In the Supreme Court of the State of California

KEVIN MICHAEL REILLY,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Case No. S202280

Fourth Appellate District, Case No. G045118
Orange County Superior Court, Case No. M11860
The Honorable Richard M. King, Judge

REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

In the Brief on the Merits, Respondent explained that initial mental evaluations of a person suspected to fall under the Sexually Violent Predator Act (SVPA) must be performed in accordance with a standardized assessment protocol, and the evaluators must concur the person meets commitment criteria before an SVPA commitment petition can be filed. While these concurring evaluations are relevant for purposes of filing a valid SVPA petition, later evaluations prepared for subsequent court proceedings do not require such concurrence.

In this case it was determined there existed a procedural irregularity in the evaluation process, because the Office of Administrative Law (OAL) had determined the standardized assessment protocol - used by the experts here to conduct Petitioner's initial SVPA evaluation - constituted an invalid underground regulation under the Administrative Procedures Act (APA). Like the court below, Petitioner contends this meant new remedial evaluations (under a valid assessment protocol) are required without need to make any showing the error affected the evaluation process. He further contends this reverted the case back to the pre-filing stage and where, as here, the remedial evaluations do not concur the person meets commitment criteria, the SVPA petition must be dismissed.

Whether two valid and concurring evaluations are initially required to file an SVPA petition is not the issue to resolve. The issue before the Court is the type and extent of remedial relief when pre-filing evaluations are later found to have been based on a procedural or administrative irregularity that had no effect on the conclusions reached by the evaluators.

As Respondent explained, the remedy to cure a protocol not ratified by the APA was adoption of an APA-compliant protocol. But a court should not vacate an otherwise properly filed SVPA petition and effectively divest a trial court's jurisdiction over pending judicial proceedings when it

is determined the assessment protocol used by the evaluators did not comport with this process. To rule otherwise would frustrate the notion that relief for procedural defects under the APA must be harmonized with the purpose and effect of the SVPA commitment scheme. Petitioner simply focuses on a need to have concurring evaluations before an SVPA petition may be filed and never addresses these principles or the authorities of this Court upon which they are based.

Moreover, Petitioner declines to address Respondent's argument that remedial evaluations are only warranted if a petitioner demonstrates the invalidity was a material error that undermined the evaluator's conclusion the person met commitment criteria. And in cases like this, where a probable cause finding is made, a petitioner must also demonstrate prejudice in that the outcome of the probable cause hearing would have been different. Regardless, when remedial evaluations are ordered, further judicial proceedings are not dependent on concurrence by evaluators the person meets commitment criteria.

ARGUMENT

I. AFFORDING REMEDIAL EVALUATIONS DOES NOT REVERT THE CASE BACK TO THE PRE-FILING STAGE

The type of and extent of remedial relief afforded when evaluations are based on a standardized assessment protocol that is later found to constitute an invalid underground regulation is the central issue before the Court. As Respondent explains, in order to harmonize the SVPA commitment scheme with remedial relief for administrative violations under the APA, remedial evaluations should only be warranted if a petitioner demonstrates the invalidity was a material error that undermined the evaluator's conclusion the person met commitment criteria. And in cases like this, in order to vacate a probable cause finding, a petitioner must also demonstrate prejudice in that the outcome of the probable cause

hearing would have been different. Regardless, when remedial evaluations are ordered, further judicial proceedings are not dependent on concurrence the person meets commitment criteria.

Petitioner declines to address these arguments. Instead, he simply maintains that when it is determined that pre-filing evaluations were based on an invalid assessment protocol, the case must revert back to the pre-filing stage where new remedial evaluations under a valid assessment protocol must be conducted, and when they do not concur the person meets commitment criteria, the SVPA petition must be dismissed. (AB 1-2.)[1]

Much of Petitioner's argument is based on general principles Respondent does not contest. For example, Respondent takes no issue with the fact that two-valid evaluations are a necessary procedural safeguard before an SVPA petition must be filed, that the initial evaluations conducted in this case were based on an invalid protocol, or that a party may challenge the validity of an SVPA petition before trial. But as shown in the Brief on the Merits and below, this does not mean the case reverts back to the pre-filing stage for remedial evaluations as a matter of course and without any showing there was material error that affected the evaluation process (or in cases where a probable cause finding had been

