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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:

> If one or more of the original evaluators is no longer available to testify for the petitioner in court proceedings, the attorney petitioning for commitment under this article may request the [DSH] to perform replacement evaluations. When a request is made for updated or replacement evaluations, the [DSH] shall perform the requested evaluations and forward them to the petitioning attorney and to the counsel for the person subject to this article.... 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).)

There is no practical distinction between a previously assigned evaluator and a replacement evaluator. Each provides a current, or updated, appraisal of a person subject to the SVPA who has previously undergone evaluation; and each are directed by section 6603, subdivision (c). The statute dictates that the same records must be reviewed, whether it is by a previously assigned evaluator or a "replacement" evaluator. A replacement evaluator is not referred to in section 6601, which outlines procedures for new or initial evaluations, rather the replacement evaluator is guided by section 6603, subdivision (c) which delineates procedures for updated evaluations. A newly assigned or "replacement" evaluator does not change the status of the proceedings, therefore there is no distinction for purposes of section 6603(j)(1) between the two. Any evaluation completed after the "initial" evaluation is regarded as a continuation of the petition, and disclosure of records uniformly applies to evaluations performed by previously assigned or newly assigned evaluators pursuant to section 6603(j)(1).

IV. SECTION 5328 DOES NOT PRECLUDE THE DISTRICT ATTORNEY FROM DISCLOSING NON-PRIVILEGED EVIDENCE TO THE PEOPLE'S RETAINED EXPERT THAT HAS BEEN OBTAINED THROUGH THE DISCOVERY PROCESS.

Section 5328 does not preclude the district attorney from disclosing non-privileged evidence obtained through the civil discovery process to the People's retained expert with a protective order. The People have addressed this issue in their Answer Brief on the Merits and incorporate those points, authorities and arguments herein.

> Under California's discovery statutes, "information is discoverable if it is unprivileged and is either relevant to the subject matter of the action or reasonably calculated to reveal admissible evidence." [Citations.] Discovery "privileges are strictly statutory. Absent a statutory privilege, no person has a privilege to refuse to produce a writing in a legal proceeding." [Citations.] "The party claiming a privilege shoulders the burden of showing that the evidence it seeks to suppress falls within the terms of an applicable [privilege] statute." [Citations.]

(*Los Angeles Unified School Dist. v. Trustees of the Southern California IBEW-NECA Pension Plan* (2010) 187 Cal.App.4th 621, 627-628, modification in original.) Statutes that characterize information as "'confidential' or otherwise limit its public disclosure" do not establish a privilege in a legal proceeding. (*Id.* at p. 629.)

> [T]he general rule is that privileges are to be "narrowly construed ... because they operate to prevent the admission of relevant evidence and impede the correct determination of issues."

(*Id.* at pp. 630-631, omission in original.)

The Civil Discovery Act applies to the SVPA proceedings. (See *People v. Landau, supra*, 214 Cal.App.4th 1 and *People v. Lee, supra*, 177 Cal.App.4th 1108.) The amendment to section 6603, adding subsection (j), was necessary to ensure equal and uniform application of those discovery provisions by the courts handling SVPA litigation. (Compare *Landau, supra*, with *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376.) These discovery rights are now specifically enumerated in section 6603(j)(1).

Section 6603(j)(1) provides that the district attorney is entitled to the discovery of all information reviewed in preparing updated evaluations after January 1, 2016. This section coupled with section 6602, subdivision (c)(1) provides an exception to sections 5328 confidentiality provision for the purpose of the SVP proceedings.

> Evidence Code section 721, subdivision (a), provides in pertinent part that "a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to ... the matter upon which his or her opinion is based and the reasons for his or her opinion." Such cross-examination properly includes documents and records examined by an expert witness in preparing his or her testimony. [Citation.]

(*People v. Smith* (2007) 40 Cal.4th 483, 509, first omission in original.) This Evidence Code section necessitates that the People's retained expert be able to review the same documents reviewed by the SVP's expert. Disclosure of confidential information to a retained expert or member of the prosecution team solely for use in the SVP proceedings does not eliminate the confidential nature of the information.

Further, disclosure of the records to the district attorney's retained expert comports with the plain language of section 6603(j)(1) because that section provides the district attorney "may *use* the records in [the SVP] proceedings ... and shall not disclose them for any *other* purpose." (Welf. & Inst. Code, § 6603, subd. (j)(1), emphasis added.) The presentation of the civil commitment petition at trial requires expert testimony. Thus, use of the records by the district attorney's expert at trial does not run afoul of the statutory requirements.

