IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

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

I. INTRODUCTION

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

Walker appellate court had in its Order to Show Cause of March 6, 2020 directed the government to "address whether *Bennett v. Superior Court* (2019) 39 Cal. App. 5th 862 was correctly decided."

After the decision, the *Walker* appellate court summarily denied Walker's Petition for Rehearing within 3 days of its filing. The Rehearing Petition raised issues that had not been addressed in the court's opinion – including due process and the court's failure to discuss in detail the evidence of the unreliability of case-specific hearsay evidence as introduced over objection and motion to strike at the probable cause hearing.

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

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

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

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

Petitioner filed his "Opening Brief on the Merits" (OBM) on October 7, 2020.

Attorneys for Real Party in Interest filed its "Answer Brief on the Merits" (ABM) on December 22, 2020.

II. SUMMARY OF *WALKER* OPINION IN COURT OF APPEAL

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

The *Walker* decision relied extensively on *In re Parker* (1998) 60 Cal.App.4th 1453 and its speculation of the legislative history of Welf. & Inst. Code section 6602(a)[3] for support of its newly created hearsay rule.

The *Walker* decision creates a new hearsay exception in 6602(a). Although the *Walker* court had asked for briefing on whether *Bennett* was

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

2 No Rehearing or Petition for Review was sought by the government in *Couthren*. In *Couthren* one of the attorneys listed for real party on its Petition for Writ of Mandate in the Court of Appeal – Moona Nandi- is the signing attorney in the *Walker case* – both in the *Walker* case in the Court of Appeal and in the ABM filed in this court. The Writ Petition to the court of appeal by real party in *Couthren* endorsed procedures established in the *Parker* case. Walker is moving, in the accompanying Request for Judicial Notice, that this court take judicial notice of the docket and Petition for Review filed by the government in *Couthren*.

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

correctly decided, it did not request the parties to address whether 6602 included a hearsay exception. The decision indicates that 6602 directs the judge to "review the petition".[4] Although the decision admits that the SVP Act does not address what the petition must include (Slip Opinion page 14), the decision then "understand[s]" (Slip Opinion page 16) that the SVP Petition includes the expert reports.[5] And thus the reports are admissible under 6602.

The *Walker* decision rejected the government's argument that the Rules of Evidence do not apply at SVP probable cause hearings. (Slip Opinion p 11 & 13). The *Walker* decision also reiterated *Parker*:

> "…an SVP defendant at a probable cause hearing may both cross-examine the professionals who prepared the evaluations and call

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

[5] This understanding is factually incorrect as indicated by the actual Walker SVP Petition filed in San Francisco Superior Court - attached hereto as Exhibit A. The Petition only included one page summary reports by experts MacSpeiden and Karlsson - not the detailed reports that included the unreliable hearsay first introduced (over objection and motion to strike) at the Probable Cause hearing per the government cited authority of *Parker* and *Kirk*. (OSC 0006-0008; OSC 0218-0219) The ABM repeats this misstatement of the record at ABM 19 & 33 claiming that the detailed evaluations by experts MacSpeiden and Karlsson were "accompanying the Petition" ABM 19 and that the Petition "includes the underlying evaluations" (ABM 33) The *Walker* opinion indicated that the record on appeal included the trial court record (Slip opinion 24-25 footnote 4) However both the *Walker* opinion and the ABM assume and/or argue that the detailed reports were attached to the Walker Petition in support of their new hearsay rule and arguments—although the opinion states that it doesn't even matter whether the evaluations were attached to the Petition in connection with its newly stated hearsay rule (Slip Opinion 14-15). To correct the record, Exhibit A is attached to this brief. In an abundance of caution, Walker is also moving in an accompanying pleading to have this court take judicial notice of Exhibit A - the Petition and attachments filed in the Walker trial court on June 2, 2015.

witnesses to provide relevant testimony. Where an evaluation relies on hearsay evidence that is unreliable, the SVP defendant can expose that vulnerability at the probable cause hearing." (Slip Opinion 25)

III. SUMMARY OF PETITIONER'S OPENING BRIEF ON THE MERITS

Petitioner filed his Opening Brief on the Merits (OBM) in this court on October 7, 2020. That brief included the following:

