

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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PEOPLE OF THE STATE OF CALIFORNIA,)

Petitioner,)

Case No.: S225562 Frank A. McGuire Clerk
Deputy

vs.)

) DCA Case
) No. G050827

THE SUPERIOR COURT OF THE STATE)

OF CALIFORNIA FOR THE)

COUNTY OF ORANGE,)

) (OC Superior Court
) Case No. M-9531)

Respondent,)

)
RICHARD ANTHONY SMITH,)

Real Party in Interest.)
_____)

ANSWER BRIEF ON THE MERITS

FOLLOWING THE APPEAL FROM THE
SUPERIOR COURT OF ORANGE COUNTY
THE HONORABLE KIMBERLY MENNINGER, JUDGE PRESIDING

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SUMMARY OF ARGUMENT

The petitioning attorney in a Sexually Violent Predator Act (“SVPA”) civil commitment proceeding is entitled to obtain and review all medical and psychological treatment records that were reviewed by the state evaluators in conducting their updated evaluations. On October 7, 2015, Senate Bill No. 507 was signed by the Governor and chaptered by the Secretary of State. (Sen. Bill No. 507, approved by Governor, Oct. 7, 2015, Sen. Final Hist. (2015-2016 Reg. Sess.) p. 2.) This bill was introduced by Senator Fran Pavley to amend Welfare and Institutions Code section 6603¹ to ensure that the petitioning attorney in an SVPA proceeding would have the same access to the medical and psychological records as the evaluators performing updated Sexually Violent Predator (“SVP”) evaluations. (Sen. Com. on Public Safety, Rep. on Sen. Bill No. 507 (2015-2016 Reg. Sess.) April 27, 2015, attached as Exhibit 1, pp. 34-35, 40.) The bill also provided that upon request the court shall issue a subpoena or court order for the requested records. (*Ibid.*) The bill further authorized that the attorneys may use the records in the commitment proceeding but would prohibit disclosure for any other purpose. (*Ibid.*) Section 6603 was amended to add subdivision (j) to clarify ambiguity in the

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

existing statutory language and resolve the inconsistent judicial interpretations as to whether the district attorney is entitled to the medical and psychological treatment records. (Sen. Com. on Public Safety, Rep. on Sen. Bill No. 507 (2015-2016 Reg. Sess.) April 27, 2015, attached as Exhibit 1, pp. 34-35, 40.) The newly enacted subdivision (j)(1) of amended section 6603 now expressly provides that the district attorney shall have full and complete access to the State Hospital information that is otherwise confidential under section 5328.²

² Amended section 6603, subdivision (j) states:

(j)(1) Notwithstanding any other law, the evaluator performing an updated evaluation shall include with the evaluation a statement listing all records reviewed by the evaluator pursuant to subdivision (c). The court shall issue a subpoena, upon the request of either party, for a certified copy of these records. The records shall be provided to the attorney petitioning for commitment and the counsel for the person subject to this article. The attorneys may use the records in proceedings under this article and shall not disclose them for any other purpose.

(2) This subdivision does not affect the right of a party to object to the introduction at trial of all or a portion of a record subpoenaed under paragraph (1) on the ground that it is more prejudicial than probative pursuant to Section 352 of the Evidence Code or that it is not material to the issue of whether the person subject to this article is a sexually violent predator, as defined in subdivision (a) of Section 6600, or to any other issue to be decided by the court. If the relief is granted, in whole or in part, the record or records shall retain any confidentiality that may apply under Section 5328 of this code and Section 1014 of the Evidence Code.

(3) This subdivision does not affect any right of a party to seek to obtain other records regarding the person subject to

(continued...)

The district attorney has not therefore addressed this issue in this Answer Brief on the Merits.

As to the remaining issue on review, the legislative history of the recent amendment to section 6603 reflects that the Legislature has declined to provide a statutory resolution to that question.³ The Legislature's amendment to section 6603 does however provide that the petitioning attorney "may use the [confidential] records in proceedings under this article and shall not disclose them for any other purpose." (Welf. & Inst. Code, § 6603, subd. (j)(1), as amended by Stats. 2015, ch. 507, § 1.) Further, nowhere in the SVPA does the Legislature explicitly prohibit the district attorney from disclosing confidential information to an independent expert who has been retained as a consultant

² (...continued)
this article.

