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Supreme Court of California
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In the Supreme Court of the State of California

JEFFREY WALKER,

Petitioner,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Case No. S263588

First Appellate District, Division Four, Case No. A159563
San Francisco County Superior Court, Case Nos. 2219428, 195989
The Honorable Charles Crompton, Judge

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

Do defendants in Sexually Violent Predator Act (SVPA) proceedings have a due process right to confront and cross-examine witnesses presenting contested hearsay evidence?

Did the superior court violate the rule of *People v. Sanchez* (2016) 63 Cal.4th 6665—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 SVPA?

INTRODUCTION

Walker is awaiting adjudication to determine whether he is a sexually violent predator (SVP) under Welfare and Institutions Code section 6600 et seq.[1] At the probable cause hearing (§ 6602), over Walker's hearsay objection, the prosecutor introduced the psychological evaluations upon which the SVP petition was based. Walker subsequently called and questioned the experts who authored the evaluations and other witnesses. After the hearing, the superior court determined there was probable cause to believe Walker qualified for SVP commitment.

The expert evaluations contained "case-specific facts asserted in hearsay statements" within the meaning of *People v. Sanchez*, *supra*, 63 Cal.4th 665, which was decided six months after the probable cause hearing. The evaluations were

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[1] Unless otherwise specified, all further statutory references are to the Welfare and Institutions Code.

admissible, however, because section 6602, subdivision (a) creates an exception to the hearsay rule for the psychological evaluations prerequisite to the filing of an SVP petition and any hearsay within them. And although Walker was given the opportunity to call and examine the experts and other witnesses, neither the statute nor due process so required. An SVP probable cause hearing provides for judicial review of the petition and statutorily required evaluations. The prospective SVP may introduce admissible documentary evidence and present attorney argument, but has no right to call or confront witnesses. The conclusion to the contrary in *In re Parker* (1998) 60 Cal.App.4th 1453, 1469-1470 is incorrect.

LEGAL BACKGROUND

A. Overview of the SVPA

The SVPA authorizes civil commitment of a select group of criminal offenders upon their release from prison. To meet the definition of an SVP, and thus qualify for commitment, the person must (1) have been convicted of a sexually violent offense against one or more victims (commonly called the "predicate offense"), and (2) suffer from a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent predatory criminal behavior. (§ 6600, subd. (a)(1); *People v. Hurtado* (2002) 28 Cal.4th 1179, 1182.)

The process for determining whether a person meets the requirements for commitment takes place in several stages. Following referral by the Secretary of the Department of

Corrections and Rehabilitation (DCR), the person is screened by the DCR and the Board of Parole Hearings to determine whether the person is likely to be an SVP. (§ 6601, subds. (a), (b).) If so, the person is referred to the State Department of State Hospitals (DSH) for a "full evaluation" by two mental health experts appointed by the Director of the DSH (Director), who evaluate the person in accordance with a standardized assessment protocol to determine whether the person is an SVP as defined in section 6600. (§ 6601, subds. (b)-(d).) The standardized assessment protocol "require[s] assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of re-offense among sex offenders, including criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (§ 6601, subd. (c).)

If both evaluators agree that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director forwards a request that a petition for commitment be filed to the appropriate county's designated counsel (generally, the district attorney). (§ 6601, subds. (d), (i).) If the evaluators disagree, two independent evaluators are appointed. (§ 6601, subd. (e).) A petition for commitment may not be filed unless the initial two evaluators or the two independent evaluators agree that the person meets the commitment criteria. (§ 6601, subds. (d), (f); *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 909-910.)

If, upon receiving a request to file a petition, the district attorney concurs with the Director's recommendation, he or she files a petition for commitment in the superior court, and a new round of proceedings ensues. (§ 6601, subd. (i).)

The person may request that the court conduct a facial review of the petition under section 6601.5. That section provides, "Upon filing the petition and a request for review under this section, a judge of the superior court shall review the petition and determine whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe" the person is an SVP. (§ 6601.5.) "If the judge determines that the petition, on its face, supports a finding of probable cause, the judge shall order that the person be detained in a secure facility" and a section 6602 hearing must be set within 10 days. (§ 6601.5.)[2]

Regardless of whether the court has conducted a facial review of the petition, the court must determine whether there is probable cause: "A judge of the superior court shall review the petition and shall determine whether there is probable cause to believe" the person is an SVP. (§ 6602, subd. (a); *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 247.) "The person named in the petition shall be entitled to assistance of counsel at the probable cause hearing." (§ 6602, subd. (a).) If probable cause is found, the judge orders that the person remain in custody in a

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[2] This procedure is generally used when the person is scheduled to be released from custody before a probable cause determination under section 6602 can be made.

secure facility and the matter is referred for trial, at which a court or unanimous jury must find beyond a reasonable doubt that the person is an SVP in order for the person to be committed. (§§ 6602, subd. (a), 6603, subd. (g), 6604.)

B. *People v. Sanchez*

In *People v. Sanchez*, *supra*, 63 Cal.4th 665, this Court clarified what an expert can and cannot do when relying on hearsay or relating hearsay to the jury. The Court explained, "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686.)

What an expert cannot do is "relate as true case-specific facts asserted in hearsay statements, *unless they are independently proven by competent evidence or are covered by a hearsay exception*." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, italics added.) The Court disapproved its prior opinion in *People v. Gardeley* (1996) 14 Cal.4th 605 "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez*, *supra*, at p. 686, fn. 13.)[3]

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[3] *Sanchez*, a criminal law case, went on to hold that a prosecution expert's recitation of inadmissible case-specific hearsay may violate the confrontation clause, as interpreted by (continued…)

STATEMENT OF THE CASE

In June 2015, the District Attorney of the City and County of San Francisco filed a petition to commit Walker as an SVP. The petition was supported by the evaluations of psychologists Thomas MacSpeiden and Roger Karlsson. (OSC0179-212, OSC0372-402.)[4] In addition to discussing the predicate offense, a 1990 rape against victim Mary, both reports discussed and relied on the alleged facts of two sexual offenses that did not qualify as predicate offenses under the SVPA: a 1989 rape charge against victim Tuesday that was dismissed and a 2005 rape charge against victim Julianna of which Walker was acquitted.[5] (OSC0194-196, OSC0374, OSC0382-383; see § 6600, subd. (b).) The experts were made aware of the alleged conduct in these nonpredicate offenses from a probation report and a police inspector's affidavit in support of an arrest warrant. (OSC0194-195, OSC0374, OSC0382.)

At the probable cause hearing, using the procedure set forth in *In re Parker*, *supra*, 60 Cal.App.4th 1453, 1469-1470, the

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(…continued)
Crawford v. Washington (2004) 541 U.S. 36. (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) This aspect of *Sanchez* does not apply to SVP cases, which are civil proceedings. (*Sanchez*, *supra*, 63 Cal.4th at p. 680, fn. 6; see also *People v. Fulcher* (2006) 136 Cal.App.4th 41, 55; *People v. Angulo* (2005) 129 Cal.App.4th 1349, 1367-1368.)

