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August 9, 2016

Frank A. McGuire
Supreme Court Clerk/Administrator
350 McAllister Street
San Francisco, CA 94102

RE: *People v. Superior Court (Smith)*
No. S225562
(DCA No. G050827; Super. Ct. No. M-9531)

To the Clerk of the Supreme Court:

INTRODUCTION

The People submit this supplemental letter brief at the request of this Court addressing the following issues: I) Would application of Welfare and Institutions Code section 6603, subdivision (j)[1] ("section 6603(j)") to this case violate real party in interest Richard Anthony Smith's ("Smith") right to equal protection of the law by treating him differently from mentally disordered offenders ("MDO") and mentally disordered sex offenders ("MDSO")? II) Can section 6603(j) be applied to Mr. Smith's case despite the fact that the case arose before that section was amended to add subdivision (j)? III) Does the disclosure authorized by section 6603(j) apply to records reviewed by evaluators performing initial and/or replacement evaluations? IV) Can the district attorney share information disclosed pursuant to section 6603(j) with its retained expert witness?

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

I. APPLICATION OF SECTION 6603(j) OF THE SEXUALLY VIOLENT PREDATOR ACT ("SVPA") DOES NOT VIOLATE MR. SMITH'S RIGHT TO EQUAL PROTECTION OF THE LAW.

Application of section 6603(j) to this case does not violate Mr. Smith's right to equal protection of the law for several reasons. First, for purposes of the application of section 6603(j) to Mr. Smith's case he is not similarly situated to the MDO or the MDSO.[2] Second, if this Court were to conclude Mr. Smith is similarly situated, this law does not treat an individual pending SVPA commitment proceedings in an unequal manner from a prisoner or committee pending an MDO or MDSO proceeding. Third, there is both a rational basis and a compelling state reason for the implementation of this statute to the SVPA proceedings that is necessary to further the state's interest in ensuring that sexually violent predators are accurately identified so that they can be confined and treated for the protection of the public.

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[2] The People recognize that this Court has held an alleged Sexually Violent Predator ("SVP") with pending commitment proceedings under the SVPA is similarly situated to the MDO and MDSO because all three have the same interest at stake, namely "the loss of liberty through involuntary civil commitment[.]" (*People v. McKee* (2010) 47 Cal.4th 1172, 1204 ("*McKee I*").) The application of section 6603(j), however, is unique in that its provisions would not be applicable to the MDO or MDSO proceedings because of procedural differences between the MDO and MDSO Acts and the SVPA. Whether this Court would characterize those distinctions as a rationale for treating the alleged SVP differently, or find that these groups are not similarly situated for purposes of the challenged law, the result is the same. The application of section 6603(j) to Mr. Smith does not violate equal protection of the law.

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. [Citation.]

(*City of Cleyburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439 [87 L.Ed.2d 313, 105 S.Ct. 3249].)

> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. [Citations.]

(*Id.* at p. 440.) The courts will apply a strict scrutiny standard when the statute classifies by race, alienage or national origin, or where the law impinges upon a personal right protected by the Constitution. (*Ibid.*) In the present case, Mr. Smith is not a member of a suspect class and the right at stake is not a fundamental right but rather an alleged statutory right that provides confidentiality to certain state hospital records. In *McKee I*, the SVP's right at stake was more intertwined with his liberty interest; whereas here, the right at stake is a statutory right to privacy. Thus, rational basis review should be the applicable standard in this case.

This Court in *McKee I*, held that the MDO and NGI were similarly situated for the purpose of the challenged provision of the SVPA, which was amended by Proposition 83 in 2006 and changed the SVP's civil commitment from a two year term to an indeterminate term and shifted the burden to the SVP to show he/she no longer qualifies as an SVP. (*People v. McKee*, supra, 47 Cal.4th at p. 1203.) This Court explained that in determining if two groups are similarly situated the relevant inquiry is whether the groups are

"sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws." (*People v. McKee*, supra, 47 Cal.4th at p. 1202.) Equal protection however does not require "absolute equality." (*People v. Romo* (1975) 14 Cal.3d 189, 196.)

