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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,* v. **ORANGE COUNTY SUPERIOR COURT,** *Respondent;* **RICHARD ANTHONY SMITH,** *Real Party in Interest.*	Supreme Court Case No. S225562 Court of Appeal Case No. G050827 Orange County Superior Court Case No. M-9531; The Honorable Kimberly Menninger, Judge.

REPLY / SUPPLEMENTAL BRIEF ON THE MERITS

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ARGUMENT SUMMARY

On October 7, 2015, Senate Bill No. 507 was approved by the Governor and filed with the Secretary of State. The bill added subdivision (j)(1)[1] to section 6603 of the Welfare and Institutions Code. This newly added provision directly impacts the second "Question Granted Review"[2] in this matter. On page 3 of its Answer Brief on the Merits (Answer), the district attorney asserts that newly added section 6603, subdivision (j)(1), "provides that the district attorney shall have full and complete access to the State Hospital information that is otherwise confidential under section 5328." As discussed in greater detail below, the district attorney is wrong. First, newly added section 6603, subdivision (j)(1), violates the Equal Protection guarantees of the California Constitution and the United States Constitution and thus cannot be constitutionally implemented. Second, even if newly added section 6603, subdivision (j)(1), can be constitutionally implemented, it does not apply retroactively; therefore, newly added section 6603, subdivision (j)(1), provides the district attorney with copies of only information and records obtained in the course

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[1] Section 6603, subdivision (j)(1), states: "Notwithstanding any other law, the evaluator performing an updated evaluation shall include with the evaluation a statement listing all records reviewed by the evaluator pursuant to subdivision (c). The court shall issue a subpoena, upon the request of either party, for a certified copy of these records. The records shall be provided to the attorney petitioning for commitment and the counsel for the person subject to this article. The attorneys may use the records in proceedings under this article and shall not disclose them for any other purpose."

[2] The second "Question Granted Review" states: "Is the district attorney entitled to review medical and psychological treatment records or is access limited to confidential treatment information contained in an updated mental evaluation conducted under Welfare and Institutions Code section 6603, subdivision (c)(1)?"

of providing services performed on or after January 1, 2016. Third, newly added section 6603, subdivision (j)(1), does not provide the district attorney with "full and complete access" to an alleged SVP's records; rather it expressly provides the district attorney with access to only those records reviewed by the evaluators appointed by the Department of State Hospitals (DSH) to conduct updated or replacement evaluations.

Senate Bill No. 507 also included a provision[3] which discusses the first "Question Granted Review."[4] On page 4 of its Answer, the district attorney asserts that in passing Senate Bill No. 507 (in its final form) the Legislature "declined to provide a statutory resolution to that question." As discussed in greater detail below, the district attorney is wrong. The legislature has provided a statutory resolution. First, the legislature enacted section 5328 which prohibits the disclosure of confidential treatment information to the district attorney's retained expert. Second, in June 2000, the legislature enacted section 6603, subdivision (c), which created an exception to section 5328's general rule of confidentiality. However, this legislative exception permits only the DSH evaluators appointed to conduct updated or replacement evaluations to access confidential treatment

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[3] Section 2 of Senate Bill No. 507 states: "Nothing in this act is intended to affect the determination by the Supreme Court of California, in People v. Superior Court (Smith) (Docket No. S225562), whether an expert retained by the district attorney in a proceeding under the Sexually Violent Predator Act (Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code) is entitled to review otherwise confidential treatment information under Section 5328 of the Welfare and Institutions Code."

[4] The first "Question Granted Review" states: "Is an expert retained by the district attorney in a proceeding under the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 et seq.) allowed to review otherwise confidential treatment information under Welfare and Institutions Code section 5328?"

information. (*Albertson v. Superior Court* (2001) 25 Cal.4th 796, 805-807.) This exception does not authorize the disclosure of confidential treatment to the district attorney's retained expert.

ARGUMENT

I. NEWLY ADDED SECTION 6603, SUBDIVISION (j)(1), VIOLATES FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION UNDER THE LAW AND THUS CANNOT BE IMPLEMENTED.