- Detailed the facts and arguments presented at the probable cause hearing that were largely ignored by the court of appeal opinion (and later in summarily denying Walker's filed Petition for Rehearing). Facts at the hearing indicated that witnesses T and J had lied in their initial statements to police of alleged sexual assaults by Walker. Those false unreliable allegations were used by government experts in their reports and testimony and the judge at the hearing in support of probable cause. (OBM 10-13; with reference to record contained in Petitioner's Petition for Rehearing at that pleading pages 7-12)
- These issues were also ignored in the government's Return brief in the appellate court.
- A critique of the *Walker* appellate court reasoning and its speculation – including a critique of the differences of other proceedings cited in the *Walker* opinion that allow hearsay.
- A discussion of due process and related balancing test, the unreliability of the contested hearsay, and the failure of the probable cause hearing judge and the *Walker* opinion's

failure to use or require any gatekeeper[6] function at the probable cause hearing – issues largely ignored by the court of appeal.

- A discussion of *Crawford* and *Sanchez.*
- Other factors not considered by the *Walker* court of appeal.
- An analysis in support of the *Bennett* and *Couthren* decisions.

For this Reply Brief, Petitioner will not extensively reargue the above points and reasoning and refers this court to that brief.

IV. SUMMARY OF REAL PARTY'S ANSWER BRIEF ON THE MERITS

Petitioner notes that the government in its Answer Brief raises many issues and points of contention it did not raise below and often took contrary positions to the arguments it now raises. The most obvious example is the government's rejection of *Parker* in its ABM. This court has delineated the issues it is considering based on Petitioner's Petition for

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6 Walker directed the *Walker* court to the gatekeeping issue in his Petition for Rehearing at page 25. This issue was also raised in Petitioner's OMB at page 26.

In *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 this court discussed the gatekeeper function involving cases with expert testimony. S*argon* indicated that the goal of trial court gatekeeping of expert opinion is to exclude opinions based on speculation or facts based on conjecture and invalid and unreliable expert opinion. *Sargon* indicated a judge's duty in evaluating admissibility of expert testimony:

> "[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon, supra,* at pp. 771-772.)

At Walker's probable cause hearing government expert MacSpeiden admitted he was speculating and categorized J as a "pathological liar" and couldn't say if J had lied about being raped or lied about not being raped. (OBM 10-12 & footnote 6 that references Walker's Rehearing and Reply briefs in the court of appeal for OSC page reference details of speculation.)

Review and in this court's granting of that Petition and this court's additional directive to discuss due process. The government made no attempt to Petition this court for Review of *Walker* of the many portions of the *Walker* court of appeal opinion it now contends were in error. It made no previous attempt to maintain that *Parker* was incorrect and relied on *Parker* at the trial court and appellate court levels in *Walker*.

The principles of waiver and forfeiture apply to the government. The forfeiture doctrine bars the prosecution from raising an argument on appeal that it failed to raise in the trial court. *People v. Tillman* (2000) 22 Cal.4th 300, 302-303. To be reviewable, the underlying objection, contention or theory must have been urged and determined in the trial court. *People v. Thomas* (2018) 29 Cal.App.5th 1107 at pp. 1113-1114

In the Walker case at the probable cause hearing, the prosecution not only did not disavow *Parker*, but it also relied on *Parker* for introduction of the government expert reports. It also relied on *Parker* in the *Walker* court of appeal. Petitioner objects and asks that this court find that the government has waived or forfeited its rejection of *Parker* and related arguments first claimed in its ABM..

With the above objections raised and lodged, Real party's Answer, in summary, advances (or ignores) the following:

- Wants this court to maintain the *Walker* appellate court's creation of a new hearsay rule by authority of 6602 while admitting that this new exception is only "implied" (ABM 18)
- Claims that the *Walker* appellate court was incorrect when it stated that the 6600(a)(3) hearsay exception applies to both SVP probable cause hearings and trial (ABM 42 footnote 17, Slip opinion p 23)
- Rejects all due process protections established in *Parker* in 1998 while conceding that this court has cited *Parker* with

approval on 4 occasions. (ABM 11, 27)

