details underlying the commission of a *predicate* offense ... *Otto* supra at 206 and the Court and the parties agreed the victim hearsay statements must contain special indicia of reliability to satisfy due process. *Otto* supra at 210. Emphasis added.

As noted above, at Walker's probable cause hearing prosecution expert MacSpeiden admitted he was speculating and that he could not tell if the San Francisco case allegations of rape were true or not true. Prosecution expert Karlsson could not even say until he returned to his office if his opinion would change after first finding out at the probable cause hearing that Walker had been found not guilty in the San Francisco case.

Under California law. it is also well established that "[e]xpert opinion testimony constitutes substantial evidence only if based upon conclusions or assumptions supported by evidence in the record. Opinion testimony in the record which is conjectural or speculative ·cannot rise to the dignity of substantial evidence."·· (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4 th 644, 651.)

Thus, if the alleged facts are unreliable, a significant essential portion of the foundation (the non-qualifying offense allegations were essential to of the opinions of MacSpeiden and Karlsson) and resulting finding of probable cause is not supported by substantial evidence.

As noted above, Walker renewed his motion to exclude the non-qualifying offense allegations during the defense case that was denied by the probable cause hearing Judge – after Walker introduced evidence that the initial allegations were false (i.e. not reliable).

VI. OTHER FACTORS NOT CONSIDERED BY *WALKER* DECISION

The following were additional issues listed in Petitioner's Petition for Rehearing that the *Walker* court failed to address in its opinion but were addressed in Walker's Petition for Rehearing that the *Walker* court summarily denied.

The *Walker* opinion did not consider the delay that will be occasioned by the improper denial of the ability to keep out of evidence improper hearsay evidence at the probable cause hearing. This is because of the delay and prejudice to an accused SVP who cannot adequately contest the case against him at the probable cause hearing and the time required in bringing a SVP case to trial. Courts understand the difficulties in bringing SVP petitions to trial and the widespread trial delays. These issues are discussed in *Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156, 1170-1172.

The *Walker* opinion did not consider the principles of collateral estoppel – the same San Francisco alleged facts used by the same prosecuting office at the criminal trial and by its experts at the probable cause hearing.

The *Walker* opinion, while acknowledging that there are differences in the cases it cites that allow hearsay in other contexts (Slip Opinion at pages 17-19), did not address why the other contexts are appropriate justifications for the use of unreliable hearsay in a SVP probable cause hearing. As *Couthren* observed citing several cases the *Walker* court cites in support of use of hearsay in other contexts:

> Where a hearsay exception has been implied in other contexts, the statutory language at issue has specifically referenced the documentary evidence the court is permitted to review. *Couthren, supra*, Footnote 5 , at 1014
>
> And noted:
>
> Notably, section 6605 [a provision of the SVP Act related to

> petitions for unconditional release from civil commitment] was amended by the electorate after *Cheek* [*People v. Cheek* (2001) 25 Cal.4th 894] and now expressly provides that "the court . . . can consider the petition and any accompanying documentation provided by the medical director, the prosecuting attorney, or the committed person" at the show cause hearing. (§ 6605, subd. (a)(1) (Prop. 83, § 29, eff. Nov. 8, 2006); see § 6604.9, subd. (f).) No similar amendment was made to section 6602. *Couthren*, *supra*, Footnote 6, at 1016

Parker (a SVP probable cause hearing under 6602) and *Cheek* (a probable cause hearing of a previously committed person as a SVP moving for release under 6605) were concerned solely with whether something *more* than a facial review of the relevant petition was required, given the ambiguity in the statutory language and the liberty interest at stake in these proceedings. *Cheek* does not mention the admissibility of hearsay at all, simply concluding that sections 6602 and 6605 should be construed in a similar fashion to allow for a proper rebuttal of the prosecutor's case. *Couthren*, *supra*, at 1017.

VII. THE *BENNETT* AND *COUTHREN* CASES WERE CORRECTLY DECIDED

A. *BENNETT*

In *Bennett*, the court acknowledged that "[s]ection 6600, subdivision (a)(3) creates a hearsay exception allowing for admission of the documentary evidence described in the statute, as well as multiple-level-hearsay statements contained therein, to prove a prior qualifying *conviction*." (*Bennett*, *supra*, at p. 875.) Contrary to the First District, Division Four in this case, however, the *Bennett* court found that "[t]his hearsay exception … does not allow for the introduction of hearsay evidence to prove the details of non-predicate offenses under the SVPA or alleged offenses that *did not result in conviction*." (*Id*., at p. 877.) Thus, an expert could not rely on hearsay statements detailing mere criminal conduct to support his/her opinion that the person is a sexually violent

predator, as they were in this case, because "the validity of the expert's opinion ultimately turns on the truth of the hearsay statement." (*Ibid*.) "If the hearsay that the expert relies on and treats as true is *not* true, an important basis for the opinion is lacking." (*Ibid*.)

As an example, the *Bennett* court addressed the result in *People v. Burroughs* (2016) 6 Cal.App.5th 378. In that case, the prosecution "established the existence and details of the defendant's qualifying sexually violent offenses through the introduction of various materials, certain contents of which fell under the section 6600, subdivision (a)(3) exception." (*Bennett*, *supra*, at p. 878.) "The documentary evidence, however, also contained information regarding the defendant's personal history, including details of uncharged sex offenses the defendant allegedly committed. (*Ibid*.) "The appellate court concluded that this type of information should have been excluded: 'much of the documentary evidence upon which the experts relied was hearsay that was not shown to fall within a hearsay exception. The trial court accordingly erred by allowing the experts to testify to the contents of this evidence as the basis for their opinions.'" (*Ibid*.) "Because these evidentiary errors were prejudicial, the judgment adjudicating the defendant an SVP was reversed." (*Ibid*.)

As another example, the *Bennett* Court addressed the result in *People v. Roa*, (2017) 11 Cal.App.5th 428. In that case, the "expert testimony regarding case-specific facts of the defendant's qualifying predicate offenses was admissible because the facts underlying these offenses were independently proven by documentary evidence admitted under section 6600, subdivision (a)(3)." (*Bennett*, *supra*, at p. 877.) "[T]he trial court erred, however, in allowing experts to testify regarding statements contained in a report prepared by a district attorney investigator regarding events that occurred decades earlier, including an arrest of the defendant

for alleged sexual assault that did not result in conviction." (*Id.* at p. 878.) "The experts in this case testified extensively about case-specific facts they obtained from the investigator's reports and treated those facts as true and accurate to support their opinions." (*Ibid*.) "The investigator's reports themselves were not admitted into evidence, and there is no other evidence of the case-specific facts concerning the earlier incidents." (*Ibid*.) "Admission of expert testimony relating case-specific facts about these incidents was error." (*Ibid*.)

Likewise, in *Bennett*, "the trial court erred by allowing expert testimony of case-specific facts relating to [a] 2012 incident [for which he was never convicted], and that the trial court improperly relied on the incident in finding probable cause." (*Bennett*, *supra*, at p. 879.) The reviewing court also found that "even if the [prosecution] had attempted to introduce documentary evidence containing details regarding [this incident], such as the police report or probation report relied on by the experts, there does not appear to be any discernible ground for deeming the documents admissible." (*Ibid*.) Reversal was required because "the case-specific hearsay regarding the 2012 incident was introduced by the experts, was necessary to their opinions, and was critical to the trial court's ruling" and, thus, "key evidence needed to establish the second and third elements of the SVP determination would be lacking" at trial. (*Id*., at p. 885.)

