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SUPREME COURT
FILED

AUG 25 2016

Frank A. McGuire Clerk

Deputy

August 24, 2016

Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *People v. Orange County Superior Court (Smith)*
Case No. S225562 (O.C. Sup. Ct. No. M-9531)
Supplemental Reply Letter Brief

To the Clerk of the Court:

On June 15, 2016, the court invited the Orange County District Attorney to file a supplemental letter brief to address four delineated issues. The court also invited Mr. Smith (Real Party in Interest) to file a supplemental reply letter brief. The district attorney's supplemental letter brief was filed on August 11, 2016. Mr. Smith hereby submits this supplemental reply letter brief.

Introduction

As discussed in greater detail in Real Party in Interest's Opening Brief on the Merits, Reply / Supplemental Brief on the Merits, and this Supplemental Reply Letter Brief, section 5328 of the Welfare and Institutions Code,[1] the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 *et seq*; "SVPA" or "SVP Act") (including newly added section 6603, subdivision (j); hereafter section 6603(j)) and this court's prior rulings limit the district attorney's access to Mr. Smith's treatment records and prohibit the district attorney

[1] All future references to a section are references to the Welfare and Institutions Code unless otherwise noted.

from disseminating Mr. Smith's treatment records to its retained expert. In addition, newly added section 6603(j) violates Mr. Smith's right to equal protection of the laws. Furthermore, newly added section 6603(j) cannot be lawfully applied to Mr. Smith's case retrospectively or prospectively. Even if it can be applied prospectively, the district attorney may only access treatment records generated in the course of services provided to Mr. Smith on or after January 1, 2016. Further, section 6603(j) expressly provides the district attorney with access to only those records reviewed and relied upon by the evaluators appointed by the Department of State Hospitals (DSH) to conduct "updated" evaluations after January 1, 2016.

1. Equal Protection

As discussed in greater detail in Real Party in Interest's briefs, application of section 6603(j) would violate Mr. Smith's right to equal protection of the laws by treating him differently from similarly situated mentally disordered offenders (MDOs) and mentally disordered sex offenders (MDSOs).

In its Supplemental Letter Brief, the district attorney asserts "Mr. Smith is not similarly situated to the MDO or MDSO with regard to the application of section [6603(j)(1) because that section] applies to updated evaluations [and there] is no comparable provision in the MDO or MDSO statutory scheme." (Supplemental Letter Brief, p. 4.) The district attorney's argument is inapposite. The inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) The challenged law (*i.e.*, section 6603(j)) creates an exception to section 5328's confidentiality provisions. Since section 5328's confidentiality provisions apply equally to SVPs, MDOs and MDSOs, SVPs are similarly situated to MDOs and MDSOs for purposes of the equal protection analysis. (See, for example, *People v. McKee* (2010) 47 Cal.4th 1172, 1203 [concluding that MDOs and SVPs are similarly situated for purposes of equal protection analysis since both MDOs and SVPs suffer from mental disorders that render them dangerous to others, both have been convicted of a serious or violent felony, and both are civilly committed to the Department of Mental Health for treatment of their disorders.]; (*In re Calhoun* (2004) 121 Cal.App.4th 1315, 1353 [concluding that, for forcible treatment with antipsychotic medication, MDOs and SVPs are similarly situated.]; *In re Greenshields* (2014) 227 Cal.App.4th 1284, 1293 [concluding that, for forcible treatment with antipsychotic medication, MDOs, SVPs and persons found not guilty by reason of insanity (NGIs) are similarly situated.].)

In its Supplemental Letter Brief, the district attorney also asserts "Mr. Smith is not being treated in an unequal manner because the district attorney does have access to the MDO's and MDSO's confidential information and treatment records." (Supplemental Letter Brief, p. 6.) In support of this assertion, the district attorney cites multiple code sections on pages 6-12 of its Supplemental Letter Brief. However, none of the sections cited by the

district attorney provide a statutory exception to section 5328's general rule of confidentiality for MDOs and MDSOs.