A. MR. SMITH IS NOT SIMILARLY SITUATED TO THE MDO AND MDSO FOR PURPOSES OF THE APPLICATION OF SECTION 6603(j).

Unlike in *McKee I, supra*, Mr. Smith is not similarly situated to the MDO or MDSO with regard to the application of section 6603, subdivision (j)(1) ("section 6603(j)(1)") to his SVPA proceedings. Section 6603(j)(1) applies to updated evaluations conducted pursuant to section 6603, subdivision (c)(1). The SVPA necessitates updated evaluations because the pre-trial litigation often extends beyond one year. There is no comparable provision in the MDO or MDSO statutory scheme because the MDO and MDSO Acts provide for one-year commitments requiring that the district attorney file a new petition annually to extend the commitment. (See Pen. Code, § 2972, subd. (c) and former Welf. & Inst. Code, § 6316.2, was repealed by Stats. 1981, ch. 928, p. 3485, § 2.) Under the MDO Act, the State Department of State Hospitals ("DSH") is required to order and submit an annual evaluation regarding the MDO's state of remission along with accompanying affidavits in support of that evaluation to the district attorney. (Pen. Code, § 2970, subd. (a).) This would necessarily require providing the district attorney confidential treatment records.

The former MDSO Act has a similar provision that requires that if the Director of Mental Health has good cause to believe the MDSO still meets the statutory criteria, the director may submit supporting evaluations and the case file to the prosecuting attorney who may then file a petition for extended commitment no later than 90 days before the expiration of the original commitment. (Former Welf. & Inst. Code, § 6316.2, subd. (b).) Both the MDO and MDSO Acts provide for annual evaluations and supporting affidavits or documentation to be submitted to the district attorney in support of a petition for extended commitment. This documentation includes information that is deemed confidential pursuant to section 5328.

Because the SVPA provides for an indeterminate commitment, updated evaluations are often necessary to obtain a current mental diagnosis in order to present the commitment petition for trial. Section 6603, subdivision (c)(1) provides the authority to order updated mental evaluations. The newly enacted section 6603(j)(1) now mandates the evaluator lists all the documents reviewed in preparing the updated evaluation, and also requires the court issue a subpoena for certified copy of those records upon request of either party. This provision of the SVPA is necessary when the pretrial proceedings extend beyond one year. Since the MDO and MDSO are subject to one year commitments and their statutory schemes provide for annual reviews, they are not similarly situated to the alleged SVP as to the application of section 6603(j)(1).

B. THE APPLICATION OF SECTION 6603(j) TO MR. SMITH DOES NOT RESULT IN UNEQUAL TREATMENT.

Mr. Smith claims that the application of this statute violates equal protection of the law because:

> [T]he 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. [Citations.]

(Reply/Supplemental Brief at pp. 4-5.)

Mr. Smith's claim fails. 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.

The MDO Act is codified in sections 2960 et seq. of the Penal Code.

> "The MDO Act establishes a comprehensive scheme for treating prisoners who have severe mental disorders that were a cause or aggravating factor in the commission of the crime for which they were imprisoned. (See § 2960.) The act addresses treatment in three contexts – first, as a condition of parole (§ 2962); then, as continued treatment for one year upon termination of parole (§ 2970); and finally, as an additional year of treatment after expiration of the original, or previous, one-year commitment (§ 2972)." [Citation.]

(*People v. Cobb* (2010) 48 Cal.4th 243, 251.) The MDO Act civil commitment procedures are set forth in Penal Code sections 2970 and 2972. These sections extend the MDOs civil commitment after the expiration of their parole or release from prison, and for annual recommitment thereafter.

