IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner*, vs. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE, *Respondent*, RICHARD ANTHONY SMITH, *Real Party in Interest.*	Case No.: S225562 DCA Case No. G050827 (OC Superior Court Case No. M-9531)

ANSWER BRIEF ON THE MERITS

FOLLOWING THE APPEAL FROM THE
SUPERIOR COURT OF ORANGE COUNTY
THE HONORABLE KIMBERLY MENNINGER, JUDGE PRESIDING

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PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner*,	)	Case No.: S225562
vs.	)	DCA Case No. G050827
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE, *Respondent*,	)	(OC Superior Court Case No. M-9531)
RICHARD ANTHONY SMITH, *Real Party in Interest.*	)	

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	)	
Respondent,	)	
	)	
RICHARD ANTHONY SMITH,	)	
	)	
Real Party in Interest.	)	

QUESTIONS GRANTED REVIEW

This Court granted review of this case on the following issues: (1) Is an expert retained by the prosecution in a proceeding under the Sexually Violent Predator Act 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)?

SUMMARY OF ARGUMENT

The petitioning attorney in a Sexually Violent Predator Act ("SVPA") civil commitment proceeding is entitled to obtain and review all medical and psychological treatment records that were reviewed by the state evaluators in conducting their updated evaluations. On October 7, 2015, Senate Bill No. 507 was signed by the Governor and chaptered by the Secretary of State. (Sen. Bill No. 507, approved by Governor, Oct. 7, 2015, Sen. Final Hist. (2015-2016 Reg. Sess.) p. 2.) This bill was introduced by Senator Fran Pavley to amend Welfare and Institutions Code section 6603[1] to ensure that the petitioning attorney in an SVPA proceeding would have the same access to the medical and psychological records as the evaluators performing updated Sexually Violent Predator ("SVP") evaluations. (Sen. Com. on Public Safety, Rep. on Sen. Bill No. 507 (2015-2016 Reg. Sess.) April 27, 2015, attached as Exhibit 1, pp. 34-35, 40.) The bill also provided that upon request the court shall issue a subpoena or court order for the requested records. (*Ibid.*) The bill further authorized that the attorneys may use the records in the commitment proceeding but would prohibit disclosure for any other purpose. (*Ibid.*) Section 6603 was amended to add subdivision (j) to clarify ambiguity in the

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

existing statutory language and resolve the inconsistent judicial interpretations as to whether the district attorney is entitled to the medical and psychological treatment records. (Sen. Com. on Public Safety, Rep. on Sen. Bill No. 507 (2015-2016 Reg. Sess.) April 27, 2015, attached as Exhibit 1, pp. 34-35, 40.) The newly enacted subdivision (j)(1) of amended section 6603 now expressly provides that the district attorney shall have full and complete access to the State Hospital information that is otherwise confidential under section 5328.[2]

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[2] Amended section 6603, subdivision (j) states:

(j)(1) Notwithstanding any other law, the evaluator performing an updated evaluation shall include with the evaluation a statement listing all records reviewed by the evaluator pursuant to subdivision (c). The court shall issue a subpoena, upon the request of either party, for a certified copy of these records. The records shall be provided to the attorney petitioning for commitment and the counsel for the person subject to this article. The attorneys may use the records in proceedings under this article and shall not disclose them for any other purpose.

(2) This subdivision does not affect the right of a party to object to the introduction at trial of all or a portion of a record subpoenaed under paragraph (1) on the ground that it is more prejudicial than probative pursuant to Section 352 of the Evidence Code or that it is not material to the issue of whether the person subject to this article is a sexually violent predator, as defined in subdivision (a) of Section 6600, or to any other issue to be decided by the court. If the relief is granted, in whole or in part, the record or records shall retain any confidentiality that may apply under Section 5328 of this code and Section 1014 of the Evidence Code.

(3) This subdivision does not affect any right of a party to seek to obtain other records regarding the person subject to

(continued...)

The district attorney has not therefore addressed this issue in this Answer Brief on the Merits.

As to the remaining issue on review, the legislative history of the recent amendment to section 6603 reflects that the Legislature has declined to provide a statutory resolution to that question.[3] The Legislature's amendment to section 6603 does however provide that the petitioning attorney "may use the [confidential] records in proceedings under this article and shall not disclose them for any other purpose." (Welf. & Inst. Code, § 6603, subd. (j)(1), as amended by Stats. 2015, ch. 507, § 1.) Further, nowhere in the SVPA does the Legislature explicitly prohibit the district attorney from disclosing confidential information to an independent expert who has been retained as a consultant

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[2] (...continued)
this article.

(4) Except as provided in paragraph (1), this subdivision does not affect any right of a committed person to assert that records are confidential under Section 5328 of this code or Section 1014 of the Evidence Code.

(Welf. & Inst. Code, § 6603, subd. (j), as amended by Stats. 2015, ch. 507, § 1.)

[3] Section 2 of Senate Bill No. 507 states:

Nothing in this act is intended to affect the determination by the Supreme Court of California, in *People v. Superior Court (Smith)* (Docket No. S225562), whether an expert retained by the district attorney in a proceeding under the [SVPA] ... is entitled to review otherwise confidential treatment information under Section 5328 of the Welfare and Institutions Code.

(Stats. 2015, ch. 507, § 2.)

and/or an expert witness in an SVPA proceeding. Moreover, there is no limiting provisions in the SVPA as it relates to the use of expert witnesses, though it provides for additional rights in this regard for the alleged SVP.[4] Since the Legislature has determined that the petitioning attorney shall have access and receive confidential records, it logically follows that the attorney should be allowed to use those records to litigate the SVP petition. The value of those records is greatly diminished without the assistance of an expert to interpret them. By preventing the District Attorney from disclosing confidential records to their expert, the court is effectively eliminating the expert from the process altogether.

To determine the intended effect of arguably conflicting provisions of section 5328 and the SVPA, the courts must harmonize the intent of the confidentiality provision in section 5328 with the purpose of the SVPA. (See *Medical Board of California v. Superior Court* (2001) 88 Cal.App.4th 1001, 1013.) The primary purpose of the confidentiality provision in section 5328

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[4] Since the SVPA proceedings are civil, not criminal, the alleged SVP does not have the same rights as a criminal defendant. The Legislature therefore have enumerated additional rights that the alleged SVP would not ordinarily have in a civil proceeding, such as the right to have an expert appointed at no cost. (See Welf. & Inst. Code, § 6603, subd. (a).)

is to "encourage[] persons with mental problems to seek, accept and undergo treatment and to be open and candid in treatment." (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 948.) The primary purpose of the SVPA is to accurately identify the SVPs, and confine and treat them in order to protect the public. (*People v. Yartz* (2005) 37 Cal.4th 529, 540.)

No person in custody pending an SVP commitment petition would reasonably expect any level of confidentiality in light of the statutory provisions allowing access to treatment records to a variety of psychologists for the purpose of preparing SVP evaluations; particularly, since these evaluations are used solely for the purpose of litigating the SVP petition.[5] The SVPA also allows the district attorney access to these confidential records. The SVPA has therefore eliminated any assurance of confidentiality. In light of this diminished confidentiality coupled with the overriding public safety interest, the district attorney should be able to disclose the SVPs confidential State Hospital records to a retained expert in order to competently present the SVP petition at a probable cause hearing or trial.

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[5]This Court in *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 807, acknowledged that the Legislature was aware of the conflict between section 5328 and the SVPA, and recognized that the SVPA does not protect confidential treatment records.

PROCEDURAL HISTORY

On March 6, 2002, the District Attorney of Orange County filed a petition seeking to commit real party in interest, Richard Anthony Smith, ("Smith") as an SVP pursuant to section 6600, et. seq., based on two state evaluations that both concluded Smith has a currently diagnosed mental disorder such that he is likely to engage in acts of sexual violence without appropriate treatment and custody within the meaning of section 6601, subdivisions (c) and (d). (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 2 and Exhibit B.) Updated evaluations were later conducted and again concluded Smith met the SVP criteria.

On February 27, 2007, Smith waived his right to a probable cause hearing pursuant to section 6602, subdivision (a). (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 19.) On March 23, 2010, Smith filed a motion pursuant to *In re Ronje* (2009) 179 Cal.App.4th 509, requesting the court order new evaluations and a new probable cause hearing. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 21.) On November 23, 2010, the court granted that request. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 24.)

The California Department of State Hospitals ("CDSH") assigned state evaluators Nancy Rueschenberg, Ph.D. and Dana Putnam, Ph.D. to conduct

these new evaluations. On February 2, 2011, Dr. Rueschenberg prepared an evaluation and opined that Smith no longer meets the SVP criteria. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit C.) On February 7, 2011, Dr. Putnam prepared an evaluation and also opined that Smith no longer meets the SVP criteria. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit D.)

On March 22, 2011, the People filed a motion to allow the People's retained expert Harry Goldberg, Ph.D. to conduct a mental examination of Smith and to review Smith's state hospital records. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit E.) On April 1, 2011, the People filed an addendum to that motion and attached declaration. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit F.) On April 15, 2011, the court granted that motion. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 28.)

On March 23, 2011, Smith filed an Entry of Plea in Abatement seeking to dismiss the petition based upon the two negative evaluations. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 26.) The motion was denied by the court and Smith sought a writ of mandate/prohibition. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit G, p. 80.) On March 28, 2012, in an unpublished opinion,

the appellate court granted Smith's writ petition and directed the trial court to dismiss the SVP petition. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit H.)

On June 27, 2012, this Court granted review and hold pending the disposition in *Reilly v. Superior Court* (2013) 57 Cal.4th 641. (*Smith v. Superior Court, supra*, G045119, review granted Jun. 27, 2014, No. S202338.) On November 13, 2013, this Court issued its opinion in *Reilly v. Superior Court, supra,* 57 Cal.4th 641 and transferred *Smith v. Superior Court, supra*, G045119, back to the appellate court for reconsideration in light of that decision. On January 14, 2014, the appellate court issued its order in *Smith v. Superior Court, supra*, G045119, granting the petition in part and denying the petition in part. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit I.) This court granted the petition with respect to the trial court's order granting the People's motion to compel respondent to undergo a mental examination and to allow access to Smith's state hospital records. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit I, p. 100.)

On March 21, 2014, pursuant to this Court's order, the Honorable Richard M. King vacated the court's previous orders compelling Smith to undergo a mental examination by the People's retained mental health expert and allow that expert access to Smith's state hospital records. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 37.) A jury trial date was set for August 25, 2014. (*Ibid.*)

On June 16, 2014, Smith served the People with a "Demand For Exchange Of Expert Witness Information pursuant to Code of Civil Procedure Section 2034.210." (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit J.) On July 7, 2014, the People timely served Smith with the "People's Expert Information" designating state evaluator Dr. Putnam and retained expert Dr. Dawn Starr as the People's experts. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit K.) On July 17, 2014, Smith filed a "Notice and Motion to Exclude Dr. Starr as an Expert Witness and Preclude Petitioner from Disclosing Any Confidential Information to Dr. Starr." (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit M.)

On July 29, 2014, Smith served the People with his expert exchange naming Dr. Mark A. Schwartz, Dr. Dana E. Putnam, and Dr. Howard Barbaree as his trial experts. (Petn. for Writ of Mandate/Prohibition, Exhibit N, filed under seal.) This expert information included an evaluation report dated July 22, 2014, by Smith's retained expert witness Dr. Schwartz, and a copy of Dr. Putnam's 2011 evaluation. By way of civil discovery and pursuant to section 6603, subdivision (c)(1), the People requested all documents listed in these experts' evaluations that were relied upon by the experts in preparing their evaluations and forming their opinions. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibits O and P.)

On September 24, 2014, the People filed a "Motion for Court Order To Release Records To Retained Expert And Protective Order." (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit Q.) On September 29, 2014, the trial court denied the People's motion. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit R, p. 259.) The People filed a writ of mandate/prohibition in the appellate court seeking an order granting the People's request for protective order and request to show their retained expert the confidential documents obtained pursuant section 6603. The appellate court requested an informal response. On January 22, 2015, the

appellate court issued a notice pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171. (DCA Docket Case No. G050827). On February 24, 2015, the appellate court granted the petition and issued a peremptory writ of mandate in the first instance compelling the respondent court to issue an order allowing the People to provide their retained expert, Dr. Starr, the records relied upon by the state evaluators in conducting their updated evaluations. (*People v. Superior Court (Smith)*, (Feb. 24, 2015, G050827) [nonpub. opn.].) On April 6, 2015, Smith filed the underlying petition for review which was granted by this Court.

ARGUMENT

I.

THE DISTRICT ATTORNEY SHOULD NOT BE PROHIBITED AS A MATTER OF LAW FROM DISCLOSING CONFIDENTIAL STATE HOSPITAL RECORDS TO A RETAINED EXPERT AS NECESSARY TO PROPERLY PRESENT THE SVP PETITION FOR COMMITMENT.

A. Withholding Confidential Records from the District Attorney's Retained Expert Thwarts the Legislative Intent of the SVPA.

The SVPA does not prohibit the petitioning attorney from presenting evidence at trial through a retained expert; thus the SVPA should not preclude the petitioning attorney from disclosing otherwise confidential information obtained pursuant to the statutory provisions of the SVPA to that expert.

Moreover, adopting a rule that would hinder the petitioning attorney from presenting the most reliable evidence to the trier of fact would frustrate the intent and purpose of the SVPA.

The SVPA was enacted in 1995, codified in Article 4 of Division 6, sections 6600 through 6609.3. (Stats. 1995, ch. 763, § 3.) The intent of the SVPA was set forth in a statement accompanying the Act, which reads:

> "The Legislature further finds and declares that while these individuals have been duly punished for their criminal acts, they are, if adjudicated sexually violent predators, a continuing threat to society. The continuing danger posed by these individuals and the continuing basis for their judicial commitment is a currently diagnosed mental disorder which predisposes them to engage in sexually violent criminal behavior. It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes." (Stats. 1995, ch. 763, § 1.)

(*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1145, fn. 5; see also *People v. Yartz, supra*, 37 Cal.4th at p. 540.) "The process for determining whether a convicted sex offender meets the foregoing requirements takes place in several stages, both administrative and judicial." (*Hubbart v. Superior Court, supra,* 19 Cal.4th at p. 1145.)

The SVPA has built in procedural safeguards to ensure that only those persons who meet the SVP criteria are ensnared in the judicial process. Before a convicted sex offender may be subject to judicial proceedings instituted

under the SVPA, there is an administrative screening process. That process begins with the Secretary of the Department of Corrections and Rehabilitation ("CDCR") to determine if an inmate "may be" a sexually violent predator. (Welf. & Inst. Code, § 6601, subd. (a)(1).) If the inmate meets the initial screening requirements the person is then referred to the next screening level described by section 6601, subdivision (b). This secondary screening requires the CDCR and the Board of Parole Hearings review the inmate's social, criminal and institutional history. (Welf. & Inst. Code, § 6601, subd. (b).) This screening is conducted in accordance with a structured screening instrument developed by the CDSH. (*Ibid.*)

> 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 [CDSH] for a full evaluation of whether the person meets the criteria in Section 6600.

(Welf. & Inst. Code, § 6601, subd. (b).)

Section 6601, subdivisions (c) through (g) describe the final screening requirements – the evaluation process – before the CDSH may refer a person to the District Attorney for the filing of an SVP petition and commence the judicial process. "The purpose of this evaluation is not to identify SVP's but, rather, to screen out those who are not SVP's." (*People v. Medina* (2009) 171 Cal.App.4th 805, 814.) These administrative procedures provide the

safeguards to ensure "meritless petitions" do not reach trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063.)

The evaluation process requires that two psychiatrist or psychologists evaluate the inmate to determine if the inmate meets the statutory SVP criteria. (Welf. & Inst. Code, § 6601, subd. (d).) An SVP is defined as

> [A] person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

(Welf. & Inst. Code, § 6600, subd. (a)(1).) A "'[d]iagnosed mental disorder'" is defined to include

> [A] congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

(Welf. & Inst. Code, § 6600, subd. (c).) The petitioning attorney bears the burden of proving beyond a reasonable doubt to the court or an unanimous jury that the alleged SVP meets the statutory criteria. (Welf. & Inst. Code, §§ 6604, 6603, subds. (a), (f)) The determination as to whether the person meets the statutory definition requires the person be examined

> "[I]n accordance with a standardized assessment protocol" that considers "diagnosable mental disorders, as well as various factors," including "criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder," which factors are "known to be associated with the risk of reoffense among sex offenders." (§ 6601, subd. (c).)

(*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 910.) If both evaluators concur that the inmate is an SVP, section 6601, subdivision (h) requires the CDSH forward a request for a petition to be filed for commitment under the SVPA to the District Attorney of the designated county. (Welf. & Inst. Code, § 6601, subd. (d).) If the evaluations result in a difference of opinion, then the inmate is subject to further examination by two independent evaluators. (Welf. & Inst. Code, § 6601, subd. (e).) If both independent evaluators agree that the inmate meets the SVP criteria the CDSH must refer the petition to be filed for an SVP commitment. (Welf. & Inst. Code, § 6601, subd. (f).) If, however, the independent evaluators do not agree or both agree that the inmate does not meet the SVP criteria the inmate is released and no petition is filed. (*Ibid.*)

The filing of the petition requires concurring opinions regarding the inmates *current* mental condition or 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. (*People v. Superior Court (Ghilotti), supra*, 27 Cal.4th at p. 920.) It is the determination as to whether a person

meets the SVP legal criteria set forth in the statute that is critical to the initial filing and validity of the SVP petition.

Consistent with this tenet, this court in *Ghilotti* noted:

> The evaluators' *professional* judgment is therefore to be exercised within a specified *legal* framework, and their legally accurate understanding of the statutory criteria is crucial to the Act's proper operation.

(*People v. Superior Court (Ghilotti), supra,* 27 Cal.4th at p. 910, italics in original.) This court further explained that

> [T]he SVPA makes the evaluators' conclusions, reached pursuant to the specific procedures and standards described above, critical to the legal authority to file a petition for commitment or recommitment. (§ 6601, subds. (d)-(f).) ... The statutory scheme thus necessarily calls into question whether the evaluators, in reaching their conclusions at this critical gatekeeping stage, have accurately understood the statutory criteria.

(*People v. Superior Court (Ghilotti), supra,* 27 Cal.4th at p. 910.) Thus, the reliability and accuracy of the evaluators' reports and their expert opinion in determining if an inmate meets the SVP criteria is necessary to ensure that only those who meet the statutory criteria are committed under the SVPA.

The SVPA provides that

> Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county pursuant to subdivision (I) who may file a petition for commitment.

(Welf. & Inst. Code, § 6601, subd. (d).) The district attorney makes the final decision as to whether to file the SVP petition based upon a review of the concurring evaluations and the supporting documentation. (Welf. & Inst. Code, § 6601, subd. (I).)

> The filing of the petition triggers a new round of proceedings under the Act. The superior court first holds a hearing to determine whether there is "probable cause" to believe that the person named in the petition is likely to engage in sexually violent predatory criminal behavior upon release. [Citations.] [Fn. omitted.] The alleged predator is entitled to the assistance of counsel at this hearing. If no probable cause is found, the petition is dismissed. However, if the court finds probable cause within the meaning of this section, the court orders a trial to determine whether the person is an SVP under section 6600. The alleged predator must remain in a "secure facility" between the time probable cause is found and the time trial is complete. [Citation.] [Fn. omitted.]

(*Hubbart v. Superior Court, supra*, 19 Cal.4th at pp. 1146-1147.)

The district attorney has the burden of showing that the inmate has a current mental condition that qualifies him as an SVP. (*Albertson v. Superior Court, supra*, 25 Cal.4th at p. 802.) If the district attorney determines that updated evaluations are needed in order to present the case for commitment,

the SVPA allows the district attorney to request that the CDSH perform these evaluations. (*Id.* at p. 805; Welf. & Inst. Code, § 6603, subd. (c)(1).) These updated evaluations are based upon

> [A]vailable medical and psychological records, including treatment records, consultation with current treating clinicians, and interview of the person being evaluated, whether voluntarily or by court order.

(Welf. & Inst. Code, § 6603, subd. (c)(1).)[6]

The newly enacted subdivision (j) of section 6603 explicitly authorizes the district attorney to obtain certified copies of all records, including confidential treatment records, reviewed by the state evaluators in the preparation of any updated SVP evaluations. (Welf. & Inst. Code, § 6603, subd. (j), as amended by Stats. 2015, ch. 507, § 1.) The updated evaluations need not concur in order to proceed to trial on the petition; "[they] are intended for informational and evidentiary purposes." (*Gray v. Superior Court* (2002) 95 Cal.App.4th 322, 328.) The trier of fact must therefore resolve any conflicts in the evidence. (See *Reilly v. Superior Court, supra,* 57 Cal.4th at pp. 655-656.) The purpose of the amendment to section 6603 is to provide the

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[6] Amended section 6603 now includes subdivision (j) which authorizes the district attorney may obtain all confidential records reviewed by the state evaluators. (Welf. & Inst. Code, § 6603, subd. (j), as amended by Stats. 2015, ch. 507, §1.)

district attorney the same access to the records as the expert evaluators, and so that the district attorney has complete information at the time the SVP cases are being reviewed and presented at trial. (Sen. Comm. on Public Safety, Rep. on Sen. Bill No. 507 (2015-2016 Reg. Sess.) April 27, 2015, attached as Exhibit 1, pp. 34-35, 40.) Senator Pavley, the author of this new legislation, recognized the importance of complete information in order to test an expert's opinion. She cites to the March 2015 California State Auditor report of the CDSH that concluded that SVP evaluations are not conducted in a consistent manner and evaluators are not always considering all relevant information. (*Id.* at p. 41; Cal. State Auditor, California Department of State Hospitals (Mar. 2015) Report 2014-125, attached as Exhibit 2.) Senator Pavley explained that the bill is necessary because:

> Some of California's most violent sexual predators can be released back into society if complete information is not available to prosecutors and defense lawyers at the time the predator's cases are being reviewed. This bill is needed to ensure such mistakes are prevented in the future, providing more peace of mind to already traumatized victims, their families and the public at large.

(Sen. Comm. on Public Safety, Rep. on Sen. Bill No. 507 (2015-2016 Reg. Sess.) April 27, 2015, attached as Exhibit 1, p. 42.) Senator Pavley noted that

> [The] bill would essentially eliminate the restrictions and limitation imposed on the state in seeking to obtain treatment records that were considered in updated evaluations.

(*Id.* at p. 46.)

The July 13, 2015, committee report on public safety also explains:

> "'SB 507 addresses the need for fair hearings when Sexually Violent Predators (SVPs) come up for state hospital commitment reviews. This bill establishes that both prosecuting attorneys and defense attorneys will have equal access to mental health treatment records before SVPs are assessed for their potential release from state's hospitals. A lack of access to these records can deprive judges and juries of the information they need to decide whether or not it is safe to release a violent sex offender from a state hospital. The records would remain confidential for all purposes *other than* the SVP proceedings.

(Assem. Com. on Public Safety, Rep. on Sen. Bill No. 507 (2015-2016 Reg. Sess.) July 13, 2015, italics added, attached as Exhibit 3, p. 118.) This statement illustrates the importance of presenting all material relevant evidence to the trier of fact to ensure a fair and accurate result. A "fair" hearing is also one that provides a level playing field. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90.) This is not accomplished by depriving the district attorney's experts access to records reviewed and relied upon by the alleged SVP's experts.

In an SVP trial, it is the trier of fact who must determine whether the alleged SVP is suffering from a currently diagnosed mental disorder making the alleged SVP presently dangerous and likely to reoffend. (Welf. & Inst. Code, § 6600, subd. (a)(3).) Often an "'expert prediction may be the only evidence available.' [Citations.]" (*People v. Lowe* (2012) 211 Cal.App.4th 678, 684-685.)

> Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness.... [J]uries remain the primary factfinders ... and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party.... [T]he psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them.

(*Ake v. Oklahoma* (1985) 470 U.S. 68, 81 [84 L.Ed.2d 53,105 S.Ct. 1087], fn. omitted.)

> Whether an individual is mentally ill and dangerous to ... others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists.

(*Addington v. Texas* (1979) 441 U.S. 418, 429 [60 L.Ed.2d 323, 99 S.Ct. 1804], italics in original.) Thus, expert testimony is critical in an SVP trial, and without the assistance of an expert the State is unable to meaningfully

rebut the alleged SVP's experts. The district attorney, therefore, must be given a fair opportunity to meet its burden of proof. (See *Albertson v. Superior Court, supra*, 25 Cal.4th at p. 803.)

B. The Purpose of Welfare and Institutions Code Section 5328 must Be Harmonized with and Not Frustrate the Intent and Effectiveness of the SVPA.

The Lanterman-Petris-Short Act ("LPSA") was enacted in 1967. (Stats. 1967, ch. 1667, § 36.) The stated purpose of this law was to

> [P]rovid[e] a new procedure for the care and treatment of persons who are dangerous or gravely disabled as a result of mental disorder or chronic alcoholism[.]

(Sen. Bill No. 677 (1967 Reg. Sess.) as amended July 28, 1967, p. 1.) Among other things, the Legislature declared that the Act intended "[t]o safeguard individual rights through judicial review[]" but also "guarantee and protect public safety[.]" (Stats. 1967, ch. 1667, § 36, p. 4074.) The LPSA provides the procedures for the civil commitment of persons with mental illness who are either gravely disabled and cannot care for themselves or are a danger to themselves or others. (Welf. & Inst. Code, §§ 5000 - 5550.)

The LPSA contains a confidentiality provision set forth in section 5328 "'to encourage persons with mental or alcoholic problems to seek treatment on a voluntary basis.' [Citations.]" (*State Dept. of Public Health v. Superior Court, supra*, 60 Cal.4th at p. 953), and to address any concerns with embarrassment and stigma associated with mental health treatment (*In re S. W.* (1978) 79 Cal.App.3d 719, 721). Section 5328 provided:

> All information and records obtained in the course of providing services under this part to either voluntary or involuntary recipients of services shall be confidential.

(Welf. & Inst. Code, § 5328 (1967 ed.).) At the time of enactment, section 5328 contained four specified exceptions enumerated in subdivisions (a) through (d). (Welf. & Inst. Code, § 5328, subds. (a)-(d) (1967 ed.).) Over the course of forty-four years, section 5328 has been amended 18 times to expand the coverage to persons committed pursuant to Divisions 4, 4.1, 4.5, 6, and 7 and also to enlarge the list of exceptions to confidentiality to twenty-six. (Welf. & Inst. Code, § 5328, subds. (a)-(y).) In addition to the exceptions contained in section 5328, subdivisions (a) through (y), there are additional statutory exceptions within the applicable divisions themselves.[7]

Section 5328 was made applicable to persons subject to the SVPA involuntary commitment process set forth in section 6600 et seq. when the

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[7] See for example, section 5328.01 through section 5329.

SVPA became effective January 1, 1996. The SVPA contains enumerated exceptions to section 5328's confidentiality provision. (See Welf. & Inst. Code, §§ 6601, subds. (b) & (c), 6603, subds. (a) & (c)(1), 6604.9, subd. (a), 6605, subd. (a).) The most recent exception is set forth in the newly enacted subdivision (j)(1) of section 6603. The amendment states that the district attorney "may use the confidential records in proceedings under this article." (Welf. & Inst. Code, § 6603, subd. (j)(1), as amended by Stats. 2015, ch. 507, §1.)[8] Clearly a trial is a proceeding under this article, and use of confidential records to present expert testimony showing the alleged SVP meets the statutory requirements of the SVPA would comport with the plain language of the statute.

> "The Legislature, of course, is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.]" [Citation.]

(*People v. Yartz, supra*, 37 Cal.4th at p. 538, first omission in original.)

Here, the SVPA and the legislative amendments to section 6603 were adopted and became effective after section 5328 was enacted. The SVPA

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[8] The statute also provides:

> Except as provided in paragraph (1), this subdivision does not affect any right of a committed person to assert that records are confidential under Section 5328 ....