Finally, section 6603(j)(1) requires the court subpoena the confidential records upon request of either party and provide them to both parties. The court should be able to examine these records and release those that the court determines are relevant to the SVP proceedings to the People's designated expert with a protection order. This procedure would comply with the disclosure provision set forth in section 5328(f) because the records are subpoenaed to the court and disclosed by the court only as necessary for the administration of justice.

CONCLUSION

For all the foregoing reasons, the People respectfully request this Court find the application of section 6603(j)(1) to the SVP proceedings does not violate equal protection of the law, that the People are entitled to all records reviewed by evaluators who have conducted updated evaluations after January 1, 2015, and that the People may disclose these records to a designated retained expert pursuant to a court order with a protective order.

Respectfully submitted,

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Attorney for the People

ATTACHMENT

SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 507	**Hearing Date:**	April 21, 2015
Author:	Pavley		
Version:	February 26, 2015		
Urgency:	No	**Fiscal:**	Yes
Consultant:	JM		

Subject: ***Sexually Violent Predators***

HISTORY

Source: Los Angeles County District Attorney

Prior Legislation:
AB 1607 (Fox) Ch. 877, Stats. 2014
SB 295 (Emmerson) Ch. 182, Stats. 2013
SB 760 (Alquist) Ch. 790, Stats. 2012
Proposition 83, November 2006 General Election
SB 1128 (Alquist) Ch. 337, Statutes 2006
AB 893 (Horton) Ch. 162, Stats. 2005
AB 2450 (Canciamilla) Ch. 425, Stats. 2004
AB 493 (Salinas) Ch. 222, Stats. 2004
SB 659 (Correa) Ch. 248, Stats. 2001
AB 1142 (Runner) Ch. 323, Stats. 2001
SB 2018 (Schiff) Ch. 420, Stats. 2000
SB 451 (Schiff) Ch. 41, Stats. 2000
AB 2849 (Havice) Ch. 643, Stats. 2000
SB 746 (Schiff) Ch. 995, Stats. 1999
SB 11 (Schiff) Ch. 136, Stats. 1999
SB 1976 (Mountjoy) – Ch. 961, Stats. 1998
AB 888 (Rogan) – Ch. 763, Stats. 1995
SB 1143 (Mountjoy) – Ch. 764, Stats 1995

Support: Crime Victims United of California; California District Attorneys Association

Opposition: American Civil Liberties Union; California Public Defenders Association

PURPOSE

The purpose of this bill is to provide that the prosecutor or county attorney petitioning for commitment of a person alleged to be a sexually violent predator and the attorney for the person shall have the same access to records as the expert evaluators, and to prohibit any other use of the otherwise confidential records.

Existing law provides for the civil commitment for psychiatric and psychological treatment of a prison inmate found to be a sexually violent predator (SVP) after the person has served his or her prison commitment. (Welf. & Inst. Code, § 6600, et seq.)

Existing law defines an SVP as "a person who has been convicted of a sexually violent offense against at least one victim, 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).)

Existing law provides that where the Department of Corrections and Rehabilitation determines that an inmate fits the criteria for evaluation as an SVP, the inmate shall be referred for evaluation to the Department of State Hospitals (DSH). (Welf. & Inst. Code § 6601, subd. (b).)

Existing law provides that the inmate "shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of the DSH." If both evaluators concur that the person meets the criteria for SVP commitment, DSH shall request a district attorney or county counsel[1] in the county of commitment to prison to file a commitment petition. (Welf. & Inst. Code § 6601, subd. (d).)

Existing law provides that if the evaluators designated by DSH disagree, additional independent evaluators are appointed. The second pair of evaluators must agree that the person meets the requirement for SVP commitment or the case cannot proceed. (Welf. & Inst. Code § 6601, subd. (c)-(e).)

Existing law provides that if DSH requests the district attorney to petition for commitment, the prosecutor shall have access to "copies of the evaluation reports and any other supporting documents" considered by the evaluators. (Welf. & Inst. Code § 6601, subd. (d).)

Existing law provides for a hearing procedure to determine whether there is probable cause to believe that a person who is the subject of a petition for civil commitment as an SVP is likely to engage in sexually violent predatory criminal behavior upon his or her release from prison. (Welf. Inst. Code § 6602.)

Existing law provides that a person committed as a SVP shall be held for an indeterminate term upon commitment. (Welf. & Inst. Code, § 6604.1.)

Existing law requires a jury trial at the request of either party with a determination beyond a reasonable doubt that the person is an SVP. (Welf. & Inst. Code § 6603.)

Existing law grants an alleged SVP "access to all and to have access to all relevant medical and psychological records and reports." (Welf. & Inst. Code, § 6603, subd. (a)

Existing law provides that if the attorney petitioning for commitment of an SVP determines that updated evaluations are necessary in order to properly present the case for commitment, the attorney may request the Department of Mental Health (now denominated the Department of State Hospitals – DSH) to perform updated evaluations.

