In the Supreme Court of the State of California

KEVIN MICHAEL REILLY, **Petitioner,** v. **THE SUPERIOR COURT OF ORANGE COUNTY,** **Respondent,** **THE PEOPLE OF THE STATE OF CALIFORNIA,** **Real Party in Interest.**	Case No. S202280 SUPREME COURT FILED SEP 12 2012 Frank A. McGuire Clerk Deputy

Fourth Appellate District, Case No. G045118
Orange County Superior Court, Case No. M11860
The Honorable Richard M. King, Judge

OPENING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
BRADLEY A. WEINREB
Deputy Attorney General
State Bar No. 157316
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2290
Fax: (619) 645-2271
Email: Bradley.Weinreb@doj.ca.gov
Attorneys for Real Party in Interest

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QUESTION GRANTED REVIEW

Must a pending SVPA civil commitment petition be dismissed when the expert re-evaluations are done pursuant to *In re Ronje* (2009) 179 Cal.App.4th 509, but do not agree the person meets commitment criteria?

ARGUMENT SUMMARY

The initial mental evaluations of a person suspected to fall under the Sexually Violent Predator Act (SVPA) must be performed in accordance with a standardized assessment protocol, and the evaluators must concur the person meets commitment criteria before a commitment petition can be filed. While these concurring evaluations are relevant for purposes of filing the SVPA petition, later evaluations prepared for subsequent court proceedings do not require such concurrence.

When it is determined there existed a procedural irregularity in the evaluation process, such as here where an invalid standardized assessment protocol had been used to conduct the initial SVPA evaluation, it does not divest the court of jurisdiction over the petition, nor does it return the case to the pre-filing stage to affect the continuation of judicial proceedings by requiring new concurring evaluations. Further, remedial evaluations should only be warranted if it is demonstrated the invalidity was a material error which undermined the conclusion the person met commitment criteria.

PROCEDURAL HISTORY[1]

> Reilly was the subject of an SVPA commitment petition filed in July 2000, while he was serving a three-year prison term for engaging in lewd and lascivious conduct. After Reilly completed his prison sentence, and while being held in civil

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[1] The indented portion of the Procedural History is adopted from appellate court's "Summary of the Opinion" in *Reilly v. Superior Court* (2012) __ Cal.App.4th __, 139 Cal.Rptr.3d 194. It is located at Exhibit A to the Petition for Review and referenced herein as "*Slip Opn. (Reilly)*."

commitment at a state hospital, a recommitment petition against him was filed in July 2008.[2] The 2008 recommitment petition was based on two evaluations that concluded he met the criteria for commitment as a sexually violent predator. Updated evaluations pursuant to section 6603, subdivision (c) were conducted in 2009 and reached the same conclusion. The evaluations supporting the 2008 recommitment petition and the 2009 updated evaluations were conducted according to the invalid assessment protocol.

Following our decision in *Ronje* [*In re Ronje* (2009) 179 Cal.App.4th 509], the trial court ordered new evaluations of Reilly to be conducted according to a validly approved assessment protocol. Both of those evaluations in 2011 concluded Reilly no longer met the criteria for commitment as a sexually violent predator.

Before a post-*Ronje* probable cause hearing was conducted, Reilly filed a plea in abatement seeking dismissal of the SVPA commitment petition on the ground both post-*Ronje* evaluators concluded he no longer met the criteria for commitment as a sexually violent predator. The trial court denied the plea in abatement, as well as those brought on the same or similar grounds by nine other persons named in SVPA commitment petitions. A different trial court denied a motion to dismiss brought by an 11th person named in an SVPA commitment petition. The court also granted the district attorney's motion to compel Reilly to undergo a mental evaluation by the district attorney's retained mental health professional and to grant that mental health professional access to Reilly's state hospital records.

Reilly and the 10 others brought petitions for writ of mandate or prohibition to overturn the trial court's orders and have their SVPA commitment petitions dismissed. Reilly also challenges the trial court's order compelling him to undergo

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[2] The initial SVPA finding was for a determinate two year term, because it pre-dated the amended SVPA that now provides for an indeterminate commitment term. An indeterminate commitment term is still subject to annual review and subsequent evaluations of the person's condition. (*People v. McKee* (2010) 47 Cal.4th 1172.)

another mental evaluation and releasing his medical records to the district attorney's chosen evaluator.

(*Slip Opn. (Reilly), supra,* at pp. 3-4.)

In a published decision the appellate court reversed and ordered the petition dismissed. The appellate court ruled dismissal was compelled because "post- *Ronje*" evaluations did not produce the concurrence required to support filing of an initial SVPA petition. The appellate court reasoned these evaluations replaced and cured invalid and defective pre-filing evaluations. Without two concurring evaluations, *a fortiori*, no petition could have been filed, which then divested the trial court's jurisdiction over any further judicial proceedings. (*Id.* at p. 24.)

This Court granted a petition for review and deemed this as lead case.[3]

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[3] This Court grant and held review in two other published and eight unpublished related decisions contemporaneously issued on the same date. The cases relate to three procedural postures:

(1) *Reilly* and the related case of *Smith v. Superior Court (People)* (S20238), were post-probable cause proceedings where the court dismissed the SVPA petition because remedial post-*Ronje* evaluations did not agree the person met commitment criteria; (2) *Boysel v. Superior Court (People)* (S202324) and related cases of *Rigby v. Superior Court (People)* (G045614), *Quintero v. Superior Court (People)* (G045200), *Lefort v. Superior Court (People)* (G045204), and *Yancy v. Superior Court (People)* (G045213), were pre-probable cause proceedings and after post-*Ronje* evaluations disagreed the person met SVPA commitment criteria, a plea in abatement was filed that challenged the court's jurisdiction to proceed with a probable cause hearing. Because there was no evidence in the record the reports of the two independent evaluators were before the trial court, the court denied petitions for writ of mandamus/prohibition without prejudice to renew the challenge to the SVPA commitment petition based upon those reports; and finally (3) *Wright v. Superior Court (People)* (S202320) and related cases of *Gordon v. Superior Court (People)* (S202322), *Chambers v. Superior Court (People)* (S202334), and *Lunday v. Superior Court (People)* (S202366), also disagreed in post-*Ronje* evaluations and the subsequent independent evaluator reports were also not yet before the trial court, but that was because independent evaluators had yet to be appointed.

(continued...)

ARGUMENT

I. WHERE AN EVALUATION WHICH SUPPORTED THE FILING OF AN SVPA PETITION IS BASED ON AN INVALID ASSESSMENT PROTOCOL, THAT CIRCUMSTANCE DOES NOT DIVEST THE TRIAL COURT OF JURISDICTION OVER THE PETITION AND FURTHER JUDICIAL PROCEEDINGS ARE NOT PREDICATED ON REMEDIAL EVALUATIONS THAT AGREE THE PERSON CONTINUES TO MEET COMMITMENT CRITERIA

When a trial court concludes an evaluation which led to the filing of an SVPA petition had relied on an invalid assessment protocol, that fact does not divest the court of jurisdiction over the petition and revert the case back to the pre-filing stage to require concurring evaluations to justify further judicial proceedings. In any event, should remedial evaluations conducted under the proper assessment protocol be afforded, they should be predicated on the petitioner establishing there was material error which affected the conclusion the person met commitment criteria.

A. Overview of the SVPA

When the secretary of the Department of Corrections and Rehabilitation (DCR) determines a person in custody may be a sexually violent predator, the secretary refers the inmate for an evaluation. (Welf. & Inst. Code, § 6601, subd. (a).)[4] After the secretary's referral, the inmate is screened by the DCR and the Board of Parole Hearings to determine whether the person is likely to be an SVP. If the DCR and the Board conclude that is the case, the inmate is referred for a "full evaluation" by

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(...continued)
Regardless, all of these cases went further and embraced the reasoning employed in the instant case.

[4] Unless otherwise noted, further statutory references are to the Welfare and Institutions Code.

the State Department of Mental Health (DMH). (Welf. & Inst. Code, § 6601, subd. (b).) At that time, DMH,

> evaluate[s] the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator . . . .

(§ 6601, subd. (c); *People v. Hurtado* (2002) 28 Cal.4th 1179, 1182–1183.)

The Legislature has directed that the standardized assessment protocol "shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders." (§ 6602, subd. (c).) The protocol is statutorily mandated for the administrative evaluations leading up to the filing of an SVPA petition. (§ 6601, subds. (c) & (d).) But the protocol's validity is not a jurisdictional requirement in order to file a petition. (*People v. Medina* (2009) 171 Cal.App.4th 805, 816; *Ronje, supra*, 179 Cal.App.4th at p. 518.)

If the two initial evaluators disagree whether the inmate meets the SVPA criteria, two more independent evaluators are appointed. (§ 6601, subd. (e).) [5] A petition for commitment may not be requested unless the initial two evaluators appointed under subdivision (d), or the two independent evaluators appointed under subdivision (e), agree the inmate meets the commitment criteria. (§ 6601, subds. (d), (f).) After these evaluations are completed and the DMH concludes the inmate is an SVP, the director of the DMH requests that a petition for commitment be filed by the district attorney or the county counsel of the county where the inmate

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[5] The SVPA sets forth further requirements for these "independent professionals" including that they have at least five years of experience in the diagnosis and treatment of mental disorders, that they not be state government employees and that any licensed psychologists have a "doctoral degree in psychology." (§ 6601, subd. (g).)

was convicted. If upon review that official concurs, a petition for commitment *shall* be filed in the superior court. (§ 6601, subds. (h), (i).)