(Welf. & Inst. Code, § 6603, subd. (j)(4), as amended by Stats. 2015, ch. 507, § 1.)

provisions providing disclosure of the alleged SVP's state hospital records, including treatment records, "clarifies within the SVPA an exception to section 5328's general rule of confidentiality ...." (*Albertson v. Superior Court, supra*, 25 Cal.4th at p. 805.)

> "'A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all their provisions. [Citations.] .....'" [Citations.]

(*State Dept. of Public Health v. Superior Court, supra*, 60 Cal.4th at p. 955.)

The Legislature took into consideration the issue of confidentiality when it enacted Senate Bill No. 507. The committee report sets forth the arguments in support of and in opposition to the bill. The opposition, represented by the ACLU, the California Psychiatric Association and the California Public Defender's Association, expressed their concern that a breach of section 5328's confidentiality would undermine the purposes and effectiveness of therapy. (Assem. Com. on Public Safety, Rep. on Sen. Bill No. 507 (2015-2016 Reg. Sess.) July 13, 2015, attached as Exhibit 3, pp. 124-125.) In light of these concerns the bill's author suggested that

> Should this bill be enacted, the Legislature in coming years may wish to review how the opening of all treatment records to prosecutors changes the conduct of SVP patients, the matters considered at trial and trial outcomes.

(Sen. Com. on Public Safety, Rep. on Sen. Bill No. 507 (2015-2016 Reg. Sess.) April 27, 2015, attached as Exhibit 1, p. 48.) This statement acknowledges that in order to effectuate the goals of the SVPA the intent of section 5328's confidentiality provision will need to be narrowed. Also, the passage of the bill shows that the Legislature was willing to sacrifice confidentiality to ensure the accuracy and reliability of the SVP commitment proceedings. Thus, allowing the district attorney the right to disclose confidential treatment records to their retained expert, with an accompanying protective order, serves the purpose of section 5328 while harmonizing the intent and effectiveness of the SVPA.

C. During the Pendency of an SVPA Commitment Proceeding, the Alleged SVP's Expectation of Privacy Is Substantially Reduced and Thus the Policies Underlying Welfare and Institutions Code Section 5328's Confidentiality Provision must Give Way to the State's Interest in Public Safety.

In *People v. Martinez* (2001) 88 Cal.App.4th 465, the court examined the sex offender's right to privacy in the context of the prosecution's examination of psychological and medical records, and the presentation of that information at trial. While the court affirmed there exists a legally protected

privacy interest in Martinez's psychological records, his expectation of privacy in those records was "substantially reduced" due to the fact that those records had already been disclosed, examined and extensively summarized by state mental health evaluators pursuant to the statutory scheme. (*People v. Martinez, supra.*, 88 Cal.App.4th at pp. 474, 478.) The court explained:

> [T]he SVPA contemplates and expressly provides for the disclosure of all relevant records, including medical and psychological records, and their consideration in an SVP commitment proceeding. [Fn. omitted.]

(*Id.* at pp. 475-476.) The court further acknowledged that the prosecutor plays an integral role in achieving the purpose of the SVPA, which is to identify, evaluate and commit potential SVPs. (*Id.* at p. 479.) Further, protecting the public by accurately identifying sexually violent predators before their release into the community and providing the necessary mental health treatment is a compelling state interest. (*Ibid.*)

Here, Smith's confidential records have been disclosed to several state evaluators, and his retained experts. In addition, the SVPA allows disclosure of those records to the district attorney. The purpose behind section 5328's confidentiality provision, to encourage treatment and reduce stigma, has already been reduced by these disclosures. Thus, the policies underlying section 5328's confidentiality provision are not further diminished by allowing access to the district attorney's retained expert. But, by denying the

district attorney's expert access to these confidential records the reasons for the SVPA, the identification of SVPs and protecting public safety, is hampered.

II.

THE CIVIL DISCOVERY ACT ALLOWS FOR THE USE OF RETAINED EXPERTS AT THE SVP TRIAL AND NECESSARILY WOULD INCLUDE PROVIDING THOSE EXPERTS THE ALLEGED SVP'S CONFIDENTIAL STATE HOSPITAL RECORDS OBTAINED PURSUANT TO WELFARE AND INSTITUTIONS CODE SECTION 6603.

SVPA commitment trials are "'special proceedings of a civil nature.' [Citations.]'" (*People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 988; *People v. Yartz, supra*, 37 Cal.4th at p. 536; *People v. Burns* (2005) 128 Cal.App.4th 794, 804.) "Accordingly, unless otherwise indicated on the face of the statute, rules of civil procedure will operate. [Citations.]" (*People v. Superior Court* (*Preciado*) (2001) 87 Cal.App.4th 1122, 1128.) The Civil Discovery Act applies to "special proceeding[s] of a civil nature." (Code Civ. Proc., §§ 2016.020, subd. (a), 2017.010.) Since the Legislature has made no express provision for discovery in SVPA litigation, the Civil Discovery Act therefore applies. (*People v. Angulo* (2005) 129 Cal.App.4th 1349, 1368.)

> The Civil Discovery Act provides the trial court with the authority and the procedures for management of discovery, so that discovery can serve its purpose in SVPA proceedings.

(*People v. Superior Court (Cheek), supra*, 94 Cal.App.4th at p. 991.)

> The discovery rules are "liberally construed in favor of disclosure and the trial court is vested with wide discretion to grant or deny discovery. [Citation.]" [Citations].

(*People v. Landau* (2013) 214 Cal.App.4th 1, 25, first omission in original.)

"The act is 'applied in each SVPA proceeding on a case-by-case basis.' [Citation.]" (*Ibid.*)

> The statutes governing expert witness discovery are part of the Civil Discovery Act [citation]. The purposes of the discovery statutes are "to assist the parties and the trier of fact in ascertaining the truth; ... to expedite and facilitate preparation and trial; to prevent delay; and to safeguard against surprise." [Citation.]
>
> The Supreme Court has noted that the need for pretrial discovery is greater with respect to expert witnesses than ordinary fact witnesses because the opponent must prepare to cope with the expert's specialized knowledge. [Citation.] The Legislature responded to this need by enacting detailed procedures for discovery pertaining to expert witnesses. [Citations.]

(*Boston v. Penny Lane Centers, Inc* (2009)170 Cal.App.4th 936, 950-951.)

In the present case, the Civil Discovery Act was utilized by the parties in the trial court. Pursuant to Code of Civil Procedure section 2034.210, the People provided Smith with the "petitioner's exchange of expert information" designating Dr. Putnam and Dr. Starr as the People's expert witnesses that they intended to offer at trial. In response, Smith filed a motion to exclude Dr. Starr as the People's expert witness at trial and to preclude the People from allowing her to review any of the discovery, which would necessarily include reports,

evaluations and supporting documentation prepared by Smith's designated trial experts. The People subsequently filed a motion for a court order allowing the People to release the discovery (to include those documents and evaluations relied upon by Smith's experts) to the People's expert witness, and included an accompanying protective order for any records deemed confidential. The trial court denied the People's motion; and the People filed a petition for writ of mandate/prohibition in the appellate court. In granting the People's writ petition and ordering the respondent court to order release of records to the People's retained expert and protective order, the court explained:

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

(*People v. Richard Smith*, filed February 24, 2015, G050827, at p. 5. [nonpub. opn.].)

The People properly engaged in the exchange of expert information pursuant to the Code of Civil Procedure section 2034.210. Without the ability

to disclose the records that Smith's experts relied upon to the People's retained experts, the People would be effectively precluded from presenting the petition to the trier of fact at trial. The intent of the SVPA is to ensure that the sexually violent predator is identified, confined, and treated. The procedures set out in the SVPA is to ensure not only that the alleged SVP is provided due process but, also so that the purpose of the Act is effectuated.

CONCLUSION

To preclude the People from providing their retained experts with the records necessary to demonstrate that an alleged SVP is a threat to the public strikes at the heart of the SVPA, rendering it ineffective to its stated task of protecting the public from the dangers of untreated SVPs. For the forgoing reasons, the district attorney should be able to disclose confidential records obtained pursuant to sections 6601 and 6603 to a retained expert in order to effectively and competently present the SVP commitment petition.

Dated this 3rd day of November, 2015.

Respectfully submitted,

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

BY: 
ELIZABETH MOLFETTA
DEPUTY DISTRICT ATTORNEY

EXHIBIT 1

2015 California Senate Bill No. 507, California 2015-2016 Regular Session
Legislative History *(Approx. 11 pages)*

NETSCAN

2015 CA S.B. 507 (NS)
2015 California Senate Bill No. 507, California 2015-2016 Regular Session

CALIFORNIA COMMITTEE REPORT
VERSION: GeneralApril 27, 2015Version Date April 27, 2015
Pavley.

TEXT:
BILL ANALYSIS

SENATE COMMITTEE ON PUBLIC SAFETY Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No: SB 507 Hearing Date: April 28, 2015

---------- |Author: |Pavley | |----------
+----------| |Version: |February 26, 2015 | -----
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---------- |Urgency: |No |Fiscal: |Yes | ----------
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|Consultant:|JM | | | | ----------

Subject: Sexually Violent Predators

HISTORY

Source: Los Angeles County District Attorney

Prior Legislation:AB 1607 (Fox) - Ch. 877, Stats. 2014 SB 295 (Emmerson) - Ch. 182, Stats. 2013 SB 760 (Alquist) - Ch. 790, Stats. 2012 Proposition 83, November 2006 General Election SB 1128 (Alquist) - Ch. 337, Stats. 2006 AB 893 (Horton) - Ch. 162, Stats. 2005 AB 2450 (Canciamilla) - Ch. 425, Stats. 2004 AB 493 (Salinas) - Ch. 222, Stats. 2004 SB 659 (Correa) - Ch. 248, Stats. 2001 AB 1142 (Runner) - Ch. 323, Stats. 2001 SB 2018 (Schiff) - Ch. 420, Stats. 2000 SB 451 (Schiff) - Ch. 41, Stats. 2000 AB 2849 (Havice) - Ch. 643, Stats. 2000 SB 746 (Schiff) - Ch. 995, Stats. 1999 SB 11 (Schiff) - Ch. 136, Stats. 1999 SB 1976 (Mountjoy) - Ch. 961, Stats. 1998 AB 888 (Rogan) - Ch. 763, Stats. 1995 SB 1143 (Mountjoy) - Ch. 764, Stats. 1995

Support: Crime Victims United of California; California

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District Attorneys Association

Opposition:American Civil Liberties Union; California Public Defenders Association

PURPOSE

The purpose of this bill is to provide that the prosecutor or county attorney petitioning for commitment of a person alleged to be a sexually violent predator and the attorney for the person shall have the same access to

records as the expert evaluators, and to prohibit any other use of the otherwise confidential records.

COMMENTS

Existing law provides for the civil commitment for psychiatric and psychological treatment of a prison inmate found to be a sexually violent predator (SVP) after the person has served his or her prison commitment. (Welf. & Inst. Code, 6600, et seq.)

Existing law defines an SVP as "a person who has been convicted of a sexually violent offense against at least one victim, and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst. Code, 6600, subd. (a)(1).)

Existing law provides that where the Department of Corrections and Rehabilitation determines that an inmate fits the criteria for evaluation as an SVP, the inmate shall be referred for evaluation to the Department of State Hospitals (DSH). (Welf. & Inst. Code 6601, subd. (b).)

Existing law provides that the inmate "shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the

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Director of the DSH." If both evaluators concur that the person meets the criteria for SVP commitment, DSH shall request a district attorney or county counsel<1> in the county of commitment to prison to file a commitment petition. (Welf. & Inst. Code 6601, subd. (d).)

Existing law provides that if the evaluators designated by DSH disagree, additional, independent evaluators are appointed. The second pair of evaluators must agree that the person meets the requirement for SVP commitment or the case cannot proceed. (Welf. & Inst. Code 6601, subd. (c) -(e).)

Existing law provides that if DSH requests the district attorney to petition for commitment, the prosecutor shall have access to "copies of the evaluation reports and any other supporting documents" considered by the evaluators. (Welf. & Inst. Code 6601, subd. (d).)

Existing law provides for a hearing procedure to determine whether there is probable cause to believe that a person who is the subject of a petition for civil commitment as an SVP is likely to engage in sexually violent predatory criminal behavior upon his or her release from prison. (Welf. Inst. Code 6602.)

Existing law provides that a person committed as a SVP shall be held for an indeterminate term upon commitment. (Welf. & Inst. Code, 6604.1.)

Existing law requires a jury trial at the request of either party with a determination beyond a reasonable doubt that the person is an SVP. (Welf. & Inst. Code 6603.)

Existing law grants an alleged SVP "access to all and to have access to all relevant medical and psychological records and reports." (Welf. & Inst. Code, 6603, subd. (a)

Existing law provides that if the attorney petitioning for ----------

<1> The counsel for the state is designated by the board of supervisors and is typically the district attorney. (Welf. and Inst. Code 6601, subd. (f).)

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commitment of an SVP determines that updated evaluations are necessary in order to properly present the case for commitment, the attorney may request the Department of Mental Health (now denominated the Department of State Hospitals - DSH) to perform updated evaluations.

If one or more of the original evaluators is no longer available to testify for the prosecution in court proceedings, the prosecutor may request the DSH to perform replacement evaluations.

DSH shall perform the requested evaluations and forward them to the prosecutor and counsel for the alleged SVP.

Updated or replacement evaluations shall be ordered only 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.

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 alleged SVP.

If an updated or replacement evaluation results in a split opinion as to whether the alleged SVP meets the criteria for commitment, DSH shall conduct two additional evaluations, as specified. (Welf. & Inst. Code 6603, subd. (c)(1).)

Existing law provides that if the second pair of experts performing the updated evaluations conclude that the person is not an SVP, or if there is a split of opinion, the case shall proceed on the basis of the original evaluations concluding or finding that the person is an SVP. (Reilly v. Superior Court (2013) 57 Cal.4th 641.)

Existing law defines "no longer able to testify for the petitioner in court proceedings" as the evaluator is no longer authorized by DSH to perform evaluations of SVPs as a result of any of the following:

The evaluator has failed to adhere to the protocol of the

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DSH;

The evaluator's license has been suspended or revoked;

The evaluator is legally unavailable, as specified; or

The evaluator has retired or not entered into a new contract with to continue as an evaluator. (Welf. & Inst. Code 6603, subd. (c)(1)-(2).)

Existing law provides that a new evaluator shall not be appointed if the resigned or retired evaluator has opined that the individual named in the petition has not met the criteria for commitment, as specified. (Welf. & Inst. Code 6603, subd. (c)(1).)

Existing law requires that an SVP patient have an annual examination on his mental condition. The report on the examination shall include consideration of whether or not conditional release to a less restrictive alternative or an unconditional release is in the SVP patient's best interest and what conditions would adequately protect the community. (Welf. & Inst. Code, 6604.9.)

Existing law provides that if DSH determines that an SVP patient's condition has so changed that he or she no longer meets the SVP criteria, or that he can be safely and conditionally released under supervision, the SVP patient can file a petition for unconditional release or a petition for conditional release. (Welf. & Inst. Code, 6604.9.)

Existing law provides that upon receipt of a petition for unconditional release, the court shall set a hearing to determine if there is probable cause that the SVP patient "has so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior. If the court finds probable to support such a finding, the matter shall be set for a jury trial as though it were an original petition for commitment. (Welf. & Inst. Code, 6604.9 and 6605.)

Existing law provides that if DSH, independent of the annual review and report of an SVP's mental condition, that the SVP patient can be safely and conditionally released under

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supervision, the court shall forward a report and recommendation for conditional release to the prosecutor and the attorney for the SVP patient. (Welf. & Inst. Code, 6607.)

Existing law provides that if DSH does not concur that an SVP can be safely and conditionally released under supervision, the SVP can petition for conditional release or an unconditional discharge any time after one year of commitment. (Welf. & Inst. Code 6608, subd. (a).)

Existing law provides that, if the court finds the conditional release petition is not frivolous, the court shall give notice of the hearing date to the attorney designated to represent the county of commitment, the attorney for the committed person, and the Director of State Hospitals at least 30 court days before the hearing date. (Welf. & Inst. Code 6608, subd. (b).)

Existing law provides that where DSH in the annual report on the mental status of an SVP patient finds that the conditional discharge would be in the best interests of the patient under conditions that would protect the public, the following shall:

The state shall have the burden of proof by a preponderance of the evidence that the SVP would be likely to commit sexually violent offenses if conditionally released.

If the petition for conditional release is denied by court, the SVP may not file another petition for conditional release for one year. (Welf. & Inst. Code 6608, subd. (i).)

Existing law provides that if in the annual report DSH does not find that conditional discharge is appropriate, the SVP patient shall have the burden of proof by a preponderance of the evidence at the hearing. (Welf. & Inst. Code 6608, subd. (i).)

Existing law requires the court to first obtain the written recommendation of the director of the treatment facility before taking any action on the petition for conditional release if the is made without the consent of the director of the treatment facility. (Welf. & Inst. Code, 6608, subd. (c).)

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Existing law provides that the court shall hold a hearing to determine whether the person committed would be 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 due to his or her diagnosed mental disorder if under supervision and treatment in the community.

Existing law provides that the attorney designated the county of commitment shall represent the state and have the committed person evaluated by experts chosen by the state and that the committed person shall have the right to the appointment of experts, if he or she so requests. (Welf. & Inst. Code, 6608, subd. (e).)

Existing law requires the court to order the committed person placed with an appropriate forensic conditional release program (CONREP) operated by the state for one year if the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community.

Existing law provides that a substantial portion of SVP CONREP shall include outpatient supervision and treatment. The court shall retain jurisdiction of the person throughout the course of the program. (Welf. & Inst. Code 6608, subd. (e).)

Existing law provides that if the court denies the petition to place the person in an appropriate forensic conditional release program, the person may not file a new application until one year has elapsed from the date of the denial. (Welf. & Inst. Code 6608, subd. (h)

Existing law allows, after a minimum of one year on conditional release, the committed person, with or without the recommendation or concurrence of the Director of State Hospitals, to petition the court for unconditional discharge, as specified. If the court finds probable cause that the person is no longer an SVP, the court shall set the matter for jury trial. The state shall bear the burden to prove beyond a reasonable doubt that the person remains an SVP. (Welf. & Inst. Code 6605, subds. (a)-(b) and 6608, subd. (k).)

Existing law provides that a person petitioning for conditional release is entitled to assistance of counsel in the conditional

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release and county of domicile hearings. (Welf. & Inst. Code 6608, subd. (a.))

Existing law provides that the procedure for a conditional release hearing in a case in which the county of domicile has not yet been determined by the court, proceed as follows:

The court, upon deeming that a conditional release petition is not frivolous, shall provide notice to the attorney for the committed person, the designated attorney for the county of commitment, and the Director of State Hospitals of its intent to set a conditional release hearing, and requires these entities to notify the court within 30 court days of receiving the notice of intent if it is alleged that a county other than the county of commitment is the domicile county.

The court shall deem the county of commitment as the county of domicile and set a date for the conditional release hearing, with at least 30 court days' notice, as specified, if no county, other than the county of commitment, is alleged to be the county of domicile.

The court shall, after giving 30-days' notice, hold a hearing to determine the county of domicile if any other county, other than the county of commitment, is alleged to be the county of domicile. Allows the designated attorney for any alleged county of domicile, the attorney for the county of commitment, the attorney for the petitioner, and the Director of State Hospitals to file and serve declarations, documentary evidence, and other pleadings, specific to the issue of domicile only, at least 10 court days prior to the hearing. Allows the court, in its discretion, to decide the issue of domicile based upon the pleadings alone or permit such additional argument and testimony as is in the interest of justice.

The court, after determining county of domicile, shall set a date for a conditional release hearing and give notice of the hearing, as specified, including to the designated attorney for the county of domicile at least 30 court days before the date of the hearing.

The designated attorney of the domicile county has the

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right to represent the state at the conditional release hearing, and to provide notice to parties, as specified, if he or she elects to do so. The designated attorney from each of the county commitment and domicile may mutually agree that the attorney for the county of domicile will represent the state in the conditional release hearing. The attorneys from each county should cooperate.

The court's determination of a county of domicile is final and applies to future proceedings relative to the commitment or release of a SVP. (Welf. & Inst. Code 6608, subd. (b). 6608.5.)

Existing law provides that a conditional release hearing in a case in which the county of domicile has been determined by the court, shall proceed as follows:

The court, upon deeming that a conditional release petition is not frivolous, to provide notice to the attorney for the committed person, the designated

attorney for the county of commitment, the attorney for the county of domicile and the Director of State Hospitals of the date of the conditional release hearing at least 30 days prior to the hearing.

Provides that representation of the state at the conditional release shall be the attorney for the county of commitment unless the attorney for the county of domicile has been deemed to represent the state. (Welf. & Inst. Code 6608, subd. (c.).)

Existing law provides, if a committed person has been conditionally released by a court to a county other than the county of domicile - the county of placement - and the jurisdiction of the person has been transferred to that county, the notice required for a subsequent conditional release hearing is to be given to the designated attorney of the county of placement, who will represent the state in any further proceedings. (Welf. & Inst. Code 6608, subd. (d).)

Existing law provides that if the committed person has been placed on conditional release in a county other than the county of commitment, jurisdiction of the person shall, upon the request of the designated attorney of the county of placement,

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be transferred to that county. (Welf. & Inst. Code 6608.5, subd. (g).)

This bill provides that where updated or replacement evaluations have been prepared, the attorney petitioning for commitment and the SVP patient's counsel "shall have the same access to records as an [expert psychologist or psychiatrist] evaluator." The court shall issue a subpoena or court order for those records upon request. The attorneys may only use the records in proceedings under this article and shall not be disclose them for any other purpose. The records are confidential to the extent otherwise provided by law.

This bill does not limit the access of the prosecutor and counsel for an SVP patient or alleged SVP to records relied upon by the evaluators.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

143% of design bed capacity by June 30, 2014; 141.5% of design bed capacity by February 28, 2015; and, 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed

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capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, Coleman v. Brown, Plata v. Brown (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, Coleman v. Brown, Plata v. Brown (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

Whether a proposal erodes a measure which has contributed to reducing the prison population; Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy; Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction; Whether a proposal corrects a constitutional problem or legislative drafting error; and Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

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COMMENTS

1.Need for This Bill

According to the author:

In 1996, the Legislature created the Sex Offender Commitment Program to target a small, but extremely dangerous subset of "sexually violent predators" (SVPs) who present a continuing threat to society because their mental disorders predispose them to engage in sexually violent behavior. Specifically, an SVP is a person who was previously convicted of a sexually violent offense and committed to prison for that or another offense. Prior to release from prison, experts from the Department of State Hospitals evaluate the inmate to determine if he is likely, because of a mental disorder, to commit a sexually violent offense if released. The person is then entitled to a trial in which the prosecutor must establish beyond a reasonable doubt that the experts' opinions are correct. If the jury or court agrees, the person is committed to a state hospital as an SVP.

Despite the critical role DSH evaluations play in the SVP commitment process, as the California State Auditor cited in its March 2015 report, the California Department of State Hospitals "has not ensured that it conducts these evaluations in a consistent manner" and have noted "instances in

which evaluators did not demonstrate that they considered all relevant information."

The court in Albertson v. Superior Court (2001) 25 Cal. 4th 796, held that Welfare and Institutions Code (WIC) Section 6603 grants express authority for updated expert evaluations and clarified an exception to the general rule of confidentiality of treatment records that allows the prosecutor "access to treatment record information, insofar as that information is contained in an updated evaluation." Some trial courts have interpreted this language to grant the DA access only to treatment information and not to the records themselves. Section 6603 states

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that the updated evaluations shall include a review of medical and mental health records. It does not explicitly grant prosecutor's access to the records, nor did it explicitly deny or limit access. The Albertson court noted that "in a SVPA proceeding, a district attorney may obtain, through updated mental evaluations otherwise confidential information concerning an alleged SVP's treatment." Whether the DA is granted direct access to the records, or only allowed to access records relied upon by the evaluators, depends upon each judge's reading of Albertson. As a result, the issue is repeatedly litigated and the results vary throughout California.

In Seaton v. Mayberg (2010) 610 Fed.3rd 530, 539, the U.S. Ninth Circuit court held that sexually violent predator evaluations fall within a number of long-established exceptions to the confidentiality of medical communication. These include cases of restraint due to insanity, contagious diseases, abuse of children and gunshot wounds. In People v. Martinez, the 4th District Court of Appeal held that it is not a violation of the California right to privacy (to provide copies of mental health treatment records to the prosecutor in an SVP case. (People v. Martinez (1994) 88 Cal App 4th 465.

Some of California's most violent sexual predators can be released back into society if complete information is not available to prosecutors and defense lawyers at the time the predator's cases are being reviewed. This bill is needed to help ensure such mistakes are prevented in the future, providing more peace of mind to already traumatized victims, their families and the public at large.

According to the National Intimate Partners and Sexual Violence Survey, conducted by the Centers for Disease Control and Prevention, there are an estimated two million female victims of rape in California, and estimated 8.5 million survivors of sexual violence, other than rape, in the United States.

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Twenty others states and the federal government allow involuntary civil commitment of sexually violent predators. California is the only state that does not have a specific legislative provision granting prosecutors access to mental health and medical records for the purpose of carrying out sexually violent predator commitment law.

2. SVP Law Generally

The Sexually Violent Predator Act (SVPA) establishes a civil commitment scheme for sex offenders who are about to be released from prison. The

DSH uses specified criteria to determine whether an individual qualifies for treatment as a SVP. A person may be deemed a SVP if: (a) the person has committed specified sex offenses against one or more victims; (b) he has a diagnosable mental disorder that makes him<2> 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; and, (3) two licensed psychiatrists or psychologists concur in the diagnosis. If both clinical evaluators find that the person meets the criteria, the case is referred to the county district attorney who may file a petition for civil commitment.

Once a petition has been filed, a judge holds a probable cause hearing; and if probable cause is found, the case proceeds to a trial at which the prosecutor must prove to a jury beyond a reasonable doubt that the offender meets the statutory criteria. The state must prove "[1] a person who has been convicted of a sexually violent offense against [at least one] victim and [2] who has a diagnosed mental disorder that [3] makes the person a danger to the health and safety of others in that it is likely that he or she will engage in [predatory] sexually violent criminal behavior." (Cooley v. Superior Court (Martinez) (2002) 29 Cal.4th 228, 246.) If the prosecutor meets this burden, the person then can be civilly committed to a DSH facility for treatment.

The DSH must conduct a yearly examination of a SVP's mental condition and submit an annual report to the court. This annual review includes an examination by a qualified expert. (Welf. & Inst. Code, 6604.9.) In addition, DSH has an obligation to

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<2> Virtually all SVPs have been men.

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seek judicial review any time it believes a person committed as a SVP no longer meets the criteria, not just annually. (Welf. & Inst. Code, 6607.)

The SVPA was substantially amended by Proposition 83 ("Jessica's Law"), which became operative on November 7, 2006. Originally, a SVP commitment was for two years; but now, under Jessica's Law, a person committed as a SVP may be held for an indeterminate term upon commitment or until it is shown that the defendant no longer poses a danger to others. (See People v. McKee (2010) 47 Cal. 4th 1172, 1185-1187.) Jessica's Law also amended the SVPA to make it more difficult for SVPs to petition for less restrictive alternatives to commitment. These changes have survived due process, ex post facto, and, more recently, equal protection challenges. (See, People v. McKee, supra, 47 Cal. 4th 1172 and People v. McKee (2012) 207 Cal.App.4th 1325.) The standards and procedures for conditional release proceedings were changed by SB 295 (Emmerson) Ch. 182, Stats. 2013.

3. Extent of Confidentiality of Psychotherapy Treatment Records of Persons Committed as SVPs and Alleged SVPs a.Privacy Rights Generally and the Psychotherapist-Patient Privilege

The California Constitution includes an explicit right to privacy. (Art. I, 1.) The "penumbras" of specific rights in the United States Constitution include a right to privacy for matters relating to family and procreation. (Griswold v. Connecticut (1965) 381 US. 479, 481-486; Roe v. Wade (1973) 410 U.S.

113.) The United States Supreme Court has not clearly described a more general right to privacy, except as is created by the Fourth Amendment right to be free from unreasonable searches and seizures. (People v. Gonzales (2013) 56 Cal.4th 353, 370-372.)

The California Evidence Code includes a psychotherapist-patient confidentiality privilege. (Evid. Code 1014.) The patient is the holder of the privilege and the privilege is substantially broader than the doctor-patient privilege. (People v. Gonzales, supra, 46 Cal.4th, at p.384.) The privilege applies apart from any privacy rights a person may

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have in medical records generally.

b.Involuntary Forensic Mental Health Treatment

The SVP law and program is one of a number of "forensic" involuntary commitment categories in California. Forensic patients are involuntarily committed to DSH from the criminal justice system for treatment. Forensic patients include mentally disordered offenders (MDO), persons found not guilty by reason of insanity (NGI) and defendants who are incompetent to stand trial (IST). Forensic patients comprise over 90% of DSH patients. DSH also treats is true civil commitment patients pursuant to the Lanterman-Petris-Short (LPS) Act. An LPS patient is a person with a mental illness who is either gravely disabled and cannot care for himself or herself, or is a danger to self or others. (Welf. & Inst. Code 5000-5550.)

As described above, an SVP is involuntarily committed for mental health treatment because he has a mental disorder that makes it likely that he will engage in sexually violent and predatory sex crimes if released into society. Nevertheless, the SVP is constitutional because it "establish[es] a nonpunitive, civil commitment scheme covering persons who are to be viewed, '"not as criminals, but as sick persons."' (Hubbart v. Superior Court (People) (1999) 19 Cal.4th 1138 1166-1167; Welf. and Inst. code 6250.) c. Treatment and Confidentiality in SVP Commitments

Generally, records of treatment of DSH patients, including SVP records, are confidential, unless otherwise specified. (Welf. & Inst. Code 5328.)<3> Section 5238 states that "[a]ll information and records obtained in the course of providing services under? Division 6 [including SVP law] to either voluntary or involuntary recipients of services shall be ----------<3> However, the confidentiality and other rules concerning treatment of mentally disordered offenders, persons not guilty by reason of insanity and persons who are incompetent to stand trial can be described as a patchwork of statutes and court decisions. For example, there are Evidence Code provisions concerning MDOs and specific provisions authorizing release of records where specified forensic patients are accused of a crime in a DSH facility. (Welf. & Inst. Code 5328.1.)

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confidential." (See, Gilbert v. Superior Court (2014) 224 Cal.App.4th 376,)

However, subdivision (c) of Section 6603 creates a limited exception to confidentiality rules in the context of updated or replacement expert evaluations on the issue of whether a person is an SVP: Under section 6603,

subdivision (c)(1), the People may obtain updated evaluations of an alleged SVP and obtain access to "otherwise confidential treatment information ? to the extent such information is contained in an updated mental evaluation." (Albertson v. Superior Court (2001) 25 Cal.4th 796, 807, italics added.)

The Supreme Court recently reiterated the limitations on the prosecution's access to treatment information, specifically holding that section 6603 does not authorize disclosure of therapy records directly to the People but authorizes review of such records by the independent evaluators and grants the People access to otherwise confidential treatment information only to the extent it is contained in the updated mental evaluation. (People v. Gonzales (2013) 56 Cal.4th 353, 379, fn. 11.)

The SVP law requires that an SVP be given or offered treatment if the state has proved that he is too dangerous to be released into society after he has served his full prison term. It appears that the most complete way to determine if an SVP patient continues to pose an unacceptable danger is through an evaluation of his or her most recent psychiatric records, as well as past reports and transcripts. However, review of treatment records for purposes of recommitment proceedings raises constitutional privacy and statutory confidentiality issues. (Sporich v. Superior Court (2000) 77Cal.App.4th at pp. 426-427.)<4>

The sponsor and author cite People v. Martinez (1994) 88 Cal.App.4th 465 in explicitly or implicitly arguing that an SVP or alleged SVP has little or no expectation of privacy in any of his medical or psychological records, including records of ---------- <4> The core holding in Sporich was that prosecutor could not obtain updated or new evaluations for a commitment proceeding. The Legislature superseded this holding by granting express authority for the state to obtain updated or new evaluations in Welfare and Institutions Code Section 6603, subdivision (c) - the section and subdivision considered by this bill.

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individual psychotherapy sessions. It does not appear that Martinez can be read that broadly, although the opinion includes some statements to that effect. The court in Martinez also recognized that an SVP patient has substantial privacy expectations or rights in medical or psychological matters, including psychotherapy records that are generally protected by the psychotherapist/patient privilege. The court, nevertheless, held that the state's interest in the records outweighed Martinez's privacy interests, although the opinion can be read as holding that giving the prosecutor access to psychotherapy records was error, although harmless in the context of the SVP trial. (Id., at p 479.). Further, the court specifically rejected a privacy claim as to the records relied upon by the experts who evaluated Martinez. The court held:

The examination of records by the prosecutor was harmless. The relevant information in the records was available to the prosecutor in summary form in the reports from Drs. Vognsen and Malinek. Defendant concedes that these witnesses were authorized to examine and consider defendant's records, and because they relied upon these records in forming their opinions, it was proper for the prosecutor to examine them concerning this information. (See People v. Visciotti (1992) 2 Cal. 4th 1, 81["It is proper to question an expert

about matter on which the expert bases his or her opinion and on the reasons for that opinion"].) Moreover, their testimony constituted substantial, if not compelling, evidence to support the trial court's decision to sustain the commitment petition. Consequently, any impropriety by the prosecutor in reviewing defendant's records was harmless under any standard of review. (See Chapman v. California (1967) 386 U.S. 18; People v. Watson (1956) 46 Cal. 2d 818.) (People v. Martinez, supra, 88 Cal.App.4th 465, 482.)

The court in Martinez also appears to have relied upon upheld the disclosure of Martinez's treatment records based on the "dangerous patient" exception in Evidence Code Section 1024 to

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the confidentiality of psychotherapy records.<5> (Id., at p. 479-484.) It appears that the court applied the dangerous patient exception because the purpose of the former MDSO law and the SVP law is to protect the public from sexual crimes. Such reasoning could arguably establish a blanket exception to confidentiality in any involuntary commitment based on the danger to the public that flowed from a person's mental disorder.

The California Supreme Court in People v. Gonzales, supra, 56 Cal.4th 353, held that the dangerous patient exception does not, per se, authorize disclosure to the prosecutor in a SVP case of the alleged SVP or SVP patient's psychotherapy records. (Id., at pp. 959-960.) The dangerous patient exception allows disclosure of confidential treatment information to prevent a specific and imminent harm. Gonzalez's holding that the dangerous patient exception does not generally apply in an SVP case does not, however, tell us when prosecutors can get access to such records.

This bill would essentially eliminate the restrictions and limitation imposed on the state in seeking to obtain treatment records that were considered in updated evaluations. The sponsor - the Los Angeles Attorney - emphasizes the public safety purpose of the SVPA and essentially argues that any right or expectation of privacy for an SVP in his treatment records must yield to the prosecutor's need to obtain all information necessary to establish that a person is an SVP or remains an SVP.

d. Federal Court Opinion noted in Author's Background Material- Seaton v. Mayberg

The author's background cites a decision of the Federal 9th Circuit Court of Appeal in arguing that an SVP or an alleged SVP has no viable claim of confidentiality or privacy in treatment records:

In a section 1983 civil rights claim, the Ninth ---------- <5> The opinion in Martinez analyzes SVP privacy and confidentiality from a number of perspectives, without clearly explaining the basis for its ruling. The opinion can arguably be cited as supporting opposing arguments.

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Circuit court evaluated the claim and determined that there is no constitutional right to privacy in medical records protected by the due process clause. "Whatever constitutional right to privacy of medical information may exist, the California civil commitment procedure for sexually violent predators falls outside it." (Seaton v. Mayberg (2010) 610 P.3rd 530,

539.) The court set forth several examples where those without criminal convictions have no right to privacy and found that a sexually violent predator evaluation falls within those long established exceptions to the confidentiality of medical communications. Other public health and safety requirements overcoming a right to privacy include cases of restraint due to insanity, contagious diseases, abuse of children, and gunshot wounds. ...California is the only state that does not have a legislative provision granting prosecutors access to mental health and medical records for the purpose of carrying out sexually violent predator commitment law.

Seaton concerned the confidentiality of the records of a prison inmate who was being evaluated as an alleged SVP, not treatment records of a person already committed to the SVP program. (Id., at pp. 532-533.) Seaton can be read as holding that the federal constitution does not include a substantial right of privacy beyond family and procreative matters. Specifically the court stated that constitutional protections do not extend to medical records generally, contrary to the assumptions of many. For example, the privacy protections in HIPPA cannot be asserted by an individual citizen. (Id., at pp. 533-541.) e.California Courts and Seaton

California courts have considered Seaton and noted that the opinions of lower federal courts concerning federal constitutional issues, although persuasive, are not binding on California courts. (People v. Zapien (1993) 4 Cal.4th 929, 989.) These California decisions have found that SVP treatment records are essentially presumed to be confidential until a contrary rule is demonstrated. (People v. Gonzales, supra, 56 Cal.4th 353, 387, fn. 19.) f. SVP Patients may be Reluctant to Engage in Psychotherapy if

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the Records are Completely Open to Prosecutors as Evidence that a Person is or Remains an SVP

The policy basis for the confidentiality of psychotherapy records has been long recognized by California courts: "[A]n environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy." (In re Lifschutz (1970) 2 Cal.3d 415, 422.) This bill squarely presents the issue of how this principle should be applied to SVP treatment. It can be argued that if all therapy records are open to prosecutors, SVP patients may be particularly reluctant to be truthful in therapy, greatly reducing the effectiveness of treatment. If all psychotherapy records are available to the prosecutor, an SVP would have a considerable incentive to be dishonest and attempt to manipulate his therapist in the hope of creating a record that he is no longer a sexual predator.

Prior to 2006 - when an SVP was subject to recommitment every two years - DSH personnel noted that many SVP patients did not actively engage in treatment because they were afraid that admissions of prior sexual misconduct would be used against them at a recommitment trial. Under current law, an SVP is committed indefinitely. He must essentially create a record that he is no longer an SVP, rather than hope that the prosecutor would not prevail at a recommitment trial

As noted above, the SVP law is constitutional because its purpose is treatment of mentally disordered persons, not punishment or preventive detention. (Hubbart v. Superior Court (People), supra, 19 Cal.4th 1138 1166-

1167.) If all psychotherapy records are open to prosecutors, SVP patients will likely argue that the records simply become evidence for prosecutors of SVP status, equivalent to evidence of guilt at a criminal trial.

Should this bill be enacted, the Legislature in coming years may wish to review how the opening of all treatment records to prosecutors changes the conduct of SVP patients, the matters considered at trial and trial outcomes. Committee members may wish to consider whether access to psychotherapy records by prosecutors should be obtained through a motion to the court in which the prosecutor can establish good cause for release of the records.

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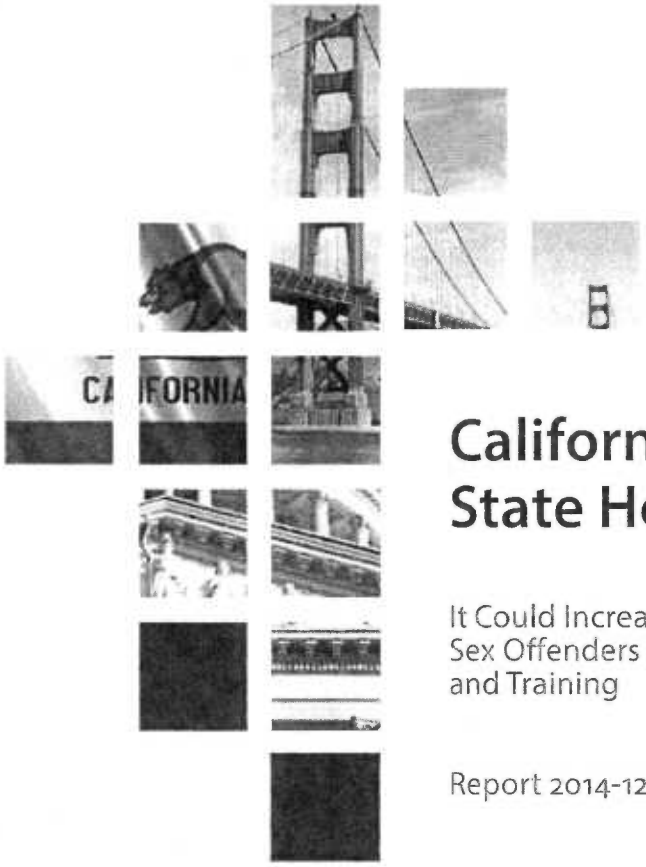
EXHIBIT 2

California State Auditor
March 2015



California Department of State Hospitals

It Could Increase the Consistency of Its Evaluations of Sex Offenders by Improving Its Assessment Protocol and Training

Report 2014-125

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March 12, 2015 2014-125

The Governor of California
President pro Tempore of the Senate
Speaker of the Assembly
State Capitol
Sacramento, California 95814

Dear Governor and Legislative Leaders:

As requested by the Joint Legislative Audit Committee, the California State Auditor presents this audit report concerning the California Department of State Hospitals' (State Hospitals) Sex Offender Commitment Program (program). The program targets a small but extremely dangerous subset of sexually violent offenders (offenders) who present a continuing threat to society because their diagnosed mental disorders predispose them to engage in sexually violent criminal behavior. State Hospitals evaluates these offenders to determine whether they meet criteria to be considered sexually violent predators (SVPs) and whether courts should consider committing such offenders to a state hospital.

Our report concludes that State Hospitals' evaluations of potential SVPs were inconsistent. Although state law requires that evaluators consider a number of factors about offenders, such as their criminal and psychosexual histories, we noted instances in which evaluators did not consider all relevant information. We noted that gaps in policies, supervision, and training may have contributed to the inconsistent evaluations. Specifically, State Hospitals' standardized assessment protocol for conducting evaluations of potential SVPs lacks adequate detail and direction for SVP evaluators on how to perform evaluations. Further, State Hospitals' headquarters lacks a process of supervisory review of evaluators' work from a clinical perspective. We also noted that State Hospitals has not consistently offered training to its evaluators, and did not provide SVP evaluators with any training between August 2012 and May 2014. Also, State Hospitals could not demonstrate that its evaluators had training on a specific type of instrument used when assessing whether an individual would commit another sexual offense until it began offering such training at the end of 2014.

We also noted additional areas in which State Hospitals could improve its evaluation process. Specifically, it has not documented its efforts to verify that its evaluators met the experience portion of the minimum qualifications for their positions. In addition, in March 2013, State Hospitals developed a process for assigning and tracking the workload of its evaluators and recently revised it in January 2015. Although the revised process addresses some concerns about workload assignments, it omits other elements and State Hospitals has not established a formal process for periodically reviewing its workload assignment process. Finally, State Hospitals needs to address its backlog of annual evaluations of currently committed SVPs at Coalinga State Hospital (Coalinga). When Coalinga fails to promptly perform these evaluations, it is not fulfilling one of its critical statutory obligations, leaving the State unable to report on whether the SVPs continue to pose risks to the public and whether unconditional release or release to a less restrictive environment might be an appropriate alternative.

Respectfully submitted,

Elaine M. Howle

ELAINE M. HOWLE, CPA
State Auditor

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Contents

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Summary

Results in Brief

The Legislature created the Sex Offender Commitment Program (program) in 1996 to target a small but extremely dangerous subset of sexually violent offenders who present a continuing threat to society because their diagnosed mental disorders predispose them to engage in sexually violent criminal behavior. Through this program, the California Department of Corrections and Rehabilitation (Corrections) refers certain sex offenders (offenders) to the California Department of State Hospitals (State Hospitals) for psychological evaluations when those offenders are nearing their scheduled release dates. State Hospitals' evaluators determine whether the offenders meet the criteria for being a sexually violent predator (SVP). If State Hospitals determines that offenders meet the SVP criteria, it requests the county counsels to petition for the offenders' commitments to a state hospital. If the county counsels concur with the request, the counties will submit a petition to the court, which decides whether the individuals should be committed. State law designates Coalinga State Hospital (Coalinga) as the hospital for SVPs unless unique circumstances exist. For example, one female SVP is held at another state hospital. As of June 2014 approximately 930 individuals were either residing at Coalinga pending trials for commitment or were committed as SVPs.

Despite the critical role State Hospitals' evaluations play in the SVP commitment process, it has not ensured that it conducts these evaluations in a consistent manner. State law requires that evaluators consider a number of factors about offenders, such as their criminal and psychosexual histories, when determining whether they meet the SVP criteria. However, of the 29 evaluations we reviewed—23 conducted by evaluators at State Hospitals' headquarters in Sacramento and six conducted by evaluators at Coalinga—we noted instances in which evaluators did not demonstrate that they considered all relevant information. For example, one evaluation did not indicate that the evaluator used a certain kind of instrument to gauge the risk that the individual would commit another sexual crime, and eight did not note that the evaluators had reviewed a report from Corrections that identifies any communication challenges or disabilities the individuals might have that could affect their assessments. In fact, we noted one instance in which differences in the documentation that evaluators indicated they reviewed led evaluators to reach very different conclusions about an individual: One evaluator noted that the individual had experienced suicidal thoughts, while the other stated that he did not have any mental health issues.

Audit Highlights . . .

Our audit of the California Department of State Hospitals' (State Hospitals) evaluation process for determining whether offenders meet the criteria of a sexually violent predator (SVP) highlighted the following:

- *It has not ensured that it conducts these evaluations in a consistent manner.*
- *Although state law requires evaluators to use a standardized assessment protocol when conducting evaluations, State Hospitals' existing protocol lacks detail.*
- *None of its reviews of SVP evaluations at headquarters focus on ensuring the quality of the evaluations from a clinical perspective.*
  - *The quality assurance team provides guidance to less experienced evaluators but does not provide supervisory review.*
  - *Coalinga State Hospital (Coalinga) has not established a process to document its clinical reviews of evaluations.*
- *It could better use data related to court outcomes to identify areas to strengthen its evaluations.*
- *Its training for SVP evaluators has been inconsistent—between August 2012 and May 2014 it offered no training at all.*
- *Coalinga has a significant backlog of annual SVP evaluations—it had 261 annual evaluations that were due to courts as of December 2014.*

When evaluators do not consider all relevant information, it is possible that State Hospitals may recommend that courts commit individuals who do not pose a danger to the public, or they may not recommend commitment of individuals who do. Further, when evaluators do not fully document how they reached their conclusions, they may not be able to adequately defend those conclusions if challenged in court. To avoid such situations, we would expect State Hospitals to provide its evaluators with significant guidance regarding how they should perform evaluations. State law requires evaluators to use a standardized assessment protocol when conducting evaluations. However, State Hospitals' existing protocol lacks detail. For example, the protocol does not give guidance on specific risk assessment approaches or list specific risk assessment instruments evaluators may choose to use. In contrast, the former protocol State Hospitals used in 2007 covered approaches to risk assessment and risk assessment instruments. However, State Hospitals revised and simplified this protocol in 2008 because the Office of Administrative Law determined that certain provisions of the protocol met the definition of regulations but had not gone through the required regulatory process.

Additionally, evaluators did not always consider all three criteria for determining whether offenders might be recommended for commitment; however, this decision created some efficiency. Specifically, in three evaluations we reviewed the evaluators noted that they did not diagnose a mental disorder—the second of three criteria that must be met for commitment—and therefore chose not to evaluate the third criterion, which is whether the diagnosed mental disorder makes the offenders likely to engage in sexually violent, predatory criminal behavior in the future without treatment and custody. State Hospitals has directed evaluators to complete evaluation of all three criteria regardless of the outcome of one. However, if the evaluator determines that an offender will not meet the criteria, we believe stopping the evaluations is both appropriate and efficient.

Given that State Hospitals recently hired many of its evaluators and that evaluating SVPs requires highly specialized skills, we also would expect State Hospitals to have established certain quality control measures, such as supervisory reviews, to ensure that its evaluators complete adequate and consistent evaluations. However, none of State Hospitals' reviews of SVP evaluations at headquarters focus on ensuring the quality of the evaluations from a clinical perspective. Further, in October 2013, State Hospitals established a quality assurance and training team (quality assurance team) to provide guidance to State Hospitals' less-experienced evaluators at headquarters; however, the quality assurance team does not provide supervisory review. At Coalinga—where evaluators conduct annual evaluations of individuals whom the State has already committed as SVPs—hospital managers stated that evaluators receive multiple levels of clinical review. However, Coalinga has not established a

process to document these reviews. Without evidence of adequate supervision and review, State Hospitals' evaluations may fail to effectively demonstrate the need to recommend or not recommend commitment of an individual.

Further, State Hospitals could better use data related to court outcomes to identify areas to strengthen its evaluations. High-quality evaluations are important because courts use them to decide whether individuals are SVPs and should be committed to a state hospital. However, State Hospitals has not consistently tracked the disposition of SVP court cases, and the courts do not always agree with State Hospitals' recommendations. For example, in one of the 23 evaluations we reviewed at State Hospitals' headquarters, a court chose to release an offender even though evaluators determined that he met the SVP criteria. A November 2014 change to State Hospitals' court scheduling process for evaluators may help State Hospitals better track case outcomes and evaluate trends for court decisions; however, it is too soon to conclude whether this new process is successful. Unless it tracks the dispositions of its SVP court cases, State Hospitals is missing an opportunity to improve its evaluation process and potentially strengthen its training and supervision of evaluators.

Besides providing guidance and supervisory reviews to evaluators, providing ongoing technical training is important to ensure the competence of those conducting evaluations of potential and current SVPs. However, State Hospitals has not consistently offered training to SVP evaluators. In 2009 and 2010 State Hospitals offered its evaluators—at the time, mostly contractors—training on a variety of topics, including sex offender risk assessment tools, statistics on sexual recidivism, the effect of aging on recidivism, and the violence-risk scale. In anticipation of hiring evaluators, State Hospitals developed its own training, which it provided in 2011 and part of 2012. However, between August 2012 and May 2014, it offered no training at all.

More recently, State Hospitals began taking steps to provide more robust training to its evaluators at its headquarters, though it has yet to take similar steps for the evaluators at Coalinga. In 2014 State Hospitals' chief psychologist and the quality assurance team developed a training plan for evaluators at headquarters. Specifically, in May 2014, State Hospitals offered comprehensive SVP training for all consulting psychologists, who currently represent 33 of 45 evaluators on staff. The training focused on the background of the SVP statutes, the various criteria under which State Hospitals evaluates potential SVPs, and a specific type of risk assessment tool. State Hospitals has a tentative plan to offer additional training but has yet to schedule it. Coalinga's evaluators receive fewer training opportunities than the evaluators

at headquarters. Coalinga's forensic senior psychologist supervisor designed a training plan for fiscal year 2014–15 to help new evaluators at the hospital develop a basic understanding of state law affecting forensic evaluations, forensic report writing, and risk assessment. She indicated that Coalinga is also in the process of developing an ongoing training plan for experienced evaluators and has some trainings scheduled for 2015.

Compounding the inconsistent training offered to evaluators, State Hospitals has not offered training on dynamic risk assessment instruments until recently. A dynamic risk assessment may consider factors that change slowly, such as personality disorders or sexual preference, to help predict long-term risk, and may consider acute, rapidly changing factors, such as negative mood or intoxication, that could signal the possible timing of a reoffense. However, in two trainings on forensic assessment in 2012, State Hospitals' instructors provided a high-level overview of dynamic risk factors but did not provide instructions on how to use specific assessment instruments. State Hospitals' chief psychologist stated that a dynamic risk assessment tool strengthens an evaluation by providing a higher degree of certainty when estimating the risk of a reoffense. As a result, State Hospitals provided training on dynamic risk assessment instruments in December 2014 and January 2015.

Finally, Coalinga has a significant backlog of annual SVP evaluations it has not completed. State law requires State Hospitals to evaluate at least annually SVPs committed to it. However, according to Coalinga's tracking log of overdue annual reports, it had 261 annual evaluations that were due to courts as of December 2014. According to the acting chief of forensic services at Coalinga, State Hospitals briefly required Coalinga's evaluators to complete another type of evaluation in addition to the annual evaluations, creating additional work. Further, he stated that Coalinga has found it difficult to hire staff. When State Hospitals does not complete annual evaluations on time, it is not fulfilling its statutory obligation to consider whether an SVP is a candidate for release.

Recommendations

To promote efficiency, the Legislature should change state law to allow State Hospitals the flexibility to stop an evaluation once the evaluator determines that the offender does not meet one of the SVP criteria.

To improve the consistency of its evaluations, by June 2015 State Hospitals should create a written policy that requires its evaluators to include the following documentation in their evaluations:

- Detail describing all the documentation they reviewed.
- A description of the risk assessment instruments the evaluator used.
- Acknowledgement of their review of a form from Corrections that identifies any communication challenges or disabilities the offenders might have that could affect their assessments.

To promote consistency and ensure that it provides sufficient guidance to evaluators, State Hospitals should update its assessment protocol by March 2016 to include more specific instructions on how to conduct evaluations, such as what assessment instruments evaluators should use and what documents they should consider.

To improve the consistency and completeness of its evaluations, by December 2015 State Hospitals should develop a plan for the formal, supervisory review of evaluations from a clinical perspective.

To ensure that it has the data necessary to inform its training and supervision of evaluators, State Hospitals should identify the most efficient means for obtaining the outcomes of past trials—at least three years of past trials if possible—and should ensure that it includes such outcomes in its database by March 2016. It should use this information to provide training and supervision where they are most needed.

To ensure that its evaluators have the necessary training to conduct evaluations effectively and consistently, State Hospitals should complete the development of its comprehensive training plan for all evaluators by June 2015. In addition, by September 2015 it should provide training on risk assessment instruments to all new evaluators and those who have not yet received such training.

To reduce its backlog of annual evaluations at Coalinga and to reduce the number of days these evaluations are overdue, State Hospitals should continue its efforts to hire enough evaluators to meet its workload.

Agency Comments

State Hospitals generally agreed with our recommendations, described the steps it would take to implement them, and provided estimated implementation dates.

Introduction

Background

The Legislature created the Sex Offender Commitment Program (program) in 1996 to target a small but extremely dangerous subset of sex offenders (offenders) who present a continuing threat to society because their diagnosed mental disorders predispose them to engage in sexually violent predatory criminal behavior. State law designates these offenders as sexually violent predators (SVPs) and allows the State to commit them to a treatment facility for an indeterminate period of time. The law lists crimes that qualify as sexually violent offenses and defines *predatory* to mean acts against strangers, persons of casual acquaintance, or persons with whom the offender established relationships primarily for the purposes of victimization. Before the State commits offenders, state law requires that the State conduct trials to determine whether the offenders meet the criteria for an SVP—that, by reason of diagnosed mental disorders, they are likely to engage in acts of predatory sexual violence upon release. Determining whether offenders are SVPs and committing them for treatment is a civil rather than a criminal process.

Changes to state law during the last decade have expanded the scope of the program. In September 2006 Senate Bill 1128 (SB 1128) became law and added more crimes to the list of sexually violent offenses that could cause offenders to qualify as SVPs. More dramatically, in November 2006, California voters passed Proposition 83, also known as Jessica's Law. In addition to creating additional residency restrictions and requiring global positioning system monitoring for certain sex offenders, Jessica's Law added more crimes to the list of sexually violent offenses and decreased from two to one the number of victims necessary for the SVP designation to apply. Both SB 1128 and Jessica's Law abolished the previous two-year term of civil commitment for SVPs and instead established a commitment term of indeterminate length. State law requires that individuals committed to the program as SVPs receive annual evaluations to consider their readiness for release. Further, as of June 2012, state law generally designated Coalinga State Hospital (Coalinga) as the state hospital for placing individuals committed as SVPs.[1]

The Process for Evaluating SVPs

The California Department of State Hospitals (State Hospitals) and the California Department of Corrections and Rehabilitation (Corrections), including its Board of Parole Hearings (Parole Board),

[1] According to a July 2014 census from State Hospitals, there was one female SVP at another state hospital.

each play a role in identifying, evaluating, and requesting the commitment of an offender as an SVP. However, a court or jury makes the final determination of an offender's SVP status. State law requires that Corrections and its Parole Board screen offenders based on whether they committed sexually violent predatory offenses and on reviews of their social, criminal, and institutional histories. To complete these screenings, the law requires that Corrections use a structured screening instrument developed and updated by State Hospitals in consultation with Corrections. According to state law, when Corrections determines through this screening process that offenders may be SVPs, it must refer the offenders to State Hospitals for further evaluation at least six months before their scheduled release dates.

Indicators That a Sex Offender Is a Sexually Violent Predator

The California Department of State Hospitals uses the following criteria in state law to determine whether a sex offender (offender) meets the criteria of a sexually violent predator:

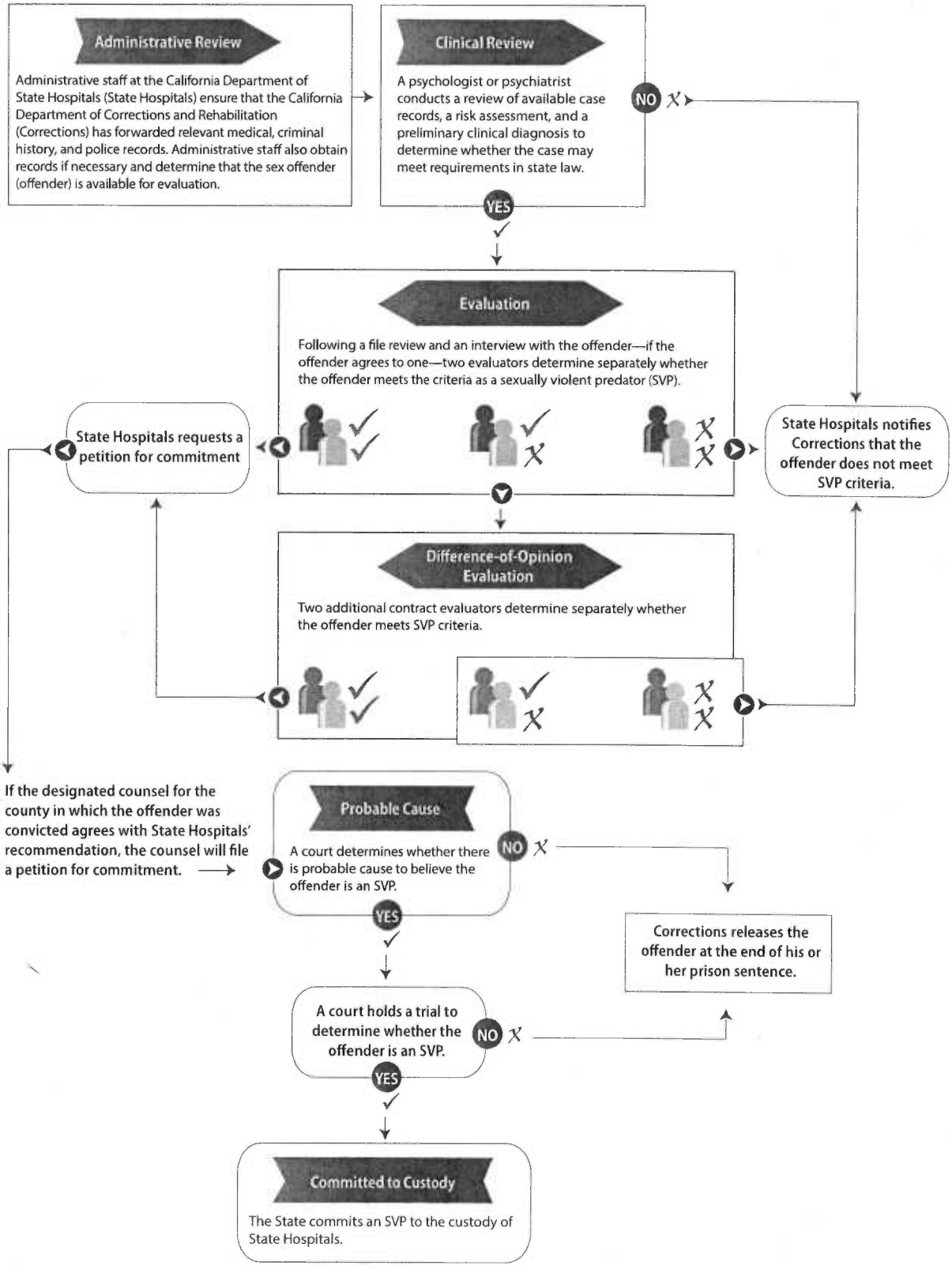
- The offender has been convicted of a sexually violent predatory offense against one or more victims, such as rape when committed with force, threats, or other violence.
- The offender suffers from a diagnosed mental disorder.
  - The law defines a diagnosed mental disorder as a condition affecting the emotional and volitional capacity that predisposes the person to commit criminal sexual acts to a degree that the person is a menace to the health and safety of others.
- The diagnosed mental disorder makes the person likely to engage in sexually violent predatory criminal behavior in the future without treatment and custody.
  - The law defines predatory offenses as acts against strangers, persons of casual acquaintance, or persons with whom the offender established relationships primarily for the purpose of victimization.
  - Regulations require evaluators to use tests and instruments and to consider various risk factors to determine the risk that an offender will commit future crimes.

Sources: Analysis of California Welfare and Institutions Code, Section 6600 et seq., Title 9 of the California Code of Regulations, and a California Supreme Court decision.

State law requires that State Hospitals evaluate all offenders that Corrections refers to it. It specifies that for each of these offenders, State Hospitals must conduct an evaluation consisting of assessments by two mental health professionals who must be practicing psychiatrists or psychologists. However, in practice, State Hospitals has an agreement with Corrections to conduct clinical reviews on Corrections' behalf in order to determine whether offenders merit a full evaluation. Figure 1 illustrates the process that State Hospitals uses to determine whether it should recommend to the district attorneys or the designated county counsels responsible for handling SVP cases (designated counsels) that the court should commit offenders to the program.

State law requires State Hospitals' evaluators to determine whether the offenders that Corrections refers to it meet the criteria for the SVP designation. State Hospitals divides the criteria for evaluation into three broad areas, which the text box describes in more detail. Two evaluators independently review information related to each offender and attempt to interview him or her. If both evaluators agree that the offender meets the SVP criteria, State Hospitals must request a petition for commitment. If the two evaluators disagree, the law requires State Hospitals to appoint two additional evaluators—who must meet certain professional qualifications and cannot be employees of the State—to perform evaluations. The two additional evaluators must agree that the offender meets the SVP criteria if State Hospitals is to request a petition for commitment.

Figure 1
Process for Determining Whether an Offender Meets the Criteria of a Sexually Violent Predator



Sources: California Welfare and Institutions Code, Section 6600 et seq., State Hospitals' chief psychologist in the Forensic Services Division, and State Hospitals' records of clinical evaluations.

Static and Dynamic Risk Factors

Static risk factors are fixed or historical characteristics, such as offender age, offense history, and sexual deviance.

Dynamic risk factors are characteristics that can change over time, such as cooperation with supervision, self-regulation, and social influences.

Selected Risk Assessment Tools

- Static-99/Static-99R: A 10-item, score-based assessment tool used for adult male offenders ages 18 and over that addresses the risk of reoffending by examining more static risk factors such as the offender's age, conviction for nonsexual violence, prior sex offenses, and relationship with victims, among other items.
- Stable 2007: An evidence-based risk assessment tool that measures dynamic risk factors. The State Authorized Risk Assessment Tool for Sex Offender Review Committee (SARATSO committee) adopted the Stable 2007 in September 2013 as the new dynamic risk assessment instrument for California.
- The Structured Risk Assessment/Forensic Version Light (SRA-FVL) assesses long-term vulnerabilities through a review of two domains, sexual interests and relational style, and a partial review of a third domain, self-management.

Sources: The Web site for the SARATSO committee and www.static99.org, a Web site whose advisory board includes the creators of the Static-99.

Assessing the Risk of Reoffense

Evaluators have a number of risk assessment instruments at their disposal for evaluating the risk that the offender will commit another sexually violent predatory crime in the future. The tools assist evaluators in assessing the impact various less changeable and more changeable characteristics—called static and dynamic variables, respectively—have on the risk that an individual will commit another crime. The text box describes the types of variable risk factors and identifies several risk assessment tools State Hospitals uses.

State law established a committee—the State Authorized Risk Assessment Tool for Sex Offenders Review Committee (SARATSO committee)—to select tools for use when assessing whether sex offenders will likely commit other sexual crimes. SARATSO selected the Static-99R risk assessment scale as the tool to evaluate adult males required to register as sex offenders. State law requires the SARATSO committee to determine whether the State should replace or supplement the static assessment tool in use. Until 2013 the SARATSO committee recommended supplementing the Static-99R with another assessment tool—the Structured Risk Assessment/Forensic Version Light. In 2013 SARATSO selected the Stable 2007 dynamic risk assessment instrument to supplement the Static-99R.

Process for Committing Offenders as SVPs

Although State Hospitals conducts evaluations to determine whether offenders meet the SVP criteria, a court or jury makes the final decision to commit the offenders. When two evaluators determine that an offender meets the SVP criteria, state law requires that State Hospitals request the designated counsel of the county in which the offender was convicted to file a petition in court to commit the offender. If the county's designated counsel agrees with State Hospitals' recommendation, he or she must file a petition for commitment. State law requires that a judge determine whether probable cause exists to detain an offender beyond his or her prison term. If a judge determines that there is probable cause that the offender may be an SVP, he or she will order

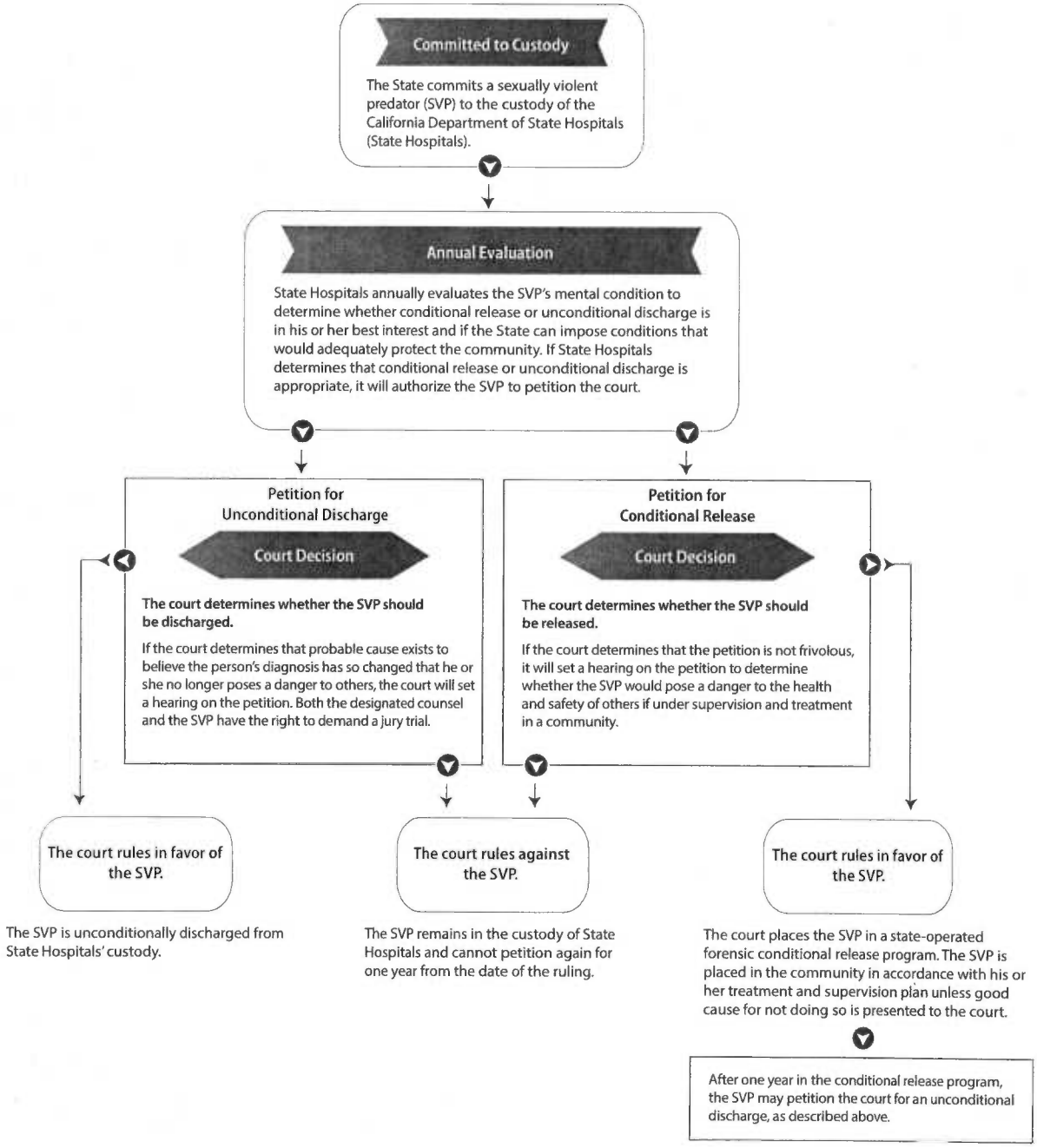
that the offender remain in custody in a secure facility. State law then requires a trial to determine whether the offender is an SVP. During the trial, the court may call upon State Hospitals' evaluators to provide testimony regarding their evaluations. According to State Hospitals, as of June 2014, 354 individuals at Coalinga were awaiting trial to determine whether they would be committed or released. The acting chief of forensic services at Coalinga stated that some individuals awaiting trial receive treatment. However, State Hospitals' chief psychologist told us that offenders' attorneys may recommend they not seek treatment because courts may see participation in treatment as an admission that they are SVPs. Representatives of the courts may periodically request updated evaluations of potential SVPs awaiting trial.

Additionally, some offenders purposely delay their trials and remain confined at a state hospital but are not technically committed as SVPs. State Hospitals' chief psychologist stated that offenders often delay their trials because age is a factor in determining whether an individual is likely to commit another sexually violent, predatory crime, as older offenders are statistically less likely to reoffend. According to State Hospitals' Sex Offender Commitment Program Support System, during fiscal years 2009–10 through 2013–14, courts determined that between eight and 22 individuals per year did not meet the SVP criteria and released them. In fiscal year 2013–14, for example, courts released 16 individuals, compared to the population of approximately 350 awaiting trial at Coalinga as of June 2014.

Treatment and Release

If a court or jury finds that an offender is an SVP, a court commits the offender to a secure facility—generally Coalinga—for an indeterminate time period. State law requires State Hospitals to offer treatment. For those SVPs refusing treatment, State Hospitals must continue to offer treatment on at least a monthly basis. According to State Hospitals, as of June 2014 the courts had committed 573 individuals as SVPs who were housed at Coalinga, and the forensic senior psychologist supervisor at Coalinga stated that 35 percent participate in treatment. Although state law does not require treatment, it allows courts to consider an SVP's failure to participate in or complete treatment when determining whether the SVP's condition has changed and whether the SVP is eligible for release. Figure 2 on the following page outlines the process from commitment through release.

Figure 2
Process Through Which the State Releases Sexually Violent Predators From the Custody of the California Department of State Hospitals



Source: California Welfare and Institutions Code, Section 6600 et seq.

State law requires State Hospitals to evaluate SVPs once a year to determine whether they might qualify for release. The law also requires that a professionally qualified person prepare the evaluation report. In addition to the evaluation performed by an evaluator at Coalinga, the SVP may retain, or request the court to appoint, an expert to perform the annual evaluation. The evaluator's annual report must consider whether the SVP currently meets the SVP criteria and whether unconditional release or release to a less restrictive alternative than a state hospital—called a conditional release—would be in the SVP's best interest. State Hospitals must file these annual reports with the courts in the counties that committed the SVPs. As of December 2014 Coalinga had 11 evaluators performing annual evaluations.

Similar to the decision to commit an SVP, the decision to release an SVP resides with the courts. When State Hospitals finds that an SVP's condition has changed and that he or she no longer meets the SVP criteria and unconditional discharge is appropriate, state law requires State Hospitals' director to authorize the SVP to file a petition for unconditional discharge with the court responsible for his or her initial commitment. If the court determines that probable cause exists that an individual's diagnosed mental disorder has changed and he or she is not a danger to others, then state law requires the court to set a hearing on the issue. Both the designated counsel and the SVP have the right to request a jury trial. When determining whether an SVP seeking unconditional discharge continues to meet the SVP criteria, state law places the burden of proof on the State to prove beyond reasonable doubt that the SVP remains a danger to others. Table 1 on the following page shows the number of offenders who had been committed as SVPs who were discharged from a state hospital, as well as the number of SVPs that State Hospitals conditionally released, during fiscal years 2009–10 through 2013–14.

As part of its annual evaluations, State Hospitals may also recommend the release of an SVP to a less restrictive environment, called a conditional release. An SVP may petition a court for a conditional release with or without State Hospitals' recommendation. If a court determines the SVP's petition is not frivolous, the court will conduct a hearing to determine whether releasing him or her would pose a danger to the health and safety of others—that is, whether the SVP is likely to engage in sexually violent predatory criminal behavior due to a diagnosed mental disorder, if under supervision and treatment in the community.

If a court determines that the SVP would not be a danger to others through treatment in the community, state law requires the court to order the SVP into a state-operated conditional release program that includes outpatient supervision

and treatment. The conditional release program requires SVPs to abide by various conditions. For example, in July 2014, an SVP released into the conditional release program agreed to numerous conditions, such as outpatient treatment, 24-hour monitoring via a global positioning system, and restrictions on travel. State Hospitals has a contract with Liberty Healthcare to provide services for the conditional release program.

Table 1
Individuals Discharged From California Department of State Hospitals' Custody or Released Conditionally
Fiscal Years 2009–10 Through 2013–14

FISCAL YEAR	INDIVIDUALS DISCHARGED OR RELEASED*	OF THOSE RELEASED, INDIVIDUALS ADMITTED TO THE CONDITIONAL RELEASE PROGRAM†
2009–10	23	4
2010–11	22	0
2011–12	17	3
2012–13	10	2
2013–14	14	2
Totals	**86**	**11**

Sources: California State Auditor's analysis of data obtained from the California Department of State Hospitals' (State Hospitals) Sex Offender Commitment Program Support System; information from State Hospitals' conditional release program; and a spreadsheet of discharges, transfers, and deaths from Coalinga State Hospital.

* Of the 86 individuals discharged from State Hospitals' custody during the audit period, only nine were committed for indeterminate terms. The remaining 77 had expired two-year commitments—that is, they were committed before changes to state law in 2006, and the courts did not recommit them for an indeterminate term. Individuals may be unconditionally discharged from State Hospitals' custody to the community when a court determines they no longer meet the criteria of a sexually violent predator (SVP). Individuals may also be discharged to parole, incarceration—for example, to a county jail—discharged to immigration for deportation, or released to the conditional release program.

† SVPs released conditionally must agree to certain restrictions, such as outpatient treatment and monitoring.

Progress on Implementing Recommendations From a 2011 Audit on the Program

State Hospitals has fully implemented three recommendations from the California State Auditor's (state auditor) prior audit report and has stated that it will not implement two. In July 2011 the state auditor issued a report titled *Sex Offender Commitment Program: Streamlining the Process for Identifying Potential Sexually Violent Predators Would Reduce Unnecessary or Duplicative Work* (Report Number 2010-116). The report concluded that the processes at Corrections and the former California Department of Mental Health—now State Hospitals—for identifying and evaluating SVPs were not as efficient as they could be and at times

resulted in the State performing unnecessary work.[2] The report made five recommendations to State Hospitals, and we discuss the status of each in the following paragraphs.

The report recommended that State Hospitals expand the use of its database to capture more specific information about the offenders whom Corrections refers to it and the outcomes of the screenings and evaluations that it conducts. State Hospitals has completed database enhancements that enable it to track more specific information related to victims, offenders, offenses, clinical screening outcomes, and evaluation outcomes.

State Hospitals also fully implemented a recommendation that it continue its efforts to obtain approval for a new position classification for evaluators, continue to recruit qualified individuals, and continue its efforts to train its consulting psychologists to conduct evaluations. State Hospitals received approval from the State Personnel Board for a new sexually violent predator evaluator (SVPE) position and, according to the assistant deputy director of State Hospitals' Forensic Services Division (forensic services), has completed hiring evaluators in this classification. As of December 2014 State Hospitals had 12 SVPEs and 33 consulting psychologists on staff to conduct evaluations.

Further, we recommended that State Hospitals complete and submit reports to the Legislature on its efforts to hire state employees to conduct evaluations and on the impact of Jessica's Law on the program. As previously noted, State Hospitals completed its hiring of employees to complete evaluations. State Hospitals submitted a report to the Legislature in July 2012, which included information on the impact of Jessica's Law.

State Hospitals reported to us that it will not implement two recommendations. First, the report recommended that, to eliminate duplicative effort and increase efficiency, Corrections and State Hospitals jointly revise their structured screening instrument so that the referral process would adhere more closely to the law's intent. As previously discussed, state law requires Corrections and its Parole Board to screen potential SVPs in accordance with a structured screening instrument developed and updated by State Hospitals in consultation with Corrections. If this screening determines that the offender is likely to be an SVP, state law requires Corrections to refer the person to State Hospitals for a full evaluation. However, our 2011 audit report found that Corrections

[2] In June 2012 the California Department of Mental Health was renamed the California Department of State Hospitals. To avoid confusion, we refer to the California Department of Mental Health as State Hospitals throughout the report.

frequently referred offenders whom State Hospitals had previously evaluated and found not to meet the SVP criteria, even though those offenders had not committed new sexual crimes.

To address this recommendation, State Hospitals reported that it believes that by entering into a memorandum of understanding with Corrections in January 2011, in which Corrections delegated authority to State Hospitals to conduct a clinical review, it is in compliance with the law's intent. State Hospitals agreed to conduct clinical review screens of offenders' sexually violent predatory offenses and social, criminal, and institutional histories. According to the assistant deputy director of forensic services, the memorandum uses State Hospitals' expertise in evaluating potential offenders.

Finally, State Hospitals reported that it will not implement a recommendation related to reducing costs for unnecessary evaluations. Specifically, the report recommended that it should either issue a regulation or seek a statutory amendment to clarify that when resolving a difference of opinion between the two initial evaluators of an offender, it must seek the opinion of a fourth evaluator only when the third evaluator concludes that the offender meets SVP criteria. State Hospitals stated that it will not implement this recommendation because of the significant reduction in referrals it receives from Corrections and its finding that potential costs savings were insignificant. Therefore, according to the assistant deputy director of forensic services, State Hospitals plans to continue to obtain two evaluations to resolve cases in which the initial two evaluators do not agree.

Scope and Methodology

The Joint Legislative Audit Committee directed the state auditor to perform an audit of the policies and procedures that State Hospitals' mental health professionals follow when evaluating sex offenders for initial commitment, recommitment, and conditional or unconditional release.

Table 2
Audit Objectives and the Methods Used to Address Them

	AUDIT OBJECTIVE	METHOD
1	Review and evaluate the laws, rules, and regulations significant to the audit objectives.	Reviewed relevant state laws and regulations.
2	Review the policies and procedures used by evaluators at the California Department of State Hospitals (State Hospitals) when conducting evaluations of offenders and sexually violent predators (SVPs). Specifically, determine the following: a. The amount of time that evaluators are directed to spend on evaluations. b. The peer and supervisory review procedures for evaluations. c. The steps taken to replace an evaluator when an evaluation is incomplete. d. Whether the policies or procedures provide any monetary or workload incentives to evaluators. e. Whether the policies and procedures used by State Hospitals' evaluators are consistent with best practices, to the extent that those practices can be identified.	To evaluate State Hospitals' policies and procedures for the specified items, we did the following: • Reviewed current and prior versions of State Hospitals' standardized assessment protocol and other documentation related to conducting evaluations. • Reviewed a decision from the Office of Administrative Law that provisions of State Hospitals' 2007 protocol were regulations that had not been approved through the Administrative Procedure Act. • Interviewed key staff at State Hospitals and at Coalinga State Hospital (Coalinga) to obtain their perspectives. Also reviewed State Hospitals' available policies and procedures. • Noted that neither State Hospitals nor Coalinga has formal policies regarding replacing evaluators when evaluations are incomplete, but managers at both entities stated that a new evaluator assigned to an incomplete evaluation would need to redo it entirely. • Interviewed key staff at State Hospitals and Coalinga to determine what peer and supervisory review procedures are used in the evaluation process. Also reviewed available documentation of the peer and supervisory review procedures. To assess whether State Hospitals' policies and procedures were consistent with best practices, we did the following: • Reviewed guidance from the American Psychological Association (APA) regarding forensic evaluation of sex offenders and incorporated that into our work on objectives 3 and 7c. • Reviewed laws related to SVPs in Massachusetts, Washington, and South Carolina, as well as audits or other research on programs in Virginia, Florida, and Colorado. We did not identify specific practices for California to follow.
3	Review a selection of evaluations, including evaluations for initial commitment and for conditional and unconditional release, and determine whether the evaluations were completed in accordance with state law and regulations, with State Hospitals' policies and procedures, and with any identifiable best practices. As part of this review, consider the breadth of documents that State Hospitals' evaluators consider when completing an evaluation of a sex offender or SVP and the number of treating staff interviewed as part of the evaluation.	• Interviewed relevant staff regarding State Hospitals' and Coalinga's expectations for completing evaluations. • Selected and reviewed 29 evaluations conducted during fiscal years 2009–10 through 2013–14, including 23 from State Hospitals' evaluators at its headquarters and six from Coalinga's evaluators. Our selection included initial, updated, and annual evaluations, as well as evaluations performed immediately before an offender or an SVP's release. • Assessed the extent to which the 29 evaluations adhered to State Hospitals' protocol and expectations as well as APA guidance. • Compared each of the 23 evaluations at State Hospitals' headquarters to other evaluations of the same individual to determine any differences in the documents the evaluators indicated they used. • For the six evaluations at Coalinga, we assessed the number of treatment staff consulted when developing the evaluation. We have no findings in this area.
4	By year, determine the number of positive determinations and the number of negative determinations for both offenders and SVPs.	Calculated positive and negative determinations for offenders using data obtained from State Hospitals' Sex Offender Commitment Program Support System (SOCPSS) and present the data in Table 5 on page 41. See the discussion about SVPs in Objective 5.
5	Determine the following information by year: a. The number of SVPs that State Hospitals found suitable for conditional release. b. The number of SVPs that State Hospitals found suitable for unconditional release. c. The number of SVPs released for any reason, including a case dismissal or a finding by State Hospitals that the individual did not meet the SVP criteria. d. The number of SVPs that State Hospitals found unsuitable for release.	• Calculated the number of individuals released using data from State Hospitals' SOCPSS. • Obtained a list of all SVPs who had been or were currently in State Hospitals' conditional release program. • In SOCPSS, State Hospitals tracks the findings of each evaluation of individuals who have been committed to State Hospitals. However, it does not track an overall result by individual evaluated. Thus, we are not able to report on the number of SVPs that State Hospitals found suitable for release. Instead, we report the findings of individual evaluators. The table on page 52 in the Appendix provides information on the conclusions of individual evaluators regarding the individuals committed to the custody of State Hospitals. • Interviewed key State Hospitals management regarding its efforts to track the outcomes of court cases.

continued on next page . . .

	AUDIT OBJECTIVE	METHOD
6	By year, determine the total number of evaluators used by State Hospitals, the number of those evaluators that were State Hospitals' employees, and the number of cases assigned to each evaluator.	• Using data obtained from State Hospitals' SOCPSS, information obtained from both State Hospitals and Coalinga on their evaluators, and State Hospitals' payroll data obtained from the California State Controller's Office's Uniform State Payroll System, we calculated the number of employee and contract evaluators State Hospitals used during fiscal years 2009–10 through 2013–14 and the number of evaluations conducted. We present this data in Table 6 on page 44. • Identified State Hospitals' method for assigning cases to evaluators. Because State Hospitals assigns evaluators on a per-evaluation basis, rather than a per-case basis, the steps we took to address Objective 6 also pertain to Objective 7b. We also report on the process for assigning workload to evaluators in Objective 8.
7	Review the qualifications and experience of the evaluators State Hospitals used. At a minimum, consider the following:	• Interviewed relevant staff regarding State Hospitals' procedures to verify that evaluators had the appropriate qualifications. • Reviewed employment or contracting records for a selection of 15 employee and contract evaluators. • For the 15 selected evaluators, we determined the number of years of experience based on the licensure period and other documentation. • Verified whether each of the evaluators had a current, state-issued license to practice psychology or psychiatry in California.
	a. The number of years of relevant experience for State Hospital employees who conducted evaluations as compared to the number of years of experience for evaluators that State Hospitals contracted with.	
	b. The number of evaluations conducted by State Hospitals' employees for each of the last five years as compared to the number of evaluations conducted by evaluators that State Hospitals contracts with over the same period.	We describe the steps taken to address Objective 7b in Objective 6.
	c. Whether State Hospitals provides adequate training to both staff and contracted evaluators.	• Reviewed training materials and schedules. • Obtained the perspective of managers at both State Hospitals' headquarters and Coalinga regarding training needs for evaluators. • Reviewed training plans in place at both State Hospitals and Coalinga.
8	To the extent possible, provide recommendations for changes that would improve the policies and procedures State Hospitals uses to evaluate offenders and SVPs and the compensation or incentives given to evaluators.	• Reviewed evaluator contracts and employee position descriptions for our audit period. • Interviewed key management to understand State Hospitals' method of assigning work to its evaluators. • Obtained documentation and evaluated workload assignment methodology to assess whether the practices in place might create incentives for employees or contractors to rush work. • Made recommendations to State Hospitals related to several of the audit objectives.
9	Review and assess any other issues significant to the evaluation of offenders and SVPs.	• Interviewed key managers at State Hospitals and reviewed relevant documentation related to State Hospitals' implementation of recommendations from a 2011 audit report by the California State Auditor (state auditor). • Interviewed relevant staff and obtained Coalinga's tracking log to identify the extent of its backlog of annual evaluations for individuSals committed as SVPs.

Sources: State auditor's analysis of Joint Legislative Audit Committee audit request 2014-125, and information and documentation identified in the table column titled *Method*.

Methods to Assess Data Reliability

In performing this audit, we obtained electronic data files extracted from the information systems listed in Table 3. The United States Government Accountability Office, whose standards we are statutorily required to follow, requires us to assess the sufficiency and appropriateness of the computer-processed information that we use to support our findings, conclusions, or recommendations. Table 3 describes the analyses we conducted using data from these information systems, our methodology for testing them, and the issues we identified pertaining to the data. Although we recognize that these issues may impact the precision of the numbers we present, there is sufficient evidence in total to support our audit findings, conclusions, and recommendations.

Table 3
Methods Used to Assess Data Reliability

INFORMATION SYSTEM	PURPOSE	METHOD AND RESULT	CONCLUSION
California Department of State Hospitals (State Hospitals) Uniform State Payroll System (payroll system) State Hospitals' payroll data as maintained by the California State Controller's Office (state controller) for the period July 1, 2009, through June 30, 2014	For the period July 1, 2009, through June 30, 2014, determine whether the individual conducting the evaluation was a State Hospitals' employee (employee) or an evaluator State Hospitals contracted with (contractor) at the time the evaluation was performed.	• We performed data-set verification procedures and electronic testing of key data elements and did not identify any errors. • We relied on completeness testing performed as part of the State's annual financial audit for payroll transactions between January 2008 and June 2013. Because we found the payroll data to be complete between January 2008 and June 2013, we have reasonable assurance that the payroll data for the period of July 2013 through June 2014 are also complete. • We did not conduct accuracy testing on these data.	Undetermined reliability for the purposes of this audit. Although this determination may affect the precision of the numbers we present, there is sufficient evidence in total to support our audit findings, conclusions, and recommendations.
State Hospitals Sex Offender Commitment Program Support System (SOCPSS) State Hospitals case and evaluation data related to sex offenders (offenders) as of September 17, 2014	To determine the number of evaluations by type, outcome, and fiscal year and the number of cases that included a difference of opinion between evaluators for offenders prior to commitment.	• We performed data-set verification procedures and electronic testing of key data elements and did not identify any issues. • For a random selection of 29 evaluations, we verified that key data elements matched source documentation and did not identify any significant issues. • To test the completeness of State Hospitals' data, we haphazardly selected 29 evaluations and traced them from State Hospitals' source documents back to SOCPSS. We found the data to be complete.	Sufficiently reliable for the purposes of this audit.

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INFORMATION SYSTEM	PURPOSE	METHOD AND RESULT	CONCLUSION
	To determine by fiscal year the number of offenders awaiting trial who received evaluations by State Hospitals. To determine by fiscal year the number of cases prior to commitment found by State Hospitals to be positive or negative for commitment.	• We performed data-set verification procedures and electronic testing of key data elements and did not identify any issues. • For a random selection of 46 evaluations prior to commitment, we attempted to verify that key data elements matched source documentation. However, we found two errors in each of two fields that contain the date that probable cause was found for an offender awaiting trial and the date that State Hospitals made its final determination for an offender prior to commitment. • To test the completeness of State Hospitals' data, we haphazardly selected 29 evaluations prior to commitment and traced them from State Hospitals' source documents back to SOCPSS. We found the data to be complete.	Not sufficiently reliable for the purposes of this audit. Although this determination may affect the precision of the numbers we present, there is sufficient evidence in total to support our audit findings, conclusions, and recommendations.
	To determine by fiscal year the number of evaluations after commitment performed on sexually violent predators (SVPs) by type and outcome.	• We performed data-set verification procedures and electronic testing of key data elements and did not identify any issues. • We performed accuracy testing for a random selection of 29 evaluations performed after commitment and attempted to verify that key data elements matched source documentation. The results of our testing identified three errors in the field that contains the date that State Hospitals received an evaluation from the evaluator. As a result, we were unable to identify the complete universe of evaluations during our audit period that were performed after commitment. Therefore, we did not conduct completeness testing for evaluations performed after commitment.	Not sufficiently reliable for the purposes of this audit. Although this determination may affect the precision of the numbers we present, there is sufficient evidence in total to support our audit findings, conclusions, and recommendations.
	To determine by fiscal year the number of offenders held due to probable cause who were discharged. To identify SVPs who were discharged by fiscal year.	• We performed data-set verification procedures and electronic testing of key data elements and did not identify any issues. • We randomly selected 29 evaluations after commitment and verified that key data elements matched source documentation, and did not identify any issues. • To assess the completeness of the SOCPSS data, we haphazardly selected 29 discharge records and traced them from State Hospitals' source documents back to SOCPSS and found the data to be complete.	Sufficiently reliable for the purposes of this audit.
	Determine by fiscal year for both State Hospitals' employees and contractors the total number evaluations conducted.	• We performed data-set verification procedures and did not identify any issues. • We performed electronic testing of key data elements and found that the data field containing Social Security number information was blank 47 percent of the time. As a result, we could not use this field to identify State Hospitals' employees who performed evaluations and took additional steps to manually identify their Social Security numbers. • We traced the universe of employees who performed evaluations during our audit period to the state controller's payroll system. We then randomly selected 29 contractors who performed evaluations during our audit period and verified that State Hospitals had contracts with these evaluators during our audit period. • As we previously described, the results of our accuracy testing of evaluations performed after commitment showed that the universe of evaluations during our audit period is not complete. Therefore, we lack assurance that we were able to identify all evaluators who performed evaluations during our audit period.	Not sufficiently reliable for the purposes of this audit. However, we determined the numbers we present for evaluations prior to commitment are accurate due to the additional steps we performed. Further, the issues identified in accuracy testing may impact the precision of the numbers we present for evaluations performed after commitment. However, there is sufficient evidence in total to support our audit findings, conclusions, and recommendations.

Sources: California State Auditor's analysis of various documents, interviews, and data from the entities listed above.

Chapter 1

THE CALIFORNIA DEPARTMENT OF STATE HOSPITALS LACKS A ROBUST ASSESSMENT PROTOCOL AND REVIEW PROCESS FOR ITS EVALUATIONS FOR THE SEX OFFENDER COMMITMENT PROGRAM

Chapter Summary

The California Department of State Hospitals (State Hospitals) has not been consistent in its evaluations of the sex offenders (offenders) whom the California Department of Corrections and Rehabilitation (Corrections) has referred to it for possible commitment as sexually violent predators (SVPs). Specifically, our review found that State Hospitals' evaluators did not always document that they considered all relevant information in their evaluations. State Hospitals' current assessment protocol likely contributed to the issues we noted. For example, the protocol does not give guidance on specific risk assessment approaches or list specific risk assessment instruments evaluators may choose to use. Further, although SVP evaluations completed by evaluators at State Hospitals' headquarters undergo several reviews, none is focused on ensuring the quality of evaluations from a clinical perspective. In October 2013 State Hospitals established a quality assurance and training team (quality assurance team) to provide guidance to State Hospitals' less-experienced evaluators at headquarters; however, the quality assurance team does not provide supervisory review.

Given that the courts, and not State Hospitals, have the final say on whether an offender is an SVP, we would expect State Hospitals to gather and analyze data on the extent to which the courts disagree with evaluators. However, State Hospitals has not consistently tracked the disposition of court cases. As such, State Hospitals is missing an opportunity to improve its evaluation process and better inform the training and supervision of its evaluators.

State Hospitals' Evaluations of Current and Potential SVPs Have Been Inconsistent

State law requires that State Hospitals evaluate offenders for possible commitment as SVPs by considering criminal history; psychosexual history; type, degree, and duration of sexual deviance; and severity of mental disorder. However, our review of 29 evaluations found that State Hospitals' evaluators did not always document that they considered all relevant information. We reviewed 23 evaluations of current and potential SVPs completed by State Hospitals' evaluators at its headquarters in Sacramento and

six annual evaluations of current SVPs that it completed at Coalinga State Hospital (Coalinga). We noted instances in which evaluators did not consider all relevant documentation, address elements of offenders' backgrounds, or use certain instruments to assess the risk of offenders committing additional crimes. When evaluators do not consider all relevant information, they may reach incorrect conclusions. Further, when they do not document the reasoning behind their conclusions, those conclusions are more likely to be challenged in court.

State Hospitals' evaluators have been inconsistent in the breadth of documentation they consider while performing evaluations.

Our review demonstrates that State Hospitals' evaluators have been inconsistent in the breadth of documentation they consider while performing evaluations. According to State Hospitals' chief psychologist, State Hospitals expects its evaluators to review all documentation relevant to offenders they are evaluating; however, it has not formalized this expectation into a written policy or procedures manual, but rather informally communicates it to evaluators.[3] Nonetheless, when we reviewed evaluations by State Hospitals' evaluators in Sacramento, we found discrepancies in the ways that different evaluators assessed the same offenders. As discussed in the Introduction, at least two evaluators must independently evaluate whether an offender meets the criteria of an SVP. However, when we compared each of the 23 evaluations selected for review to companion evaluations performed by other evaluators, we noted differences in the documents evaluators indicated they reviewed.

At times, these discrepancies led to significant differences in the evaluators' descriptions of the offenders being evaluated. For example, in one case an evaluator listed that he reviewed several mental health records for a potential SVP that another evaluator did not list. The evaluator who listed reviewing these records noted that the offender experienced suicidal thoughts during incarceration, while the other evaluator stated that the offender did not have any mental health problems according to the offender's records from Corrections. This type of discrepancy is concerning and could ultimately prove problematic in court. We also observed other instances in which evaluators noted that they reviewed records others did not, such as probation reports, court complaints, behavioral reports, treatment records, and psychiatric notes.

In addition, the evaluations we reviewed did not always consider relevant background information. Specifically, four of the 23 evaluations did not contain sections describing that the evaluator

[3] In 2015 State Hospitals' contracts with independent evaluators require that the evaluators conduct a thorough file review, including a review of the offender's correctional file, criminal history, arrest record, and county probation reports. However, this language did not appear in past contracts.

considered the psychosexual history of the offenders, as state law requires. According to the Center for Sex Offender Management, a psychosexual history is a detailed and thorough sexual history that includes the exploration of sexual development, attitudes, fantasies, and adjustment.[4] Although two of these four evaluations contained sexual history sections and relationship history sections, they did not contain sections describing psychosexual history. According to State Hospitals' chief psychologist, the discussion in the sexual history and relationship history sections in these two evaluations did not adequately cover psychosexual history, although they addressed some elements of it. The remaining two evaluations did not contain specific sections on sexual history.

State Hospitals' evaluators also did not always fully document their use of static and dynamic risk assessment instruments, which we describe in the Introduction. A state regulation stipulates that the evaluator, according to his or her professional judgment, must apply tests or instruments along with other static and dynamic risk factors when making the assessment. The chief psychologist told us that State Hospitals has interpreted the regulations to mean that evaluators will apply both a static and a dynamic risk assessment instrument in conducting an SVP evaluation. However, the chief psychologist acknowledged that State Hospitals has not communicated this expectation to evaluators in a written policy. We could find no documentation of the use of a dynamic risk assessment instrument for one of the 23 evaluations we reviewed, and another evaluator used scores from a previous assessment of dynamic risk factors. Further, in four of the 23 evaluations, the evaluators did not include the scoring grids for some or all of the risk assessment instruments the evaluators used, even though the scoring grids allow evaluators to demonstrate how they reached conclusions regarding risks for reoffense. In another instance, the evaluator noted that he included the scoring instruments in an addendum; however, the evaluator did not note that he was referring to an addendum to his previous evaluation of the offender.

State Hospitals' evaluators did not always document whether they took into consideration any potential barriers to communication with the offenders they evaluated.

Further, State Hospitals' evaluators did not always document whether they took into consideration any potential barriers to communication with the offenders they evaluated. Forensic psychology specialty guidelines from the American Psychological Association state that when interpreting assessment results, forensic practitioners consider the purpose of the assessment as well as the various test factors, test-taking ability, and other characteristics of individuals being assessed that might reduce the accuracy of the evaluators' interpretations. These communication

[4] According to its Web site, the Center for Sex Offender Management is a national clearinghouse and technical assistance center that supports state and local jurisdictions in the effective management of offenders.

barriers could include situational, personal, linguistic, and cultural differences. Corrections uses the Disability and Effective Communication System (DECS)—a statewide disability and effective communication database—as a means of allowing its staff to view disability information and make necessary accommodations for inmates and parolees in parole proceedings. According to the chief psychologist, State Hospitals expects evaluators to review the DECS report and indicate that they examined it in their reports; however, it has not written this expectation into a policy. In eight of 23 evaluations we reviewed, the evaluators did not indicate whether they considered the DECS report, an important component that if not considered could result in an inaccurate conclusion by the evaluator.

When evaluators do not consider all relevant information, they risk drawing incorrect conclusions about whether offenders meet the SVP criteria.

When evaluators do not consider all relevant information, they risk drawing incorrect conclusions about whether offenders meet the SVP criteria. Further, if evaluators neglect to consider an adequate breadth of documentation or demonstrate how they reached their conclusions, courts may not have accurate and complete information to reach appropriate decisions. Consequently, a court may neglect to commit someone who poses a danger to the public or choose to commit someone who does not need to be in a state hospital.

In addition to not considering all relevant information, evaluators also did not always consider all three criteria for determining whether offenders might be recommended for commitment as SVPs. However, this decision created some efficiency. Specifically, the evaluators documented that they did not diagnose a mental disorder and therefore did not evaluate the third criterion for three of the 23 evaluations we reviewed. As the Introduction describes, diagnosing a mental disorder is the second of three criteria that offenders must meet to be considered for commitment as SVPs. In these cases, because the evaluators concluded that the offenders did not meet the second criterion, they chose not to assess the third criterion—whether the diagnosed mental disorder makes the offenders likely to engage in sexually violent, predatory criminal behavior in the future without treatment and custody. According to a staff legal counsel and chief psychologist, State Hospitals has directed evaluators to complete evaluations of all three criteria regardless of the outcome of one, even if that outcome means that the offender will not be considered an SVP. Nevertheless, if an evaluator determines that an offender will not meet the SVP criteria, we believe that stopping the evaluation is both sensible and efficient.

State Hospitals' Standardized Assessment Protocol Is Inadequate

The inconsistencies we found in State Hospitals' evaluations are likely due in part to the fact that its standardized assessment protocol does not provide evaluators with adequate detail and

direction on how to perform evaluations. State law requires State Hospitals to conduct its evaluations of potential SVPs in accordance with a standardized assessment protocol, which it must develop and update in consultation with Corrections. State Hospitals' existing protocol, which it established in regulation in 2009, states that evaluators must make their assessments by applying tests or instruments along with other static and dynamic factors according to their professional judgment. However, the protocol provides little additional detail to assist evaluators on how to perform the assessments. For example, it does not describe specific risk assessment approaches or list specific risk assessment instruments evaluators may choose to use, such as the Static-99R or the Stable 2007.

State Hospitals' existing protocol, which it established in regulation in 2009, states that evaluators must make their assessments by applying tests or instruments along with other static and dynamic factors according to their professional judgment; however, it provides little additional detail to assist evaluators on how to perform the assessments.

State Hospitals' previous protocol from 2007 was significantly more detailed. It included a discussion of approaches to risk assessment and identified the different types of risk factors and risk assessment instruments evaluators could use. However, in August 2008, State Hospitals revised its protocol and removed this type of detail in response to a ruling by the Office of Administrative Law (OAL) that certain provisions within it should have been adopted in the manner required by the Administrative Procedure Act (Act). Specifically, the OAL ruled that provisions of the protocol that contained instructions to the evaluators on how to conduct evaluations, which questions to ask, and how to submit findings met the definition of regulations; thus, those sections should have been adopted pursuant to the Act. In response, State Hospitals revised its standard assessment protocol, stripping much of its detail, and established it in regulation.

However, without specific guidance regarding how to conduct evaluations, evaluators may not perform their work consistently or review all of the appropriate documents, increasing the risk that they will make erroneous assessments. When we discussed adopting a more detailed standard assessment protocol with State Hospitals, a staff legal counsel and the assistant deputy director of State Hospitals' Forensic Services Division (forensic services) told us that State Hospitals plans to update its assessment protocol by following the Act.

State Hospitals Has Provided Evaluators With Limited Supervision, but Its New Quality Assurance Team Is Taking Some Steps to Improve Quality Control

Another likely cause of State Hospitals' inconsistent evaluations is the limited supervision it has provided to its evaluators. Given its recent hiring of evaluators and the highly specialized nature of evaluating current and potential SVPs, we would expect State Hospitals to have established quality control measures, such as

supervisory reviews, to ensure that evaluators complete adequate and consistent evaluations. However, none of State Hospitals' reviews of SVP evaluations focus on ensuring the quality of the evaluations from a clinical perspective. According to State Hospitals' chief psychologist, in October 2013 State Hospitals established a quality assurance team to improve opportunities for mentoring newer evaluators. Nevertheless, the quality assurance team's role is advisory, not supervisory. Further, at Coalinga—where evaluators generally focus on conducting annual evaluations of offenders who are already committed as SVPs—managers told us that evaluators should receive several levels of supervisory review. However, because Coalinga does not require supervisors to maintain a formal record of the reviews, it cannot demonstrate that they occur.

Although evaluations of potential SVPs completed at State Hospitals' headquarters undergo several levels of review, no level of review assesses the appropriateness of clinical conclusions the evaluators draw. According to State Hospitals' chief psychologist, a case manager performs a nonclinical review and checks evaluations for grammar and stylistic errors. A staff legal counsel at State Hospitals informed us that legal counsel also reviews certain evaluations: those that recommend commitment and those in which the two initial evaluators disagree about commitment and the two independent professionals who subsequently assess the offender also disagree. Further, she stated that legal counsel began reviewing update evaluations—evaluations that update information for prior evaluations—in January 2015. The staff legal counsel stated that the legal office checks for logic errors, continuity of thought, and consistent reasoning. The legal office also considers whether evaluations respond to the criteria necessary for legal commitment. However, it does not provide any analysis of whether evaluators correctly performed clinical elements, such as using a risk assessment instrument.

If an evaluation lacks strong clinical elements, it may face scrutiny in court due to poor quality of the evaluator's analysis; ultimately, it may fail to adequately demonstrate the need to commit or not commit an offender.

According to State Hospitals' chief psychologist, he signs off on some SVP evaluations, such as instances when a case manager or State Hospitals' legal services request a review. However, his reviews are more cursory than substantive. They critique the structure of an evaluation and ensure that its legal argument is sound but, like the legal office's reviews, they do not consider the quality of the clinical elements of the evaluation. If an evaluation lacks strong clinical elements, it may face scrutiny in court due to poor quality of the evaluator's analysis; ultimately, it may fail to adequately demonstrate the need to commit or not commit an offender.

State Hospitals' headquarters currently lacks the supervisory structure necessary to perform clinical reviews of evaluations. As of December 2014, 45 employee evaluators at State Hospitals' headquarters reported to the chief psychologist, who holds the only supervisory position. The chief psychologist stated that he is also responsible for overseeing the contract evaluators who perform SVP evaluations, and he expects there to be approximately 20 contractors for 2015. He also said that the clinical staff would like to expand case file reviews to ensure that the evaluators properly complete evaluations. However, he stated this would require an expansion of the quality assurance team and he estimates that he would need four or five veteran clinical staff on the team to fully run quality assurance of SVP evaluations. He told us that he requested the creation of such positions from the administration of forensic services in spring 2014, but the administration only approved an additional chief psychologist position in December 2014. He said that the process to fill this position will likely take several months.

As of December 2014, 45 employee evaluators at State Hospitals' headquarters reported to the chief psychologist, who holds the only supervisory position.

Although State Hospitals does not have a process to perform a clinical supervisory review of evaluations, it has taken some steps to improve the quality of the evaluations. According to the chief psychologist, he established the quality assurance team shortly after joining State Hospitals in October 2013. Led by the chief psychologist and two field trainers who are veterans in the area of psychological evaluations, the team provides guidance to State Hospitals' consulting psychologists—a classification of evaluator that requires less experience—and assists in the development and implementation of State Hospitals' training plan. Although the team does not perform supervisory reviews, they are available to provide feedback to evaluators on their SVP evaluations upon the request of the evaluator, State Hospitals' management, or legal counsel. State Hospitals' chief psychologist provided an example of an instance in which he stated an evaluator requested that a quality assurance team member review a draft evaluation prior to its completion. In the review, the quality assurance team member noted multiple instances in which the evaluator could improve the quality of the writing and the clarity of the conclusion, and he also noted places where the evaluator neglected to include necessary information.

The quality assurance team is also responsible for State Hospitals' mentorship program for new evaluators. According to the chief psychologist, in August 2014 State Hospitals started a mentorship program for new SVP evaluators to shadow more-experienced evaluators, obtain feedback on evaluations, and receive assistance and training in courtroom testimony. State Hospitals has two classifications at headquarters responsible for conducting SVP evaluations: sexually violent predator evaluators and consulting psychologists. We discuss these classifications in more detail in Chapter 2. State Hospitals designed the mentorship program to

assist only the consulting psychologists, because the minimum qualifications for this position do not require prior experience in the risk assessment and diagnosis of SVPs or an equivalent class of offenders. The quality assurance team is responsible for determining when new evaluators participating in the mentorship program are ready to complete evaluations on their own; according to the chief psychologist, the program usually lasts from a year to a year and a half. The chief psychologist stated that 12 consulting psychologists were participating in the mentorship program as of October 2014.

The chief psychologist said he would like to expand the supervisory review function and to continue the work of the quality assurance team; however, he acknowledges that he would need additional staff to do so. Without adequate supervision and review, State Hospitals' evaluators may not complete evaluations effectively, increasing the risk that the evaluators either will not identify offenders who meet the definition of an SVP or will erroneously conclude they do.

In contrast to State Hospitals' process at headquarters, the managers at Coalinga told us that multiple levels of review occur for the annual evaluations its evaluators perform of SVPs, but there is no evidence kept of their occurrence.

In contrast to State Hospitals' process at headquarters, the managers at Coalinga told us that multiple levels of review occur for the annual evaluations its evaluators perform of SVPs. However, Coalinga has not established a process to document these reviews. According to the acting chief of forensic services (forensics) at Coalinga, the forensic senior psychologist supervisor reviews each evaluation and identifies specific problems, such as missing risk factors, which she communicates to the evaluators. In addition, the acting chief of forensics stated that he conducts a quick read-through of the evaluations to ensure that they make sense and are convincing. Further, he said that an analyst reviews the evaluations for grammar, spelling, and punctuation errors. However, he also told us that Coalinga does not document these various reviews.

According to Coalinga's medical director, he signs the letters that transmit evaluations to the courts. The medical director stated that he reviews the evaluations at this time to ensure that they contain correct grammar and sentence structure and that the content supports the evaluators' recommendations. The medical director said that he does not use a checklist or follow any other guidance when reviewing these evaluations, and the only documentation to show his review is his signature on the letters to the courts. In the event that the medical director disagrees with an evaluation, he asks the evaluator to consider a modification, paying particular attention to the issue he deems to be important. If the evaluator declines to reconsider, the medical director submits a cover letter in disagreement with the evaluator's opinion.

Coalinga has a tool for documenting supervisory review but has not formally adopted its use. In 2012 Coalinga created a checklist to use for reviewing annual evaluations to ensure that they were accurate and complete. According to Coalinga's acting chief of forensics, he uses the checklist as a reference document when performing his reviews. Coalinga's forensic senior psychologist supervisor, on the other hand, stated that she does not use it. Coalinga's acting chief of forensics explained that he does not want to formalize the use of the checklist because courts could request checklists, and any errors or omissions might diminish the strength of the evaluations. However, we disagree with this reasoning since the reviews are performed before Coalinga finalizes its evaluations, so the evaluators would have a chance to correct errors. Further, using a formal checklist would assist both supervisors and evaluators in documenting that the evaluations are completed consistently and according to Coalinga's expectations.

If State Hospitals Increased Its Tracking of Court Data, It Could Strengthen Its Evaluation Process

State Hospitals could better use data related to court outcomes to identify areas for strengthening its evaluations. According to its Web site, one of State Hospitals' goals is excellence in forensic evaluation. As part of its effort to ensure that it meets this goal, we would expect it to examine the usefulness of its evaluations to those who use them—specifically, courts considering whether offenders meet the SVP criteria and should be committed. However, according to the chief psychologist, State Hospitals has not analyzed data regarding the disposition of its cases or established benchmarks to evaluate the rate at which courts agree or disagree with evaluators.

State Hospitals has not analyzed data regarding the disposition of its cases or established benchmarks to evaluate the rate at which courts agree or disagree with evaluators.

Courts do not always agree with State Hospitals' evaluators regarding whether offenders should be committed as SVPs. Under state law, State Hospitals' evaluators report on whether they believe offenders meet the SVP criteria based on their evaluations. However, a court or jury ultimately decides whether an offender will be committed to a state hospital. According to State Hospitals' assistant deputy director of forensic services, courts periodically disagree with its evaluators' findings. In our review of 23 evaluations, we noted one instance in which evaluators determined that an offender met the criteria as an SVP, yet the courts chose to release the offender. Given that the courts have the final say on whether offenders are SVPs, we would expect State Hospitals to gather and analyze data on court outcomes so that it can identify potential weaknesses in its processes for conducting evaluations.

However, State Hospitals has not consistently tracked the disposition of these court cases. The assistant deputy director of forensic services explained that before November 2014, State Hospitals' case managers tracked the disposition of court cases regarding SVP commitment by attempting to follow up with the courts and district attorneys directly. However, she indicated that this process was not always successful because court hearings were sometimes postponed or cancelled, so keeping up with the rescheduling of cases throughout the State demanded significant resources. She also stated that some counties were responsive to State Hospitals' requests for case outcomes and frequently reported their data, whereas counties with larger caseloads were often not as responsive. Moreover, she stated that when evaluators were primarily contractors, the courts sent notices to testify on their findings to the evaluators directly. Consequently, State Hospitals was often not aware of the court schedules, making it more difficult to consistently follow up on the outcome of cases.

Because State Hospitals does not consistently track the courts' dispositions for its SVP cases, it is missing an opportunity to gain data that could improve its evaluation process and inform its training and supervision of its evaluators.

Because State Hospitals does not consistently track the courts' dispositions for its SVP cases, it is missing an opportunity to gain data that could improve its evaluation process and inform its training and supervision of its evaluators. State Hospitals' chief psychologist agreed that analyzing the dispositions of cases could be beneficial. He stated that if, for example, the courts routinely reach conclusions that oppose evaluators' findings, State Hospitals could try to determine the cause, such as poor report writing or testimonial skills. It could then use this analysis to focus its training to best enhance evaluators' skills. We believe that collecting and analyzing such data would be an important element in its efforts to ensure high-quality evaluations.

State Hospitals recently changed its approach to tracking case outcomes. According to the assistant deputy director, the courts mail State Hospitals the notices for evaluators to appear in court now that most of the evaluators are employees and not contractors. As a result, case managers can better track the progress of cases through court and follow up with the district attorneys or courts for outcome results. Further, in November 2014, after our audit began, forensic services revised its process for its court scheduling. The revised process acknowledged that the previous court scheduling process was convoluted, confusing, and inefficient, with multiple instances of miscommunication between court officials, headquarters staff, and evaluators. Under the revised process, policy support staff are responsible for verifying which evaluators courts subpoena, inputting the relevant case data into the case management system, tracking key dates, and running reports for data and research. Policy support unit staff are also responsible for tracking initial and updated court appearance dates for evaluators. This new process may help State Hospitals

better track case outcomes, compile data, and evaluate trends in court decisions. However, given that State Hospitals only recently made these revisions, it is too soon to conclude that its process is effective.

Recommendations

Legislature

To promote efficiency, the Legislature should change state law to allow State Hospitals the flexibility to stop an evaluation once the evaluator determines that the offender does not meet one of the SVP criteria.

State Hospitals

To improve the consistency of its evaluations, by June 2015, State Hospitals should create a written policy that requires its evaluators to include the following documentation in their evaluations:

- Detail describing all the documentation they reviewed.
- The offender's psychosexual history.
- A description of the risk assessment instruments the evaluator used and the scoring tool for those risk assessments.
- Acknowledgement of the evaluator's review of the DECS report.

To promote consistency and ensure that it provides sufficient guidance to evaluators, State Hospitals should update its assessment protocol by March 2016 to include more specific instructions on how to conduct evaluations, such as what assessment instruments evaluators may use and what documents they should consider. State Hospitals should also develop a timeline for periodically reviewing and making any necessary updates to the assessment protocol.

To comply with state law, State Hospitals should ensure that it follows the Administrative Procedures Act for future changes to its standardized assessment protocol.

To improve the consistency and completeness of its evaluations, by December 2015 State Hospitals should develop a plan for the formal, supervisory review of evaluations from a clinical perspective that balances the needs of the program with its resource limitations. For example, rather than attempting to review

every evaluation, State Hospitals could focus its review efforts on those evaluations most at risk of error or inconsistency, such as those completed by the newest evaluators. If State Hospitals adopts this or a similar approach, it should review the remaining evaluations on a sample basis.

To ensure that it can demonstrate the consistency of Coalinga's supervisory review of annual evaluations, by June 2015 State Hospitals should direct Coalinga to formally adopt its checklist for reviewing evaluations, provide the checklist to its evaluators, and include the checklist as part of its evaluation process. State Hospitals should also develop a checklist for the evaluations it performs at its headquarters and adopt it as part of its standardized assessment protocol by March 2016.

To ensure that it has the data necessary to inform its training and supervision of evaluators, State Hospitals should identify the most efficient means for obtaining the outcomes of past trials—at least the outcomes of three years of past trials if possible—and should ensure that it includes such outcomes in its database by March 2016. Additionally, by June 2015 it should establish procedures to ensure that it promptly collects the outcomes from current and future trials. Finally, State Hospitals should develop procedures to analyze these data at least twice annually to identify any trends in cases in which the courts' determinations differed from the State Hospitals evaluators' recommendations. It should use this information to provide training and supervision where they are most needed.

Chapter 2

THE CALIFORNIA DEPARTMENT OF STATE HOSPITALS HAS NOT PROVIDED CONSISTENT TRAINING TO ENSURE ITS EVALUATORS PRODUCE THOROUGH EVALUATIONS

Chapter Summary

The California Department of State Hospitals (State Hospitals) has not consistently offered training to the evaluators who assess sex offenders (offenders) to determine whether the State should recommend committing them as sexually violent predators (SVPs). Although in 2009 and 2010 State Hospitals offered training on a wide variety of topics to evaluators, it did not provide them with any training between August 2012 and May 2014, a period during which it hired many new employees. Also, State Hospitals developed a training plan that began with comprehensive training for its evaluators in May 2014; however, it has yet to implement most of the plan. Consequently, until recently State Hospitals did not provide many evaluators with training on critical risk assessment tools. Ongoing training is important to ensure the competence of those conducting evaluations of current and potential SVPs. Further, State Hospitals can improve its tracking of training records. If it cannot demonstrate that its evaluators received the required training, State Hospitals might compromise the integrity of evaluations.

We also noted additional areas in which State Hospitals could improve its evaluation process. Specifically, it has not documented its efforts to verify that its evaluators met the experience portion of the minimum qualifications for their positions. Further, it has only recently begun to analyze the trends in the rate at which its evaluators determine offenders meet the criteria as SVPs—what it refers to as its positive rate. In addition, in March 2013, State Hospitals developed a process for assigning and tracking the workload of its evaluators; however, evaluators expressed concerns about this process, which led to State Hospitals revising it in January 2015. Although the revised process addresses some concerns, it omits other elements. Finally, State Hospitals needs to address its backlog of annual evaluations of currently committed SVPs at Coalinga State Hospital (Coalinga). If Coalinga fails to promptly perform these evaluations, it is not fulfilling one of its critical statutory obligations, leaving the State unable to report on whether SVPs continue to pose risks to the public.

State Hospitals Has Not Consistently Offered Training to Its SVP Evaluators

State Hospitals has been inconsistent in offering training to its SVP evaluators. During 2009 and 2010, it offered training to SVP evaluators on a wide variety of topics. In anticipation of hiring employee evaluators during 2011 and 2012, State Hospitals decided to develop and implement in-house training. This change in training approach had a greater focus on the basic principles of SVP evaluations. Nevertheless, State Hospitals did not provide any training to its evaluators between August 2012 and May 2014. Further, it did not provide current evaluators at Coalinga with any training related to performing evaluations. New management at State Hospitals has acknowledged the need for more training and recently began increasing its training efforts.

Ongoing training is important to ensure the competence of those conducting evaluations of potential and current SVPs. According to state law, only practicing psychologists and psychiatrists can perform evaluations of potential SVPs. In addition, according to the American Psychological Association's specialty guidelines for forensic psychology adopted in 2011, competence in forensic psychology can be acquired through a combination of education, training, supervised experience, and study, among other things. The specialty guidelines recommend that forensic practitioners make ongoing efforts to develop and maintain their competencies and keep abreast of developments in the fields of psychology and the law.

State Hospitals offered a wide range of training to SVP evaluators in 2009 and 2010, and in 2011 State Hospitals implemented its own training in-house for conducting SVP evaluations.

State Hospitals offered a wide range of training to SVP evaluators in 2009 and 2010. Specifically, State Hospitals offered its evaluators—at that time, mostly contractors—training on a variety of topics, including sex offender risk assessment tools, statistics on sexual recidivism, the effect of aging on recidivism, and the violence-risk scale. According to the assistant deputy director of State Hospitals' Forensic Services Division (forensic services), State Hospitals funded the cost of the trainings throughout the State, and the contract evaluators paid for their travel and expenses.

However, in anticipation of hiring evaluators as employees, in 2011 State Hospitals implemented its own training in-house for conducting SVP evaluations. Specifically, according to the assistant deputy director of forensic services, the previous acting clinical director developed training for its SVP evaluators in consultation with State Hospitals' legal division. She stated that State Hospitals developed its own training program to benefit both the experienced contract evaluators transitioning into state service and new evaluators with less experience in forensic evaluation and court testimony. State Hospitals offered trainings during September 2011 and July 2012 on topics such as the Static-99

assessment (described in the Introduction), forensic report writing, legal changes that impact evaluations, and expert witness testimony preparation.

From August 2012 to May 2014, State Hospitals did not provide any training for SVP evaluators who worked in its headquarters.

From August 2012 to May 2014, however, State Hospitals' training documentation shows that it did not provide any training for SVP evaluators who worked in its headquarters. This nearly two-year gap may in part be the result of a staffing issue: The clinical director responsible for developing and implementing the training retired in April 2013. According to the assistant deputy director of forensic services, State Hospitals did not hire another clinical director—tasked in part with developing a training plan—until October 2013.

Further, according to the former forensic senior psychologist supervisor at Coalinga, State Hospitals provided evaluators at Coalinga with fewer training opportunities in recent years. Specifically, he stated that before 2011, evaluators at Coalinga trained with State Hospitals' evaluators on the Static-99 and dynamic risk assessment tools. However, according to the former forensic senior psychologist supervisor, in 2011 Coalinga evaluators were training with State Hospitals less frequently, and by 2012 they were not part of the training offered by State Hospitals. When we asked administrators at State Hospitals and Coalinga why their evaluators stopped training together, they were unable to provide an explanation. According to Coalinga's current forensic senior psychologist supervisor, Coalinga did not offer consistent training for its evaluators. The forensic senior psychologist supervisor stated that the lack of consistent training resulted in the evaluators producing inconsistent and at times inadequate evaluations. She said that if less-experienced evaluators do not receive consistent training in forensic evaluations to complement their on-the-job experience, they cannot adequately perform their jobs and are ineffective witnesses in court.

State Hospitals has recently begun taking some initial steps to implement more robust training for its evaluators at headquarters. In 2014 State Hospitals' chief psychologist and the quality assurance and training team (quality assurance team) developed a training plan for evaluators at headquarters. Specifically, in May 2014, State Hospitals offered a comprehensive SVP training for all consulting psychologists—who, as of December 2014, represent 33 of 45 evaluators on staff at State Hospitals—on the background of the SVP statutes, the various criteria under which State Hospitals evaluates potential SVPs, and the Static-99R risk assessment. As we discuss later in the chapter, consulting psychologists belong to one of two civil service classifications conducting evaluations at State Hospitals' headquarters. The other classification, which requires more experience, is a sexually violent predator evaluator (SVPE).

In December 2014 and January 2015, State Hospitals also held training about a dynamic risk assessment instrument for the current evaluators working at its headquarters. In addition, the tentative training plan included expected courses on the Stable 2007 dynamic risk assessment instrument, court testimony, and updates to risk assessment instruments. However, according to the chief psychologist, as of January 2015 State Hospitals had not scheduled any of these additional trainings.

According to the chief psychologist, a second aspect of State Hospitals' new training effort includes a mentorship program for evaluators at headquarters. The program began in August 2014 and is designed to help new consulting psychologists develop their evaluation skills by shadowing experienced evaluators. For the first year to year and a half, new evaluators will progress from performing smaller tasks to drafting written evaluations and preparing court testimony, while receiving constructive feedback from their mentors. State Hospitals' goal is to foster the new evaluators' development and help experienced evaluators—in their role as mentors—refine their basic skills.

Coalinga's evaluators have continued to receive fewer training opportunities than the evaluators at headquarters.

Coalinga's evaluators have continued to receive fewer training opportunities than the evaluators at headquarters. According to Coalinga's forensic senior psychologist supervisor, Coalinga's evaluators do not participate in State Hospitals' mentorship program. Coalinga's forensic senior psychologist supervisor designed a training plan for fiscal year 2014–15 to help new evaluators at the hospital develop a basic understanding of state law affecting forensic evaluations, forensic report writing, and risk assessment. She indicated that Coalinga is also in the process of developing an ongoing training plan for experienced evaluators and has some trainings scheduled for 2015.

Until Recently, State Hospitals Did Not Provide Training on Dynamic Risk Assessment Instruments

Compounding the inconsistent training offered to evaluators, until recently State Hospitals has not provided training on dynamic risk assessment instruments. A dynamic risk assessment instrument may consider both stable factors, such as personality disorders or sexual preference, that help predict long-term risk; and acute, rapidly changing factors, such as a negative mood or intoxication, that signal the potential for reoffense. Although state regulation requires evaluators to apply tests or instruments and consider stable and dynamic risk factors when performing forensic evaluations, State Hospitals could not demonstrate until recently that it provided training to its evaluators on these instruments. The assistant deputy director of forensic services told us that

State Hospitals focused its training efforts during 2011 and 2012 on certain aspects of forensic evaluations, such as examining clinical and static risk factors, rather than on dynamic factors. Recently, in December 2014 and January 2015, State Hospitals provided training on dynamic risk assessment instruments.

Until December 2014 State Hospitals did not provide training on how to complete dynamic risk assessment instruments.

Until December 2014 State Hospitals did not provide training on how to complete dynamic risk assessment instruments. In the two trainings on forensic assessment in 2012, State Hospitals' instructors provided high-level overviews of dynamic risk factors but did not provide instructions on how to use specific assessment instruments, such as the Stable 2007. Our review of training materials from January 2009 through November 2014 found no other instances in which trainings addressed dynamic risk assessment instruments, even though State Hospitals was hiring evaluators from 2012 through 2014 to replace the contractors who had been performing the evaluations of potential SVPs. Although some contract evaluators who later became employees may have obtained training on dynamic risk assessment instruments on their own, new evaluators with little or no forensic experience were not provided training from State Hospitals on how to perform dynamic risk assessments. According to the assistant deputy director of forensic services, the previous clinical psychiatrist viewed certain aspects of dynamic risk assessment to be less critical to reaching conclusions during forensic evaluations. However, the chief psychologist, who started in October 2013, stated that State Hospitals acknowledged the importance of assessing dynamic risk factors when performing evaluations.

State Hospitals' chief psychologist explained that State Hospitals' position is that sufficient evaluation of a potential SVP includes an assessment of both static and dynamic factors and that a dynamic risk assessment tool strengthens an evaluation by providing a higher degree of certainty when estimating the risk of a reoffense. Nevertheless, as of late August 2014, he estimated that about 75 percent of the consulting psychologists—one of the two civil service classifications conducting SVP evaluations at State Hospitals' headquarters had not had adequate, updated, or any training in dynamic risk assessment instruments and variables. According to the assistant deputy director of forensic services, several consulting psychologists attended trainings on the Stable 2007 dynamic risk assessment instrument offered by external trainers between February and May 2014. Moreover, although the chief psychologist stated that he thought the SVPEs had received training on dynamic risk assessment tools, he also told us that State Hospitals has not offered update trainings to keep its evaluators current on the possible changes and new research in the field regarding the instruments.

To ensure that its evaluators have adequate training related to dynamic risk assessment tools and other areas of knowledge specific to evaluating potential and current SVPs, State Hospitals must improve its tracking of training. According to the assistant deputy director of forensic services, State Hospitals did not track the training taken by each evaluator before 2011 because the majority of its evaluators were contractors who were experts in their field and whom it expected to stay current on training. She stated that in 2013 State Hospitals began tracking all of its evaluators' training to ensure they were meeting the continuing education requirements necessary to maintain their licenses. However, State Hospitals' tracking does not include an analysis of the specific types of training evaluators receive. For example, state law currently requires evaluators to use the Static-99R to evaluate male SVPs. Therefore, evaluators must be trained on the Static-99R instrument so they can properly use it when performing evaluations. However, because State Hospitals does not analyze the type of training its evaluators receive, it cannot demonstrate that its evaluators received the required training. If the evaluators are not properly trained on the instruments they use, it may compromise the integrity of their evaluations and result in challenges to their findings.

If the evaluators are not properly trained on the instruments they use, it may compromise the integrity of their evaluations and result in challenges to their findings.

Training ensures that evaluators possess the latest and best information. State Hospitals' chief psychologist stated that to be effective, forensic evaluators must receive training every one to two years because of advances in the field of forensic psychology, changes to the way evaluations are conducted, and changes in case law that impacts evaluations, among other reasons. Without adequate training in dynamic risk assessment instruments, evaluators may use them incorrectly, increasing the likelihood of errors in estimating the risk of reoffense. In addition, evaluators who forgo tests of dynamic risk factors because they were not adequately trained may compromise their ability to fully support and defend their findings in court.

State Hospitals Has Not Documented Its Efforts to Verify Its Evaluators' Qualifications

State Hospitals uses employees and some contractors to conduct evaluations of potential and current SVPs. Table 4 summarizes the minimum qualifications of the four employee classifications as well as the contractors that conduct the various evaluations at State Hospitals' headquarters and at Coalinga. As Table 4 shows, only the SVPE position has comparable minimum qualifications to those state law requires for the contractors State Hospitals hires to complete difference-of-opinion evaluations. The other positions—consulting psychologist, senior psychologist specialist, and psychologist—require less experience and therefore receive less compensation and have lighter workloads.

Table 4
California Department of State Hospitals' Evaluator Classification, Type of Evaluations Performed, Minimum Qualifications, and Number as of December 2014

CLASSIFICATION	TYPES OF EVALUATIONS PERFORMED	LICENSE REQUIREMENT*	EDUCATION*	EXPERIENCE	NUMBER AS OF DECEMBER 2014
Contractor, State Hospitals	Difference-of-opinion Initial evaluations, update evaluations, initial evaluations	Valid license as a psychologist issued by the California Board of Psychology	Doctorate degree (implied by license requirement)	Five years postdoctoral, postinternship experience as a licensed psychologist in the practice of psychological evaluation and risk assessment and diagnoses of sexually violent predators (SVPs).	35
Sexually Violent Predator Evaluator (SVPE)	Initial evaluations, update evaluations, replacement evaluations, recommitment initial evaluations	Valid license as a psychologist issued by the California Board of Psychology	Doctorate degree in psychology	Five years postdoctoral, postinternship experience as a licensed psychologist in the practice of psychological evaluation and risk assessment and diagnoses of SVPs or equivalent class of sex offenders (offenders). The SVPEs must have 40 hours of expert witness testimony in high-risk offender cases or SPV cases.	12
Consulting Psychologist	Initial evaluations, clinical screens, update evaluations	Valid license as a psychologist issued by the California Board of Psychology	Doctorate degree in psychology	Two years experience in California state civil service performing clinical psychology duties equivalent to those of a psychologist or clinical psychologist; or Three years of full-time postdoctoral, postinternship experience in the practice of psychology involving either training, research, consultation, or program planning in mental health services.	33
Contractor, Coalinga State Hospital (Coalinga)†	Annual evaluations	Valid license as a psychologist (implied by experience requirement)‡	Doctorate degree (implied by license requirement)	Five years post-licensure experience primarily conducting forensic evaluations.‡	7
Psychologist (Health Facility—Clinical-Safety)	Annual evaluations	Valid license as a psychologist issued by the California Board of Psychology	Completion of requirements for a doctorate degree with specialization in clinical or child clinical psychology	None.	2
Senior Psychologist Specialist	Annual evaluations	Valid license as a psychologist issued by the California Board of Psychology	Doctorate degree in psychology	One year experience in California state service performing the duties of a psychologist (health facility) or staff psychologist (any specialty); or Two years postdoctoral, postinternship experience in the practice of psychology involving assessment and treatment and either training, research, consultation, or program planning in mental health services.	2

Sources: Classification bulletins from the California Department of Human Resources; California Welfare and Institutions Code, Section 6600 et. seq.; invitations for bid from the California Department of State Hospitals (State Hospitals); and employment files at State Hospitals and Coalinga, as well as interviews with the forensic senior psychologist supervisor and the acting chief of forensic services at Coalinga.

* State law allows psychiatrists to conduct evaluations as well. However, the only psychiatrist conducting evaluations as of December 2014 was a contractor at Coalinga who possessed a license to practice medicine.

† Coalinga contracts with professional registries that employ individuals that it uses to evaluate SVPs.

‡ During our audit period, Coalinga did not have a formal description of its minimum qualifications for its contract evaluators. According to the acting chief of forensic services, he expects contract evaluators to have five years of experience post-licensure. Starting September 2014, Coalinga contracts specify minimum qualifications for its contract evaluators that are in line with what is noted in the table.

State Hospitals demonstrated that it verified that its evaluators met some of their positions' minimum qualifications. We reviewed the files of 15 current evaluators at both headquarters and Coalinga—nine employees and six contractors—to determine whether State Hospitals verified that they met the minimum qualifications for their positions. Each file we reviewed contained a copy of the evaluator's license to practice psychology—or medicine, in the case of the one psychiatrist—which we also independently verified through the State's licensing boards. According to the California Board of Psychology, a doctorate degree is necessary for licensure as a psychologist in California. Similarly, the California Medical Board requires a doctorate degree for licensure as a psychiatrist. Therefore, although the files we reviewed did not contain evidence of doctorate degrees, the evaluators' possession of valid licenses demonstrates that they have such degrees.

However, State Hospitals could not demonstrate whether its evaluators met the experience portions of their positions' minimum qualifications. Although it retained job applications and other information the applicants submitted, it did not document that it had verified the information related to experience, for example, by contacting references or past employers. We reviewed 15 evaluators' personnel files—nine employees and six contractors. According to information the individuals submitted to State Hospitals, each of the six contractors had more than 10 years of experience as a licensed psychologist or psychiatrist, with four having 25 or more years experience. In contrast, only four of the nine employees had 10 years of experience or more. However, for 12 files we reviewed at State Hospitals' headquarters, we did not find any documentation that State Hospitals verified employees' or contractors' experience. For two of the three files we reviewed at Coalinga, there was a checklist that included a section for contacting past employers. In one instance, notes in the checklist indicated that Coalinga sent letters to past employers but did not indicate whether it received answers to the letters. In the second instance, the section on the checklist was blank. Without a formal process for documenting that they verify required experience, neither State Hospitals nor Coalinga can demonstrate that it has ensured that individuals hired meet the minimum qualifications for their positions.

For 12 files we reviewed at State Hospitals' headquarters, we did not find any documentation that State Hospitals verified employees' or contractors' experience.

State Hospitals Is Starting to Develop a Key Measurement for Assessing Evaluator Performance

The Joint Legislative Audit Committee (audit committee) asked us to report on the number of offenders State Hospitals determined to be positive and negative for commitment. Table 5 presents the number of offender cases evaluated by State Hospitals' evaluators and the outcome of those evaluations for fiscal years 2009–10 through 2013–14. As the table notes, during that five-year period the rate by

which State Hospitals determined that offenders met the criteria to be an SVP remained below 8 percent. These data provide an overall picture of the number of offender cases State Hospitals determined met the criteria for commitment.[5]

Table 5
Final Case Outcomes of the Evaluation of Offenders Based on the California Department of State Hospitals' Clinical Evaluations of Potential Sexually Violent Predators
Fiscal Years 2009–10 Through 2013–14

FISCAL YEAR	CASES FOUND POSITIVE FOR COMMITMENT*	CASES FOUND NEGATIVE FOR COMMITMENT*	TOTAL CASES EVALUATED	PERCENTAGE OF CASES FOUND POSITIVE FOR COMMITMENT	TOTAL CASES EVALUATED THAT INCLUDED A DIFFERENCE OF OPINION†
2009–10	63	1,066	1,129	5.6%	108
2010–11	122	2,014	2,136	5.7	154
2011–12	105	1,216	1,321	7.9	131
2012–13	43	791	834	5.2	78
2013–14	31	730	761	4.1	52

Source: California State Auditor's analysis of data obtained from the California Department of State Hospitals' (State Hospitals) Sex Offender Commitment Program Support System.

* When the required number of evaluators agree that an individual meets the criteria as a sexually violent predator (SVP), State Hospitals recommends to the designated counsel of the county where the offender was convicted that the State commit the individual to a state hospital.

† These cases are a subset of the total cases evaluated. State law requires that, if the first two evaluators do not agree that an individual meets the criteria of an SVP, two additional contract evaluators will conduct an evaluation. The two additional evaluators must both agree that an individual meets the criteria of an SVP for State Hospitals to recommend commitment.

However, it is also important to track the rate by which individual evaluators determine that an offender meets the criteria as an SVP. Although State Hospitals has accumulated data on its evaluations for several years, it has only recently begun analyzing those data. State Hospitals' administrators acknowledged the value of determining the rate at which State Hospitals' evaluators initially determine that offenders meet the SVP criteria—the positive rate—and of identifying evaluators whose positive rates are unusually high or low. Specifically, the chief psychologist stated that an evaluator with a consistently low positive rate should warrant attention.

Nevertheless, State Hospitals has not yet performed a comprehensive analysis to determine what constitutes a valid positive range. The chief psychologist noted that State Hospitals has performed 32,282 initial evaluations since 1996, and that 22 percent of these were positive. However, he stated that positive rates should

[5] In addition to offenders, the audit committee also asked us to report on the number of SVPs found positive and negative for commitment. We report on evaluators' conclusions regarding SVPs in the Appendix.

be between 8 percent and 18 percent based on State Hospitals' current analysis of the data. Our analysis of the data related to initial evaluations for the three years beginning in fiscal year 2011–12 shows that the positive rate of State Hospitals' evaluators is 9.2 percent. The rate may be lower in recent years because of the impact of Jessica's Law, which reduced the number of offenses needed to qualify as an SVP from two to one and increased the number of crimes considered qualifying offenses. These changes essentially made it more likely for an offender to be evaluated for commitment, but not necessarily meet all the criteria of an SVP. Because the rate we calculated is at the bottom of the range State Hospitals identified, we are concerned that State Hospitals' range may not be appropriate.

Because the rate we calculated is at the bottom of the range State Hospitals identified, we are concerned that State Hospitals' range may not be appropriate.

Further, the chief psychologist stated that in April 2014 State Hospitals began identifying consulting psychologists who have conducted a minimum number of evaluations yet have rarely concluded that offenders met the SVP criteria. Based on its analysis, the chief psychologist told us that State Hospitals identified 12 consulting psychologist evaluators who concluded that offenders met the SVP criteria less than 7 percent of the time. Six of these evaluators have never produced a positive evaluation. He also indicated that as of January 2015, several newly hired evaluators continue to produce very low positive rates that range from 0 percent to 3 percent. State Hospitals is reviewing these evaluators' evaluations and working with them to see whether there are ways to improve the evaluation process. However, the chief psychologist indicated that retraining or mentoring for this small group of psychologists has not yet been determined. Without an appropriate range for positive evaluations, State Hospitals risks that it will not be able to adequately identify those evaluators whose positive rates deviate from the norm.

State Hospitals Recently Made Changes to Its Contract Practices That Reduce Incentives for Negative Evaluations

State Hospitals' past practice of setting no minimum amount that contractors must bid to complete evaluation services may have created an incentive for evaluators to write negative evaluations. However, State Hospitals recently made changes to eliminate that possible incentive.

The audit committee asked us to review whether State Hospitals' policies or procedures provided any monetary or workload incentives to evaluators. In our review, we noted that the invitation for bids of evaluators to perform SVP evaluations may have created an incentive for some contract evaluators to write negative evaluations. Specifically, although State Hospitals

established maximum limits for contract evaluators' bids of services, it did not set a minimum bid amount in fiscal years 2009–10 through 2010–11 for the various services contract evaluators provide—including those associated with appearing as a witness at court trials to determine whether an offender should be committed as an SVP. As a result, possibly to be more competitive on price, two of 68 contractors bid zero on court testimony time and another bid zero on court travel time and court wait time. An additional seven evaluators bid significantly below the average cost on those activities as well. Having the ability to submit zero or lower-than-average bids for court-related costs may have knowingly or unknowingly created an incentive to determine that offenders did not meet the SVP criteria, because doing so decreased the likelihood that the evaluators would spend time and incur costs on court-related activities. Furthermore, State Hospitals assigned contract evaluators up to six evaluations at a time, and as they finished evaluations, it could assign them more. Therefore, contractor evaluators who did not have to go to court or who sped through evaluations would have had more time to perform additional evaluations.

However, in September 2012, State Hospitals addressed this potential problem when it issued a request for proposals (RFP) for contractors to perform SVP evaluations beginning in January 2013. Specifically, the RFP established both minimum and maximum rates for some services and set fixed rates for others. For example, it set a minimum rate for performing initial evaluations at $1,500 per case and a maximum rate of $2,500 per case. It also established an hourly rate for court testimony at $200. According to its business services chief, the contracts for 2015 are exempt from competitive bidding using a provision from the *State Contracting Manual* that exempts contracts solely for the purpose of obtaining expert witness testimony—the California Department of General Services approved the 2015 contracts for SVP evaluators, which included fixed rates. State Hospitals' fixed rates will prevent evaluators from bidding low on court-related costs, which could have created an incentive to write negative evaluations.

Further, a 2008 State Personnel Board decision has significantly reduced the role of contractors in performing evaluations. The State Personnel Board found that a state law allowing state government entities to contract for work that state workers cannot perform did not justify State Hospitals' contracting for evaluators. State law authorized State Hospitals to continue using contract evaluators temporarily until it could hire employees to replace them. Historically, contract evaluators have completed more evaluations for the Sex Offender Commitment Program than employee evaluators have completed, but that trend is shifting. During fiscal years 2010–11 and 2011–12, contract evaluators

Historically, contract evaluators have completed more evaluations for the Sex Offender Commitment Program than employee evaluators have completed, but that trend is shifting.

produced 99 percent of all evaluations. However, this pattern changed significantly beginning in fiscal year 2012–13, as State Hospitals began hiring evaluators rather than depending solely on contractors: By fiscal year 2013–14, employees performed 53 percent of all evaluations. Given that State Hospitals claimed in September 2014 that it had completed hiring employee evaluators, we expect this number to increase in the coming years. Table 6 shows the number of contract and employee evaluators and the number of evaluations each group performed during the last five fiscal years.

Table 6
Evaluations Performed by the California Department of State Hospitals' Employee and Contract Evaluators Fiscal Years 2009–10 Through 2013–14

	FISCAL YEAR									
	2009–10		2010–11		2011–12		2012–13		2013–14	
	CONTRACTOR*	EMPLOYEE	CONTRACTOR*	EMPLOYEE	CONTRACTOR*	EMPLOYEE	CONTRACTOR*	EMPLOYEE	CONTRACTOR*	EMPLOYEE
All Evaluations										
Total number of evaluators	74	7	80	7	77	13	59	38	42	40
Total evaluations conducted	3,615	101	5,746	68	3,735	55	1,315	1,507	1,168	1,336
Percent of all evaluations	97%	3%	99%	1%	99%	1%	47%	53%	47%	53%
Mean evaluations per individual†	49	14	72	10	49	4	22	40	28	33
Precommitment										
Number of initial evaluations	2,272	0	4,295	3	2,624	18	493	1,296	476	1,048
Number of other precommitment evaluations‡	747	0	834	0	646	0	456	69	381	100
Postcommitment										
Number of annual evaluations	128	95	306	62	233	32	215	92	164	116
Number of other postcommitment evaluations§	468	6	311	3	232	5	151	50	147	72

Sources: California State Auditor's analysis of data obtained from the California Department of State Hospitals' (State Hospitals) Sex Offender Commitment Program Support System, State Hospitals' payroll data obtained from the California State Controller's Office's Uniform State Payroll System, and additional documents provided by State Hospitals.

* State Hospitals contracts with individual evaluators. Coalinga State Hospital (Coalinga) retains non-civil service evaluators from registries with which it has contracts—we include these evaluators in the "contractor" category. In some cases, an individual could have been both non-civil service and civil service in the same fiscal year. In such cases, we counted the individual twice.

† We present the mean evaluations per individual for informational purposes; however, the value of any conclusions drawn from this data is limited. As noted above, in cases where an individual was both a contractor and an employee in a fiscal year, we counted that individual twice. Further, not all individuals represented in the total number of evaluators were available and working the entire year, which affects the average evaluations per individual.

‡ This number includes evaluations where State Hospitals had to bring in two additional evaluators because the first two evaluators did not agree on whether individuals were sexually violent predators (SVPs). State law requires that contractors conduct these difference-of-opinion evaluations. The number also includes additional evaluations conducted at the request of attorneys or the courts.

§ Once a court commits an SVP, state law requires that person to receive annual evaluations. Nevertheless, attorneys or the courts may request that State Hospitals conduct additional evaluations. Also, some individuals committed prior to a 2006 law that made commitments indeterminate do not receive annual evaluations, but attorneys or the courts may request additional evaluations.

Despite State Hospitals' statement that it has completed its hiring of evaluators, it will continue to work with contractors in the future because state law requires contract evaluators to resolve difference-of-opinion evaluations. According to the assistant deputy director of forensic services, State Hospitals expects to continue contracting with about 20 evaluators in 2015 to provide independent evaluations in cases where the two original employee evaluators disagree about whether offenders meet the SVP criteria. She stated that contractors could also perform a limited number of initial evaluations if State Hospitals has a spike in evaluations or some other temporary need. Further, she stated that State Hospitals would likely not have sufficient work to keep its contractors fully occupied. Therefore, without additional work to perform, evaluators have less financial incentive to finish evaluations quickly.

State Hospitals would likely not have sufficient work to keep its contractors fully occupied, and without additional work to perform, evaluators have less financial incentive to finish evaluations quickly.

State Hospitals Can Improve Its Efforts to Assess the Effectiveness of Its Evaluator Workload Matrix

When State Hospitals reduced the number of contract evaluators and hired employee evaluators, it developed a process for assigning and tracking the workload of its evaluators. In March 2013 State Hospitals convened a group of four SVPEs and two consulting psychologists who developed a matrix that reflected the activities that affect the evaluator's ability to complete evaluations and the associated value of each activity. The matrix lists the various evaluations and related tasks evaluators perform and includes points assigned for each evaluation or task. For example, the matrix that will be in use until March 2015 assigns one point for an initial SVP evaluation and assigns two points for court testimony provided at a jury trial. State Hospitals set matrix workload expectations of eight points per month for SVPEs and five points per month for consulting psychologists. In the event of unforeseen circumstances, such as a lengthy replacement evaluation or extended court testimony, evaluators may submit a workload adjustment form, which management must approve.

State Hospitals recently revised the matrix and created one matrix for each of the two classifications of evaluators at headquarters. According to forensic services' evaluator workload summary, in the original matrix each point was equivalent to 20 hours of work. The assistant deputy director of forensic services stated that a prior hospital administrator had calculated that the SVPEs should be able to complete an evaluation in about 20 hours, based on invoices from contractors. Therefore, State Hospitals initially set the workload of SVPEs at eight points, or 160 hours per month. She stated that because consulting psychologists are less experienced and are compensated at a level of about a third less than SVPEs, their

workload was set at five points, or about a third less than SVPEs. However, she stated that SVPEs voiced concerns that evaluations will take longer than 20 hours due to a recent decision to require evaluators to complete an analysis of all SVP criteria even if one is negative. Based on further conversations with the evaluators, State Hospitals revised its workload matrix in January 2015, creating different matrices for SVPEs and for consulting psychologists.

The new matrices give evaluators more time to perform certain aspects of their work, but omit other elements. The new matrices, which take effect in March 2015, include a workload expectation of seven points a month for SVPEs, with each point equivalent to 23 hours, or 161 hours per month. In contrast, consulting psychologists will continue with a workload expectation of five points, with a point being equivalent to 30 hours, or 150 hours per month. However, probable cause hearings are worth no points on the consulting psychologists' matrix. According to the assistant deputy director of forensic services, based on conversations with SVPEs, a probable cause hearing is between eight and 12 hours, so giving consulting psychologists credit for one point for a probable cause hearing would mean giving them credit for 30 hours of work, more than twice what an average hearing would take. Nevertheless, the position specifications for consulting psychologists do not require the same level of experience as for SVPEs, and therefore it seems possible that preparing for and participating in a probable cause hearing could take longer for consulting psychologists than for SVPEs. Further, the matrix for SVPEs gives them one point for probable cause hearings; at 23 hours per point, this is still around twice what the expected duration of a probable cause hearing would be.

It is also not clear that the matrices account for administrative or other tasks evaluators may perform. The matrices account for time spent on evaluations, court testimony, multiday training, and time off. They do not specifically account for administrative tasks, such as staff meetings and training lasting less than one day, or other job-related activities, such as keeping up with research in the field. Further, the matrices do not specifically account for travel, stating only that State Hospitals will review travel on a case-by-case basis using the workload adjustment form.

While State Hospitals has used the workload adjustment form to analyze the effectiveness of its workload matrices, its analysis is limited.

While State Hospitals has used the workload adjustment form to analyze the effectiveness of its workload matrices, its analysis is limited. Specifically, between June 2012 and January 2014, State Hospitals assigned 59 replacement evaluations, and four evaluators submitted six workload reduction requests, of which State Hospitals approved three. The assistant deputy director stated that based on the analysis of workload adjustment requests, State Hospitals concluded that the equivalency for replacement

evaluations was appropriate. However, this analysis only reviewed one type of evaluation in isolation and not the overall effectiveness of the workload assignments in the matrix. Further, according to the assistant deputy director, few evaluators submit workload adjustments, even though management expects the evaluators to submit them to account for complex cases, additional time needed to prepare for court, or other unforeseen circumstances. She stated that management communicates the importance of completing the workload adjustment forms during its regular conference calls with the evaluators. Nevertheless, neither the policy instituting the form nor the form itself clearly indicates these expectations.

Finally, State Hospitals could track evaluators' hours to further validate the effectiveness of its workload matrix. As previously noted, revisions in the current matrices are the result of discussions with some evaluators, primarily with the more-experienced SVPEs. According to the assistant deputy director of forensic services, evaluation of the workload matrix has been driven by concerns raised by evaluators, not because of a regular evaluation of workload. For example, State Hospitals does not track the number of hours that evaluators spend on each evaluation. According to the assistant deputy director of forensic services, State Hospitals does not expect its evaluators to complete timesheets to this level of detail. Nevertheless, tracking the actual time spent conducting the various evaluation activities over time would be useful in analyzing whether the current workload expectations are reasonable. Although State Hospitals does convene regular monthly meetings with its evaluators to discuss various topics, including workload, without meaningful periodic analysis of the evaluator matrix and the time evaluators spend on evaluations, State Hospitals risks either increasing pressure to rush evaluations or wasting resources while evaluators are idle. If State Hospitals does not give evaluators adequate time to create evaluations or to prepare for court, it may create an atmosphere that discourages evaluators from doing thorough evaluations to determine whether offenders meet the criteria of an SVP.

Coalinga Has a Significant Backlog of Annual Evaluations That It Has Not Completed

Coalinga has a backlog of annual evaluations of SVPs it needs to complete. State law requires State Hospitals to evaluate at least annually SVPs committed to it. According to Coalinga's January 2015 log of overdue annual reports, it had 261 evaluations that were due in court by the end of December 2014 that it had yet to complete. Coalinga's forensic senior psychologist supervisor stated that evaluators produce the oldest annual evaluations first;

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however, when Coalinga receives a request from a judge, district attorney, or defense attorney for an expedited report, such a request moves that particular evaluation to the top of the list.

According to the acting chief of forensic services at Coalinga (forensics), part of the cause of its backlog is additional work State Hospitals assigned to it. Specifically, beginning in April 2011, State Hospitals' headquarters directed evaluators at Coalinga to conduct evaluations for offenders whom the State committed before Jessica's Law and who, therefore, only received a two-year commitment term. Before April 2011 State Hospitals' evaluators at headquarters conducted these evaluations, which it refers to as recommitment evaluations. According to a tracking log from Coalinga, as of October 2014, 125 offenders were awaiting trial to determine whether they should receive indeterminate commitments because they had completed their two-year commitments. Coalinga's acting chief of forensics stated that because evaluators at Coalinga were completing the recommitment evaluations, they were unable to complete as many annual evaluations. A State Hospitals' legal counsel stated that there were concerns about whether the assignment of those evaluations to Coalinga's evaluators was appropriate. Therefore, the assistant deputy director of forensic services told us that State Hospitals took back responsibility for completing recommitment evaluations in August 2013.

Coalinga's acting chief of forensics stated that chronic staffing shortages at Coalinga also have contributed to the backlog of annual evaluations and does not have an estimate for when the backlog will be eliminated.

Coalinga's acting chief of forensics stated that chronic staffing shortages at Coalinga also have contributed to the backlog of annual evaluations, a situation that Coalinga hopes to address. He stated that more attractive incentives available for evaluator staff at headquarters have resulted in evaluators transferring to that location. Coalinga had 11 evaluators as of December 2014, seven of whom were contractors. Coalinga's medical director told us that administrators are working on a plan to alleviate the backlog that includes using contract evaluators to perform annual evaluations, continuing to hire well-qualified evaluators, and providing incentives for evaluators to keep their employment with Coalinga by allowing them to work remotely. However, this plan is still in development, and Coalinga does not have an estimate for when the backlog will be eliminated.

When State Hospitals does not ensure that it completes annual evaluations on time, it is not fulfilling one of its critical statutory obligations. Without such evaluations, the State cannot determine whether an SVP continues to pose a risk to the public and whether an unconditional release or a conditional release to a less restrictive alternative might be in the best interests of the offender and the State.

Recommendations

To ensure that its evaluators, including those at Coalinga, have the necessary training to conduct evaluations effectively and consistently, State Hospitals should complete development of comprehensive training plans for all evaluators by June 2015. In addition, by September 2015 State Hospitals should provide training on the Static-99R and dynamic risk assessment instruments to all new evaluators and those who have not yet received such training.

To ensure that all its evaluators are aware of changes in forensic evaluations, State Hospitals should provide annual training on updates to risk assessment instruments.

To demonstrate that it has provided appropriate training and that its employees have received that training, State Hospitals should immediately begin maintaining training records for all employee and contract evaluators.

By June 2015 State Hospitals should establish a formal process for consistently documenting that it has verified that the individuals it hires as evaluators meet all the minimum qualifications for their positions. State Hospitals should ensure that staff at Coalinga follow the process established in Coalinga's checklist for validating the past employment of employee and contract evaluators.

To improve its overall effectiveness, by December 2015 State Hospitals should further analyze the rate at which its evaluators determine that offenders meet the SVP criteria. State Hospitals should focus its analysis on evaluations it performed in the most recent three fiscal years because of its transition to civil service evaluators and because changes to state law have affected how it performs evaluations. State Hospitals should establish what the normal acceptable ranges for commitment rates are and work with evaluators whose findings consistently fall outside that range.

To ensure that it has an effective method for assigning and tracking evaluator workload, by September 2015 State Hospitals should establish a formal process for periodically reviewing its workload matrices. This process should include periodic assessments of how well evaluators are meeting their workload expectations and whether adjustments would be appropriate. The process should also include input from key stakeholders.

State Hospitals should explore options for tracking the time evaluators spend on each evaluation activity to increase the accuracy of the workload equivalencies it includes in its workload matrix and should implement such options by September 2015.

To reduce its backlog of annual evaluations at Coalinga and reduce the number of days these evaluations are overdue, State Hospitals should immediately determine the extent to which its evaluators who work at headquarters can provide assistance to Coalinga. To ensure that it does not develop a similar backlog in the future, State Hospitals should continue its efforts to hire evaluators sufficient to meet its workload.

We conducted this audit under the authority vested in the California State Auditor by Section 8543 et seq. of the California Government Code and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives specified in the scope section of the report. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Respectfully submitted,

Elaine M. Howle

ELAINE M. HOWLE, CPA
State Auditor

Date: March 12, 2015

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For questions regarding the contents of this report, please contact Margarita Fernández, Chief of Public Affairs, at 916.445.0255.

Appendix

THE RESULTS OF EVALUATIONS OF SEXUALLY VIOLENT PREDATORS

The Joint Legislative Audit Committee asked us to report on the number of sexually violent predators (SVPs) that the California Department of State Hospitals (State Hospitals) found suitable or unsuitable for discharge or release. However, according to State Hospitals, it tracks the findings of individual evaluators rather than the number of SVPs found suitable or unsuitable for release. As a result, Table A on the following page reports on the conclusions of individual evaluations of SVPs. Because state law requires State Hospitals to evaluate SVPs committed to a state hospital for indeterminate terms annually, the number of annual evaluations in the table for each year generally corresponds to the number of SVPs evaluated each year. However, there is a population of individuals who were committed to State Hospitals' custody prior to changes in state law that made commitment terms indeterminate rather than the former two-year commitments. These individuals' two-year commitments have expired, and the courts have not yet held trials to determine whether these individuals are to be committed to indeterminate terms. According to a State Hospitals' staff legal counsel, these individuals do not receive annual evaluations. Designated county counsels, defense attorneys, or the courts may request additional evaluations of these individuals, sometimes requesting multiple evaluations for the same individual. As a result, the number of other postcommitment evaluations in the table does not equate to the number of individuals evaluated. Further, because this table presents data on the conclusions of individual evaluations, it cannot be effectively compared to data on the number of SVPs released—as we present in Table 1 on page 14—because courts may disagree with the findings of State Hospitals' evaluators.

Table A
Conclusions of Evaluations of Sexually Violent Predators
Fiscal Years 2009–10 Through 2013–14

	ANNUAL EVALUATIONS			OTHER POSTCOMMITMENT EVALUATIONS*		
FISCAL YEAR	EVALUATOR CONCLUDES THAT THE INDIVIDUAL CONTINUES TO MEET THE CRITERIA FOR A SEXUALLY VIOLENT PREDATOR (SVP)†	EVALUATOR CONCLUDES THAT THE INDIVIDUAL NO LONGER MEETS THE CRITERIA FOR AN SVP†	EVALUATOR CONCLUDES THAT THE INDIVIDUAL IS A POSSIBLE CANDIDATE FOR CONDITIONAL RELEASE†	EVALUATOR CONCLUDES THAT THE INDIVIDUAL CONTINUES TO MEET THE DEFINITION OF AN SVP‡	EVALUATOR CONCLUDES THAT THE INDIVIDUAL NO LONGER MEETS THE DEFINITION OF AN SVP‡	EVALUATOR CONCLUDES THAT THE INDIVIDUAL IS A POSSIBLE CANDIDATE FOR CONDITIONAL RELEASE‡
2009–10	223	3	1	405	69	0
2010–11	365	4	1	264	49	1
2011–12	267	0	3	197	39	4
2012–13	301	2	6	153	39	8
2013–14	275	3	7	168	48	3

Sources: California State Auditor's analysis of data obtained from the California Department of State Hospitals' (State Hospitals) Sex Offender Commitment Program Support System; legal counsel for State Hospitals; Coalinga's acting chief of forensic services; and California Welfare and Institutions Code, Section 6600 et seq.

* Committed individuals may receive other evaluations from State Hospitals at the request of designated county counsels, defense attorneys, or the courts. For example, a portion of Coalinga State Hospital's (Coalinga) population was committed prior to changes in state law that made terms indeterminate and remains in Coalinga on expired, two-year committments, pending a trial to determine whether an indeterminate commitment is warranted.

† These numbers represent the number of evaluations conducted and the conclusions of the individual evaluators. Because SVPs must receive annual evaluations, these numbers should generally correspond to individual SVPs; however, SVPs likely appear in multiple years.

‡ These numbers represent the number of evaluations conducted and the conclusions of the individual evaluators. For this population of SVPs, there is no ultimate State Hospitals recommendation. According to the acting chief of forensic services at Coalinga, State Hospitals transmits these evaluations to the courts that requested them and, while individual evaluators opine on the suitability of SVPs for release, State Hospitals does not make an overall conclusion.

STATE OF CALIFORNIA — DEPARTMENT OF STATE HOSPITALS EDMUND G. BROWN JR., GOVERNOR

OFFICE OF THE DIRECTOR
1600 Ninth Street, Room 151
Sacramento, CA 95814

February 20, 2015

Elaine M. Howle, CPA*
California State Auditor
555 Capitol Mall, Suite 300
Sacramento, CA 95814

Dear Ms. Howle:

The California Department of State Hospitals (DSH) has attached it's response to the draft report entitled "California Department of State Hospitals: It Could Increase the Consistency of Its Evaluations of Sex Offenders by Improving Its Assessment Protocol and Training". The DSH appreciated the work performed by the California State Auditor and the opportunity to respond to the draft report.

Please contact Sophie Cabrera, Assistant Deputy Director of the Forensic Services Division, at (916) 651-5296 if you have any questions.

Sincerely,

PAM AHLIN
Director

Attachment

* California State Auditor's comments appear on page 59.

Response to the California State Auditor
Draft Report Entitled

"Department of State Hospitals: It Could Increase the Consistency of Its Evaluations of Sex Offenders by Improving Its Assessment Protocol and Training"

Recommendation: To improve the consistency of its evaluations, by June 2015, State Hospitals should create a written policy that requires its evaluators to include the following documentations in their evaluations:

- Detail describing all the documentation they reviewed.
- The offender's psychosexual history.
- A description of the risk assessment instruments they used and the scoring tool for those risk assessments.
- Acknowledgement of their review of the Disability and Effective Communication System (DECS).

Response: DSH will implement. DSH plans that by June 2015 a letter will be provided to DSH evaluators identifying inclusion of documentation that was reviewed, offender's psychosexual history, description of risk assessment tools, and acknowledgement of DECS review.

Recommendation: To promote consistency and ensure that it provides sufficient guidance to evaluators, State Hospitals should update its assessment protocol by March 2016 to include more specific instructions on how to conduct evaluations, such as what assessment instruments evaluators may use and what documents they should consider. State Hospitals should also develop a timeline for periodically reviewing and making any necessary updates to the assessment protocol.

① **Response:** DSH will implement. DSH plans that by March 2016 the regulatory process will be initiated to update the standardized assessment protocol to include more specific instruction on how to conduct evaluations. DSH will develop a timeline for periodic review of the protocol to make updates as necessary.

Recommendation: To comply with State law, State Hospitals should ensure that it follows the Administrative Procedure Act for future changes to its standardized assessment protocol.

Response: DSH will implement. DSH will follow the Administrative Procedure Act for future changes to the standardized assessment protocol where appropriate.

Recommendation: To improve the consistency and completeness of its evaluations, by December 2015 State Hospitals should develop a plan for the formal, supervisory review of evaluations from a clinical perspective that balances the needs of the program with its resource limitations. For example, rather than attempting to review every evaluation, State

Hospitals could focus its review efforts on those evaluations most at risk of error or inconsistency, such as those completed by the newest evaluators. If State Hospital adopts this or a similar approach, it should review the remaining evaluations on a sample basis.

Response: DSH will implement. DSH is exploring options that will improve the clinical supervisory review process. DSH currently focuses its review process on newly hired evaluators and plans to adopt a process by December 2015 to review remaining evaluations on a sample basis.

Recommendation: To ensure that it can demonstrate the consistency of Coalinga supervisory review of annual evaluations, by June 2015, State Hospitals should direct Coalinga to formally adopt its checklist for reviewing evaluations, provide the checklist to its evaluators and include the checklist as part of its evaluations process. State Hospitals should also develop a checklist for the evaluations it performs at its headquarters and adopt it as part of its standardized assessment protocol by March 2016.

Response: DSH will partially implement. DSH plans that by June 2015; DSH-Coalinga will implement the use of a checklist for reviewing evaluations and provide the checklist to its evaluators as part of the evaluation process. DSH-Headquarters will develop a checklist for reviewing evaluations and provide the checklist to evaluators. However, the checklist document will not be included as part of the standardized assessment protocol as it will be used for administrative purposes and not be included as part of the evaluation. ②

Recommendation: To ensure that it has the data necessary to inform its training and supervision of evaluators, State Hospitals should identify the most efficient means for obtaining the outcomes of past trials – at least the outcomes of three years of past trials if possible – and should ensure that it includes such outcomes in its database by March 2016. Additionally, by June 2015 it should establish procedures to ensure that it promptly collects the outcomes from current and future trial.

Finally, State Hospitals should develop procedures to analyze these data at least twice annually to identify any trends in cases in which the courts' determination differed from the State Hospitals evaluator's recommendation. It should use this information to provide training and supervision I where they are most needed.

Response: DSH will implement. DSH has established a procedure to ensure collection of information regarding trial outcome and plans to formalize the procedure by June 2015. By March 2016 DSH plans that it will seek and institute necessary modification to its database so that it can effectively capture the trial outcome information. DSH will analyze the data at least twice annually to identify trends in which court determinations differed from evaluator recommendation and use this information for training and supervisory purposes.

Recommendation: To ensure that its evaluators including those at Coalinga have the necessary training to conduct evaluations effectively and consistently, State Hospitals should complete development of comprehensive training plans for all evaluators by June 2015. In addition, by September 2015 State Hospitals should provide training on the Static 99R and dynamic risk assessment instrument to all new evaluators and those have not yet received such training.

Response: DSH will implement. DSH plans that by June 2015, DSH-Headquarters will complete and coordinate a comprehensive training plan with DSH-Coalinga. In addition, DSH plans that by September 2015, training will be provided on the Static-99R and a dynamic risk assessment tool to all new evaluators that have not received such training.

Recommendation: To ensure that all its evaluators are aware of changes in the forensic evaluations, State Hospitals should provide annual training on updates to risk assessment instruments.

Response: DSH will implement. DSH plans to provide annual training on updates to risk assessment instruments.

Recommendation: To demonstrate it has provided appropriate training and that its employees have received that training, State Hospitals should immediately begin maintaining training records for all employees and contract evaluators.

Response: DSH will implement. DSH has instituted this practice.

Recommendation: By June 2015, State Hospitals should establish a formal process for consistently documenting that it has verified that the individuals it hires as evaluators meet all the minimum qualifications for their positions. State Hospitals should ensure that staff at Coalinga follows the process established in Coalinga's checklist for validating the past employment of employee evaluators and contract evaluators.

Response: DSH will implement. DSH plans that by June 2015, DSH-Coalinga will institute a process and checklist for validating past employment and minimum qualifications of new employee and contract evaluators. DSH-Headquarters will continue to have the DSH Human Resources division check minimum qualifications of new hire employees and institute an additional review process for checking minimum qualifications.

Recommendation: To improve its overall effectiveness, by December 2015, State Hospitals should further analyze the rate at which its evaluators determine offenders meet the SVP criteria. State Hospitals should focus its analysis on evaluations it performed in the most recent three fiscal years because of its transition to civil service evaluators and because changes to state law have affected how it performs evaluations. State Hospitals should establish what the normal acceptable ranges for commitment rates are and work with evaluators whose findings consistently fall outside that range.

Response: DSH will implement. DSH plans that by December 2015, it will establish a normal acceptable range for commitment rates. DSH will analyze the commitment rates of evaluators to work with evaluators that consistently fall outside of the normative range.

Recommendation: To ensure that it has an effective method for assigning and tracking evaluator workload, State Hospitals should establish a formal process for periodically reviewing its workload matrix by September 2015. This process should include periodic assessments of how well evaluators are meeting their workload expectations and whether adjustments would be appropriate. The process should also include input from key stakeholders.

Response: DSH will implement. DSH plans that by September 2015, a formal process will be established, with input from key stakeholders, for periodically reviewing the evaluator workload matrix and assessing workload expectations and workload adjustments that would be appropriate.

Recommendation: State Hospitals should explore options for tracking the time evaluators spend on each evaluation activity to increase the accuracy of the workload equivalencies it includes in its workload matrix and implement such options by September 2015.

Response: DSH will implement. DSH plans that by September 2015, different options will be explored for conducting a time study to assess workload equivalencies and the evaluator workload matrix.

Recommendation: To reduce backlog of annual evaluations at Coalinga and reduce the number of days these evaluations are overdue, State Hospitals should immediately determine the extent to which its evaluators who work at headquarters can provide assistance to Coalinga. To ensure it does not develop a similar backlog in the future, State Hospitals should continue its efforts to hire evaluators sufficient to meet its workload.

Response: DSH will implement. DSH-Coalinga is currently exploring options to develop a contract to hire evaluators to liquidate the backlog of annual evaluations. DSH-Coalinga will continue efforts to hire evaluators to meet the workload demand. DSH-Headquarters will assess its employee workload to determine its ability to provide assistance to DSH-Coalinga.

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Comments

CALIFORNIA STATE AUDITOR'S COMMENTS ON THE RESPONSE FROM THE CALIFORNIA DEPARTMENT OF STATE HOSPITALS

To provide clarity and perspective, we are commenting on the California Department of State Hospitals' (State Hospitals) response to our audit. The numbers below correspond to the numbers we placed in the margin of State Hospitals' response.

We are concerned regarding the timeliness of State Hospitals' planned action. Rather than update its assessment protocol by March 2016 as we recommended, State Hospitals' response indicates that it only plans to initiate the regulatory process by that date, which means that the updated protocol will not be in place until much later—typically eight to 12 months. As we state on page 25, without specific guidance regarding how to conduct evaluations, evaluators may not perform their work consistently or review all of the appropriate documents, increasing the risk that they will make erroneous assessments. ①

We are disappointed that State Hospitals has chosen to stop short of including a supervisory checklist in its formal processes. We acknowledge that using the checklist as an administrative tool is an important step in ensuring consistent evaluations. However, including such a checklist in the evaluation process and the standardized assessment protocol ensures that State Hospitals and Coalinga State Hospital can demonstrate consistency. ②

EXHIBIT 3

2015 California Senate Bill No. 507, California 2015-2016 Regular Session
Legislative History *(Approx. 9 pages)*

NETSCAN

2015 CA S.B. 507 (NS)
2015 California Senate Bill No. 507, California 2015-2016 Regular Session

CALIFORNIA COMMITTEE REPORT
VERSION: GeneralJuly 13, 2015Version Date July 13, 2015
Pavley.

TEXT:
BILL ANALYSIS

SB 507

Page 1

Date of Hearing: July 14, 2015

Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Bill Quirk, Chair

SB 507 (Pavley) - As Amended July 2, 2015

SUMMARY: Allows the prosecutor petitioning for commitment of a person alleged to be a sexually violent predator (SVP) to access treatment records reviewed by the expert evaluators. Specifically, this bill:

1)Requires an evaluator who is performing an updated evaluation to include a statement listing all records reviewed to make that evaluation.

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2)Allows either party to subpoena for a certified copy of the records. The records shall be provided to both the attorney petitioning for commitment and the attorney for the SVP.

3)Allows the attorneys to use the records for the SVP proceedings, but prohibits disclosure for any other purpose.

4)Specifies that the right of any party to object to all or a portion of a subpoenaed record on grounds of prejudicial effect outweighing probative value, or on the basis of materiality to the issue of whether the person is a SVP or to any other issue to be decided by the court remains unaffected.

5)States that if the objection is sustained in whole or in part, the record or records shall retain their confidentiality, as specified.

6)Specifies that this subdivision does not affect the right of a party to seek other records regarding the SVP.

7)Provides that with the exception created above, the rights of a SVP to assert that his or her records are confidential are not affected.

8)States that this bill does not affect the California Supreme Court's determination of the issue of whether or not an expert retained by the district attorney in a SVP proceeding is entitled to review otherwise confidential treatment information.

EXISTING LAW:

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1)Provides for the civil commitment for psychiatric and psychological treatment of a prison inmate found to be a SVP after the person has served his or her prison commitment. (Welf. & Inst. Code, 6600, et seq.)

2)Defines a "sexually violent predator" as "a person who has been convicted of a sexually violent offense against at least one victim, and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst. Code, 6600, subd. (a)(1).)

3)Provides that if evaluators concur that a petition should be filed to commit a person as a SVP, the Director of the Department of State Hospitals (DSH) shall forward a request for a petition for commitment to the pertinent prosecuting attorney for the county. Copies of the evaluation reports and any other supporting documentation shall be made available to that attorney. (Welf. & Inst. Code, 6601, subds. (d) & (h).)

4)States that if the county's designated prosecuting attorney concurs with the recommendation, then the commitment petition shall be filed in the county of conviction. (Welf. & Inst. Code, 6601, subd. (i).)

5)Entitles a person alleged to be a SVP to certain rights, including the right to a jury trial, to the assistance of counsel, to retain experts or professionals to perform an examination, and to have access to all relevant medical and psychological records and reports. (Welf. & Inst. Code, 6603, subd. (a).)

6)Allows the prosecutor to obtain updated evaluations of the alleged SVP if he or she determines they are necessary to

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Page 4 properly present the case for commitment. The prosecutor may also obtain replacement evaluations if the original evaluator is no longer available to testify. (Welf. & Inst. Code, 6603, subd. (c).)

7)Specifies that updated or replacement evaluations include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews with the alleged SVP. (Welf. & Inst. Code, 6603, subd. (c).)

8)Permits a person committed as a SVP to be held for an indeterminate term upon commitment. (Welf. & Inst. Code, 6604 & 6604.1.)

9)Requires that a person found to have been a SVP and committed to the DSH have a current examination on his or her mental condition made at

least yearly. The report shall be in the form of a declaration. The report must be filed with the court and also be served on the prosecuting agency involved in the initial commitment. The report shall include consideration of conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and also what conditions can be imposed to adequately protect the community. (Welf. & Inst. Code, 6604.9.)

10) Permits the SVP to retain a qualified expert or professional person to examine him or her, and the retained individual shall have access to all records concerning the SVP. (Welf. & Inst. Code, 6604.9, subd. (a).)

11) Provides that when DSH determines that the person's condition has so changed that he or she is not likely to commit acts of predatory sexual violence while under community treatment and supervision, then the DSH Director shall forward a report and recommendation for conditional release to the court, the prosecuting agency, and the attorney of record for the committed person. (Welf. & Inst. Code, 6607.)

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12) Establishes a process whereby a person committed as a SVP can petition for conditional release any time after one year of commitment, notwithstanding the lack of recommendation or concurrence by the Director of DSH. (Welf. & Inst. Code, 6608, subd. (a).)

13) Provides that all information and records obtained in the course of providing services to either a voluntary or involuntary recipient of services under the Sexually Violent Predator Act (SVPA) shall be confidential, except under limited circumstances. (Welf. & Inst. Code, 5328.)

FISCAL EFFECT: Unknown

COMMENTS:

1)Author's Statement: According to the author, "SB 507 addresses the need for fair hearings when Sexually Violent Predators (SVPs) come up for state hospital commitment reviews. This bill establishes that both prosecuting attorneys and defense attorneys will have equal access to mental health treatment records before SVPs are assessed for their potential release from state's hospitals. A lack of access to these records can deprive judges and juries of the information they need to decide whether or not it is safe to release a violent sex offender from a state hospital. The records would remain confidential for all purposes other than the SVP proceedings.

"Under California law, SVPs are those who have been convicted of a sexually violent offense, such as forcible rape, forcible sodomy, or child molestation, and who have been determined by

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Page 6 a judge or jury to be likely to commit a similar offense in the future due to a diagnosed mental disorder. In these instances, SVPs are committed to a state hospital.

"In 1996, the Legislature created the Sex Offender Commitment Program to target a small, but extremely dangerous subset of sexually violent offenders

who present a continuing threat to society because their diagnosed mental disorders predispose them to engage in sexually violent criminal behavior.

"This can be particularly problematic in SVP cases because the District Attorney is charged with proving to a unanimous jury, beyond a reasonable doubt, that a sexual predator currently has a diagnosed mental disorder which predisposes him to commit sexually violent crimes, and that he meets the criteria for indefinite commitment of a state hospital for sex offender treatment.

"In Albertson v. Superior Court (2001) 25 Cal. 4th 796, the court held that WIC section 6603 granted express authority for updated evaluations and clarified an exception to the general rule of confidentiality of treatment records in that it allows the district attorney "access to treatment record information, insofar as that information is contained in an updated evaluation." Some trial courts have interpreted this language to grant the DA access only to treatment information and not to the records themselves.

"The court issued this decision immediately after the Legislature enacted Section 6603 to allow prosecuting attorneys to request updated evaluations. Section 6603 states that the updated evaluations shall include a review of medical and mental health records. It did not explicitly grant access of the records to prosecutors, nor did it explicitly deny or limit access either. The Albertson court noted that 'in a SVPA proceeding, a district attorney may obtain, through updated mental evaluations otherwise confidential information concerning an alleged SVP's treatment.'

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"At the present time, whether or not the DA is granted direct access to the records or whether the DA is only allowed to access records relied upon by the evaluating psychologists, depends upon the judge's reading of Albertson. As a result, the issue is repeatedly litigated and the results vary throughout California.

"In Seaton vs. Mayberg (2010) 610 P.3rd 530, 539, the Ninth Circuit court cited that sexually violent predator evaluations fall within those long established exceptions to the confidentiality of medical communications. It cited other public health and public safety requirements overcoming a right to privacy include cases of restraint due to insanity, contagious diseases, abuse of children and gunshot wounds. In People v. Martinez, the 4th District Court of Appeal held that it is not a violation of the California right to privacy (Article I, Section 1 of the California Constitution) to provide copies of mental health treatment records to the prosecutor in an SVP case. People v. Martinez (1994) 88 Cal App 4th 465.

"Some of California's most violent sexual predators can be released back into society if complete information is not available to prosecutors and defense lawyers at the time the predator's cases are being reviewed. This bill is needed to help ensure such mistakes are prevented in the future, providing more peace of mind to already traumatized victims, their families and the public at large.

"According to the National Intimate Partners and Sexual Violence Survey, conducted by the Centers for Disease Control and Prevention, there are an

estimated two million female victims of rape in California, and estimated 8.5 million survivors of sexual violence, other than rape, in the United States.

"There are 20 states that have laws providing for involuntary civil commitment of sexually violent predators similar to California's SVP law, in addition to the federal SVP law (the Adam Walsh Act). California is the only state that does not

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Page 8 have a specific legislative provision granting prosecutors access to mental health and medical records for the purpose of carrying out sexually violent predator commitment law."

2)SVP Law Generally: The Sexually Violent Predator Act (SVPA) establishes an extended civil commitment scheme for sex offenders who are about to be released from prison, but are referred to the DSH for treatment in a state hospital because they have suffered from a mental illness which causes them to be a danger to the safety of others.

The DSH uses a specified criterion to determine whether or not an individual qualifies for treatment as a SVP. Under existing law, a person may be deemed a SVP if: (a) the defendant has committed specified sex offenses against two or more victims; (b) the defendant has a diagnosable 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; and, (c) two licensed psychiatrists or psychologists concur in the diagnosis. If both clinical evaluators find that the person meets the criteria, the case is referred to the county district attorney who may file a petition for civil commitment.

Once a petition has been filed, a judge holds a probable cause hearing; and if probable cause is found, the case proceeds to a trial at which the prosecutor must prove to a jury beyond a reasonable doubt that the offender meets the statutory criteria. The state must prove "[1] a person who has been convicted of a sexually violent offense against [at least one] victim[] and [2] who has a diagnosed mental disorder that [3] makes the person a danger to the health and safety of others in that it is likely that he or she will engage in [predatory] sexually violent criminal behavior." (Cooley v. Superior Court (Martinez) (2002) 29 Cal.4th 228, 246.) If the prosecutor meets this burden, the person is then be civilly committed to a DSH facility for treatment.

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The DSH must conduct a yearly examination of a SVP's mental condition and submit an annual report to the court. This annual review includes an examination by a qualified expert. (Welf. & Inst. Code, 6605, subd. (a).) In addition, the DSH has an obligation to seek judicial review any time it believes a person committed as a SVP no longer meets the criteria, not just annually. (Welf. & Inst. Code, 6605, subd. (f).)

The SVPA was substantially amended by Proposition 83 ("Jessica's Law") operative on November 7, 2006. Originally, a SVP commitment was for two years; but now, under Jessica's Law, a person committed as a SVP may be

held for an indeterminate term upon commitment or until it is shown the defendant no longer poses a danger to others. (See People v. McKee (2010) 47 Cal. 4th 1172, 1185-1187.) Jessica's Law also amended the SVPA to make it more difficult for SVPs to petition for less restrictive alternatives to commitment. These changes have survived due process, ex post facto, and, more recently, equal protection challenges. (See People v. McKee, supra, 47 Cal. 4th 1172; and People v. McKee (2012) 207 Cal.App.4th 1325.)

3)Obtaining Release From Commitment: A person committed as a SVP may petition the court for conditional release or unconditional discharge after one year of commitment. (Welf. & Inst. Code, 6608, subd. (a).) The petition can be filed with, or without, the concurrence of the Director of State Hospitals. The Director's concurrence or lack thereof makes a difference in the process used.

A SVP can, with the concurrence of the Director of State Hospitals, petition for unconditional discharge if the patient "no longer meets the definition of a SVP," or for conditional release. (Welf. & Inst. Code, 6604.9, subd. (d).) If an evaluator determines that the person no longer qualifies as a SVP or that conditional release is in the person's best interest and conditions can be imposed to adequately protect the community, but the Director of State Hospitals disagrees with the recommendation, the Director must nevertheless authorize the petition. (People v. Landau (2011) 199

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Cal.App.4th 31, 37-39.) When the petition is filed with the concurrence of the DSH, the court order a show cause hearing. (Welf. & Inst. Code, 6604.9, subd. (f).) If probable cause is found, the patient thereafter has a right to a jury trial and is entitled to relief unless the district attorney proves "beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent behavior if discharged." (Welf. & Inst. Code, 6605.)

A committed person may also petition for conditional release or unconditional discharge notwithstanding the lack of recommendation or concurrence by the Director of State Hospitals. (Welf. & Inst. Code, 6608, subd. (a).) Upon receipt of this type of petition, the court "shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." (Welf. & Inst. Code, 6608, subd. (a).) If the petition is not found to be frivolous, the court is required to hold a hearing. (People v. Smith (2013) 216 Cal.App.4th 947.)

The SVPA does not define the term "frivolous." The courts have applied the definition of "frivolous" found in Code of Civil Procedure section 128.5, subdivision (b)(2): "totally and completely without merit" or "for the sole purpose of harassing an opposing party." (People v. Reynolds (2010) 181 Cal.App.4th 1402, 1411; see also People v. McKee, supra, 47 Cal.4th 1172; People v. Collins (2003) 110 Cal.App.4th 340, 349.) Additionally, in Reynolds, supra, 181 Cal.App.4th at p. 1407, the court interpreted Welfare and Institutions Code section 6608 to require the petitioner to allege facts in the petition that will show he or she is not likely to engage in sexually-violent

criminal behavior due to a diagnosed mental disorder, without supervision and treatment in the community, since that is the relief requested.

Once the court sets the hearing on the petition, then the

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Page 11 petitioner is entitled to both the assistance of counsel, and the appointment of an expert. (People v. McKee, supra, 47 Cal.4th 1172, 1193.) At the hearing, the person petitioning for release has the burden of proof by a preponderance of the evidence. (Welf. & Inst. Code, 6608, subd. (i); People v. Rasmuson (2006) 145 Cal.App.4th 1487, 1503.) If the petition is denied, the SVP may not file a subsequent petition until one year from the date of the denial. (Welf. & Inst. Code, 6608, subd. (h).)

4)Disclosure of Records: Under current law, the prosecuting attorney can access the mental health records of a person who is initially referred to a state hospital for a SVP screening. (See Welf. & Inst. Code, 6601, subd. (d).) The psychotherapist-patient privilege arguably does not attach because the consultation is not for purposes of treatment; rather the person is being examined by a potential adversary's doctor for the potential adversary's purpose. (See e.g., Seaton v. Mayberg (2010) 610 F.3d 530, 540.)

However, once the person is in treatment, Welfare and Institutions Code section 5328 requires the confidentiality of all information and records obtained in the course of providing services to either voluntary or involuntary recipients of treatment under the SVPA. There are several limited exceptions to the general rule on the confidentiality of treatment records. For example, section 5328, subdivision (f) permits release of information "to the courts, as necessary to the administration of justice." Similarly, subdivision (j) permits release "to the attorney for the patient in any and all proceedings upon presentation of a release of information signed by the patient."

Additionally, under section 6603, the prosecution may access "otherwise confidential treatment information ? to the extent such information is contained in an updated evaluation."

In Albertson v. Superior Court (2001) 25 Cal.4th 796, the California Supreme Court considered, inter alia, whether the

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Page 12 legislation amending section 6603, subdivision (c), regarding updated and replacement evaluations authorized the prosecutor to obtain access to the SVP's treatment records. The statute provides in pertinent part: "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." Relying on legislative history the court held "that in an SVPA proceeding a local government's designated counsel (here, the district attorney) may obtain, through updated mental evaluations, otherwise confidential information concerning an alleged SVP's treatment." (Id. at p. 805.) The court referenced letters in opposition to the bill which raised concerns that the language would compromise confidentiality, and a recommendation from the Assembly Public Safety Committee to omit the language mandating the release of treatment records. (Id. at pp. 806-807.) The court noted that despite this recommendation, the final version of

the bill left intact the language allowing review of treatment records. (Id. at p. 807.) The court concluded that the provision provides an exception to the general rule of confidentiality of treatment records, and allows the district attorney access to treatment record information, insofar as that information is contained in an updated evaluation. (Ibid.; italics added.)

However, at least one recent appellate court case has interpreted section 6603 to give prosecutors limited direct access to such records. See (Gilbert v. Superior Court (2014) 224 Cal.App.4th 367, 382.)

This bill seeks to ensure that the prosecuting attorney has access to all the records on which the evaluators have based their evaluations. The most recent amendments to the bill require an evaluator to list in the evaluation all the records relied upon. These are the records which will be subject to disclosure.

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It should be noted that the California Supreme Court recently granted review in People v. Superior Court (Smith) (Feb. 24, 2015, G050827) [nonpub. opn.], review granted 5/20/2015 (S225562) and one of the questions it is considering whether prosecutors pursing recommitment under the SVP statute should have access to confidential patient-psychotherapist records. Should the Legislature intervene at this time when the subject matter addressed by this bill will be decided by the California Supreme Court?

5)Psychotherapist-Patient Privilege: "Crucial to psychotherapeutic treatment is a patient's readiness to reveal his thoughts, dreams, fantasies, sins and shame. It would be unreasonable to expect a patient to freely participate in such treatment if he knew that what he said and what the therapist learned from what he said could all be revealed in court. A patient in therapy has and needs a justifiable expectation of confidentiality as to his psychotherapeutic treatment." (In re Eduardo A. (1989) 209 Cal.App.3d 1038, 1042.)

Recently, the California Supreme Court held that in a trial under the SVPA, admission of defendant's therapy records and therapist's testimony, under the dangerous patient exception was erroneous. (People v. Gonzales (2013) 56 Cal.4th 353, 357.) Before the SVP trial, the prosecutor sought to access the defendant's psychological records compiled during evaluations and counseling sessions. The trial court granted access to the records based on the dangerous-patient exception to the psychotherapist-patient privilege. The appellate court reversed, holding that disclosure was inappropriate and that the error amounted to a violation of the federal constitutional right of privacy. The Supreme Court granted the People's petition for review. (Ibid.) The Supreme Court agreed that it was erroneous to permit disclosure of the records under the dangerous-patient exception to the psychotherapist-patient privilege.

The court stated that, regardless of whether or not it would be useful or valuable for a district attorney to have access to

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Page 14 confidential communications made by a SVP in the course of therapy sessions in order to evaluate his or her mental condition or potential

danger, the usefulness or value of such information was not a valid basis to eliminate the patient's right to protect against the disclosure of such communications. (Id. at p. 374.)

However, the Court did note that the privilege is not absolute and when a therapist providing treatment to a SVP concludes that the patient is a danger to himself or others and disclosure is necessary to prevent the threatened danger, despite the psychotherapist-patient privilege, the therapist may testify in an SVP proceeding. (Id. at p. 380.) In this case, the trial court's conclusion that the dangerous patient exception applied was based solely on the prosecution's conclusory offer of proof that the records and testimony of the therapist would show that the therapist believed appellant presented a danger, and no actual proof was presented. Nevertheless, the Court noted that even when some of the patient's statements in therapy might be subject to disclosure under the dangerous-patient exception, the rest of the confidential communications during therapy sessions remain privileged. (Id. at p. 382.)

6)Argument in Support: The Los Angeles District Attorney's Office, the sponsor of this bill, states, "Los Angeles courts have recently refused to provide prosecutors with access to treatment records necessary to prepare for trial. Given that SVP cases are based upon the current mental condition of the offender and given that the district attorney must prove the People's care to a jury, beyond a reasonable doubt, this places the People in an untenable position.

"SB 507 would require that attorneys for both the People and the SVP be provided copies of records that were reviewed by the State Department of State Hospital experts as part of the offender's updated evaluation. Since these experts testify in the SVP trial, the bill permits records they reviewed as part of their evaluation to be used for the purpose of that trial.

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However, the records would remain confidential for all other purposes?.

"In the past, state hospital records were routinely provided to district attorneys in SVP cases. In the last few years, Los Angeles courts have denied requests for subpoenas for state hospital records when requested by the People. A review of California counties revealed that courts in every other California county surveyed grant the People access to these records. Moreover, every one of the 20 states that have sexually violent predator laws grants prosecutors access to mental health and medical records for the purpose of carrying out the law.

"The SVP is entitled to hire his or her own experts, at the expense of the state. That expert is given full access to the mental health records. It is difficult, if not impossible, to cross examine the SVP's expert without knowing what is in the mental health records.

"Even direct examination of the state hospital evaluators is difficult as crucial evidence is often left out of their reports. This is unavoidable given that the evaluator generally provides only a brief summary of the records he or she has reviewed as part of the evaluation?."

7)Arguments in Opposition:

a) The California Psychiatric Association (CPA) writes, "The CPA has concerns that SB 507 would breach the patient-psychotherapist privilege thereby undermining both the purposes and effectiveness of therapy. Courts have ruled, that even though 'the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protects (sic).' (People v. Gonzales (2013) 56 Cal.4th

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353, citing California Law Revision Com.) CPA's further concern is that if enacted SB 507 would not only have serious adverse effects on its members, other mental health professionals as well as on the patients they treat, it may open the door to further incursions into the relationship between a therapist and their patient.

"The CPA supports current law that provides comprehensive safeguards requiring and permitting reports to the authorities from an individual's confidential therapy under certain delineated circumstances. None allows direct disclosure of the record themselves. The precedent SB 507 would set were it to be enacted may threaten to broaden out those exceptions in carefully crafted current law and could potentially allow direct disclosure in those laws."

b) The California Public Defenders Association states, "Under existing law, individuals subject to Welfare & Institutions Code section 6603 are Pretrial Detainees. They have not been committed under the SVPA. They are being held on probable cause pending trial.

"Under existing practice, many of these Pretrial Detainee Individuals have been given the opportunity for the first time and have successfully participated in sex offender treatment at Coalinga State Hospital. Some of these Pretrial Detainees have completed years of sex offender treatment at Coalinga which entailed undergoing a course of incredibly invasive treatment, where they were expected to speak openly, in a group setting, about their most painful childhood experiences, their most shameful thoughts, fantasies and actions, and their plans for relapse prevention when released. Most, if not, all of them were never given the option of participating in a comprehensive intensive sex offender treatment program before because, with the exception of a small pilot program, sex offender treatment has not been available in California prisons for decades. If sex offender treatment had been offered in prison, many of these Pretrial Detainees Individuals would

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Page 17 never have been held under the SVPA.

"When the prosecution requests updated evaluations pursuant to Welfare & Institutions Code section 6603, the independent and state evaluators are obligated to determine whether the Pretrial Detainees are currently dangerous. If the Pretrial Detainee is infirm, significantly older or has successfully completed many years of sex offender treatment, the state and

independent mental health professionals may find that the Pretrial Detainee does not currently meet the criteria for commitment under the SVPA. The evaluators' conclusions are grounded in evidence based research. The evaluators are trained by the Department of State Hospitals and adhere to the protocol promulgated by the Department.

"SB 507 would give district attorneys access to the Pretrial Detainees' mental health records so that they could "second guess" the Department of State Hospitals mental health professionals thus allowing the district attorneys to supplant the Department's evidence based judgment with their own non-scientific judgment about an individual Pretrial Detainee's future dangerousness. This is a slippery slope which trends away from a civil commitment scheme based on independent expert opinion toward further incarceration for past crimes."

c) According to the ACLU, "We appreciate that the bill has been amended to make clear that it is not intended to impact the issue of prosecutor's use of expert witnesses in SVP proceedings, now before the California Supreme Court in the case of People v. Superior Court (Smith) (Docket No. S225562). This has been one of our concerns about the bill.

"The Smith case will also address the issue that is the core of SB 507: whether prosecutors pursing recommitment under the SVP statute should have access to confidential patient-psychotherapist records. We believe that the Legislature should wait until the court has ruled on this

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Page 18 issue before changing the current rules.

"We remain concerned that SB 507 invades the confidential nature of the patient-therapist relationship, as discussed in People v. Gonzales (2013) 56 Cal.4th 353. Giving the prosecution complete and unfettered access to the patient's treatment records would make it even more difficult for the patient to share honestly and openly with the therapist and, ultimately, make it more difficult to treat these individuals."

8)Related Legislation: AB 262 (Lackey) places additional residency restrictions on SVP's conditionally released for community outpatient treatment. AB 262 failed passage in this committee and granted reconsideration.

9)Prior Legislation:

a) SB 295 (Emmerson), Chapter 182, Statutes of 2013, revised the procedures to be used by the courts for SVP petitions, whether with or without DSH concurrence, for conditional release and unconditional discharge.

b) Proposition 83 ("Jessica's Law"), operative on November 7, 2006, and SB 1128 (Alquist), Chapter 337, Statutes of 2006, made numerous changes to sex offender and SVP law, including making commitment terms indefinite.

c) SB 2018 (Schiff), Chapter 420, Statutes of 2000, allows the prosecutor to obtain updated or replacement evaluations.

REGISTERED SUPPORT / OPPOSITION:

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Support

Los Angeles County District Attorney's Office (Sponsor)

Association of Deputy District Attorneys Association for Los Angeles Deputy Sheriffs California Association of Code Enforcement Officers California College and University Police Chiefs Association California Narcotic Officers Association California State Lodge, Fraternal Order of Police Crime Victims United of California Long Beach Police Officers Association Los Angeles County Professional Peace Officers Association Los Angeles Police Protective League Sacramento County Deputy Sheriffs' Association Riverside Sheriffs Association

Opposition

American Civil Liberties Union

California Psychiatric Association California Public Defenders Association Legal Services for Prisoners with Children

Analysis Prepared by:Sandy Uribe / PUB. S. / (916)

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CERTIFICATE OF WORD COUNT
[California Rules of Court, Rule 8.520(c)]

The text of the Answer Brief on the Merits consists of 7,020 words as counted by the word-processing program used to generate this brief.

Dated this 3rd day of November, 2015.

Respectfully submitted,

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

BY: 
ELIZABETH MOLFETTA
DEPUTY DISTRICT ATTORNEY

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

RE: RICHARD ANTHONY SMITH VS. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE
SUPREME COURT CASE NO: S225562; DCA CASE NO. G050827;
(OC SUPERIOR COURT CASE NO. M-9531)

I am a citizen of the United States; I am over the age of eighteen years and not a party to the within entitled action; my business address is: Office of the District Attorney, County of Orange, 401 Civic Center Drive West Santa Ana, California 92701.

On November 3, 2015, I served the within **ANSWER BRIEF ON THE MERITS** on interested parties in said action by placing a true copy thereof enclosed in a sealed envelope, in the United States mail at Santa Ana, California, that same day, in the ordinary course of business, postage thereon fully prepaid, addressed as follows:

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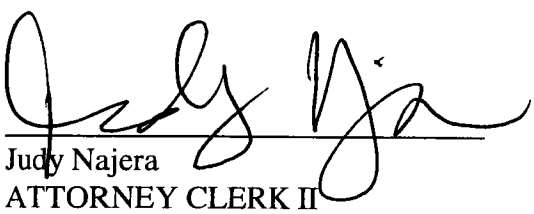
I declare under penalty of perjury that the foregoing is true and correct.
Executed on November 3, 2015, at Santa Ana, California.



Judy Najera
ATTORNEY CLERK II