- Relies heavily on *People v. Otto* (2001) 26 Cal. 4th 200 – a case cited by Walker to exclude the unreliable hearsay at the probable cause hearing.[7]
- Ignores that *Otto, supra,* at 210 established (and the government there agreed) that hearsay "must contain special indicia of reliability to satisfy due process". (OBM 19)
- A person facing a SVP probable cause hearing has no right to call or confront witnesses (ABM 11, 19) and that 6602 requires that there be no oral testimony (ABM 11, 28)
- *Sanchez* is not applicable to civil proceedings (ABM 14) while previously stating it agrees with *People v. Burroughs* (2016) 6 Cal. App. 5th 378 and *People v. Roa* (2017) 11 Cal.App.5th 428 (*Walker* Court of Appeal Return at p 17). *Burroughs* and *Roa* applied *Sanchez* to SVP proceedings.
- A person facing a SVP probable cause hearing has no due process rights (with analogies to Grand Jury and criminal felony preliminary hearing proceedings) while agreeing that SVP probable cause hearings should "weed out groundless charges" but claims that this purpose can be accomplished without oral

[7] *Otto* discussed the use of hearsay allowed in 6600(a)(3) which includes the requirement that such hearsay must be from a defined qualifying offense and there must have been a conviction for that qualifying offense – the legislative due process requirements for hearsay in SVP cases. *Otto* specified that a conviction of a qualifying offense was a critical element to satisfy due process. In Walker's case the hearsay of false allegations from T and J were from cases where there was no conviction for a qualifying offense (dismissal by the trial judge in the case of T based on an interview of T that was contrary to her initial allegations or findings of not guilty by a jury that found J had lied) – in each case clear evidence that the initial allegations of sexual assault by T and J were false and unreliable.

testimony. (ABM 28-30)

- Agrees that hearsay must be reliable (ABM 22) and has repetitively done so in this case and by the cases it cites.
- Argues extensively that *Couthren* was wrong but fails to note that it did not make its now claimed faults in *Couthren* when it sought review of the *Couthren* trial court in the court of appeal and did not even file a Petition for Rehearing of *Couthren* or for Review in this court after its Petition for Writ of Mandate was rejected by the *Couthren* court of appeal in a published opinion.
- The ABM did not address Walker's points (OBM 25-28 and Petition for Rehearing 7-12) that the case - specific statements of T and J were unreliable and used by the prosecution experts who engaged in speculation in forming their opinions and thereafter used by the probable cause judge.
- Fails to address that *Sanchez* applies to all cases - content to rely on the *Walker* court of appeal's creation of a hearsay exception out of 6602 as an end run around due process and *Sanchez*.

V. DISCUSSION

A. GOVERNMENT'S REJECTION OF *PARKER* IN ANSWER BRIEF

With the prosecution's handling and reliance on *Parker* in the Walker case in the trial court and earlier in the appeal process, it is remarkable and untenable that the government now is taking the position that *Parker* procedures are incorrect and that a person facing a SVP Petition at a probable cause hearing has no right to cross exam or present witnesses. The abrupt change is likely attributable to *Parker's* creation of a due process floor for SVP probable cause hearings in 1998 versus the

prosecution's ABM current claim that no due process rights apply.

At the start of the testimony of prosecution expert MacSpeiden at the Walker probable cause hearing, the prosecution had marked MacSpeiden's full report and moved it into evidence citing *Parker* and *In re Kirk* (1999) 74 Cal. App.4th 1066. (OSC0006-0008) This full report was not attached to the SVP Petition filed in Walker on June 2, 2015. (Exhibit A attached) Pursuant to *Parker* procedures the prosecution also produced MacSpeiden for cross examination by Walker without Walker having to subpoena his presence. (OSC 0008)

Similarly, at the start of the testimony of prosecution expert Karlsson at the probable cause hearing, the prosecution had marked Karlsson's full report and moved it into evidence again citing *Parker* and *Kirk* for its introduction into evidence (OSC0218-0219). This full report was also not attached to the SVP Petition filed in *Walker* on June 2, 2015. (Exhibit A attached) The prosecution also produced Karlsson for cross examination by Walker without Walker having to subpoena his presence. (OSC0218-0219)

The government's Return in the *Walker* court of appeal states that the Walker probable cause hearing finding was made under procedures set forth in *Parker* and did not criticize or object to those procedures . (Return at p 20)

The government, in its *Walker* court of appeal briefing, extensively relied on *Parker* - particularly when criticizing the *Bennett* decision. The government's Return in the *Walker* court of appeal advanced the argument that "*Bennett* reads *Parker* too narrowly." (Return at p 17)

Now the government, after over 20 years of supporting the *Parker* procedures, rejects *Parker* (including its own use and reliance on *Parker* in the *Walker* case at the probable cause hearing and in the court of appeal) and argues for a return to a paper review of the SVP Petition at

SVP probable cause hearings – a position that *Parker* ruled in 1998 did not comport with due process.

