IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KEVIN MICHAEL REILLY,

Petitioner,

v.

ORANGE COUNTY SUPERIOR COURT,

Respondent;

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Supreme Court Case No. S202280

(Court of Appeal Case No. G046850; Orange County Superior Court Case No. M-10821)

RESPONSIVE BRIEF ON THE MERITS

OFFICE OF THE ORANGE COUNTY PUBLIC DEFENDER

FRANK OSPINO
Public Defender
JEAN WILKINSON
Chief Deputy Public Defender
SHARON PETROSINO
Senior Assistant Public Defender
MARK S. BROWN
Assistant Public Defender
State Bar No. 156849
14 Civic Center Plaza
Santa Ana, California 92701-4029
(714) 834-2144

Attorneys for Petitioner

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14 Civic Center Plaza
Santa Ana, California 92701-4029
(714) 834-2144

Attorneys for Petitioner

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QUESTION GRANTED REVIEW

Was petitioner entitled to dismissal of a petition for commitment under the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 *et seq.*) when the evaluations originally supporting the filing of the petition were conducted under an assessment protocol that was later found to constitute an invalid regulation and the results of reevaluation under a properly-adopted assessment protocol would have precluded the initial filing of the petition under Welfare and Institutions Code section 6601?

ARGUMENT SUMMARY

In *In re Ronje* (2009) 179 Cal.App.4th 509, 516-517 (*Ronje*), the court determined that the evaluations done before the SVP Petition was filed were not valid because the evaluations were conducted pursuant to an invalid standardized assessment protocol. To correct this procedural error, the *Ronje* court remanded with directions to order new evaluations under section 6601 of the Welfare and Institutions Code using a valid assessment protocol. (*Ronje* at p. 521.)[1]

Through its rulings, *Ronje* anticipated that (1) the post-*Ronje* evaluations would be valid because the doctors would use a valid assessment protocol, (2) the statutory requirement for two valid evaluations would be satisfied by the post-*Ronje* evaluations (not the invalid pre-*Ronje* evaluations), and (3) the SVP Petition would therefore be lawful because the SVP Petition would be supported by two valid post-*Ronje* evaluations. On the other hand, the SVP Petition would be unlawful (and should be dismissed) if not supported by two valid post-*Ronje* evaluations.

In Petitioner's matter, Dr. Clipson's 2008 evaluation and Dr. Webber's 2008 evaluation were not valid because the evaluations were

[1] The People did not seek review of this case.

conducted pursuant to an invalid standardized assessment protocol and may not be used to support the lawfulness of the SVP Petition. Furthermore, Dr. Clipson's 2011 evaluation is valid, but may not be used to support the lawfulness of the SVP Petition because Dr. Clipson determined that Petitioner is not an SVP. Finally, Dr. Webber's 2011 evaluation is valid, but also may not be used to support the lawfulness of the SVP Petition because Dr. Webber determined that Petitioner is not an SVP. Thus, the SVP petition should be dismissed.

PROCEDURAL HISTORY

On July 1, 2008, the Orange County District Attorney (OCDA) filed a "Petition for Recommitment as a Sexually Violent Predator" (hereinafter referred to as the "SVP Petition") under the Sexually Violent Predator Act (Welfare & Institutions Code section 6600 et seq; "SVPA" or "SVP Act").[2] This SVP Petition was assigned case # M-11860. The OCDA attached to the SVP Petition an evaluation by Dr. Clipson dated June 20, 2008, and an evaluation by Dr. Weber dated January 14, 2008.[3] For ease of reference these evaluations are referred to as "pre-*Ronje* evaluations."

On November 19, 2009, in *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*), the court ruled that Ronje had been evaluated under an invalid DMH protocol, and therefore, was entitled to new evaluations pursuant to

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

[3] Dr. Clipson and Dr. Weber both performed updated evaluations of Petitioner, pursuant to Section 6603, on August 25, 2009, and August 5, 2009, respectively. The People assert, without any basis in fact, that the 2009 evaluations were done by the doctors using the 2009 standardized assessment protocol. (Opening at pp. 14, 39-40.) In fact, the Office of Administrative Law did not approve the 2009 standardized assessment protocol until September 14, 2009.

section 6601, using a valid assessment protocol. Accordingly, the *Ronje* court "remanded with directions to (1) order new evaluations under section 6601 using a valid assessment protocol, and (2) conduct another probable cause hearing under section 6602, subdivision (a) based on those new evaluations." (*Ronje* at p. 521.)

In response to the *Ronje* ruling, on November 19, 2010, Judge Marion ordered that new evaluations be conducted pursuant to section 6601 and expressly rejected the "People's request to use updated evaluations instead of new evaluations..." Furthermore, Judge Marion ordered that the doctors conduct the new evaluations by using a valid standardized assessment protocol. Finally, Judge Marion ordered that the probable cause hearing be conducted based on these new evaluations.[4]

After Judge Marion's order, the State Department of Mental Health (DMH) re-appointed Dr. Clipson and Dr. Weber to evaluate Petitioner as an SVP. In a report dated February 26, 2011, Dr. Clipson opined that Petitioner does not meet the criteria for an SVP. In a report dated February 25, 2011, Dr. Weber opined that Petitioner does not meet the criteria for an SVP. For ease of reference these evaluations are referred to as "post-*Ronje* evaluations."

On March 17, 2011, Petitioner filed a Plea in Abatement.[5] On April 15, 2011, Judge King denied Petitioner's motions.

On April 20, 2011, Petitioner filed a Petition for a Writ of Mandate / Prohibition in the Court of Appeal, Fourth Appellate District, Division Three, case number G045118. The petition was granted on March 28, 2012.

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[4] The People did not seek review of Judge Marion's orders.

[5] In the Supplemental Points and Authorities, Petitioner requested that the Plea in Abatement also be considered a demurrer pursuant to section 430.10(a) of the Code of Civil Procedure and a non-statutory motion to dismiss.

On May 7, 2012, the People filed a Petition for Review in this Honorable Court. On June 13, 2012, this Honorable Court granted the petition. On June 20, 2012, this Honorable Court designated this case the lead case and deferred further action on ten other pending matters.