Prior to a prisoner's release on parole, Penal Code section 2962, subdivision (d)(1) requires that the person in charge of treating the prisoner, and a practicing psychiatrist or psychologist from the DSH evaluate the prisoner. (Pen. Code, § 2962, subd. (d)(1).) In addition, a chief psychiatrist of the Department of Corrections and Rehabilitation ("CDCR") must certify to the Board of Prison Hearings that the prisoner meets the MDO requirements. (*Ibid.*) Penal Code section 2970, subdivision (a) provides that prior to the termination of parole or release from prison, the director of the program overseeing the MDO's inpatient or outpatient treatment program (or the Secretary of the CDCR if the MDO refused treatment as a condition of parole) shall submit to the district attorney an evaluation for any MDO whose severe mental disorder is not in remission or cannot be kept in remission without treatment. (Pen. Code, § 2970, subd. (a).) Upon request by the district attorney this evaluation shall be accompanied by *supporting affidavits*. (*Ibid.*) The MDO Act therefore provides a statutory mechanism to obtain confidential information from the MDO's treating professionals and those providing services pursuant to the Act.

The SVPA has a similar provision. Section 6601, subdivision (d) states:

> 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 SVPA requires that the initial evaluation assess the alleged SVP's mental disorder as well as risk factors that

include "criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (Welf. & Inst. Code, § 6601, subd. (c).)

The civil commitment process for the MDO and MDSO are similar. While the statutory provisions for commitment of the MDSO were repealed in 1981, it applied prospectively only. (Stats. 1981, ch. 928, p. 3485, § 2.) Existing MDSOs are therefore still subject to these provisions. The MDSO Act provided for a civil commitment after conviction of a sex offense, for a period not to exceed the maximum term of imprisonment for the convicted offenses. (Former Welf. & Inst. Code, § 6302, was repealed by Stats. 1981, ch. 928, p. 3485, § 2, and § 6316.1, was repealed by Stats. 1981, ch. 928, p. 3485, § 2.) The MDSO's criminal case was suspended during the commitment. (Former Welf. & Inst. Code, § 6316, was repealed by Stats. 1981, ch. 928, p. 3485, § 2.) Former section 6316.2 provided for an extension beyond the maximum term if the person

> Suffers from a mental disease, defect, or disorder, and as a result of such mental disease, defect, or disorder, is predisposed to the commission of sexual offenses to such a degree that he presents a substantial danger of bodily harm to others.

(Former Welf. & Inst. Code, § 6316.2, subd. (a)(2).)

Former section 6316.2, subdivision (b) provided:

> If during a commitment under this part, the Director of Mental Health has good cause to believe that a patient is a person described in subdivision (a), the director may submit such **supporting evaluations and case file** to the prosecuting attorney who may file a petition for extended commitment in the superior court which issued the original commitment. Such petition shall be filed no later than 90 days before the expiration of the original commitment. Such petition shall state the reasons for the extended commitment, with accompanying affidavits specifying the factual basis for believing that the person meets each of the requirements set forth in subdivision (a).

(Former Welf. & Inst. Code, § 6316.2, subd. (b), emphasis added.) This provision provided the district attorney access to confidential information contained in both the supporting evaluation and the MDSO's case file.

In addition, the MDO Act and MDSO Act have a mechanism for annual mental evaluations because the commitment term is only one year in length. The MDO statute provides that the written evaluations that are submitted to the district attorney to support a recommitment petition be accompanied by supporting affidavits if requested by the district attorney. (Pen. Code, § 2970, subd. (a).) These affidavits often contain confidential records and treatment information.

The MDSO Act provides that the court appoint evaluators to examine an alleged MDSO to determine if that person meets the statutory criteria. (Former Welf. & Inst. Code § 6307, was repealed by Stats. 1981, ch. 928, p. 3485, § 2.) In addition, Evidence Code section 1017, subdivision (a) provides

an exception to the patient psychotherapist privilege "if the psychotherapist is appointed by order of the court to examine a patient[.]" (Evid. Code, § 1017, subd. (a).) Evidence Code section 1017, subdivision (b) provides:

> There is no privilege if the psychotherapist is appointed by Board of Prison Terms to examine a patient pursuant to the provisions of [MDO Act].