B. GOVERNMENT'S EMBRACE OF *PARKER* IN OTHER CASES

In *Bennett* the government (in its Petition for Review filed in this court S258639) extensively argued that *Bennett* was inconsistent with *Parker*. In the government's view expressed in *Bennett*:

> *"Parker* was also consistent with the purpose of the probable cause hearing. which is just to allow the alleged SVP to challenge the accuracy of the evaluations at an early stage."
>
> and
>
> "Instead *Parker* struck the correct balance. Under *Parker.* the alleged SVP has a fair chance to challenge the experts· opinions via cross-examination and introducing his own evidence if he so desires. He could therefore show that the experts· understanding of the facts were mistaken or incomplete. or that they used out- dated professional standards. And ultimately any facts upon which an expert relies must still be *reliable.* Nothing in *Parker* altered the rule that experts may not rely on speculative or irrelevant material."
> From *Bennett* S258639 Petition for Review filed October 18, 2019, pages 25, 28

In *People v. Superior Court (Couthren)* (*November 7, 2019)(A155969); 41 Cal. App. 5th 100*, the government, in its Petition to the court of appeal for a Writ of Mandate filed December 13, 2018, challenged the Superior Court's granting of a motion to dismiss based on *Sanchez* violation at *Couthren's* SVP probable cause hearing. The government in *Couthren* also relied on *Parker* in seeking the Writ relief requested. That Petition indicated that *Parker* required as a matter of due process, "the prospective SVP *should* have the ability to challenge the accuracy of such reports by calling such experts for cross-examination." (emphasis

added to quote of *Parker* at p 12 of the *Couthren* Writ Petition.)[8]

Unlike the *Walker* probable cause hearing (where the prosecution produced its experts MacSpeiden and Karlsson for cross examination per *Parker*), in *Couthren* the government's Writ Petition also criticized Couthren's defense attorney for not subpoenaing the prosecution experts involved there.

C. DUE PROCESS

The government's position is simple. A prospective SVP has no right to any due process rights at a probable cause hearing (ABM 28-32) The ABM does not answer or respond to Petition's Opening Brief on the Merits analysis of due process or the balancing process, the use of unreliable hearsay and the related gatekeeper function of a judge in evaluating the admissibility of expert testimony.

1. *PARKER* APPLIED DUE PROCESS PROTECTIONS TO SVP PROBABLE CAUSE HEARINGS

Parker set out the procedural due process requirements for SVP probable cause hearings. The case indicated that the legislative intent in creating 6602 was unclear: "6602 is not a model of clarity" (*Parker* at p 1466) and stated it would "leave to either the Supreme Court or the Legislature to fill the procedural gap in section 6602 by describing the specific procedures to ensure fairness for all SVP cases." (*Parker* at p 1469).

However this court denied a Petition for Review of *Parker* on April 29, 1998 and the legislature has not clarified procedures for 6602 since *Parker* despite *Parker's* encouragement to do so.

This court has however in *Sanchez* ruled in 2016 that case-specific hearsay evidence cannot be used by experts in any case - which includes

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[8] Walker requests that this court take judicial notice (and is filing a separate request for judicial notice) of the Docket and Petition for Review filed by the government in *Couthren* A155969.

SVP probable cause hearings.

2. DUE PROCESS IS EVALUATED BY A BALANCING TEST IN SVP PROBABLE CASES

Walker set out in detail in his Opening Brief on the Merits the due process issue that this court has asked the parties to address. (OBM 19-24) In that analysis, Walker cited *People v. Litmon* (2008) 162 Cal.App.4th 383 as indicating the parameters of due process and that a balancing test is used to evaluate due process issues in SVP cases. The ABM does not address the *Litmon* case or the due process issues or balancing test factors raised in the OBM. The balancing factors are set out at OBM pages 22-23. To that list of balancing factors it should be added that the 3rd factor of government interest does not focus solely on the interest of protecting the public but also includes the fiscal and administrative burdens that additional or substitute procedural safeguards would entail. In Walker's case, if the probable cause judge had excluded the improper unreliable hearsay it would not have imposed any additional burden on the government as there would not have been a finding of probable cause. Walker would have been referred to parole. It would actually have saved the government money because it would not have had to spend funds to confine petitioner until trial as Walker would have been paroled.[9] There would not be a trial as the government would not have to go to trial on a Petition that could not be sustained. Government and court appointed SVP defense attorney costs and expenses would also be saved.