Once the petition is filed, it proceeds to a facial judicial review to determine if the facts alleged establish probable cause the person meets SVPA commitment criteria. (§ 6601.5.) If such a determination is made, the matter then proceeds to a probable cause hearing, and if probable cause is found, then to trial. (§ 6603.)

As the statute makes expressly clear, the only prerequisite to the filing a petition and then proceeding to judicial review is that two experts agree at the pre-filing stage that the person meets commitment criteria. (*People v. Superior Court (Ghilott)* (2002) 27 Cal.4th 888, 894.)

The purpose of the pre-filing evaluation process is not to show the soundness of the evaluation procedure or the credibility of those evaluations conducted. Instead, it is to screen out individuals who plainly do not meet SVPA commitment criteria. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063.)

After the screening function of the pre-filing evaluations is fulfilled and a petition is filed, evaluators play a relevant but less integral role in the judicial proceedings that follow. Indeed, the People need not even allege the evaluations or attach them to the petition. (*People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1128; § 6601, subds. (h) and (i).) And at the probable cause hearing, the People are not required to prove the filing of the petition was predicated on two concurring evaluations conducted pursuant to section 6601, much less that the evaluators used a proper assessment protocol. (See § 6602, subd. (a); see also *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 248-250 [probable cause is screening step superseding DMH's concurring evaluation requirement].)

The probable cause hearing is analogous to a preliminary hearing in a criminal proceeding, because it contemplates a full adversarial proceeding

in which evaluators may testify and where the person named in the petition "may challenge the reports by calling the professionals to the stand and cross-examining them," as well as has ability to call his own witness with relevant evidence bearing on the issue of whether there is probable cause to believe he meets SVPA commitment criteria. (*Cooley v. Superior Court, supra*, 29 Cal.4th at pp. 245, fn. 8, and 247.)

Similarly, at trial the person named in the petition is entitled to examine the witnesses and evidence presented against him, as well as retain professionals or experts to perform an examination on his behalf. It must be found beyond a reasonable doubt and based on a unanimous verdict that the person named in the petition is a sexually violent predator. (§§ 6603-6604.)

B. The Evaluations and the Invalid Assessment Protocol

As relevant here, three potential circumstances may occur with respect to the evaluation process. None affect a court's jurisdiction to proceed with further judicial proceedings once a petition is filed.

First, although two concurring evaluations are required to file the SVPA petition, the failure to do so may be subject to independent judicial review. In cases where the initial or independent evaluators do not concur that a person meets commitment criteria to justify filing an SVPA petition, the People may still file the SVPA petition if they believe the conclusion was based on "material legal error." (*Ghilotti, supra,* 27 Cal.4th at p. 909.) In that instance, the court conducts a facial review and examines the negative report(s) and if it finds material legal error in the evaluation (i.e., the doctor applied an incorrect legal standard in conducting, or did not comply with the statutory criteria governing, the evaluations), dismissal is not warranted. (*Id.* at pp. 909, 912, 966.)

Second, both the SVPA and courts recognize there may be inherent delays in proceeding to a probable cause hearing or to trial, where a

person's "current" disorder and likelihood to reoffend if released are at issue for the fact-finder. In some circumstances updated or replacement evaluations may be required in anticipation of a probable cause hearing or trial.[6] As this Court has noted, "[i]t is apparent that the process has a number of steps and may take some considerable time to complete." (*In re Lucas* (2012) 53 Cal.4th 839, 846.) But once a petition is filed there is no legal requirement the evaluators continue to believe a person meets commitment criteria. (*Gray v. Superior Court* (2002) 95 Cal.App.4th 322 [where updated evaluations result in a split of opinion, dismissal of the previously filed petition is not required].) In other words, a change in the expert's conclusion does not affect the continued validity of the SVPA petition or the subsequent proceedings. (*People v. Scott, supra,* 100 Cal.App.4th at p. 1063 ["rather than demonstrating the existence of the two evaluations, the People are required to show the more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior"]; see also *People v. Superior Court (Preciado), supra,*

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[6] Section 6603, subdivision (c)(1), provides in pertinent part as follows:

> If the attorney petitioning for commitment under this article determines that updated evaluations are necessary in order to properly present the case for commitment, the attorney may request the State Department of Mental Health to perform updated evaluations. 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 State Department of Mental Health to perform replacement evaluations. . . . If an updated or replacement evaluation results in a split opinion as to whether the person subject to this article meets the criteria for commitment, the State Department of Mental Health shall conduct two additional evaluations in accordance with subdivision (f) of Section 6601.

87 Cal.App.4th at p. 1130 ["the statute does not require the People to prove the existence of such evaluations at either the probable cause hearing or at trial"].)

This is because "the requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so." (*Preciado, supra*, 87 Cal.App.4th at p. 1130.) Instead, once a petition is filed, "[t]he legal determination that a particular person is an SVP is made during the subsequent judicial proceedings, rather than during the screening process. [Citation.]" (*People v. Medina, supra*, 171 Cal.App.4th at p. 814.) At that time, the only issue becomes whether there is evidence the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior. (*People v. Scott, supra,* 100 Cal.App.4th at p. 1063.)

Third, is the circumstance where a person named in the petition challenges the validity of the evaluations which supported the filing of the SVPA petition. One example might be where the evaluator's credentials are challenged. (See *In re Wright* (2005) 128 Cal.App.4th 663.) Or as in this case, a person challenges evaluations as being based on an administrative irregularity or procedural defect in the standardized assessment protocol.

To that end, on August 15, 2008, the Office of Administrative Law (OAL) determined the 2007 standardized assessment protocol that had been developed by DMH constituted an invalid "underground" regulation under the Administrative Procedures Act (APA).[7] (See § 6601, subd. (c); Gov.

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[7] OAL Determination No. 19 found the protocol used by the Department for SVP evaluations—the "Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)"—was a regulation and therefore (continued...)

Code, §§ 11340.5, 11342.600.) "'An underground regulation is a regulation that a court may determine to be invalid because it was not adopted in substantial compliance with the procedures of the [APA]. [Citation].'" (*Patterson Flying Service v. Cal. Dept. of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 429.) OAL's determination that an underground regulation was created is not enforceable against the agency through any formal administrative means, and while its determination the protocol was invalid is not binding on the courts, it is entitled to deference.[8] (*People v. Medina, supra,* 171 Cal.App.4th at p. 814; see also *Grier v. Kizer* (1990) 219 Cal.App.3d 422.)

(...continued)
should have been adopted pursuant to the APA. (2008 OAL Determination No. 19, Aug. 15, 2008 (OAL file No. CTU 2008-0129-01). It can be located at http://www.oal.ca.gov/res/docs/pdf/determinations/2008/2008_OAL_Determination_19.pdf

[8] The People did not challenge the OAL determination. In fact, in response and on February 6, 2009, DMH adopted a new emergency assessment protocol pursuant to the APA (Gov. Code, §§ 11346.1 and 11349.6). (Return to Petition for Writ of Mandate/Prohibition at p. 6, referring to Exhs. 5 and 6.) It was approved by the OAL on September 14, 2009 (Gov. Code, § 11349.6, subd. (d)). (*People v. Medina, supra,* 171 Cal.App.4th at p. 814; see also Return to Petition for Writ of Mandate/ Prohibition at p. 7, referring to Exh. 8.)

Understandably, current SVPA evaluations are now conducted based on a now APA-compliant protocol. As a result, there may only be a limited number of cases that challenge the validity of the protocol. However, there may exist unforeseen challenges to the validity of the current assessment protocol on other bases, or perhaps other challenges to the legality of the evaluations or evaluation process which lead to the filing of an SVPA petition, or even challenges to other civil commitment or even criminal proceedings that might have attendant APA or regulatory guidelines. (See *Morales v. Cal. Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 729 [lethal injection protocol is regulation subject to APA].)

C. *Ronje and* the Remedial Evaluations in this Case

In November 2009, this same appellate court decided *In re Ronje.* In *Ronje*, an SVPA petition had been filed and probable cause finding had been made. *Ronje* agreed with OAL's determination the assessment protocol being used by SVPA evaluators at that time constituted an invalid underground regulation. (*In re Ronje, supra,* 179 Cal.App.4th at p. 517.)[9] To that end, *Ronje* observed that,

> To implement section 6601, the DMH has over the years published a clinical evaluator handbook and standardized assessment protocol for its SVP evaluators. In August 2008, the OAL issued a determination that various challenged portions of the 2007 version of the Clinical Evaluator Handbook and Standardized Assessment Protocol met the statutory definition of a regulation and, therefore, should have been adopted pursuant to the Administrative Procedure Act (APA), Government Code section 11340.5. (2008 OAL Determination No. 19 (Aug. 15, 2008) p. 1 <http://www.oal.ca. gov/Determinations_Issued_in_2008.htm> [as of Nov. 19, 2009].) The OAL determined that, as such, the protocol constituted an underground regulation as defined in California Code of Regulations, title 1, section 250. (2008 OAL Determination No. 19, *supra*, at p. 13.) A regulation enacted in violation of the APA is invalid. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 340, 42 Cal.Rptr.3d 47, 132 P.3d 249.)
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> The 2008 OAL Determination No. 19 concerned only whether the assessment protocol constituted a regulation under Government Code section 11342.600 and stated, "[n]othing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment." (2008 OAL Determination No. 19, *supra*, at p. 1.) The 2008 OAL Determination No. 19 advised that the OAL "has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination." (*Ibid.*)

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[9] In February 2009, the First Appellate District had assumed but did not decide the validity of the OAL determination. (*People v. Medina, supra,* 171 Cal.App.4th at p. 815.)