ARGUMENT

I. THE SVPA INCLUDES A "TWO-VALID-EVALUATIONS" PROCEDURAL SAFEGUARD.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) To evaluate due process claims, the United States Supreme Court in *Mathews v. Eldridge* (1976) 424 U.S. 319, 335 (*Mathews*), articulated a three-factor test that considers (1) the private interest that is affected by the state action; (2) the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value, if any, of additional or other **procedural safeguards**; and (3) the state's interest, including the function involved, and the fiscal and administrative burdens that the additional or other procedural requirement would raise. The *Mathews* test applies to involuntary civil commitments. (*Addington v. Texas* (1979) 441 U.S. 418, 425; *In re Ronje* (2009) 179 Cal.App.4th 509, 519.) "It is of course within the power of the State to regulate procedures under which its laws are carried out..." (*Speiser v. Randall* (1958) 357 U.S. 513, 523.)

To conform with the requirements of Due Process, the legislature has included many procedural safeguards in the SVPA. For example, the SVP Act states that a petition to commit a person as an SVP may be filed only "if the individual was in custody pursuant to his or her determinate

prison term, parole revocation term, or a hold placed pursuant to Section 6601.3, at the time the petition is filed." (Welf. & Inst. Code, § 6601, subd. (a)(2); see also *In re Lucas* (2012) 53 Cal. 4th 839, 843.)

If the individual is lawfully in custody and the Secretary of the Department of Corrections and Rehabilitation (CDCR) determines that a prisoner may be a sexually violent predator (SVP), the Secretary refers the prisoner for an initial screening before the prisoner's scheduled release date. (Welf. & Inst. Code, § 6601(a) & (b).) If, as a result of this initial screening, it is determined that the prisoner is likely to be an SVP, the Secretary refers the prisoner to the State Department of Mental Health (DMH) for a full evaluation as an SVP. (Welf. & Inst. Code, § 6601(b).)

If a prisoner is referred to DMH, DMH must appoint two psychiatrists or psychologists to evaluate the prisoner. (Welf. & Inst. Code, § 6601(d).) If the two initial evaluators agree that the prisoner is an SVP, DMH must request a commitment petition from the District Attorney. (Welf. & Inst. Code, § 6601(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(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(f).) Whether appointed by DMH as initial evaluators or independent professionals, the doctors are required to evaluate the prisoner "in accordance with a **standardized assessment protocol**, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator 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." (Welf. & Inst. Code, § 6601(c), emphasis added.) Thus, the procedural safeguard described in this paragraph has the following two components: (1) the doctors must evaluate the prisoner in accordance with a standardized assessment protocol, and (2) the two doctors must agree that the prisoner is an SVP. For ease of reference, this procedural safeguard is referred to as "Two-Valid-Evaluations" procedural safeguard.

"The evaluations are a prerequisite to the filing of the petition and the evaluations serve as a **procedural safeguard** to prevent meritless petitions from reaching trial [citations]." (*In re Wright* (2005) 128 Cal. App. 4th 663, 672, emphasis added; see also *People v. Superior Court (Ghilotti)* (2002) 27 Cal. 4th 888, 894 ["[A] petition seeking the commitment or recommitment of a person as a sexually violent predator cannot be filed unless two mental health professionals, specifically designated by [DMH] under statutory procedures to evaluate the person for this purpose, have agreed, by correct application of the statutory standards, that the person [is an SVP]."] and at p. 909 ["[W]e, like the courts below, conclude that a petition for commitment or recommitment may not be filed unless two evaluators, appointed under the procedures specified in section 6601, subdivisions (d) and (e), have concurred that the person currently meets the criteria for commitment under the SVPA."]; see also *People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1130 ["The discrete and preliminary role the evaluations play in the statutory scheme does not in any sense undermine their importance or suggest the People may ignore the protection they provide. (citations omitted.) When the required evaluations have not been performed, an alleged SVP may bring that fact to the trial court's attention and obtain appropriate relief."].)

People's Arguments

Despite the statutory mandate and case precedent, the People ask this Honorable Court to ignore and bypass the "Two-Valid-Evaluations" procedural safeguard. According to the People, "the only prerequisite to the filing a [*sic*] petition and then proceeding to judicial review is that two experts agree at the pre-filing stage that the person meets the commitment criteria." (Opening at p. 6, 23.) The People further assert: "After the screening function of the pre-filing evaluations is fulfilled and a petition is filed, evaluators play a relevant but less integral role in the judicial proceedings that follow. Indeed the People need not even allege the evaluations or attach them to the petition." (Opening at pp. 6, 30.) The People's arguments suffer from a fatal flaw; they ignore and bypass the "Two-Valid-Evaluations" procedural safeguard written into the SVP Act.

Likewise, in *Davenport v. Superior Court* (2012) 202 Cal.App.4th 665, 670 (*Davenport*), the First Appellate District ignored and bypassed the "Two-Valid-Evaluations" procedural safeguard. According to the court in *Davenport*, "[a]fter the petition has been filed, the People's burden is not to prove two evaluations exist, but to prove the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior." (*Davenport* at p. 670.) The *Davenport* court further explains that once the petition has been filed, "the question of whether a person is a sexually violent predator should be left to the trier of fact unless the prosecuting attorney is satisfied that proceedings should be abandoned." (*Davenport* at p. 672.) Like the People's arguments above, the *Davenport* ruling is wrong because it ignores and bypasses the "Two-Valid-Evaluations" procedural safeguard.

To further illustrate the importance of the "Two-Valid-Evaluations" procedural safeguard, and the problems that arise if it is ignored or bypassed, consider the following hypothetical:

> The DMH appointed two doctors to evaluate John Smith. The two doctors concurred that John Smith was not an SVP. The DA filed the SVP petition anyway. At the probable cause hearing, the DA called a hired expert, Dr. Jekyll, to opine that John Smith is an SVP. Based solely on the testimony of Dr. Jekyll, the trial court found probable cause to believe that John Smith was an SVP.

The hypothetical demonstrates the importance of the "Two-Valid-Evaluations" procedural safeguard. Without it, John Smith did not have an opportunity to point out that the SVP Petition was never supported by two concurring evaluations done in accordance with a standardized assessment protocol. This result is contrary to the express language of the SVP Act and the holdings in the cases cited in this section I.