Under the holding in *Bennett*, therefore, "[a]ny expert may still *rely* on hearsay in forming an opinion, and may tell the [factfinder] *in general terms* that he did so" but only if the expert is merely describing "the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception," including that created under section 6600. (*Bennett*, *supra*, at p. 878 (emphasis in original).)

B. COUTHREN

Couthren addressed the legislative history in 6600(a)(3) and 6602 similar to authority Petitioner has addressed above[7]. The *Walker* opinion ignores the legislative history and case law and replaces it with speculation. The *Couthren* opinion succinctly and correctly stated in discussing 6602:

> The People contend that section 6602 establishes a hearsay exception for expert evaluations at the probable cause hearing on the basis of the trial court's obligation to "review the petition." The People argue this necessitates review of expert evaluations attached to a civil commitment petition. Nothing in the statutory language permits such a reading. Expert evaluations are not mentioned in this provision. Further, there is no stated requirement, in section 6602 or elsewhere in the SVP Act, that expert evaluations be attached to, or otherwise incorporated into, the petition. Rather, the SVP Act provides only that, if the Department of State Hospitals determines that a person qualifies for commitment under the SVP Act, it "shall forward a request for a petition to be filed" to the appropriate county attorney, making available "[c]opies of the evaluation reports and any other supporting documents." (§ 6601, subd. (h)(1).)And, if that attorney concurs, "a petition for commitment shall be filed." (*Id.*, subd. (i).) The SVP Act thus omits any mention of what an SVP petition should contain. Under the People's argument, section 6602 would give license to allow *any* document attached to an SVP petition to be admitted into evidence, thus depriving the trial court of its gatekeeping function to test the competency and reliability of such evidence. We decline to infer a seemingly limitless hearsay exception on the basis of a simple directive that the court "review the [SVP] petition." (§ 6602, subd. (a).) *Couthren, supra* at 1014

The *Couthren* court also, as noted above, indicated that section 6605 was amended after an appellate decision to allow hearsay in such post

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[7] (See within brief at pages 13-14, *Otto*, supra, and AB 1983; Stats. 2000, Ch. 41, (S.B. 451) Sec. 2. Effective June 26, 2000 and Stats 1996, Ch 462, (A.B. 3130) § 4)

SVP commitment proceedings for release (6605) and that no similar amendment was made to section 6602. *Couthren*, supra, Footnote 6 at 1016

In *Couthren*, the court acknowledged that "SVP evaluations are typically comprehensive and draw from numerous sources, including probation and police reports, investigative reports from prosecuting agencies, court records and transcripts, face-to-face interviews with the SVP defendant, prison and hospital rule violation reports, records of arrests, convictions and juvenile dispositions, and hospital records, including staff treatment notes, medication reports, and attendance records." (*Couthren*, *supra*, at pp. 1010-1011.) "Where an evaluation author relies upon and relates statements from secondary sources to prove the truth of the information they contain, these out-of-court statements constitute further levels of hearsay." (*Id*., at p. 1011.) "For example, an expert evaluation may convey statements from a police report quoting a crime victim's recollections concerning the SVP defendant." (*Ibid*.) "Each level of hearsay, the expert evaluation, the police report, and the victim's statement, must fall within an exception to be admitted into evidence." (*Ibid*.)

Like *Bennett*, the court in *Couthren* found "section 6600, subdivision (a)(3) does not authorize the use of documentary evidence that bears no relation to qualifying SVP convictions or the details of such offenses." (*Couthren*, *supra*, at p. 1015.) "Given this express limitation on the scope of the hearsay exception, it would be incongruous for the Legislature to have already enacted a hearsay exception under section 6602, one which allows the use of multiple-level hearsay in an expert evaluation for *any* purpose." (*Ibid*. (emphasis in original).) "If such an exception already existed by virtue of the statutory command to 'review the petition,' there would have been no need to pass section 6600, subdivision (a)(3)." (*Ibid*.)

"The legislative history behind passage of section 6600, subdivision (a)(3) belies this theory." (*Ibid*.) In sum, "the Legislature did not exempt SVP probable cause hearings from evidentiary rules concerning hearsay or create a statutory exception to hearsay that authorizes the wholesale admission of expert evaluation reports in SVP proceedings." (*Ibid*.)

Thus, "[w]hile portions of an expert evaluation may be admissible under an applicable exception, for example, details about a qualifying conviction may be introduced under section 6600, subdivision (a)(3), no statutory exception to hearsay permits the wholesale admission of expert evaluation reports at an SVP trial." (*Couthren*, *supra*, at p. 1012.) "It follows that the general rules precluding admission of hearsay and multiple levels of hearsay must apply at an SVP probable cause hearing as well." (*Ibid*.)

Although multiple hearsay may be considered by a prosecution's expert when forming their opinion that a defendant is likely to engage in sexual violence when determining probable cause to proceed to an SVP trial, this exception only applies to prior convictions of qualifying offenses and not criminal conduct or other conduct alleged but not proven.

The First District, Division Four in *Walker* has expanded this narrow exception to include multiple hearsay to establish criminal conduct alleged but not proven (or anything in an expert's report) whenever an expert is forming his/her opinion or the trial court is determining probable cause. Such a rule, however, not only contradicts established precedent, it is dangerous and a violation of due process.

It is particularly dangerous when the hearsay allegations allowed by the *Walker* opinion not only did not result in a conviction for a qualifying offense but evidence at the probable cause hearing also established that the initial allegations were lies and thus unreliable on an additional level.

VIII. CONCLUSION

The conflict between the *Sanchez, Bennett* and *Couthren* decisions and the *Walker* opinion are appropriate reasons alone for this court to grant review of *Walker.* Trial court judges and SVP litigants deserve a clear ruling on whether *Sanchez* apples at SVP probable cause hearings

The *Walker* opinion is not supportable by either *Parker* and/or *Cooley.* All cases cited by the government and Walker acknowledge that a primary purpose of the SVP probable cause hearing is to weed out SVP Petitions that are not supported by competent evidence. The *Walker* decision makes it exceedingly difficult, if not impossible, to weed out cases where improper case-specific allegations are allowed into evidence and can be used by the probable cause hearing judge to support an adverse decision.

The *Walker* opinion's concern about duplication of proceedings – probable cause hearing and trial -- is thwarted because cases that should be dismissed at probable cause will now have to go to trial and prejudice the alleged SVP accused by the lengthy delay in getting to trial. During the delay until trial, the accused SVP will be subjected to prison like, locked down conditions at Coalinga State Hospital.

The *Walker* opinion is also not supported by legislative history.

Bennett and *Couthren* were correctly decided and properly applied the rule restricting expert testimony in *Sanchez* to SVP probable cause hearings. Petitioner Walker deserves the same standard to be applied to his probable cause hearing.

For the foregoing reasons, this court should grant this Petition for Review.