3. OTHER PROCEEDINGS ADVANCED BY ANSWER BRIEF TO JUSTIFY NO DUE PROCESS VIOLATION IN *WALKER*

The ABM advances references to proceedings other than, and in addition to, those indicated, in the *Walker* opinion to justify its current position that due process doesn't apply to SVP probable cause hearings.

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[9] See following pp 18-19 for discussion of available parole requirements.

The ABM points to criminal grand jury proceedings where a potential defendant has no right to be present or to cross examine witnesses (ABM 29-30) but admits that a prosecutor has a duty to reveal exculpatory evidence to the grand jury (citing Penal Code section 939.71 that codified *Johnson v. Superior Court* (1975) 15 Cal. 3d 248, 255.) Under Penal Code section 939.71, if the prosecutor does not fulfill this duty, the defendant can move for dismissal if substantial prejudice is shown. A defendant charged with a crime by a grand jury indictment can also challenge the indictment and grand jury procedures under Penal Code section 995.

In contrast, in the Walker case the prosecution at the probable cause hearing made no attempt to provide the exculpatory evidence concerning the unreliability of witnesses T and J statements to its experts or the court. That information was provided by the defense.

The ABM also cites preliminary hearing procedures in criminal cases with references to Prop 115 and the improper use of the preliminary hearing by defendants to conduct discovery. (ABM 31)

These points were not at issue in the Walker probable cause hearing. The hearsay exception provided by Prop 115 for preliminary hearings does not allow "readers" of other reports and multiple hearsay. (See *Whitman v. Superior Court* (1991) 54 Cal. 3d 1063,1072.) This multiple level hearsay practice of using "readers" is not only permitted but encouraged and mandated by the *Walker* court of appeal opinion – even when it is established that the hearsay is unreliable. Walker was also not engaging in discovery efforts at the probable cause hearing. He was presenting evidence of the unreliability of the improper case-specific hearsay of T and J used by the prosecution experts that was then used by the court in ruling that probable cause had been established.

The ABM at p 31 notes that civil discovery methods may be used

in SVP proceedings. This is true, but this point goes against the government and the *Walker* court of appeal decision on evaluation of balancing factors in evaluating due process issues. With civil discovery methods available, an attorney representing a SVP candidate should (in addition to normal investigative steps) prior to probable cause hearing (and certainly before trial if probable cause is found) consider taking depositions of potential witnesses who have provided unreliable hearsay that is included in prosecution expert reports. To not do so in appropriate cases would invite later IAC claims if eventually there were an unfavorable probable cause ruling or a positive SVP finding at trial because of inadequate defense preparation. Depositions would cost the government additional funds in travel and court reporter fees and government attorney time in those cases and naturally would lengthen the entire litigation process. Because practically all potential SVPs are completing lengthy prison sentences, and thus are without funds to retain an attorney, they receive public defenders or court appointed attorneys who also have associated litigation costs including obtaining and paying expert defense witnesses. This also increases the entire cost of the SVP defense that is usually fully paid for by the government.

The ABM also at page 26 footnote 12 references several other legislative directives concerning use of hearsay in hearings for administrative or court proceedings for respiratory therapists, podiatrists and juvenile service plans. As noted in OBM 29 and in Walker's Petition for Rehearing at pp 20-23 other alternative provisions for other areas and those cited in the *Walker* opinion, are areas where the legislature has directed the court or administrative body *specifically* what hearsay evidence is permissible.

This is not the case in 6602 where the ABM admits that:

"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." (ABM 18)

These other areas, frequently as amplified in case law, usually include a requirement that an exception to the hearsay rule is not valid unless the hearsay evidence proposed for admission is "inherently reliable" or notes that the hearsay statements must bear a "special indicia of reliability". The case -specific hearsay introduced at Walker's probable cause hearing was not inherently reliable, it was hearsay that was not reliable at all.

