

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Petitioner,

v.

**ORANGE COUNTY SUPERIOR
COURT,**

Respondent;

RICHARD ANTHONY SMITH,

Real Party in Interest.

Supreme Court Case No. S225562

Court of Appeal Case No. G050827

Orange County Superior Court
Case No. M-9531; The Honorable
Kimberly Menninger, Judge.

SUPREME COURT
FILED

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OPENING BRIEF ON THE MERITS

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QUESTIONS GRANTED REVIEW

(1) Is an expert retained by the district attorney in a proceeding under the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 *et seq.*) allowed to review otherwise confidential treatment information under Welfare and Institutions Code section 5328?

(2) Is the district attorney entitled to review medical and psychological treatment records or is access limited to confidential treatment information contained in an updated mental evaluation conducted under Welfare and Institutions Code section 6603, subdivision (c)(1)?

ARGUMENT SUMMARY

Section 5328 of the Welfare and Institutions Code¹ provides that all information and records obtained in the course of providing services to either voluntary or involuntary recipients of services under the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 *et seq.*; “SVPA” or “SVP Act”) shall be confidential. (*Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 380.) Thus, section 5328 generally prohibits the dissemination of Mr. Smith’s treatment records to anyone.

However, in June 2000, the legislature enacted section 6603(c), which creates an exception to section 5328’s general rule of confidentiality. (See *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 805-807.) This legislative exception permits only the evaluators, who are appointed by the Department of State Hospitals (DSH) to conduct updated or replacement evaluations, to review Mr. Smith’s therapy records. Thus, this exception “does not authorize disclosure of therapy records directly to the district attorney..., but rather

¹ All future references to a section are references to the Welfare and Institutions Code unless otherwise noted.

authorizes review of such records only by the independent evaluators and grants a district attorney access to otherwise confidential treatment information concerning an alleged SVP only ‘to the extent such information is contained in an updated mental evaluation.’ ” (*People v. Gonzales* (2013) 56 Cal.4th 353, 379, footnote 11, emphasis added, citing *Albertson v. Superior Court, supra*, 25 Cal.4th 796, 807; see also *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 380.) This exception also does not authorize disclosure of therapy records to the district attorney’s retained expert (and the district attorney’s retained expert may not be provided with access to those portions of the DSH evaluators’ reports which include information from the therapy records).

PROCEDURAL HISTORY

On March 6, 2002, the Orange County District Attorney (OCDA) filed a “Petition for Commitment as a Sexually Violent Predator” (hereinafter referred to as the “SVP Petition”) against Mr. Smith under the SVP Act. OCDA attached to the SVP Petition the evaluations of mental health professionals, Dana Putnam, Ph.D., and Charles Jackson, Ph.D. The evaluators’ reports were dated 1/18/2002 and 2/4/2002, respectively.²

In light of the ruling in *In re Ronje* (2009) 179 Cal.App.4th 509 (which was later overruled by *Reilly v. Superior Court* (2013) 57 Cal.4th 641), the Department of State Hospitals (formerly the Department of Mental Health) reappointed Dr. Putnam and Dr. Rueschenberg to evaluate Mr. Smith as an

² Due to Dr. Jackson’s subsequent unavailability, the following updated evaluations were completed pursuant to section 6603(c)(1): Dr. Putnam in 5/2006 (positive); Dr. Schwartz in 5/2006 (negative/non-SVP opinion); Dr. Rueschenberg in 8/2006 (positive); and Dr. Zinik in 8/2006 (negative/non-SVP opinion).

SVP pursuant to section 6601(d).³ In a report dated February 7, 2011, Dr. Putnam opined Mr. Smith did not meet the criteria for an SVP. In a report dated February 2, 2011, Dr. Rueschenberg opined Mr. Smith did not meet the criteria for an SVP.

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

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

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

After remand from this court, the COA again issued a writ of mandate in *Smith v. Superior Court* (Jan. 14, 2014; G045119) (nonpub.opn) directing

³ In a memorandum dated February 16, 2010, DSH stated that "only the evaluators who have found the person positive will be scheduled to complete new evaluations. Evaluators who have opined that the person does not meet the criteria will not be assigned new evaluations as the outcome of the negative evaluation(s) is unlikely to change." Thus, DSH tried to "stack the deck" against Mr. Smith by reappointing only the doctors who had previously found Mr. Smith was an SVP (*i.e.*, Dr. Putnam and Dr. Rueschenberg) and did not reappoint the doctors who had previously found Mr. Smith was not an SVP (*i.e.*, Dr. Schwartz and Dr. Zinik).