Dated: July 29, 2020

Respectfully submitted,

_____/s/_____

ERWIN F. FREDRICH

Attorney for Petitioner

VERIFICATION

I, the undersigned, am an attorney licensed to practice in the State of California. I am the attorney of record for petitioner in the trial court and was court appointed in San Francisco Superior Court because of Petitioner's indigency. All facts alleged in the above Petition for Review herein, are true of my own personal knowledge or upon information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 29, 2020 at San Francisco, California.

_____/s/_____
ERWIN F. FREDRICH

CERTIFICATE OF WORD COUNT

Counsel for Petitioner hereby certifies that this Petition for Review consists of 6,666 words (including tables, proof of service, verification, and this certificate) but excluding attachments, according to the word count of the computer word-processing program.

Dated: July 29, 2020

_____/s/_____
ERWIN F. FREDRICH
Attorney for Petitioner,
JEFFREY WALKER

ATTACHMENT 1

COURT OF APPEAL OPINION
WALKER v. SUPERIOR COURT (PEOPLE)
A159563

Filed June 30, 2020

Court of Appeal, First Appellate District
Charles D. Johnson, Clerk/Executive Officer
Electronically FILED on 6/30/2020 by M. Garcia, Deputy Clerk

Filed 06/30/2020

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JEFFREY WALKER, Petitioner, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	A159563 (City & County of San Francisco Super. Ct. No. 2219428)

Jeffrey Walker petitions for a writ of mandate that would direct the superior court to reverse its finding of probable cause to commit Walker as a sexually violent predator (SVP). Walker argues the superior court's finding was based on inadmissible hearsay contained in two statutorily mandated psychological evaluations. We hold that the SVP statute, which requires these psychological evaluations as the basis for an SVP petition, also requires the court to consider the evaluations in deciding whether there is probable cause to proceed to an SVP trial. In reviewing the evaluations, the court may consider hearsay contained within them. Thus, we deny Walker's writ petition.

BACKGROUND

In June 2015, as Walker neared the end of a state prison commitment, the People filed a petition to commit him civilly as an SVP. The petition was supported by the evaluations of two psychologists appointed by the Director of State Hospitals, Thomas MacSpeiden and Roger Karlsson. Both psychologists concluded Walker satisfied the criteria to be considered an SVP. Their evaluations noted that Walker had previously been convicted of a sexually violent offense—a 1990 conviction for rape. The evaluations also described offenses charged against Walker that did not result in a conviction for a sexually violent offense.

The trial court held a probable cause hearing spanning five sessions in February and March of 2016. At the beginning of the hearing, Walker objected to the admission of the MacSpeiden and Karlsson evaluations on the ground they contained inadmissible hearsay. In particular, Walker objected to portions of the evaluations describing details of two sexually violent offenses for which Walker was charged but not convicted. One of these offenses was a rape charge from 1989 that was dismissed prior to trial, though Walker was convicted of unlawful sexual intercourse with a minor against the same victim. (See Pen. Code, § 261.5.) A second offense was also an alleged rape, in 2005. A jury acquitted Walker of this charge, though it convicted him of pandering the same victim. The experts obtained details of the conduct underlying these two alleged offenses from a probation report and a police inspector's affidavit.

The trial court overruled Walker's objection to the psychologists' evaluations. During the probable cause hearing, Walker's attorney cross-examined the psychologists at length about their evaluations, including their reliance on the alleged rapes from 1989 and 2005 that did not result in

convictions. Walker also testified on his own behalf and called a number of his own witnesses, including a third psychologist appointed by the Director of State Hospitals who concluded Walker did not meet the criteria to be considered an SVP. Following the hearing, the trial court found there was probable cause to believe Walker should be committed as an SVP.

In September 2016, Walker moved to dismiss the SVP petition. He argued that the psychological evaluations contained case-specific hearsay statements submitted for their truth, in contravention of the Supreme Court's then-recent decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). The trial court denied the motion. In March of 2017, Walker moved to have the court reconsider the denial of his prior motion to dismiss based on new case law applying *Sanchez* to SVP trials. The trial court again denied the motion.

In October 2019, Walker filed another motion to dismiss, this time citing *Bennett v. Superior Court* (2019) 39 Cal.App.5th 862 (*Bennett*), which held, relying on *Sanchez*, that case-specific facts conveyed by two psychologists in their evaluations and testimony were inadmissible at an SVP probable cause hearing. (*Id.* at p. 880.) The trial court denied Walker's motion. Walker challenged the ruling in a petition for writ of mandate filed with this court (*Walker v. Superior Court* (Dec. 2, 2019, A158971) [nonpub. opn.]), which a different panel of this court summarily denied.

In January 2020, Walker filed another motion to dismiss, this time citing *Bennett* as well as a second appellate opinion, *People v. Superior Court* (*Couthren*) (2019) 41 Cal.App.5th 1001 (*Couthren*). Once again, the trial court denied the motion. Walker challenged the ruling by filing the instant petition for writ of mandate in our court. In response, we issued an order to

show cause that directed the parties to address whether *Bennett* was correctly decided. The matter is now before us for decision.

DISCUSSION

Walker contends the trial court impermissibly relied on case-specific hearsay contained in the psychological evaluations to find probable cause. Absent the inadmissible hearsay, he contends there was insufficient evidence to commit him as an SVP. As we explain, we conclude the statute governing SVP probable cause hearings permitted the trial court to consider the evaluations and any hearsay contained within them. At the probable cause hearing, but not at Walker's SVP trial still to occur, hearsay statements in the reports may be considered even where they are not independently proven by competent evidence or covered by another hearsay exception.

A. The Sexually Violent Predator Act

The Sexually Violent Predator Act (SVP Act) (Welf. & Inst. Code, § 6600 et seq.)[1] "allows for the involuntary commitment of certain convicted sex offenders, whose diagnosed mental disorders make them likely to reoffend if released at the end of their prison terms." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 235 (*Cooley*).) In order to commit a person as an SVP, the People must show that the person has been convicted of one or more of the sexually violent offenses listed in section 6600, subdivision (b); the person has a diagnosed mental disorder; and the mental disorder "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).) "The civil commitment can only commence if, after a trial, either a judge or a unanimous jury finds beyond a reasonable doubt that the person is an SVP." (*Cooley*, *supra*, 29 Cal.4th at p. 243.)

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[1] All undesignated statutory references are to this code.

"The trial, however, is the last stage of a complex administrative and judicial process to determine whether an offender should be civilly committed as an SVP." (*Cooley*, *supra*, 29 Cal.4th at p. 244.) Before the People may file a petition to commit an inmate as an SVP, the Department of Corrections and Rehabilitation (CDCR) must first screen the inmate, generally at least six months before his or her scheduled release date. (§ 6601, subd. (a).) "If as a result of this screening it is determined that the person is likely to be a sexually violent predator, the [CDCR] shall refer the person to the State Department of State Hospitals for a full evaluation of whether the person meets the criteria in Section 6600." (§ 6601, subd. (b).)