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[1] The argument may be summarized in this fashion: (1) two-valid evaluations are a necessary procedural safeguard before an SVPA petition must be filed (AB 4); (2) the 2007 assessment protocol used by SVPA evaluators was invalid (AB 9); (3) the initial evaluations in this case were invalid because they were based on the invalid 2007 assessment protocol; (4) the remedy for an evaluation based on an invalid assessment protocol is a remedial and compliant evaluation (AB 12); (5) a party may challenge the validity of an SVPA petition where the remedial or compliant evaluations do not concur the person meets commitment criteria (AB 17); (6) Petitioner followed the procedures here (AB 23); (7) two-valid evaluations are not a predicate for proceeding to a probable cause hearing (AB 26); and (8) a matter cannot proceed unless the two valid remedial or compliant evaluations concur the person meets commitment criteria (AB 28).

made, vacated it the outcome of that hearing would have been different), which essentially divests the court of jurisdiction unless the new remedial evaluations concur the person still meets commitment criteria.

Yet by focusing exclusively on the need for two valid concurring evaluations to justify the filing of an SVPA petition, Petitioner misconstrues Respondent's argument to ignore this statutory requirement.[2] (AB 7; see Welf. & Inst. Code, § 6601, subds. (d)-(f).) He then uses this assertion to posit a hypothetical throughout his brief where two evaluators find a person does not qualify for SVPA commitment but the People nevertheless file a petition in violation of the SVPA statute, and then insulate it from any challenge by presenting some other hired expert whose opinion supports a probable cause finding. (AB 8; see also AB 26, AB 27.)

As the SVPA makes expressly clear, the prerequisite to filing a petition and then proceeding to judicial review is the concurrence of two experts at the pre-filing stage the person meets commitment criteria. (BOM

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[2] Petitioner also seems to challenge Respondent's statement the evaluators in this case used a valid assessment procedure when they re-evaluated him in 2009. (AB 1-2.) Respondent never disputed the initial 2008 evaluations were conducted pursuant to an invalid assessment protocol. (BOM 12-13.) Petitioner claims, however, that respondent baldly asserts the August 2009 re-evaluations (which found he met commitment criteria) were based on the 2009 standardized assessment protocol when it had not yet been approved. (AB 2, fn. 3.) But as the People explained, in light of the OAL finding the Department of Mental Health adopted new emergency assessment protocols in February of 2009, and the OAL approves these protocols in September. The 2009 updated evaluations used this assessment protocol and it was the same assessment protocol that these same experts used in the 2011 remedial evaluations. The only basis for the changed conclusions from 2009 and 2011, was the 18-month lapse of time between the evaluations periods (where petitioner had progressed in treatment and reduced the statistical likelihood he might reoffend), and not the method of assessment. (See BOM 14, referring to Return to Petition for Writ of Mandate/Prohibition at p. 18, referring to Exhs. 7-11 [evaluations conditionally lodged under seal].)

4-6; Welf. & Inst. Code, § 6601, subds. (d)-(f)); *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 894.) These experts perform their evaluations in accordance with a standardized assessment protocol and where two concurring evaluations (either two initial or two independent following a split of opinion) do not exist, a petition may not be filed or it shall be dismissed.[3] (BOM 22-23 [filing untimely petition under section 6601, subdivision (a) - *People v. Whaley* (2008) 160 Cal.App.4th 779, 804; see also *People v. Allen* (2007) 42 Cal.4th 91, 94-95 (untimely MDO petition), or filing petition based on one rather than the required two evaluations - *Butler v. Superior Court* (2000) 78 Cal.App.4th 1171, 1174; *Peters v. Superior Court* (2000) 79 Cal.App.4th 845)].)

This Court has recognized an exception to the above. While two concurring evaluations are required to file the SVPA petition, in cases where the initial or independent evaluators do not concur that a person meets commitment criteria to justify filing an SVPA petition, the People may still file the SVPA petition if they believe the conclusion was based on "material legal error." (*Ghilotti, supra,* 27 Cal.4th at p. 909.) In that instance, the court conducts a facial review and examines the negative report(s) and if it finds material legal error in the evaluation (i.e., the doctor applied an incorrect legal standard in conducting, or did not comply with the statutory criteria governing, the evaluations), dismissal is not warranted. (*Id.* at pp. 909, 912, 966.)