As discussed in greater detail in Real Party in Interest's briefs, section 5328 reflects the legislative recognition that disclosing confidences impairs effective treatment of the mentally ill, and thus is contrary to the best interests of society. By adding section 6603(j) to the SVP Act, the Legislature has denied only SVPs the right to keep their treatment records confidential from prosecutors. The Legislature did not deny similarly situated MDOs and MDSOs the right to keep their treatment records confidential from prosecutors. Through this amendment, the Legislature has denied SVPs the opportunity to meaningfully participate in the treatment afforded other similarly situated MDOs and MDSOs.

Finally, in its Supplemental Letter Brief, the district attorney asserts "there is a compelling state reason to allow the district attorney access to all [confidential treatment records because] SVPs pose a greater public safety risk than MDOs." (Supplemental Letter Brief, pp. 12-13.) In support of its argument that SVPs pose a greater public safety risk than MDOs, the district attorney cites the findings in *People v. McKee* (2012) 207 Cal.App.4th 1325, including evidence SVPs pose a unique danger to women and children, have diagnostic and treatment differences from MDOs, and a higher risk of reoffending than MDOs. (Supplemental Letter Brief, p. 13.) However, none of those evidentiary distinctions provide the state with a compelling reason to let the district attorney access Mr. Smith's confidential treatment records and deny Mr. Smith the opportunity to meaningfully participate in treatment.[2] To the contrary, the state has a compelling interest (and a constitutional mandate) to encourage Mr. Smith to participate in treatment. Finally, the district attorney asserts it should be granted access to Mr. Smith's confidential treatment records because "only about 25 percent of SVPs participate in treatment." (Supplemental Letter Brief, p. 13.) It can hardly be said the state has a compelling interest in getting the confidential treatment records of SVPs like Mr. Smith who actually participate in treatment because 75 percent of SVPs do not participate. To the contrary, the state has a compelling interest (and a constitutional mandate) to encourage greater participation in treatment by keeping the treatment records confidential.

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[2] If this court determines the district attorney is entitled to an evidentiary hearing, this court should remand this matter to the trial court for that evidentiary hearing to determine whether, applying the strict scrutiny standard, the district attorney can justify the disparate treatment of SVPs by showing the disparate treatment of SVPs is necessary to further compelling state interests. (*People v. McKee* (2010) 47 Cal.4th 1172, 1184, 1196–1198, 1208–1211.)

2. Retroactive and Prospective Application

As discussed in greater detail below and in Real Party in Interest's briefs, recent amendments to section 6603 (including newly added section 6603(j)) catastrophically weaken the confidentiality protections and effectively eviscerate the Legislature's treatment goals. Thus, newly added section 6603(j) cannot be lawfully applied to Mr. Smith's case retrospectively or prospectively.

In *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1171 (emphasis added), this court made clear, in considering an *ex post facto* challenge to an earlier version of the SVP Act, the Legislature had "disavowed any 'punitive purpose[ ],' and declared its intent to establish 'civil commitment' proceedings **in order to provide 'treatment'** to mentally disordered individuals who cannot control sexually violent criminal behavior. [Citations.] The Legislature also made clear that, despite their criminal record, persons eligible for commitment and treatment as SVP's are to be viewed 'not as criminals, but as sick persons.' [Citation.] Consistent with these remarks, the [Act] was placed in the Welfare and Institutions Code, surrounded on each side by other schemes concerned with the care and treatment of various mentally ill and disabled groups."

Consistent with the legislative commitment to provide treatment to SVPs, "[s]ection 5328's confidentiality protections are designed 'to encourage persons with mental or alcoholic problems to seek treatment on a voluntary basis.' " (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 953-954, citing *County of Riverside v. Superior Court* (1974) 42 Cal.App.3d 478, 481; see also the Law Revision Commission comment accompanying Evidence Code section 1014, which was cited in *People v. Gonzales* (2013) 56 Cal.4th 353, 379 and states in relevant part: "Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life... Unless a patient... is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment... depends.")