(*In re Ronje, supra,* 179 Cal.App.4th at p. 515.)

Although *Ronje* correctly determined use of an invalid assessment standardized protocol during the pre-filing SVPA evaluation did not divest the trial court of jurisdiction over the petition, *Ronje* also concluded that evaluations conducted under the invalid protocol constituted an error or irregularity in the SVPA commitment proceedings itself. (*Ronje, supra,* 179 Cal.App.4th at p. 518.) *Ronje* then held the remedy was to cure the defective evaluation, which meant the case reverted back to the pre-filing stage and mandated, without any further showing, that (1) new evaluations using a valid APA-compliant protocol be prepared and (2) a new probable cause hearing be conducted. (*Id.* at pp. 519, 521.)[10]

Ronje then served as the framework for the appellate court's decision in this case. Petitioner was previously found to be an SVP and a recommitment petition was filed. The trial court had found probable cause that petitioner met SVPA commitment criteria, then subsequently ordered post-*Ronje* evaluations; the experts thereafter changed conclusions and found petitioner no longer met SVPA commitment criteria. The trial court denied a plea in abatement to dismiss and ordered a new probable cause hearing. The appellate court reversed and found dismissal of the petition was compelled because, after post-*Ronje* evaluations no longer agreed petitioner met commitment criteria, this fact invalidated the SVPA petition. The effective result was to divest the court's jurisdiction to proceed with a new probable cause hearing and instead required dismissal.

This ruling must be viewed in the context of the evaluations conducted in this case. The appellate court observed the evaluations which

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[10] *Ronje* was a pre-trial writ proceeding in which the Orange County District Attorney represented Real Party in Interest, and did not challenge the validity of the OAL determination or file a Petition for Review.

supported the 2008 recommitment petition and the 2009 updated evaluations were conducted according to the invalid assessment protocol. (*Slip Opn. (Reilly), supra,* at p. 3.) That was not entirely accurate.

The initial recommitment evaluations were conducted on January 14, 2008 [Dr. Webber] and June 20, 2008 [Dr. Clipson]. (Return to Petition for Writ of Mandate/Prohibition at pp. 5-6, referring to Exh 2 [register of actions for Case No. M-11860] and 3 and 4 [evaluations conditionally lodged under seal].) These evaluations were relied on for the probable cause hearing and finding on March 2, 2009. (Return to Petition for Writ of Mandate/Prohibition at pp. 6-7, referring to Exh. 2, p. 5.) These same doctors then prepared updated evaluations for the scheduled trial, on August 11, 2009 [Dr. Webber] and September 18, 2009 [Dr. Clipson], finding petitioner continued to meet commitment criteria. (Return to Petition for Writ of Mandate/Prohibition at p. 7, referring to Exh. 7 and 9 [evaluations conditionally lodged under seal].)

Based on the *Ronje* decision, the trial court vacated the probable case finding and granted petitioner's motion for new evaluations and a new probable cause hearing, on November 19, 2010. (Return to Petition for Writ of Mandate/Prohibition at p. 8, referring to Exh. 2, p. 7.)[11] On February 25, 2011, Dr. Webber prepared a new evaluation where he opined that petitioner no longer met SVPA commitment criteria. On February 26, 2011, Dr. Clipson also prepared a new evaluation where he opined that

[11] The evaluations challenged in this case were performed in January and June of 2008, *before* the August 2008 OAL determination the protocol was invalid and before the *Ronje* decision that upheld that OAL determination. However, that does not appear consequential because the OAL determination "effectively invalidate[d] the operative content of the protocol" and voided the assessment protocol. (*People v. Medina, supra,* 171 Cal.App.4th at p. 814; see also *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557; Gov. Code, § 11350.)

petitioner no longer met SVPA commitment criteria. (Return to Petition for Writ of Mandate/Prohibition at p. 9, referring to Exh. 10 and 11 [evaluations conditionally lodged under seal].)

It bears noting that because DMH adopted new emergency protocols in February 2009 that the OAL approved in September, the 2009 updated evaluations (which agreed petitioner met commitment criteria) and the 2011 new post-*Ronje* evaluations (which found he no longer met commitment criteria) used the *same valid assessment protocol*. A comparison of the prior and post-*Ronje* evaluations suggests the doctors did not change their opinions because of the assessment protocol or any irregularities in their prior evaluations or the evaluation process. As Dr. Webber stated, "the protocol did not change my conclusions stated in the previous evaluation or the way in which the evaluation was conducted." (Return to Petition for Writ of Mandate/Prohibition, at Exh. 10 [Sealed].) Instead, the changed opinion was simply the result of the 18-month lapse of time between the evaluations periods (where petitioner had progressed in treatment and reduced the statistical likelihood he might reoffend), and not in the method of assessment. (Return to Petition for Writ of Mandate/ Prohibition at p. 18, referring to Exhs. 7-11 [evaluations conditionally lodged under seal].)

As shown below, assuming the OAL correctly determined the assessment protocol relied on before filing in this case constituted an invalid regulation, the remedy articulated first by *Ronje* and then by the instant case was an unwarranted rule of law that contravenes the SVPA and decisions from this Court.

Instead, where a trial court concludes evaluations which led to the filing of an SVP petition relied on an invalid assessment protocol or other procedural irregularity, a court still retains jurisdiction to continue further judicial proceedings, and remedial relief of new evaluations is not warranted absent evidence the invalidity was a material error that

undermined the conclusion that the person met commitment criteria. Regardless, agreement the person meets commitment criteria is not required because the evaluations and the conclusions within are merely collateral to the continued judicial proceedings.

D. A Court Retains Jurisdiction Over an SVPA Petition Even Where Evaluations Which Supported the Filing of the SVPA Petition Were Invalid or Based on a Procedural Irregularity

Because SVPA evaluations are conducted based on a standardized assessment protocol, this case presents the question of whether an agency's failure to adopt a regulation without complying with APA requirements invalidates not just the regulation at issue, but the SVPA evaluations and the SVPA petition itself. Relying on the remedy it had crafted in *Ronje*, the appellate court essentially ruled that because the agency blundered, the sexual predator must necessarily go free.

The fact that petitioner's original pre-filing evaluations were conducted pursuant to a protocol that constituted an underground regulation did not, however, divest the trial court of jurisdiction and it may still properly proceed on the SVP petition. (*In re Ronje, supra,* 179 Cal.App.4th at p. 518 ["Use of the evaluations based on the invalid assessment protocol, though erroneous, does not deprive the trial court of fundamental jurisdiction over the SVPA commitment petition. The trial court has the power to hear the petition notwithstanding the error in using the invalid assessment protocol. Dismissal therefore is not the appropriate remedy"].)[12]

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[12] In concluding the trial court still retained fundamental jurisdiction over the SVPA petition, *Ronje* relied on *People v. Glenn, formerly published* at (2009) 178 Cal.App.4th 778 [use of evaluations conducted pursuant to the invalid assessment protocol did not deprive the trial court of the legal power to hear and determine the subsequently filed SVPA

(continued...)

As *Medina* observed,

> Although [the defendant] contends that the initial trial court lacked "fundamental" jurisdiction over his petition, thereby producing a void judgment, his claim does not call into question the court's personal or subject matter jurisdiction. As to personal jurisdiction, there is no evidence to suggest, and [the defendant] does not contend, that he lacked minimum contacts with the State of California [citation] or that he was not served with the documents necessary to initiate the proceedings. [Citations.] As to subject matter jurisdiction, the superior court was undoubtedly the appropriate court to hear the commitment petition [citations], and there is no claim of untimeliness.

(*People v. Medina, supra,* 171 Cal.App.4th at p. 816.)

Any argument that evaluations based on an invalid assessment protocol is a procedural prerequisite to conferring jurisdiction, was as *Medina* stated, "an argument that the court acted in excess of its jurisdiction, rather than without fundamental jurisdiction." (*People v. Medina, supra,* 171 Cal.App.4th at p. 816.) This is also in accord with decisions of this Court. (See, e.g., *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660 [when a court lacks fundamental jurisdiction, the judgment is void and therefore vulnerable to direct or collateral attack at any time]; *People v. Pompa–Ortiz* (1980) 27 Cal.3d 519, 529 [the term "jurisdictional in the fundamental sense" means the "legal power to hear and determine a cause"]; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288 ["Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties"].)

(...continued)
commitment petition, and therefore was not jurisdictional in a fundamental sense]. This Court granted review of *Glenn* on May 10, 2010 (S178140) and it is no longer cite-able. (Cal. Rules of Court, rule 8.1105(e)(1).)