As discussed in greater detail in the Opening Brief on the Merits, section 5328 (1) reflects the legislative recognition that disclosing confidences impairs effective treatment of the mentally ill, and thus is contrary to the best interests of society, and (2) prohibits the disclosure of an alleged SVP's treatment records to the district attorney or the district attorney's retained expert. However, as also noted in the Opening Brief on the Merits, effective September 13, 2000, the Legislature created an exception to section 5328's general rule of confidentiality for alleged SVPs. More specifically, the Legislature amended section 6603, subdivision (c), to permit Department of State Hospital (DSH) evaluators, who are appointed to conduct updated or replacement evaluations, to review an alleged SVP's treatment records. (*Albertson v. Superior Court* (2001) 25 Cal.4th 796, 805-807 (*Albertson*).)

Effective January 1, 2016, the Legislature attempted to create another SVP exception to section 5328's general rule of confidentiality. More specifically, the Legislature added section 6603, subdivision (j)(1), which grants the district attorney access to the confidential therapy records of alleged SVPs, but not to the confidential therapy records of any other recipient of these services, including similarly situated mentally disordered offenders (MDOs) and mentally disordered sex offenders (MDSOs). This

disparate treatment of SVPs violates federal and state constitutional rights to equal protection under the law. (*People v. McKee* (2010) 47 Cal.4th 1172.) Thus, newly added section 6603, subdivision (j)(1), cannot be lawfully implemented.

A meritorious claim under the equal protection clause requires a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) The inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged. (*Ibid.*)

In *In re Smith* (2008) 42 Cal.4th 1251, 1266-1267, this court summarized the relevant principles for applying equal protection analysis to civil commitment statutes as follows: "(1) generally speaking, no individual or group when being civilly committed may be denied substantive or procedural protections that are provided to the population as a whole; (2) on the other hand, the Legislature may make reasonable distinctions between its civil commitment statutes based on a showing that the persons are not similarly situated, meaning that those who are reasonably determined to represent a greater danger may be treated differently from the general population; (3) in particular, those who are criminally convicted, and those indicted of criminal charges but incompetent to stand trial, may be distinguished, at least initially, from the general population for civil commitment purposes, because their criminal acts demonstrate that they potentially pose a greater danger to society than those not in the criminal justice system."

Here, the legislature has denied only SVPs the right to keep their treatment records confidential from prosecutors. The legislature did not deny similarly situated MDOs and MDSOs the right to keep their treatment

records confidential from prosecutors. (See, for example, *People v. McKee, supra,* 47 Cal.4th at p. 1203 [concluding that MDOs and SVPs are similarly situated.]; (*In re Calhoun* (2004) 121 Cal.App.4th 1315, 1353 [concluding that, for forcible treatment with antipsychotic medication, MDOs and SVPs are similarly situated.]; *In re Greenshields* (2014) 227 Cal.App.4th 1284, 1293 [concluding that, for forcible treatment with antipsychotic medication, MDOs, SVPs and persons found not guilty by reason of insanity (NGIs) are similarly situated.].) By doing so, the legislature has denied SVPs the opportunity to meaningfully participate in the treatment afforded other similarly situated MDOs and MDSOs.

Furthermore, the government has not shown why only SVPs should lose the right to keep their treatment records confidential from prosecutors. Accordingly, this disparate treatment of SVPs violates federal and state constitutional rights to equal protection under the law. Thus, newly added section 6603, subdivision (j)(1), cannot be lawfully implemented.

II. EVEN IF NEWLY ADDED SECTION 6603, SUBDIVISION (j)(1), CAN BE CONSTITUTIONALLY IMPLEMENTED, IT MAY ONLY BE APPLIED PROSPECTIVELY; THEREFORE THE DISTRICT ATTORNEY MAY ONLY ACCESS TREATMENT RECORDS GENERATED IN THE COURSE OF SERVICES PROVIDED ON OR AFTER JANUARY 1, 2016.