Petitioner's hypothetical therefore presumes facts and circumstances that would simply not ever be sanctioned by a court. He then uses this mis-construction to attack Respondent's statement that the two-valid evaluation

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[3] Of course, the question before the Court is the type of and extent of remedial relief afforded when as here, evaluations are based on a standardized assessment protocol that is later found to constitute an invalid underground regulation.

requirement is collateral to continued judicial proceedings. (AB 12, referring to BOM 15.) This ignores Respondent's explanation of the role that evaluations play in the pre-filing stage when compared to post-filing judicial proceedings. As Respondent explained, evaluations may be a pre-requisite to a properly filed initial SVPA petition, but are collateral to the continued proceedings *after* a properly filed valid petition is before the court. (BOM 15.) That is why, for example, a properly filed petition is not subject to mandatory dismissal when one or both of the experts change their position and opine the person no longer meets commitment criteria.[4] (BOM 8-9, referring to *Gray v. Superior Court* (2002) 95 Cal.App.4th 322 [where updated evaluations result in a split of opinion, dismissal of the previously filed petition is not required]; *People v. Scott* (2002) 100 Cal.App.4th 1060, 1063 ["rather than demonstrating the existence of the

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[4] Petitioner also mischaracterizes Respondent's argument to be that even if an invalid petition is filed, it must proceed to probable cause and trial, and a petitioner can never seek its dismissal other than by challenging the evidence at the probable cause hearing or trial. (AB 17, 24.) Respondent has never made such an assertion.

The SVPA does not expressly provide a means to challenge a commitment petition, either before or at the probable cause hearing, for defects in or the lack of evaluations. (See *Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677, 1685-1686 [the SVPA did not expressly incorporate the Code of Civil Procedure; therefore, summary judgment was not permitted in an SVPA commitment proceeding].) But this Court authorized a nonstatutory pleading to challenge a commitment proceeding before the probable cause hearing via a plea in abatement. (*Ghilotti, supra*, 27 Cal.4th at pp. 912-913.) And independent of *Ghilotti*, appellate cases have authorized motions or pleadings to challenge an SVPA commitment petition. (E.g., *People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1128-1129 [petition filed without the required concurrence of two evaluators may be challenged by plea in abatement]; *Peters, supra,* 79 Cal.App.4th at pp. 847, 851 [same based on motion to dismiss]; *Butler v. Superior Court, supra,* 78 Cal.App.4th at pp. 1181-1182 [same].) Respondent has not contended otherwise.

two evaluations, the People are required to show the more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior"]; see also *Preciado, supra,* 87 Cal.App.4th at p. 1130 ["the requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so"]; *People v. Medina* (2009) 171 Cal.App.4th 805, 814 [once a petition is filed, "[t]he legal determination that a particular person is an SVP is made during the subsequent judicial proceedings, rather than during the screening process"].)

In asserting that a party is entitled to remedial evaluations without any showing the evaluation process was materially affected by the use of an assessment protocol later found to constitute an invalid regulation, Petitioner relies extensively on the appellate decision of *Ronje* [*In re Ronje* (2009) 179 Cal.App.4th 509], and claims Respondent cannot challenge its the reasoning because it was not presented as an issue for review. (AB 16, fn. 14, referring to Cal. Rules of Court, rule 8.520(b)(3).) Respondent never asserted *Ronje* was wrongly decided because it provided for remedial relief. Respondent's contention is that remedial relief afforded under *Ronje* was poorly reasoned and failed to account for how that relief should be provided, and was then wrongly extended under the circumstances of this case to compel dismissal.

The question now posed to this Court: "Must a pending SVPA civil commitment petition be dismissed when the expert re-evaluations are done pursuant to *In re Ronje* (2009) 179 Cal.App.4th 509, but do not agree the person meets commitment criteria?," implicitly invites a need to evaluate the remedial relief that was afforded under *Ronje*. Thus, it was not necessary to separately petition the Court to address *Ronje*; the question before the Court asks it to consider circumstances where *Ronje* remedial

evaluations should be performed, the showing needed to warrant such remedial evaluations, and, whether dismissal is required if the remedial evaluations lack concurrence.[5] At the very least, the continued viability of *Ronje* and the parameters of any relief under it were "fairly included" in the petition and in the issue now presented on review. (Cal. Rules of Court, rule 8.516(a).) Finally, *Ronje* is not controlling law and Petitioner errs in trying to elevate it to that status before this Court.