Through its repeated weakening of the confidentiality protections in section 5328, the Legislature has lost sight of its treatment goals in the SVP Act and the key role section 5328 plays in that treatment goal. In June 2000, the Legislature added subdivision (c) to section 6603 to permit DSH evaluators to review an alleged SVP's confidential treatment records. But at least the DSH evaluators are "neutral" mental health professionals. After the June 2000 amendment to section 6603, in *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 807, this court held the district attorney is granted access to information from an alleged SVP's treatment records "to the extent such information is contained in an updated [or replacement] mental evaluation." This year (effective January 1, 2016), the Legislature added section 6603(j) to also grant the district attorney direct access to an alleged SVP's confidential treatment records. Permitting the district attorney, who is not a supporter or provider for treatment, but an advocate for the lifetime detention of the alleged SVP, to

access the confidential treatment records severely undermines the Legislature's stated treatment goals in the SVP Act. In light of the recent diminution of the confidentiality protections in section 5328, this court should reaffirm the Legislature's treatment goal (*Hubbart v. Superior Court, supra,* 19 Cal.4th 1138, 1171.), find that the confidentiality protections provided by section 5328 are vital to that treatment goal, find that the recent amendments to section 6603 (including newly added section 6603(j)) catastrophically weaken the confidentiality protections and effectively eviscerate the Legislature's treatment goals, and thus rule the recent amendments to section 6603 cannot be lawfully applied retrospectively or prospectively.

Even if this court finds the Legislature's treatment goals have not been eviscerated, this court should find that section 6603(j) may only be applied prospectively. Legislative changes do not apply retroactively unless the Legislature expresses its intention that they should do so. (*Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 371; *Aetna Casualty & Surety Co. v. Industrial Acci. Com.* (1947) 30 Cal.2d 388, 393.) Furthermore, section 6603(j) may not be applied to retroactively waive the confidentiality provisions in section 5328. At the time the treatment services were provided to Mr. Smith, the Legislature provided that his communications would be confidential, his treatment records would not be disclosed to the district attorney (or an expert retained by the district attorney), and disclosure to the district attorney (or an expert retained by the district attorney) was unlawful. The Legislature cannot make these promises of confidentiality to coax Mr. Smith to openly participate in treatment and then retroactively revoke its promise and disclose his communications and treatment records to the district attorney. Furthermore, Mr. Smith must be given the opportunity to decide whether, in light of the legislative changes, he wants to continue his participation in treatment. Therefore, the district attorney may only access treatment records generated in the course of services provided on or after January 1, 2016.

In its Supplemental Letter Brief, the district attorney acknowledges a "newly enacted statute does not operate retrospectively," but asserts the Legislature was merely clarifying an ambiguity in section 6603(c) and "[now] the SVPA explicitly provides the People the right to access the records relied upon by the DSH evaluators..." (Supplemental Letter Brief, pp. 14-16.) As discussed in the preceding paragraphs, despite the district attorney's attempt to trivialize the Legislature's changes to the confidentiality protections in section 5328, the change is not merely a clarification but rather a significant diminution of the confidentiality protections in section 5328, the ultimate consequence of which may be to undermine the legality of the entire SVP Act.

3. Limitations on DA's Access to Records

As discussed in greater detail below and in Real Party in Interest's briefs, section 6603(j) does not provide the district attorney with access to all confidential treatment records. Rather it expressly provides the district attorney with access to only those "records

reviewed" by the DSH evaluators appointed to conduct "updated" evaluations after January 1, 2016. Furthermore, this statutory provision should be read to provide the district attorney with access to only those records reviewed and relied upon by the DSH evaluators. Records that the DSH evaluators did not rely upon should not be provided to the district attorney.

To avoid the limitations described above, the district attorney asserts in its Supplemental Letter Brief there is "no practical distinction" between an "initial" evaluation, an "updated" evaluation and a "replacement" evaluation. (Supplemental Letter Brief, p. 19-22.) The district attorney's assertions are contrary to the express wording in the SVP Act. First, section 6601 (not 6603) provides that an "initial" evaluation is initiated by DSH (not the district attorney) and performed before an SVP petition is filed by the district attorney. Second, section 6603 (not 6601) provides that "updated" and "replacement" evaluations are initiated by the district attorney (not DSH) and done by an evaluator after the SVP petition is filed. Third, section 6603, subdivision (c), provides that "updated" evaluations are done only if the district attorney "determines that updated evaluations are necessary in order to properly present the case for commitment" and only if the district attorney requests an "updated" evaluation. Fourth, section 6603, subdivision (c), provides that "replacement" evaluations are done only if the district attorney requests a "replacement" evaluation and only if one or more of the evaluators is "no longer available to testify." In addition, section 6603, subdivision (c)(2), delineates the specific circumstances under which an evaluator is "no longer available to testify." Further, section 6603, subdivision (c)(2)(D), provides that a "replacement" evaluation may not be requested by the district attorney if the evaluator who resigned or retired had previously opined the individual is not an SVP. Thus the legislator created separate code sections and significant distinctions for each category of evaluation.