Judge King to vacate his previous orders and enter new orders (a) denying OCDA's motion to compel Mr. Smith to submit to a mental health examination conducted by Dr. Harry Goldberg, and (b) denying OCDA's motion to permit Dr. Goldberg to review Mr. Smith's treatment records.

On June 17, 2014, the district attorney requested that DSH direct Dr. Putnam to perform an updated evaluation of Mr. Smith pursuant to section 6603(c)(1) of the Welfare and Institutions Code.⁴

On September 25, 2014, OCDA filed a motion requesting that Judge Menninger issue an order permitting Dr. Dawn Starr, the district attorney's retained expert, to review Mr. Smith's treatment records.

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

On October 9, 2014, OCDA filed a petition for writ of mandate (G050827) in the COA. On October 27, 2014, Mr. Smith filed an informal response opposing the petition for writ of mandate.

On January 22, 2015, the COA issued a "*Palma* Notice."⁵ On February 2, 2015, Mr. Smith filed a supplemental informal response opposing the issuance of a preemptory writ in the first instance.

On February 24, 2015, the COA issued a preemptory writ in the first instance in *Smith v. Superior Court* (Feb. 24, 2015; G045119) (nonpub.opn)

⁴ Dr. Rueschenberg was no longer available to perform an updated SVP evaluation. In addition, because Dr. Rueschenberg had previously opined Mr. Smith is not an SVP, the district attorney was prohibited by section 6603(c)(2)(D) from requesting a replacement SVP evaluation.

⁵ *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.

compelling Judge Menninger to issue an order allowing OCDA to turn over Mr. Smith's treatment records to its new retained expert, Dr. Dawn Starr.

On April 6, 2015, Mr. Smith filed a Petition for Review in this Honorable Court. On May 20, 2015, this Honorable Court granted the petition, designated this case the lead case and deferred further action on six other pending matters.⁶

ARGUMENT

I. AN EXPERT RETAINED BY THE DISTRICT ATTORNEY IN A PROCEEDING UNDER THE SVP ACT IS NOT ALLOWED TO REVIEW OTHERWISE CONFIDENTIAL TREATMENT INFORMATION UNDER WELFARE AND INSTITUTIONS CODE SECTION 5328.

A. The SVP process

A person is an SVP if he “has been convicted of a sexually violent offense against one or more victims and ... has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” (Welf. & Inst. Code, § 6600, subdivision (a).) A person deemed an SVP is indefinitely committed to a state hospital for treatment for his disorder. (Welf. & Inst. Code, § 6604.)

The SVP evaluation process starts in prison. If the Secretary of the Department of Corrections and Rehabilitation determines that a prisoner may be an SVP, the Secretary refers the prisoner for an initial screening before

⁶ *Jackson v. The Superior Court of Orange County* (S225708), *Morehead v. The Superior Court of Orange County* (S225715), *Quintero v. The Superior Court of Orange County* (S225714), *Rabuck v. The Superior Court of Orange County* (S225705), *Ronje v. The Superior Court of Orange County* (S225702) and *Schneider v. The Superior Court of Orange County* (S225703).

the prisoner's scheduled release date. (Welf. & Inst. Code, § 6601, subdivisions (a) and (b).) If, as a result of this initial screening, it is determined that the prisoner is likely to be an SVP, the Secretary refers the prisoner to the Department of State Hospitals (DSH) for a full evaluation as an SVP. (Welf. & Inst. Code, § 6601, subdivision (b).) DSH appoints two psychiatrists or psychologists to evaluate the prisoner. (Welf. & Inst. Code, § 6601, subdivision (d).) If the two initial evaluators agree that the prisoner is an SVP, DSH must request a commitment petition from the District Attorney. (Welf. & Inst. Code, § 6601, subdivision (d).) If the two initial evaluators do not agree that the prisoner is an SVP, DMH is required to appoint two independent professionals to evaluate the prisoner as an SVP. (Welf. & Inst. Code, § 6601, subdivision (e).) If the two independent professionals agree that the prisoner is an SVP, DMH must request a commitment petition from the district attorney. (Welf. & Inst. Code, § 6601, subdivision (f).)