Even if newly added section 6603, subdivision (j)(1), can be constitutionally implemented, it may only be applied prospectively. Legislative changes do not apply retroactively unless the Legislature expresses its intention that they should do so. (*Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 371; *Aetna Casualty & Surety Co. v. Industrial Acci. Com.* (1947) 30 Cal.2d 388, 393.) "[T]he general rule of construction, coming to us from the common law, that

when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively." (*In re Estrada* (1965) 63 Cal.2d 740, 746.) Therefore, the district attorney may only access treatment records generated in the course of services provided on or after January 1, 2016.

Additionally, newly added section 6603, subdivision (j)(1), may not be applied to retroactively waive the confidentiality provisions in section 5328 (even if the Legislature had intended retroactive application). At the time the treatment services were provided to Mr. Smith, the Legislature provided that his communications would be confidential,[5] his treatment records would not be disclosed to the district attorney (or an expert retained by the district attorney), and disclosure to the district attorney (or an expert retained by the district attorney) was unlawful.[6] The Legislature cannot make these promises of confidentiality to coax Mr. Smith to openly participate in treatment and then retroactively revoke its promise and disclose his communications and treatment records to the district attorney. Furthermore, Mr. Smith must be given the opportunity to decide whether, in light of the legislative changes, he wants to continue his participation in

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[5] For example, in *People v. Gonzales* (2013) 56 Cal.4th 353, 379, this court held that "neither section 1024 [of the Evidence Code] nor any other provision renders the psychotherapist-patient privilege inapplicable in an SVPA proceeding."

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

treatment. Therefore, the district attorney may only access treatment records generated in the course of services provided on or after January 1, 2016.

III. NEWLY ADDED SECTION 6603, SUBDIVISION (j)(1), DOES NOT PROVIDE THE DISTRICT ATTORNEY WITH ACCESS TO ALL INFORMATION AND RECORDS OBTAINED IN THE COURSE OF PROVIDING SERVICES.

On page 3 of its Answer Brief on the Merits (Answer), the district attorney asserts that newly added section 6603, subdivision (j)(1), "provides that the district attorney shall have full and complete access to the State Hospital information that is otherwise confidential under section 5328." The district attorney is wrong. First, subdivision (j)(1) does not apply retroactively (see Section II above). Second, subdivision (j)(1) does not provide the district attorney with access to all information and records obtained in the course of providing services to either voluntary or involuntary recipients of services under the Sexually Violent Predator (SVP) Act. Rather it expressly provides the district attorney with access to only those "records reviewed" by the DSH evaluators appointed to conduct updated (not replacement) evaluations. Furthermore, this statutory provision should be read to provide the district attorney with access to only those records reviewed by and relied upon the DSH evaluators. Records that the DSH evaluators did not rely upon should not be provided to the district attorney.

Furthermore, by its express terms, newly added section 6603, subdivision (j)(1), applies only to records reviewed by a DSH evaluator on or after January 1, 2016, and in conjunction with an updated evaluation issued on or after January 1, 2016. Subdivision (j)(1) expressly states "the evaluator performing an updated evaluation shall include with the evaluation a statement listing all records reviewed by the evaluator..." and requires the

court to issue a subpoena for those records and then provide a copy of those records to the district attorney. Before January 1, 2016, evaluators were not required to include a "statement listing all records reviewed by the evaluator" and the court was not required to issue a subpoena for those records nor required to provide a copy of those records to the district attorney.