In addition, subdivision (j)(1) expressly refers to "updated" evaluations done pursuant to subdivision (c) of section 6603, not "initial" evaluations done pursuant to subdivision (c) or subdivision (e) of section 6601 and not "replacement" evaluations done pursuant to subdivisions (c)(1) and (c)(2) of section 6603. If the Legislature had intended to include "replacement" evaluations, the Legislature would have simply stated "updated or replacement" evaluations in subdivision (j)(1) just as it had done in subdivision (c)(1). If the Legislature had intended to include "initial" evaluations in subdivision (j)(1), the Legislature would not have included the phrase "the evaluator performing an updated evaluation" in subdivision (j)(1) and would not have included the phrase "listing all records reviewed by the evaluator pursuant to subdivision (c) [of section 6603]" in subdivision (j)(1), but would have simply included all evaluations done pursuant to sections 6601 and 6603 in subdivision (j)(1).

Furthermore, newly added subdivision (j)(1) applies only to records reviewed and relied upon by a DSH evaluator on or after January 1, 2016, and in conjunction with an updated

evaluation issued on or after January 1, 2016.[3] Subdivision (j)(1) expressly states "the evaluator performing an updated evaluation shall include with the evaluation a statement listing all records reviewed by the evaluator..." and requires the court to issue a subpoena for those records and then provide a copy of those records to the district attorney. Before January 1, 2016, evaluators were not required to include a "statement listing all records reviewed by the evaluator" and the court was not required to issue a subpoena for those records nor required to provide a copy of those records to the district attorney. Thus, newly added subdivision (j)(1) applies only to records reviewed and relied upon by a DSH evaluator on or after January 1, 2016, and in conjunction with an updated evaluation issued on or after January 1, 2016.[4]

4. Prohibitions against Dissemination to Retained Expert

As discussed in greater detail in Real Party in Interest's briefs, even if newly added section 6603(j) can be constitutionally implemented, section 5328, the SVP Act (including newly added section 6603(j)) and this court's prior rulings, prohibit the district attorney from disseminating Mr. Smith's treatment records to its retained expert.

In its Supplemental Letter Brief, the district attorney asserts (and assumes) the Civil Discovery Act (Code Civ. Proc. § 2016.010 *et seq.*) permits the district attorney to retain experts, disseminate confidential records and compel mental health evaluations in the same way and to the same extent a defendant named in a civil case (which, for example, alleges damages arising out of an automobile accident) may retain experts, disseminate confidential records and compel mental health evaluations. (Supplemental Letter Brief, pp. 23-25.) The district attorney is wrong. While it is true the Civil Discovery Act has application to proceedings filed under the SVP Act, the designation of experts, dissemination of confidential records and compelled mental health evaluations are controlled by the very detailed procedures in the SVP Act (and section 5328).

Unlike the civil litigant who must independently retain an expert pursuant to the Civil Discovery Act to evaluate the plaintiff who is suing for emotional distress, the district attorney is automatically provided (and limited) by the SVP Act with mental health evaluations performed by at least two and maybe four experts appointed by the Department of State Hospitals (DSH). (See, for example, Welf. & Inst. Code, § 6601, subdivision (d) [DSH initially appoints two psychiatrists or psychologists to evaluate the prisoner.] and

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[3] The district attorney appears to have conceded this point on page 24 of its Supplemental Letter Brief where the district states: "Section 6603(j)(1) provides that the district attorney is entitled to the discovery of all information reviewed in preparing updated evaluations after January 1, 2016."

[4] As discussed in section 3 above, the district attorney is further limited to only treatment records generated in the course of services provided on or after January 1, 2016.