As this Court observed in *American Contractors Indemnity Co.*,

> "'[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction.'" [Citation.] When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by "principles of estoppel, disfavor of collateral attack or res judicata." [Citation.] Errors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal, and are generally not subject to collateral attack once the judgment is final unless "unusual circumstances were present which prevented an earlier and more appropriate attack." [Citations.]

(*American Contractors Indemnity Co., supra*, 33 Cal.4th at p. 661, similarly *People v. Allegheny Casualty Co.* (2007) 41 Cal.4th 704, 716, fn. 7.)

Underscoring the notion that a court maintains jurisdiction over an SVPA petition, even when as here, the evaluations which supported the petition are found to be procedurally invalid, is this Court's decision in *Ghilotti*. There, a petition was filed but without two concurring evaluations, because DMH and the People believed there existed material legal error in the evaluation process. This Court determined that "a court entertaining a petition for an involuntary civil commitment has the implicit authority to review for legal error the expert evaluations which are a prerequisite to the filing of such a petition." (*Ghilotti, supra,* 27 Cal.4th at p. 910.) If the lack of two valid evaluations deprived a superior court of fundamental jurisdiction, then the superior court would not have the power to conduct the review authorized by this Supreme Court.

This Court's decision of *In re Lucas* also supports the notion that a procedural irregularity to justify the filing of an SVPA petition does not undermine further SVPA proceedings. *Lucas* addressed the "good cause" showing needed for the Board of Parole Hearings to issue a 45-day hold to

extend the custody of a potential SVP who would otherwise be released before a full evaluation could be conducted and an SVPA petition filed beyond the inmate's scheduled release date. Of importance in *Lucas* was the fact that the regulation designed to implement the Board's purview over a prisoner's extended custody was found to be deficient. (*In re Lucas, supra,* 53 Cal.4th at pp. 844-845.)

Nevertheless, although the procedural defect at issue in *Lucas* may have invalidated the Board's actions, it did not invalidate the petition upon which it was based. Instead, *Lucas* recognized the Board was excused for then relying on an invalid regulation, because its reliance was a "good faith mistake of fact or law" and there was not any negligent or intentional wrongdoing in calculating custody. (*In re Lucas, supra,* 53 Cal.4th at pp. 852, 854, and 858; also *In re Smith* (2008) 42 Cal.4th 1251, 1260.)

Admittedly, the SVPA expressly provides that invalid *custody* determination must take into account whether it was excused based on mistake of fact or law,[13] but it does not afford the same language for purportedly invalid evaluations. That is an immaterial distinction. Both involve the validity of the SVPA petition – custody and evaluations that concur a person meets commitment criteria are each a prerequisite in order to properly file an SVP petition. Consequently, they must be harmonized to effectuate the intent of the SVPA.

Finally, two intermediate appellate decisions also support the notion that once jurisdiction is conferred over an SVPA petition, it remains even where pre-filing evaluations are later invalidated.

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[13] "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 noted above, *Gray* recognized that once a petition is filed, there is no legal requirement the evaluators continue to believe a person meets commitment criteria. (*Gray v. Superior Court, supra,* 95 Cal.App.4th 322 [where updated evaluations result in a split of opinion, dismissal of the previously filed petition is not required].) *Gray* recognized that the suggested interpretation of the interplay between section 6603, subdivision (c) [updated or replacement evaluations] and section 6601, subdivision (f) [independent evaluations for initial filing purposes], would require it either to insert language into the former or to construe the latter through the use of analogy, neither of which was permissible without "very clear indications" that the supposed legislative purpose sought to be accomplished was intended. (*Id.* at p. 327.) The court explained:

> Gray would have us amend subdivision (f) of section 6601 to read in part (with changes in the language italicized): "[A] petition to request commitment under this article shall only be filed if both independent professionals who evaluate the person pursuant to subdivision (e) concur that the person meets the criteria for commitment specified in subdivision (d). *Furthermore, if the independent professionals who evaluate the person—after a split of opinion has resulted from an updated or replacement opinion—do not concur, a pending proceeding under this Act shall be forthwith dismissed.*" This, however, is not what the statute says. To say that a petition may not be filed unless certain conditions are met is not the same as to say that proceedings "may not go forward" if those conditions cease to exist.

(*Gray, supra*, 95 cal.App.4th at pp. 327-328, italics added by *Gray*.)

Also instructive is *In re Wright*, which involved the situation where one of two evaluations was challenged as procedurally defective because, like here, there was a lack of statutory compliance. In *Wright,* the two evaluators selected by the DMH could not agree whether the defendant met the SVPA commitment criteria. (*In re Wright, supra,* 128 Cal.App.4th at p. 668.) As a result, two independent evaluators were appointed, and they

concluded the defendant met the SVP criteria. (*Ibid.)* Subsequently, an SVPA petition was filed and a jury found the defendant was an SVP. (*Id.* at pp. 667, 669.) After obtaining information suggesting one of the two independent evaluators lacked the education and experience qualifications required by section 6601, subdivision (g), in order to render an evaluation, the defendant filed a petition for writ of habeas corpus alleging he was deprived of due process because one of the two evaluations supporting the SVPA commitment petition was defective. (*Id.* at pp. 667, 669, 673.)

Wright assumed for purposes of analysis that the challenged evaluator was not qualified to conduct the secondary evaluation under subdivision (g) of section 6601. (*Wright, supra,* 128 Cal.App.4th at p. 672.) The appellate court concluded that any defect in the evaluations was harmless and likened the defect in the evaluation to an illegality in a pretrial commitment proceeding, which is not jurisdictional in a fundamental sense. Thus reversal was not required unless the defendant could show he was deprived of a fair trial or suffered prejudice as a result of the defective evaluation. (*Id.* at p. 673.)

E. The Remedy In *Ronje* That Provides For Remedial Evaluations Without Any Further Showing is Misguided and Should Not Be Adopted by this Court

Although *Ronje* properly concluded a trial court retains jurisdiction over SVP proceedings despite evaluations based on invalid protocols, it nevertheless went on to craft an ill-conceived remedy by further concluding the use of an invalid protocol constituted an error in the SVPA judicial proceeding itself, and, that the case had to revert back to the pre-filing stage. In so doing, it concluded nothing further need be shown and the defective condition had to be cured with new remedial and APA-compliant evaluations, as well as a new probable cause hearing be conducted. That reasoning is facially, and fatally, inconsistent.

Fundamentally, *Ronje* rested on the mistaken belief that the invalid protocol constituted an error in the SVPA judicial proceeding itself. But that belief is incompatible with its recognition that the OAL challenge was procedural not substantive, and, that there was no evidence the procedural error had any effect on the substantive conclusions in the original evaluations. (*In re Ronje, supra*, 179 Cal.App.4th at pp. 519, 521.) It also rests inapposite to its recognition that,

> [t]he 2008 OAL Determination No. 19 does not address the assessment protocol's accuracy or reliability in determining whether the person is an SVP as defined in the SVPA. The 2008 OAL Determination No. 19 made clear the ruling concerned only whether the assessment protocol constituted a regulation under Government Code section 11342.600 and stated, "[n]othing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment." (2008 OAL Determination No. 19, *supra*, at p. 1.)

(*In re Ronje, supra*, 179 Cal.App.4th at p. 520.)

While it accepted a court's continued jurisdiction, *Ronje* also erroneously believed that ordering new evaluations started the case anew, which effectively divested the court of jurisdiction until a new petition was filed. At the same time, *Ronje* denied the request for dismissal of the petition that had been filed. Instead, it limited the remedy to ordering new evaluations using a valid assessment protocol and conducting a new probable cause hearing. (*In re Ronje, supra*, 179 Cal.App.4th at p. 519.) Nothing in *Ronje* supported treating the order for new evaluations under a valid protocol as divesting the trial court of jurisdiction over the filed petition and over further proceedings.

Regardless, the use of the invalid assessment protocol in conducting SVPA evaluations does not deprive the trial court of jurisdiction over the subsequently filed commitment petition. (*People v. Medina, supra*, 171 Cal.App.4th at p. 816.) Similarly, even a petition that was supported by

only one, not two evaluations, will not deprive the court of jurisdiction where the petition was facially valid and where the lack of a second evaluation was subsequently cured. (*People v. Superior Court (Preciado), supra*, 87 Cal.App.4th at p. 1130.)

In any event, the *Ronje* remedy and its extended application here - which resulted in dismissal of the SVPA petition because the remedial evaluations did not concur - contravenes the SVPA and cannot be harmonized with this Court's jurisprudence and other SVPA decisions.

1. A valid regulation and assessment protocol is not a statutory prerequisite to filing an SVPA Petition

Section 6601, subdivision (f), only declares as a general rule that an SVP petition may not be filed in the *first instance* without the concurrence of two doctors. Those first-instance evaluations were obtained here. Admittedly, the evaluators used a procedure that was later declared to have not been properly ratified under the APA, but they nonetheless still complied with their duties and conducted evaluations that supported a petition properly filed as set forth in the SVPA.