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

On page 4 of its Answer, the district attorney asserts that in passing Senate Bill No. 507 (in its final form) the Legislature "declined to provide a statutory resolution to that question." The district attorney is wrong. The Legislature has provided a statutory resolution. First, the legislature enacted section 5328 which, as discussed in greater detail in the Opening Brief on the Merits, prohibits the disclosure of confidential treatment information to the district or an expert retained by the district attorney. Second, in June 2000, the legislature enacted section 6603, subdivision (c), which created an exception to section 5328's general rule of confidentiality. (*Albertson, supra,* 25 Cal.4th at pp. 805-807.) This legislative exception permits only the DSH evaluators appointed to conduct updated or replacement evaluations to access confidential treatment information. This exception "authorizes review of such records only by the [DSH] evaluators..." (*People v. Gonzales* (2013) 56 Cal.4th 353, 379, footnote 11, citing *Albertson, supra,* 25 Cal.4th at p. 807; see also *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 380.) Thus, the district attorney's retained expert is not allowed to review any of

Mr. Smith's treatment records[7] (and may not be provided with access to those portions of the DSH evaluators' reports which include information from Mr. Smith's treatment records[8]).

Furthermore, the Legislature expressly declined to enact amendments to section 6603 which would have explicitly permitted the district attorney to disclose the confidential treatment records to its retained expert. For example, the April 30, 2015, and June 2, 2015, versions of Senate Bill 507 included a provision that would have permitted the district attorney to disclose an alleged SVP's treatment records to the district attorney's retained expert after seeking consent from the court.[9] However, this provision was eliminated from the final version of the bill.

On page 22 of its Answer, the district attorney asserts "expert testimony is critical in an SVP trial, and without the assistance of an expert the State is unable to meaningfully rebut the alleged SVP's experts. The district attorney, therefore, must be given a fair opportunity to meets its

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

[8] Mr. Smith asserts section 5328 prohibits the DSH evaluators from including in their written reports confidential information from Mr. Smith's treatment records.

[9] The proposed provision stated: "This subdivision does not create any new rights or limitations regarding the retention of an expert witness by either party or access to records by an expert retained or sought to be retained by either party. The attorney petitioning for commitment shall not provide access to the records obtained under paragraph (1) to any third party, including an expert retained or sought to be retained by that attorney, without the consent of the court upon noticed motion."

burden of proof." This assertion is misleading and fails to acknowledge that the Legislature expressly provided the district attorney with the assistance of multiple experts. As discussed in greater detail in the Opening Brief on the Merits, the SVP Act requires DSH to appoint two psychiatrists or psychologists to evaluate the prisoner. (Welf. & Inst. Code, § 6601, subdivision (d).) If the two initial evaluators do not agree that the prisoner is an SVP, DMH is required to appoint two independent professionals to evaluate the prisoner as an SVP. (Welf. & Inst. Code, § 6601, subdivision (e).) And when the district attorney requests replacement evaluations, DSH must appoint new evaluators to perform replacement evaluations. (Welf. & Inst. Code, § 6603, subdivision (c)(1).) In truth, the district attorney is simply not happy the DSH evaluators have determined that Mr. Smith is not an SVP.

Furthermore, there is no statutory or case-based exception warranting disclosure or admissibility of treatment records made confidential pursuant to section 5328 simply because the district attorney would otherwise be unable to meet its burden of proof. (*In re M.L.* (2012) 210 Cal.App.4th 1457, 1470-1471 [the government bore the burden in a dependency proceeding of proving the mother had a mental illness and needed her psychiatric records to do so.].) "Were this the only test to be applied in order to disclose and admit such documents at trial, the result would substantially erode the psychotherapist-patient privilege and chill a patient's feeling of freedom in expressing herself during therapy, because any such disclosures could readily be used against her in the future." (*Ibid.*)

On pages 27-29 of its Answer, the district attorney asserts that since the DSH evaluators have access to an alleged SVP's treatment records, there is no real harm in further disclosing those records to the expert retained by the district attorney. This argument fails to take into account the Legislature's