[4] The record below consists of petitioner's exhibits to his petition for writ of mandate and additional material Bates stamped OSC0001-OSC0592. For simplicity, the prefix and leading zeroes are omitted in the end number of a range.

[5] Walker was convicted of unlawful sexual intercourse with a minor against Tuesday and of pandering Julianna.

prosecutor introduced the experts' reports into evidence. Walker objected that the reports contained hearsay regarding the two nonpredicate offenses. (OSC0025-30, OSC0172-173, OSC0177.) His attorney called and questioned both experts at length about the propriety of basing their opinions in part on dismissed and acquitted charges. Counsel also called (i) Walker, who testified he did not rape Tuesday or Julianna; (ii) victim Julianna's ex-boyfriend, who testified that Julianna told him she had lied about being raped; and (iii) psychologist Bruce Yanofsky, who testified that Walker did not meet the criteria for SVP commitment. (OSC0413-414, OSC0440, OSC0526-527, OSC0531-533.) Counsel also submitted a 1991 public defender investigator's report regarding Tuesday's case. According to counsel, Tuesday told the investigator Walker did not use force or violence against her. (OSC0475, OSC0478-479.)[6] On April 6, 2016, the court issued a written order finding probable cause that Walker was an SVP. (Petn. Exh. A.)

Between September 2016 and January 2020, relying on *People v. Sanchez*, *supra*, 63 Cal.4th 665 and its progeny, Walker made four motions to dismiss the SVP petition or to reconsider the court's refusal to dismiss it. All four motions were denied. Walker challenged the third denial via a petition for writ of mandate, which the Court of Appeal summarily denied. (*Walker v. Superior Court* (Dec. 6, 2019, A158971) [nonpub. order].) A

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[6] The investigative report, identified as Exhibit J in the transcript of the probable cause hearing is not part of the record submitted in support of the writ petition.

similar challenge to the fourth denial resulted in the issuance of an order to show cause.

On June 30, 2020, the First District Court of Appeal, Division Four, filed a published opinion disagreeing with two prior opinions—*Bennett v. Superior Court* (2019) 39 Cal.App.5th 862 and *People v. Superior Court* (*Couthren*) (2019) 41 Cal.App.4th 5th 1001—that concluded in light of *Sanchez* that case-specific facts contained in an expert report are inadmissible at an SVP probable cause hearing unless independently proven or covered by a hearsay exception.[7] The court held that "section 6602(a) creates an exception to the hearsay rule that permits a trial court at an SVP probable cause hearing to accept and consider the statutorily required expert evaluations, including case-specific facts obtained from hearsay sources contained within the evaluations." (Opinion 24.) "Because these evaluations and their contents are 'covered by a hearsay exception' specific to SVP probable cause hearings, they are not subject to exclusion under *Sanchez*." (Opn. 13.)[8]

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[7] *Bennett* rejected the People's argument that formal rules of evidence, including the hearsay rule, do not apply at the probable cause hearing. *Couthren* rejected the People's argument that section 6602 established a multiple-level hearsay exception for expert evaluations at the probable cause hearing.

[8] We are informed by the deputy district attorney assigned to Walker's case that Walker has not requested a stay in the proceedings in superior court. His next court date is on January 21, 2021, to set the matter for trial.

ARGUMENT

This Court has never addressed what procedures apply at an SVP probable cause hearing, except in dicta, and the SVPA provides no specific procedural requirements. In 1998, when the statute was in its infancy, Division One of the Fourth District Court of Appeal set forth its interpretation of section 6602's requirement for a probable cause determination in *In re Parker*, *supra*, 60 Cal.App.4th 1453. It held that the prosecutor could present the hearsay reports of the evaluators, but that the prospective SVP had the right to call the evaluators for cross-examination and to call his or her own witnesses. (*Id.* at pp. 1469-1470.) This Court denied review of the decision, and the *Parker* procedure has been used since.

Parker's analysis, however, is incorrect. A probable cause hearing under section 6602 consists of judicial review of the SVP petition and, by implication, the underlying evaluations. The statute does not authorize, and the state and federal Constitutions do not require, a hearing with oral testimony. At the hearing, the court may consider the evaluations and hearsay within them in determining probable cause because section 6602 contains an implied multiple-level hearsay exception authorizing their admission. The statute's provision of counsel for the prospective SVP at the hearing also suggests the court may entertain argument addressing the existence of probable cause and consider documentary evidence, subject to the rules of evidence.

For these reasons, the Court of Appeal did not err in upholding the superior court's probable cause determination based on the expert evaluations accompanying the petition, including case-specific hearsay within them. Walker, for his part, received more process than he was due when the superior court allowed him to call the evaluators and other witnesses to testify at the probable cause hearing.

I. NEITHER THE STATE OR FEDERAL CONSTITUTIONS NOR SECTION 6602 PROVIDES A RIGHT TO CALL OR CONFRONT WITNESSES

Parker concluded, and Walker appears to agree, that a prospective SVP has a right under the due process clause and section 6602 to call witnesses and confront the evaluators. That is incorrect. Section 6602 does not contemplate a hearing with oral testimony, and due process does not compel such a hearing.

A. Section 6602 Does Not Provide for a Hearing With Oral Testimony

A court conducting a section 6602 probable cause hearing may consider the SVP petition, the statutorily required expert evaluations upon which the petition is based, any admissible documentary evidence, and argument by the parties. The statute does not provide for a hearing with oral testimony.

"It is well settled that the proper goal of statutory construction 'is to ascertain and effectuate legislative intent, giving the words of the statute their usual and ordinary meaning. When the statutory language is clear, [the court] need go no further. If, however, the language supports more than one reasonable interpretation, we look to a variety of extrinsic aids,

including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy. [Citations.]" (*In re Lucas* (2012) 53 Cal.4th 839, 849, internal quotation marks omitted.)

The statutory language in this case instructs the court to "review the petition" and "determine whether there is probable cause." (§ 6602, subd. (a).) A threshold issue is what constitutes the petition. Specifically, does the petition include the evaluations prerequisite to the filing of the petition? The statute does not expressly require the evaluations to be attached to the petition. However, this Court held in *People v. Superior Court* (*Ghilotti*), *supra*, 27 Cal.4th 888, 913, that the evaluators' reports should be attached to the petition so that the prospective SVP can, if appropriate, challenge the petition on the ground that the supporting evaluations are "infected by legal error." (See also *Cooley v. Superior Court*, *supra*, 29 Cal.4th at p. 255 [determination at probable cause hearing is based on the petition "which is, in turn, necessarily based on the two concurring psychological evaluations required by section 6601"]; *In re Parker*, *supra*, 60 Cal.App.4th at p. 1469, fn. 15 [Legislature impliedly intended evaluations to be attached to the petition or incorporated by reference]; Cal. Code Regs., tit. 15, § 4014.1, subd. (b) [suggesting DSH may provide evaluations directly to the court].) Attaching the evaluations to the petition (or submitting them in conjunction) also makes sense. The Legislature plainly did not intend the court to find probable cause based solely on

allegations made by the district attorney without examination of the evaluations that are necessarily the sole source of some of the allegations. The Legislature provided detailed directions on the process of evaluation, knowing that the evaluations would be the basis for many of the allegations. And the Legislature knew how to provide for a facial review without determining the truth of the allegations, as it did in section 6601.5. It went beyond such facial review in section 6602, providing the court "shall review the petition *and* shall determine probable cause." (Italics added.) Section 6602's reference to the "petition," therefore, implicitly includes the evaluations.[9]