D. PAROLE CONDITIONS ARE APPROPRIATE PROTECTIONS FOR THE PUBLIC FOR THOSE WHO DO NOT QUALIFY FOR SVP COMMITMENT

The legislature has determined that only a small percentage of those convicted of at least one previous qualifying sexual offense qualify for SVP status.

The SVP statutory provision, if the government cannot establish that a person qualifies for SVP status, is for the person to be referred to parole. Parole conditions can be quite restrictive, controlling, burdensome and onerous to the parolee but also assure that the community is protected by intensive parole supervision (OBM 24 -footnote 12). Each person will also have a lifelong duty to register under Penal Code section 290. The ABM does not challenge or contest these points. Each person referred to parole after a negative finding of SVP status will have individualized parole conditions imposed, applied and monitored by a qualified experienced parole agent. The parolee will have to agree to the terms or will not be released on parole but returned to prison to complete the full term. If a parolee violates any condition of parole, the parolee can also be returned to prison until the full sentenced term is completed. At the completion of the full term, the person could again be evaluated for SVP

status.[10]

Walker asks that this court take judicial notice of the lengthy list of specific conditions that can be imposed by parole agents as indicated in the accompanying Request for Judicial Notice for California Department of Corrections and Rehabilitation forms SMOS PPST120 and SMOS PPST 121.

VI. CONCLUSION

The government has waived and/or forfeited many of the positions it first raises in its ABM.

The *Walker* Court of Appeal opinion allowing unreliable hearsay at SVP probable cause hearings is incorrect on many levels. It, inter alia,:

- Violates due process
- Ignores that hearsay must be reliable and *requires* the SVP probable cause judge to admit unreliable hearsay (including lies and false allegations) as long as the unreliable hearsay is contained in a prosecution expert's report
- Ignores addressing the unreliable hearsay used at Walker's probable cause hearing
- Allows no gatekeeper role to the probable cause hearing judge
- Is not based on legislative history and/or alternatively

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[10] This court recently ruled (on December 28, 2020, *In re Gadlin*, S 254599) that with the passage of Proposition 57, some convicted sex offenders are entitled to early parole. Walker's situation is different, as he was *entitled* to parole at the time of the filing of the SVP Petition because he had served his prison term and was not seeking early parole. *Gadlin* however reiterates Walker's position that for many convicted sex offender inmates (including those facing SVP Petitions where probable cause is not established), the legislature and the electorate have determined that parole is effective and appropriate protection for the community while allowing those previously imprisoned to return to the community - with intensive oversight by parole and lifelong Penal Code section 290 registration requirements.

speculates on what the legislature was thinking

While ignoring the unreliability of the allegations of T and J, the *Walker* decision advances the argument that 6602 mandates that unreliable hearsay must be used at SVP probable cause hearings if it is included in a prosecution expert evaluation. This is wrong. The *Walker* decision argues that this is perfectly fine and not a violation of due process. This is doubly wrong.

This court should reject and reverse the *Walker* court of appeal decision and grant Petitioner's request to order the SVP petition dismissed.

Dated: January 7, 2021

Respectfully submitted,

/s/

ERWIN F. FREDRICH
Attorney for Petitioner
JEFFREY WALKER

CERTIFICATE OF WORD COUNT

Counsel for Petitioner hereby certifies that this Reply Brief on the Merits consists of 4,692 words (including tables and this certificate, but excluding Proof of Service and attached Exhibit), according to the word count of the computer word-processing program used.

Dated: January 7, 2021

/s/

ERWIN F. FREDRICH

EXHIBIT A

Petition for Commitment (SVP) filed in People v. Walker
in San Francisco Superior Court Nos 195989 (2219428) on June 2, 2015

ENDORSED
FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

2015 JUN -2 PM 12: 12

CLERK OF THE COURT
BY: _____
DEPUTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

Petitioner,	SCN: SVP 195989 MCN: SVP 2219428
vs. JEFFREY WALKER,	PETITION FOR COMMITMENT PURSUANT TO WELFARE & INSTITUTIONS CODE 6601, ET SEQ.;
Respondent.	DATE: DEPT: 22 TIME: 9:00 A.M.