This stands in contrast to the circumstance where a petition is not "properly" filed, because it was done in contravention of the express terms of the SVPA. One example is filing an untimely petition, because section 6601, subdivision (a), requires a person to be in custody and screened before their release date. (*People v. Whaley* (2008) 160 Cal.App.4th 779, 804 ["In general, the only act that may deprive a court of jurisdiction [under the Act] is the People's failure to file a petition for recommitment before the expiration of the prior commitment."]; see also, *People v. Allen* (2007) 42 Cal.4th 91, 94-95 [untimely filing of a petition for recommitment under the Mentally Disordered Offenders Act (Pen. Code, § 2960 et seq.)].) Another example is where the People fail to comport with the statutory language and file an SVPA petition based on one rather than the required

two mental health evaluations. In that instance, the petition is dismissed without prejudice to being re-filed with two concurring evaluations. (*Butler v. Superior Court* (2000) 78 Cal.App.4th 1171, 1174; *Peters v. Superior Court* (2000) 79 Cal.App.4th 845.) [14]

In any event, the administrative irregularity later discovered in this case cannot be construed *nunc pro tunc* to then invalidate not just the evaluations but the otherwise properly filed petition. To do so would require the People to presciently engage in a formal process neither contemplated by nor required under the SVPA before it chooses to file a recommended petition: assess the credibility of the evaluator's professional judgment *and* whether every action and procedure undertaken by the *recommending agency* complied with every jot and title of administrative and regulatory procedures, which is independent of the evaluation itself.

This is contrary to the SVPA. Once evaluations are rendered and the agency recommends a petition be filed, if the People concur then its only responsibility at that juncture *shall* be to file an SVPA petition. Any challenges to the propriety of the evaluations are then left to judicial review after the petition is filed. (*Ghilotti, supra*, 27 Cal.4th at pp. 909-910 [once the experts concur, the petition may be filed and whether the experts complied with their statutory obligation should be entertained by the court].) Consequently, any finding that pre-filing evaluations were based on an invalid procedural irregularity need not afford any remedial relief and certainly not preclude further judicial proceedings from going forward.

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[14] This principle of course, is subject to the *Ghilotti* exception where the People file a petition for judicial review without concurring evaluations, where it believes there existed legal error in the evaluation process.

2. Relief for procedural defects under the APA must be harmonized with and not frustrate enforcement of the SVPA

The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations promulgated by administrative agencies. (Gov. Code, § 11346; *Grier v. Kizer, supra,* 219 Cal.App.3d at p. 431, disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw, supra,* 14 Cal.4th at p. 577.) "A major purpose of the APA is to provide a procedure for persons or entities affected by a regulation to be heard on the merits in its creation, and to have notice of the law's requirements so they can conform their conduct accordingly." (*Morales v. Cal. Dept. of Corrections & Rehabilitation, supra,* 168 Cal.App.4th at p. 736, referring to *Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4th at pp. 568–569.)

In the context of the SVPA evaluation, the assessment protocol is not designed to limit the evaluators' professional judgment whether a person meets SVPA commitment criteria. Instead its purpose is to generally explain the factors and approaches used in the evaluation process and as related to the interview of the committee. As a result, the remedy to cure a protocol not ratified by the APA is an APA-compliant protocol. That ultimately occurred through the administrative process. But it in no way should an evaluation that inadvertently did not comport with this process operate to vacate a filed SVPA petition and effectively divest a trial court's jurisdiction over pending judicial proceedings. To rule otherwise would frustrate the notion that relief for procedural defects under the APA must be harmonized with the SVPA.

In this case, the appellate court determined the invalid regulation invalidated not just the evaluations which supported the SVPA petition and mandated APA-compliant evaluations, but also voided the SVPA judicial

proceeding itself. This ruling ignored important public policies and societal interests that this Court has stated must be considered in fashioning a fair remedy for curing procedural administrative defects under the APA.

The central purpose of the APA is "to reduce the unnecessary regulatory burden on private individuals and entities . . . ." (Gov. Code, § 11340.1, subd. (a).) It is not the purpose of the APA to block enforcement of laws enacted by the Legislature or the people, and such obstruction is not a permissible use of the APA. This Court made that fact clear in *Tidewater Marine Western, Inc. v. Bradshaw.*

Tidewater involved wage orders issued by the Industrial Welfare Commission pursuant to certain provisions of the Labor Code and the interpretation and enforcement of those orders by the Division of Labor Standards Enforcement (DLSE). (*Tidewater, supra,* 14 Cal.4th at p. 561.) After resolving a federal preemption issue, this Court asked whether DLSE's enforcement policy was void for failure to follow the APA. (*Id.* at p. 568.) This Court noted, but rejected an argument submitted by an amicus curiae that interpretive regulations, as distinguished from quasilegislative regulations, were not subject to the full APA process. (*Id.* at pp. 574-575.) This Court "conclude[d] that DLSE's policy for determining whether to apply IWC wage orders to maritime employees constitutes a regulation and is void for failure to comply with the APA." (*Id.* at p. 576.) However, this Court emphatically rejected the proposition that this meant the wage orders did not apply:

> "If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA, then we would undermine the legal force of the controlling law. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations. Here, for example, if Tidewater and Zapata violate applicable IWC wage orders, they should not be immune

> from suit simply because the DLSE adopted an invalid policy. The DLSE's policy may be void, but the underlying wage orders are not void. Courts must enforce those wage orders just as they would if the DLSE had never adopted its policy."

(*Tidewater, supra,* 14 Cal.4th at p. 577.)

APA litigation must not be allowed to frustrate the SVPA. Nowhere in the findings and purposes of the APA is there any indications that such a result was intended or should be allowed. (See Gov. Code, §§ 11340 (findings), 11340.1 (intent); *Tidewater, supra*, 14 Cal.4th at p. 568-569.)

This Court applied the same principle in *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 332-340. There, the Department of Toxic Substance Control had an extremely broad rule for deciding what companies are involved with hazardous materials and thus subject to a statutory fee. This Court held this was an underground regulation, invalid under the APA. But that did not mean it voided the fees and Morning Star automatically got its money back. This Court further decided it was not in a position to decide the "hazardous materials" question itself. "Instead, we direct the Board [of Equalization] to conduct further administrative proceedings on Morning Star's refund request, without reliance upon the Department's invalid regulation." (*Id.* at p. 341.)

As in *Tidewater*, the individual case continued to move forward without a regulation, decided on its merits under the statute. As to the request for injunctive relief, this Court permitted collection of the fees to continue, due to the critical importance of the program, until the department complied with the APA. The length of this authorization was left to the superior court on remand. (*Morning Star, supra*, 38 Cal.4th at p. 342.) *Morning Star* thus indicates an important government function should not be impeded while an agency treads the administrative road toward APA compliance.

Importantly, in *Morning Star* this Court also relied on its inherent powers in order to ensure the status quo was preserved:

> Our instructions here derive from the court's inherent power to issue orders preserving the status quo. (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 216 [157 Cal.Rptr.840, 599 P.2d 31].) In *California Hotel*, we concluded that a minimum wage order promulgated by the IWC pursuant to various sections of the Labor Code was invalid because it lacked an adequate "statement of basis" as required by statute. (*Ibid.*) But we further concluded that the order was of "critical importance to significant numbers of employees" who bore "no responsibility for the deficiencies of" the order. (*Ibid.*) We therefore exercised "our inherent power to make an order appropriate to preserve the status quo pending correction of deficiencies," directing the issuance of a writ of mandate to compel the IWC to correct the deficiencies "within 120 days of the finality of the opinion." (*Ibid.*)
>
> So, too, in the present case, the continued viability of the hazardous materials fee program is of critical importance to the State of California, as determined by the Legislature, and any disruption in collection of the fee would seriously undermine the program. With these considerations in mind, as in California Hotel we will allow the Department a reasonable opportunity to correct the deficiency in its hazardous material fee regulations by subjecting them to APA procedures, while maintaining the current system in the interim. [Citations.] . . . . Once the Department has complied with the APA, Morning Star's administrative proceedings may resume, with these proceedings and the Department's schedules generally being governed by any properly adopted regulations.

(*Morning Star Co., supra*, 38 Cal.4th at pp. 341-342.)

Here, too, courts should avoid creating remedial procedures that unnecessarily disrupt SVPA proceedings or delay trials. The SVPA proceedings are of "critical importance" to the public, which has an interest in being protected from dangerous sexual predators and having those predators treated rather than released because administrative procedures were not followed — procedures that petitioner has not shown affected the

reliability of the experts' opinions which underlied the petition filed in his case. Analogously, this Court recognizes the validity of continued SVPA proceedings, despite a later finding that the predicate condition of custody was later found illegal or invalid, such as when based on the erroneous revocation of parole and an instance where "the constable has blundered." (See *In re Smith, supra,* 42 Cal.4th at p. 1261, and *In re Lucas, supra*, 53 Cal.4th at p. 853, referring to Assem. Com. on Public Safety, Republican Analysis of Sen. Bill No. 11 (1999–2000 Reg. Sess.) as amended Apr. 6, 1999, p. 1 ("sexually violent predators are not to be unleashed on society simply because 'the constable has blundered'"); also, *People v. Hale* (1994) 29 Cal.App.4th 730, 734 ["We first address Hales' point that because the scientist has blundered the toxic dumper must necessarily go free. [fn.] We discern no per se rule which automatically precludes the introduction of evidence of disposal of hazardous waste just because the gathering of the sample does not follow every jot and title of the EPA manual"].) This is consistent with the Legislature's recognition that "[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).)