The matter does not end there, however. As the *Parker* court observed, section 6602 not only requires review of the petition, but also grants the prospective SVP the right to "assistance of counsel at the probable cause hearing." (*Parker*, *supra*, 60 Cal.App.4th at p. 1464.) As introduced, both legislative versions of section 6602 provided only for review of the petition. (Assem. Bill No. 888 (1995-1996 Reg. Sess.) § 3 as introduced Feb. 22, 1995; Sen. Bill No. 1143 (1995-1996 Reg. Sess.) § 3 as

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[9] Though amicus asserts otherwise, there is nothing inconsistent about construing "petition" in section 6602 to include the prerequisite evaluations but not other documents that could be attached to the petition. (ACB 16.) The SVPA requires evaluations to be prepared pursuant to a standardized assessment protocol and forbids an SVP petition from being filed without the agreement of the initial two evaluators or the two independent evaluators. (§ 6601, subds. (d), (f).) No other documents the district attorney might choose to attach to the SVP petition hold this unique status.

introduced Feb. 24, 1995.) The provision for assistance of counsel was added later to both bills with no explanation. (Assem. Amend. to Assem. Bill No. 888 (1995-1996 Reg. Sess.) § 3, April 25, 1995; Assem. Amend. to Sen. Bill No. 1143 (1995-1996 Reg. Sess.) § 3, July 13, 1995.)[10] Its inclusion shows that the Legislature intended more than an ex parte judicial review of the petition and evaluations. But neither the language of section 6602 nor its legislative history indicates the Legislature intended a hearing with witnesses appearing in person. The word "hearing" does not, by its own force, require oral testimony. (See, e.g., Cal. Rules of Court, rule 3.1306(a) ["evidence received at a law and motion hearing must be by declaration of request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown]; *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 201 [court does not necessarily abuse its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony].) Moreover, requiring a hearing with witnesses appearing in person would render the need to "review the petition" superfluous as the court would be receiving the same information through the evaluators' testimony. (*In re C.H.* (2011) 53 Cal.4th 94, 103 ["It is a settled principle of statutory construction, that courts should 'strive to give meaning to every word in a statute to avoid

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[10] The Legislature amended the bills to provide counsel for a committed SVP petitioning for conditional release or unconditional discharge at the same time it provided counsel for the probable cause hearing, again with no explanation.

constructions that render words, phrases, or clauses superfluous'"].)

The *Parker* court concluded the Legislature intended a potential SVP to be able to challenge the basis of the SVP petition in a manner similar to a criminal preliminary hearing. (*Parker*, *supra*, 60 Cal.App.4th at p. 1469.) The Penal Code, however, expressly provides for live testimony by witnesses at preliminary hearings and lays out a rich statutory framework regulating the details of witness testimony at such hearings. (Pen. Code, §§ 859b, 861.5, 865-870; cf. *People v. Johnson* (2006) 38 Cal.4th 717 [prosecution may not present its case at a suppression hearing by affidavit because language of Penal Code sections 1538.5 and 1539 clearly contemplates hearing with oral testimony].) Had the Legislature intended the same for an SVP probable cause determination it would have said so. (Cf. *Hurtado v. California* (1884) 110 U.S. 516, 535 [if purpose of Fourteenth Amendment was for grand jury procedure to be used in all states, it would contain express declaration like Fifth Amendment].)[11] By comparison, the Legislature did expressly grant potential SVP's the right to a unanimous jury trial with the burden on the prosecution to prove beyond a reasonable doubt that the person qualifies for commitment, demonstrating that it knows how to incorporate criminal-like procedures when that is what it intends.

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[11] *Parker* also analogized section 6602 to pretrial administrative proceedings under the Lanterman-Petris-Short Act (§ 5000 et seq.). (*Parker*, *supra*, 60 Cal.App.4th at p. 1468.) There, too, however, the Legislature expressly provided for a hearing with oral testimony. (§ 5256.4, subd. (a).)

(§§ 6603, subd. (g), 6604.) And it demonstrated that it knows how to incorporate a broad right to present evidence. (§ 6603, subd. (e) ["This section does not prevent the defense from presenting otherwise relevant and admissible evidence"].)

Parker also concluded a probable cause hearing with oral testimony was intended based on a comparison with section 6601.5. Under that section, if requested, the superior court determines whether the "petition, on its face, supports a finding of probable cause," in which case the judge orders the person detained and sets a probable cause hearing under section 6602 within 10 days. *Parker* concluded that limiting the proceeding under section 6601.5 to a review of the petition "on its face," that is to say, a "paper review," demonstrated the Legislature did not intend the probable cause hearing under section 6602 to be a "paper review" as such a limitation would render the hearing under section 6602 superfluous. (*Parker*, *supra*, 60 Cal.App.4th at p. 1466.)

A section 6601.5 determination, however, is made in an ex parte proceeding. The prospective SVP has no right to an attorney, no right to present evidence of any kind, and no right to be present when the court makes its determination. The scope of the court's review, moreover, is limited to determining whether the petition establishes probable cause "on its face"—that is, without any examination of the quality or credibility of the evaluations. The prosecution's burden at this stage is a pleading burden, much like the initial burden of a petitioner seeking habeas corpus relief. (See *People v. Duvall* (1995) 9 Cal.4th 464,

474 [to satisfy initial burden of pleading adequate grounds for relief, petitioner must state fully and with particularly the facts on which relief is sought and include copies of reasonably available documentary evidence].) In an SVP case, the burden is met by submitting the petition and evaluations to the court. The court's duty, concomitantly, is, upon request, to ask "whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe" the person is an SVP. (§ 6601.5; cf. *Duvall*, *supra*, at pp. 474-475 [whether the allegations, if true, would entitle the person to relief].) This means checking to ensure the petition is supported by the necessary evaluations and that the evaluations conclude the person meets the criteria for SVP commitment.

At the probable cause hearing under section 6602, by contrast, the court goes beyond a facial review on the assumption that the facts asserted are true. It considers the merits of the evaluations and assesses the truth of their conclusions. The person has the right to counsel, who may argue probable cause is lacking because the evaluations are infected with legal error (*Ghilotti*, *supra*, 27 Cal.4th at p. 913) or with factual error. With regard to the latter, the attorney may present documentary evidence, subject to the rules of evidence, to show the evaluators' conclusions were erroneous. In this case, for example, counsel would have been permitted to introduce court records showing Walker's cases against victims Tuesday and Julianna resulted in dismissal and acquittal. And counsel would have been able to argue that because of those dispositions, the cases should not

have been considered by the evaluators (cf. *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771), that the evaluators' opinions lacked sufficient basis, and, therefore, that there was not probable cause to believe Walker qualified for SVP commitment.