Among the troubling aspects of *Ronje* (and this case) was the fact that it was a post-probable cause matter, but the appellate court ordered not just new remedial (or protocol-compliant) evaluations, but also vacated the probable cause finding. And this remedial approach was absent any showing by Petitioner that the procedural irregularity identified by the OAL affected the evaluation process or the expert's conclusions had any effect on the substantive conclusions in the original evaluations. (*In re Ronje, supra*, 179 Cal.App.4th at pp. 519, 521.) Given that, there was also no required showing the irregularity had an affect on the outcome of the probable cause hearing. This broad swath approach renders judicial involvement to be nothing more than a ministerial act and is incongruous with this Court's approach of a related issue in *Ghilotti*.

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[5] Further the Petition for Review observed this Court needed to resolve the conflict in the law between *Ronje* and *Davenport*, and clarify the effect on pending SVPA petitions where underlying evaluations are found to be based on an invalid assessment protocol "and the proper remedy that then flows from the post-*Ronje* evaluation process." (Petition for Review at p. 2.) The argument within the petition also advocated that the remedy articulated in *Ronje* of both re-evaluations and a new probable cause hearing "itself goes too far" and that if this Court found new evaluations must be ordered to cure procedurally defective pre-filing evaluations, it should not necessarily mandate a court vacate a probable cause finding if one had occurred. (Petition for Review, at p. 12, fn. 12.)

In *Ghilotti*, this Court recognized that pre-filing evaluations (that maintain the person does not meet commitment criteria) may independently be reviewed and if material legal error were found, it would otherwise warrant further SVPA judicial proceedings. This Court's rationale presumed a showing made to justify independent judicial review and then judicial findings entered to justify continued proceedings. But Petitioner's argument all removes any of this judicial oversight and makes judicial involvement merely to order remedial evaluations as a matter of course. In that regard, he contends all judicial proceedings are void, including cases where a finding of probable cause is made, a finding that is wholly independent of the evaluations that had supported the filing of the petition. That cannot be harmonized with the principle that an SVPA petition should proceed to probable cause hearing, even where the experts no longer agree or believe the person meets commitment criteria.

Welfare and Institutions Code section 6601, subdivision (f), only declares as a general rule that an SVPA petition may not be filed in the first instance without the concurrence of two doctors. Those first-instance evaluations were obtained here. Admittedly, the evaluators used a procedure that was later declared to have not been properly ratified under the APA, but they nonetheless still complied with their duties and conducted evaluations that supported a petition properly filed as set forth in the SVPA, and there has been no showing those evaluations were performed improperly or affected by the invalid assessment protocol. And in circumstances where a petition has been filed

> and the court has found probable cause to exist, the matter should proceed to trial. In other words, once a petition has been properly filed and the court has obtained jurisdiction, the question of whether a person is a sexually violent predator should be left to the trier of fact unless the prosecuting attorney is satisfied that proceedings should be abandoned.

(*Gray v. Superior Court, supra*, 95 Cal.App.4th at p. 329).

II. REMEDIAL RELIEF FOR PROCEDURAL DEFECTS UNDER THE APA MUST BE HARMONIZED WITH THE SVPA COMMITMENT SCHEME AND SHOULD REQUIRE A SHOWING OF MATERIAL ERROR OR PREJUDICE, AND ANY REMEDIAL RELIEF AFFORDED DOES NOT COMPEL DISMISSAL IF THERE IS A LACK OF CONCURRENCE

As noted above, Petitioner's argument is premised on contending pre-filing evaluations based on an invalid assessment protocol require new evaluations based on a valid assessment protocol and when they do not concur the person meets commitment criteria, the matter must be dismissed. (AB 1-2.) This relief is mandated without any further showing and operates to void not just the evaluations but the SVPA petition itself, by returning the case to the pre-filing stage where dismissal is compelled unless there are two new concurring evaluations. While that may be an easy answer, it is not the correct one. Further, it fails to address Respondent's arguments that (1) remedial evaluations must be predicated on a petitioner showing the use of the invalid protocol was a material error that affected the evaluator's conclusion, or in cases where this is done after a probable cause finding, the petitioner must additionally establish prejudice in that the outcome of the probable cause hearing would have been different and (2) regardless, there is no requirement the remedial evaluation concur the person meets commitment criteria because they have no affect on the propriety of continued judicial proceedings.[6]