In this as in other SVPA cases, the experts' findings were based on their own independent professional judgment and codes of ethics. Their credibility and opinions will be tested by an impartial fact finder under the highest burden of proof. Certainly, the public bears "no responsibility" for the failure of DMH to adopt a protocol pursuant to the APA that affected the "validity" of the protocol, particularly where it did not materially affect the evaluators' conclusions.

Thus, the remedy to cure a defective assessment protocol was administrative adoption of an APA-compliant protocol, not ordering new evaluations and void a probable cause finding. To then use this process to

compel dismissal of SVPA proceedings because of the conclusion rendered in remedial evaluations - a remedy designed to cure only a procedural irregularity - placed too much emphasis on the administrative practices of the recommending agency and a greater faith in evaluators rather than the courts, whereas the SVPA and judicial decisions have consistently placed on them at most collateral and marginal relevancy once the petition has been filed. Indeed, it would strain all credulity to dismiss a pending petition due to such a procedural irregularity, when as noted above, dismissal is not even warranted in cases that involve a more substantive defect where the custody over a potential SVP is found based on an erroneous action.

F. Remedial Evaluations Should Only Be Warranted When the Invalid Protocol Materially Affected the Prior Evaluations Or the Outcome of the Probable Cause Hearing

Given the trial court still retained jurisdiction over the SVPA petition and dismissal was not warranted, the question remains under what circumstances should a trial court provide relief where a petitioner establishes there existed an administrative or procedural irregularity within the pre-filing evaluation process? As noted above, once an SVPA petition is filed, there is no need for remedial relief because further judicial proceedings are designed to test the evidence as to whether a person meets commitment criteria.

Nevertheless, the appellate court in *Ronje* and again here concluded the invalidity voided the SVPA petition and reverted the case back to the pre-filing stage, even after probable cause had already been found. In other words, no further showing need be made to compel remedial evaluations, evaluations which must again concur the person meets commitment criteria, or the person previously found to meet commitment criteria should be freely released without need for any additional judicial review. This

conclusion fails to account for a more sensible approach if this Court finds remedial evaluations should be afforded. In that instance, they should only be ordered where the petitioner shows the invalidity or irregularity materially affected the evaluator's conclusion, and in cases where a probable cause finding had been made, that the outcome of the hearing would have been different.

1. Remedial evaluations are not necessary to cure a non-compliant APA protocol and even when performed, agreement is not required because they are collateral to the judicial proceedings

As noted above, the remedy for an invalid protocol is adoption of a valid protocol, not further judicial remedial action in an individual civil commitment proceeding. Further, remedial evaluations are not necessary because lack of concurrence in the remedial evaluations will not prevent the case from proceeding forward.

This position finds support in *Davenport v. Superior Court* (2012) 202 Cal.App.4th 665. There, the appellate court addressed the post-*Ronje* evaluation process for cases where after probable cause had been found, the post-*Ronje* evaluations result in a split of opinion on whether a person meets SVPA commitment criteria. It rejected the proposition—central to the decision of the appellate court here—that pursuant to *Ronje*, the SVPA evaluation process effectively begins anew, as if a commitment petition had never previously been filed. (*Id.* at pp. 671-673.)[15]

Davenport presumed, but did not address, the propriety of post-*Ronje* evaluations to cure the defective evaluations. Nevertheless, consistent with the *Gray* decision, *Davenport* held these post-*Ronje* evaluations are

[15] On March 28, 2012, this Court denied review in *Davenport*, and a decision from the Fifth Appellate District which involved similar facts but contrary held dismissal of the SVPA petition was warranted. (*Sizneroz v. Superior Court (People)* (F062298).)

comparable to updated or replacement evaluations prepared before trial. Consequently, in that circumstance dismissal is not required regardless of whether the original pair of doctors, or a subsequently-appointed second set of doctors, do not both agree whether the person meets commitment criteria. (*Davenport v. Superior Court, supra*, 202 Cal.App.4th at pp. 671-672.) *Davenport* stated,

> Given the procedural safeguards in place—a probable cause hearing, a jury trial, a unanimous verdict—there is no need to dismiss the commitment petition and start the SVP evaluation process from the beginning in this case.

(*Davenport, supra*, 202 Cal.App.4th at p. 673, referring to *Gray v. Superior Court, supra*, 95 Cal.App.4th at p. 330.)

While the appellate court here erroneously believed ordering new post-*Ronje* evaluations started the case anew which effectively divested the court of jurisdiction until a new petition was filed, *Davenport* offers a more sound understanding of the interplay between the evaluations and recommendations presented to the People to justify their filing of a proper petition, and the attendant judicial proceedings.

Unless a filed petition is later dismissed because "the prosecuting attorney is satisfied that proceedings should be abandoned." (*Gray, supra,* 95 Cal.App.4th at p. 329), it simply goes forward subject to judicial review that tests the sufficiency of the petition and the evidence. Any further evaluations performed – whether to provide updated or replacement evaluations, or even to cure a remedial error as discussed below – should have no affect on the propriety of judicial proceedings and thus do not mandate concurrence.

2. Once an SVPA petition is filed, material error must be shown to warrant remedial evaluations

Assuming this Court determines that APA-compliant evaluations should be provided, *Ronje* simply went too far in concluding a petitioner is entitled to remedial evaluations without any further showing required.

Ronje was based on the mistaken belief the error constituted an irregularity in the preliminary stage of the SVPA judicial proceeding, which although it does not deprive the superior court of fundamental jurisdiction to hear and determine a commitment or recommitment petition, was an irregularity that can cause the court to act in excess of jurisdiction. The remedy afforded was then based on the rule in criminal proceedings that holds when an irregularity is addressed pre-trial, the petitioner is not required to show actual prejudice, as the error can be corrected expeditiously. (*People v. Pompa-Ortiz, supra,* 27 Cal.3d at p. 529; *In re Ronje, supra*, 179 Cal.App.4th at pp. 517-518.) Conversely, if the irregularity is not corrected before trial and is raised as an issue on appeal, the irregularity does not require reversal unless the person shows he was deprived of a fair trial or was otherwise prejudiced in his ability to mount a defense. (*Pompa-Ortiz*, at p. 529; *People v. Medina*, *supra*, 171 Cal.App.4th at pp. 818-819.) [16]

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[16] *Medina* also contained an apt discussion about the lack of prejudice when in rejected a corollary claim that counsel rendered ineffective assistance because had he challenged the validity of the evaluations before trial, the petition might have been dismissed or at the very least he would have been "screened out" under an APA-compliant protocol:

> [I]n order to satisfy the standard for prejudice, Medina must show that had his trial counsel challenged the protocol, thereby obtaining reevaluation, it is reasonably probable he would have been screened out or otherwise would have been found not to be an SVP. [fn.] Medina points out that there is controversy among

(continued...)

While intermediate appellate court decisions have adopted and applied *Pompa-Ortiz* to SVPA matters, this Court has yet to endorse its application.[17] Nevertheless, while the *Pompa-Ortiz* methodology provides reasoned guidance on remedies for pretrial irregularity in *criminal* proceedings, it should not be broadly adopted in this *civil commitment* proceeding. Instead it must be narrowly construed to require a showing of material error and prejudice.

Real Party respectfully submits that once an SVPA petition is filed, remedial evaluations are simply not needed even where a court determines it was supported by pre-filing evaluations based on an invalid protocol. But

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(...continued)

> mental health professionals concerning the proper manner of evaluating SVP's and argues "it is very possible that the [Department] ... [will] adopt regulations that create a completely different protocol for the evaluation of sexually violent predators." Even if we assume this to be true, it does not demonstrate that an APA-compliant protocol is reasonably likely to lead to a different conclusion regarding Medina himself. He makes no showing that the characteristics of his particular mental disorder are sufficiently "borderline" or controversial that there is a reason to believe that changes in the protocol would affect his personal standing. Indeed, he does not discuss the evidence in the record relating to his own disorder at all. Instead, he argues that because of the controversy, it is "completely impossible to predict whether [he] will be found to qualify as a sexually violent predator under the new protocol." This is simply insufficient to carry his burden of demonstrating the reasonable probability, rather than the mere possibility, of a different outcome. (See similarly *Castillo, supra*, 170 Cal.App.4th at pp. 1177–1179, 89 Cal.Rptr.3d 71.)

(*People v. Medina, supra,* 171 Cal.App.4th at p. 820.)

[17] In *People v. Hurtado, supra,* 28 Cal.4th 1179, this Court observed the appellate decision of *People v. Talhelm* (2000) 85 Cal.App.4th 400, 405, applied *Pompa-Ortiz* to a challenge against a probable cause finding.

if they are to be afforded, they must be predicated on a petitioner showing the use of the invalid protocol was a material error that affected the evaluator's conclusion. And in cases where this is done after a probable cause finding, the petitioner must additionally establish prejudice in that the outcome of the probable cause hearing would have been different.

Recently, the appellate court in *Macy v. Superior Court* (2012) 206 Cal.App.4th 1393, as modified on denial of rehearing (July 09, 2012) (Petition for Review filed in S204255, on July 24, 2012), tried to craft this very solution. The appellate court reasoned *Ronje* represented a poor remedial approach and determined "the *Ronje* remedy must be fine-tuned." (*Macy, supra,* 206 Cal.App.4th at p. 1400.) There, updated evaluations were conducted pursuant to section 6603, and they produced conflicting opinions regarding whether the petitioner met SVP commitment criteria. Upon Macy's *Ronje* motion, the court ordered a new probable cause hearing, but no further evaluations.