(4) Except as provided in paragraph (1), this subdivision does not affect any right of a committed person to assert that records are confidential under Section 5328 of this code or Section 1014 of the Evidence Code.
(Welf. & Inst. Code, § 6603, subd. (j), as amended by Stats. 2015, ch. 507, § 1.)

³ 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 [SVPA] ... is entitled to review otherwise confidential treatment information under Section 5328 of the Welfare and Institutions Code.

(Stats. 2015, ch. 507, § 2.)

and/or an expert witness in an SVPA proceeding. Moreover, there is no limiting provisions in the SVPA as it relates to the use of expert witnesses, though it provides for additional rights in this regard for the alleged SVP.⁴ Since the Legislature has determined that the petitioning attorney shall have access and receive confidential records, it logically follows that the attorney should be allowed to use those records to litigate the SVP petition. The value of those records is greatly diminished without the assistance of an expert to interpret them. By preventing the District Attorney from disclosing confidential records to their expert, the court is effectively eliminating the expert from the process altogether.

To determine the intended effect of arguably conflicting provisions of section 5328 and the SVPA, the courts must harmonize the intent of the confidentiality provision in section 5328 with the purpose of the SVPA. (See *Medical Board of California v. Superior Court* (2001) 88 Cal.App.4th 1001, 1013.) The primary purpose of the confidentiality provision in section 5328

⁴ Since the SVPA proceedings are civil, not criminal, the alleged SVP does not have the same rights as a criminal defendant. The Legislature therefore have enumerated additional rights that the alleged SVP would not ordinarily have in a civil proceeding, such as the right to have an expert appointed at no cost. (See Welf. & Inst. Code, § 6603, subd. (a).)

is to “encourage[] persons with mental problems to seek, accept and undergo treatment and to be open and candid in treatment.” (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 948.) The primary purpose of the SVPA is to accurately identify the SVPs, and confine and treat them in order to protect the public. (*People v. Yartz* (2005) 37 Cal.4th 529, 540.)

No person in custody pending an SVP commitment petition would reasonably expect any level of confidentiality in light of the statutory provisions allowing access to treatment records to a variety of psychologists for the purpose of preparing SVP evaluations; particularly, since these evaluations are used solely for the purpose of litigating the SVP petition.⁵ The SVPA also allows the district attorney access to these confidential records. The SVPA has therefore eliminated any assurance of confidentiality. In light of this diminished confidentiality coupled with the overriding public safety interest, the district attorney should be able to disclose the SVPs confidential State Hospital records to a retained expert in order to competently present the SVP petition at a probable cause hearing or trial.

⁵This Court in *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 807, acknowledged that the Legislature was aware of the conflict between section 5328 and the SVPA, and recognized that the SVPA does not protect confidential treatment records.

PROCEDURAL HISTORY

On March 6, 2002, the District Attorney of Orange County filed a petition seeking to commit real party in interest, Richard Anthony Smith, (“Smith”) as an SVP pursuant to section 6600, et. seq., based on two state evaluations that both concluded Smith has a currently diagnosed mental disorder such that he is likely to engage in acts of sexual violence without appropriate treatment and custody within the meaning of section 6601, subdivisions (c) and (d). (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 2 and Exhibit B.) Updated evaluations were later conducted and again concluded Smith met the SVP criteria.

On February 27, 2007, Smith waived his right to a probable cause hearing pursuant to section 6602, subdivision (a). (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 19.) On March 23, 2010, Smith filed a motion pursuant to *In re Ronje* (2009) 179 Cal.App.4th 509, requesting the court order new evaluations and a new probable cause hearing. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 21.) On November 23, 2010, the court granted that request. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 24.)

The California Department of State Hospitals (“CDSH”) assigned state evaluators Nancy Rueschenberg, Ph.D. and Dana Putnam, Ph.D. to conduct

these new evaluations. On February 2, 2011, Dr. Rueschenberg prepared an evaluation and opined that Smith no longer meets the SVP criteria. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit C.) On February 7, 2011, Dr. Putnam prepared an evaluation and also opined that Smith no longer meets the SVP criteria. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit D.)