Welf. & Inst. Code, § 6601, subdivision (e) [If the two initial evaluators do not agree that the prisoner is an SVP, DSH is required to appoint two independent professionals to evaluate the prisoner as an SVP.].) If the district attorney later determines updated evaluations are necessary in order to properly present the case for commitment, the district attorney may request that the DSH experts perform updated evaluations. (Welf. & Inst. Code, § 6603, subdivision (c)(1).) If one or more of the DSH experts later become unavailable to testify for the district attorney in court proceedings, the district attorney may request that DSH appoint another expert to perform replacement evaluations. (Welf. & Inst. Code, § 6603, subdivision (c)(1).) Furthermore, each of the DHS experts must "evaluate the person in accordance with a standardized assessment protocol" developed and maintained by DSH. (Welf. & Inst. Code, § 6601, subdivision (c).) If the district attorney believes a DSH evaluator committed an error in the evaluation, the district attorney may ask the trial court to review the evaluation for material legal error. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888.) In this proceeding, the SVP Act provided the district attorney with multiple mental health evaluations of Mr. Smith by five DSH experts.[5] The SVP Act does not authorize the district attorney to retain yet another expert to perform yet another mental health evaluation of Mr. Smith. (See, for example, *Sporich v. Superior Court* (2000) 77 Cal.App.4th 422, 425-426; superseded on other grounds by Welf. & Inst. Code, § 6603, subdivision (c) ["The pertinent language of the SVP enactment is unambiguous. With the exception of certain circumstances not present here (citation omitted), the Welfare and Institutions Code allows the state to conduct two precommitment mental examinations-no more, and no less."]; but see *People v. Landau* (2013) 214 Cal. App. 4th 1.) Thus, notwithstanding the Civil Discovery Act, the SVP Act prohibits the district attorney from disseminating Mr. Smith's treatment records to its retained expert.

Even if the SVP Act authorizes the district attorney to retain yet another expert to perform yet another mental health evaluation of Mr. Smith, section 5328 and newly added section 6603(j) prohibit the district attorney from disseminating Mr. Smith's treatment records to its retained expert. Although section 6603(j) expressly grants the court permission to disseminate the subpoenaed records to the district attorney,[6] section 6603(j) does not permit the district attorney to disseminate Mr. Smith's treatment records to its retained expert. Section 6603(j)(1) expressly states the "attorneys may use the records in proceedings under this article and shall not disclose them for any other purpose." Thus, although the district attorney may "use the records in proceedings under this article"

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[5] Mr. Smith has been evaluated by the following DSH doctors: Dr. Putnam, Dr. Jackson, Dr. Schwartz, Dr. Rueschenberg and Dr. Zinik.

[6] As discussed in section 3 above, section 6603(j)(1) permits the court to disseminate only records reviewed and relied upon by a DSH evaluator on or after January 1, 2016, and in conjunction with an updated evaluation issued on or after January 1, 2016.

(*e.g.*, as exhibits at the probable cause hearing (Welf. & Inst. Code, § 6602) or the jury trial (Welf. & Inst. Code, § 6603)), the statute, by design,[7] does not permit the district attorney to disseminate Mr. Smith's treatment records "for any other purpose" (including to its retained expert).

Conclusion

Section 5328, the SVP Act (including newly added section 6603(j)) and this court's prior rulings, limit the district attorney's access to Mr. Smith's treatment records and prohibit the district attorney from disseminating Mr. Smith's treatment records to its retained expert. In addition, newly added section 6603(j) violates Mr. Smith's right to equal protection of the laws. Furthermore, newly added section 6603(j) cannot be lawfully applied to Mr. Smith's case retrospectively or prospectively. Even if it can be applied prospectively, the district attorney may only access treatment records generated in the course of services provided to Mr. Smith on or after January 1, 2016. Further, section 6603(j) expressly provides the district attorney with access to only those records reviewed and relied upon by the evaluators appointed by DSH to conduct "updated" evaluations after January 1, 2016.

Respectfully submitted,

Mark S. Brown
Senior Assistant Public Defender
Attorney for Mr. Smith

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

DECLARATION OF SERVICE

People v. Orange County Superior Court (Smith)
Case No. S225562 (O.C. Sup. Ct. No. M-9531)

STATE OF CALIFORNIA)
)ss
COUNTY OF ORANGE)

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

That on the 24th day of August 2016, I served a copy of the **Supplemental Reply Letter Brief** in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelopes were addressed (without the telephone numbers) as follows:

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

Executed on this 24th day of August 2016, at Santa Ana, California.

Reve Gonzalez
Secretary, Orange County
Public Defender's Office