When the CDCR refers an inmate to the Department of State Hospitals, the Department of State Hospitals "shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of State Hospitals, to determine whether the person is a sexually violent predator as defined in this article. The 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. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (§ 6601, subd. (c).) The offender is first evaluated by two mental health professionals designated by the Director of State Hospitals. (§ 6601, subds. (c), (d).) 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 State Hospitals forwards a request for a petition for civil commitment to the county in which the inmate was convicted of the offense for which he is currently incarcerated. (§ 6601, subd. (d).) If only one

professional concludes the offender meets the criteria stated in section 6601, subdivision (d), then the Director of State Hospitals arranges for further examination by two independent mental health professionals. (§ 6601, subd. (e).) Both of these mental health professionals must agree the inmate meets the criteria for commitment as an SVP in order for the process to proceed. (*Ibid.*)

If, after conducting this evaluation process, the evaluators agree that the inmate is an SVP, the Department of State Hospitals forwards a request to county prosecutors to file a commitment petition. (§ 6601, subds. (f), (h)(1), (i).) "Copies of the evaluation reports and any other supporting documents shall be made available to the attorney . . . who may file a petition for commitment." (§ 6601, subd. (h)(1).) If the county prosecutors agree with the recommendation, "a petition for commitment shall be filed in the superior court." (§ 6601, subd. (h)(1).)

Once a petition has been filed, the trial court must review it. As an interim step if a request is made, "a judge of the superior court shall review 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 judge determines the petition contains sufficient facts to establish probable cause, "[t]he probable cause hearing provided for in Section 6602 shall commence within 10 calendar days of the date of the order issued by the judge." (*Ibid.*)

Whether or not preceded by the paper review of section 6601.5, a person alleged to be an SVP is entitled to a probable cause hearing. (§ 6602, subd. (a) (§ 6602(a)).) At the probable cause hearing, the judge "shall review the petition and shall 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." (*Ibid.*) The SVP defendant "shall be entitled to assistance of counsel at the probable cause hearing." (*Ibid.*) If at the conclusion of the hearing "the judge determines there is not probable cause, he or she shall dismiss the petition and any person subject to parole shall report to parole. If the judge determines that there is probable cause, the judge shall order that the person remain in custody in a secure facility until a trial is completed." (*Ibid.*)

When a case advances to trial, the People have the burden of proving beyond a reasonable doubt that the defendant is a sexually violent predator. (§ 6604.) "If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of State Hospitals for appropriate treatment and confinement in a secure facility." (*Ibid.*) Once a person has been found to be an SVP, the Department of State Hospitals must conduct annual mental health examinations, reporting to the court whether the person continues to meet the definition of an SVP. (§ 6604.9, subd. (a).) The report to the court must recommend whether unconditional discharge or conditional release to a less restrictive alternative (that would adequately protect the community) is in the person's best interest. (§ 6604.9, subd. (b).) If the Director of State Hospitals does not recommend either unconditional discharge or conditional release, the SVP may still petition for conditional release. (§ 6608, subd. (a).)

B. Precedent Addressing the Probable Cause Hearing

The SVP Act is sparse in its description of the procedural requirements for a probable cause hearing, saying little more than this: "A judge of the superior court shall review the petition and shall 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(a).) However, the specific procedural requirements of a probable cause hearing have been delineated in a series of court of appeal and Supreme Court cases.

The first of these cases was *In re Parker* (1998) 60 Cal.App.4th 1453 (*Parker*), which established an SVP defendant's right to more than mere "paper review" of the petition and psychological evaluations. (*Id.* at p. 1460.) The People took the position in *Parker* that a paper review sufficed for a probable cause hearing, despite the hearsay nature of the evaluations. (*Id.* at p. 1461.) The court rejected this view, explaining that the language of section 6602 required "a hearing," meaning an SVP defendant should be "able to effectively challenge the facts on which the petition was filed, i.e., the underlying attached experts' evaluations." (*Id.* at p. 1468.) Although section 6602 does not specify "procedural requirements, other than the right to be represented by counsel and to have a hearing," the court concluded "common sense and fairness dictate" a defendant be allowed to present both oral and written evidence. (*Id.* at p. 1469.) Elaborating, the court explained: "While we believe the prosecutor may present the opinions of the experts through the hearsay reports of such persons, the prospective SVP should have the ability to challenge the accuracy of such reports by calling such experts for cross-examination. Further, the prospective SVP should have the ability to call such other witness who, upon a proper showing, the superior court judge finds to have relevant evidence." (*Id.* at pp. 1469–1470.)

The Supreme Court endorsed *Parker*'s approach to probable cause hearings in *People v. Cheek* (2001) 25 Cal.4th 894. *Cheek* addressed the parameters of a "show cause hearing" under section 6605, a parallel provision

of the SVP Act concerning unconditional release of a person previously committed as an SVP. The Court commented that a section 6605 show cause hearing "resembles" a section 6602 probable cause hearing, as both hearings are pretrial in nature and afford a defendant the right to be present and to be represented by an attorney. (*Id.* at p. 899.) Reasoning by analogy from *Parker*, the court concluded section 6605 "should be construed to grant a defendant the same rights to present evidence and cross-examine witnesses as he has under section 6602." (*Id.* at p. 900.)

One year after *Cheek*, the Supreme Court directly addressed the "scope and substance" of a probable cause hearing in *Cooley*, *supra*, 29 Cal.4th at p. 235. *Cooley* held that the purpose of a probable cause hearing is to inform the trial court's decision as to "whether a reasonable person could entertain a strong suspicion that the petitioner has satisfied all the elements required for a civil commitment as an SVP, specifically, whether (1) the offender has been convicted of a qualifying sexually violent offense . . .[2]; (2) the offender has a diagnosable mental disorder; (3) the disorder makes it likely he or she will engage in sexually violent criminal conduct if released; and (4) this sexually violent criminal conduct will be predatory in nature." (*Id.* at p. 236.) The Court reached this conclusion even though section 6602(a) describes the probable cause determination in different, and simpler, terms, requiring only probable cause to believe a person is " 'likely to engage in sexually violent predatory criminal behavior' " upon release. (*Cooley*, at p. 246.) The court interpreted section 6602(a) based on not only its language, but also the "purpose of the probable cause hearing within the structure of the SVP [Act],"

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[2] When *Cooley* was decided, the SVP Act required proof of a qualifying sexually violent offense against at least two victims, but the SVP act was amended by voter initiative in 2006 to drop the requirement for a second victim. (See Prop. 83, as approved by voters, Gen. Elec. (Nov. 7, 2006).)

concluding that a probable cause determination must encompass all of the elements required for the ultimate determination at trial. (*Cooley*, at p. 247.)

The *Cooley* Court likewise looked to the purpose and structure of the SVP Act in interpreting the meaning of " 'likely' " in section 6602(a). (*Cooley*, *supra*, 29 Cal.4th at p. 254.) The Court concluded " 'likely' " meant the same thing in defining probable cause (§ 6602(a)) as it did in explaining what the two concurring psychological evaluations must find to initiate SVP commitment proceedings in the first place (§ 6601, subd. (d)). The Court reasoned, "the determination at the probable cause hearing is based on the petition filed by designated counsel, which is, in turn, necessarily based on the two concurring psychological evaluations required by section 6601." (*Cooley*, at pp. 255–256.)