Moreover, and as Respondent suggested, remedial evaluations should not be compelled unless the court determines the evaluators relied on an

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[6] Respondent made clear in the Brief on the Merits that this does not preclude updated or replacement evaluations for probable cause or trial, or otherwise prevents the defense from expert review or its own expert evaluations. (BOM 7; Welf. & Inst. Code, §§ 6603-6604; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 245, fn. 8, and 247.)

invalid protocol or other procedural irregularity, and, this was a material error that undermined the confidence of the conclusion. And in those cases where a probable cause finding has already been made, remedial evaluations are be more circumscribed in that a petitioner must additionally establish prejudice that the outcome of that proceeding would have been different. That is because there is no longer a basis to challenge the commencement of the SVPA proceedings, but instead a desire to vacate a judicial determination that probable cause existed, which is a finding not necessarily dependent on the evaluation reports.

Petitioner offers no response to these arguments. Instead and like the court below, he wrongly presumes that under *Ronje* and the rule of *Pompa-Ortiz* [*People v. Pompa–Ortiz* (1980) 27 Cal.3d 519], new evaluations (and a new probable cause hearing) are warranted without any showing the irregularity at issue affected the evaluation process (or the probable cause determination). (See *Ronje, supra*, 179 Cal.App.4th at p. 517 ["Under *Pompa–Ortiz*, "[t]he right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects."].) But as Respondent explained, this principle concerns only irregularities which occur in the judicial hearing, not procedural irregularities during the pre-filing evaluation process. To construe it otherwise would be inconsistent with this Court's observation that *Pompa–Ortiz* "must not be read overbroadly." (*People v. Standish* (2006) 38 Cal.4th 858, 885.) Given that *Pompa-Ortiz* did not "establish that any and all irregularities that precede or bear some relationship to the preliminary examination require that the information be set aside" (*ibid*), it is hard to fathom why a petitioner in a civil commitment proceeding is entitled as a matter of course to both new evaluations and a new probable cause hearing for a procedural irregularity

that occurred during the pre-filing evaluation process, and not within the judicial hearing itself.

The error with this approach is that in the context of an SVPA evaluation, the assessment protocol is not designed to limit the evaluators' professional judgment on whether a person meets SVPA commitment criteria. Instead its purpose is generally to explain the factors and approaches used in the evaluation process and as related to the interview of the committee. As a result and as Respondent explained, the remedy to cure a protocol not ratified by the APA is an APA-compliant protocol. That ultimately occurred through the administrative process. But in no way should an evaluation that inadvertently did not comport with this process vacate an otherwise properly filed SVPA petition and effectively divest a trial court's jurisdiction over pending judicial proceedings without any showing of error or prejudice. (Cf. *In re Wright* (2005) 128 Cal.App.4th 663, 673 [defect in the evaluations harmless unless defendant could show he was deprived of a fair trial or suffered prejudice as a result of the defective evaluation].) To rule otherwise would frustrate the notion that relief for procedural defects under the APA must be harmonized with the SVPA.

In fact, the court below and Petitioner fail to even address the important public policies and societal interests that this Court stated must be considered in fashioning a fair remedy for curing APA procedural administrative defects. As this Court has observed, "a court reviewing a challenge to a regulation that is invalid under the APA has broad discretion to devise a fitting remedy that avoids disruption of important state programs or laws." (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 340; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561, 572, 576–577.)

This is why the *Ronje* remedy and its unwarranted extension here was ill-conceived and must be refined. Based on the jurisprudence of this Court and to better effectuate the SVPA commitment scheme, this Court should set forth a refined rule of law that requires a petitioner to show the administrative irregularity had a material affect on the SVPA evaluation process and expert conclusion, and in cases where a probable cause finding has been made, on the outcome of that hearing itself. In other words, when an individual seeks relief to cure defective evaluations, the person must affirmatively show (1) the concurring evaluations that were the basis for filing of an SVP petition were conducted using an invalid assessment protocol, and (2) this error or irregularity "reasonably might have affected the outcome" the expert's conclusion. And in cases where a probable cause finding had been made, vacated only when a petitioner shows prejudice in that the result of the hearing would have been different.