(Evid. Code, § 1017, subd. (b).)[3] Both the MDO and MDSO Acts provide for the release of otherwise confidential information and records to the district attorney during the pendency of the civil commitment proceedings.

In addition to the above described statutory provisions, the rules of discovery in both the MDO and MDSO proceedings also provide release to the district attorney confidential documents that were considered and relied upon for an expert's opinion. The rules of civil and criminal discovery apply to the MDO proceedings. (Pen. Code, § 2972, subd.(a).) The rules of criminal discovery (Pen. Code, § 1054 et seq.) apply to the MDSO. (Former Welf. & Inst. Code, § 6316.2, subd. (c).) These discovery provisions provide for reciprocal discovery.

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[3] Evidence Code section 1017, was amended in 1987 to add subdivision (b). (See Stats.1987, ch. 687, § 1, p. 2178.) This occurred *after* subdivision (h) was added to Penal Code section 2970 extending the rights set forth in Lanterman-Petris-Short Act to the MDO, commencing with section 5325, which includes section 5328. (See Stats. 1985, ch. 1418, §1, p. 5009.) The rights contained in Penal Code 2970, subdivision (h) were later recodified in Penal Code 2972, subdivision (g) in 1986. (See Stats. 1986, ch. 858, § 7, pp. 2955-2956.)

> The purpose of [reciprocal discovery] is to promote ascertainment of truth by liberal discovery rules which allow parties to obtain information in order to prepare their cases and reduce the chance of surprise at trial. [Citation.] Reciprocal discovery is intended to protect the public interest in a full and truthful disclosure of critical facts, to promote the People's interest in preventing a last minute defense, and to reduce the risk of judgments based on incomplete testimony. [Citation.]

(*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1201.) "Consistent with [this] purpose[] ... discovery statutes are to be construed broadly in favor of disclosure .... [Citations.]" (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1249.)

Further, Code of Civil Procedure section 2017.010 provides:

> Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action.

(Code Civ. Proc., § 2017.010.)

While section 5328 provides "[a]ll information and records obtained in the course of providing services" under the civil commitment acts shall be confidential, subdivision (f) of this section allows disclosure to the courts, as necessary to the administration of justice. (See Welf. & Inst. Code, § 5328.) The discovery rules allow the trial court the power to control the admission of evidence at trial. (*People v. Landau* (2013) 214 Cal.App.4th 1, 25.) The trial

court may therefore as necessary to the administration of justice provide confidential, non-privileged relevant evidence to both parties for use in the civil commitment trial. (See *Boling v. Superior Court* (1980) 105 Cal.App.3d 430, 443.)

C. APPLICATION OF SECTION 6603(j) IS NECESSARY TO FURTHER THE COMPELLING STATE INTEREST IN IDENTIFYING SEXUALLY VIOLENT PREDATORS IN ORDER TO PROVIDE THEM TREATMENT AND PROTECT PUBLIC SAFETY.

Finally, if this Court were to conclude that an alleged SVP is similarly situated to the MDO and MDSO and that the application of section 6603(j) treated these groups in an unequal manner, there is a rational basis and a compelling state reason for the application of that law to the SVP and not the MDO and MDSO.[4] As previously discussed, the MDO and MDSO are treated differently because they are not subject to updated evaluations. The required disclosure of information reviewed by an evaluator in conducting an updated evaluation would therefore not apply in an MDO or MDSO proceeding. Nonetheless, there is a compelling state reason to allow the district attorney access to all records reviewed and considered by the expert witnesses at trial in order to ensure that the SVP is accurately identified for the protection of the public.

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[4] While we assert a rational basis review is the applicable standard, we nonetheless provide a compelling state interest for the application of the new statute to Mr. Smith and not the MDO and MDSO.