In dicta, the Court in *Cooley* observed that the SVP Act "does not provide any specific procedural requirements for the probable cause hearing," but it again endorsed *Parker*'s interpretation of the statutory requirements. (*Cooley*, *supra*, 9 Cal.4th at p. 245, fn. 8.) The Court explained: "*Although the petitioner is allowed, despite their hearsay nature, to present the contents of any reports that form the basis of the petition as evidence*, the alleged sexual predator is allowed to cross-examine the expert concerning the evaluation and can call the expert to the stand for that purpose. ([*Parker*, *supra,* 60 Cal.App.4th] at pp. 1469–1470.) The person named in the petition is thus allowed to 'challenge the accuracy' of the evaluations by experts who found that he or she met the criteria for an SVP. (*Id.* at p. 1470.)" (*Ibid.*, italics added.) For years, courts of appeal addressing other aspects of SVP proceedings have recited the *Parker*/*Cooley* rule as settled law. (E.g., *People v. Hayes* (2006) 137 Cal.App.4th 34, 43; *People v. Superior Court* (*Preciado*)

(2001) 87 Cal.App.4th 1122, 1130, fn. 2; *People v. Superior Court* (*Howard*) (1999) 70 Cal.App.4th 136, 154.)

Appellate case law has also established that the rules of evidence apply at an SVP probable cause hearing. Indeed, "the Evidence Code applies in all actions, '[e]xcept as otherwise provided by statute.' " (*In re Kirk* (1999) 74 Cal.App.4th 1066, 1072 (*Kirk*), quoting Evid. Code, § 300.) Finding no such exception for probable cause hearings, *Kirk* applied the certification requirements of Evidence Code sections 1530 and 1531.

Such was the settled state of the law until last year, when two appellate cases took issue with the *Parker/Cooley* rule allowing prosecutors to prove probable cause through the two statutorily mandated psychological evaluations, as long as the evaluators were subject to cross-examination. In *Bennett*, a Second District panel addressed whether criminal background information contained in the psychological evaluations should be excluded as hearsay at an SVP probable cause hearing. Similar to this case, the evaluations discussed two rape-related offenses that were charged against the defendant but dismissed before trial. (*Bennett*, *supra*, 39 Cal.App.5th at p. 869.) The psychologists relied on a police report and a probation report for descriptions of the alleged offenses. (*Ibid.*) The court held this was case-specific hearsay not separately shown by independent evidence nor covered by a hearsay exception, and that it was therefore inadmissible at the probable cause hearing. (*Id.* at pp. 880–881.)

Underlying the *Bennett* court's decision was *Sanchez*, where our Supreme Court clarified the circumstances under which an expert may testify to case-specific hearsay at a criminal trial. (*Sanchez*, *supra*, 63 Cal.4th at p. 670.) The Supreme Court explained: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those

statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*Id.* at p. 686.) Case-specific hearsay facts may not be related by an expert "unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Ibid.*)

The court in *Bennett* noted that *Sanchez* had "repeatedly" been held to apply in SVP trials, and concluded *Sanchez* should be extended to SVP probable cause hearings, as well. (*Bennett*, *supra*, 39 Cal.App.5th at pp. 878, 882.) Consistent with settled law, the court rejected the People's argument that the formal rules of evidence, including the hearsay rule, did not apply at a probable cause hearing. (*Id.* at p. 882.) Charting a new course, the court then concluded the information about alleged rapes was case-specific hearsay inadmissible under *Sanchez*, leaving the trial court's finding of probable cause unsupported by substantial evidence, and requiring the SVP petition to be dismissed. (*Bennett*, at pp. 881, 885.)

A similar result was reached in *Couthren*, *supra*, 41 Cal.App.5th 1001, where another First District panel upheld on hearsay grounds a trial court's exclusion of expert evaluations, in their entirety, at a probable cause hearing. (*Id.* at p. 1006.) In reaching this conclusion, *Couthren* rejected the People's argument that section 6602(a)'s directive for a trial court to " 'review the petition' " establishes a hearsay exception for expert evaluations at a probable cause hearing. (*Couthren*, at pp. 1014–1015.) *Courthren* also endorsed *Bennett*'s conclusion that the evaluations were subject to *Sanchez*'s rule against case-specific hearsay not supported by independent evidence or covered by a hearsay exception. (*Couthren*, at pp. 1019–1021.)

C. Reconciling *Sanchez* With *Cooley*

We agree with *Bennett* and *Couthren* that the rules of evidence, including the holding of *Sanchez*, apply at an SVP probable cause hearing. (See, e.g., *Bennett*, *supra*, 39 Cal.App.5th at pp. 882–883; *Couthren*, *supra*, 41 Cal.App.5th at p. 1012.) We see no basis for, and reject, the Attorney General's contrary argument. But unlike *Bennett* and *Couthren*, we also agree with the dicta in *Cooley*, that "the petitioner is allowed, despite their hearsay nature, to present the contents of any reports that form the basis of the petition as evidence." (*Cooley*, s*upra*, 29 Cal.4th at p. 245, fn. 8, citing *Parker*, *supra*, 60 Cal.App.4th at pp. 1469–1470.)

The key to reconciling these two legal principles lies in a careful examination of the SVP Act's provision for probable cause hearings. As has long been understood, exceptions to the Evidence Code's rule against hearsay (Evid. Code, § 1200) may be found in statutes outside the Evidence Code, and in judicial decisions. (*In re Malinda S.* (1990) 51 Cal.3d 368 (*Malinda S.*), partially superseded by statute as explained in *In re I.C.* (2018) 4 Cal.5th 869, 884–885.) We conclude that when the SVP Act directs the superior court to "review the petition" in determining probable cause (§ 6602(a)), the act establishes just such an exception to the hearsay rule. This exception allows—indeed requires—the trial court to consider the expert evaluations on which the petition necessarily depends, including case-specific facts obtained from hearsay sources described within the evaluations. Because these evaluations and their contents are "covered by a hearsay exception" specific to SVP probable cause hearings, they are not subject to exclusion under *Sanchez*. (*Sanchez*, *supra*, 63 Cal.4th at p. 686.)

The starting point for our analysis is the language of section 6602(a) governing SVP probable cause hearings. Section 6602(a) states that a

superior court judge "shall review the petition" to determine whether there is probable cause to believe the defendant "is likely to engage in sexually violent predatory criminal behavior upon his or her release." (§ 6602(a).) The first question we must answer is, what does "the petition" include? In some cases, the statutorily required evaluation reports are attached to the petition (see *Couthren*, *supra*, 41 Cal.App.5th at p. 1006); in some they are not. Does the happenstance of a prosecutor's choice in preparing papers for filing determine whether the trial judge should review the expert evaluations? Or must a trial judge review the evaluations at a probable cause hearing regardless of whether they were attached to the petition or separately submitted? To answer these questions, we interpret section 6602(a) "in light of the language used and the purpose of the probable cause hearing within the structure of the [SVP Act]." (*Cooley*, *supra*, 29 Cal.4th at p. 247.) But we need not belabor the point, as even Walker agrees the reports may be introduced at a probable cause hearing, except to the extent they contain case-specific double hearsay.