measured diminution of the confidentiality of an alleged SVP's treatment records. More specifically, in section 6603, subdivision (c), the Legislature permitted only neutral DSH evaluators to look at an alleged SVP's treatment records. (*People v. Gonzales, supra,* 56 Cal.4th at p. 379, footnote 11 [This exception "authorizes review of such records only by the [DSH] evaluators..."], citing *Albertson, supra,* 25 Cal.4th at p. 807.) The district attorney's argument also fails to take into account the fact the district attorney is not a neutral party like a DSH evaluator; rather the district attorney is the advocate directly responsible for seeking a lifetime commitment of the alleged SVP. In addition, the district attorney's reliance on *People v. Martinez* (2001) 88 Cal. App. 4th 474 (*Martinez*) is misplaced. In *Martinez*, the court only equivocally held the prosecutor's examination of psychological records did not violate the alleged SVP's constitutional right of privacy. However, to the extent *Martinez* holds section 5328 (as opposed to the constitutional right to privacy) does not prohibit disclosure of confidential treatment records to an expert retained by the district attorney, this court should overrule *Martinez*.

On pages 29-32 of its Answer, the district attorney asserts that the Civil Discovery Act supersedes section 5328 and permits disclosure of confidential treatment records to the expert retained by the district attorney. The district attorney is wrong. Although the Civil Discovery Act has application in the SVP context, trial courts "lack the power to embroider the discovery statute to provide greater discovery beyond those afforded by [the SVP Act]." (*Sporich v. Superior Court* (2000) 77 Cal.App.4th 422, 427; superseded on other grounds by § 6603, subdivision (c).) The SVP Act circumscribes, in detail, the number and timing of the psychological examinations of an alleged SVP (*Id.* at pp. 425-426) and section 6603, subdivision (c), authorizes review of confidential treatment records only by

the DSH evaluators, not an expert retained by the district attorney. (*People v. Gonzales, supra,* 56 Cal.4th at p. 379, footnote 11, citing *Albertson, supra,* 25 Cal.4th at p. 807; see also *Gilbert v. Superior Court, supra,* 224 Cal.App.4th at p. 380.) In addition, the district attorney's reliance on *People v. Landau* (2013) 214 Cal. App. 4th 1 (*Landau*) is misplaced. In *Landau,* appellate counsel erroneously conceded that "an expert retained by the district attorney may review otherwise confidential records and interview an alleged SVP if good cause for the evaluation exists." (*Id.*, at p. 24.) Therefore, the *Landau* court never reached the issue presented here. However, to the extent *Landau* holds the Civil Discovery Act supersedes section 5328 and permits disclosure of confidential treatment records to the expert retained by the district attorney, this court should overrule *Landau.*

CONCLUSION

As discussed above and in the Opening Brief on the Merits, section 5328 prohibits the district attorney's retained expert from reviewing Mr. Smith's treatment records. In addition, newly added section 6603, subdivision (j)(1), violates federal and state constitutional rights to equal protection under the law and thus cannot be lawfully implemented. Accordingly, section 5328 also prohibits disclosure of an alleged SVP's treatment records to the district attorney, except to the extent such information is contained in an updated or replacement mental evaluation.

Dated: December 14, 2015

Respectfully submitted,
FRANK OSPINO
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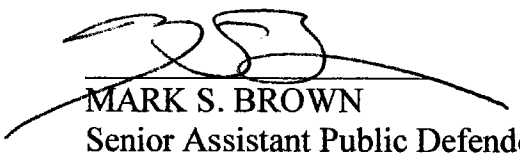

MARK S. BROWN
Senior Assistant Public Defender

WORD COUNT CERTIFICATION

(California Rules of Court, Rules 8.204(c) and 8.520(c)(1) and (d)(2))

I, Mark S. Brown, declare as follows:

I represent Mr. Smith in this matter pending before this court. This REPLY / SUPPLEMENTAL BRIEF ON THE MERITS was prepared in Microsoft Word, and according to that program's word count, it contains 3,652 words.

I declare under penalty of perjury the above is true and correct. Executed on December 14, 2015, in Santa Ana, California.

MARK S. BROWN
Senior Assistant Public Defender

DECLARATION OF SERVICE

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

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

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

That on the 14th day of December 2015, I served a copy of the **REPLY / SUPPLEMENTAL BRIEF ON THE MERITS** in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelopes were addressed (without the telephone numbers) as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14th day of December 2015, at Santa Ana, California.

Angela Friedlander
Secretary