In short, *Parker* was correct that the procedures for section 6601.5 and section 6602 are different. The difference is not that the former is a paper hearing and the latter a hearing with oral testimony, however. It is that the former is ex parte, permits consideration of no evidence beyond the petition (including the evaluations), and assumes the truth of the petition (including the evaluations), whereas the latter is adversarial, tests the truth of the petition (including the evaluations) for probable cause, and permits the prospective SVP to introduce proper documentary evidence.[12]

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[12] The Legislature has, in other schemes, provided for judicial or administrative review of a petition or application to determine whether additional proceedings should be held. (E.g., Bus. & Prof. Code, § 3756, subds. (a)-(c) [after filing of "petition detailing the reasonable cause" to believe respiratory therapist unable to practice and filing of opposition, "the board shall review the petition and any written opposition . . . , or the board may hold a hearing . . . to determine if reasonable cause exists]; *id*., § 2292 [similar for podiatrist]; Gov. Code, § 54960, subd. (c)(3) ["If the court, following a review of the motion" seeking disclosure of a recording of a closed session "finds that there is good cause to believe that a violation has occurred, the court may review, in camera, the recording of that portion of the closed session alleged to have violated the act"]; Welf. & Inst. Code, § 601.5 [if probation department files petition under § 601, subd. (a), as to minor who fails to comply with service plan, "the court shall review the

(continued…)

This Court has cited *Parker* with approval on four occasions. None of those cases required the Court to consider the correctness of *Parker*'s holding and, therefore, none is controlling. (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10 ["It is axiomatic that cases are not authority for propositions not considered"]; see also *People v. Lasko* (2000) 23 Cal.4th 101, 110 [rejecting statements in decisions reaching back to 1917 as dicta].)

This Court first considered the substantive requirements for a probable cause determination in *Cooley v. Superior Court*, *supra*, 29 Cal.4th 228. The parties in that case did not dispute *Parker*'s decision regarding the procedural requirements. (*Id*. at p. 245, fn. 8; see also OBM 13 [acknowledging *Cooley*'s mention of *Parker* was dictum.) *People v. Torres* (2001) 25 Cal.4th 680, 683 cited *Parker* for the principle that a prospective SVP has a right to confront and call witnesses at the probable cause hearing, but the issue *Torres* considered—whether at trial the trier of fact must find the person's predicate offenses were predatory in nature—had nothing to do with *Parker*. Similarly, *People v. Hurtado*, *supra*, 28 Cal.4th 1179, 1186, noted that *Parker* analogized an SVP probable cause hearing to a criminal preliminary hearing, but considered an issue unrelated to section 6602 procedure—whether the trier of fact must find the

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(…continued)
petition and any other facts which the court deems appropriate in relation to" failure and may defer hearing on petition for renewed compliance efforts].)

prospective SVP is likely to commit sexually violent criminal acts that are predatory in nature.

Finally, in *People v. Cheek* (2001) 25 Cal.4th 894, this Court held that a committed SVP seeking release is entitled to confront and call witnesses at the show cause hearing under section 6605. The Court rested its reasoning in part on parallels between section 6605 and section 6602, which *Parker* construed as granting those rights. The Attorney General in *Cheek* sought to distinguish the language of section 6602 from that in section 6605. (*Id*. at p. 900.) This Court thus had no occasion to consider whether *Parker* was correct in the first place.[13]

For all of these reasons, *Parker*'s interpretation of section 6602 was incorrect. The statute does not provide for a hearing with oral testimony, but simply for judicial review of the petition and evaluations, along with consideration of any admissible documentary evidence and argument.

B. A Prospective SVP Has No Due Process Right To Confront and Call Witnesses at the Probable Cause Hearing

A prospective SVP also has no due process right to confront and call witnesses at a section 6602 probable cause hearing.

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[13] Disapproval of *Parker* would not necessarily affect the holding in *Cheek* because the two procedures arise in substantially different contexts and the SVPA has itself changed substantially since *Cheek* was decided. Then, SVP commitments were for two years and show cause hearings under section 6605 were set annually as a matter of right unless waived by the SVP. Now commitments are indeterminate and a committed SVP must obtain authorization to petition under section 6605.

Although, as discussed above, the statutory procedure set forth for an SVP probable cause hearing differs from that for a criminal preliminary hearing, their purpose is similar: "[T]o weed out groundless or unsupported charges . . . and to relieve the accused of the degradation and expense of a . . . trial." (*Cooley*, *supra*, 29 Cal.4th at p. 247, internal quotation marks omitted.) That screening function can be accomplished readily without oral testimony. (See *Gerstein v. Pugh* (1975) 420 U.S. 103, 121 [nature of a probable cause determination, where "credibility determinations are seldom crucial" and "the fine resolution of conflicting evidence" is not required, justifies use of an informal procedure].) The forum for measuring the strength of the evidence that a person qualifies for SVP commitment is the trial. What the United States Supreme Court has said about a criminal trial is equally true for an SVP trial:

> The guilt or innocence determination in state criminal trials is "a decisive and portentous event." [Citation.] "Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." [Citations.]

(*Herrera v. Collins* (1993) 506 U.S. 390, 491.)

Indeed, even a criminal defendant has no constitutional right to call or confront witnesses at a pretrial screening proceeding. Thus, the United States and California Constitutions both expressly authorize the prosecution of serious crimes by grand jury indictment–a proceeding that does not permit the accused to appear personally or by counsel, to call or confront witnesses, or to present exculpatory evidence. (U.S. Const., 5th

Amend.; Cal. Const., art I, § 14.)[14] Furthermore, "it is well established that hearsay is admissible in indictment proceedings before federal grand juries." (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1079, citing *Costello v. United States* (1956) 350 U.S. 359, 363-364.) And even where prosecution is commenced by information, the due process clause of the Fourteenth Amendment does not require a state to afford the accused a preliminary hearing. (*Lem Woon v. Oregon* (1913) 229 U.S. 586, 590; see also *Gerstein v. Pugh*, *supra*, 420 U.S. at p. 119; *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 41; *Bowens*, *supra*, at p. 39 [electorate abrogated the holding in *Hawkins v. Superior Court* (1978) 22 Cal.3d 584 that an indicted defendant had a right to a postindictment preliminary hearing].) A fortiori, when state procedure nevertheless provides for a judicial probable cause hearing, there is no constitutional bar to determining probable cause based on hearsay evidence. (*Whitman*, *supra*, at p. 1081.)

The constitutional standards for civil commitment proceedings are less stringent than those for criminal proceedings. States may choose, as California has, to adopt the criminal law standard of "beyond a reasonable doubt," but commitment based on "clear and convincing evidence" will satisfy due process under the federal Constitution. (*Addington v. Texas* (1979) 441 U.S. 418, 433.) The Fifth Amendment's privilege against self-incrimination does not apply in SVP cases. (*People v. Leonard*

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[14] In California, prosecutors are required by statute to inform grand juries of known exculpatory evidence. (Pen. Code, § 939.71, subd. (a).)