The SVP Act does not expressly address what a petition must include, but it does elaborately describe the necessary role of the psychological evaluations in initiating an SVP proceeding. No petition may be filed unless a potential SVP has been evaluated by two professionals who agree the person meets the statutory definition of an SVP. (§ 6601, subds. (d), (e).) Only once this pair of evaluators has agreed may the Department of State Hospitals forward a request for a petition to be filed (§ 6601, subds. (f), (h)(1), (i)), and "[c]opies of the evaluation reports" must accompany the request. (§ 6601, subd. (h)(1).) As the Supreme Court in *Cooley* observed, "the determination at the probable cause hearing is based on the petition . . ., which is, in turn, *necessarily based on the two concurring psychological*

evaluations required by section 6601." (*Cooley*, *supra*, 29 Cal.4th at p. 255, italics added.) Because of this necessary connection between the evaluations and the petition, one can "infer[] the report's facts were impliedly intended to be pleaded by averments or proper attachment to the petition." (*Parker*, *supra*, 60 Cal.App.4th at p. 1468, fn. 15.)

In light of the integral role the evaluations play in initiating an SVP petition, we conclude the evaluations must be deemed incorporated into the petition, regardless of whether the People physically attach them to the petition at the time of filing or provide them to the court under separate cover. It follows that because the evaluations are properly incorporated into a petition, section 6602's directive for a trial court to "review the petition" at a probable cause hearing necessarily requires the court to review the evaluations, as well. This is not an open-ended invitation for prosecutors to attach just any document to the petition so that the trial court will consider it in determining probable cause, but rather a rule that recognizes the unique role of the statutorily mandated psychological evaluations in initiating an SVP action.

Having concluded a trial judge must, in reviewing an SVP petition, review the expert evaluations on which it depends, we turn to the issue Walker presses—whether the judge may review and consider the entirety of an evaluation or only such portions as do not contain otherwise inadmissible double hearsay. Walker concedes the admissibility of certain portions of the evaluations as a substitute for the direct testimony of their authors, but contends that *Sanchez* precludes admission of case-specific hearsay contained within the evaluations unless the hearsay statements are independently proven or covered by a hearsay exception. We note that the language of section 6602(a) contains no such carve out. It requires the trial judge to

determine probable cause based on a review of "the petition," which we understand to include the evaluations, not just some portion of the petition and evaluations whose admissibility is independently established. But even if we conclude the language of section 6602(a) is ambiguous on this point, our analysis of the SVP Act's structure and purpose (*Cooley*, *supra*, 29 Cal.4th at p. 247) confirms that section 6602(a) excepts the evaluations and any information contained within them from the hearsay rule, allowing the trial judge to consider the reports in their entirety.

We begin, once again, with section 6601, the provision requiring two concurring psychological evaluations prior to the filing of an SVP petition. In section 6601, the Legislature prescribes a "standardized assessment protocol" for evaluators, spelling out a number of requirements: "The 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. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (§ 6601, subd. (c).) Much of this broad array of historical information will be found in hearsay sources. Indeed, the evaluations in this case reveal that both evaluators relied on a variety of hearsay sources, including court records, probation reports, Walker's record of arrest and prosecutions, and Walker's prison central file recounting incidents during his incarceration. The Legislature clearly intended for evaluators to rely on hearsay sources in their evaluations, as the alternative would be to require that evaluators reinvestigate a lifetime worth of historical information comprising the person's "criminal and psychosexual history," a near-impossible task for which a psychologist is ill-suited. And given that the evaluations necessarily contain considerable amounts of case-

specific hearsay, the Legislature must have intended the trial judge to review this hearsay in reviewing the reports. Were this not the case, most of the historical information included in the evaluations at the Legislature's behest would be subject to exclusion.

The fact that the evaluations are prepared by neutral evaluators applying a standardized assessment protocol supports their full admissibility at a probable cause hearing. The evaluations are similar in this regard to the social studies the Supreme Court deemed admissible in juvenile dependency proceedings in *Malinda S., supra,* 4 Cal.5th 368. There, the Supreme Court construed a statute directing juvenile courts to " 'receive and consider' " social studies prepared by probation officers or social workers as creating a hearsay exception reaching multiple-level hearsay contained in these reports. (*Malinda S.*, at pp. 375–376, 385.) The court explained that the social studies are "prepared by disinterested parties in the regular course of their professional duties," and that "[t]hese elements of objectivity and expertise lend them a degree of reliability and trustworthiness." (*Id.* at p. 377.) The Court distinguished *Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532 (*Daniels*), where an accident report filed by a private individual was not admissible, although the Vehicle Code allowed the Department of Motor Vehicles to consider " 'its official records' " at a hearing to suspend a person's driver's license. (*Malinda S.*, at pp. 377–378.) Unlike a social study in a dependency proceeding, a private accident report "did not reflect the competency, reliability and trustworthiness necessary to exempt it from the hearsay rule." (*Id.* at p. 377.) The Court also emphasized that hearsay in "a social study is admissible only if, on request of the parent or guardian, the social worker is made available for cross-examination." (*Id.* at p. 378.)

Like the social studies in *Malinda S.* and unlike the accident reports in *Daniels*, the SVP Act evaluations are prepared by disinterested professionals who must follow a standardized assessment protocol, and who may be cross-examined at the probable cause hearings on the accuracy of their reports. These hallmarks of reliability support the admissibility at a probable cause hearing of the evaluations, including any hearsay within them.

We are also guided by a commonsense consideration that influenced our Supreme Court in *Conservatorship of Manton* (1985) 39 Cal.3d 645 (*Manton*), namely the wisdom of avoiding duplication in the evidence at an initial hearing and a subsequent trial. *Manton* addressed the statutory scheme for conservatorship proceedings for gravely disabled persons. Applicable statutes direct a county officer to investigate alternatives to conservatorship and "render to the court a written report of investigation prior to" the initial conservatorship hearing. (§ 5354, subd. (a).) At the initial hearing, the court "may receive the report in evidence and may read and consider the contents thereof in rendering its judgment." (*Ibid.*) But if the proposed conservatee demands a subsequent jury trial, *Manton* held that the investigator's report is not admissible at trial. (*Manton*, at p. 652.) The court explained: "If the report were admissible at both the initial hearing and a subsequent court trial, the two proceedings would be essentially identical in terms of the acceptable range of evidence to be considered. We believe that the better interpretation is one avoiding such redundancy in the absence of clear legislative intent to the contrary." (*Id.* at p. 651.)

Manton's preference for avoiding redundancy applies with the same force here, where all agree the psychologists' evaluations and multiple-level hearsay in them are inadmissible at an SVP trial. (See *People v. Yates* (2018) 25 Cal.App.5th 474, 476; *People v. Roa* (2017) 11 Cal.App.5th 428, 452–453.)

Similar to the directive in the conservatorship statutes, the SVP Act directs courts to "review the petition" at a probable cause hearing, but does not repeat this directive for the subsequent trial. (§ 6602(a).) The conservatorship and SVP statutes thus similarly differentiate the evidence appropriate to a probable cause or initial hearing from the evidence admissible in the subsequent trial. As in *Manton*, our construction of the SVP Act recognizes a hearsay exception that applies at the initial probable cause hearing but not at trial, while Walker's reading of the SVP Act contemplates two proceedings that "would be essentially identical in terms of the acceptable range of evidence to be considered." (*Manton*, *supra*, 39 Cal.3d at p. 651.) Like the *Manton* court, we believe the "better interpretation is one avoiding such redundancy in the absence of clear legislative intent to the contrary," which we have not found. (*Ibid.*) We find it highly unlikely the Legislature intended for a prosecutor to procure independent evidence for the vast amount of case-specific hearsay information contained in a psychological evaluation—including criminal history, familial and relationship history, medical information, and a defendant's prison disciplinary record—at a probable cause hearing, and then again at a subsequent trial.