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[1] The counsel for the state is designated by the board of supervisors and is typically the district attorney. (Welf. and Inst. Code § 6601, subd. (f).)

- If one or more of the original evaluators is no longer available to testify for the prosecution in court proceedings, the prosecutor may request the DSH to perform replacement evaluations.
- DSH shall perform the requested evaluations and forward them to the prosecutor and counsel for the alleged SVP.
- Updated or replacement evaluations shall be ordered only 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.
- 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 alleged SVP.
- If an updated or replacement evaluation results in a split opinion as to whether the alleged SVP meets the criteria for commitment, DSH shall conduct two additional evaluations, as specified. (Welf. & Inst. Code § 6603, subd. (c)(1).)

Existing law provides that if the second pair of experts performing the updated evaluations conclude that the person is not an SVP, or if there is a split of opinion, the case shall proceed on the basis of the original evaluations concluding or finding that the person is an SVP. (*Reilly v. Superior Court* (2013) 57 Cal.4th 641.)

Existing law defines "no longer able to testify for the petitioner in court proceedings" as the evaluator is no longer authorized by DSH to perform evaluations of SVPs as a result of any of the following:

- The evaluator has failed to adhere to the protocol of the DSH;
- The evaluator's license has been suspended or revoked;
- The evaluator is legally unavailable, as specified; or
- The evaluator has retired or not entered into a new contract with to continue as an evaluator. (Welf. & Inst. Code § 6603, subd. (c)(1)-(2).)

Existing law provides that a new evaluator shall not be appointed if the resigned or retired evaluator has opined that the individual named in the petition has not met the criteria for commitment, as specified. (Welf. & Inst. Code § 6603, subd. (c)(1).)

Existing law requires that an SVP patient have an annual examination on his mental condition. The report on the examination shall include consideration of whether or not conditional release to a less restrictive alternative or an unconditional release is in the SVP patient's best interest and what conditions would adequately protect the community. (Welf. & Inst. Code, § 6604.9.)

Existing law provides that if DSH determines that an SVP patient's condition has so changed that he or she no longer meets the SVP criteria, or that he can be safely and conditionally released under supervision, the SVP patient can file a petition for unconditional release or a petition for conditional release. (Welf. & Inst. Code, § 6604.9.)

Existing law provides that upon receipt of a petition for unconditional release, the court shall set a hearing to determine if there is probable cause that the SVP patient "has so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior. If the court finds probable to support such a finding, the matter shall be set for a jury trial as though it were an original petition for commitment. (Welf. & Inst. Code, §§ 6604.9 and 6605.)

Existing law provides that if DSH, independent of the annual review and report of an SVP's mental condition, that the SVP patient can be safely and conditionally released under supervision, the court shall forward a report and recommendation for conditional release to the prosecutor and the attorney for the SVP patient. (Welf. & Inst. Code, § 6607.)

Existing law provides that if DSH does not concur that an SVP can be safely and conditionally released under supervision, the SVP can petition for conditional release or an unconditional discharge any time after one year of commitment. (Welf. & Inst. Code § 6608, subd. (a).)

Existing law provides that, if the court finds the conditional release petition is not frivolous, the court shall give notice of the hearing date to the attorney designated to represent the county of commitment, the attorney for the committed person, and the Director of State Hospitals at least 30 court days before the hearing date. (Welf. & Inst. Code § 6608, subd. (b).)

Existing law provides that where DSH in the annual report on the mental status of an SVP patient finds that the conditional discharge would be in the best interests of the patient under conditions that would protect the public, the following shall:

- The state shall have the burden of proof by a preponderance of the evidence that the SVP would be likely to commit sexually violent offenses if conditionally released.

- If the petition for conditional release is denied by court, the SVP may not file another petition for conditional release for one year. (Welf. & Inst. Code § 6608, subd. (i).)

Existing law provides that if in the annual report DSH does not find that conditional discharge is appropriate, the SVP patient shall have the burden of proof by a preponderance of the evidence at the hearing. (Welf. & Inst. Code § 6608, subd. (i).)

Existing law requires the court to first obtain the written recommendation of the director of the treatment facility before taking any action on the petition for conditional release if the is made without the consent of the director of the treatment facility. (Welf. & Inst. Code, § 6608, subd. (c).)

Existing law provides that the court shall hold a hearing to determine whether the person committed would be 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 due to his or her diagnosed mental disorder if under supervision and treatment in the community.

Existing law provides that the attorney designated the county of commitment shall represent the state and have the committed person evaluated by experts chosen by the state and that the committed person shall have the right to the appointment of experts, if he or she so requests. (Welf. & Inst. Code, § 6608, subd. (e).)

Existing law requires the court to order the committed person placed with an appropriate forensic conditional release program (CONREP) operated by the state for one year if the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community.

Existing law provides that a substantial portion of SVP CONREP shall include outpatient supervision and treatment. The court shall retain jurisdiction of the person throughout the course of the program. (Welf. & Inst. Code § 6608, subd. (e).)

Existing law provides that if the court denies the petition to place the person in an appropriate forensic conditional release program, the person may not file a new application until one year has elapsed from the date of the denial. (Welf. & Inst. Code § 6608, subd. (h)

Existing law allows, after a minimum of one year on conditional release, the committed person, with or without the recommendation or concurrence of the Director of State Hospitals, to petition the court for unconditional discharge, as specified. If the court finds probable cause that the person is no longer an SVP, the court shall set the matter for jury trial. The state shall bear the burden to prove beyond a reasonable doubt that the person remains an SVP. (Welf. & Inst. Code §§ 6605, subds. (a)-(b) and 6608, subd. (k).)

Existing law provides that a person petitioning for conditional release is entitled to assistance of counsel in the conditional release and county of domicile hearings. (Welf. & Inst. Code § 6608, subd. (a.))

Existing law provides that the procedure for a conditional release hearing in a case in which the county of domicile has not yet been determined by the court, proceed as follows:

- The court, upon deeming that a conditional release petition is not frivolous, shall provide notice to the attorney for the committed person, the designated attorney for the county of commitment, and the Director of State Hospitals of its intent to set a conditional release hearing, and requires these entities to notify the court within 30 court days of receiving the notice of intent if it is alleged that a county other than the county of commitment is the domicile county.

- The court shall deem the county of commitment as the county of domicile and set a date for the conditional release hearing, with at least 30 court days' notice, as specified, if no county, other than the county of commitment, is alleged to be the county of domicile.

- The court shall, after giving 30-days' notice, hold a hearing to determine the county of domicile if any other county, other than the county of commitment, is alleged to be the county of domicile. Allows the designated attorney for any alleged county of domicile, the attorney for the county of commitment, the attorney for the petitioner, and the Director of State Hospitals to file and serve declarations, documentary evidence, and other pleadings, specific to the issue of domicile only, at least 10 court days prior to the hearing. Allows the court, in its discretion, to decide the issue of domicile based upon the pleadings alone or permit such additional argument and testimony as is in the interest of justice.

- The court, after determining county of domicile, shall set a date for a conditional release hearing and give notice of the hearing, as specified, including to the designated attorney for the county of domicile at least 30 court days before the date of the hearing.

- The designated attorney of the domicile county has the right to represent the state at the conditional release hearing, and to provide notice to parties, as specified, if he or she elects to do so. The designated attorney from each of the county commitment and domicile may mutually agree that the attorney for the county of domicile will represent the state in the conditional release hearing. The attorneys from each county should cooperate.

- The court's determination of a county of domicile is final and applies to future proceedings relative to the commitment or release of a SVP. (Welf. & Inst. Code §§ 6608, subd. (b). 6608.5.)

Existing law provides that a conditional release hearing in a case in which the county of domicile has been determined by the court, shall proceed as follows:

- The court, upon deeming that a conditional release petition is not frivolous, to provide notice to the attorney for the committed person, the designated attorney for the county of commitment, the attorney for the county of domicile and the Director of State Hospitals of the date of the conditional release hearing at least 30 days prior to the hearing.

- Provides that representation of the state at the conditional release shall be the attorney for the county of commitment unless the attorney for the county of domicile has been deemed to represent the state. (Welf. & Inst. Code § 6608, subd. (c.).)

Existing law provides, if a committed person has been conditionally released by a court to a county other than the county of domicile – the county of placement - and the jurisdiction of the person has been transferred to that county, the notice required for a subsequent conditional release hearing is to be given to the designated attorney of the county of placement, who will represent the state in any further proceedings. (Welf. & Inst. Code § 6608, subd. (d).)

Existing law provides that if the committed person has been placed on conditional release in a county other than the county of commitment, jurisdiction of the person shall, upon the request of the designated attorney of the county of placement, be transferred to that county. (Welf. & Inst. Code § 6608.5, subd. (g).)

This bill provides that where updated or replacement evaluations have been prepared, the attorney petitioning for commitment and the SVP patient's counsel "shall have the same *access* to records as an [expert psychologist or psychiatrist] evaluator." The court shall issue a subpoena or court order for those records upon request. The attorneys may only use the records in proceedings under this article and shall not be disclose them for any other purpose. The records are confidential to the extent otherwise provided by law.

This bill does not limit the access of the prosecutor and counsel for an SVP patient or alleged SVP to records relied upon by the evaluators.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> In 1996, the Legislature created the Sex Offender Commitment Program to target a small, but extremely dangerous subset of "sexually violent predators" (SVPs) who present a continuing threat to society because their mental disorders predispose them to engage in sexually violent behavior. Specifically, an SVP is a person who was previously convicted of a sexually violent offense and committed to prison for that or another offense. Prior to release from prison, experts from the Department of State Hospitals evaluate the inmate to determine if he is likely, because of a mental disorder, to commit a sexually violent offense if released. The person is then entitled to a trial in which the prosecutor must establish beyond a reasonable doubt that the experts' opinions are correct. If the jury or court agrees, the person is committed to a state hospital as an SVP
>
> Despite the critical role DSH evaluations play in the SVP commitment process, as the California State Auditor cited in its March 2015 report, the California Department of State Hospitals "has not ensured that it conducts these evaluations in a consistent manner" and have noted "instances in which evaluators did not demonstrate that they considered all relevant information."
>
> The court in *Albertson v. Superior Court* (2001) 25 Cal. 4th 796, held that Welfare and Institutions Code (WIC) Section 6603 grants express authority for updated expert evaluations and clarified an exception to the general rule of confidentiality of treatment records that allows the prosecutor "access to treatment record information, insofar as that information is contained in an updated evaluation." Some trial courts have interpreted this language to grant the DA access only to treatment information and not to the records themselves. Section 6603 states that the updated evaluations shall include a review of medical and mental health records. It does not explicitly grant prosecutor's access to the records, nor did it explicitly deny or limit access. The *Albertson* court noted that "in a SVPA proceeding, a district attorney may obtain, through updated mental evaluations otherwise confidential information concerning an alleged SVP's treatment." Whether the DA is granted direct access to the records, or only allowed to access records relied upon by the evaluators, depends upon each judge's reading of *Albertson*. As a result, the issue is repeatedly litigated and the results vary throughout California.
>
> In *Seaton v. Mayberg* (2010) 610 Fed.3rd 530, 539, the U.S. Ninth Circuit court held that sexually violent predator evaluations fall within a number of long-established exceptions to the confidentiality of medical communication. These include cases of restraint due to insanity, contagious diseases, abuse of children and gunshot wounds. In *People v. Martinez*, the 4th District Court of Appeal held that it is not a violation of the California right to privacy (to provide copies of mental health treatment records to the prosecutor in an SVP case. (*People v. Martinez* (1994) 88 Cal App 4th 465.

Some of California's most violent sexual predators can be released back into society if complete information is not available to prosecutors and defense lawyers at the time the predator's cases are being reviewed. This bill is needed to help ensure such mistakes are prevented in the future, providing more peace of mind to already traumatized victims, their families and the public at large.

According to the National Intimate Partners and Sexual Violence Survey, conducted by the Centers for Disease Control and Prevention, there are an estimated two million female victims of rape in California, and estimated 8.5 million survivors of sexual violence, other than rape, in the United States.

Twenty others states and the federal government allow involuntary civil commitment of sexually violent predators. California is the only state that does not have a specific legislative provision granting prosecutors access to mental health and medical records for the purpose of carrying out sexually violent predator commitment law.

2. SVP Law Generally

The Sexually Violent Predator Act (SVPA) establishes a civil commitment scheme for sex offenders who are about to be released from prison. The DSH uses specified criteria to determine whether an individual qualifies for treatment as a SVP. A person may be deemed a SVP if: (a) the person has committed specified sex offenses against one or more victims; (b) he has a diagnosable mental disorder that makes him[2] 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; and, (3) two licensed psychiatrists or psychologists concur in the diagnosis. If both clinical evaluators find that the person meets the criteria, the case is referred to the county district attorney who may file a petition for civil commitment.

Once a petition has been filed, a judge holds a probable cause hearing; and if probable cause is found, the case proceeds to a trial at which the prosecutor must prove to a jury beyond a reasonable doubt that the offender meets the statutory criteria. The state must prove "[1] a person who has been convicted of a sexually violent offense against [at least one] victim[] and [2] who has a diagnosed mental disorder that [3] makes the person a danger to the health and safety of others in that it is likely that he or she will engage in [predatory] sexually violent criminal behavior." (*Cooley v. Superior Court (Martinez)* (2002) 29 Cal.4th 228, 246.) If the prosecutor meets this burden, the person then can be civilly committed to a DSH facility for treatment.

The DSH must conduct a yearly examination of a SVP's mental condition and submit an annual report to the court. This annual review includes an examination by a qualified expert. (Welf. & Inst. Code, § 6604.9.) In addition, DSH has an obligation to seek judicial review any time it believes a person committed as a SVP no longer meets the criteria, not just annually. (Welf. & Inst. Code, § 6607.)

The SVPA was substantially amended by Proposition 83 ("Jessica's Law"), which became operative on November 7, 2006. Originally, a SVP commitment was for two years; but now, under Jessica's Law, a person committed as a SVP may be held for an indeterminate term upon

[2] Virtually all SVPs have been men.

commitment or until it is shown that the defendant no longer poses a danger to others. (See *People v. McKee* (2010) 47 Cal. 4th 1172, 1185-1187.) Jessica's Law also amended the SVPA to make it more difficult for SVPs to petition for less restrictive alternatives to commitment. These changes have survived due process, ex post facto, and, more recently, equal protection challenges. (See, *People v. McKee*, *supra*, 47 Cal. 4th 1172 and *People v. McKee* (2012) 207 Cal.App.4th 1325.) The standards and procedures for conditional release proceedings were changed by SB 295 (Emmerson) Ch. 182, Stats. 2013.

3. Extent of Confidentiality of Psychotherapy Treatment Records of Persons Committed as SVPs and Alleged SVPs

a. *Privacy Rights Generally and the Psychotherapist-Patient Privilege*

The California Constitution includes an explicit right to privacy. (Art. I, § 1.) The "penumbras" of specific rights in the United States Constitution include a right to privacy for matters relating to family and procreation. (*Griswold v. Connecticut* (1965) 381 US. 479, 481-486; *Roe v. Wade* (1973) 410 U.S. 113.) The United States Supreme Court has not clearly described a more general right to privacy, except as is created by the Fourth Amendment right to be free from unreasonable searches and seizures. (*People v. Gonzales* (2013) 56 Cal.4th 353, 370-372.)

The California Evidence Code includes a psychotherapist-patient confidentiality privilege. (Evid. Code § 1014.) The patient is the holder of the privilege and the privilege is substantially broader than the doctor-patient privilege. (*People v. Gonzales*, *supra*, 46 Cal.4th, at p.384.) The privilege applies apart from any privacy rights a person may have in medical records generally.

b. *Involuntary Forensic Mental Health Treatment*

The SVP law and program is one of a number of "forensic" involuntary commitment categories in California. Forensic patients are involuntarily committed to DSH from the criminal justice system for treatment. Forensic patients include mentally disordered offenders (MDO), persons found not guilty by reason of insanity (NGI) and defendants who are incompetent to stand trial (IST). Forensic patients comprise over 90% of DSH patients. DSH also treats is true civil commitment patients pursuant to the Lanterman-Petris-Short (LPS) Act. An LPS patient is a person with a mental illness who is either gravely disabled and cannot care for himself or herself, or is a danger to self or others. (Welf. & Inst. Code §§ 5000-5550.)

As described above, an SVP is involuntarily committed for mental health treatment *because he has a mental disorder that makes it likely that he will engage in sexually violent and* predatory sex crimes if released into society. Nevertheless, the SVP is constitutional because it "establish[es] a nonpunitive, civil commitment scheme covering persons who are to be viewed, '"not as criminals, but as sick persons.'" (*Hubbart v. Superior Court* (*People*) (1999) 19 Cal.4th 1138 1166-1167; Welf. and Inst. code § 6250.)

c. Treatment *and Confidentiality in SVP Commitments*

Generally, records of treatment of DSH patients, including SVP records, are confidential, unless otherwise specified. (Welf. & Inst. Code 5328.)[3] Section 5238 states that "[a]ll information and records obtained in the course of providing services under... Division 6 [including SVP law] to either voluntary or involuntary recipients of services shall be confidential." (See, *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376,)

However, subdivision (c) of Section 6603 creates a limited exception to confidentiality rules in the context of updated or replacement expert evaluations on the issue of whether a person is an SVP: Under section 6603, subdivision (c)(1), the People may obtain updated evaluations of an alleged SVP and obtain access to "otherwise confidential treatment information ... *to the extent such information is contained in an updated mental evaluation.*" (*Albertson v. Superior Court* (2001) 25 Cal.4th 796, 807, italics added.)

The Supreme Court recently reiterated the limitations on the prosecution's access to treatment information, specifically holding that section 6603 does not authorize disclosure of therapy records directly to the People but authorizes review of such records by the independent evaluators and grants the People access to otherwise confidential treatment information only to the extent it is contained in the updated mental evaluation. (*People v. Gonzales* (2013) 56 Cal.4th 353, 379, fn. 11.)

The SVP law requires that an SVP be given or offered treatment if the state has proved that he is too dangerous to be released into society after he has served his full prison term. It appears that the most complete way to determine if an SVP patient continues to pose an unacceptable danger is through an evaluation of his or her most recent psychiatric records, as well as past reports and transcripts. However, review of treatment records for purposes of recommitment proceedings raises constitutional privacy and statutory confidentiality issues. (*Sporich v. Superior Court* (2000) 77Cal.App.4th at pp. 426-427.)[4]

The sponsor and author cite *People v. Martinez* (1994) 88 Cal.App.4th 465 in explicitly or implicitly arguing that an SVP or alleged SVP has little or no expectation of privacy in any of his medical or psychological records, including records of individual psychotherapy sessions. It does not appear that *Martinez* can be read that broadly, although the opinion includes some statements to that effect. The court in *Martinez* also recognized that an SVP patient has substantial privacy expectations or rights in medical or psychological matters, including psychotherapy records that are generally protected by the psychotherapist/patient privilege. The court, nevertheless, held that the state's interest in the records outweighed Martinez's privacy interests, although the opinion can be read as holding that giving the prosecutor access to psychotherapy records was error, although harmless in the context of the SVP trial. (*Id.*, at p

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[3] However, the confidentiality and other rules concerning treatment of mentally disordered offenders, persons not guilty by reason of insanity and persons who are incompetent to stand trial can be described as a patchwork of statutes and court decisions. For example, there are Evidence Code provisions concerning MDOs and specific provisions authorizing release of records where specified forensic patients are accused of a crime in a DSH facility. (Welf. & Inst. Code 5328.1.)

[4] The core holding in *Sporich* was that prosecutor could not obtain updated or new evaluations for a commitment proceeding. The Legislature superseded this holding by granting express authority for the state to obtain updated or new evaluations in Welfare and Institutions Code Section 6603, subdivision (c) – the section and subdivision considered by this bill.

479.). Further, the court specifically rejected a privacy claim as to the records *relied upon by the experts who evaluated Martinez*. The court held:

> The examination of records by the prosecutor was harmless. The relevant information in the records was available to the prosecutor in summary form in the reports from Drs. Vognsen and Malinek. Defendant concedes that these witnesses were authorized to examine and consider defendant's records, and because they relied upon these records in forming their opinions, it was proper for the prosecutor to examine them concerning this information. (See *People v. Visciotti* (1992) 2 Cal. 4th 1, 81["It is proper to question an expert about matter on which the expert bases his or her opinion and on the reasons for that opinion"].) Moreover, their testimony constituted substantial, if not compelling, evidence to support the trial court's decision to sustain the commitment petition. Consequently, any impropriety by the prosecutor in reviewing defendant's records was harmless under any standard of review. (See *Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal. 2d 818.) (People v. Martinez, supra, 88 Cal.App.4th 465, 482.)

The court in *Martinez* also appears to have relied upon upheld the disclosure of Martinez's treatment records based on the "dangerous patient" exception in Evidence Code Section 1024 to the confidentiality of psychotherapy records.[5] (*Id.*, at p. 479-484.) It appears that the court applied the dangerous patient exception because the purpose of the former MDSO law and the SVP law is to protect the public from sexual crimes. Such reasoning could arguably establish a blanket exception to confidentiality in any involuntary commitment based on the danger to the public that flowed from a person's mental disorder.

The California Supreme Court in *People v. Gonzales*, supra, 56 Cal.4th 353, held that the dangerous patient exception does not, per se, authorize disclosure to the prosecutor in a SVP case of the alleged SVP or SVP patient's psychotherapy records. (*Id.*, at pp. 959-960.) The dangerous patient exception allows disclosure of confidential treatment information to prevent a specific and imminent harm. Gonzalez's holding that the dangerous patient exception does not generally apply in an SVP case does not, however, tell us when prosecutors can get access to such records.

This bill would essentially eliminate the restrictions and limitation imposed on the state in seeking to obtain treatment records that were considered in updated evaluations. The sponsor – the Los Angeles Attorney – emphasizes the public safety purpose of the SVPA and essentially argues that any right or expectation of privacy for an SVP in his treatment records must yield to the prosecutor's need to obtain all information necessary to establish that a person is an SVP or remains an SVP.

d. *Federal Court Opinion noted in Author's Background Material– Seaton v. Mayberg*

The author's background cites a decision of the Federal 9th Circuit Court of Appeal in arguing that an SVP or an alleged SVP has no viable claim of confidentiality or privacy in treatment records:

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[5] The opinion in *Martinez* analyzes SVP privacy and confidentiality from a number of perspectives, without clearly explaining the basis for its ruling. The opinion can arguably be cited as supporting opposing arguments.

