IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEFFREY WALKER, Petitioner, v. **SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN FRANCISCO,** Respondent, **PEOPLE OF THE STATE OF CALIFORNIA,** Real Party in Interest.	No. S263588 Court of Appeal No. A159563 (San Francisco County Superior Court Nos. 2219428 (195989)

PETITIONER'S OPENING BRIEF ON THE MERITS

ERWIN F. FREDRICH
State Bar #53551
P.O. BOX 471313
San Francisco, CA 94147
(415) 563-8870

Email: efredrich@juno.com

Attorney for Petitioner Jeffrey Walker

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PETITIONER'S OPENING BRIEF ON THE MERITS

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

I. INTRODUCTION

On July 31, 2020 Petitioner, Jeffrey Walker, represented by attorney Erwin F. Fredrich, filed a Petition for Review of a decision – *Walker v. Superior Court of San Francisco (2020)*, (A159563) [hereafter *Walker*] -certified for publication (51 Cal. App. 5th 682), issued on June 30, 2020 by the Court of Appeal, First Appellate District, Division Four-- denying Petitioner's request for a Petition for a Writ of Mandate for a violation of his rights at a probable cause hearing in a Sexually Violent Predator (SVP) case.

This court granted review on September 9, 2020. This court's web site's "Case Summary" indicates:

> This case presents the following issue: Did the superior court violate the rule of People v. Sanchez (2016) 63 Cal.4th 665 - that an expert cannot relate case-specific hearsay unless the facts are independently proved or covered by a hearsay exception - by relying on case-specific hearsay contained in psychological evaluations in finding probable cause to commit petitioner under the Sexually Violent Predator Act?

On September 11, 2020 this court expanded issues to be briefed and argued:

> The issues to be briefed and argued in the above-captioned matter are expanded to include: Do defendants in Sexually Violent Predator Act (SVPA) proceedings have a due process right to confront and cross-examine witnesses presenting contested hearsay evidence?

A Petition for Rehearing in *Walker* was filed in the Court of Appeal on July 13, 2020 that directed the appellate court's attention to various facts and legal issues omitted in the appellate court's opinion. The Rehearing Petition, *inter alia*, addressed the omission in the *Walker* opinion of any of the specific facts at the probable cause hearing that detailed the unreliability of the case-specific hearsay allegations in expert reports and testimony introduced over objection and later motion to strike and the failure of the decision to address the issue of due process. (California Rules of Court 8.500(c) (2)). The Petition for Rehearing was summarily denied by the Court of Appeal in an Order filed on July 16, 2020.

The omitted facts and issues in the Petition for Rehearing were addressed in Petitioner's Petition for Review filed in this Court on July 31, 2020.

The omitted facts and issues in the Petition for Rehearing are also addressed in this pleading.

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

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

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

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1 The *Walker* appellate court decision did refer to and took judicial notice of the Petition for Review in *Bennett* that was filed by the government and the denial of review by the California Supreme Court on January 2, 2020 - S258639. However the *Walker* court disagreed with and rejected the *Bennett* court of appeal decision, the applicability of the California Supreme Court's denial of review and Petitioner's argument. (Slip Opinion page 24, Footnote 4.)

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

review everything in the report and then can use anything in the report(s) as a basis for the Judge's ruling on probable cause.

Petitioner Walker's position is that the *Walker* decision is not supported by legislative history or case law, the *Walker* decision denies Walker due process, *Sanchez* applies at SVP probable cause hearings, the *Bennett* and *Couthren* cases were correctly decided and that Walker deserves the same relief as granted in *Bennett* and *Couthren* – dismissal of the SVP Petition.

Because the First Appellate District, Division Four, in its opinion in *Walker,* did not discuss in detail facts from Petitioner's probable cause hearing, this pleading summarizes pertinent facts from the hearing and provides details of legal issues not discussed in the *Walker* opinion but noted in Petitioner's Petition for Rehearing. The legal issues in the Petition for Rehearing included due process concerns that this court has asked the parties to address in its expanded order of September 11, 2020. The *Walker* court did not address due process in its opinion (other than one brief mention when discussing use of hearsay in other contexts different than SVP probable cause hearings - Slip Opinion p 20). As indicated above, the *Walker* court subsequently summarily denied the Petition for Rehearing. (California Rules of Court 8.500(c) (2))

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

II. SUMMARY OF OPINION

The *Walker* decision creates a new hearsay exception in Welf. & Inst.