Malinda S. and *Manton* are far from the only examples where courts may consider certain hearsay evidence at a specialized proceeding. It is well-settled that certain types of hearsay may be considered at criminal sentencing hearings (Pen. Code, § 1170, subd. (b); *People v. Arbuckle* (1978) 22 Cal.3d 749, 754), parole and probation revocation proceedings (*People v. Maki* (1985) 39 Cal.3d 707, 709; *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066–1067); restitution hearings (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543); and disposition hearings in juvenile delinquency cases (*In re Vincent G.* (2008) 162 Cal.App.4th 238, 244). While these

proceedings differ from SVP probable cause hearings in several respects, they share the common theme that hearsay evidence may be presented in a variety of circumstances consistent with legislative mandates and a party's due process rights.

In reaching a result contrary to the one we reach, the courts in *Bennett* and *Couthren* acknowledge many of the authorities we have cited, but attempt—unpersuasively in our view—to harmonize their holdings with those authorities. For example, the court in *Bennett* believes that excluding on hearsay grounds "a key piece of evidence upon which the experts relied . . . is consistent with *Parker* and *Cooley*'s findings that a defendant may challenge the accuracy of the expert reports at the probable cause hearing." (*Bennett*, *supra*, 39 Cal.App.5th at p. 883.) We believe this is a misreading of *Parker* and *Cooley*. When those cases discuss a defendant's ability to challenge the accuracy of the evaluations, they refer specifically to the defendant's right to cross-examine the experts on their findings, and follow up by noting the defendant's right to present conflicting evidence. (See *Parker*, *supra*, 60 Cal.App.4th at p. 1470 ["the prospective SVP should have the ability to challenge the accuracy of such reports by calling such experts for cross-examination"]; *Cooley*, *supra*, 29 Cal.4th at p. 245, fn. 8 [same].) The courts never equate questioning experts about the accuracy of their evaluations with an objection to the *admissibility* of the evaluations on hearsay grounds. Rather, both courts conclude that evaluations are admissible despite containing hearsay.

We likewise disagree with the suggestion that the rule of *Parker* and *Cooley* is no longer good law in light of *Sanchez*. (See *Bennett*, *supra*, 39 Cal.App.5th at p. 883.) *Sanchez* abolished a practice whereby courts would admit hearsay facts into evidence through expert testimony under the guise

that such facts were not being admitted for their truth, but rather to show the basis of an expert's opinion. (*Sanchez*, *supra*, 63 Cal.4th at pp. 680–681.) But *Sanchez* affirmed the well-settled rule that hearsay, including case-specific facts related by experts, is admissible if it is covered by an exception to the hearsay rule. (*Id.* at p. 686 ["What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception"].) We read *Parker* and *Cooley* as recognizing such an exception to the hearsay rule for psychological evaluations at an SVP probable cause hearing. *Parker* and *Cooley* thus remain entirely consistent with *Sanchez*.

Couthren observes, with some justification, that *Parker* and *Cooley* did not squarely confront the issue we decide today. *Couthren* notes that *Parker* "provides no analysis supporting the free admission of the evaluators' reports as competent evidence to support a finding of probable cause and contains no discussion regarding the competency of the multiple hearsay necessarily contained within such expert evaluations." (*Couthren, supra*, 41 Cal.App.5th at p. 1017). *Couthren* also downplays *Cooley*'s citation to *Parker*, as "describing matters which were not disputed by the parties and therefore not analyzed by the court." (*Couthren*, at p. 1017.) We do not believe that *Parker* and *Cooley* are so easily dismissed. The court in *Parker* was squarely confronted with a hearsay challenge to the evaluations, as the defendant's primary contention was that the trial court's " 'paper review' " procedure—where it considered only the evaluations at the probable cause hearing—impermissibly "relied upon inadmissible hearsay." (*Parker*, *supra*, 60 Cal.App.4th at p. 1460.) And *Cooley*, although its citation to *Parker* is dicta, is a case devoted to "the scope and substance of the probable cause determination required by section 6602, subdivision (a)." (*Cooley*, *supra*, 29

Cal.4th at p. 235.) We do not believe the Supreme Court would have made such germane pronouncements if it did not mean what it said.

Bennett and *Couthren* also analogize an SVP probable cause hearing to a criminal preliminary hearing, and note that the hearsay exception which allows qualified peace officers to relate out-of-court statements at a preliminary hearing (see Pen. Code, § 872, subd. (b)) does not support the admission of hearsay in evaluators' reports at an SVP probable cause hearing. (*Bennett*, *supra*, 39 Cal.App.5th at p. 884, fn. 6.; *Couthren*, *supra*, 41 Cal.App.5th at pp. 1017–1018.) This is true but, we think, beside the point. We agree that the two hearings share a similar purpose—to " ' " 'weed out groundless or unsupported charges . . . and to relieve the accused of the degradation and expense of a . . . trial.' " ' " (*Cooley*, *supra*, 29 Cal.4th at p. 247.) But it is apparent from the statutes governing the two hearings that they fulfill this purpose in different ways. For SVP probable cause hearings, section 6602 directs a trial court to "review the petition," but makes no mention of the prosecution's obligation to examine witnesses or present other types of evidence. (See § 6602(a).) The statues governing criminal preliminary hearings, by contrast, contemplate that the prosecution will present its case by examining witnesses in the presence of the defendant. (See Pen. Code, § 865.) The hearsay exception added to the Penal Code by Proposition 115 (see Pen. Code, § 872, subd. (b)) allows prosecutors to spare crime victims and witnesses from testifying at a preliminary hearing and serves as a powerful exception to the hearsay rule in the context of a criminal prosecution. The *Parker*/*Cooley* rule has an analogous, but not identical, effect in the context of an SVP probable cause hearing.[3]

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[3] Accepting that Proposition 115 does not apply at an SVP probable cause hearing, we note that the rule of *Bennett* and *Couthren* results in an

Finally, we are not persuaded by Walker's argument that it would be inappropriate to construe section 6602(a) as excepting expert evaluations from the hearsay rule at a probable cause hearing in light of a separate, more explicit hearsay exception in section 6600, subdivision (a)(3) (§ 6600(a)(3)). This provision of the SVP Act allows the prosecution to rely on documentary evidence to prove the existence of, and specific facts underlying, any convictions for a sexually violent offense that form the predicate for the SVP petition. (See § 6600(a)(3) [existence and details of predicate offenses may be shown with, inter alia, "preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals"]; accord *Bennett*, *supra*, 39 Cal.App.5th at p. 880; *Couthren*, *supra*, 41 Cal.App.5th at p. 1016.) Section 6600(a)(3) functions as a hearsay exception that not only applies at SVP probable cause hearings, but also extends to SVP trials. It is "intended to relieve victims of the burden and trauma of testifying about the details of the crimes underlying the prior convictions," as well as to address the concern "that victims and other percipient witnesses would no longer be available." (*People v. Otto* (2001) 26 Cal.4th 200, 208 (*Otto*).)