The court in *People v. McKee* (2012) 207 Cal.App.4th 1325 (*McKee II*) considered whether the government had presented sufficient evidence to show that the unequal treatment of the SVPs, by extending the SVP commitment to an indeterminate term and placing the burden on the SVPs to show they should be released, was necessary to further a compelling state interest for the protection of the public. (*Id.* at p. 1347.) In *McKee II*, the court concluded the People had met their burden. (*Ibid.*) The People had presented sufficient evidence to show that SVPs pose a great risk and unique dangers to women and children, and have diagnostic and treatment differences from MDOs. (*Ibid.*) In addition, expert testimony presented at the hearing reflected that "nearly 90 percent of SVPs are diagnosed with pedophilia or other paraphilias[]" and these typically persist throughout a patient's lifetime. (*Id.* at p. 1344.) And, "only about 25 percent of SVPs participate in treatment." (*Ibid.*) The evidence also reflected SVPs have a higher risk of sexual reoffending than the MDOs. (*Id.* at p. 1342.) Thus, based upon the findings in *McKee II*, it has been shown that SVPs pose a greater public safety risk than MDOs. Application of section 6603(j) to the SVPA proceeding is necessary to further a compelling state interest in the accuracy of the SVP determination to ensure the public safety goals of the SVPA are not compromised. The *McKee II* judicial findings support a compelling reason to provide an exception to section 5328's confidentiality provision so that the district attorney may present all relevant and probative evidence to the trier of fact at

the SVP trial. Thus, section 6603(j)(1) as applied to Mr. Smith's case does not violate equal protection of the law.

II. WHILE GENERALLY A NEWLY ENACTED STATUTE DOES NOT OPERATE RETROSPECTIVELY, THE PROVISIONS OF SECTION 6603(j)(1) ARE STILL APPLICABLE TO MR. SMITH'S CASE.

Effective January 1, 2016, section 6603(j)(1) provides:

> 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.

(Welf. & Inst. Code, § 6603, subd. (j)(1) as amended by Stats. 2015, ch. 576, § 1.)

> A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intends them to do so. [Citations.]

(*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) A Legislature however may make changes to the language of a statute in order to clarify the statutes original meaning. (*Ibid.*) "Such a legislative act has no retrospective effect because the true meaning of the statute remains the same. [Citations.]" (*Ibid.*)

> [Further, t]he Legislature, ... is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.]

(*People v. Harrison* (1989) 48 Cal.3d 321, 329.)

Here, subdivision (j)(1) was added to section 6603 by Senate Bill 507, signed and chaptered on October 7, 2015. The bill was first introduced to the legislature on February 26, 2015. The analysis prepared for the Senate Committee on Public Safety discussed this Court's holding in *Albertson v. Superior Court* (2001) 25 Cal.4th 796, noting that section 6603

> [C]larified an exception to the general rule of confidentiality of treatment records that allows the prosecutor "access to treatment information, insofar as that information is contained in an updated evaluation."

(Attachment, p. 8.) The analysis noted that the trial courts have interpreted this Court's statement in different ways. Some courts interpret this language to grant the district attorney access to the records relied upon by the evaluators and other courts have limited that access solely to the evaluation. (*Ibid.*) The bill's author noted that this Court in *People v. Gonzalez* (2013) 56 Cal.4th 353, 379, fn. 11, reiterated the limitation. (Attachment, p. 11.)

It is evident by the commentary and timing of this bill, that section 6603(j) was added by the Legislature to clarify the ambiguity in section 6603, subdivision (c). The author of SB 507 commented:

> The bill establishes that both the prosecuting attorneys and defense attorneys will have equal access to mental health treatment records before SVPs are assessed for their potential release from state hospitals. A lack of access to these records can deprive judges and juries of the information they need to decide whether or not it is safe to release a violent sex offender from a state hospital. The records would remain confidential for all purposes **other than the SVP proceedings**.