Finally, even if this Court determines new compliant remedial evaluations are compelled absent any further showing by a petitioner, the evaluators need not concur the person meets commitment criteria for continued judicial proceedings. In *Preciado*, the appellate court properly rejected the argument that the failure to obtain two evaluations deprived the trial court of jurisdiction to proceed on an SVPA commitment petition. (*Preciado, supra*, 87 Cal.App.4th at pp. 1127–1128.) The court held the SVPA does not require the petition to allege the existence of the two assessment evaluations and, therefore, the petition was valid at the time it was filed despite the lack of two evaluations. (*Id.* at p. 1128.) Although the petition was subject to attack on that ground, the court concluded, "this defect was not one going to the substantive validity of the complaint" and the failure to obtain evaluations "was merely in the nature of a plea in abatement, by which a defendant may argue that for collateral reasons a complaint should not proceed." (*Ibid.*) "In general, where a defect

impairing a litigant's right to proceed existed at the time a complaint was filed but has been cured by the time the defense is raised, the defect will be ignored." (*Ibid.*, citing 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 1058, p. 508.)

The *Preciado* appellate court explained,

> [N]othing on the face of the statute requires a petition to allege the existence of two psychological evaluations, and the statute does not require the People to prove the existence of such evaluations at either the probable cause hearing or at trial.... [O]nce the petition is filed a new round of proceedings is triggered. [Citation.] After the petition is filed, rather than demonstrating the existence of the two evaluations, the People are required to show the more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior. [Citation.] In short, like many other matters subject to the principles governing pleas in abatement, the requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so.

(*Preciado, supra*, 87 Cal.App.4th at p. 1130, fn. omitted; see also *People v. Scott, supra,* 100 Cal.App.4th at p. 1063.)

Although the preceding discussion related to fundamental jurisdiction to proceed, *Preciado* correctly stands for the proposition that assessment evaluations of two concurring health professionals, though a requirement for filing an SVPA commitment petition, are not a condition to the trial court's jurisdiction over the petition. And more importantly, they do not affect the petition's substantive validity. Defective evaluations, or the failure to obtain them, can be cured later by producing valid APA-compliant evaluations, or by establishing the defendant satisfies the statutory definition of an SVP. Similarly, assessment evaluations based on a valid standardized assessment protocol, though a requirement for filing an SVPA commitment petition, are simply not a condition of a trial court's

continued jurisdiction over an SVPA commitment petition and thus their conclusions do not affect the petition's substantive validity.

As a result, while a person may resort to the remedy of ensuring APA compliant evaluations to cure a procedurally defective condition, he should not benefit from a conclusion he no longer meets commitment criteria, because that conclusion lies outside the APA-compliant protocol process. And as Respondent observed in this case, that conclusion may often be for reasons unrelated to the assessment protocol. (BOM 14.) In other words and as the *Davenport* appellate court soundly reasoned, like updated evaluations prepared for the probable cause hearing or trial, the conclusion rendered in the remedial evaluations should have no effect on whether judicial proceedings continue, particularly where there has been a complete failure to identify any substantive defect in the assessment protocol and the lack of evidence the protocol had any material effect on the conclusions rendered in the evaluations. (*Davenport v. Superior Court* (2012) 202 Cal.App.4th 665, 671-673.)

To otherwise preclude further court proceedings and order release (here of an already once adjudicated sexually violent predator) without the credibility of the evaluations being tested by the judicial process, would ignore important societal interests when fashioning a fair remedy for procedural administrative defects, represent an unwarranted extension of an

unsound decision in *Ronje* and conflict with the better reasoning set forth in *Davenport* and the jurisprudence of this Court, and be inconsistent with the purpose and goals of the SVPA commitment scheme.

Dated: November 5, 2012

Respectfully submitted,

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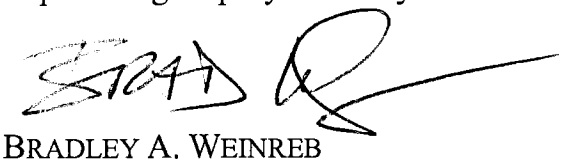

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 4,824 words.

Dated: November 5, 2012

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

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