SVP probable cause hearing that is more cumbersome for the court and disruptive for victims and witnesses than is a Proposition 115 preliminary hearing in a felony prosecution. The *Bennett* and *Couthren* rule requires victims and witnesses (except certain crime victims excepted under § 6600(a)(3), discussed *infra*) to testify at a probable cause hearing *and* at trial, perhaps several times over if an SVP later contests his or her right to unconditional release. (See *Cheek*, *supra*, 25 Cal.4th at p. 900.) If, to proceed more efficiently and spare victims and witnesses from testifying repeatedly, the prosecutor elicits from the expert at the probable cause hearing his or her opinion but not the case-specific hearsay on which it is based (see *Sanchez*, *supra*, 63 Cal.4th 665 at p. 685), the trial court will have less information at its disposal than the Legislature intended in directing the trial court to "review the petition" to determine probable cause. (§ 6602(a).)

The hearsay exception for expert evaluations that we are concerned with in this case is different in both function and purpose. The exception here is limited to probable cause hearings and allows the People to make an initial showing, through the evaluations of experts, that an SVP defendant has a diagnosed mental disorder and is likely to engage in sexually violent criminal behavior that is predatory in nature. The exception is designed to streamline the People's ability to make this initial showing without having to duplicate the evidence they will need to put forth at trial, while preserving the SVP defendant's ability to challenge the soundness of the evaluators' opinions. The exception here may also "relieve victims of the burden and trauma of testifying about the details" of certain crimes (*Otto, supra*, 26 Cal.4th at p. 208.), but *only* at the probable cause hearing. An alleged victim of crimes other than the predicate crimes of conviction must testify at an SVP trial, unless other admissible evidence establishes the facts on which the evaluators rely.

In summary, we conclude that section 6602(a) creates an exception to the hearsay rule that permits a trial court at an SVP probable cause hearing to accept and consider the statutorily required expert evaluations, including case-specific facts obtained from hearsay sources contained within the evaluations. We respectfully disagree with *Bennett*'s and *Couthren's* holdings to the contrary.[4] Because the evaluations are covered by a hearsay exception,

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[4] Walker suggests that since the Supreme Court denied review in *Bennett*, the court concluded that *Bennett* was correctly decided. He also asks that we take judicial notice of the petition for review filed with the Supreme Court in *Bennett* and the Court's order denying review. We grant Walker's request for judicial notice, but reject his argument. "[A] denial of a petition for review is not an expression of opinion of the Supreme Court on the merits of the case." (*Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 689, fn. 8.)

the trial court did not err in overruling Walker's objection to the evaluations and relying on them in assessing probable cause.

We conclude by noting that an SVP defendant is not at the mercy of a psychologist's evaluation at a probable cause hearing. A defendant may assure himself that an evaluator is qualified to provide a medical opinion (Evid. Code, § 720) and that the evaluations satisfy other admissibility requirements. (See *In re Kirk, supra*, 74 Cal.App.4th at pp. 1076–1077.) As *Cooley* and *Parker* teach, an SVP defendant at a probable cause hearing may both cross-examine the professionals who prepared the evaluations and call witnesses to provide relevant testimony. Where an evaluation relies on hearsay evidence that is unreliable, the SVP defendant can expose that vulnerability at the probable cause hearing. And where the prosecution is unable to produce at trial necessary witnesses on whose hearsay statements the evaluators rely, that problem, too, will be fully exposed at the appropriate time. The hearsay exception contained in section 6602(a) is limited to probable cause hearings, and will not relieve the People of their obligation to call witnesses at an SVP trial. (See *People v. Yates, supra*, 25 Cal.App.5th at p. 476; *People v. Roa, supra*, 11 Cal.App.5th at pp. 452–453.)

DISPOSITION

The petition for writ of mandate is denied.

Walker separately requests judicial notice of the written objections he filed in this case to the admissibility of the Karlsson and MacSpeiden evaluations. We deem the objections a part of the trial court record, and therefore need not separately take judicial notice of them.

TUCHER, J.

WE CONCUR:

STREETER, Acting P. J.

BROWN, J.

Trial Court:	City & County of San Francisco Superior Court
Trial Judge:	Hon. Charles Crompton
Counsel for Petitioner:	Erwin F. Fredrich
Counsel for Respondents:	Xavier Becerra, Attorney General; Lance E Winters, Chief Assistant Attorney General; Jeffrey M. Laurence, Senior Assistant Attorney General; Rene A. Chacon, Supervising Deputy Attorney General; Moona Nandi, Deputy Attorney General

ATTACHMENT 2

COURT OF APPEAL
ORDER DENYING PETITION FOR REHEARING
[NO CHANGE IN JUDGMENT]
WALKER v. SUPERIOR COURT (PEOPLE)
A159563

Filed July 16, 2020

Court of Appeal, First Appellate District
Charles D. Johnson, Clerk/Executive Officer
Electronically FILED on 7/16/2020 by M. Garcia, Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JEFFREY WALKER, Petitioner, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	A159563 (City & County of San Francisco Super. Ct. No. 2219428) **ORDER DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]**

THE COURT:

Appellant's petition for rehearing is denied.

Dated: 07/16/2020

Streeter, J.

STREETER, Acting P. J.

ACTING PJ

PROOF OF SERVICE

PETITION FOR REVIEW

WALKER v. SUPERIOR COURT (PEOPLE)

Court of Appeal Case Number A159563

DECLARATION OF ELECTRONIC SERVICE AND FILING

(Cal. Rules of Court, rules 2.251(i)(1)& 8.71 (f)(1)

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 360 Ritch Street, Suite 201 San Francisco, CA 94107. On below date I have caused to be served a true copy of the attached **Petition for Review** including Attachments thereto by electronic delivery through TrueFiling to each of the following at the email addresses below. My email address used to e-serve:efredrich@juno.com. I, the undersigned, declare I uploaded a pdf version of the above-identified document to the TrueFiling site for electronic service to the following:

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and for e-filing in the **Court of Appeal, First District, Div. 4** through the True-Filing system per CRC 8.500 (f)(1).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 29, 2020 at San Francisco, California.

_____/s/_____
ERWIN F. FREDRICH

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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S263588

PROOF OF SERVICE

PETITION FOR REVIEW

WALKER v. SUPERIOR COURT (PEOPLE)

Court of Appeal Case Number A159563

DECLARATION OF ELECTRONIC SERVICE AND FILING

(Cal. Rules of Court, rules 2.251(i)(1)& 8.71 (f)(1)

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 360 Ritch Street, Suite 201 San Francisco, CA 94107. On below date I have caused to be served a true copy of the attached **Petition for Review** including Attachments thereto by electronic delivery through TrueFiling to each of the following at the email addresses below. My email address used to e-serve:efredrich@juno.com. I, the undersigned, declare I uploaded a pdf version of the above-identified document to the TrueFiling site for electronic service to the following:

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and for e-filing in the **Court of Appeal, First District, Div. 4** through the True-Filing system per CRC 8.500 (f)(1).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 29, 2020 at San Francisco, California.

_____/s/_____
ERWIN F. FREDRICH

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 7/31/2020 by Tayuan Ma, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Jeffrey Walker v. Superior Court (People)**
Case Number: **TEMP-PO3PZ362**
Lower Court Case Number:

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7/29/2020
Date

/s/Erwin Fredrich
Signature

Fredrich, Erwin (53551)

Last Name, First Name (PNum)

Erwin F. Fredrich

Law Firm