(2000) 78 Cal.App.4th 776, 789-790, 792; see also *Allen v. Illinois* (1986) 478 U.S. 364, 375.) Nor does a prospective SVP have a due process right to be tried while mentally competent as does a criminal defendant. (*Moore v. Superior Court* (2010) 50 Cal.4th 802, 807, 819-820.)

Finally, whatever the theoretical value in a criminal case of using a preliminary hearing for discovery or preservation of evidence (e.g., 4 Lafave et al., Criminal Procedure (4th ed.) The Preliminary Hearing, §§ 14.1(b) & 14.1(d); but compare *Hawkins*, *supra*, 22 Cal.3d at p. 588 [taking expansive view of the purpose of preliminary hearings] with Pen. Code, § 866, subd. (b), as amended by Proposition 115, as approved by voters, Primary Elec. (June 6, 1990) [preliminary hearing "shall not be used for purposes of discovery"]), precluding a prospective SVP from calling and cross-examining witnesses at the probable cause hearing does not impede his ability to obtain discovery or preserve evidence for later use at trial. The person can obtain information about his case through the tools provided by the civil discovery rules. (*People v. Superior Court* (*Cheek*) (2001) 94 Cal.App.4th 980 [Civil Discovery Act applies in SVPA proceedings]; *Leake v. Superior Court* (2001) 87 Cal.App.4th 675 [same].) Evidence preservation is significantly less important than in a criminal case because unlike a criminal trial, which requires fact finding regarding a historical event, the issue in an SVP trial is whether the person meets commitment criteria at the time the verdict is rendered. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1162; *Litmon v. Superior Court* (2004) 123

Cal.App.4th 1156, 1170; see also § 6603, subd. (d) [updating or replacing evaluations].) Nor is there a pressing need to preserve victim testimony as there is in a criminal trial, because an "SVP proceeding occurs at the end of a defendant's sentence, which may be years after the events in question." (*People v. Otto* (2001) 26 Cal.4th 200, 214.)

For all of these reasons, a prospective SVP has no due process right under the state and federal Constitutions to call or confront witnesses at a section 6602 probable cause hearing.

II. SECTION 6602 CREATES A HEARSAY EXCEPTION FOR STATUTORILY REQUIRED EVALUATIONS AND THE HEARSAY WITHIN THEM

The Court of Appeal correctly concluded that section 6602 impliedly contains a hearsay exception for the statutorily required evaluations and their contents. Walker disagrees, primarily relying on authority the Court of Appeal rightly disagreed with and on due process, which does not, as Walker would have it, bar hearsay in a probable cause proceeding.

A. Section 6602 Creates a Multiple Hearsay Exception for Expert Evaluations

As argued above, the court's function at a section 6602 hearing is to examine the petition and evaluations. The next question is whether the court is prohibited from reviewing those same evaluations because they are hearsay. To ask the question is to answer it.

It is well settled that "exceptions to the hearsay rule are not limited to those enumerated in the Evidence Code; they may also be found in other codes and decisional law." (*In re Malinda S.*

(1990) 51 Cal.3d 368, 376; accord, *Otto*, *supra*, 26 Cal.4th at p. 207.) Section 6602 requires the court to review the petition, which, as explained above, includes the underlying evaluations. The Legislature was well aware that evaluations are themselves hearsay. It also specifically contemplated that they would contain hearsay as it prescribed they were to be prepared in accordance with a "standardized assessment protocol," which "shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of re-offense among sex offenders, including criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (§ 6601, subd. (c).) As the court below recognized, "[m]uch of this broad array of historical information will be found in hearsay reports." (Opn. 16.) In this case, the evaluators relied on, inter alia, probation reports, court records, prison records, and records of Walker's arrests and prosecutions. (OSC0180, OSC0373.) The Legislature must have intended for evaluators to rely on hearsay sources such as these "as the alternative would be to require that evaluators reinvestigate a lifetime worth of historical information comprising the person's 'criminal and psychosexual history,' a near-impossible task for which a psychologist is ill-suited." (Opn. 16.) In directing the court to "review" the petition, then, the Legislature must have intended the trial court to review the hearsay within the petition. For this reason, *Sanchez*'s prohibition on experts relating case-specific hearsay does not

apply because the hearsay at issue here is "covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.)

Resorting to dictionary definitions, amicus argues that "review" does not mean "receive" or "admit." (ACB 8-11.) But statutes are construed to effectuate legislative intent, not to satisfy a party's conception of linguistic exactitude. And even amicus concedes "review" can mean "consider." (ACB 8-9.) "Most common English words have a number of dictionary definitions . . . . One should assume the contextually appropriate meaning unless there is reason to think otherwise." (Scalia & Garner, Reading Law (2012) p. 70.) In the context of a nonfacial review of the petition for probable cause under section 6602, the superior court could hardly "review the petition" (§ 6602, subd. (a)) if it did not consider the petition and evaluations, which it could not do if the evaluations were excluded as hearsay. Moreover, the statute directs that the court "shall review the petition *and shall determine* whether there is probable cause to believe" the person is an SVP. (§ 6602, subd. (a), italics added.) In *In re Malinda S.*, *supra*, 51 Cal.3d 368, 377-378, this Court found similar language conveyed an intent for the material to be used substantively, not merely as background consideration, or as amicus suggests, simply to "know *what* the prosecution is seeking to prove" before examining evidence to determine whether there is probable cause. (ACB 16, original italics.)

The inference that the Legislature intended to create a hearsay exception in section 6602 is further bolstered by the fact that SVP evaluations are "prepared by neutral evaluators

applying a standardized assessment protocol." (Opn. 17.) *In re Malinda S.*, *supra*, 51 Cal.3d 368 is again instructive. There, this Court held that a statute directing juvenile courts to receive and consider social studies prepared by probation officers or social workers created a hearsay exception for the reports and hearsay within them. (*Id.* at pp. 375-376, 385.) The Court relied in part on the fact that the social studies are prepared by "disinterested parties in the regular course of their professional duties." (*Id.* at p. 377.) It concluded that "[t]hese elements of objectivity and expertise lend them a degree of reliability and trustworthiness." (*Ibid.*)

By contrast, in *Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 538, this Court held that a Vehicle Code section permitting the Department of Motor Vehicles to consider "its official records" at a hearing to suspend a person's driver's license did not create a hearsay exception so as to authorize a suspension based solely on an accident report by a private person.[15] The Court observed that such a report, even if made an "official record" of the DMV, "does not suffice to create a greater degree of competency, reliability or trustworthiness in the *preparation* of the report." (*Id.* at p. 539.) That lack of inherent reliability made statements in the reports by private persons

[15] Government Code section 11513, subdivision (d) permits an agency to consider hearsay evidence to supplement or explain other evidence in an adjudicative proceeding, but prohibits sole reliance on hearsay evidence to support a finding.

distinguishable from statements covered by traditionally recognized hearsay exceptions. (*Ibid.*)

Walker and amicus argue that the evaluators in an SVP case are not neutral because by the time of the probable cause hearing, they have formed the opinion that the person named in the petition is an SVP. (OBM 18; ACB 18.) However, an expert does not lose impartiality by forming an opinion based on relevant information. If that were the case, no expert would ever be neutral. The expert's function is to render an opinion based on matter of a type that reasonably may be relied upon by an expert forming an opinion on that subject. (Evid. Code, § 801.)

SVP experts are neutral because they are free to form their own conclusions; they do not work for the district attorney's office; they are paid the same whether or not they conclude the person qualifies for commitment; and they have no reason to harbor a personal bias against the prospective SVP. That these experts may later testify in a manner consistent with what they wrote in their opinions does not render them advocates any more than a random percipient witness to a crime who testifies at trial consistent with his on-the-scene statement. Nor is it true, as Walker suggests, that evaluators' conclusions, once made, are fixed. Because a person's mental disorder and dangerousness are dynamic factors, one would expect evaluators sometimes to change their minds, and experience demonstrates that they do. (See, e.g., *Reilly v. Superior Court* (2013) 57 Cal.4th 641, 650-651; *Davenport v. Superior Court* (2012) 202 Cal.App.4th 665, 668.)

This Court's reasoning in *Conservatorship of Manton* (1985) 39 Cal.3d 645 also supports the view that the Legislature intended statutorily required evaluations to be admissible at a section 6602 probable cause hearing. Manton was referred for conservatorship under the Lanterman-Petris-Short Act, which triggered the preparation of a conservatorship investigation report. (§§ 5352, 5354.) The statutory scheme for conservatorship provides for a hearing within 30 days of the filing of the petition. (§ 5365.) Under section 5354, the investigating officer must submit the investigation report to the court "prior to the hearing," and the court "may receive the report in evidence and may read and consider the contents thereof in rendering its judgment." (§ 5354, subd. (a).) The hearing may be waived if the proposed conservatee demands a trial before the hearing date. (§ 5350, subd. (d)(1).) A trial demand may also be made within five days following the hearing. (*Ibid.*) The statute is silent regarding the use of the report at trial. This Court concluded that the report was admissible only at the hearing because the scheme's provision of a trial in lieu of or after a hearing indicated the Legislature did not intend the two proceedings to be duplicative:

> If the report were admissible at both the initial hearing and a subsequent court trial, the two proceedings would be essentially identical in terms of the acceptable range of evidence to be considered. We believe that the better interpretation is one avoiding such redundancy in the absence of clear legislative intent to the contrary.

(*Manton*, *supra*, at p. 651; cf. *Costello*, *supra*, 350 U.S. at p. 363 [hearsay permitted in grand jury proceedings; defendant not

entitled to "a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury" prior to the trial on the merits].)

Likewise here, section 6602 directs the court to review the petition and determine probable cause, but section 6604, governing trials, makes no reference to the petition and provides that the court or jury "shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." As in *Manton*, it is logical to assume from this statutory structure and language that the Legislature did not intend the permissible evidence at the two proceedings to be the same. The Legislature thus made evaluations and their hearsay contents admissible at the probable cause hearing, but not at trial. (*People v. Yates* (2018) 25 Cal.App.5th 474, 476 [experts may not relate case-specific facts contained in hearsay statements at SVP trial without hearsay exception or independent proof]; *People v. Roa* (2017) 11 Cal.App.5th 428, 452-453 [same]; see also *People v. Burroughs* (2016) 6 Cal.App.5th 378, 407 [same].) Moreover, from a practical point of view, it is "highly unlikely the Legislature intended for a prosecutor to procure independent evidence for the vast amount of case-specific hearsay information contained in a psychological evaluation—including criminal history, familial and relationship history, medical information, and a defendant's prison disciplinary record—at a probable cause hearing, and then again at a subsequent trial." (Opn. 19.)

Walker notes that there is a bill pending in the Legislature that would amend section 6602 to expressly authorize the use of

multiple-level hearsay statements in SVP probable cause hearings to show the details of nonpredicate sexual offenses. (Assem. Bill No. 1983 (2019-2020 Reg. Sess.); OBM 16.) He argues there would be no need for this bill if section 6602 already provided such an exception. Assembly Bill No. 1983 is no longer under consideration. The Committee on Public Safety returned it without further action, and the bill has died. (http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB1983.) In any event, a 2020 bill is a poor barometer of the Legislature's intent 25 years ago when it enacted section 6602. As this Court has observed, "very limited guidance" can be drawn from proposed but unenacted legislation. (*Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 922.) "The light shed by such unadopted proposals is too dim to pierce statutory obscurities. As evidences of legislative intent they have little value." (*Id.* at p. 923, internal quotation marks omitted.)

In *People v. Superior Court* (*Couthren*), *supra*, 41 Cal.App.5th 1001, a sister division of the court below rejected the notion that section 6602 creates a hearsay exception for evaluations and the hearsay within them.[16] *Couthren* believed

[16] Because this case was before a different division of the same appellate district that decided *Couthren*, real party in interest opted to present a different argument below as to why respondent court did not err in finding probable cause based on the evaluations. As in *Bennett*, *supra*, 39 Cal.App.5th 862, 882, real party argued that the formal rules of evidence do not apply in section 6602 probable cause hearings. Real party has since (continued…)

such an interpretation was "difficult to square with the hearsay exception the Legislature unambiguously enacted" in section 6600, subdivision (a)(3). (*Couthren*, *supra*, at p. 1014.) That section provides, in relevant part, "The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by [DSH]." (*Ibid.*)

As this Court explained in *People v. Otto*, *supra*, 26 Cal.4th 200, section 6600, subdivision (a)(3) allows the use of multiple-level hearsay to prove the details of the prospective SVP's predicate offenses. (*Id.* at p. 208.) Section 6600, subdivision (a)(3) was added as an amendment to the originally enacted SVPA after prosecutors complained that "'they must bring victims back to court to re-litigate proof of prior convictions.'" (*Ibid.*, quoting Sen. Com. on Crim. Proc., analysis of Assem. Bill. No. 3130 (1995-1996 Reg. Sess.) as amended May 24, 1996, p. 7.) According to *Couthren*, there would be no need to enact such a limited hearsay exception if section 6602 already contained a broader exception "allow[ing] the use of multiple-level hearsay in an expert

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(…continued)
abandoned that position in light of the issues presented before this Court and the opportunity to correctly and definitively resolve the conflict in the decisions of the Courts of Appeal.

evaluation for *any* purpose." (*Couthren*, *supra*, 41 Cal.App.5th at p. 1015.) *Couthren*'s premise is flawed. Section 6602 creates a specific hearsay exception for expert SVP evaluations *at the probable cause hearing*, not "for any purpose." The expert evaluations remain inadmissible *at trial* unless other exceptions apply. By adding section 6600, subdivision (a)(3), the Legislature solved a *trial* problem, which could not be solved by a hearsay exception that applies only to probable cause hearings.