The hypothetical also demonstrates that the People's argument and the *Davenport* ruling effectively eliminate the "Two-Valid-Evaluations" procedural safeguard. According to the People's argument and the *Davenport* ruling, the first procedural safeguard available to John Smith is the probable cause hearing. (Opening at pp. 6, 23, 30, 43-44; *Davenport* at pp. 672, 674 and 676.) And, according to the People's argument and the *Davenport* ruling, the DA need not prove that two concurring evaluations exist at that probable cause hearing. (Opening at pp. 6, 23, 30, 43-44; *Davenport* at p. 671.) Thus, John Smith did not have an opportunity to point out that the SVP Petition was never supported by two concurring evaluations done in accordance with a standardized assessment protocol. Again, this result is contrary to the express language of the SVP Act and the holdings in the cases cited in this section I.

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II. THE 2007 SAP HAS NEVER BEEN PROMULGATED AND IS THEREFORE AN "UNDERGROUND REGULATION."

In *Ronje*, the Fourth Appellate District correctly determined that the 2007 version of the Clinical Evaluator Handbook and Standardized Assessment Protocol (2007 SAP)[6] was a regulation and had not been properly promulgated:

> To implement section 6601, the DMH has over the years published a clinical evaluator handbook and standardized assessment protocol for its SVP evaluators. In August 2008, the [Office of Administrative Law (OAL)] issued a determination that various challenged portions of the 2007 version of the Clinical Evaluator Handbook and Standardized Assessment Protocol met the statutory definition of a regulation and, therefore, should have been adopted pursuant to the Administrative Procedure Act (APA), Government Code section 11340.5. (2008 OAL Determination No. 19 (Aug. 15, 2008) p. 1 <http: //www.oal.ca.gov/ Determinations_Issued_in_2008.htm> [as of Nov. 19, 2009].) The OAL determined that, as such, the protocol constituted an underground regulation as defined in California Code of Regulations, title 1, section 250. (2008 OAL Determination No. 19, *supra*, at p. 13.) A regulation enacted in violation of the APA is invalid. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 340.)

(*Ronje* at p. 515.)

The *Ronje* court went on to correctly hold that the "OAL's determination the 2007 assessment protocol is an underground regulation, though not binding on us, is 'entitled to due deference.' (citation omitted.)

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[6] The SVPA commitment petition against Ronje was filed in March 2006, so his evaluations likely were conducted in accordance with the 2004 assessment protocol. The *Ronje* court found that "the 2004 assessment protocol is substantially the same as the 2007 version determined by the OAL to constitute an invalid regulation. The relevant portions of the 2004 version differ only in a few, nonsubstantive respects from the corresponding portions in the 2007 version that were the basis for 2008 OAL Determination No. 19." (*Ronje* at p. 516.)

... [¶] We conclude 2008 OAL Determination No. 19 was correct under *Tidewater*... [¶] As an underground regulation, the 2007 standardized assessment protocol is invalid. (citation omitted.)" (*Ronje* at pp. 516-517.)

In *Davenport*, the First Appellate District held: "Given that the 2007 protocol has been superseded and that we would reach the same result regardless of its administrative validity or invalidity, we shall also proceed on the assumption the protocol was invalid." (*Davenport* at p. 670.)

People's Arguments

In its Opening Brief, the People appear to concede that the 2007 SAP was a regulation that had not been properly promulgated. (Opening at pp. 9-12.) In its Opening Brief, the People also note: "The People did not challenge the OAL determination." (Opening at p. 10, footnote 8.) In addition, the People did not seek review of any portion of the *Ronje* decision, including the holding that the 2007 SAP was a regulation that had not been properly promulgated.

Furthermore, the People appear to concede that, as an underground regulation, the 2007 SAP is invalid. (Opening at pp. 24, 30.) The People correctly acknowledge that "the remedy to cure a protocol not ratified by the APA is an APA-compliant protocol." (Opening at pp. 24, 30.) In addition, the People did not seek review of any portion of the *Ronje* decision, including the holding that the 2007 SAP was invalid.

Finally, the People assert, without any basis in fact, that there are no substantive defects in the 2007 SAP.[7] (Opening at p. 42.) First, the 2007 SAP was an underground regulation. Thus, the SVP community was never given an opportunity to identify the substantive defects in the

[7] This issue was not presented by the petition for review and should not be considered. (Cal. Rules of Court, rule 8.520(b)(3); *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal. 4th 713, 726.)

2007 SAP. (See, for example, *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 569 ["The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny."].) Second, DMH never promulgated the 2007 SAP. Instead DMH replaced the 2007 SAP, which was 68 pages in length and contained detailed instructions for the evaluators, with the 2009 version of the Clinical Evaluator Handbook and Standardized Assessment Protocol (2009 SAP). The 2009 SAP is 6 pages in length and merely consists of a restatement of the statutory and case law on the issue of SVP evaluations.

III. SINCE THE 2007 SAP IS INVALID, THE PRE-*RONJE* EVALUATIONS ARE INVALID.

Because the pre-*Ronje* evaluations were not done in accordance with a valid standardized assessment protocol, the *Ronje* court determined that the pre-*Ronje* evaluations are invalid. (*Ronje* at p. 521.) "Use of the invalid assessment protocol therefore constitutes an error or irregularity in the SVPA proceedings." (*Ronje* at pp. 516-517.) Thus, the *Ronje* court remanded with directions to order new evaluations of Ronje under section 6601 using a valid assessment protocol..." (*Ronje* at p. 521.) The People did not seek review of the *Ronje* decision.

In response to the *Ronje* ruling, on November 19, 2010, Judge Marion determined that, because the pre-*Ronje* evaluations were not done in accordance with a valid standardized assessment protocol, the pre-*Ronje* evaluations are invalid for 21 pending SVP matters, including

Petitioner's pending SVP matter.[8] The People did not seek review of Judge Marion's determination in any of these 21 pending SVP matters.[9]

People's Arguments

In its Opening Brief, the People appear to concede that, because the pre-*Ronje* evaluations were not done in accordance with a valid standardized assessment protocol, the pre-*Ronje* evaluations are invalid. (Opening at p. 14.) However, the People assert: "Regardless, agreement the person meets commitment criteria is not required because the evaluations and conclusions within are merely collateral to the continued judicial proceedings." (Opening at p. 15.) Once again, the People improperly ask this Honorable Court to ignore and bypass the "Two-Valid-Evaluations" procedural safeguard.