On March 22, 2011, the People filed a motion to allow the People's retained expert Harry Goldberg, Ph.D. to conduct a mental examination of Smith and to review Smith's state hospital records. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit E.) On April 1, 2011, the People filed an addendum to that motion and attached declaration. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit F.) On April 15, 2011, the court granted that motion. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 28.)

On March 23, 2011, Smith filed an Entry of Plea in Abatement seeking to dismiss the petition based upon the two negative evaluations. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 26.) The motion was denied by the court and Smith sought a writ of mandate/prohibition. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit G, p. 80.) On March 28, 2012, in an unpublished opinion,

the appellate court granted Smith's writ petition and directed the trial court to dismiss the SVP petition. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit H.)

On June 27, 2012, this Court granted review and hold pending the disposition in *Reilly v. Superior Court* (2013) 57 Cal.4th 641. (*Smith v. Superior Court, supra*, G045119, review granted Jun. 27, 2014, No. S202338.)

On November 13, 2013, this Court issued its opinion in *Reilly v. Superior Court, supra*, 57 Cal.4th 641 and transferred *Smith v. Superior Court, supra*, G045119, back to the appellate court for reconsideration in light of that decision. On January 14, 2014, the appellate court issued its order in *Smith v. Superior Court, supra*, G045119, granting the petition in part and denying the petition in part. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit I.) This court granted the petition with respect to the trial court's order granting the People's motion to compel respondent to undergo a mental examination and to allow access to Smith's state hospital records. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit I, p. 100.)

On March 21, 2014, pursuant to this Court's order, the Honorable Richard M. King vacated the court's previous orders compelling Smith to undergo a mental examination by the People's retained mental health expert and allow that expert access to Smith's state hospital records. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit A, p. 37.) A jury trial date was set for August 25, 2014. (*Ibid.*)

On June 16, 2014, Smith served the People with a "Demand For Exchange Of Expert Witness Information pursuant to Code of Civil Procedure Section 2034.210." (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit J.) On July 7, 2014, the People timely served Smith with the "People's Expert Information" designating state evaluator Dr. Putnam and retained expert Dr. Dawn Starr as the People's experts. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit K.) On July 17, 2014, Smith filed a "Notice and Motion to Exclude Dr. Starr as an Expert Witness and Preclude Petitioner from Disclosing Any Confidential Information to Dr. Starr." (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit M.)

On July 29, 2014, Smith served the People with his expert exchange naming Dr. Mark A. Schwartz, Dr. Dana E. Putnam, and Dr. Howard Barbaree as his trial experts. (Petn. for Writ of Mandate/Prohibition, Exhibit N, filed under seal.) This expert information included an evaluation report dated July 22, 2014, by Smith's retained expert witness Dr. Schwartz, and a copy of Dr. Putnam's 2011 evaluation. By way of civil discovery and pursuant to section 6603, subdivision (c)(1), the People requested all documents listed in these experts' evaluations that were relied upon by the experts in preparing their evaluations and forming their opinions. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibits O and P.)

On September 24, 2014, the People filed a "Motion for Court Order To Release Records To Retained Expert And Protective Order." (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit Q.) On September 29, 2014, the trial court denied the People's motion. (Petn. for Writ of Mandate/Prohibition Lodged Documents, Exhibit R, p. 259.) The People filed a writ of mandate/prohibition in the appellate court seeking an order granting the People's request for protective order and request to show their retained expert the confidential documents obtained pursuant section 6603. The appellate court requested an informal response. On January 22, 2015, the

appellate court issued a notice pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171. (DCA Docket Case No. G050827). On February 24, 2015, the appellate court granted the petition and issued a peremptory writ of mandate in the first instance compelling the respondent court to issue an order allowing the People to provide their retained expert, Dr. Starr, the records relied upon by the state evaluators in conducting their updated evaluations. (*People v. Superior Court (Smith)*, (Feb. 24, 2015, G050827) [nonpub. opn.].) On April 6, 2015, Smith filed the underlying petition for review which was granted by this Court.

ARGUMENT

I.

THE DISTRICT ATTORNEY SHOULD NOT BE PROHIBITED AS A MATTER OF LAW FROM DISCLOSING CONFIDENTIAL STATE HOSPITAL RECORDS TO A RETAINED EXPERT AS NECESSARY TO PROPERLY PRESENT THE SVP PETITION FOR COMMITMENT.