If the district attorney later determines updated evaluations are necessary in order to properly present the case for commitment, the district attorney may request that DSH perform updated evaluations. (Welf. & Inst. Code, § 6603, subdivision (c)(1).) When a request is made for updated evaluations, DSH directs the original evaluators to provide updated evaluations to the district attorney and counsel for the alleged SVP. (*Ibid.*)

If one or more of the evaluators later become unavailable to testify for the district attorney in court proceedings, the district attorney may request that DSH perform replacement evaluations. (Welf. & Inst. Code, § 6603, subdivision (c)(1).) When a request is made for replacement evaluations, DSH appoints new evaluators to perform replacement evaluations. (*Ibid.*) "However, updated or replacement evaluations shall not be performed except as necessary to update one or more of the original evaluations or to replace

the evaluation of an evaluator who is no longer available to testify for the petitioner in court proceedings.” (*Ibid.*) “These updated or replacement evaluations shall include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews of the person being evaluated, either voluntarily or by court order.” (*Ibid.*) If an updated or replacement evaluation results in a split opinion as to whether the person subject to this article meets the criteria for commitment, DSH appoints two additional psychiatrists or psychologists to evaluate the alleged SVP. (*Ibid.*)

B. Section 5328 does not permit the disclosure of an alleged SVP’s treatment records to anyone relevant to this proceeding.

Section 5328 provides in relevant part: “All information and records obtained in the course of providing services under Division 4 (commencing with Section 4000), Division 4.1 (commencing with Section 4400), Division 4.5 (commencing with Section 4500), Division 5 (commencing with Section 5000), **Division 6 (commencing with Section 6000)**, or Division 7 (commencing with Section 7100), to either voluntary or involuntary recipients of services shall be confidential.”⁷ (Emphasis added.) Section 5328’s provisions apply to voluntary and involuntary recipients of services under the SVP Act. (*Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 380.)

Section 5328 reflects the legislative recognition that disclosing confidences impairs effective treatment of the mentally ill, and thus is

⁷ In addition, section 5328.15 provides in relevant part: “All information and records obtained in the course of providing services under Division 5 (commencing with Section 5000), **Division 6 (commencing with Section 6000)**, or Division 7 (commencing with Section 7100), to either voluntary or involuntary recipients of services shall be confidential.” (Emphasis added.)

contrary to the best interests of society. “Section 5328’s confidentiality protections are designed ‘to encourage persons with mental or alcoholic problems to seek treatment on a voluntary basis.’ ” (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 953-954 , citing *County of Riverside v. Superior Court* (1974) 42 Cal.App.3d 478, 481; see *Sorenson v. Superior Court* (2013) 219 Cal.App.4th 409, 447; *In re S.W.* (1978) 79 Cal.App.3d 719, 721 [section 5328 seeks to protect patients from the “embarrassment or more serious consequences” and “undesired publicity” that could result if their having received treatment became public knowledge]; see also the Law Revision Commission comment accompanying Evidence Code section 1014, which was cited in *People v. Gonzales* (2013) 56 Cal.4th 353, 379 and states in relevant part: “Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient’s life... Unless a patient... is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment... depends.”)⁸

However, recognizing that some private and public interests must override the patient’s, the Legislature established several limited exceptions to Section 5328’s confidentiality protections. As originally enacted, section 5328 contained a much shorter list of exceptions. (See Stats. 1967, ch. 1667, § 36, pp. 4074, 4092–4093.) It was reenacted and amended in 1972 (Stats. 1972, ch. 1058, § 2, pp. 1960–1961) and has subsequently been

⁸ Anyone who knowingly violates section 5328 by releasing confidential information without authorization is subject to a civil action with damages equivalent to the greater of \$ 10,000 or treble the amount of actual damages. (§ 5330, subdivision (a).) Anyone who negligently violates section 5328 faces damages equivalent to \$ 1,000 plus actual damages. (§ 5330, subdivision (b).)

amended several times to expand the list of exceptions. In addition, some exemptions have been codified in other statutes. (See, for example, sections 5328.01 to 5328.06, 5328.1 to 5328.6, 5328.8 and 5328.9.) Although the Legislature has created many exceptions to section 5328's protections, none of these exceptions permit the disclosure of an alleged SVP's treatment records to anyone relevant to this proceeding.⁹ Thus, as applied to this matter, section 5328 prohibits the disclosure of any of Mr. Smith's treatment records.

