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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LARRY JACKSON,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G046650

(Super. Ct. No. M11361)

O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Richard F. Toohey, Judge. Petition denied.

Frank Ospino, Public Defender, Jean Wilkinson, Chief Deputy Public Defender, Sharon Petrosino and Mark S. Brown, Assistant Public Defenders, for Petitioner.

No appearance for Respondent.

Tony Rackauckas, District Attorney, and Elizabeth Molfetta, Deputy District Attorney, for Real Party in Interest.

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### INTRODUCTION

Larry Jackson is the subject of a commitment petition filed pursuant to the Sexually Violent Predator Act, Welfare and Institutions Code section 6600 et seq. (SVPA).<sup>1</sup> The respondent court found, pursuant to section 6602, probable cause existed to believe Jackson met the criteria for commitment as a sexually violent predator. By this petition for writ of mandate or prohibition, Jackson challenges the respondent court's decision to receive in evidence at the probable cause hearing two evaluation reports prepared by psychologists appointed to evaluate him pursuant to section 6601. For reasons we will explain, we deny the petition.

### OVERVIEW OF THE SVPA SCREENING AND EVALUATION PROCESS

The SVPA provides for involuntary civil commitment of an offender immediately upon conclusion of his or her prison term if the offender is found to be a sexually violent predator. (*Reilly v. Superior Court* (2013) 57 Cal.4th 641, 646 (*Reilly*); *People v. Yartz* (2005) 37 Cal.4th 529, 534.) A sexually violent predator is defined as “a person who has been convicted of a sexually violent offense against one or more victims and who has 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 criminal behavior.” (§ 6600, subd. (a)(1).) A “diagnosed mental disorder” is defined to include “a congenital or acquired condition affecting the emotional or volitional capacity that

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<sup>1</sup> Further code references are to the Welfare and Institutions Code unless otherwise indicated.

predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.” (§ 6600, subd. (c).)

The procedure for commitment under the SVPA begins with an initial screen in which the Secretary of California’s Department of Corrections and Rehabilitation (CDCR) determines whether a person in CDCR custody might be a sexually violent predator. (§ 6601, subd. (a)(1).) If the secretary determines the person might be a sexually violent predator, the secretary refers that person to the next level evaluation. (*Ibid.*)

After the secretary’s referral, the person is screened by the CDCR and the Board of Parole Hearings in accordance with “a structured screening instrument” developed and updated by the State Department of State Hospitals (SDSH) in consultation with the CDCR. (§ 6601, subd. (b).) “If as a result of this screening it is determined that the person is likely to be a sexually violent predator, the [CDCR] shall refer the person to the [SDSH] for a full evaluation of whether the person meets the criteria in Section 6600.” (*Ibid.*)

The procedures for a full evaluation are set forth in section 6601, subdivision (c) (section 6601(c)) and section 6601, subdivisions (d) through (i). Under section 6601(c) and section 6601, subdivision (d), the person is evaluated by two practicing psychiatrists or psychologists, or by one of each profession. The evaluations must be conducted “in accordance with a standardized assessment protocol, developed and updated by the [SDSH], to determine whether the person is a sexually violent predator as defined in this article.” (§ 6601(c).) If both evaluators find 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,” then the SDSH forwards a request to file a petition for commitment to the county of the person’s last conviction. (§ 6601, subd. (d).) If the county’s designated counsel concurs with the recommendation, then counsel files a petition for commitment in the superior court. (§ 6601, subd. (i).)

If one of the two professionals performing the evaluation does not conclude the person meets the criteria for commitment as a sexually violent predator, and the other concludes the person does meet those criteria, then the SDSH “shall arrange for further examination of the person by two independent professionals selected in accordance with subdivision (g).” (§ 6601, subd. (e).) If an evaluation by two independent professionals is conducted, a petition for commitment may be filed only if both concur the person meets the criteria for commitment as a sexually violent predator. (§ 6601, subd. (f).)

Upon filing of the SVPA commitment petition, the superior court must review the petition and determine “whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release.” (§ 6601.5.) If the court determines the petition on its face supports a finding of probable cause, then it must order the person named in the petition to be kept in a secure facility until a probable cause hearing under section 6602 is conducted. (§ 6601.5.) The probable cause hearing must be conducted within 10 calendar days of the issuance of the order finding the petition would support a finding of probable cause. (*Ibid.*)

The purpose of the probable cause hearing is to determine whether “there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release.” (§ 6602, subd. (a).) If the court finds probable cause, it orders a trial to determine whether the person is a sexually violent predator under section 6600. (§ 6602, subd. (a).) The person named in the petition must remain in a secure facility between the time probable cause is found and the time trial is completed. (*Ibid.*)

#### **ALLEGATIONS OF THE PETITION AND THE RETURN**

In June 2007, the Orange County District Attorney filed a petition for commitment under the SVPA alleging Jackson was a sexually violent predator as defined in section 6600. Attached to the SVPA commitment petition were two evaluation reports

of Jackson; one report was prepared by Douglas R. Korpi, Ph.D., and the other was prepared by Jack Vogensen, Ph.D. Judge Kazuharu Makino reviewed the petition and found it stated sufficient facts which, if true, would constitute probable cause to believe Jackson was likely to engage in sexually violent predatory criminal behavior on his release. As a consequence, Judge Makino ordered Jackson to be detained, pursuant to section 6601.5, in a secure facility until the probable cause hearing.

In August 2008, the Office of Administrative Law (OAL) issued 2008 OAL Determination No. 19, in which the OAL determined the 2007 version of the SDSH's Clinical Evaluator Handbook and Standardized Assessment Protocol (Aug. 2007) (2007 SAP) used for SVPA evaluations amounted to an "underground regulation" because portions of the assessment protocol, though regulatory in nature, had not been adopted pursuant to Government Code section 11340.5, part of the Administrative Procedure Act (APA; Gov. Code, § 11340 et seq.). (2008 OAL Determination No. 19 (Aug. 15, 2008) p. 3, available at <[http://www.oal.ca.gov/res/docs/pdf/determinations/2008/2008\\_OAL\\_Determination\\_19.pdf](http://www.oal.ca.gov/res/docs/pdf/determinations/2008/2008_OAL_Determination_19.pdf)> [as of Dec. 6, 2013]; see *Reilly, supra*, 57 Cal.4th at p. 649.) In *In re Ronje* (2009) 179 Cal.App.4th 509, 516-517 (*Ronje*), disapproved in *Reilly, supra*, 57 Cal.4th 641, we agreed with the OAL and likewise concluded the 2007 SAP was invalid as an underground regulation. In 2009, the SDSH issued the 2009 version of its Standardized Assessment Protocol for Sexually Violent Predator Evaluations (Feb. 2009) (2009 SAP) as the new standardized assessment protocol for SVPA evaluations. In February 2009, the OAL took emergency regulatory action to adopt part of the 2009 SAP. In September 2009, the OAL made permanent the emergency regulatory action.

In response to *Ronje*, in November 2010, Judge James P. Marion<sup>2</sup> ordered new evaluations of Jackson, pursuant to section 6601, using a valid standardized

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<sup>2</sup> We recognize and join in the public defender's respect, expressed in the writ petition, for our friend and colleague, the late Judge Marion.

assessment protocol. In compliance with the court's order, the SDSH reassigned Dr. Korpi and Dr. Vognsen to evaluate Jackson. In a report dated January 22, 2011, Dr. Korpi concluded Jackson met the criteria for commitment as a sexually violent predator. In a report dated February 9, 2011, Dr. Vognsen also concluded Jackson met those criteria.

A post-*Ronje* probable cause hearing was conducted over two days in January 2012 before the respondent court. Jackson presented a motion in limine to exclude the written reports prepared by Dr. Korpi and Dr. Vognsen on the ground their evaluations of him were invalid because they were conducted in accordance with the 2009 SAP, which, he argued, is not a valid standardized assessment protocol under the SVPA and had not been promulgated as a regulation. In support of his motion, Jackson submitted declarations from two psychologists (Richard Wollert, Ph.D., and Robert L. Halon, Ph.D.), both of whom expressed the opinion that the 2009 SAP is not a "standardized assessment protocol," as that term is understood in the "scientific and psychological community." The district attorney opposed the motion in limine on the ground Jackson failed to provide the notice required by Code of Civil Procedure section 1005 and, as a result, the district attorney did not have an opportunity to prepare written opposition.<sup>3</sup>

On January 19, 2012, the respondent court denied Jackson's motion in limine and received in evidence Dr. Korpi's January 2011 report and Dr. Vognsen February 2011 report. On the same day, the respondent court found, pursuant to section 6602, probable cause existed to believe Jackson met the criteria for commitment as a sexually violent predator.

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<sup>3</sup> Near the end of the probable cause hearing, the respondent court stated it had reviewed the "points and authorities submitted by the People and also by the respondent regarding the in limine motion." Written opposition to the motion in limine does not appear in the record presented to us.

## HISTORY OF WRIT PETITION PROCEEDINGS

In March 2012, Jackson filed this petition for writ of mandate or prohibition to challenge the respondent court's order receiving in evidence the 2011 evaluation reports of Dr. Korpi and Dr. Vognsen. We summarily denied Jackson's writ petition.

Jackson petitioned the California Supreme Court for review of our order summarily denying his writ petition. He presented four issues for Supreme Court review, one of which was whether Dr. Korpi's January 2011 evaluation report and Dr. Vognsen's February 2011 evaluation report were updated or new evaluations. The Supreme Court granted the petition for review and transferred the matter back to us with directions to vacate our order denying mandate and to issue an order directing the respondent court to show cause why the relief requested in the petition for writ of mandate or prohibition should not be granted. We complied with the Supreme Court's directions. The district attorney filed a return to Jackson's petition for writ of mandate or prohibition, to which Jackson filed a reply.

After oral argument, we vacated submission to allow the parties to file supplemental letter briefs addressing the impact of *Reilly, supra*, 57 Cal.4th 641, on this case. After receiving supplemental letter briefs from the district attorney and Jackson, we resubmitted the matter.

## DISCUSSION

### I.

#### **The Evaluators Conducted New Evaluations as Then Required by *Ronje*.**

Jackson argues Dr. Korpi's January 2011 evaluation report and Dr. Vognsen's February 2011 evaluation report were updated rather than new evaluations

and, therefore, should not have been received in evidence at the probable cause hearing. We disagree. Under *Reilly, supra*, 57 Cal.4th 641, Jackson cannot prevail even if this argument has merit.

In *Reilly*, the Supreme Court concluded a court is not required to dismiss SVPA commitment proceedings if the OAL determines the initial evaluations supporting the SVPA commitment petition were conducted under a standardized assessment protocol that did not comply with the OAL's procedural requirements. (*Reilly, supra*, 57 Cal.4th at p. 646.) "Instead, an alleged sexually violent predator (SVP) must show that any fault that did occur under the assessment protocol created a *material* error." (*Ibid.*) "Absent material error, 'once a petition has been properly filed and the court has obtained jurisdiction, the question of whether a person is a sexually violent predator should be left to the trier of fact . . .'" (*Id.* at p. 656.) *Reilly* disapproved *Ronje, supra*, 179 Cal.App.4th 509, to the extent it required new evaluations using a valid standardized assessment protocol without a showing of material error. (*Reilly, supra*, at pp. 655, 656.)

In *Rabuck v. Superior Court* (Dec. 6, 2013, G046936) \_\_ Cal.App.4th \_\_, \_\_ [page 10] (*Rabuck*), we concluded that absent a showing of material error in using the 2007 SAP, whether evaluation reports prepared using the 2009 SAP constituted new or updated ones would make no difference to their admissibility at the probable cause hearing. Thus, "[a]bsent a showing of material error, the [initial] evaluations of [Jackson] would be valid and would support filing the SVPA commitment petition, and the 2011 evaluations properly could serve as either new or updated evaluations under section 6603, subdivision (c)(1)." (*Id.* at p. \_\_ [p. 10].) Jackson has not shown that use of an invalid assessment protocol materially affected his initial evaluations. (See *Reilly, supra*, 57 Cal.4th at p. 656.) Since evaluators concluded Jackson was a sexually violent predator under both the 2009 SAP and the 2007 SAP, "it is clear that the 2007 protocol error did not materially affect the outcome of his probable cause hearing." (*Ibid.*)

Jackson's contention the evaluations were "updates" rather than "new" has no merit even if it remains viable after *Reilly*. *Ronje* required new evaluations under section 6601(c); that is, evaluations conducted as though no prior diagnosis had been reached and no SVPA commitment petition had yet been filed. In contrast, updated evaluations are permitted under section 6603, subdivision (c)(1), "[i]f the attorney petitioning for commitment under this article determines that updated evaluations are necessary in order to properly present the case for commitment."

The evidence supported a finding that Dr. Korpi's January 2011 evaluation report and Dr. Vognsen's February 2011 evaluation report were new evaluations of Jackson. At the probable cause hearing, Dr. Vognsen testified the 2011 evaluation was a new evaluation pursuant to *Ronje*. At the probable cause hearing, Dr. Korpi testified his 2011 evaluation of Jackson was a "*Ronje* evaluation." Dr. Korpi testified that for updated evaluations, he only considers one criterion, does not review the committing qualifying offenses, and focuses "on changes and risk."

In his February 2011 evaluation report, Dr. Vognsen stated, "[t]he present Evaluation of Mr. Jackson is undertaken in response to a court order . . . for a new evaluation with regard to the *Ronje* decision." Acknowledging his prior evaluations of Jackson, Dr. Vognsen stated in his report, "[n]evertheless, I will treat this as a new evaluation." Dr. Vognsen's February 2011 evaluation report shows that he considered Jackson's entire psychiatric, family, criminal, and qualifying offense history, which, Dr. Vognsen testified, he would not do for an updated evaluation. Dr. Vognsen conducted a clinical interview of Jackson in January 2011 and reassessed all of the commitment criteria and risk factors. Dr. Korpi's January 2011 evaluation report shows Dr. Korpi too considered Jackson's entire psychiatric, family, criminal, and qualifying offense history. His January 2011 evaluation report reassessed all of the commitment criteria and risk factors.

## II.

### **The Evaluators Followed the 2009 SAP.**

Jackson argues Dr. Korpi and Dr. Vognsen, though purporting to use the 2009 SAP, in fact used the 2007 SAP in preparing their 2011 evaluations of him. According to Jackson, the 2011 evaluation reports prepared by Dr. Korpi and Dr. Vognsen demonstrate they used the 2007 SAP because those reports include the same headings, apply the same criteria, make the same findings, and use the same diagnostic tools and risk factors, as those required by the 2007 SAP.

Under *Reilly*, if Dr. Korpi and Dr. Vognsen used the 2007 SAP in preparing their 2011 evaluation reports of Jackson, any error would be harmless unless he made a showing that use of the 2007 SAP resulted in material error. (*Reilly, supra*, 57 Cal.4th at p. 656 & fn. 5.) Neither in his writ petition nor his supplemental letter brief addressing *Reilly*, did Jackson make such a showing. Jackson does not contend any of the reports prepared by Dr. Korpi and Dr. Vognsen, or any of their diagnoses and conclusions, are inaccurate or otherwise invalid.

Jackson argues provisions included in the 2011 evaluation reports prepared by Dr. Korpi and Dr. Vognsen indicate they followed the 2007 SAP. Dr. Korpi's and Dr. Vognsen's 2011 evaluation reports did follow the format, outline, and structure provided in the 2007 SAP and did include notice, provisions, and findings required by that protocol. But the 2009 SAP does not prohibit them from doing so and does not prescribe a particular format, outline, or structure for an evaluation report. (*Rabuck, supra*, \_\_\_ Cal.App.4th at p. \_\_\_ [p. 12].) As Jackson argues, Dr. Korpi's and Dr. Vognsen's 2011 evaluation reports used the headings "I. Identifying Data," "II. Findings," and "III. Conclusion" (boldface & some capitalization omitted), which were provided by the 2007 SAP. In *Rabuck, supra*, \_\_\_ Cal.App.4th at page \_\_\_ [page 12], we concluded, "those are logical and natural headings for sections within an SVPA evaluation report."

As further proof that Dr. Korpi and Dr. Vognsen did not follow the 2009 SAP, Jackson asserts they drafted their conclusions in a specific format required by the 2007 SAP.<sup>4</sup> Section IV.C. of the 2009 SAP, *supra*, at page 3, identifies the question the evaluator must answer as “[d]oes the person being evaluated have a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody?” The findings in Dr. Korpi’s 2011 evaluation report and Dr. Vognsen’s 2011 evaluation report track this question and answer it. “Dr. [Korpi] and Dr. [Vognsen] drafted their respective conclusions in a format that is so obvious and logical that it cannot be said to be specific to the 2007 SAP.” (*Rabuck, supra*, \_\_\_ Cal.App.4th at p. \_\_\_ [p. 13].)

Jackson contends Dr. Korpi and Dr. Vognsen followed the 2007 SAP because they used procedures, diagnostic tests, and actuarial risk assessment tools specifically required by that protocol. In *Rabuck, supra*, \_\_\_ Cal.App.4th at page \_\_\_ [pages 13-14], we rejected a similar argument. We explained that “[u]nlike the 2007 SAP, which provided detailed instructions on how to conduct a sexually violent predator assessment and prepare an evaluation report, the 2009 SAP relies on each evaluator’s exercise of ‘independent professional judgment in the course of performing SVP [(sexually violent predator)] evaluations.’ [Citation.]” (*Id.* at p. \_\_\_ [p. 13].) We concluded that the evaluators’ decision to follow procedures and practices and to apply tests, instruments, and actuarial risk tools that were required by the 2007 SAP did not mean they failed to use the 2009 SAP. (*Id.* at p. \_\_\_ [p. 14].)

Likewise, “the fact Dr. [Korpi] and Dr. [Vognsen] decided to follow procedures and practices and to apply tests, instruments, and actuarial risk tools that were

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<sup>4</sup> Dr. Vognsen concluded: “Based upon the above information it is my opinion that Mr. Jackson does meet the criteria as a Sexually Violent Predator as described in Section 6600 of the Welfare and Institutions Code.” Dr. Korpi concluded: “Based on the above information, it is my opinion that Mr. Jackson **does meet** criteria as a Sexually Violent Predator as outlined in Section 6600 of the Welfare & Institutions Code.”

required by the 2007 SAP does not mean they failed to use the 2009 SAP.” (*Rabuck, supra*, \_\_\_Cal.App.4th at p. \_\_\_ [p. 14].) In compliance with the 2009 SAP, Dr. Korpi and Dr. Vognsen explained in their respective 2011 evaluation reports how the tests, instruments, and risk factors they used had gained professional recognition or acceptance in the field of diagnosing, evaluating, or treating sexual offenders, how they were applied, and why they were appropriate to Jackson.

Jackson argues Dr. Vognsen used the 2007 SAP because, at the beginning of his 2011 evaluation report, he stated he provided Jackson with a notice of evaluation as a sexually violent predator, presumably in the form attached as appendix B to the 2007 SAP. We rejected the identical argument in *Rabuck, supra*, \_\_\_Cal.App.4th at page \_\_\_ [page 14]. Jackson also argues that Dr. Korpi and Dr. Vognsen followed the 2007 SAP by including in their respective 2011 evaluation reports a statement, required by the 2007 SAP, on the question whether Jackson’s future sexually violent acts and offenses would, or likely would, be predatory in nature. “But the fact Dr. [Korpi] and Dr. [Vognsen] answered a question presented by the 2007 SAP does not lead to the conclusion they did not follow the 2009 SAP and meet its requirements.” (*Id.* at p. \_\_\_ [p. 15].)

### III.

#### **The 2009 SAP Is a Legitimate Standardized Assessment Protocol and Complies with Section 6601(c).**

Jackson argues the 2009 SAP is invalid because it is not a standardized assessment protocol as that term is understood in the scientific and psychological communities. In support of this argument, he relies on the declarations of Dr. Wollert and Dr. Halon, both of whom presented a definition of a standardized assessment protocol, reviewed the 2009 SAP, and concluded it did not come within that definition. Jackson submitted Dr. Wollert’s declaration and Dr. Halon’s declaration in support of his motion in limine to exclude the 2011 evaluation reports prepared by Dr. Korpi and Dr. Vognsen. The motion in limine was filed on the first day of the probable cause

hearing, and, in the return, the district attorney asserts he did not have an opportunity to prepare written opposition. The respondent court orally denied the motion in limine without explanation and without issuing a written ruling.

Under rule 3.1112(f) of the California Rules of Court, the trial court has discretion to set the timing and place of the filing and service of a motion in limine. We can infer the respondent court denied Jackson's motion in limine on the ground it was untimely, and the court would have been acting within its discretion by so doing. The respondent court also did not err if it denied the motion in limine on the merits. Whether the 2009 SAP constitutes a valid standardized assessment protocol ultimately is a legal issue the resolution of which depends on interpretation of statute. In *Rabuck, supra*, \_\_ Cal.App.4th at page \_\_ [pages 15-18], we also concluded the 2009 SAP is a legitimate standardized assessment protocol as required by section 6601(c).

#### IV.

#### **The 2009 SAP Was Properly Promulgated as a Regulation.**

Jackson argues that if the 2009 SAP is a legitimate standardized assessment protocol, it is invalid nonetheless because it is an underground regulation that was not promulgated in accordance with the APA. But if the 2009 SAP was not promulgated in accordance with the APA, then Jackson would have the burden of showing material error (*Reilly, supra*, 57 Cal.4th at pp. 646, 656-657); that is, "the invalid assessment protocol materially affected his . . . evaluations" (*id.* at p. 656). He has not done so. In addition, in *Rabuck, supra*, \_\_ Cal.App.4th at page \_\_ [pages 18-19], we concluded the 2009 SAP was validly promulgated as a regulation.

Government Code section 11350 identifies the limited grounds on which the validity of a regulation may be challenged. Jackson does not challenge the OAL's approval of section IV.D. of the 2009 SAP on any of the grounds identified in Government Code section 11350.

**DISPOSITION**

The petition for writ of mandate or prohibition is denied.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.