In reviewing the trial court proceedings, *Macy* first determined that *Ronje* and the OAL correctly found the language in the assessment protocol at issue was a "regulation" within the meaning of the APA. (*Macy, supra* , 206 Cal.App.4th at 1409.) *Macy* then disagreed with *Davenport's* conclusion that

> new *Ronje* evaluations, which are aimed at remedying the error or irregularity of the original concurring evaluators use of an invalid assessment protocol, are necessarily analogous to evaluations prepared pursuant to section 6603, subdivision (c), and, therefore, merely evidentiary in all circumstances.... Thus, where an individual is asserting that a petition was not properly filed because the concurring evaluations were conducted based upon an invalid assessment protocol, it is not at all clear that the new *Ronje* evaluations serve the same purpose as updated evaluations generated pursuant to section 6603.

(*Macy, supra*, 206 Cal.App.4th at p. 1412.)

Macy then sought to refine the *Ronje* remedy, at least in those instances where a probable cause hearing had already been conducted. It determined the probable cause finding itself cannot simply be discarded and vacated and revert the case back to the pre-filing stage. To do so would ignore this Court's decisions of *Pompa–Ortiz, supra*, 27 Cal.3d 519, *People v. Konow* (2004) 32 Cal.4th 995, *People v. Standish* (2006) 38 Cal.4th 858, and *Ghilotti, supra*, 27 Cal.4th 888. In applying the principles of those cases, *Macy* concluded that, "where an individual challenges a probable cause hearing on the ground that the section 6601 evaluations leading to the filing of the petition were conducted using an assessment protocol that was invalid under the APA, the person must show that this error or irregularity 'reasonably might have affected the outcome' of that probable cause hearing." (*Macy, supra*, 206 Cal.App.4th at p. 1414.)

Although Real Party submits *Davenport* more correctly reasoned remedial evaluations do not affect continued judicial proceedings, it did not address what would occur if the evaluations no longer agreed the person met commitment criteria. Of course, because they are collateral to the continued judicial proceedings, the implicit conclusion is that their agreement is of no consequence. *Macy* sought to craft a remedy that recognized this fact.

Macy applied *Pompa-Ortiz* and this Court's jurisprudence in harmony with the SVPA, to articulate a refined rule of law that requires a petitioner to show the administrative irregularity had a material affect on the SVPA evaluations, and in cases where a probable cause finding has been made, on the outcome of that hearing itself.

In *Pompa–Ortiz*, this Court stated: "It is settled that denial of a *substantial right* at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion. [Citations.]" (*People v. Pompa–Ortiz, supra*, 27 Cal.3d

at p. 523; emphasis added.) This Court then went on to establish an additional rule:

> [In criminal proceedings,] irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects.

(*People v. Pompa–Ortiz, supra*, 27 Cal.3d at p. 529.)

In *People v. Konow, supra,* 32 Cal.4th 995, the People appealed from the superior court's order setting aside the information under Penal Code section 995. (*Id.* at p. 1012.) The magistrate desired to dismiss the complaint in furtherance of justice (Pen. Code, §1385), but believed he could not do so. (*Id.* at p. 1026.) This Court then applied the *Pompa-Ortiz* rule and held "a defendant is denied a substantial right affecting the legality of the commitment when he or she is subjected to prejudicial error, that is, error that reasonably might have affected the outcome [citation]." (*Id.* at p. 1024.)

And in *People v. Standish, supra,* 38 Cal.4th 858, the People appealed from a judgment of dismissal and challenged the superior court's setting aside the information (Pen. Code, § 995) on the ground the defendant should have been released on his own recognizance. (*Standish, supra*, at p. 866.) Importantly, this Court stated *Pompa–Ortiz* "must not be read overbroadly. That case did not establish that any and all irregularities that precede or bear some relationship to the preliminary examination require that the information be set aside pursuant to section 995 . . . ." (*Id.* at p. 885.) This Court then concluded erroneous refusal to grant "release

pending the preliminary examination did not amount to denial of a substantial right at the preliminary examination within the meaning of section 995, in the absence of evidence that the error reasonably might have affected the outcome of that hearing." (*Id.* at p. 863.) As a result, a superior court may not "set aside an information . . . when a magistrate refuses . . . to grant OR release to an in-custody defendant . . . in the absence of a determination that the error reasonably might have affected the outcome of the preliminary examination." (*Id.* at p. 882.)

Perhaps of greater guidance is this Court's decision in *Ghilotti*, holding courts have implicit authority to review for legal error the expert evaluations that serve as a prerequisite to the filing of an SVPA petition. (*Ghilotti, supra,* 27 Cal.4th at p. 910.) Importantly in *Ghilotti* this Court established a procedure for remedial relief in the event there existed a facial defect in evaluators' concurring reports:

> [I]f the Director [of the DMH] has obtained reports that *do concur* the person meets the criteria for commitment or recommitment, and a petition is filed on that basis, the evaluators' reports should also be attached to the petition. The person may then file a pleading challenging the petition's validity on grounds that one or more of the supposedly concurring reports are infected by legal error. [¶] We stress that such judicial review is limited to whether one or more evaluators' reports are infected by material legal error. An evaluator's report is infected with legal error if, on its face, it reflects an inaccurate understanding of the statutory criteria governing the evaluation. [¶] On the other hand, judicial review of an evaluator's report does not extend to matters of debatable professional judgment within an evaluator's expertise. The professional determinations of an evaluator, insofar as based on consideration and application of correct legal standards, is conclusive at the initial screening stage set forth in section 6601.

(*People v. Superior Court (Ghilotti*), *supra,* 27 Cal.4th at p. 913.)

In setting forth this standard, this Court recognized the need to employ a materiality standard:

> If the court concludes that one or more evaluators has committed legal error in reaching his or her conclusions, the court must further determine whether the error is *material.* An evaluator's legal error shall be deemed material it, and only if ... (1) there appears a reasonable probability, sufficient to undermine confidence in the outcome, that the error affected the evaluator's ultimate conclusion, and (2) a change in the evaluator's conclusion would either supply, or disssolve, the necessary concurrence of two designated evaluators."

(*Ghilotti*, *supra,* 27 Cal.4th at p. 913, emphasis in original.)

It bears noting, however, that this Court also recognized a report need not be redone "pursuant to correct legal standards," if upon review of the current reports, "the court finds the report makes expressly clear that correct legal standards *were* applied." (*Id.* at p. 914, fn. 10.) In other words, absent evidence the evaluators themselves engaged in a decision that was legally and materially in error, there is no need for remedial action.

A similar analysis was employed in *In re Lucas,* where this Court found the procedural irregularity of invalid custody did not operate to undermine SVPA proceedings. Instead, *Lucas* recognized the Board was excused for then relying on an invalid regulation, because its reliance was a "good faith mistake of fact or law" and there was no indication of any negligent or intentional wrongdoing in calculating custody. (*In re Lucas, supra*, 53 Cal.4th at pp. 852, 854, and 858; see also *In re Smith, supra,* 42 Cal.4th at p. 1260.)

As in *Lucas*, where a petition would have otherwise been dismissed if the Board were found at fault for relying on a regulation later deemed invalid, so too here it was entirely excusable for evaluators to conduct assessments despite the protocol later being deemed invalid. For purpose of assessing custody, there must be some showing the correctional authorities acted with negligent or intentional wrongdoing. (*Lucas, supra*,

53 Cal.4th at p. 854.) Similarly, there is no indication here the evaluators conducted their assessment in a negligent or intentionally wrong manner.

Accordingly, this Court's jurisprudence affords a reasonable remedy when a procedural irregularity is found in the pre-filing evaluation process: because an invalid regulation may be void but does not *per se* impede judicial proceedings from going forward, the procedural irregularity in that screening process is not the *sine qua non* of denial of a fundamental right at the probable cause hearing, nor does it mandate remedial relief or otherwise affect the court's jurisdiction over a properly filed petition. Instead, when an individual challenges the commitment petition on grounds that the supporting evaluations were conducted using an invalid assessment protocol, that person must show the error or irregularity resulted in a material defect that affected the conclusion of those evaluations before he is entitled to any remedial relief, and prejudice in the outcome if a probable cause hearing had been made. (See *Ghilotti, supra*, 27 Cal.4th at p. 913.)

This conclusion finds further support by this Court's statement in the APA context, that "a court reviewing a challenge to a regulation that is invalid under the APA has broad discretion to devise a fitting remedy that avoids disruption of important state programs or laws." (*Morning Star Co. v. State Bd. of Equalization, supra,* 38 Cal.4th at p. 340; *Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4th at pp. 561, 572, 576–577.)