C. Although section 5328 prohibits the disclosure of an alleged SVP's treatment records to anyone relevant to this proceeding, the Legislature amended section 6603(c) to permit certain DSH evaluators to access an alleged SVP's treatment records.

Although section 5328 prohibits the disclosure of an alleged SVP's treatment records to anyone relevant to this proceeding, the Legislature amended section 6603(c) effective September 13, 2000, to create an exception to section 5328's general rule of confidentiality. (See *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 805-807 (*Albertson*), which also includes a detailed description of the legislative history of section 6603(c).)

As discussed in subsection A above, Section 6603(c) sets out express authority for the district attorney to request updated or replacement evaluations from DSH. When a request is made for updated evaluations, DSH directs the original or replacement evaluators to provide updated or replacement evaluations to the district attorney and counsel for the alleged SVP. (Welf. & Inst. Code, § 6603, subdivision (c)(1).) Furthermore, section 6603(c) provides that "[t]hese updated or replacement evaluations shall include review of available medical and psychological records,

⁹ Similarly, the exceptions listed in section 5328.15, subdivisions (a)-(c), do not apply to anyone relevant to this proceeding. Thus, as applied to this matter, section 5328.15 also prohibits the disclosure of any of Mr. Smith's treatment records.

including treatment records...” (Welf. & Inst. Code, § 6603, subdivision (c)(1).) Thus, section 6603(c)’s exception to section 5328’s general rule of confidentiality permits DSH evaluators, who are appointed to conduct updated or replacement evaluations, to review an alleged SVP’s treatment records. (*Albertson v. Superior Court, supra*, 25 Cal.4th 796, 807.)

D. The district attorney’s retained expert in this matter is not allowed to review any of Mr. Smith’s section 5328 treatment records.

Section 6603(c)’s exception to section 5328’s general rule of confidentiality does not include within its provisions experts retained by the district attorney. To the contrary, the section 6603(c) exception is expressly limited to the original DSH evaluators who are updating a prior evaluation and evaluators appointed by DSH to replace an evaluator who is no longer available to testify for the district attorney in the court proceedings. (Welf. & Inst. Code, § 6603, subdivision (c)(1).) Thus, the district attorney’s retained expert is not allowed to review any of Mr. Smith’s treatment records¹⁰ (and may not be provided with access to those portions of the DSH evaluators’ reports which include information from Mr. Smith’s treatment records¹¹).

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¹⁰ DSH has also taken this position. For example, in a declaration under penalty of perjury and dated February 25, 2015, Sophie Cabrera, the Chief of the Department of State Hospital’s Forensic Services, stated “only evaluators designated by DSH for a specific case should be permitted to conduct an evaluation or testify for the [district attorney].”

¹¹ Mr. Smith asserts section 5328 prohibits the DSH evaluators from including in their written reports confidential information from Mr. Smith’s treatment records.

II. SECTION 5328 DOES NOT PERMIT THE DISCLOSURE OF AN ALLEGED SVP'S TREATMENT RECORDS TO THE DISTRICT ATTORNEY, EXCEPT TO THE EXTENT SUCH INFORMATION IS CONTAINED IN AN UPDATED OR REPLACEMENT MENTAL EVALUATION.

A. The SVP Act mandates the dissemination of Mr. Smith's CDCR records to the district attorney.

As discussed in section I, if the two initial evaluators agree that the prisoner is an SVP (Welf. & Inst. Code, § 6601, subdivision (d).) or the two independent professionals agree that the prisoner is an SVP (Welf. & Inst. Code, § 6601, subdivision (f).), DSH must request a commitment petition from the district attorney. In addition, DSH must provide the district attorney with “[c]opies of the evaluation reports and any other supporting documents. (Welf. & Inst. Code, § 6601, subdivisions (d) and (h).) Thus, the SVP Act expressly mandates the dissemination of Mr. Smith's CDCR records to the district attorney.¹²

B. Notably absent from the SVP Act is any provision authorizing the dissemination of Mr. Smith's treatment records to the district attorney.

Although the SVP Act expressly mandates the dissemination of Mr. Smith's CDCR records to the district attorney (Welf. & Inst. Code, § 6601, subdivisions (d) and (h)), the SVP Act contains no provision authorizing dissemination of Mr. Smith's treatment records to the district attorney.