(Assem. Com. on Public Safety, Analysis of Sen. Bill No. 507 (2015-2016 Reg. Sess.) Jul. 13, 2015, p. 3, emphasis added.) Now, the SVPA *explicitly*

provides the People the right to access the records relied upon by the DSH evaluators so that the district attorney may present all relevant evidence at the SVP trial.

Mr. Smith asserts, though contrary to the plain language of section 6603(j)(1), only records created after January 1, 2016 may be produced. Mr. Smith further argues that all treatment records created prior to January 1, 2016, remain confidential and may not be disclosed pursuant to section 6603(j)(1). (Reply/Supplemental Brief at pp. 6-7.) This claim is without merit. Section 6603(j)(1) does not put any such limitations. The statute requires that the evaluator who conducts an update evaluation list all the records reviewed by the evaluator pursuant to subdivision (c). The records that the evaluator must review are listed in section 6603, subdivision (c)(1), which was enacted in 2000 (see SB No. 2018 (1999-2000 Reg. Sess.) as approved by Governor on Sep. 12, 2000). Section 6603, subdivision (c)(1) provides:

> [U]pdated or replacement evaluations shall not be performed except as necessary to update one or more of the original evaluations or to replace the evaluation of an evaluator who is no longer available to testify for the petitioner in court proceedings. **These updated or replacement evaluations shall include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews of the person being evaluated, either voluntarily or by court order.**

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

Since its inception, section 6603, subdivision (c) has required review of all records pertaining to Mr. Smith's medical and mental health to assist an evaluator in concluding whether or not he continues to meet the criteria under

the SVPA. The legislature has declined to state that records created at or by the state hospital for a person in the custodial care of the hospital and subject to the SVPA would be confidential for any purpose under the Act. The confidentiality afforded through section 5328 is excepted by the Act in order to effectuate evaluation of the subject and to prove to a court and a jury that a person meets the SVP criteria. Treatment records, clinician's notes, interdisciplinary notes, medical records, and other data generated by the doctors, psychologists, and staff at the state hospital must be considered by the evaluator in forming an opinion as to the subject's qualification for treatment under the Act. The information is reduced to a report which is disclosed to the district attorney, the court, and is utilized as evidence at a probable cause hearing, a court trial, or a jury trial. At trial, the evaluator customarily testifies to any and all data which supports his or her opinion pursuant to Evidence Code section 802.

In *Albertson v. Superior Court, supra*, 25 Cal.4th 796, this Court acknowledged section 6603, subdivision (c) created an exception to section 5328:

> By this language, the current provision clarifies within the SVPA an exception to section 5328's general rule of confidentiality of treatment records, and allows the district attorney access to treatment record information, insofar as that information is contained in an updated evaluation. To the extent there might be any ambiguity in this regard, the history described below confirms that in an SVPA proceeding a local government's designated counsel (here, the district attorney) may obtain, through updated mental evaluations, otherwise confidential information concerning an alleged SVP's treatment.

(*Albertson v. Superior Court, supra*, 25 Cal.4th at 805.)

Section 6603(j)(1) states that records cited by an evaluator as reviewed while preparing an updated evaluation are subject to disclosure. This amendment does not require a provision authorizing the evaluator to review historical information and records because the SVPA already specifies the types of records and information the evaluator is required to consider. (See Welf. & Inst. Code, § 6601, subd. (b), review of person's social, criminal, and institutional history; § 6603, subd. (c)(1), review of medical, psychological, treatment records, and consultation with treating clinicians; § 6604.9, annual examination of mental condition.) Thus, the legislature has never made "promises of confidentiality" to Mr. Smith as his state hospital records have always been subject to review and excepted from section 5328 for use in legal proceedings pursuant to the SVPA.

