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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT MOREHEAD,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G046910

(Super. Ct. No. M10439)

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, Lance Jensen, 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

Robert Morehead 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 Morehead met the criteria for commitment as a sexually violent predator. By this petition for writ of mandate or prohibition, Morehead 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 January 2005, the Orange County District Attorney filed a petition for commitment under the SVPA alleging Morehead was a sexually violent predator as defined in section 6600. Attached to the SVPA commitment petition were two evaluation

reports of Morehead; one report was prepared by Clark R. Clipson, Ph.D., and the other was prepared by Mark A. Schwartz, Ph.D. Judge Daniel J. Didier reviewed the petition and found it stated sufficient facts which, if true, would constitute probable cause to believe Morehead was likely to engage in sexually violent predatory criminal behavior on his release. As a consequence, Judge Didier ordered Morehead 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 Morehead, 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 and ordered a new probable cause hearing based on the new evaluations. In compliance with the court's order, the SDSH reassigned Dr. Clipson and Dr. Schwartz to evaluate Morehead. In a report dated February 16, 2011, Dr. Clipson concluded Morehead met the criteria for commitment as a sexually violent predator. In a report dated February 22, 2011, Dr. Schwartz also concluded Morehead met those criteria.

A post-*Ronje* probable cause hearing was conducted over several days in July and October 2011, and March 2012, before the respondent court. At the outset of the probable cause hearing, Morehead presented a motion in limine to exclude the 2011 evaluation reports prepared by Dr. Clipson and Dr. Schwartz. Morehead argued 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 February 2012, Morehead filed a supplement to his motion in limine that included 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."

In opposition, the district attorney submitted a copy of a declaration, dated April 23, 2010, from Amy Phenix, Ph.D., the psychologist who developed the SVPA standardized assessment protocols. Dr. Phenix expressed the opinion the 2009 SAP "comports with the generally accepted definition of a 'standardized assessment protocol'" and "comprises a 'standardized assessment protocol' according to general acceptance in the field of psychology."

Dr. Clipson and Dr. Schwartz testified at the probable cause hearing. In March 2012, the respondent court issued a written ruling that denied Morehead's motion in limine. The respondent court concluded the 2009 SAP "meets and exceeds the statutory criteria of section 6601, subdivision (c)" and therefore is a valid standardized

assessment protocol. The court also concluded (1) section IV.D. of the 2009 SAP, which requires the evaluators to use certain assessment tools, had been submitted to the OAL as an emergency regulation and approved as a permanent regulation in September 2009 and (2) the rest of the 2009 SAP consists of statements from the SVPA and case law and therefore did not require approval as a regulation by the OAL. Dr. Clipson's February 2011 report and Dr. Schwartz's February 2011 report were received in evidence.

On March 16, 2012, the respondent court found, pursuant to section 6602, probable cause existed to believe Morehead met the criteria for commitment as a sexually violent predator.

#### **HISTORY OF WRIT PETITION PROCEEDINGS**

In May 2012, Morehead 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. Clipson and Dr. Schwartz. We summarily denied Morehead's writ petition.

Morehead 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. Clipson's February 2011 evaluation report and Dr. Schwartz'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 Morehead's petition for writ of mandate or prohibition, to which Morehead 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 Morehead, we resubmitted the matter.

## DISCUSSION

### I.

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

Morehead argues Dr. Clipson's February 2011 evaluation report and Dr. Schwartz'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, Morehead 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

[Morehead] 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].) Morehead 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 Morehead was a sexually violent predator under both the 2009 SAP and an earlier version of the standardized assessment protocol, “it is clear that the 2007 protocol error did not materially affect the outcome of his probable cause hearing.” (*Ibid.*)

Morehead’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. Clipson’s February 2011 evaluation report and Dr. Schwartz’s February 2011 evaluation report were new evaluations of Morehead. At the probable cause hearing, Dr. Clipson testified his 2011 valuation of Morehead was a new evaluation under section 6601. Dr. Clipson explained that an updated evaluation focuses on “what happened from the last point of interview,” while a new evaluation under *Ronje* “cover[s] the entire history, you re-visit things that perhaps you discussed before but you want to talk more about.” He testified that for the 2011 evaluation, he reviewed Morehead’s history from the beginning.

Our review of Dr. Clipson’s 30-page February 2011 evaluation report and Dr. Schwartz’s 44-page February 2011 evaluation report confirms to us they are new evaluations under section 6601(c), not updated evaluations under section 6603, subdivision (c). Dr. Clipson conducted a clinical interview of Morehead and considered

his entire psychiatric, family, criminal, and qualifying offense history, and reassessed all of the commitment criteria and risk factors. Dr. Schwartz's February 2011 evaluation report notes it is a "Ronje evaluation." That evaluation report states that Dr. Schwartz conducted a clinical interview of Morehead and considered his entire psychiatric, family, criminal, and qualifying offense history and interviewed Morehead as part of the 2011 evaluations of him. Neither Dr. Clipson nor Dr. Schwartz merely updated previous diagnoses; rather, their reports demonstrate they both started anew in reaching the conclusion Morehead met the criteria for commitment as a sexually violent predator.

## II.

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

Morehead argues that Dr. Clipson and Dr. Schwartz, though purporting to use the 2009 SAP, in fact used the 2007 SAP in preparing their 2011 evaluations of him. According to Morehead, the 2011 evaluation reports prepared by Dr. Clipson and Dr. Schwartz 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. Clipson and Dr. Schwartz used the 2007 SAP in preparing their 2011 evaluation reports of Morehead, 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 Morehead make such a showing. Morehead does not contend any of the reports prepared by Dr. Clipson and Dr. Schwartz, or any of their diagnoses and conclusions, are inaccurate or otherwise invalid.

Our review of the record leads us to conclude Dr. Clipson and Dr. Schwartz followed the 2009 SAP in their 2011 evaluations of Morehead. At the probable cause hearing, both Dr. Clipson and Dr. Schwartz testified they followed the 2009 SAP in their respective 2011 evaluations of Morehead.

Morehead argues Dr. Clipson and Dr. Schwartz followed the 2007 SAP in their 2011 evaluations “[s]ince each of the doctor’s reports contain[s] provisions required by the 2007 SAP, and these same provisions are not required by or even mentioned in the 2009 SAP.” Dr. Clipson’s and Dr. Schwartz’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 Morehead argues, Dr. Clipson’s and Dr. Schwartz’s 2011 evaluation reports used the headings “Identifying Data,” “Findings,” and “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.”

In addition, Dr. Schwartz testified his 2011 evaluation report of Morehead followed the same format as the prior evaluation report, not because he followed the 2007 SAP, but because “I’ve been doing this a long time and I’m comfortable with that format.” Dr. Clipson testified, “the format essentially was dictated by the statute.”

As further proof that Dr. Clipson and Dr. Schwartz did not follow the 2009 SAP, Morehead asserts they drafted their conclusions in a specific format required by the 2007 SAP.<sup>3</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

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<sup>3</sup> Dr. Clipson concluded: “Based on the above information, in my opinion the patient DOES meet the criteria as a sexually violent predator as described in Section 6600(a) of the Welfare and Institutions Code.” (Boldface omitted.) Dr. Schwartz concluded: “Based on the above information, it is this evaluator’s professional opinion that Mr. Morehead MEETS the criteria as a sexually violent predator as described in Section 6600(a) of the Welfare and Institutions Code.”

appropriate treatment and custody?” The findings in Dr. Clipson’s 2011 evaluation report and Dr. Schwartz’s 2011 evaluation report track this question and answer it. “Dr. [Clipson] and Dr. [Schwartz] 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].)

Morehead contends Dr. Clipson and Dr. Schwartz 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. [Clipson] and Dr. [Schwartz] decided to follow procedures and practices and to apply tests, instruments, and actuarial risk tools that were 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. Clipson and Dr. Schwartz 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 Morehead.

Morehead argues Dr. Clipson and Dr. Schwartz used the 2007 SAP because, at the beginning of their respective 2011 evaluation reports, each stated he provided Morehead 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].

Morehead argues that Dr. Clipson “presumably” followed the 2007 SAP in conducting the clinical interview on February 10, 2011 because Morehead refused to sign the notice, and the 2007 SAP stated the inmate “may want to interview without signing the Notification.” (2007 SAP, *supra*, at p. 10.) The 2009 SAP does not require the person to sign a notice form before being interviewed and states, “[i]t is not required that the person understand” the information provided by the notification given. (2009 SAP, *supra*, at p. 3.) Thus, the fact Dr. Clipson interviewed Morehead after he refused to sign the notice form does not mean Dr. Clipson improperly followed the 2007 SAP.

Morehead also argues that Dr. Clipson and Dr. Schwartz followed the 2007 SAP by including in their respective 2011 evaluation reports a statement, required by the 2007 SAP, on the question whether Morehead’s future sexually violent acts and offenses would, or likely would, be predatory in nature. “But the fact Dr. [Clipson] and Dr. [Schwartz] 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.” (*Rabuck, supra*, \_\_Cal.App.4th at p. \_\_ [p. 15].)

### III.

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

Morehead 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. The district attorney, in response, relies on Dr. Phenix’s declaration. Dr. Phenix, who was instrumental in developing the assessment protocols under the SVPA, declared the

2009 SAP is a standardized assessment protocol according to generally accepted principles of psychology.

The respondent court concluded that Morehead did not overcome “the strong presumption of regularity accorded administrative rules and regulations” and that the 2009 SAP is a “genuine” standardized assessment protocol because it “meets and exceeds the statutory criteria of section 6601, subdivision (c).” It is not entirely clear whether, how, and to what extent the respondent court considered Dr. Wollert’s declaration, Dr. Halon’s declaration, and Dr. Phenix’s declaration, in concluding the 2009 SAP is a valid standardized assessment protocol.<sup>4</sup> Based on the order, it appears the respondent court did not find Dr. Wollert’s and Dr. Halon’s declarations persuasive and did not consider Dr. Phenix’s declaration at all. The order expressly relies on section 6601 and the 2009 SAP itself to conclude “the 2009 SAP qualifies as the [standardized assessment protocol] required by section 6601.”

Whether the 2009 SAP constitutes a true 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 concluded, based on statute and California Supreme Court authority, 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.**

Morehead 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 Morehead would have the burden of

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<sup>4</sup> Morehead asserts the respondent court denied him the opportunity to cross-examine Dr. Phenix, but he does not support that assertion with a citation to the record.

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. Morehead 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.