Code section[3] 6602(a). The decision indicates that 6602 directs the judge to "review the petition".[4]

Although the decision admits that the SVP Act does not address what the petition must include (Slip Opinion page 14), the decision then "understand[s]" (Slip Opinion page 16) that the petition includes the expert reports. Therefore this creates a hearsay exception that makes *Sanchez* inapplicable to SVP probable cause hearings and that then anything in the expert reports is admissible. (Slip Opinion page 13)

The *Walker* decision invokes a claimed "Parker/Cooley Rule"[5] (Slip Opinion at pages 10,11 & 22) for support of the decision's rejection of *Sanchez*, *Bennett* and *Couthren.* The *Walker* decision, however, admits that both *Parker* and *Cooley* indicated that 6602 did not specify procedural requirements for probable cause hearings. (Slip Opinion pages 8,10)

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

The *Walker* decision also speculates about what the legislature intended in 6602. The *Walker* decision's conjecture and speculation concerning legislative intent is unsupported by anything in legislative history.

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

[4] See Amicus Brief application to file and brief filed herein September 25, 2020 by Darren Bean (permission for filing brief granted by this court on September 30, 2020) for a discussion of the difference between "review" and "admit" or "receive".

[5] *In re Parker* (1998) 60 Cal.App.4th 1453 and *Cooley v. Superior Court (2002)29 Cal. 4th 228.* The phrase is used several times in the *Walker* opinion (Slip opinion pages 10, 11, 22) but a Google Scholar search of California cases for the phrase indicates only one case has used the phrase – the *Walker* court of appeal opinion.

III. PROBABLE CAUSE HEARING RECORD

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

Walker, at the start of the probable cause hearing in February 2016, objected to evidence of details of allegations of non-qualifying offenses introduced through the government experts' reports and testimony. The hearing was spread over 5 evidentiary sessions ending in March 2016. The objection was based on hearsay, due process, 6600(a)(3), People v. *Otto* (2001) 26 Cal. 4th 200 and that the evidence was unreliable. The objection was denied. Walker renewed this objection and moved to strike this information after the defense case established that the information based on non-qualifying offense allegations used by the experts was unreliable - the initial allegations were lies and/or not true. That renewed objection and motion to strike were also denied.

Government experts MacSpeiden and Karlsson[7] relied on case-

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[6] The transcripts and reports were BATES numbered OSC0001 thru OSC0591.Pertinent details were summarized in Petitioner's Reply Brief filed March 24, 2020 (at pages 24-26) and Petition for Rehearing filed on July 13, 2020 (at pages 8-11) in the court of appeal and included references to OSC BATES numbering. A few additional BATES references are included in this brief.

[7] MacSpeiden and Karlsson were appointed after Yanofsky, one of the initial two state appointed evaluators, found Walker to not qualify for SVP status. The split findings of the two state experts initially appointed resulted in the appointments of MacSpeiden and Karlsson. See 6601(e). Walker

specific hearsay regarding non qualifying alleged offenses in their reports and testimony at the probable cause hearing from a San Francisco criminal case (complaining witness "J") and a San Jose (Santa Clara County) criminal case (complaining witness "T").

A jury found Walker "not guilty" of the allegations of Walker committing any sexually violent offenses (including rape) in the San Francisco criminal case involving J. Walker was only convicted of pandering in that case (a non-qualifying offense that does not require any sexual contact or sexual interaction with the defendant). The complaining witness J in that case told her boyfriend (after the criminal trial) that she had lied about being raped by Walker.

A Judge in connection with a court trial, dismissed a charge of rape in a San Jose case because the complaining witness (T) admitted to Walker's public defender's investigator before trial that, contrary to her initial complaint of forcible rape, there actually had not been any force and that she did not verbally or physically resist the sexual activity that occurred. The investigative report, redacted for privacy reasons, was introduced into evidence at Walker's SVP probable cause hearing on March 18, 2016. (Exhibit J; OSC0404, 0442,& 0478) Walker was only convicted by the Judge of unlawful sexual intercourse (a non-qualifying offense) because the complaining witness was under 18 at the time of the initial allegations (T was 17). The same Judge however found Walker guilty of a qualifying offense involving a different complaining witness -- "M".

Expert MacSpeiden used the unreliable initial forcible sex allegations from both the San Jose T and San Francisco J cases (combined with the information from the qualifying offense M) to establish a modus

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called Yanofsky as a defense witness at the probable cause hearing.

operandi "MO" of Petitioner and also indicated that this was a central/essential part of his opinion. MacSpeiden, who classified the San Francisco complainant J as a "pathological liar", could not with any great deal of certainty say whether she lied about being raped or lied about not being raped, but speculated and still accepted and used the rape allegation by J as a basis of his opinion. He specifically admitted he was speculating. This was despite MacSpeiden's report that indicated that the jury in the San Francisco criminal case stated its reason for finding Walker only guilty of pandering. The jury felt that the complaining witness J in the San Francisco case was lying about forcible sex offense charges and thus found Walker not guilty of those charges but did find him guilty of pandering. (OSC0197)

Expert Karlsson was unaware of the not guilty verdict in the San Francisco case and indicated that the not guilty verdict might change his opinion but he would have to return to the quiet of his office to consider whether his opinion would change. The probable cause hearing Judge later denied a motion to recall Karlsson to determine whether he had changed his opinion after getting back to his office.