That section 6602 applies only to probable cause hearings is evident from its content. The section's three subdivisions address solely the conduct of a probable cause hearing (§ 6602, subd. (a)), the continuance of a probable cause hearing (§ 6602, subd. (b)), and the notification to DSH of the outcome of a probable cause hearing (§ 6602, subd. (c)). Accordingly, the hearsay exception contained in section 6602 applies only to probable cause hearings.

Similarly, when the hearsay exception in section 6600, subdivision (a)(3) is read in context, it is clear that it applies only to trials:

> Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support *a court or jury determination that a person is a sexually violent predator*, but shall not be the sole basis for the determination. The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals. *Jurors shall be admonished that they may not find a person a sexually violent predator* based

on prior offenses absence relevant evidence of a currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

(§ 6600, subd. (a)(3), italics added.)[17]

Even if section 6602 and section 6600, subdivision (a)(3) partially overlap, however, the latter does not displace the former. As the court below noted, the two hearsay exceptions are "different in both function and purpose." (Opn. 24.) The exception in section 6602 streamlines the People's ability to make an initial showing, at the probable cause hearing only, that the person is an SVP by permitting admission of expert evaluations. At trial, the exception in section 6600, subdivision (a)(3) "relieve[s] victims of the burden and trauma of testifying about the details" of the predicate offenses, and relieves prosecutors from having to call victims who may no longer be available. (*People v. Otto*, *supra*, 26 Cal.4th at p. 208.) To prove the details of nonpredicate offenses or alleged offenses that did not result in conviction, however, the prosecution at an SVP trial must call witnesses in person or establish the facts on which the evaluators rely through other admissible evidence.

Couthren also suggested that section 6602 does not contain a hearsay exception because this Court stated in *Otto* that "[a]s originally enacted, the SVPA did not permit the use of

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[17] The court below incorrectly asserted that the hearsay exception in section 6600, subdivision (a)(3) applies both at SVP trials and SVP probable cause hearings. (Opn. 23.)

documentary evidence." (*Couthren*, *supra*, 41 Cal.App.5th at p. 1015, citing *Otto*, *supra*, 26 Cal.4th at p. 208.) *Couthren* read too much into this statement. The issue in *Otto* was whether the trial court erred in permitting the prosecution to prove the defendant's predicate offenses *at trial* with documentary evidence. (*Otto*, *supra*, 26 Cal.4th at p. 203.) Notwithstanding the Court's broad language, the statement cannot be understood as a pronouncement regarding the use of documentary evidence at probable cause hearings, a situation the Court was not addressing. Cases are not authority for propositions not considered. (*People v. Casper* (2004) 33 Cal.4th 38, 43.)

Couthren further noted that section 6605, which this Court likened to section 6602 in *People v. Cheek*, *supra*, 25 Cal.4th 894, was eventually amended to provide an explicit hearsay exception, whereas "[n]o similar amendment was made to section 6602." (*Couthren*, *supra*, 41 Cal.App.5th at p. 1016, fn. 6.) As of 2014, when a committed SVP files a petition for unconditional discharge, the court at the show cause hearing "can consider the petition and any accompanying documentation provided by the medical director, the prosecuting attorney, or the committed person." (§ 6605, subd. (a)(1), as amended by Stats. 2013, ch. 182, § 2; see also § 6604.9, subd. (f).) Legislative history shows this change, along with others, was made to address asymmetry in the procedures for conditional release and unconditional discharge following the electorate's enactment of Proposition 83. (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 295 (2013-2014 Reg. Sess.) as amended June 20, 2013, pp. C, G; see

People v. Smith (2013) 212 Cal.App.4th 1394, 1402-1404 [discussing inconsistency created by Prop. 83].)[18] Because no similar clean-up legislation was necessary for section 6602, no significance can be drawn from the absence of an express hearsay exception as in section 6605.[19]

B. Section 6602's Hearsay Exception Does Not Violate Due Process

Admitting multiple-level hearsay for the limited purpose of finding probable cause that a person is an SVP prior to trial does not violate due process. As discussed in Argument I, *ante*, the accused in a criminal case may be subject to a probable cause proceeding in which hearsay is admissible (*Costello*, *supra*, 350 U.S. at pp. 363-364; *Whitman*, *supra*, 54 Cal.3d at p. 1079) and the opportunity to call and confront witnesses denied (U.S. Const., 5th Amend.; Cal. Const., art. I, § 14). A prospective civil committee stands on *lower* constitutional ground. (See *Addington*, *supra*, 441 U.S. at p. 433; *Allen*, *supra*, 478 U.S. at p. 375; *Moore*, *supra*, 50 Cal.4th at pp. 807, 819-820.)

Furthermore, in *People v. Otto*, *supra*, 26 Cal.4th 200, this Court sanctioned the use of multiple-level hearsay at an SVP

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[18] *Couthren* erroneously asserted the change to section 6605 was made by the electorate as part of Proposition 83, when it was actually made by the Legislature as a response thereto. (*Couthren*, *supra*, 41 Cal.App.5th at p. 1016, fn. 6.)

[19] *Bennett*, *supra*, 39 Cal.App.5th 862, like *Couthren*, held the prosecution may not introduce case-specific hearsay through expert evaluations at an SVP probable cause hearing. Its reasoning is not relevant here, however, because the People in that case did not argue that section 6602 contains a hearsay exception for expert evaluations.

trial, a proceeding that affords the person greater rights than the probable cause hearing. *Otto* held that section 6600, subdivision (a)(3)'s multiple hearsay exception allowing the admission of documentary evidence at trial to prove the details underlying the commission of a person's predicate offenses complied with due process. (*Id.* at pp. 209-215.) The Court analyzed the issue by balancing four relevant factors: "(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; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." (*Id.* at p. 210.)

The effect of relying on evaluator reports to find probable cause here are similar to, but lesser than, those discussed in *Otto*. There, the Court concluded that the private interests that would be affected by reliance on the victims' hearsay statements were the significant limitations on Otto's liberty, the stigma of being classified as an SVP, and subjection to unwanted treatment. (*Otto*, *supra,* 26 Cal.4th at p. 210.) A finding of probable cause also results in the person remaining in a secure facility, but only until trial, whereas an SVP commitment is for an indeterminate term. Moreover, the person would have been in custody for part

of that time to finish out his or her prison term even without a probable cause finding.. (See § 6601, subd. (a)(1) [referral process for SVP commitment begins six months prior to prison release date].) Because the person remains in precommitment status after a finding of probable cause, the person does not bear the stigma of being classified as an SVP, but the lesser stigma of awaiting trial as someone who the state claims, but has not proven, is an SVP. Finally, as an unadjudicated SVP, the person would not ordinarily be subject to unwanted treatment, though the court has discretion to order placement or treatment at the state hospital pending trial. (§ 6602.5; *People v. Cianco* (2003) 109 Cal.App.4th 175, 196.)