After this court granted review in *Albertson* “to determine whether the district attorney was entitled to updated interviews and evaluations and

¹² The disclosures under sections 6601(d) and (h) may also be subject to limitations. For example, disclosure of CDCR therapy records may be prohibited by the psychotherapist-patient privilege (See *People v. Gonzales* (2013) 56 Cal.4th 353, 379.) However, this court granted review only on the issue of whether section 5328 prohibits the disclosure of an alleged SVP's treatment records.

access to treatment information, the Legislature enacted, and the Governor signed, urgency legislation amending a key provision of the SVPA, section 6603, subdivision (c).” (*Albertson v. Superior Court, supra*, 25 Cal.4th 796, 798.) This court concluded the Legislature intended through these amendments to (1) permit the district attorney to request updated or replacement evaluations, and (2) create a limited exception to section 5328’s confidentiality provisions and permit the DSH evaluators, who are appointed to conduct updated or replacement evaluations, to review an alleged SVP’s treatment records. (*Id.* at p. 804.) Notably absent from the Legislature’s amendments to the SVP Act is any provision authorizing disclosure of an alleged SVP’s treatment records to the district attorney.

C. However, the SVP Act grants the district attorney access to information from Mr. Smith’s treatment records to the extent such information is contained in an updated or replacement mental evaluation.

When the district attorney requests updated or replacement evaluations, DSH must provide a copy of the updated or replacement evaluations to the district attorney and counsel for the alleged SVP. (Welf. & Inst. Code, § 6603, subdivision (c)(1).)¹³ In *Albertson*, this court held the district attorney is granted access to information from an alleged SVP’s treatment records “to the extent such information is contained in an updated [or replacement] mental evaluation.” (*Albertson v. Superior Court, supra*, 25 Cal.4th 796, 807.) However, this exception “does not authorize disclosure of therapy records directly to the district attorney..., but rather authorizes review of such records only by the independent evaluators and grants a

¹³ If, after reading a copy of the updated or replacement evaluations, the district attorney believes the DSH evaluators committed an error in the updated or replacement evaluations, the district attorney may ask the trial court to review the evaluations for material legal error. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888.)

district attorney access to otherwise confidential treatment information concerning an alleged SVP only ‘to the extent such information is contained in an updated [or replacement] mental evaluation.’ ” (*People v. Gonzales* (2013) 56 Cal.4th 353, 379, footnote 11, citing *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 807; see also *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 380; but see *Lee v. Superior Court* (2009) 177 Cal.App.4th 1108, 1135 [“[I]n SVPA proceedings, the district attorney is automatically entitled to defendants’ medical records and treatment information under section 6603, subdivision (c)(1), and thus subpoenas to obtain such information are unnecessary.”].) Thus, the SVP Act grants the district attorney access to information from Mr. Smith’s treatment records only to the extent information from those records is contained in an updated or replacement mental evaluation.¹⁴

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¹⁴ As stated in footnote 11, Mr. Smith asserts section 5328 prohibits the DSH evaluators from including in their written reports confidential information from Mr. Smith’s treatment records.

CONCLUSION

As discussed above, section 5328 prohibits the district attorney's retained expert from reviewing Mr. Smith's treatment records. In addition, the district attorney may access information from Mr. Smith's treatment records only to the extent information from those records is contained in an updated or replacement mental evaluation.

Dated: August 18, 2015

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



MARK S. BROWN
Assistant Public Defender
Writ and Appeals


WORD COUNT CERTIFICATION

(California Rules of Court, Rules 8.204(c) and 8.520(c)(1))

I, Mark S. Brown, declare as follows:

I represent Mr. Smith in this matter pending before this court. This OPENING BRIEF ON THE MERITS was prepared in Microsoft Word, and according to that program's word count, it contains 3,771 words.

I declare under penalty of perjury the above is true and correct.
Executed on August 18, 2015, in Santa Ana, California.


MARK S. BROWN
Assistant Public Defender

DECLARATION OF SERVICE

*People of the State of California v. Orange County Superior Court;
Richard Anthony Smith, Real Party in Interest - Case No. S225562
Court of Appeal Case No. G050827; O.C. Sup. Ct. No. M-9531*

STATE OF CALIFORNIA)
)ss
COUNTY OF ORANGE)

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

That on the 18th day of August 2015, I served a copy of the **OPENING BRIEF ON THE MERITS** in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelopes were addressed (without the telephone numbers) as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 18th day of August 2015, at Santa Ana, California.



Angela Friedlander
Secretary