Both MacSpeiden and Karlsson used the original allegations of T for support that Walker qualified for SVP status, ignoring T's contrary subsequent statements to Walker's investigator.

There was simply no basis other than speculation for the experts to assume that Walker had committed a qualifying sex offense in either the San Francisco (J) or San Jose (T) cases and use it as a basis for an expert opinion.

The probable cause hearing Judge then used the speculation in finding probable cause – "based on the evidence presented". (page 1 of Exhibit A, written 2 page decision of probable cause hearing Judge, attached to Writ of Mandate Petition filed in the *Walker* Court of Appeal

on February 14, 2020.)

Petitioner also had subpoenaed T to the probable cause hearing and she did not appear. A proof of service was filed and Petitioner asked for a body attachment that was denied by the probable cause Judge. OSC0482[8]

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

The *Walker* decision uses 6602 to create a new hearsay rule by speculating what the legislature was thinking when it was passed in 1995.

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

The opinion indicates that a "Parker/Cooley Rule"[9] is settled law. (citing 3 cases – only 1 of which was decided after *Cooley* -- Slip Opinion pp 10-11). All five cases were decided long before *Sanchez*. *Cooley* only mentions *Parker,* in dicta, in a footnote (as the *Walker*

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[8] This was contrary to Evidence Code section 804(a) that permits an adverse party to call as an adverse witness another person when an expert testifies that the expert's opinion is based "in whole or part" on a statement of the person.

[9] As noted in footnote 5, infra, a Google Scholar search of California cases for the phrase indicates only one case has used the phrase "Parker/Cooley Rule" – this case -- the *Walker* court of appeal opinion.

opinion acknowledges at pages 10, 13 and 21). *Parker* was decided in 1998 and *Cooley* in 2002.

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

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

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

The *Walker* decision also does not explain how the *Parker* and *Cooley* decisions (some 18 and 14 years prior) somehow became a "Rule" that overrules the *Sanchez* decision of 2016. *Sanchez* was a decision that interpreted what evidence an expert (Evidence Code §§ 801 and 802) could publish to the fact finder and *Sanchez* applies to all cases – as Evidence Code section 300 directs.

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

Speculative aspects of the *Walker* opinion include:

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

the reports." (Slip Opinion p 17)

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

The legislature did not pass any legislation to change the *Sanchez* holding or pass any legislation since *Sanchez* to amend sections 801 - 802 of the Evidence Code to allow experts to use improper case-specific hearsay in any case.

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

"applies at SVP probable cause hearings but also extends to SVP trials." (Slip Opinion p 23)

The legislature is aware it can limit the applicability of the rules of evidence and can adopt special rules of evidence to govern commitment proceedings – and it has done so in SVP cases [6600(a)(3)] and LPS hearing proceedings [which are not bound by rules of procedure or evidence -5256.4(b)] (See e.g. *People v. Stevens* (2015) 62 Cal.4th 325,338 and *In re Kirk,* (1999) 74 Cal.App.4th 1066, 1072-73)

Certainly if the legislature had wanted to create completely different evidentiary standards for SVP probable cause hearings under 6602 it would have done so.[10]

A. AB 1983

The legislature (after *Bennett and Couthren* became final in early January 2020) introduced a bill proposal that would add a hearsay exception to 6602 for SVP probable cause hearings. Assembly Bill 1983 would add language to section 6602 allowing prior sexual offense convictions (those that are now considered non qualifying offenses) to be proven by hearsay evidence at the probable cause hearing. (2019-2020, Reg. Sess., as amended Mar. 11, 2020; filed January 23, 2020.) Under the *Walker* decision's view of the law, there would be no need for the legislature to add this hearsay exception because a broad hearsay

[10] Originally in 1995 the SVPA required at least 2 qualifying offenses and, only if all the elements were proven, provided for a 2 year commitment – with renewal term(s) permitted but requiring subsequent trial(s). Proposition 83, passed in November 2006, lowered the qualifying offense requirement to at least 1 prior qualifying offense conviction and mandated an indeterminate commitment if SVP status was proven. Proposition 83 did not alter the hearsay exception set out in 6600(a)(3) and did not establish any hearsay exception in 6602. Proposition 83 did however establish a hearsay exception in 6605 for probable cause hearings for release after an original commitment.

exception already existed at SVP probable cause hearings in 6602. But the legislature knows what the *Bennett* and *Couthren* courts recognized (and this bill is in response to), and what the *Walker* appellate court should have similarly recognized: the rules of evidence (including the expert testimony restriction rule from *Sanchez*) apply at SVP probable cause hearings.