A. Withholding Confidential Records from the District Attorney's Retained Expert Thwarts the Legislative Intent of the SVPA.

The SVPA does not prohibit the petitioning attorney from presenting evidence at trial through a retained expert; thus the SVPA should not preclude the petitioning attorney from disclosing otherwise confidential information obtained pursuant to the statutory provisions of the SVPA to that expert.

Moreover, adopting a rule that would hinder the petitioning attorney from presenting the most reliable evidence to the trier of fact would frustrate the intent and purpose of the SVPA.

The SVPA was enacted in 1995, codified in Article 4 of Division 6, sections 6600 through 6609.3. (Stats. 1995, ch. 763, § 3.) The intent of the SVPA was set forth in a statement accompanying the Act, which reads:

“The Legislature further finds and declares that while these individuals have been duly punished for their criminal acts, they are, if adjudicated sexually violent predators, a continuing threat to society. The continuing danger posed by these individuals and the continuing basis for their judicial commitment is a currently diagnosed mental disorder which predisposes them to engage in sexually violent criminal behavior. It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes.” (Stats. 1995, ch. 763, § 1.)

(*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1145, fn. 5; see also *People v. Yartz, supra*, 37 Cal.4th at p. 540.) “The process for determining whether a convicted sex offender meets the foregoing requirements takes place in several stages, both administrative and judicial.” (*Hubbart v. Superior Court, supra*, 19 Cal.4th at p. 1145.)

The SVPA has built in procedural safeguards to ensure that only those persons who meet the SVP criteria are ensnared in the judicial process. Before a convicted sex offender may be subject to judicial proceedings instituted

under the SVPA, there is an administrative screening process. That process begins with the Secretary of the Department of Corrections and Rehabilitation (“CDCR”) to determine if an inmate “may be” a sexually violent predator. (Welf. & Inst. Code, § 6601, subd. (a)(1).) If the inmate meets the initial screening requirements the person is then referred to the next screening level described by section 6601, subdivision (b). This secondary screening requires the CDCR and the Board of Parole Hearings review the inmate’s social, criminal and institutional history. (Welf. & Inst. Code, § 6601, subd. (b).) This screening is conducted in accordance with a structured screening instrument developed by the CDSH. (*Ibid.*)

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 [CDSH] for a full evaluation of whether the person meets the criteria in Section 6600.

(Welf. & Inst. Code, § 6601, subd. (b).)

Section 6601, subdivisions (c) through (g) describe the final screening requirements – the evaluation process – before the CDSH may refer a person to the District Attorney for the filing of an SVP petition and commence the judicial process. “The purpose of this evaluation is not to identify SVP’s but, rather, to screen out those who are not SVP’s.” (*People v. Medina* (2009) 171 Cal.App.4th 805, 814.) These administrative procedures provide the

safeguards to ensure “meritless petitions” do not reach trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063.)

The evaluation process requires that two psychiatrist or psychologists evaluate the inmate to determine if the inmate meets the statutory SVP criteria.

(Welf. & Inst. Code, § 6601, subd. (d).) An SVP 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.

(Welf. & Inst. Code, § 6600, subd. (a)(1).) A “[d]iagnosed mental disorder”

is defined to include

[A] congenital or acquired condition affecting the emotional or volitional capacity that 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.

(Welf. & Inst. Code, § 6600, subd. (c).) The petitioning attorney bears the burden of proving beyond a reasonable doubt to the court or an unanimous jury that the alleged SVP meets the statutory criteria. (Welf. & Inst. Code, §§ 6604, 6603, subds. (a), (f)) The determination as to whether the person meets the statutory definition requires the person be examined

“[I]n accordance with a standardized assessment protocol” that considers “diagnosable mental disorders, as well as various factors,” including “criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder,” which factors are “known to be associated with the risk of reoffense among sex offenders.” (§ 6601, subd. (c).)