The circumstances here underscore why material error and prejudice must be shown before remedial relief is ordered. The initial evaluations were relied on for the probable cause hearing and finding on March 2, 2009. These same doctors then prepared updated evaluations (using an APA-compliant evaluation that had yet to be official adopted) for trial in August and September of 2009, finding petitioner continued to meet commitment criteria. The trial court thereafter ordered a new probable cause hearing after *Ronje* was decided. New evaluations were prepared

some 18 months later, where the experts now opined petitioner no longer met commitment criteria. But these APA-compliant evaluations used the *same* assessment protocol as the 2009 evaluations. There was no showing made that there existed any irregularities in the prior evaluations or the evaluation process itself, that the evaluators engaged in any negligence or intentional errors, or much less any other showing the opinions were remotely affected by assessment protocol. Instead, it appears the changed opinions were simply because of the 18-month lapse of time between the evaluations periods, while petitioner progressed in treatment and reduced the statistical likelihood he might reoffend. (See Return to Petition for Writ of Mandate/Prohibition at p. 18, referring to Exhs. 7-11 [evaluations conditionally lodged under seal].)

As a result, there is no reason to believe that had petitioner *initially* been evaluated under an APA-compliant protocol, he would have been found not to meet commitment criteria. Indeed, the OAL's determination includes a caveat that its review of the protocol was only for the purpose of deciding whether it was a regulation within the meaning of the APA and that it was not evaluating the advisability or wisdom of the protocol itself. (OAL Determination No. 19, supra, at p. 1.)

To construe the above circumstances to vacate the SVPA petition and order dismissal of the proceedings because of new circumstances, independent of the protocol being used, was simply unsound.

Indeed, this position also finds support in several important observations made by the appellate court in *Macy*: (1) evaluations performed pursuant to section 6601 using an invalid protocol do not deprive a superior court of fundamental jurisdiction over an SVP proceeding; (2) the People are not required to prove at the probable cause hearing the filing of the petition was predicated on two concurring evaluations pursuant to section 6601, "much less that the evaluators used an

assessment protocol properly adopted under the APA"; (3) the Legislature could have, but did not provide in the SVPA for an automatic dismissal if the original evaluators relied on an assessment protocol that is later determined to be invalid because it was not promulgated in compliance with the APA; (4) courts should avoid creating remedial procedures that unnecessarily disrupt SVP proceedings and delay trial; and (5) "the state has no interest in the involuntary civil confinement of persons who have no mental disorder or who are not dangerous to themselves or others." (*Macy, supra*, 206 Cal.App.4th at p. 1416.)

Macy then held,

> Keeping in mind the essential purposes of the SVPA to protect the public and treat qualifying mental disorders (see *People v. McKee* (2010) 47 Cal.4th 1172, 1203, 104 Cal.Rptr.3d 427, 223 P.3d 566; *Ghilotti, supra,* 27 Cal.4th at p. 921, 119 Cal.Rptr.2d 1, 44 P.3d 949; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1153, fn. 20, 81 Cal.Rptr.2d 492, 969 P.2d 584), we refine the *Ronje* remedy to better effectuate the purpose of the law. When an individual seeks *Ronje* relief after a probable cause hearing but before trial, the person must affirmatively show (1) the concurring section 6601 evaluations that were the basis for filing of an SVP petition were conducted using an invalid assessment protocol and (2) this error or irregularity "reasonably might have affected the outcome" of the probable cause hearing.

(*Macy, supra*, 206 Cal.App.4th at p. 1417.)

Macy continued,

> If the person is unable to make such a showing, the court should deny relief. If such a showing is made, the court should allow a reasonable time for the DMH to put in place a valid standardized assessment protocol, if that has not already occurred, and to obtain new evaluations using a valid protocol. If the individual additionally establishes that the use of an invalid assessment protocol resulted in a material defect in either of the concurring evaluations that were the basis for filing the commitment petition, new concurring evaluations must be produced pursuant to section 6601 to cure the defect. In this latter situation, the new evaluations are not merely evidentiary because the person is

> directly challenging the commencement of the SVP proceedings. As *Ghilotti* states, however, "[t]he professional determinations of an evaluator, insofar as based on consideration and application of correct legal standards, is conclusive at the initial screening stage set forth in section 6601." (*Ghilotti, supra,* 27 Cal.4th at p. 913, 119 Cal.Rptr.2d 1, 44 P.3d 949.)
>
> Where refined *Ronje* relief is ordered and the DMH satisfies the applicable requirements, the court must hold a new probable cause hearing pursuant to section 6602. If the rare situation arises where the DMH cannot meet those requisites, the court must dismiss the commitment petition.

(*Macy, supra*, 206 Cal.App.4th at p. 1417.)

In contrast, the appellate court's approach was to find dismissal was compelled because the remedial evaluations failed to produce the concurrence otherwise required to support an initial filing of an SVPA commitment petition. As noted above, this engrafts a remedy onto the SVPA that the Legislature declined to provide and is not supported by sound judicial analysis.

As in *Macy, Davenport* and even *Ronje*, in this case there was a complete failure to identify any substantive defect in the assessment protocol and the lack of evidence the protocol had any material effect on the conclusions in the prior evaluations. (See *Macy, supra,* 206 Cal.App.4th at p. 1417; *Davenport v. Superior Court, supra*, 202 Cal.App.4th at p. 673; *In re Ronje, supra*, 179 Cal.App.4th at p. 516.) Indeed, while the protocol may dictate the scope, methodology, and relevant considerations of an assessment prior to filing a commitment petition, it does not dictate the evaluator's findings and conclusions whether a person meets SVPA commitment criteria. This is particularly true given the purpose of post-*Ronje* relief and reevaluations is simply designed to cure a procedural defect in the assessment protocol, rather than any substantive affect on the evaluation process itself.

To that end, there are still substantial procedural protections in place that afford persons ability to challenge the SVPA petition even when remedial evaluations are not ordered. There is a prima facie judicial review once the petition is filed, and the petitioner retains the right to test and challenge the evidence at probable cause if one has not occurred, as well the protections afforded at trial. Further, new, updated, or replacement evaluations can still be prepared in anticipation of a probable cause hearing, or trial, or even evaluations may be prepared on a petitioner's behalf, all of which may warrant the People seeking dismissal. To be sure, those evaluations must be based on an APA-compliant protocol. But regardless, these evaluations do not require concurrence the person meets commitment criteria for judicial proceedings to move forward.

Accordingly, a more sensible approach, consistent with the SVPA and the prior decisions of this Court, is that a petitioner must show use of an invalid assessment protocol itself resulted in a material defect in either of the concurring evaluations, and, the error or irregularity reasonably might have affected the outcome of the evaluation, or in cases where a probable cause finding had been made, prejudice in the outcome of that hearing.

This would merely extend the already recognized principle under the SVPA that the court's gate-keeper function is to assess whether an evaluator applied the statutory criteria in a manner that on its face constituted legal error. (*Ghilotti, supra*, 27 Cal.4th at p. 912.) If the court determines the evaluator relied on an invalid protocol or other procedural irregularity, it must then determine whether that error was material and undermined the confidence of the conclusion. (*Id.* at p. 913.) Absent such a showing remedial evaluations should not be required and even when they are, agreement the person meets commitment criteria is not required for judicial proceedings to continue.

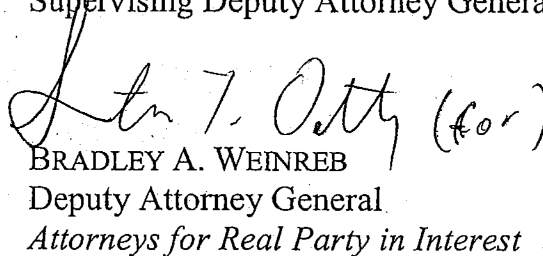
Moreover, to preclude further court proceedings and order release (here of an already once adjudicated sexually violent predator) without the credibility of the evaluations being tested by the judicial process, would ignore important societal interests when fashioning a fair remedy for procedural administrative defects, represent an unwarranted extension of an unsound decision in *Ronje*, conflict with the better reasoning as set forth in *Davenport* and *Macy* and the jurisprudence of this Court, and, would be inconsistent with the purpose and goals of the SVPA itself.

CONCLUSION

Based on the foregoing, the judgment must be reversed and the SVPA proceedings reinstated.

Dated: September 11, 2012 Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General



BRADLEY A. WEINREB
Deputy Attorney General
Attorneys for Real Party in Interest

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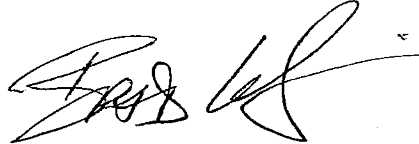
CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 13,623 words.

Dated: September 11, 2012

KAMALA D. HARRIS
Attorney General of California



BRADLEY A. WEINREB
Deputy Attorney General
Attorneys for Real Party in Interest

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **Reilly v. Superior Court (Orange County) & The People**
No.: **S202280**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 11, 2012, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Mark S. Brown (2 copies)
Orange County Public Defender's Office
Ronald Y. Butler Public Defender Building
Writs and Appeals Section
14 Civic Center Plaza
Santa Ana, CA 92701
Attorney for Petitioner Reilly

Clerk of the Court
Central Justice Center
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

Fourth Appellate District
California Court of Appeal
Division Three
P.O. Box 22055
Santa Ana, CA 92702

The Honorable Tony J. Rackauckas
District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **September 11, 2012** to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 11, 2012, at San Diego, California.

Bonnie Peak
Declarant

Bonnie Peak
Signature

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