B. RELATED PROBLEMS IN *WALKER* DECISION

Related to due process concerns, a crucial problem with the *Walker* court's created hearsay exception is that "*any information"* in the expert report is admissible. (emphasis added, Slip Opinion page 16) The accused at the probable cause hearing under the *Walker* opinion has no remedy to stop the improper unreliable evidence from coming into evidence. The list is endless of what improper material a state evaluator could put in his or her report. Then the evaluator could also use that information in testimony on which to base his or her opinion. Under the *Walker* opinion, this would be permissible under 6602 and "*indeed requires"* (Slip Opinion p 13) the probable cause hearing Judge to then review the improper material and there is no prohibition in *Walker* of the Judge then using that improper material in the Judge's probable cause decision --- as was done by Walker's probable cause hearing Judge.

The *Walker* decision paradoxically relies mainly on *Parker* in support of its creation of a new hearsay rule it claims was hidden in 6602 for SVP probable cause hearings[11]. However, the *Walker* decision

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[11] In the *Walker* court of appeal, the government did argue that 6602 by including "review the petition" meant everything in an expert report was admissible at a SVP probable cause hearing because the rules of evidence should not and do not apply and that therefore "*Sanchez* [a rule of evidence] has no bearing in SVP probable cause hearings, where the

effectively eviscerates the right to challenge the Petition at SVP probable cause hearings. The *Walker* decision, if allowed to stand, will effectively return SVP probable cause hearings to a pre *Parker* state – a mere paper review that *Parker* held was not permissible.

The *Walker* decision also claims that a rationale for admission of even unreliable hearsay in state expert reports at SVP probable cause hearings is that the experts are "neutral evaluators" who apply "a standardized assessment protocol." (Slip Opinion p 17-18) Neither claim is accurate.

If "neutral evaluators" were required, the state would be required to call as witnesses the 2 initial evaluators at the SVP probable cause hearing. That, however, is not required because if the initial 2 evaluators disagree on SVP criteria (as happened in Walker's case) – the state just gets additional evaluators until 2 agree on SVP status - 6601(e). By the time the 2 adverse evaluators arrive at the probable cause hearing they are not neutral – they are advocates for their original opinions. This was aptly demonstrated by each state expert at the probable cause hearing in Walker -- who were willing to engage in speculation but not willing to change their opinion based on evidence that the basis of their opinion was unreliable and based on the false allegations of J and T.

A "standardized assessment protocol" lends no support or restrictions on the reliability of or what information is included in the report. For example, the directive to include "criminal history" in an SVP expert report allows all sorts of unreliable information from any source to

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formal rules of evidence do not apply". (Return p 16-18) The government did not argue or advance a theory that a hidden hearsay exception was included in 6602 as the *Walker* decision states is the basis for its rejection of *Sanchez, Bennett and Couthren.* Although the court of appeal in *Walker* asked the parties to discuss whether *Bennett* was correctly decided, it did not ask the parties to discuss whether 6602 included a hearsay exception.

be included in the report. This does not comport with due process and certainly does not comport with *Sanchez* restrictions on expert testimony. A "standardized assessment protocol" cannot overrule *Sanchez* or excuse due process violations.

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

A. DUE PROCESS ANALYSIS

Due process protections have been applied to SVP proceedings, and reiterated often, long before the *Sanchez* decision. For example:

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

People v. Otto supra, in upholding the use of victim statements from qualifying offenses under 6600(a)(3) noted with approval and the Court and the parties there agreed that such hearsay statements must contain special indicia of reliability to satisfy due process. *Otto* supra at 210. Emphasis added.

People v. Hayes (2006) 137 Cal.App.4th 34 indicated:

> Deprivation of a proper, adversarial probable cause hearing is a denial of procedural due process. (*Parker, supra,* 60 Cal.App.4th at pp. 1462-1463, 1469-1470, 71 Cal.Rptr.2d 167; see *People v. Otto* (2001) 26 Cal.4th 200, 210, 109 Cal.Rptr.2d 327, 26 P.3d 1061.) A probable cause hearing is a crucial part of the panoply of procedural safeguards in the SVPA. It must be conducted at the early stages of the judicial proceedings on an SVP petition.
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> *Hayes, supra,* at 48, emphasis added.

People v. Litmon (2008) 162 Cal.App.4th 383 [*Litmon*] emphasized that a potential SVP candidate has due process rights. As the court in *Litmon* stated with respect to due process drawing from many areas of law:

"It is clear that `commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.' *Addington v. Texas,* 441 U.S. 418, 425, 99; S.Ct. 1804, 1809, 60 L.Ed.2d 323"
Litmon, supra, 162 Cal.App.4th at p. 400

The *Litmon* court outlined "Principles of Procedural Process" and "Analysis" in its opinion at pages 395-402 summarized with quotes and citations from United States Supreme Court cases that had discussed due process principles. *Litmon* lists many United States Supreme Court cases which discuss basic due process concerns. The list included the following cases:

Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494:

"The point is straightforward: the Due Process Clause provides that certain substantive rights — life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures." (*Cleveland Bd. of Educ. v. Loudermill* ,supra at 470 U.S. 541

Fuentes v. Shevin (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556:

"If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented."