While not all aspects of section 6603(j) are applicable to Mr. Smith's updated evaluations that were conducted prior to the effective date of the statute, the People are entitled to the records upon which the evaluators relied

upon in conducting the evaluation and rendering an expert opinion. Documents relied upon by expert witnesses who testify at trial are discoverable. (See generally Evid. Code, § 721, subd.(a); *People v. Landau, supra*, 214 Cal.App.4th 1; *People v. Lee* (2009) 177 Cal.App.4th 1108.)[5]

Moreover, section 6603(j)(1) applies to current litigation. Thus, any updated evaluations prepared after January 1, 2016, would require the evaluator list all information and documents reviewed in preparing that updated evaluation, and the People would be permitted to use those records in the pending proceedings under the SVPA but shall not disclose them for any other purpose.

III. THE DISCLOSURE AUTHORIZED BY SECTION 6603(j)(1) APPLIES TO RECORDS REVIEWED BY EVALUATORS PERFORMING "UPDATED" AND "REPLACEMENT" EVALUATIONS.

The disclosure provision in section 6603(j)(1) applies to records reviewed by evaluators performing updated evaluations. Replacement evaluations are also considered updated evaluations but are performed by an evaluator who is replacing a previous evaluator who is no longer available to testify. "Initial" evaluations are considered the first evaluation undertaken

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[5]This Court has noted:

> "[T]he need for pretrial discovery is greater with respect to expert witnesses than it is for ordinary fact witnesses [because] .... [ ] ... the other parties must prepare to cope with witnesses possessed of specialized knowledge in some scientific or technical field. They must gear up to cross-examine them effectively, and they must marshal the evidence to rebut their opinions." [Citation.]

(*Bonds v. Roy* (1999) 20 Cal.4th 140, 147, modifications in original.)

while the subject is still serving a prison sentence prior to the initiation of SVPA proceedings. Although the term "initial" evaluation was not coined in the SVP statute, and is not a legal term of art (see Welf. & Inst. Code, § 6600 et seq.), it is part of the SVP vernacular. Section 6601 articulates the data to be reviewed and considered when evaluating prison inmates for treatment through the SVPA. The first such evaluation is often referred to as an initial evaluation. Section 6601 provides access to the district attorney to all supporting data reviewed during the initial evaluation process.

Section 6601, subdivision (b) provides in relevant part:

> The person shall be screened by the Department of Corrections and Rehabilitation and the Board of Parole Hearings based on whether the person has committed a sexually violent predatory offense and **on a review of the person's social, criminal, and institutional history**.

(Welf. & Inst. Code, § 6601, subd. (b), emphasis added.) Section 6601, subdivision (c) states:

> The State Department of State Hospitals shall evaluate the person in accordance with a standardized assessment protocol ... to determine whether the person is a sexually violent predator as defined in this article. The ... protocol shall require **assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of re-offense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder**.

(Welf. & Inst. Code, § 6601, subd. (c), emphasis added.) Section 6601, subdivision (d) requires that the Director of State Hospitals shall

> [F]orward a request for a petition for commitment under Section 6602 to the county designated in subdivision (i). 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), emphasis added.)

Following the first evaluation, updated evaluations become necessary to determine whether the subject continues to meet the SVP criteria after the passage of time. Pursuant to *Albertson, supra,* the courts have determined that an updated evaluation would be necessary after one year had passed since the prior evaluation.

> As noted above, courts have recognized that a person's mental status can change with time (and treatment), and it appears from the new provision that the Legislature envisions that the passage of one year between evaluations itself constitutes adequate justification for an updated evaluation.

(*Albertson v. Superior Court, supra,* 25 Cal. 4th at p. 805, fn. 7.)

If an evaluator has authored evaluation(s) on a given case and is no longer authorized by the Director of State Hospitals to perform evaluations, a different evaluator may be appointed to replace him or her. (Welf. & Inst. Code, § 6603, subd. (c)(1).) The replacement evaluator is often assigned at the time an updated evaluation is sought to determine whether or not the subject continues to meet criteria under the SVPA. Section 6603, subdivision (c)(1) states: