IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NICHOLAS NEEDHAM, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	Case No. S276395 (DCA Case No. G060670) (Orange County Superior Court Case No. M-16870)

OPENING BRIEF ON THE MERITS

Following the Published Opinion of the
California Court of Appeal
Fourth Appellate District, Division Three,
Granting the Petition for Writ of Mandate/Prohibition
The Honorable Elizabeth Macias, Judge Presiding
Department C-38 [(657) 622-5238]

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PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	

To the Honorable Tani G. Cantil-Sakauye, Chief Justice and the Associate Justices of the California Supreme Court:

INTRODUCTION

"Our society uses trials to advance the search for truth." (*People v. Superior Court* (*Smith*) (2018) 6 Cal.5th 457, 473.) In the prosecution of cases petitioning for commitment under the under the Sexually Violent Predator Act ("SVPA") (Welfare and Institutions Code[1] section 6600 et seq.), that search for truth invariably leads to a trial involving a battle of the experts. In that battle, the People must prove beyond a reasonable doubt

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

that the alleged sexually violent predator ("SVP") should be committed because he is dangerous to society. At times, to meet their burden of proof, the People retain expert witnesses to conduct evaluations of the alleged SVP so experts can testify at trial that the SVP has a qualifying mental health condition and otherwise meets the statutory criteria as an SVP.

In *Smith*, this Court found that the People's retained expert can "assist ... in prosecuting the SVP petition[]" (*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 462, emphasis added) and can even "offer an opinion about the potential SVP's mental health. [Citation.]" (*id.* at p. 472). The only logical conclusion from this Court's decision in *Smith* is that the People can not only retain an expert witness, but can then present the expert's testimony at trial to explain why the person meets the SVP criteria. This reading of *Smith* is consistent with the legislative policy that SVP cases be tried on their merits, even when state evaluators no longer opine that the person is an SVP. (*Reilly v. Superior Court* (2013) 57 Cal.4th 641, 655-656.) Without retained experts, that policy could not be fulfilled

because the People must be able to present expert testimony to meet their substantial burden of proof.

Contrary to this precedent, the Court of Appeal in our case ruled that the People cannot call their retained expert at Nicholas Needham's trial on his SVP commitment petition. The Court of Appeal made no effort to distinguish this Court's opinions or its own opinion in *People v. Landau* (2013) 214 Cal.App.4th 1, wherein it held that it was not an abuse of the trial court's discretion to compel an alleged SVP to submit to a mental health examination on the eve of trial by the People's retained expert, who then testified at trial. (*Ibid.*) The lower court's opinion cannot be reconciled with this Court's prior ruling.

No case has ever held that the People are not entitled to use a retained expert at an SVPA trial. The Court of Appeal's ruling defies this Court's prior rulings and public policy. Consistent with this Court's decisions in *Smith* and *Reilly*, and the Court of Appeal's decision in *Landau*, this Court should reverse the Court of Appeal's decision in this case and clarify that the People's retained expert can testify at trial.

QUESTION GRANTED REVIEW

DOES THE SEXUALLY VIOLENT PREDATOR ACT ALLOW THE PEOPLE TO RETAIN A PRIVATE EXPERT TO TESTIFY AT TRIAL AS TO WHETHER A DEFENDANT IS A SEXUALLY VIOLENT PREDATOR, OR ARE THE EXPERT WITNESSES LIMITED TO THOSE DESIGNATED BY THE STATE DEPARTMENT OF STATE HOSPITALS?

PROCEDURAL HISTORY

On November 17, 2016, the People filed a civil action entitled "Petition for Commitment as a Sexually Violent Predator" pursuant to section 6602 against Nicholas Needham. The petition was supported by evaluations of Dr. Jeremy Coles and Dr. Michael Mussaco, who both found Needham met the criteria for commitment under the SVPA ("positive" evaluations). (Writ Petn., Exh. A, p. 6; Writ Petn., Exh. B, p. 31.)

In January 2018, upon issuing updated evaluations, Dr. Coles opined that Needham no longer met the criteria as an SVP (a "negative" evaluation). (Writ Petn., Exh. B, p. 32.) Given

Dr. Coles' change of opinion, two different evaluators, Dr. Korpi and Dr. Yanofsky, were assigned to evaluate Needham. (Writ Petn., Exh. B, p. 32.) Dr. Yanofsky submitted a positive evaluation and Dr. Korpi submitted a negative one. (Writ Petn., Exh. B, p. 32.)

In April, 2019, Dr. Yanofsky also submitted a negative evaluation, leaving the People with no experts to testify that Needham met the criteria as an SVP at trial. (Writ Petn., Exh. B, p. 32; Writ Petn., Exh. I, pp. 243.)

In July 2019, the People requested, and ultimately obtained, a protective order pursuant to *People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 462, so that their retained expert, Dr. Craig King, could be provided with Needham's medical records for purposes of conducting an SVP evaluation. (Writ Petn., Exh. A, p. 17; Writ Petn., Exh. B p. 32.) On August 30, 2019, the court also issued an order authorizing Dr. King access to the Orange County Jail and Needham's medical records there. (Writ Petn., Exh., D, pp. 59-60.)

Dr. King met with Needham on September 6, 2019. (Writ Petn., Exh, B, p. 32.) Needham gave his signed consent to the interview. (Writ Return, Supporting Document 1, p. 48.)

Needham filed two motions to exclude Dr. King's testimony on September 23, 2019, (Writ Petn., Exh. E) and February 10, 2021 (Writ Petn., Exh. F). The People filed a response to the motions on February 24, 2021. (Writ Petn., Exh. B.) Needham filed a reply on March 2, 2021 (Writ Petn., Exh. G), and then a third motion to exclude Dr. King's testimony on June 1, 2021 (Writ Petn., Exh. H).

On July 7, 2021, the court collectively heard and denied all of Needham's Motions to Exclude Dr. King. (Writ Petn., Exh. I, p. 316.)

Needham filed a Petition for Writ of Mandate/Prohibition seeking to overturn the trial court's ruling on September 7, 2021. The petition was summarily denied by the Court of Appeal on September 30, 2021. Needham filed a Petition for Review with this Court on October 5, 2021. (Case No. S271210.) On December 15, 2021, this Court granted the petition and transferred the matter to the Court of Appeal. After full briefing,

on August 8, 2022, the Court of Appeal granted the Petition for Writ of Mandate directing the superior court to vacate its ruling denying the motions to exclude the People's expert and to issue an order granting the motions. On September 15, 2022, the People filed a Petition for Review. On October 26, 2022, this Court granted review.

STANDARD OF REVIEW

The issues presented are purely questions of law which "are reviewed under the de novo standard of review. [Citation.]" (*People v. Whaley* (2008) 160 Cal.App.4th 779, 792; see also *People v. Galvan* (2008) 168 Cal.App.4th 846, 852.) Specifically, "[t]he meaning and construction of statutes are questions of law, which [the appellate courts] decide independently. [Citation.]" (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 189; see also *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) "[T]he construction of a statute is purely a question of law and is subject to de novo review on appeal. (*People v. Zeigler* (2012) 211 Cal.App.4th 638, 650, 149 Cal.Rptr.3d 786.)" (*People v. Faranso* (2015) 240 Cal.App.4th 456, 461.)

ARGUMENT

I. THE SEXUALLY VIOLENT PREDATOR/ ACT'S STATUTORY FRAMEWORK.

The SVPA is designed to civilly commit SVPs who have specified sexually violent predatory convictions, a qualifying diagnosed mental disorder and are likely to engage in acts of sexual violence. (Welf. & Inst. Code, § 6601, subd. (a)(1).) The SVPA has built in procedural safeguards to ensure that only those who meet the SVP criteria are brought into the judicial process. Before a convicted sex offender may be subject to judicial proceedings instituted under the SVPA, the Secretary of the Department of Corrections and Rehabilitation ("CDCR") conducts an administrative screening to determine if an inmate "may be" a sexually violent predator. (Welf. & Inst. Code, § 6601, subd. (a)(1).)

If the inmate meets that criteria, the inmate is referred to a secondary screening through the CDCR and the Board of Parole Hearings to determine whether the inmate has committed a sexually violent predatory offense and to review the inmate's social, criminal and institutional history. (Welf. & Inst. Code, § 6601, subd. (b).) The secondary screening is conducted in

accordance with a structured screening instrument developed by the State Department of State Hospitals ("DSH"). (Welf. & Inst. Code, § 6601, subd. (b).) "The purpose of this evaluation is not to identify SVP's but, rather, to screen out those who are not SVP's." (*People v. Medina* (2009) 171 Cal.App.4th 805, 814.) These administrative procedures provide the safeguards to ensure "meritless petitions" do not reach trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063.)

If, as a result of the screening, the CDCR determines that the inmate is likely to be an SVP, it refers the inmate to the DSH for a full evaluation of whether the person meets the criteria as an SVP. (Welf. & Inst. Code, § 6601, subd. (b).) The evaluation process requires that two psychiatrists or psychologists, or a combination thereof, evaluate the inmate to determine if the inmate meets the statutory SVP criteria. (Welf. & Inst. Code, § 6601, subd. (d).) An SVP is defined as

> [A] person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

(Welf. & Inst. Code, § 6600, subd. (a)(1).) A

> "Diagnosed mental disorder" [is defined to] include[] a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

(Welf. & Inst. Code, § 6600, subd. (c).) The determination as to whether the person meets the statutory definition requires the person be examined

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

(*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 910.) If both evaluators concur that the inmate is an SVP, the DSH must forward a request for a petition for commitment to the district attorney to be filed under the SVPA[2]. (Welf. & Inst. Code, § 6601, subd. (h)(1).) If the

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[2] In Orange County, the district attorney has been designated to handle SVPA cases under section 6601, subdivision (i).

evaluations result in a difference of opinion, then the inmate is subject to further examination by two independent evaluators. (Welf. & Inst. Code, § 6601, subd. (e).) If both independent evaluators agree that the inmate meets the SVP criteria, DSH must refer the inmate for the filing of a petition for an SVP commitment. (Welf. & Inst. Code, § 6601, subds. (f) & (h)(4).) If the independent evaluators do not agree, the inmate is released and no petition is filed. (*Ibid*.)

Copies of the evaluation reports and any other supporting documents are made available to the filing attorney. (Welf. & Inst. Code, § 6601, subd. (d).) The district attorney makes the final decision as to whether to file the SVP petition based upon a review of the concurring evaluations and the supporting documentation. (Welf. & Inst. Code, § 6601, subds. (d) & (i).)

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

(*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1146-1147.)

To protect due process rights, the Legislature has granted the alleged SVP some safeguards "commonly associated with criminal trials[]" (*Reilly v. Superior Court, supra*, 57 Cal.4th 641, 648), including the right to a jury trial, the right to the assistance of counsel, the right to retain experts, and the right to have counsel and experts appointed if the alleged SVP is indigent (Welf. & Inst. Code, § 6603, subd. (a)).

The People must prove that the inmate has a *current* mental condition that qualifies him as an SVP. (*Albertson v. Superior Court* (2001) 25 Cal.4th 796, 802.) Therefore, the SVPA

provides for updated or replacement evaluations from the DSH upon the People's request. (Welf. & Inst. Code, § 6603, subd. (d)(1).) If updated or replacement evaluations result in split opinions as to whether the individual meets the criteria for commitment, the DSH must obtain two additional independent evaluations. (Welf. & Inst. Code, § 6603, subd. (d)(1).) Contradictory opinions from evaluators do not require dismissal of the SVPA petition. (*Gray v. Superior Court* (2002) 95 Cal.App.4th 322, 328; *Reilly v. Superior Court, supra*, 57 Cal.4th 641, 648.) The updated and replacement evaluations "are intended for informational and evidentiary purposes." (*Gray v. Superior Court, supra*, 95 Cal.App.4th 322, 328.)

The People have the burden to prove to a unanimous jury that the person is an SVP beyond a reasonable doubt. (Welf. & Inst. Code, § 6604; *Reilly v. Superior Court, supra,* 57 Cal.4th 641, 648.) As discussed further below, under *Smith* the People can retain an expert and the People's expert can review the SVP's confidential medical records to assist in prosecuting the SVP petition and to offer an opinion about the SVP's mental health.

II. THIS COURT AND THE COURT OF APPEAL HAVE ROUTINELY RECOGNIZED THE DISPOSITIVE ROLE OF EXPERT WITNESS TESTIMONY IN SEXUALLY VIOLENT PREDATOR ACT PROCEEDINGS.

This Court in *People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457 acknowledged the critical role of expert witnesses in SVP trials. In *Smith*, this Court was asked to decide whether the People had the right to share an SVP's medical record with their retained expert. This Court found that they can (*id.* at p. 473), relying on the " 'critical' importance of expert testimony in an SVP proceeding (*People v. McKee* (2010) 47 Cal.4th 1172, 1192, 104 Cal.Rptr.3d 427, 223 P.3d 566) ....." (*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 469.)

In *Smith*, this Court considered its prior opinion in *McKee*, in which it focused on the unique nature of the expert opinion in SVPA cases because it "involves a prediction about the individual's future [sexually violent] behavior[]" rather than an evaluation of past criminal conduct. (*People v. McKee, supra*, 47 Cal.4th 1172, 1192, superseded by statute on other grounds as stated in *People v. McCloud* (2021) 63 Cal.App.5th 1, 14.) The

SVP evaluators form opinions not just on whether the individual has a qualifying medical condition, but also whether the person is a danger to others and likely to engage in acts of sexual violence. (Welf. & Inst. Code, § 6600, subd. (a)(1).) Thus, having credible experts who competently present information to the jury is at the core of SVP trials. As such, this Court found that "the civil commitment trial usually turns on the quality and credibility of the expert witnesses and the extent to which their evaluations are persuasive. [Citations.]" (*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 471.)

Underscoring the significance of expert witnesses, Justice Goethals, in his dissent in this case, indicated SVP trial are like "battles of expert witnesses." (*Needham v. Superior Court* (2022) 82 Cal.App.5th 114, 130 (dis. opn. of Goethals, J.).) The description, previously suggested by this Court, is especially apt in SVP cases. (See *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 260 ["the probable cause hearing can be characterized as a battle of experts, some more credible than others[]"].)

Because of their predictive analysis and application of DSH standardized assessment criteria, experts guide the prosecution throughout SVPA proceedings. They are essential to the filing decision. More importantly, they provide the foundation on which SVPA commitments are based. Courts rely on experts to find cause to detain the alleged SVP under section 6601.3 pending the resolution of the petition, and to find probable cause to proceed to trial under section 6602. Jurors rely on experts to find a person to be an SVP and subject to commitment. Without prevailing in the battle of the experts, the People cannot meet their burden of proof beyond a reasonable doubt.

III. THIS COURT'S OPINION IN *SMITH* TACITLY APPROVED THE PEOPLE'S USE OF RETAINED TESTIFYING EXPERTS AT TRIAL WHEN IT HELD THAT, IN ADDITION TO ASSISTING ON CROSS-EXAMINATION, THEY MAY ASSIST IN THE PROSECUTION OF THE SEXUALLY VIOLENT PREDATOR PETITION AND CAN OFFER OPINIONS ABOUT AN ALLEGED SEXUALLY VIOLENT PREDATOR'S MENTAL HEALTH.

The *Smith* court described the various roles an expert plays in SVPA cases. This Court stated experts can assist with the interpretation and explanation of specialized information on which SVP evaluations are based so the prosecutor can effectively cross-examine defense experts. (*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 471.) But, this Court differentiated this consulting role from the expert's role in prosecuting the SVPA petition. The court explained,

> The district attorney may then disclose those [medical] records to its retained expert, subject to an appropriate protective order, **to assist in the cross-examination of the [DSH] evaluators or mental health professionals retained by the defense and, more generally, in prosecuting the SVP petition.**

(*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 462, emphasis added.) The prosecution of the SVPA petition focuses

on the presentation of evidence by the People to meet their burden of proof.

This Court also differentiated another important function of the People's retained expert; namely that "an expert would also need to examine the relevant records **to offer an opinion about the potential SVP's mental health**. [Citation.]" (*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 471-472, emphasis added.) There must be a purpose to obtaining such an opinion. Because SVP trials are "battle of experts" where testimony is "critical," the only use the People have for a retained expert's opinion is to introduce that opinion before the jury at trial to prove their case beyond a reasonable doubt. Thus, this Court has already acknowledged that retained experts can testify at trial.

The majority opinion in our case failed to understand this Court's decision and discussion in *Smith*, suggesting this Court's statement that the People's expert may review the SVP's medical

records "to offer an opinion about the potential SVP's mental health[] [Citation.]" was a "single line" that did not mean the People's expert could offer his or her opinion to the jury at trial. (*Needham v. Superior Court, supra*, 82 Cal.App.4th 114, 128.) Justice Goethals, on the other hand, correctly understood this Court's opinion in *Smith* and the implications of the majority's flawed position when he dissented, stating:

> To me the court's implication [in *Smith*] seems clear: a testifying expert may also access such records.
>
> My colleagues acknowledge this language before dismissing its importance. "In context, we do not interpret this single line as an endorsement of the notion that the People may call a privately retained *testifying* expert." On this issue we may agree to disagree. But if their position is well taken, much of the *Smith* opinion becomes mere dictum.

(*Needham v. Superior Court, supra*, 82 Cal.App.4th 114, 130 (dis. opn. of Goethals, J.) emphasis in original.)

Indeed, in *Smith*, this Court stated that the People's retained expert can assist in "prosecuting the SVP petition." (*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 462.)) As discussed above, the only way a retained expert can meaningfully assist the People in proving their case beyond a reasonable doubt

is by providing evidence to the jury by testifying at trial. Justice Goethal's point is well taken. If the People's expert cannot testify at trial, there is no need for the People to retain an expert, let alone, have their expert review the SVP's medical records. Much of this Court's opinion in *Smith* would become "mere dictum." The clear implication from this Court's opinion in *Smith* is that the People's retained expert can review the SVP's medical records not only to assist the People in cross-examining the DSH evaluators, but also to offer affirmative opinion testimony to the jury by testifying at trial.

To hold otherwise would be to necessitate the dismissal of an SVP petition when both DSH evaluators no longer find that a person meets the SVP criteria. In a battle of the experts, the People would be unable to present the requisite evidence to prove their case. This result not only defies the logic and holding of *Smith*, but as discussed in the following section, it also defies the logic and holding of this Court's previous decision in *Reilly*.

IV. IN *REILLY*, THIS COURT AFFIRMED THAT DISMISSAL IS NOT REQUIRED WHEN DEPARTMENT OF STATE HOSPITALS EVALUATORS NO LONGER FIND THE PERSON MEETS THE SEXUALLY VIOLENT PREDATOR CRITERIA.

In interpreting the SVPA in *Reilly*, this Court explained that after the initial filing of a petition, negative opinions of DSH evaluators are not binding on the prosecution. The only logical conclusion from this Court's statement is that the People can then retain testifying experts to support their case. Otherwise, the People – in a battle of the experts – would be unable to meet the requisite threshold of proof.

The Court of Appeal's opinion in *Gray v. Superior Court* played an important part in this Court's decision in *Reilly*. In *Gray*, the court was asked to decide whether dismissal was required when there were no longer a pair of positive DSH evaluators. (*Gray v. Superior Court, supra*, 95 Cal.App.4th 322.) Five years after the start of Gray's petition process, two evaluators updating evaluations under section 6600, subdivision (d), split as to whether Gray qualified as an SVP. (*Id.* at p. 324.) Two additional independent evaluations were ordered under

section 6603, subdivision (d)(1), who also rendered opposing opinions on Gray's SVP status. (*Gray v. Superior Court, supra*, 95 Cal.App.4th 322, 324.) Gray moved for dismissal based on the split of opinions arguing that the prosecution cannot proceed if a pair of evaluators does not agree that he is an SVP. (*Id.* at pp. 324-325.)

Examining the statutory scheme, the Court of Appeal found that the conflicting evaluations should still be presented to a jury so that it can compare the quality of the assessments. The court stated,

> [L]ittle in the way of justice would be gained by permitting proceedings to be derailed by the possibly fortuitous timing of conflicting opinions. As the People point out, a purely numerical standard for the continuation of a proceeding would deprive the trier of fact of the opportunity to make a *qualitative* assessment of the experts' opinions. As the opinions accumulate, such an analysis becomes ever more important and desirable; **it is not the number of opinions that matters, but their persuasiveness**.

(*Gray v. Superior Court, supra*, 95 Cal.App.4th 322, 329, first emphasis in original.) Even multiple negative evaluations were held not to bar prosecution of an SVP petition.

> [I]f the new evaluations merely reflect a further difference of opinion, there is no reason why the prosecuting attorney should be bound to act in compliance with the view of the evaluator **(or even evaluators)** favoring the subject person.

(*Gray v. Superior Court, supra*, 95 Cal.App.4th 322, 329, emphasis added.) The court's rationale was that **trial** should ultimately determine whether or not someone is an SVP, not the changing opinions of evaluators.

> Once a petition under the Act has been filed, and the trial court (as here) has found probable cause to exist, the matter should proceed to trial. In other words, **once a petition has been properly filed and the court has obtained jurisdiction, the question of whether a person is a sexually violent predator should be left to the trier of fact** *unless* the prosecuting attorney is satisfied that proceedings should be abandoned.

(*Gray v. Superior Court, supra*, 95 Cal.App.4th 322, 329, first emphases added.) The *Gray* court refused to read into the SVPA a requirement of dismissal when post-filing evaluations do not agree. It found that the SVPA

> [D]oes not, on its face, provide any consequence for a split of opinion between the second set of evaluators. Accordingly, we are unwilling to imply the drastic requirement of dismissal."

(*Id.* at p. 328.)

In *Reilly v. Superior Court*, this Court construed the SVPA for purposes of determining whether an SVP is entitled to dismissal when the initial DSH evaluations used improper guidelines in reaching their conclusions. (*Reilly v. Superior Court, supra,* 57 Cal.4th 641, 646.) This Court, citing on *Gray*, explained that "[m]andatory dismissal is not required where one or both of the later evaluators conclude the individual does not meet the criteria for commitment [as an SVP]. [Citation.]" (*Id.* at p. 648.) Rather,

> [T]he People are entitled to have the trier of fact resolve conflict in the evidence when there are conflicting professional opinions (i.e., splits of opinion) on an alleged SVP's status. (*Davenport, supra,* 202 Cal.App.4th at p. 673, 135 Cal.Rptr.3d 239.)

(*Id.* at p. 655, fn. 2.) This Court even concluded that dismissal is not required when both updated state "evaluators conclude the individual does not meet the criteria for commitment. [Citation.]" (*Id.* at p. 648.)

In reaching its conclusion, this Court looked to the legislative history of the SVPA's amendments. It found that the SVPA should be read with a preference for resolution on the merits.

> The legislative history shows the Legislature did not intend that courts interpret section 6601's procedural requirements with unnecessary strictness to prevent the trier of fact from ultimately determining each individual's SVP status. In 1999, section 6601 was amended to add the following language: "A petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law." (§ 6601, subd. (a)(2), as amended by Stats.1999, ch. 136, § 1, p. 1831.) The purpose of the amendment was "to clarify the application of the SVP law to prevent the unintended and dangerous release of an offender pending determination of an SVP petition." (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 11 (1999–2000 Reg. Sess.) as introduced Dec. 7, 1998.) Read together, the amendment and the legislative statement of the bill's purpose indicate the **Legislature's clearly expressed preference that SVPA commitment petitions be adjudicated on their merits**.

(*Reilly v. Superior Court, supra,* 57 Cal.4th 641, 655-656.) As discussed above, because expert testimony is critical in SVPA trials, the only logical conclusion from *Reilly* and *Gray* is that the People's retained expert can offer affirmative opinion evidence to the jury by testifying at trial. If both DSH evaluators opine the

person does not meet the commitment criteria, the only effective way the People can proceed to trial is to have their retained expert testify to the jury that the person does meet the commitment criteria. Without such affirmative expert testimony, the People would have a remote chance of providing sufficient evidence to prove their case. The Court of Appeal's decision in our case renders much of the opinions in *Reilly* and *Gray* mere dictum.

V. THE PRACTICAL AND POLICY IMPLICATIONS OF THE MAJORITY OPINION IN OUR CASE WOULD UNDERMINE THE INTEGRITY OF THE SEXUALLY VIOLENT PREDATOR ACT AND THE RIGHT OF BOTH PARTIES TO A SPEEDY RESOLUTION.

The lower court's holding in our case encourages SVPs to continue their cases for years with the intent that the two initially positive DSH evaluators will – in light of the scientifically accepted risk reduction afforded to older and/or treating SVPs – eventually opine that they do not meet the SVP criteria. Moreover, this "aging" process can take years if not decades to eventually "flip" evaluators. No court could have intended such a result.

Is counsel ineffective for failing to age a case until the client obtains favorable evaluations? How is the incentive to age a case squared with the court's holding in *People v. Vasquez* (2018) 27 Cal.App.5th 36 which held the very opposite[3]? At what point does the People's right to a speedy trial trump an alleged SVP's strategic goal of flipping evaluators and aging their case with an eye toward a directed verdict?

Setting aside the rampant gamesmanship and abuse of judicial process that follows from the lower court's opinion in our case, the exclusion of the People's experts violates the public policy preference that SVP cases be tried on their merits. The People would be unable to fairly fight the battle of the experts – even though there are experts who believe the alleged SVP meets statutory criteria – because those experts cannot be called to present their opinions to the jury.

Instead of supporting the policy to decide SVPA cases on their merits, excluding the people's privately retained experts would create a policy where DSH evaluators exclusively decide

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[3] *People v. Vasquez, supra*, 27 Cal.App.5th 36 [holding that delay in SVP proceedings may violate an alleged SVP's due process right to a speedy trial].)

whether someone is an SVP or should be released. The DSH could then simply wait for two negative evaluations and release the patient. The SVPA would be meaningless surplusage in the California codes and jury trials in SVPA cases would be unnecessary. The goal of the SVPA is to protect the public from SVPs and to ensure treatment of those individuals who need it. It does so by allowing a jury to decide if an individual is an SVP. The Court of Appeal's decision in our case undermines the public policy goals described by this Court and the Legislature.

VI. RETAINING PRIVATE EXPERTS HELPS OVERCOME INCONSISTENT APPLICATION OF THE SEXUALLY VIOLENT PREDATOR ACT'S STANDARDS.

This Court recognized that because the SVPA relies on the opinions of evaluators, which have a strong subjective element, the evaluation process has proven to be an imperfect system.

> Unfortunately, as the legislative history suggests, the SDSH " 'has not ensured that it conducts these evaluations in a consistent manner' " and sometimes " 'evaluators did not demonstrate that they considered all relevant information.' " (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 507 (2015-2016 Reg. Sess.) as amended Apr. 30, 2015, p. 3, quoting Cal. State Auditor, Cal. Dept. of State Hospitals Report No. 2014-125 (Mar. 2015) p. 1.) A key way in which one party counters an opposing expert's opinion is to uncover and challenge the expert about the bases for his or her opinion. (See *People v. Smith* (2007) 40 Cal.4th 483, 509, 54 Cal.Rptr.3d 245, 150 P.3d 1224; *People v. Visciotti* (1992) 2 Cal.4th 1, 81, 5 Cal.Rptr.2d 495, 825 P.2d 388.) This is particularly true for a mental health professional's assessment of whether an individual qualifies as an SVP. Because an evaluator exercises professional judgment within the legal framework specified by the SVPA, the evaluator's "legally accurate understanding of the statutory criteria is crucial to the Act's proper operation." (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 910, 119 Cal.Rptr.2d 1, 44 P.3d 949.)

(*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 471.)

The inconsistency in evaluations sometimes results in inaccurate evaluations by DSH evaluators. But it may be explained by a variety of factors, many unrelated to whether the person continues to meet the SVP criteria.

> SVP evaluations may change over time for reasons other than that an individual no longer qualifies as an SVP. For example in *Gray*, the alleged SVP refused to be interviewed after the original set of evaluations, almost certainly rendering the later evaluations less precise. (*Gray, supra*, 95 Cal.App.4th at p. 330, 115 Cal.Rptr.2d 477.)

(*Davenport v. Superior Court* (2012) 202 Cal.App.4th 665, 673, overruled in part on other grounds by *Reilly v. Superior Court, supra*, 57 Cal.4th 641, 655.) Often, the "divergence of expert views ... demonstrates more the imprecision of psychiatric determination than the likelihood that [an SVP's] mental condition has actually altered for the better." (*Gray v. Superior Court, supra*, 95 Cal.App.4th 322, 330.)

Courts plainly recognize that evaluators can err in their opinions. They can make legal and factual mistakes. Proving the petition beyond a reasonable doubt requires that the People present experts who reviewed all the relevant material, considered all the relevant facts, and ignored improper factors in

forming an opinion about an SVP's status. The People cannot point out errors made by DSH evaluators, however, unless they are able to present contrary evidence to the jury through retained experts to meet their burden of proof in the first instance. Cross-examining the DSH evaluators is insufficient in these cases.

This case is yet another example of the need for privately retained evaluators. Because both of the DSH evaluators found that Needham did not meet the criteria as an SVP, the People examined the reasoning behind those opinions. The People found that the negative evaluations from the DSH evaluators included consideration of the fact that Needham would be on federal parole if released.

> [T]he evaluators, particularly Dr. Korpi and Dr. Yanofsky, were negative based on the fact that Mr. Needham was going to be looking at a lifetime federal parole. They believed that despite the fact that he is a sexually violent predator, he is a high risk to the community, because of the fact that he's on federal parole, he would be eligible or he would not be a threat to the community.

(Writ Petn., Exh. I, p. 271.) Essentially, their medical opinion was impacted by the misconception that "federal parole would be able to monitor [Needham] and catch him before he does

anything ...." (Writ Petn., Exh. I, p. 272.)

In reality, the belief that parole would prevent a sexually violent act is unrealistic. Parole monitoring cannot prevent new crimes. At most, it can assist the police after the crime. Parole agents cannot monitor a parolee at all times. Nor can they predict when a parolee will be sexually violent. The purpose of the SVPA is to prevent new victims by releasing only those inmates who are not a danger to the public. Recognizing this, a person's terms and conditions of parole have been deemed not relevant in the analysis of whether the person is an SVP.

> [T]he relevant inquiry is whether the defendant's mental condition makes it likely he will reoffend.... [Citation.] However, evidence that the defendant would be *required* to comply with terms and conditions of parole would not be relevant. Such evidence has no bearing on the determination whether the defendant has a disorder which makes it likely he will reoffend; it does not relate to the nature of the defendant's disorder or reflect in any way his willingness or ability to pursue treatment voluntarily.

(*People v. Krah* (2003) 114 Cal.App.4th 534, 546, emphasis in original.) Nonetheless, the DSH evaluators utilized parole status to find Needham did not qualify as an SVP. At trial, the People must be permitted to present affirmative expert testimony to demonstrate that the opinions of the DSH evaluators are legally

unsound and the conclusions to be reached when considering only proper criteria.

Dr. King is qualified to provide the necessary testimony in the People's case in chief. Over the last five years, Dr. King has contracted with the DSH to conduct sexually violent predator evaluations. By mere chance, he was not the person selected by the DSH to evaluate Needham. His opinion will demonstrate to the jury that the currently assigned DSH evaluators failed to have a " 'legally accurate understanding of the statutory criteria ....' [Citation.]" (*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 471) and have reached the erroneous conclusion that Needham is not an SVP. Dr. King opined that Needham is an SVP and should be committed. The only method to effectively correct the DSH's improper use of evaluation criteria is the presentation of a retained expert at trial. Given that mental health evaluations are subject to human error (*ibid.*), fulfilling the policy behind the SVPA requires that the People be permitted to retain an expert to evaluate an alleged SVP and that the expert be permitted to present his opinions at trial.

VII. THE CIVIL DISCOVERY ACT ALLOWS THE PEOPLE TO USE RETAINED EXPERTS AND OBTAIN DISCOVERY ABOUT THEM, INCLUDING OF THE EXPERTS TO BE CALLED AT TRIAL.

A. The Civil Discovery Act applies to Sexually Violent Predator Act proceedings.

SVPA commitment petitions are "special proceeding[s] of a civil nature .... [Citations.]" (*People v. Superior Court* (*Cheek*) (2001) 94 Cal.App.4th 980, 988; see also, *People v. Yartz* (2005) 37 Cal.4th 529, 536; *Moore v. Superior Court* (2010) 50 Cal.4th 802, 815 [SVPA petitions as " ' "special proceedings of a civil nature[]" ' "].) Special proceedings are governed by the rules of civil procedure. (*People v. Superior Court* (*Preciado*) (2001) 87 Cal.App.4th 1122, 1128 ["Accordingly, unless otherwise indicated on the face of the statute, rules of civil procedure will operate. [Citations.]"].)

> The Civil Discovery Act of 1986, located in Part 2 of the Code of Civil Procedure, applies to SVP Act proceedings (*Leake, supra*, 87 Cal.App.4th 675, 104 Cal.Rptr.2d 767; accord, *Cheek, supra*, 94 Cal.App.4th at p. 980, 114 Cal.Rptr.2d 760). *Leake* concluded that the Civil Discovery Act applied to SVP Act proceedings because the Civil Discovery Act expressly applied to both "a civil action and a special proceeding of a civil nature" (Code Civ. Proc., § 2016, subd. (b)(1)), the Legislature was deemed to have enacted the SVP Act with knowledge of existing statutes, and the SVP Act contained no indication that the Legislature intended to exempt the Act from the Civil Discovery Act. (*Leake, supra*, 87 Cal.App.4th at pp. 680-681, 104 Cal.Rptr.2d 767.) [Fn. omitted.] *Cheek, supra,* 94 Cal.App.4th 980, 114 Cal.Rptr.2d 760, agreed with *Leake* that the Civil Discovery Act applied to SVP Act proceedings because Code of Civil Procedure section 2016 declared the Civil Discovery Act applicable in both "a civil action and a special proceeding of a civil nature." (*Cheek, supra*, 94 Cal.App.4th at p. 988, 114 Cal.Rptr.2d 760.)

(*Bagration v. Superior Court* (2003) 110 Cal. App.4th 1677, 1686.)

In this case, the court and the parties utilized the provisions of the Civil Discovery Act, recognizing its applicability. (See e.g., Writ Petn., Exh. A, p. 19 ["Discovery timelines are reset[]"]; Writ Petn., Exh. C, pp. 55-56 [discussing waiver of the "discovery timelines" imposed by Code of Civil Procedure sections 2024.020 and 2024.030].) The parties exchanged expert witness information pursuant to Code of Civil Procedure section 2034.210 and the People designated Dr. Craig King as an expert witness.

(Writ Petn., Exh. E, p. 70.) The Civil Discovery Act has been consistently found to apply to SVPA cases until the lower court's inexplicable ruling that "the expert-witness provisions of the Civil Discovery Act do not apply" in SVPA cases. (*Needham v. Superior Court, supra*, 82 Cal.App.5th 114, 120; *Leake v. Superior Court* (2001) 87 Cal.App.4th 675, 679; *People v. Superior Court* (*Cheek*), *supra*, 94 Cal.App.4th 980, 996; *People v. Angulo* (2005) 129 Cal.App.4th 1349, 1358, as modified on denial of reh'g. (June 10, 2005).) This erroneous finding creates problems unrelated to the People's use of privately retained experts.

B. The Civil Discovery Act allows discovery from both sides about testifying experts.

The lower court made an overly broad ruling that "the expert-witness provisions of the Civil Discovery Act do not apply" in SVPA cases.[4] (*Needham v. Superior Court, supra*, 82 Cal.App.5th 114, 120.) This generalized statement contradicts current case law and removes an important method of discovery from both the People and the respondents in SVPA cases.

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[4] This defies their previous holding in *Landau*, where the same court applied one of the expert witness provisions to permit a compelled mental health evaluation of Landau. (*People v. Landau, supra*, 214 Cal.App.4th 1.)

The Civil Discovery Act is the only means through which expert witness discovery can be conducted by both side of an SVPA case. Code of Civil Procedure section 2034.210 provides for discovery about experts who are expected to testify at trial.[5]

> [A]ny party may obtain discovery by demanding that all parties simultaneously exchange information **concerning each other's expert trial witnesses** to the following extent:
>
> (a) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, **whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial.**

(Code Civ. Proc., § 2034.210, emphasis added.)

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[5] Of course, these discovery rights do not apply to non-testifying experts retained by a party.

> Under the Civil Discovery Act (Code Civ. Proc., § 2016 et seq.), opinions of nontestifying experts are not discoverable unless the opposing party shows that fairness requires disclosure. (Code Civ. Proc., § 2018, subd. (b); *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 297, 4 Cal.Rptr.3d 883.)

(*People v. Angulo, supra,* 129 Cal.App.4th 1349, 1358.)

Both parties have relied on the demand and exchange of expert witness information set forth in Code of Civil Procedure section 2034.210. This section is the only means by which either party can obtain information about experts to be called at trial, about the opinions to be offered and the documents on which those opinions would be based. After obtaining this information, the parties generally conduct depositions to obtain further discovery about the expert's background, opinions, and the materials the expert reviewed so that they can competently cross-examine opposing experts. The lower court's sweeping statement that the Civil Discovery Act's expert witness provisions do not apply to SVPA cases inadvertently eliminated this discovery tool from the parties without any explanation as to why expert witness discovery would be contraindicated by the SVPA.

This error unfairly prejudices the People as they cannot obtain the necessary discovery to properly prepare for the examination of any experts retained by the alleged SVP, while limiting the People's experts to DSH evaluators whose opinions are known to both parties and whose discovery can readily be

subpoenaed. The lower court's opinion creates an unfair imbalance in the litigation of SVPA cases.

C. The Civil Discovery Act permits the retention and testimony of experts by the People.

The applicability of the Civil Discovery Act to SVPA cases also permits the parties to call their retained experts to testify. Specifically in the context of SVPA cases, the same division of the Court of Appeal which rendered the opinion in *Needham* has found that "[u]nder the Civil Discovery Act, a party is permitted to retain and designate 'expert trial witnesses.' [Citations.]" (*People v. Jackson* (2022) 75 Cal.App.5th 1, 8.)

This has been the consistent position of the Court of Appeal. In *People v. Landau, supra*, 214 Cal.App.4th 1, Landau claimed error in a court order compelling him to participate in a mental health evaluation by the People's retained expert under the Civil Discovery Act. (*Id.* at p. 24.) Contrary to its opinion in our case, the court based its opinion on the applicability of the Civil Discovery Act to SVPA proceedings.

> "[T]he Civil Discovery Act applies to SVPA proceedings." (*People v. Angulo* (2005) 129 Cal.App.4th 1349, 1368, 30 Cal.Rptr.3d 189.) The act is "applied in each SVPA proceeding on a case-by-case basis." (*People v. Superior Court* (*Cheek*) (2001) 94 Cal.App.4th 980, 994, 114 Cal.Rptr.2d 760.)

(*People v. Landau, supra,* 214 Cal.App.4th 1, 25, omission in original.) The court then applied Code of Civil Procedure section 2032.020 of the Civil Discovery Act, which permits compelled mental health examinations when the "mental condition 'of that party or other person is in controversy in the action.' [Citation.]", to allow the People's retained expert to examine Landau, even on the eve of trial.[6] (*People v. Landau, supra*, 214 Cal.App.4th 1, 25, 26-27.) Since a retained expert is the only method through which an examination can be compelled under Code of Civil Procedure section 2032.020, the court did not even question the propriety of the People's use of a privately retained expert.

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[6] In our case, the People have *not* requested a compelled mental health evaluation pursuant to Code of Civil Procedure section 2032.020. They selected a less intrusive means of obtaining an evaluation. Needham had a choice as to whether he wished to participate in an evaluation. He chose to participate in the process and provided his written consent to Dr. King. (Writ Return, Supporting Document 1.) An order compelling a mental health examination was therefore unnecessary.

The majority in our case, however, did not address its prior opinion in *Landau*. As Justice Goethals, in his dissent, pointed out,

> Several courts, however, including this one, seem to have assumed that such a right [to privately retained experts] exists. In *People v. Landau* [citation], for example, we found that the trial court did not abuse its discretion when it permitted an expert retained by the prosecution to conduct a pretrial evaluation of the defendant. That expert later testified at trial.

(*Needham v. Superior Court, supra*, 82 Cal.App.5th 114, 129 (dis. opn. of Goethals, J.).) The majority opinion in our case erroneously deviated from well-settled law about the application of the Civil Discovery Act to SVPA cases, including prior opinions of this Court. (See *supra*, Section VII.A.) The application of the Civil Discovery Act supports the People's right to retain private experts, the right to have those experts examine an alleged SVP, and the right to call that expert to render an opinion at trial.

CONCLUSION

This Court has established that the People may use a retained expert "to assist ... in prosecuting the SVP petition" (*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 462) and "to offer an opinion about the potential SVP's mental health. [Citation.]" (*id.* at p. 472). The court's ruling excluding the People's retained expert defies this Court's *Smith* decision. It further contradicts this Court's intent to ensure that SVPA cases are decided by the trier of fact, not the changing opinions of DSH evaluators. (*Reilly v. Superior Court, supra,* 57 Cal.4th 641, 648.) The only logical conclusion to be drawn from this Court's rulings in *Smith* and *Reilly* is that the People may call a retained expert

to testify at trial in order to meet their burden of proof. The lower court's contrary decision is unsupported by law and should be overturned.

Dated this 22nd day of December, 2022.

Respectfully submitted,

Todd Spitzer, District Attorney
County of Orange, State of California

/s/ *Yvette Patko*

By:_____
Yvette Patko
Senior Deputy District Attorney

CERTIFICATE OF WORD COUNT

[California Rules of Court, rule 8.504(d)]

The text of the Opening Brief on the Merits consists of 7,822 words as counted by the word-processing program used to generate this brief.

Dated this 22nd day of December, 2022.

Respectfully submitted,

Todd Spitzer, District Attorney
County of Orange, State of California

/s/ *Yvette Patko*

By:_____
Yvette Patko
Senior Deputy District Attorney

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

RE: *Nicholas Needham v. The Superior Court of Orange County*
Case No. S276395
(DCA Case No. G060670;
Orange County Superior Court Case No. M-16870)

I am a citizen of the United States; I am over the age of 18 years and not a party to the within entitled action; my business address is: Office of the District Attorney, County of Orange, 300 North Flower Street, Santa Ana, CA 92703.

On December 22, 2022, I served the OPENING BRIEF ON THE MERITS on the 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:

Jason Michael Anderson
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Rancho Cucamonga, CA 91730

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 22, 2022, at Santa Ana, California.

/s/ *Catherine McDorman*

_____

Catherine McDorman
Attorney Clerk II

PROOF OF ELECTRONIC SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

RE: *Nicholas Needham v. The Superior Court of Orange County*
Case No. S276395
(DCA Case No. G060670;
Orange County Superior Court Case No. M-16870)

I am a citizen of the United States; I am over the age of 18 years and not a party to the within entitled action; my electronic service address is: appellate@da.ocgov.com; my business address is: Office of the District attorney, County of Orange, 300 North Flower Street, Santa Ana, CA 92703.

On December 22, 2022, I served the OPENING BRIEF ON THE MERITS on the interested party listed below. I caused a true electronic copy of said document to be E-Filed with the court, via TrueFiling, at the following address:

District Court of Appeal
Fourth Appellate District, Division Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701
http://www.courts.ca.gov/4dca-efile.htm

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 22, 2022, at Santa Ana, California.

/s/ *Catherine McDorman*

_____

Catherine McDorman
Attorney Clerk II

PROOF OF ELECTRONIC SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

RE: *Nicholas Needham v. The Superior Court of Orange County*
Case No. S276395
(DCA Case No. G060670;
Orange County Superior Court Case No. M-16870)

I am a citizen of the United States; I am over the age of 18 years and not a party to the within entitled action; my electronic service address is: appellate@da.ocgov.com; my business address is: Office of the District Attorney, County of Orange, 300 North Flower Street, Santa Ana, CA 92703.

On December 22, 2022, I electronically served the OPENING BRIEF ON THE MERITS on the interested parties in said action by transmitting a true copy via electronic mail as follows:

Office of State Attorney General
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 22, 2022, at Santa Ana, California.

/s/ *Catherine McDorman*

_____

Catherine McDorman
Attorney Clerk II

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **NEEDHAM v. S.C. (PEOPLE)**
Case Number: **S276395**
Lower Court Case Number: **G060670**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **yvette.patko@da.ocgov.com**

3. I served by email a copy of the following document(s) indicated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/22/2022
Date

/s/Catherine McDorman
Signature

Patko, Yvette (161892)
Last Name, First Name (PNum)

Orange County District Attorney's Office
Law Firm