IV. NEW EVALUATIONS DONE UNDER SECTION 6601 USING A VALID ASSESSMENT PROTOCOL ARE THE APPROPRIATE REMEDY.

As discussed in Section III above, the *Ronje* court found that the pre-*Ronje* evaluations were invalid because the evaluators used an invalid assessment protocol. The *Ronje* court then determined that the appropriate remedy was to order new evaluations under section 6601 using a valid

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[8] On November 23, 2010, Judge Donahue made the exact same determination for 17 other pending SVP matters.

[9] The People also did not seek review of Judge Donahue's determination in any of the 17 pending SVP matters for which he made a determination.

assessment protocol. (*Ronje* at p. 521.) The People did not seek review of *Ronje*.[10]

In response to the *Ronje* ruling, on November 19, 2010, Judge Marion ordered that new evaluations be conducted pursuant to section 6601 of the Welfare and Institutions Code for 21 pending SVP matters, including Petitioner's pending SVP matter.[11] The People did not seek review of Judge Marion's orders in any of these 21 pending SVP matters.[12]

New evaluations are the appropriate remedy.

Since the pre-*Ronje* evaluations were invalid because the evaluators used an invalid assessment protocol, Mr. Ronje requested a dismissal of the SVP Petition or new evaluations conducted under a valid assessment protocol. (*Ronje* at p. 518.) The *Ronje* court correctly determined that "[t]he decision which remedy to offer depends on whether use of evaluations based on an invalid assessment protocol deprived the trial court of fundamental jurisdiction." (*Ronje* at p. 518.) The *Ronje* court went on to correctly hold:

> The term "jurisdictional in the fundamental sense" means the "legal power to hear and determine a cause." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.) "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an

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[10] *Ronje* not only required the expenditure of time and money to perform new evaluations for Mr. Ronje, but also for nearly every pending SVP matter in the state.

[11] On November 23, 2010, Judge Donahue issued the exact same orders for 17 other pending SVP matters.

[12] The People also did not seek review of Judge Donahue's orders in any of the 17 pending SVP matters for which he issued orders.

absence of authority over the subject matter or the parties." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) In *Glenn*, we concluded that use of the evaluations conducted pursuant to the invalid assessment protocol did not deprive the trial court of the legal power to hear and determine the subsequently filed SVPA commitment petition, and therefore was not jurisdictional in a fundamental sense. (*People v. Glenn* (2009) 178 Cal.App.4th 778, 786, 807.)[13] Use of the evaluations based on the invalid assessment protocol, though erroneous, does not deprive the trial court of fundamental jurisdiction over the SVPA commitment petition. The trial court has the power to hear the petition notwithstanding the error in using the invalid assessment protocol. Dismissal therefore is not the appropriate remedy.

Instead, the proper remedy is to cure the underlying error. In *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 894, 905 (*Ghilotti*), the California Supreme Court concluded an SVPA commitment or recommitment petition cannot be filed unless, pursuant to section 6601, two mental health professionals agree the person qualifies as an SVP. The trial court may review an evaluator's assessment report for legal error and, if the court finds material legal error on the face of the report, must direct that the "erring evaluator prepare a new or corrected report applying correct legal standards." (*Ghilotti, supra*, 27 Cal.4th at p. 895.) The Supreme Court remanded the matter to the Court of Appeal with directions to issue a writ of mandamus vacating the trial court's order dismissing the recommitment petition and to remand the matter to the trial court. (*Ibid.*) On remand, the trial court was directed to review the designated evaluators' reports for material legal error and, if necessary, direct the evaluators to prepare new or corrected reports under the correct standard. (*Id.* at pp. 895, 929.)

In *People v. Superior Court* (*Preciado*) (2001) 87 Cal.App.4th 1122, 1127–1128, the Court of Appeal rejected the argument that the failure to obtain two evaluations before

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[13] On May 20, 2010, this Honorable Court transferred this case to the Court of Appeal, Fourth Appellate District, Division Three with directions to vacate its decision and to reconsider the cause in light of *People v. McKee* (2010) 47 Cal.4th 1172. (Cal. Rules of Court, rule 8.528(d).) Therefore, this case is no longer citable.

> the initial petition was filed deprived the trial court of jurisdiction to proceed on an SVPA commitment petition. The requirement of evaluations, the court reasoned, is not one affecting disposition on the merits but is a collateral procedural condition "designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so." (87 Cal.App.4th at p. 1130.) "In general, where a defect impairing a litigant's right to proceed existed at the time a complaint was filed but has been cured by the time the defense is raised, the defect will be ignored." (*Id.* at p. 1128, citing 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 1058, p. 508.) As *People v. Superior Court* (*Preciado*) and *Ghilotti* suggest, the proper remedy here is to remand the matter to the trial court with directions to (1) order new evaluations of Ronje using a valid assessment protocol, and (2) conduct another probable cause hearing under section 6602, subdivision (a) based on those new evaluations.

(*Ronje* at pp. 518-519.)

People's Arguments

In its Opening Brief, the People state: "Although *Ronje* correctly determined use of an invalid assessment standardized protocol during the pre-filing SVPA evaluation did not divest the trial court of jurisdiction over the petition, *Ronje* also concluded that evaluations conducted under the invalid protocol constituted an error or irregularity in the SVPA commitment proceeding itself. (citation omitted) *Ronje* then held the remedy was to cure the defective evaluation..." (Opening at p. 12.) The People then leap to the erroneous conclusion that: "Relying on the remedy it had crafted in *Ronje*, the appellate court essentially ruled that because the agency blundered, the sexual predator must necessarily go free." (Opening at pp. 15, 28-30.) In point of fact, *Ronje* and the appellate court held exactly the opposite. Rather than order a dismissal because the agency (DMH)

blundered, *Ronje* ordered DMH to correct its blunder and submit new evaluations after the blunder is corrected.

Next, the People improperly ask this Honorable Court to completely ignore DMH's blunder, waive compliance with the "Two-Valid-Evaluations" procedural safeguard, determine that new valid evaluations were improperly ordered by *Ronje*,[14] and ignore the determination by Dr. Clipson and Dr. Webber that Petitioner is not an SVP. Why? Because Petitioner did not first prove that the use of an invalid assessment protocol was "a material error that undermined the conclusion that the person met commitment criteria." (Opening at pp. 14, 32-40; see also *Davenport* at p. 673.)[15] The People's position is untenable. This Honorable Court should not ignore DMH's blunder unless the People first prove that the blunder was immaterial, which may be difficult given that Dr. Clipson and Dr. Webber now opine that Petitioner is not an SVP. This Honorable Court should not waive compliance with the "Two-Valid-Evaluations" procedural safeguard under any circumstance. This Honorable Court should, in accordance with the *Ronje* ruling, hold that valid evaluations are always required by the SVP Act. Finally, this Honorable Court should not ignore the determination by Dr. Clipson and Dr. Webber that Petitioner is not an SVP.

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[14] This issue was not presented by the petition for review and should not be considered. (Cal. Rules of Court, rule 8.520(b)(3); *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal. 4th 713, 726.)

[15] In support of its arguments in the Opening Brief, the People also cite *Macy v. Superior Court* (2012) 206 Cal.App.4th 1393. However, on September 12, 2012, this Honorable Court granted a petition for review and deferred further action pending consideration and disposition of a related issue in *Reilly v. Superior Court*, S202280 (see Cal. Rules of Court, rule 8.512(d)(2)). Therefore, *Macy* is no longer citable.

V. PETITIONER MAY TIMELY CHALLENGE THE VALIDITY OF THE SVP PETITION GIVEN THAT THE TWO POST-*RONJE* EVALUATORS HAVE OPINED THAT PETITIONER DOES NOT MEET THE CRITERIA FOR AN SVP.

The courts have made it clear that Petitioner may challenge the validity of the SVP Petition when the two evaluators appointed by DMH do not agree that Petitioner is an SVP at any time during the time period beginning on the first hearing date for the SVP Petition and ending on the date of the probable cause hearing. (*In re Wright* (2005) 128 Cal. App. 4th 663; *People v. Superior Court (Ghilotti)* (2002) 27 Cal. 4th 888; *People v. Superior Court (Preciado)* (2001) 87 Cal. App. 4th 1122; *People v. Superior Court (Gary)* (2000) 85 Cal. App. 4th 207; *Peters v. Superior Court* (2000) 79 Cal. App. 4th 845; *Butler v. Superior Court* (2000) 78 Cal. App. 4th 1171.)

People's Arguments

In its Opening Brief, the People mistakenly assert that Petitioner may only challenge the validity of an SVP Petition at the probable cause hearing (Opening at p. 6.) and at the trial (Opening at p. 6.). The People are simply wrong. The courts have made it clear that Petitioner may challenge the validity of the SVP Petition when the two evaluators appointed by DMH do not agree that Petitioner is an SVP at any time during the time period beginning on the first hearing date for the SVP Petition and ending on the date of the probable cause hearing.

In *Butler*, a jury found that Petitioners Butler and Cheek were an SVP. (*Butler v. Superior Court* (2000) 78 Cal. App. 4th 1171, 1174.) Both were committed to the Department of Mental Health for treatment for a period of two years. Before the expiration of those two-year commitments

ended, the People filed a petition to continue the commitments under the SVPA. Each petition was supported by one evaluation. At the probable cause hearing, each of the petitioners moved to dismiss the petition on the grounds that the petition was not supported by two evaluations concurring that petitioner is an SVP. The trial court denied the motions to dismiss. The appellate court reversed and ordered the dismissal of the petitions.

In *Peters*, the court found that Peters was an SVP. (*Peters v. Superior Court* (2000) 79 Cal. App. 4th 845, 847-851.) Peters was committed to the Department of Mental Health for treatment for a period of two years. Before the expiration of the two-year commitment ended, the People filed a petition to continue the commitment under the SVPA. Attached to the petition was a single evaluation by Dale Arnold, Ph.D.[16] Peters moved to dismiss the petition on the grounds that the petition was not supported by two evaluations concurring that petitioner is an SVP. The trial court denied the motion to dismiss. The appellate court reversed and ordered the dismissal of the petition.

In *Gary*, a jury found that Gary was an SVP. (*People v. Superior Court (Gary)* (2000) 85 Cal. App. 4th 207, 211-212.) Gary was committed to the Department of Mental Health for treatment for a period of two years. Gary's original commitment under the SVPA was scheduled to expire on December 12, 1999. On December 9, 1999, the People filed a petition to continue his commitment under the SVPA. The petition was supported by two evaluations. Dawn Starr, Ph.D, concluded that Gary was no longer an

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[16] DMH had appointed a second psychologist, Dr. Charles Jackson, Ph.D. He concluded that Peters did not meet the SVP criteria, and submitted his tentative report to DMH. Before Dr. Jackson could complete his report, the DMH informed him that it no longer wished to use his services. Nonetheless, Dr. Jackson completed his report. DMH discarded Dr. Jackson's report without informing Peters. (*Peters v. Superior Court* (2000) 79 Cal. App. 4th 845, 848.)

SVP. Robert M. Owen, Ph.D, concluded that Gary was still an SVP. On December 10, 1999, Gary argued that the petition should not have been filed because it was not supported by two evaluations concurring that Gary is an SVP. The trial court agreed[17] and dismissed the petition on the motion of Gary's counsel. The appellate court upheld the dismissal of the petition and found that "the [trial] court correctly ruled the petition failed to comply with the statute." (*Id.* at p. 219.)

In *Preciado*, a jury found that Preciado was an SVP. (*People v. Superior Court (Preciado)* (2001) 87 Cal. App. 4th 1122, 1125.) Preciado was committed to the Department of Mental Health for treatment for a period of two years. Preciado's original commitment under the SVPA was scheduled to expire on January 12, 2000. On November 16, 1999, the People filed a petition to continue his commitment under the SVPA. Attached as an exhibit to the petition was an evaluation of Preciado prepared by Dawn Starr, Ph.D. Dr. Starr concluded Preciado continued to suffer from a diagnosable mental disorder that made him likely to engage in sexually violent criminal behavior. On January 5, 2000, a second evaluation was conducted by Jill Nelson, Ph.D. Dr. Nelson also concluded Preciado continued to meet the criteria of an SVP. On April 20, 2000, the People filed an amended petition. Attached to the amended petition was the original evaluation conducted by Dr. Starr and the later evaluation conducted by Dr. Nelson. Preciado was arraigned on the amended petition on April 28, 2000. Drs. Nelson and Starr testified at the probable cause hearing. On May 23, 2000, at the conclusion of the probable cause hearing, Preciado moved to dismiss the initial petition on the grounds that the

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[17] The trial court also noted that DMH failed to appoint the two independent evaluators required by section 6601(e). (*People v. Superior Court (Gary)* (2000) 85 Cal. App. 4th 207, 211.)

People's failure to obtain two evaluations prior to filing the initial petition deprived the trial court of jurisdiction to proceed on the initial petition.[18]

The *Preciado* court first noted that the SVPA does not require the People to attach the evaluations to the petition. (*People v. Superior Court (Preciado)* (2001) 87 Cal. App. 4th 1122, 1128.) The court went on to note, however, that the SVP Petition was, at the time it was filed, "subject to attack because the DMH had not yet obtained the two evaluations required by section 6601, subdivision (d) (citations omitted.) Plainly, under *Butler* and *Peters* the People did not yet have the right to bring an SVPA petition against Preciado. However, this defect was not one going to the substantive validity of the complaint, but rather was merely in the nature of a plea in abatement, by which a defendant may argue that for collateral reasons a complaint should not proceed. (citations omitted.) In general, where a defect impairing a litigant's right to proceed existed at the time a complaint was filed but has been cured by the time the defense is raised, the defect will be ignored. (citations omitted.)" (*People v. Superior Court (Preciado)* (2001) 87 Cal. App. 4th 1122, 1125, emphasis added.) The Preciado court further noted that "[w]hen the required evaluations have not been performed, an alleged SVP may bring that fact to the trial court's attention and obtain appropriate relief." (*Id.* at p. 1130, emphasis added.) The *Preciado* court ultimately held that, since the defect had been cured by the time that Preciado filed his motion to dismiss, his motion must be denied. (*Id.* at p. 1130.) Thus, the *Preciado* court not only acknowledged that Petitioner has the right to challenge the validity of the SVP Petition, but also made it clear that time is of the essence in making that challenge.

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[18] Preciado also moved to dismiss the amended petition on the grounds that the two evaluations were not completed prior to the expiration of his commitment under the SVPA. (*People v. Superior Court (Preciado)* (2001) 87 Cal. App. 4th 1122, 1125.)

In *Ghilotti*, a jury found that Ghilotti was an SVP. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal. 4th 888, 896-900.) Ghilotti's commitment under the SVPA was scheduled to expire on December 1, 2001. Psychologists designated by DMH conducted formal evaluations of Ghilotti's current condition to determine whether he should be recommitted for an additional SVPA term, or should instead be released without conditions. These evaluators ultimately concluded that Ghilotti no longer meets the statutory criteria for commitment. DMH disagreed with the designated evaluators' recommendations. On November 9, 2001, DMH wrote to the District Attorney, asking her to file a superior court petition seeking Ghilotti's recommitment. The district attorney did so. Attached to the petition was a letter from DMH, which expressed disagreement with the evaluators' conclusions and indicated further concern that, by correct statutory criteria, the evaluators' reports actually supported Ghilotti's recommitment. Also attached to the petition were declarations from hospital psychiatrists urging that Ghilotti is not yet suitable for unsupervised release. On November 29, 2001, Ghilotti filed a written response, which challenged the legal validity of the 2001 recommitment petition and asked that the recommitment petition be dismissed. On that same day, the trial court conducted a hearing on the matter and provided the district attorney with an additional day to determine if DMH wanted to modify its position. On November 30, 2001, the trial court rejected the district attorney's sole argument that DMH may request a petition without regard to the contrary recommendations of the designated evaluators. Accordingly, the trial court dismissed the petition and ordered Ghilotti's release. The Court of Appeal summarily denied relief, making clear it agreed with the trial court that DMH cannot simply overrule or disregard the designated evaluators' recommendations against commitment.

The *Ghilotti* court first noted that "[i]n the case before us, questions have arisen whether one or more of the designated evaluators, lacking guidance as to the meaning of the statutory criteria, may have understood them inaccurately, and thus committed legal error, when reaching conclusions that Ghilotti does not qualify for recommitment under the SVPA. We must therefore determine the means of resolving that issue. ¶ The SVPA contains no express provision for judicial review of the reports of designated evaluators to determine whether they are infected with legal error. It appears to be an issue of first impression whether a court entertaining a petition for an involuntary civil commitment has authority to review for legal error the expert evaluations which are a prerequisite to the filing of such a petition. Under the SVPA, however, an affirmative conclusion is inherent in the statutory scheme, and in the nature of the judicial power." (*People v. Superior Court (Ghilotti)* (2002) 27 Cal. 4th 888, 910.) Thus, the *Ghilotti* court fashioned a remedy. More specifically, the court held the district attorney may file the petition despite the lack of concurrence of the two evaluators. (*Id.* at p. 912.) "The person named in the petition may then file a pleading challenging the validity of the petition on grounds that it is not supported by the concurrence of two evaluators under section 6601, subdivisions (d) through (f). In response, the petitioning authorities may defend the petition by asserting that one or more nonconcurring reports are infected by legal error." (*Id.* at pp. 912-913.)

In *Wright*, DMH appointed two doctors who disagreed on whether Wright was an SVP. (*In re Wright* (2005) 128 Cal. App. 4th 663, 668-669.) DMH appointed two more doctors, including Dr. Jackson, who agreed that Wright was an SVP. The trial court found probable cause at the conclusion of the probable cause hearing. A jury subsequently concluded that Wright was an SVP. After the jury verdict, it was determined that Dr. Jackson

lacked the qualifications required by the SVP Act. Wright filed a petition for habeas corpus. The *Wright* court first noted that "the evaluations play an important role in the statutory scheme and appropriate relief may be obtained after bringing any defect in the evaluations to the trial court's attention. (*Preciado*, *supra*, 87 Cal.App.4th at p. 1130.) For example, an individual could challenge the petition via a motion to dismiss at the time of the probable cause hearing and, assuming this motion is denied, seek review via a writ of habeas corpus." (*Id.* at pp. 672-673.) The *Wright* court further noted that, since respondent had not raised the defect earlier, "reversal is not necessary unless the individual can show that he or she was denied a fair trial or had otherwise suffered prejudice." (*Id.* at p. 673.) The *Wright* court ultimately held that, since respondent failed to make that showing, he was not entitled to a reversal. (*Id.* at pp. 673-674.) Thus, like the *Preciado* court, the *Wright* court not only acknowledged that Petitioner has the right to challenge the validity of the SVP Petition, but also made it clear that time is of the essence in making that challenge.

VI. PETITIONER USED THE CORRECT PROCEDURE(S) TO CHALLENGE THE VALIDITY OF THE SVP PETITION.

The courts have made it clear that (1) two doctor's evaluations are a prerequisite to the filing of an SVP Petition, and (2) Petitioner may challenge the validity of an SVP Petition when the two evaluators appointed by DMH do not agree that Petitioner is an SVP. The courts have referred to the motions as a "plea in abatement," a "motion to dismiss" or a "pleading challenging the validity of the petition," but have not otherwise provided any procedural framework. (*In re Wright* (2005) 128 Cal. App. 4th 663; *People v. Superior Court (Ghilotti)* (2002) 27 Cal. 4th 888; *People*

v. Superior Court (Preciado) (2001) 87 Cal. App. 4th 1122; *People v. Superior Court (Gary)* (2000) 85 Cal. App. 4th 207; *Peters v. Superior Court* (2000) 79 Cal. App. 4th 845; *Butler v. Superior Court* (2000) 78 Cal. App. 4th 1171.)

People's Arguments

In its Opening Brief, the People mistakenly assert that Petitioner may only challenge the validity of an SVP Petition at the probable cause hearing (Opening at p. 6.) and at the trial (Opening at p 6.). The People are simply wrong. Although the courts have not been clear about the specific procedures to use, the courts have made it clear that Petitioner may challenge the validity of an SVP Petition before the probable cause hearing.

In *Butler*, at the conclusion of the probable cause hearing, Butler's counsel "moved to dismiss the petition for recommitment. (*Butler v. Superior Court* (2000) 78 Cal. App. 4th 1171, 1178.) Likewise, at the conclusion of the probable cause hearing, Cheek's counsel "argued that the trial court should dismiss the petition..." (*Ibid.*)

In *Peters*, it appears that sometime before the probable cause hearing, "Peters moved respondent court to dismiss the petition. He asserted that the new petition was defective in that the evaluation was made by only a single health evaluator." (*Peters v. Superior Court* (2000) 79 Cal. App. 4th 845, 848-51.)

In *Gary*, at the arraignment, the trial court "noted that pursuant to section 6601, subdivision (d), the petition should not have been filed because it was not supported by two evaluations concurring that Gary is an SVP... The court then dismissed the petition on the motion of Gary's counsel." (*People v. Superior Court (Gary)* (2000) 85 Cal. App. 4th 207, 212.)

In *Preciado*, the court held "[t]he discrete and preliminary role the evaluations play in the statutory scheme does not in any sense undermine their importance or suggest the People may ignore the protection they provide. (citations omitted.) When the required evaluations have not been performed, an alleged SVP may bring that fact to the trial court's attention and obtain appropriate relief." (*People v. Superior Court (Preciado)* (2001) 87 Cal. App. 4th 1122, 1130.) Such a "defect [is] not one going to the substantive validity of the complaint, but rather [is] merely **in the nature of a plea in abatement**, by which a defendant may argue that for collateral reasons a complaint should not proceed. (citations omitted.) (*Id.* at p. 1128, emphasis added.) "In short, like many other matters subject to the principles governing pleas in abatement, the requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so." (*Id.* at p. 1130, emphasis added.)

In *Ronje*, the court held "[t]he requirement of evaluations ...is not one affecting disposition on the merits but is a collateral procedural condition 'designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so.' " (*In re Ronje* (2009) 179 Cal. App. 4th 509, 519, citing *People v. Superior Court (Preciado)* (2001) 87 Cal. App. 4th 1122, 1130.)

In *Ghilotti*, the court held that the district attorney may file the petition despite the lack of concurrence of the two evaluators. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal. 4th 888, 912.) "The person named in the petition may then file a pleading challenging the validity of the petition on grounds that it is not supported by the concurrence of two evaluators under section 6601, subdivisions (d) through (f). In response, the

petitioning authorities may defend the petition by asserting that one or more nonconcurring reports are infected by legal error." (*Id.* at pp. 912-913.)

In *Wright*, the court held "the evaluations play an important role in the statutory scheme and appropriate relief may be obtained after bringing any defect in the evaluations to the trial court's attention. (*Preciado*, *supra*, 87 Cal.App.4th at p. 1130.) For example, an individual could challenge the petition via a motion to dismiss at the time of the probable cause hearing and, assuming this motion is denied, seek review via a writ of habeas corpus." (*In re Wright* (2005) 128 Cal. App. 4th 663, 672-673.)

VII. THE "TWO-VALID-EVALUATIONS" PROCEDURAL SAFEGUARD DOES NOT APPLY AT THE PROBABLE CAUSE HEARING OR THE TRIAL.

In its Opening Brief, the People correctly point out that the People need not proffer two valid evaluations at the probable cause hearing. (Opening at p. 6.) Stated differently, the People correctly point out that the "Two-Valid-Evaluations" procedural safeguard does not apply at the probable cause hearing. Of course, this conclusion necessarily means that Petitioner may challenge the validity of the SVP Petition before the probable cause hearing. To further elucidate this issue, Petitioner again refers to the hypothetical from section I:

> At the probable cause hearing, the prosecution submitted only the written evaluation of Dr. Jekyll (because, as noted above, the People need not proffer two valid evaluations at the probable cause hearing). Based on Dr. Jekyll's evaluation alone, the trial court found probable cause to believe that John Smith is an SVP.

As the hypothetical demonstrates, John Smith never had an opportunity to point out that the SVP Petition was not supported by two valid evaluations because the "Two-Valid-Evaluations" procedural safeguard does not apply

at the probable cause hearing. Similarly, in Petitioner's matter, the People wanted to hire its own doctor, Dr. Starr, and submit the evaluation of only Dr. Starr at Petitioner's probable cause hearing. Petitioner may submit Dr. Clipson's 2011 evaluation and Dr. Webber's 2011 evaluation. However, the trial court need rely only on Dr. Starr's evaluation to find probable cause because the "Two-Valid-Evaluations" procedural safeguard does not apply at the probable cause hearing.

In its Opening Brief, the People also correctly point out that the People need not proffer two valid evaluations at the trial. (Opening at p. 6.) Stated differently, the People correctly point out that the "Two-Valid-Evaluations" procedural safeguard does not apply at the trial. Of course, this conclusion necessarily means that Petitioner may challenge the validity of the SVP Petition before the trial. To further elucidate this issue, Petitioner again refers to the hypothetical from section I:

> At the jury trial, the prosecution submitted only the testimony of Dr. Jekyll (because, as noted above, the People need not proffer the testimony of two valid evaluators at the jury trial). Based on Dr. Jekyll's testimony alone, the jury found beyond a reasonable doubt that John Smith is an SVP.

As the hypothetical demonstrates, John Smith never had an opportunity to point out that the SVP Petition was not supported by two valid evaluations because the "Two-Valid-Evaluations" procedural safeguard does not apply at the jury trial. Similarly, in Petitioner's matter, the People wanted to hire its own doctor, Dr. Starr, and submit the testimony of only Dr. Starr at Petitioner's trial. Petitioner may submit the testimony of Dr. Clipson and Dr. Webber. However, the jury need rely only on Dr. Starr's testimony to find beyond a reasonable doubt that Petitioner is an SVP.

VIII. BECAUSE THE POST-RONJE EVALUATIONS DO NOT SATISFY THE "TWO-VALID-EVALUATIONS" PROCEDURAL SAFEGUARD, THE APPELLATE COURT CORRECTLY RULED THAT THE SVP PETITION MUST BE DISMISSED.

Through its rulings, *Ronje* anticipated that (1) the post-*Ronje* evaluations would be valid because the doctors would use a valid assessment protocol, (2) the "Two-Valid-Evaluations" procedural safeguard would be satisfied by the post-*Ronje* evaluations (not the invalid pre-*Ronje* evaluations), and (3) the SVP Petition would therefore be lawful because the SVP Petition would be supported by two valid post-*Ronje* evaluations. On the other hand, the SVP Petition would be unlawful (and should be dismissed) if not supported by two valid post-*Ronje* evaluations.

In Petitioner's matter, Dr. Clipson's 2008 evaluation and Dr. Webber's 2008 evaluation were not valid because the evaluations were conducted pursuant to an invalid standardized assessment protocol and may not be used to support the lawfulness of the SVP Petition. Furthermore, Dr. Clipson's 2011 evaluation is valid, but may not be used to support the lawfulness of the SVP Petition because Dr. Clipson determined that Petitioner is not an SVP. Finally, Dr. Webber's 2011 evaluation is valid, but also may not be used to support the lawfulness of the SVP Petition because Dr. Webber determined that Petitioner is not an SVP. Since the "Two-Valid-Evaluations" procedural safeguard is not satisfied, the SVP petition should be dismissed.

People's Arguments

In its Opening Brief, the People state: "Although *Ronje* correctly determined use of an invalid assessment standardized protocol during the pre-filing SVPA evaluation did not divest the trial court of jurisdiction over

the petition, *Ronje* also concluded that evaluations conducted under the invalid protocol constituted an error or irregularity in the SVPA commitment proceeding itself. (citation omitted) *Ronje* then held the remedy was to cure the defective evaluation..." (Opening at p. 12.) The People then leap to the erroneous conclusion that: "Relying on the remedy it had crafted in *Ronje*, the appellate court essentially ruled that because the agency blundered, the sexual predator must necessarily go free." (Opening at pp. 15, 28-30.) In point of fact, *Ronje* and the appellate court held exactly the opposite. Rather than order a dismissal because the agency (DMH) blundered, *Ronje* ordered DMH to correct its blunder and submit new evaluations after the blunder is corrected. Relying on the remedy it had crafted in *Ronje*, the appellate court determined that, since DMH had corrected its blunder, the evaluations were now valid. Because the now valid post-*Ronje* evaluations do not satisfy the "Two-Valid-Evaluations" procedural safeguard, the appellate court correctly ruled that the SVP Petition must be dismissed.

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CONCLUSION

In its Opening Brief, the People adopt the position that "the state has no interest in the involuntary civil confinement of persons who have no mental disorder or who are not dangerous to themselves or others." (Opening at p. 41.) Petitioner concurs. Since the two post-*Ronje* evaluators agree that Petitioner does not meet the criteria for an SVP, the SVP Petition must be dismissed.

Dated: October 12, 2012

Respectfully submitted,
FRANK OSPINO
Public Defender
JEAN WILKINSON
Chief Deputy Public Defender
SHARON PETROSINO
Senior Assistant Public Defender

MARK S. BROWN
Assistant Public Defender
Writ and Appeals

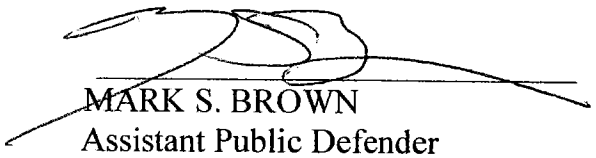
WORD COUNT CERTIFICATION

(California Rules of Court, Rules 8.204(c) and 8.486)

I, Mark S. Brown, declare as follows:

I represent Petitioner in this matter pending before this court. This RESPONSIVE BRIEF ON THE MERITS was prepared in Microsoft Word, and according to that program's word count, it contains 8,835 words.

I declare under penalty of perjury the above is true and correct. Executed on October 12, 2012, in Santa Ana, California.



MARK S. BROWN
Assistant Public Defender

DECLARATION OF SERVICE

Kevin Reilly v. Orange County Superior Court - Case No. S202280
(Court of Appeal Case No. G045118; O.C. Sup. Ct. No. M-11860)

STATE OF CALIFORNIA)
)ss
COUNTY OF ORANGE)

I am a citizen of the United States; I am over the age of 18 years; I am not a party to the above-entitled action; and I have a business address at 14 Civic Center Plaza, Santa Ana, California 92701.

On the 12th day of October 2012, I served a copy of **PETITIONER'S RESPONSIVE 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:

Office of the Attorney General
Attn: Bradley A. Weinreb
P.O. Box 85266
San Diego, CA 92186-5266
(619-645-2290)

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

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

Deputy County Clerk
Attn: Hon. Richard M. King (657-622-5242)
Orange County Sup. Ct., Dept. C-42
700 Civic Center Drive West
Santa Ana, CA 92702

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 12th day of October 2012, at Santa Ana, California.

Martha Aguirre
Secretary, Orange County Public Defender's Office