…

This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," [citation] and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," [citation] the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect."

(*Fuentes v. Shevin* , supra at 407 U.S. 81,82

From *Litmon, supra,* 162 Cal.App.4th at p. 400:

> The loss of personal freedom, which is the heart of the liberty protected by due process (see *Zadvydas v. Davis* (2001) 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653), by forced confinement in a mental institution is many orders of magnitude greater than the suspension of a license or termination of employment.
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> *Mathews v. Eldridge* (1976) 424 U.S. 319; 96 S.Ct. 893:
>
> "The `right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' [Citations] The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner.[Citations]
>
> …
>
> …" `[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" [Citation] D]ue process is flexible and calls for such procedural protections as the particular situation demands." [citation]
>
> *Mathews v. Eldridge, supra* 424 U.S. at pp. 333, 334

The *Litmon* decision concluded in evaluating the merits in *Litmon* of a due process claim involving speedy trial rights in a SVP case:

> "Under our country's long-standing jurisprudence, a person has a right to liberty that a government may not abridge without due process. If the constitutional right to procedural due process is not to be an empty concept in the context of involuntary SVP commitment proceedings, it cannot be dispensed with so easily."
>
> *Litmon, supra,* 162 Cal.App.4th at p. 406

Certainly in the context of this court's expanded order to brief and argue due process concepts application to Petitioner Walker and others facing SVP Petitions for an indefinite (lifelong) commitment, there is a due process right to confront and cross-examine witnesses presenting contested hearsay evidence.

As noted in *Litmon, supra,* 162 Cal.App.4th at p. 399 courts in evaluation of due process claims use a balancing test to determine whether to protect the interest at issue. Relevant factors in Walker's case include:

(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. This brief throughout indicates the unfairness of the *Walker* opinion created hearsay rule and its rejection of *Sanchez*. Petitioner submits the following short discussion of balancing factors in this case.

The significant limitations on a person's liberty and stigma of being classified as a sexually violent predator are factors that weigh heavily in favor of providing all reasonable procedures to prevent the erroneous deprivation of liberty interests. The typical lengthy wait to obtain a trial after an erroneous adverse probable cause hearing adds significant additional weight to this factor. Since the probable cause decision in April 2016, Walker has been in custody at Coalinga State Hospital.

The government has an interest in protecting the public from sexually violent predators recognizing that a small number of those convicted of a qualifying sexually violent offense may qualify for SVP status. However when there is not sufficient basis to classify a person as a SVP, the SVPA, the legislature and the electorate have determined that supervised parole conditions along with lifelong Penal Code section 290 registration appropriately protect the public.

However, the government also has an interest in securing an accurate factual determination concerning a SVP candidate's status as a sexually violent predator. The government has no interest in the involuntary civil confinement of persons who do not qualify for SVP status. An accurate factual determination should occur as early in the process as possible and

certainly at the probable cause hearing which is the first step of SVP proceedings that is subject to rules of evidence and the calling of and the cross examination of witnesses. The *Walker* court's opinion does not further this goal at all. The decision allows speculative and unreliable allegations at probable cause hearings (based on allegations that the *Walker* court admits would not be admissible at trial) followed by a flawed SVP finding.

The government and even the *Walker* court agree that a potential SVP candidate has the right to cross examine prosecution witnesses and introduce testimony and evidence at SVP probable cause hearings.

The government and even the *Walker* court agree that a goal of the SVP probable cause hearing is to weed out cases that do not have sufficient support for a SVP Petition.

The government and the *Walker* court then minimize and largely ignore those concepts and advance the narrative that in SVP probable cause hearings experts can base their opinions on case-specific allegations that are unreliable (including lies, falsehoods and/or untruths). In Walker's probable cause hearing, one expert admitted to speculation and a second expert was unsure of his opinion. Both accepted unreliable allegations (by J and T) to support opinions that Walker qualified as a SVP.

The *Walker* court also indicates that the probable cause hearing judge then "must" review any unreliable hearsay allegations that a government expert chooses to include in the expert's report. Allowing such unreliable allegations into evidence is a total deprivation of due process. It also negated Walker's right to a dismissal of the SVP Petition in April 2016 because, without the improperly introduced case-specific hearsay

allegations of J and T, there was not sufficient support for a SVP probable cause finding.[12]

B. CRAWFORD, SANCHEZ AND SUBSEQUENT CASE LAW

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

People v. Sanchez (2016) 63 Cal.4th 665 discussed, in detail, *Crawford* and explained the two-step analysis that should inform all Confrontation Clause inquiries and then delineated new restrictions on expert use of hearsay evidence per Evidence Code sections 801 and 802.