The risk of an erroneous deprivation of the person's private interest through the admission of hearsay is low. The expert evaluations are conducted by neutral evaluators in accordance with a standardized assessment protocol based on matter of a type that reasonably may be relied upon by experts forming an opinion on that subject. (§ 6601, subd. (c); Evid. Code, § 801.) Here, that material included a probation report and a police investigator's affidavit in support of an arrest warrant. As this Court pointed out, "courts routinely rely upon hearsay statements contained in probation reports to make factual findings concerning the details of the crime. These findings, in turn, guide the court's sentencing decision—a decision which has a great impact on the defendant's liberty interest." (*People v. Otto*, *supra*, 26 Cal.4th at pp. 212-213.) Statements in an arrest warrant affidavit are literally used as the basis for taking away

the defendant's liberty. Although the reliability of victim hearsay statements in such documents is lessened where, as here, the defendant has not been convicted of the crimes to which the statements relate (see *id.* at p. 211), such offenses, for the same reason, can at most play a supporting role in the evaluator's opinion that the person is an SVP. The SVPA thus requires the person be convicted of one or more predicate offenses in order to qualify for commitment. (§ 6600, subd. (a)(1).)

The probable value of requiring the victims of nonpredicate offenses to testify at SVP probable cause hearings instead of admitting their hearsay statements is low as well. To the extent their testimony differed from the prior statements they made closer to the time of the crimes, they would be impeached. (Evid. Code, § 1235.) Given the low burden at a probable cause hearing and the limited role of nonpredicate offenses, such testimony would be unlikely to alter the outcome.

Third, the court considers the government's interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Otto* concluded this factor weighed in favor of finding the hearsay exception in section 6600, subdivision (a)(3) complied with due process. The Court explained, "The express purpose of the SVPA articulates the strong government interest in protecting the public from those who are dangerous and mentally ill. Requiring the government to adduce live testimony from the victims could potentially impede this purpose. The SVP proceeding occurs at the end of the defendant's sentence, which

may be years after the events in question," when the victims are no longer available. (*People v. Otto*, *supra*, 26 Cal.4th at p. 214.) Moreover, in cases where the defendant pleaded guilty before the preliminary hearing or where the victim's testimony was not sufficient to establish the details of the offense as required by the SVPA, the state would never be able to meet its burden if victim hearsay statements in other documents such as probation reports were not admissible. (*Id.* at p. 215.)

The "government interest" factor weighs even more strongly in favor of the hearsay exception here. As in *Otto*, the state has a strong interest in protecting public safety by keeping potential SVP's in custody pending trial. Calling witnesses to establish the facts upon which the evaluators relied could impede this purpose for the reasons this Court identified. Calling the evaluators themselves to testify at the probable cause hearing is feasible, but costly and time consuming.[20] Most significantly, section 6602's hearsay exception applies only at the probable cause hearing. At trial, the main forum for testing the evidence, the prosecution must call and present its experts for cross-examination. To the extent the prosecution seeks to present the details underlying nonpredicate offenses or alleged offenses that did not result in conviction upon which the experts relied—i.e., offenses not covered by section 6600, subdivision (a)(3)'s hearsay exception—it must call witnesses to establish those facts or prove

[20] Indeed, not requiring evaluators to testify at probable cause hearings would free them to testify at SVP trials, alleviating delay in SVP proceedings.

them through other admissible evidence. (Cf. *Hurtado v. California*, *supra*, 110 U.S. 516, 538 [prosecution by information in lieu of grand jury indictment does not violate due process because, inter alia, "[i]t is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial"].)

Lastly, reliance on the expert evaluations to find probable cause does not impede a prospective SVP's dignitary interest in being informed of the nature, grounds, and consequences of the SVP commitment proceeding, as the person is entitled to receive copies of the petition and evaluations and to be represented by counsel at the probable cause hearing. Nor does admission of the evaluations disable the person from presenting his side of the story before a responsible government official, as counsel is permitted to present any admissible documentary evidence weighing against a finding of probable cause and to argue the evaluations are infected with legal or factual error.

It is, moreover, not illogical or unfair for the Legislature to have established a hearsay exception for the prosecution to introduce the evaluations underlying the SVP petition without granting a similar exception for defense evaluations or documentary evidence. An SVP petition may not be filed unless evaluations are prepared under section 6601 and the initial or independent evaluators agree the person meets the criteria for SVP commitment. In reviewing the petition under section 6602, the court will ensure that prosecution has met its burden of demonstrating the required evaluator agreement. An evaluation

prepared by the defense is not statutorily required and would thus be excluded as hearsay absent an exception, just as an evaluation prepared by an expert retained by the prosecutor would be excluded. In other words, the statutorily mandated evaluations—evaluations that are prepared not by the People's experts or by the defense's experts but by DSH's experts or experts independent of DSH—are admissible under section 6602 but evaluations prepared by a party's expert are inadmissible. Accordingly, there is no unfair lack of reciprocity, as the parties are equally barred from submitting evaluations prepared by experts they retain. (Cf. *Whitman v. Superior Court*, *supra*, 54 Cal.3d at p. 1082 [no due process violation in granting limited exception for hearsay testimony at preliminary hearings by certain law enforcement officers without similar hearsay exception favoring the defense].)

In sum, section 6602 provides for a hearing at which the court reviews the SVP petition and the statutorily required expert evaluations upon which it is based. Those documents and the hearsay within them are admissible because the statute contains an implicit hearsay exception authorizing their admission. At the hearing, the prospective SVP is entitled to the assistance of counsel, who may introduce admissible documentary evidence and argue that there is no probable cause because the evaluations are infected with legal or factual error. The prospective SVP is not entitled, under the statute or as a matter of due process, to call and confront witnesses at the probable cause hearing. That right is granted at trial, the main

forum for testing the strength of the evidence that the person qualifies for commitment under the SVPA. Accordingly, respondent court properly found, based on the expert evaluations, that there is probable cause to believe Walker is an SVP.[21]

[21] If it were a violation of due process to admit evaluations without the opportunity to confront the evaluators, the proper remedy would not be to invalidate the hearsay exception but to adopt (or maintain) the procedure set forth in *Parker*. That procedure does not include confronting the sources of statements on which the evaluators relied. As noted, a prospective SVP has no due process right to confront the victim of a predicate offense at trial. It would be nonsensical to hold that due process compels such a right vis-à-vis other victims at a probable cause hearing. Nonpredicate offenses are not an element of an SVP finding, and a probable cause hearing is a preliminary proceeding, not a trial.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: December 22, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 10,774 words.

Dated: December 22, 2020

XAVIER BECERRA
Attorney General of California

/S/ MOONA NANDI

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

Case Name: **Walker, Jeffrey v. Superior Court for the City and County of San Francisco**
No.: **S263588**

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 22, 2020, at San Francisco, California.

Nelly Guerrero	/s/ Nelly Guerrero
Declarant	Signature

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NANDI, MOONA (168263)
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California Dept of Justice, Office of the Attorney General

Law Firm