(*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 910.) If both evaluators concur that the inmate is an SVP, section 6601, subdivision (h) requires the CDSH forward a request for a petition to be filed for commitment under the SVPA to the District Attorney of the designated county. (Welf. & Inst. Code, § 6601, subd. (d).) If the evaluations result in a difference of opinion, then the inmate is subject to further examination by two independent evaluators. (Welf. & Inst. Code, § 6601, subd. (e).) If both independent evaluators agree that the inmate meets the SVP criteria the CDSH must refer the petition to be filed for an SVP commitment. (Welf. & Inst. Code, § 6601, subd. (f).) If, however, the independent evaluators do not agree or both agree that the inmate does not meet the SVP criteria the inmate is released and no petition is filed. (*Ibid.*)

The filing of the petition requires concurring opinions regarding the inmates *current* mental condition or 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. (*People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th at p. 920.) It is the determination as to whether a person

meets the SVP legal criteria set forth in the statute that is critical to the initial filing and validity of the SVP petition.

Consistent with this tenet, this court in *Ghilotti* noted:

The evaluators' *professional* judgment is therefore to be exercised within a specified *legal* framework, and their legally accurate understanding of the statutory criteria is crucial to the Act's proper operation.

(*People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th at p. 910, italics in original.) This court further explained that

[T]he SVPA makes the evaluators' conclusions, reached pursuant to the specific procedures and standards described above, critical to the legal authority to file a petition for commitment or recommitment. (§ 6601, subds. (d)-(f).) ... The statutory scheme thus necessarily calls into question whether the evaluators, in reaching their conclusions at this critical gatekeeping stage, have accurately understood the statutory criteria.

(*People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th at p. 910.) Thus, the reliability and accuracy of the evaluators' reports and their expert opinion in determining if an inmate meets the SVP criteria is necessary to ensure that only those who meet the statutory criteria are committed under the SVPA.

The SVPA provides that

Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county pursuant to subdivision (I) who may file a petition for commitment.

(Welf. & Inst. Code, § 6601, subd. (d).) The district attorney makes the final decision as to whether to file the SVP petition based upon a review of the concurring evaluations and the supporting documentation. (Welf. & Inst. Code, § 6601, subd. (I).)

The filing of the petition triggers a new round of proceedings under the Act. The superior court first holds a hearing to determine whether there is “probable cause” to believe that the person named in the petition is likely to engage in sexually violent predatory criminal behavior upon release. [Citations.] [Fn. omitted.] The alleged predator is entitled to the assistance of counsel at this hearing. If no probable cause is found, the petition is dismissed. However, if the court finds probable cause within the meaning of this section, the court orders a trial to determine whether the person is an SVP under section 6600. The alleged predator must remain in a “secure facility” between the time probable cause is found and the time trial is complete. [Citation.] [Fn. omitted.]

(*Hubbart v. Superior Court, supra*, 19 Cal.4th at pp. 1146-1147.)

The district attorney has the burden of showing that the inmate has a current mental condition that qualifies him as an SVP. (*Albertson v. Superior Court, supra*, 25 Cal.4th at p. 802.) If the district attorney determines that updated evaluations are needed in order to present the case for commitment,

the SVPA allows the district attorney to request that the CDSH perform these evaluations. (*Id.* at p. 805; Welf. & Inst. Code, § 6603, subd. (c)(1).) These updated evaluations are based upon

[A]vailable medical and psychological records, including treatment records, consultation with current treating clinicians, and interview of the person being evaluated, whether voluntarily or by court order.

(Welf. & Inst. Code, § 6603, subd. (c)(1).)⁶

The newly enacted subdivision (j) of section 6603 explicitly authorizes the district attorney to obtain certified copies of all records, including confidential treatment records, reviewed by the state evaluators in the preparation of any updated SVP evaluations. (Welf. & Inst. Code, § 6603, subd. (j), as amended by Stats. 2015, ch. 507, § 1.) The updated evaluations need not concur in order to proceed to trial on the petition; “[they] are intended for informational and evidentiary purposes.” (*Gray v. Superior Court* (2002) 95 Cal.App.4th 322, 328.) The trier of fact must therefore resolve any conflicts in the evidence. (See *Reilly v. Superior Court, supra*, 57 Cal.4th at pp. 655-656.) The purpose of the amendment to section 6603 is to provide the

⁶Amended section 6603 now includes subdivision (j) which authorizes the district attorney may obtain all confidential records reviewed by the state evaluators. (Welf. & Inst. Code, § 6603, subd. (j), as amended by Stats. 2015, ch. 507, §1.)