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

> "Although *Sanchez* was a criminal case, the Court stated its intention to 'clarify the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony,' generally. ([Citation].) Those code sections govern the admission of expert testimony in civil cases as well, and nothing in *Sanchez*

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12 With a dismissal Walker would have then been released from custody and placed on supervised parole. He would have been placed on greater than normal parole conditions that would include electronic monitoring, frequent reporting, restrictions on housing and work locations etc. He also would be mandated to a lifelong registration requirement under Penal Code section 290 because of his conviction in a qualifying offense.

indicates that the Court intended to restrict its holdings regarding hearsay evidence to criminal cases." (*Id*. at p. 405, fn. 6.)

People v. Roa (2017) 11 Cal.App.5th 428 then followed and also prohibited experts in SVP cases from using case -specific hearsay allegations where there was not a foundational hearsay exception under 6600(a)(3).

Bennett and *Couthren* then specifically applied *Sanchez* to SVP probable cause hearings (discussion follows at pp 30-35)

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

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

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

In the *Walker* case, the government has made no attempt to argue that the non-qualifying case-specific offense allegations from the San Francisco (J) and San Jose (T) cases were reliable. The government's "Return" in the *Walker* appellate court below, however, also conceded, while attacking *Bennett* and *Couthren,* that hearsay must be reliable for admissibility*:*

> "Reliable hearsay is admissible at an SVP probable cause hearing. Such hearsay includes expert reports and reliable hearsay contained therein." (Emphasis added, Return at page 20)

The *Walker* decision, although it mentions the defense case in very summary form, does not detail the actual evidence Walker produced as to the unreliability of the initial T and J allegations.

The government and the *Walker* court each ignore the unreliability of the J and T allegations. The unreliability of the J and T allegations cuts against their arguments for allowing the admissibility of such hearsay and is a violation of due process.

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

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

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

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

Otto, supra, noted, in evaluating 6600(a)(3), that the categories of hearsay exceptions have been limited to predicate offenses per 6600(a)(3) and that Evidence Code section 1200, subdivision (b)provides, "Except as provided by law, hearsay evidence is inadmissible."

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

At Walker's probable cause hearing prosecution expert MacSpeiden admitted he was speculating and that he could not tell if the San Francisco case (J) allegations of rape were true or not true. MacSpeiden even had information that he included in his report that the San Francisco jury felt that the complaining witness J was lying about her forcible sex allegations against Walker. (OSC0197) MacSpeiden diagnosed J as a "pathological liar". MacSpeiden, despite this, chose to use speculation assuming truth of the forcible sex allegation in the San Francisco J case to support his "M.O." theory/opinion that Walker qualified as a SVP.

Prosecution expert Karlsson could not even say until he returned to his office if his opinion would change after first finding out at the probable cause hearing that Walker had been found not guilty in the San Francisco case.

Both MacSpeiden and Karlsson accepted T's initial allegations and ignored her later contrary statement to Walker's defense investigator where the Judge dismissed any forcible sex offense charges.

Under California law. it is also well established that "[e]xpert opinion testimony constitutes substantial evidence only if based upon conclusions

or assumptions supported by evidence in the record. Opinion testimony in the record which is conjectural or speculative ·cannot rise to the dignity of substantial evidence."·· (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4 th 644, 651.)

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

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

VI. OTHER FACTORS NOT CONSIDERED BY *WALKER* DECISION

The following are additional issues (in addition to due process concerns) listed in Petitioner's Petition for Rehearing that the *Walker* court failed to address in its opinion.

The *Walker* opinion did not consider the delay that will be occasioned by the improper denial of the ability to keep out of evidence improper hearsay evidence at the probable cause hearing. This is because of the delay and prejudice to an accused SVP who cannot adequately contest the case at the probable cause hearing and the time required in bringing a SVP case to trial. Courts understand the difficulties in bringing SVP petitions to trial and the widespread trial delays. These issues are discussed in *Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156, 1170-1172 and *People v. Vasquez* (2018) 27 Cal. App. 5th 36. *Vasquez* found a speedy trial violation based on due process in upholding the trial

court's dismissal of the SVP Petition.

The *Walker* opinion did not consider the principles of collateral estoppel – the same San Francisco alleged facts (J's allegations – rejected by the criminal case jury as lies with not guilty verdicts returned) used by the same prosecuting office at the criminal trial and by its experts at the probable cause hearing.