> In a section 1983 civil rights claim, the Ninth Circuit court evaluated the claim and determined that there is no constitutional right to privacy in medical records protected by the due process clause. "Whatever constitutional right to privacy of medical information may exist, the California civil commitment procedure for sexually violent predators falls outside it." (*Seaton v. Mayberg* (2010) 610 P.3rd 530, 539.) The court set forth several examples where those without criminal convictions have no right to privacy and found that a sexually violent predator evaluation falls within those long established exceptions to the confidentiality of medical communications. Other public health and safety requirements overcoming a right to privacy include cases of restraint due to insanity, contagious diseases, abuse of children, and gunshot wounds. ...California is the only state that does not have a legislative provision granting prosecutors access to mental health and medical records for the purpose of carrying out sexually violent predator commitment law.

Seaton concerned the confidentiality of the records of a prison inmate who was being evaluated as an alleged SVP, not treatment records of a person already committed to the SVP program. (*Id.*, at pp. 532-533.) *Seaton* can be read as holding that the federal constitution does not include a substantial right of privacy beyond family and procreative matters. Specifically the court stated that constitutional protections do not extend to medical records generally, contrary to the assumptions of many. For example, the privacy protections in HIPPA cannot be asserted by an individual citizen. (*Id.*, at pp. 533-541.)

e. *California Courts and Seaton*

California courts have considered *Seaton* and noted that the opinions of lower federal courts concerning federal constitutional issues, although persuasive, are not binding on California courts. (*People v. Zapien* (1993) 4 Cal.4th 929, 989.) These California decisions have found that SVP treatment records are essentially presumed to be confidential until a contrary rule is demonstrated. (*People v. Gonzales, supra*, 56 Cal.4th 353, 387, fn. 19.)

f. *SVP Patients may be Reluctant to Engage in Psychotherapy if the Records are Completely Open to Prosecutors as Evidence that a Person is or Remains an SVP*

The policy basis for the confidentiality of psychotherapy records has been long recognized by California courts: "[A]n environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy." (*In re Lifschutz* (1970) 2 Cal.3d 415, 422.) This bill squarely presents the issue of how this principle should be applied to SVP treatment. It can be argued that if all therapy records are open to prosecutors, SVP patients may be particularly reluctant to be truthful in therapy, greatly reducing the effectiveness of treatment. If all psychotherapy records are available to the prosecutor, an SVP would have a considerable incentive to be dishonest and attempt to manipulate his therapist in the hope of creating a record that he is no longer a sexual predator.

Prior to 2006 - when an SVP was subject to recommitment every two years - DSH personnel noted that many SVP patients did not actively engage in treatment because they were afraid that admissions of prior sexual misconduct would be used against them at a recommitment trial.

Under current law, an SVP is committed indefinitely. He must essentially create a record that he is no longer an SVP, rather than hope that the prosecutor would not prevail at a recommitment trial

As noted above, the SVP law is constitutional because its purpose is treatment of mentally disordered persons, not punishment or preventive detention. (*Hubbart v. Superior Court (People), supra*, 19 Cal.4th 1138 1166-1167.) If all psychotherapy records are open to prosecutors, SVP patients will likely argue that the records simply become evidence for prosecutors of SVP status, equivalent to evidence of guilt at a criminal trial.

Should this bill be enacted, the Legislature in coming years may wish to review how the opening of all treatment records to prosecutors changes the conduct of SVP patients, the matters considered at trial and trial outcomes. Committee members may wish to consider whether access to psychotherapy records by prosecutors should be obtained through a motion to the court in which the prosecutor can establish good cause for release of the records.

– END –

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

RE: PEOPLE VS. THE SUPERIOR COURT (SMITH)
SUPREME COURT CASE NO: S225562; DCA CASE NO. G050827;
(OC SUPERIOR COURT CASE NO. M-9531)

I am a citizen of the United States; I am over the age of eighteen years and not a party to the within entitled action; my business address is: Office of the District Attorney, County of Orange, 401 Civic Center Drive West Santa Ana, California 92701.

On August 10, 2016, I served the within **PETITIONER'S SUPPLEMENTAL LETTER BRIEF** on interested parties in said action by placing a true copy thereof enclosed in a sealed envelope, in the United States mail at Santa Ana, California, that same day, in the ordinary course of business, postage thereon fully prepaid, addressed as follows:

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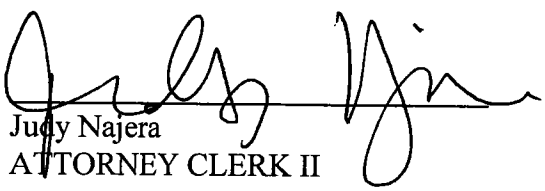
Court of Appeal of the State of California
Fourth Appellate District, Division 3
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

I declare under penalty of perjury that the foregoing is true and correct.
Executed on August 10, 2016, at Santa Ana, California.



Judy Najera
ATTORNEY CLERK II