PLEASE TAKE NOTICE that on the above date and time, or as soon thereafter as the matter may be heard, the People will request the Court to enter an order for Commitment pursuant to Welfare and Institutions Code section 6600 et seq.

The Department of Mental Health in an e-mail dated June 1, 2015, (see attached as Exhibit A) has requested that a petition for involuntary treatment be filed in the case of Jeffrey Walker. The supporting Clinical Evaluation Summary opinion of Dr. Thomas MacSpeiden

Ph.D, dated May 31, 2015 is attached as Exhibit B. The supporting Clinical Evaluation Summary opinion of Dr. Roger Karlsson, Ph.D, dated June 1, 2015, is attached as Exhibit C. Petitioner has good cause to believe that Jeffrey Walker is a person who is a danger to the health and safety of others and is likely to engage in sexually violent predatory criminal behavior.

The Petitioner respectfully requests this court set this matter for the commitment proceedings pursuant to Welfare and Institutions Code section 6601, et seq. A probable cause hearing pursuant to section 6602 of the Welfare and Institutions Code should commence within 10 calendar days of the date of the filing of this petition. This commitment petition is for an INDEFINITE term of commitment.

DATED: June 2, 2015

Respectfully submitted,

GEORGE GASCON
District Attorney

IRA H. BARG
Assistant District Attorney

DECLARATION OF IRA H. BARG

Ira H. Barg states and declares as follows:

1. I am an Assistant District Attorney currently assigned to the matter of People v. Jeffrey Walker, San Francisco Superior Court Nos: SVP 2219428/195989.

2. Attached hereto and incorporated herein by reference are an e-mail and two Clinical Evaluation Summary opinions. Exhibit A is the e-mail dated June 1, 2015, from Kim Perry, Associate Governmental Program Analyst, Sex Offender Commitment Program, California Department of Mental Health; The supporting Clinical Evaluation Summary opinion of Dr. MacSpeiden, Ph.D, dated May 31, 2015, is attached as Exhibit B. The supporting evaluation of Dr. Karlsson, Ph.D, dated June 1, 2015, is attached as Exhibit C.

3. I have reviewed the files in this case and the attached Clinical Evaluation Summary opinion (Exhibits B and C) and other material, and believe respondent is a sexually violent predator meeting the requirement for civil commitment under W&I Code section 6600, et. seq.

4. Respondent's controlling release date is June 11, 2015. By this petition to commit, Petitioner seeks a term of commitment indefinitely. Petitioner therefore seeks an immediate court review of this petitioner and the supporting documents, and order a probable cause hearing within 10 days of this filing pursuant to W&I Code sections 6602 and 6601.5 and order respondent detained in a secure facility as provided under that section.

I declare under penalty of perjury the foregoing is true and correct, except for those matters stated under Information & Belief.

Executed at San Francisco, California.

DATED: June 2, 2015

Ira H. Barg
Assistant District Attorney

GEORGE GASCON
DISTRICT ATTORNEY

Exhibit A004

EXHIBIT A

Barg, Ira (DAT)

From: Perry, Kimberly@DSH <Kimberly.Perry@dsh.ca.gov>
Sent: Monday, June 01, 2015 4:39 PM
To: Barg, Ira (DAT)
Cc: Fair, Chari@DSH; Christensen, Ryan@DSH
Subject: New SVP release date 6/11

Hi Ira,

We just received the positive findings on a DOP case that releases on 6/11. We do not have full evaluations for the DOP evaluations yet but we have Clinical Summaries. I can email you all the documents we have available now with the rest to come upon receipt. We will route it with the clinical summaries and hope to get certified copies to you by June 8.

Jeffrey Walker
CDCR: F11343
CII: A07153095
DOB: 9/18/1963

I will be out of the office tomorrow, please contact Chari Hug or Ryan Christensen with questions or I will get in touch with you Wednesday afternoon.