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

> Where a hearsay exception has been implied in other contexts, the statutory language at issue has specifically referenced the documentary evidence the court is permitted to review. *Couthren, supra*, Footnote 5 , at 1014
>
> And noted:
>
> Notably, section 6605 [a provision of the SVP Act related to petitions for unconditional release from civil commitment] was amended by the electorate after *Cheek* [*People v. Cheek* (2001) 25 Cal.4th 894] and now expressly provides that "the court . . . can consider the petition and any accompanying documentation provided by the medical director, the prosecuting attorney, or the committed person" at the show cause hearing. (§ 6605, subd. (a)(1) (Prop. 83, § 29, eff. Nov. 8, 2006); see § 6604.9, subd. (f).) No similar amendment was made to section 6602.
>
> *Couthren*, *supra*, Footnote 6, at 1016

Parker (involving a SVP probable cause hearing under 6602) and *Cheek* (a probable cause hearing of a previously committed person as a SVP moving for release under 6605) were concerned solely with whether something *more* than a facial or paper review of the relevant petition was required, given the ambiguity in the statutory language and the liberty interest at stake in these proceedings. *Cheek* does not mention

the admissibility of hearsay at all, simply concluding that section 6605 should be construed in a similar fashion as 6602 and allow more than a paper review, as *Parker* then required, to allow for cross examination of experts and allowing the previously committed SVP to present witnesses to allow a proper rebuttal of the prosecutor's case at a 6605 release probable cause hearing . (*Cf. Couthren*, *supra*, at 1017.)

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

A. *BENNETT*

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

As an example, the *Bennett* court addressed the result in *People v. Burroughs* (2016) 6 Cal.App.5th 378. In that case, the prosecution "established the existence and details of the defendant's qualifying sexually violent offenses through the introduction of various materials,

certain contents of which fell under the section 6600, subdivision (a)(3) exception." (*Bennett*, *supra*, at p. 878.) "The documentary evidence, however, also contained information regarding the defendant's personal history, including details of uncharged sex offenses the defendant allegedly committed. (*Ibid*.) "The appellate court concluded that this type of information should have been excluded: 'much of the documentary evidence upon which the experts relied was hearsay that was not shown to fall within a hearsay exception. The trial court accordingly erred by allowing the experts to testify to the contents of this evidence as the basis for their opinions.'" (*Ibid*.) "Because these evidentiary errors were prejudicial, the judgment adjudicating the defendant an SVP was reversed." (*Ibid*.)

As another example, the *Bennett* Court addressed the result in *People v. Roa*, (2017) 11 Cal.App.5th 428. In that case, the "expert testimony regarding case-specific facts of the defendant's qualifying predicate offenses was admissible because the facts underlying these offenses were independently proven by documentary evidence admitted under section 6600, subdivision (a)(3)." (*Bennett*, *supra*, at p. 877.) "[T]he trial court erred, however, in allowing experts to testify regarding statements contained in a report prepared by a district attorney investigator regarding events that occurred decades earlier, including an arrest of the defendant for alleged sexual assault that did not result in conviction." (*Id.* at p. 878.) "The experts in this case testified extensively about case-specific facts they obtained from the investigator's reports and treated those facts as true and accurate to support their opinions." (*Ibid*.) "The investigator's reports themselves were not admitted into evidence, and there is no other evidence of the case-specific facts concerning the earlier incidents." (*Ibid*.) "Admission of expert testimony relating case-specific facts about these incidents was error." (*Ibid*.)

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

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

B. COUTHREN

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

> The People contend that section 6602 establishes a hearsay exception for expert evaluations at the probable cause hearing on

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

The *Couthren* court also, as noted above, indicated that section 6605 was amended in 2006 to allow hearsay in post SVP commitment proceedings for release (6605) and that no similar amendment was made to section 6602. *Couthren*, supra, Footnote 6 at 1016

In *Couthren*, the court acknowledged that "SVP evaluations are typically comprehensive and draw from numerous sources, including probation and police reports, investigative reports from prosecuting agencies, court records and transcripts, face-to-face interviews with the SVP defendant, prison and hospital rule violation reports, records of arrests, convictions and juvenile dispositions, and hospital records, including staff treatment notes, medication reports, and attendance records." (*Couthren*, *supra*, at pp. 1010-1011.) "Where an evaluation

author relies upon and relates statements from secondary sources to prove the truth of the information they contain, these out-of-court statements constitute further levels of hearsay." (*Id*., at p. 1011.) "For example, an expert evaluation may convey statements from a police report quoting a crime victim's recollections concerning the SVP defendant." (*Ibid*.) "Each level of hearsay, the expert evaluation, the police report, and the victim's statement, must fall within an exception to be admitted into evidence." (*Ibid*.)

Like *Bennett*, the court in *Couthren* found "section 6600, subdivision (a)(3) does not authorize the use of documentary evidence that bears no relation to qualifying SVP convictions or the details of such offenses." (*Couthren*, *supra*, at p. 1015.) "Given this express limitation on the scope of the hearsay exception, it would be incongruous for the Legislature to have already enacted a hearsay exception under section 6602, one which allows the use of multiple-level hearsay in an expert evaluation for *any* purpose." (*Ibid*. (emphasis in original).) "If such an exception already existed by virtue of the statutory command to 'review the petition,' there would have been no need to pass section 6600, subdivision (a)(3)." (*Ibid*.) "The legislative history behind passage of section 6600, subdivision (a)(3) belies this theory." (*Ibid*.) In sum, "the Legislature did not exempt SVP probable cause hearings from evidentiary rules concerning hearsay or create a statutory exception to hearsay that authorizes the wholesale admission of expert evaluation reports in SVP proceedings." (*Ibid*.)

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

multiple levels of hearsay must apply at an SVP probable cause hearing as well." (*Ibid*.)

Although multiple hearsay may be considered by a prosecution's expert when forming their opinion that a prospective SVP is likely to engage in sexual violence when determining probable cause to proceed to a SVP trial, the 6600(a)(3) exception only applies to prior convictions of qualifying offenses and not criminal conduct or other conduct alleged but not proven.

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

It is particularly dangerous and a violation of due process when the hearsay allegations of T and J allowed by the *Walker* opinion not only did not result in a conviction for a qualifying offense (dismissal by a Judge and not guilty verdicts by a jury) but evidence at the probable cause hearing also established that the initial allegations were false and thus unreliable on an additional level.

VIII. CONCLUSION

The *Sanchez* case correctly decided and placed appropriate restrictions on expert use of hearsay in all cases – including SVP probable cause hearings.

The *Sanchez, Bennett* and *Couthren* decisions and the faulty reasoning of the *Walker* opinion are appropriate reasons for this court to grant Petitioner relief.

The *Walker* opinion is not supportable by *Parker* and/or *Cooley.* All cases cited by the government and Walker acknowledge that a primary

purpose of the SVP probable cause hearing is to weed out SVP Petitions that are not supported by competent evidence. The *Walker* decision makes it exceedingly difficult, if not impossible, to weed out cases where improper case-specific allegations are allowed into evidence and will be used by probable cause hearing Judges to support an adverse decision.

The *Walker* opinion's concern about duplication of proceedings – probable cause hearing and trial -- is thwarted because cases that should be dismissed at the probable cause hearing will now have to go to trial and prejudice the alleged SVP accused by the lengthy delay in getting to trial. During the delay until trial, the accused SVP will be subjected to in custody incarceration at Coalinga State Hospital as Walker has been for over 4 years.

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

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

For the foregoing reasons, this court should reverse the *Walker* decision and grant Petitioner's request to order the SVP petition dismissed.

Dated: October 7, 2020

Respectfully submitted,

_____/s/_____

ERWIN F. FREDRICH

Attorney for Petitioner

CERTIFICATE OF WORD COUNT

Counsel for Petitioner hereby certifies that this Petition for Review consists of 9,305 words (including tables and this certificate (but excluding Proof of Service), according to the word count of the computer word-processing program.

Dated: October 7, 2020

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

PROOF OF SERVICE

PETITIONER'S OPENING BRIEF ON THE MERITS S263588

WALKER v. SUPERIOR COURT (PEOPLE)

Court of Appeal Case Number A159563

DECLARATION OF ELECTRONIC SERVICE AND FILING

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

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business mailing address is PO Box 471313, San Francisco, CA 94147. On below date I have caused to be served a true copy of the attached Petitioner's Opening Brief on the Merits by electronic delivery through TrueFiling to each of the following at the email addresses below. My email address used to e-serve:efredrich@juno.com. I, the undersigned, declare I uploaded a pdf version of the above-identified document to the TrueFiling site for electronic service to the following:

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Assistant District Attorney
San Francisco County
350 Rhode Island Street
San Francisco, CA 94103
ira.barg@sfgov.org
& districtattorney@sfgov.org

Hon. Charles Crompton
Superior Court, Dept. 15
Hall of Justice
850 Bryant Street
San Francisco, CA 94103
ccrompton@sftc.org

Office of the California Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
sfagdocketing@doj.ca.gov &
Moona.Nandi@doj.ca.gov

Darren Bean (attorney on Amicus Brief)
895 Broadway
El Centro, CA 92243
darrenbean@co.imperial.ca.us

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 7, 2020 at San Francisco, California

__/s/____
ERWIN F. FREDRICH

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **WALKER v. S.C. (PEOPLE)**
Case Number: **S263588**
Lower Court Case Number: **A159563**

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Darren Bean Imperial County Public Defender 240959	darrenbean@co.imperial.ca.us	e-Serve	10/7/2020 11:53:12 AM
Moona Nandi 168263	moona.nandi@doj.ca.gov	e-Serve	10/7/2020 11:53:12 AM
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Erwin F. Fredrich

Law Firm