Thank you,

Kim Perry

Department of State Hospitals
Associate Governmental Program Analyst
Forensic Services Division
916.651.2090(phone)
916.651.1168 (fax)

Exhibit A006

EXHIBIT B

CLINICAL EVALUATION SUMMARY

WIC 6600 CIVIL COMMITMENT

I. IDENTIFYING INFORMATION

Inmate Name: JEFFREY WALKER CDC# F11343

II. FINDINGS (WIC 6600 criteria)

		YES	NO
A.	Has the inmate been convicted of a sexually violent offense against at least one victim?		
	Convicted of a qualifying offense(s)? 1.	X	
	Use of force, fear, etc., and/or victim < 14 years old? 2	X	
B.	Does the inmate have a diagnosable mental disorder that predisposes person to the commission of criminal sexual acts?		
(If YES, specify)	3.	X	

Axis I OTHER SPECIFIED PARAPHILIA, SEXUAL ACTIVITY WITH NONCONSENTING PERSONS

C. Is the inmate likely to engage in sexually violent predatory criminal behavior as a result of his/her diagnosed mental disorder without appropriate treatment and custody?

4. X

III. CONCLUSION

Based on the above information, in my opinion the inmate:

X MEETS DOES NOT MEET
the criteria as a sexually violent predator as described in section 6600(a) of the Welfare and Institutions Code.
(If a NO response is marked for any of the above questions (1-4), then the inmate **does not meet** criteria)

SIGNATURE DATE MAY 31, 2915

THOMAS R. MacSPEIDEN, Ph.D.
PRINT NAME LICENSE NUMBER PSY3441

Exhibit A008

EXHIBIT C

APPENDIX C

CLINICAL EVALUATION SUMMARY

WIC 6600 CIVIL COMMITMENT

I. IDENTIFYING INFORMATION

Inmate Name: Jeffrey Walker **CDCR#** F11343

County of Commitment: Santa Clara

II. FINDINGS (WIC 6600 criteria)

		YES	NO
A.	**Has the inmate been convicted of a sexually violent offense against at one or more victim?**		
	Convicted of a qualifying offense(s)? 1.	☒	☐
	Use of force, fear, etc., and/or victim < 14 years old? 2	☒	☐
B.	**Does the inmate have a diagnosable mental disorder that predisposes person to the commission of criminal sexual acts?**		
	(If YES, specify) 3.	☒	☐
	Axis I		
	Axis II Antisocial Personality Disorder		
C.	**Is the inmate likely to engage in sexually violent predatory criminal behavior as a result of his/her diagnosed mental disorder without appropriate treatment and custody?** 4.	☒	☐

III. CONCLUSION

Based on the above information, in my opinion the inmate:

☒ **MEETS** ☐ **DOES NOT MEET**

the criteria as a sexually violent predator as described in section 6600(a) of the Welfare and Institutions Code.
(If a NO response is marked for any of the above questions (1-4), then the inmate **does not meet** criteria)

SIGNATURE

DATE 6/1/15

PRINT NAME Roger Karlsson PhD, ABPP

LICENSE NUMBE 21331

PROOF OF SERVICE

PETITIONER'S REPLY BRIEF ON THE MERITS S263588

WALKER v. SUPERIOR COURT (PEOPLE)

Court of Appeal Case Number A159563

DECLARATION OF ELECTRONIC SERVICE AND FILING

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

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

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

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

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

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

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 7, 2021 at San Francisco, California

__/s/_____
ERWIN F. FREDRICH

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **efredrich@juno.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Reply Brief w Exh A & Proof (for filing)
REQUEST FOR JUDICIAL NOTICE	Request for Judicial Notice (for filing)

Service Recipients:

Person Served	Email Address	Type	Date / Time
Erwin Fredrich Attorney at Law 53551	efredrich@juno.com	e-Serve	1/7/2021 10:58:15 AM
Ira H. Barg Office of the District Attorney	ira.barg@sfgov.org	e-Serve	1/7/2021 10:58:15 AM
Darren Bean Imperial County Public Defender 240959	darrenbean@co.imperial.ca.us	e-Serve	1/7/2021 10:58:15 AM
Moona Nandi Office Of The Attorney General 168263	MOONA.NANDI@DOJ.CA.GOV	e-Serve	1/7/2021 10:58:15 AM
Judge Charles Crompton	ccrompton@sftc.org	e-Serve	1/7/2021 10:58:15 AM
San Francisco District Attorney	districtattorney@sfgov.org	e-Serve	1/7/2021 10:58:15 AM
California Attorney General	sfagdocketing@doj.ca.gov	e-Serve	1/7/2021 10:58:15 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

1/7/2021
Date

/s/Erwin Fredrich

Signature

Fredrich, Erwin (53551)

Last Name, First Name (PNum)

Erwin F. Fredrich

Law Firm