Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 2/23/2023 4:17:36 PM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 2/23/2023 by LaNae Brooks, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NICHOLAS NEEDHAM *Petitioner,* v. **THE SUPERIOR COURT OF ORANGE COUNTY** *Respondent.* **PEOPLE OF THE STATE OF CALIFORNIA** *Real Party In Interest*	**No. S276395** Court of Appeal No. G060670 Orange County Sup. Ct. No. M-16870

ANSWER BRIEF ON THE MERITS

Following the published opinion of the Court of Appeal Fourth Appellate District, Division Three, granting the petition for writ of mandate/prohibition in Orange County Superior Court Case No. M-16870, the Honorable Elizabeth Macias, Dept. C38 (phone: 657-622-5238)

ORANGE COUNTY PUBLIC DEFENDER'S OFFICE

MARTIN SCHWARZ
Public Defender
LAURA JOSE
Chief Deputy Public Defender
ADAM VINING
Assistant Public Defender
*ELIZABETH KHAN
Deputy Public Defender
State Bar No. 292041
801 W. Civic Center Dr., # 400
Santa Ana, California 92701
(657) 251-6090
Elizabeth.khan@ocpubdef.com

Attorneys for Petitioner,
Nicholas Needham

TABLE OF CONTENTS

Page

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

ANSWER BRIEF ON THE MERITS 6

INTRODUCTION 6

QUESTION FOR REVIEW 9

PROCEDURAL AND FACTUAL HISTORY 9

POINTS, AUTHORITY, AND ARGUMENT 11

I. THE LOWER COURT CORRECTLY DETERMINED THAT THE SVPA DOES NOT ALLOW THE PEOPLE TO RETAIN PRIVATE EXPERTS TO EVALUATE AN ALLEGED SVP AND TESTIFY AT TRIAL THAT HE MEETS COMMITMENT CRITERIA. 11

A. The Plain Language and Non-Punitive Objectives of the SVPA Support the Lower Court's Holding that the Statute Does Not Permit the People to Use Testifying Experts at Trial to Prove a Person is a SVP 11

B. While Generally Applicable to SVPA Proceedings, the Civil Discovery Act is Subject to the Specific Provisions of the SVPA and a Defendant's Constitutional Rights 21

II. A DEFENDANT SUBJECT TO THE SVPA HAS A DUE PROCESS RIGHT TO A FAIR SVP TRIAL, WHICH IS VIOLATED WHEN THE PEOPLE BYPASS STATUTORY DIRECTIVES AND USE TESTIFYING EXPERTS AT TRIAL TO PROVE THAT A DEFENDANT IS AN SVP. 25

III. THIS COURT IN *SMITH* APPROVED THE PEOPLE'S USE OF CONSULTING EXPERTS TO ASSIST IN SVP PROCEEDINGS, WHICH IS CONSISTENT WITH THE PLAIN LANGUAGE AND NON-PUNITIVE OBJECTIVES OF THE SVPA 39

CONCLUSION 42

WORD COUNT 44

DECLARATION OF SERVICE 45

TABLE OF AUTHORITIES

Page(s)

Cases

Addington v. Texas (1979) 441 U.S. 418 27

Albertson v. Superior Court (2001) 25 Cal.4th 796 ..... 15, 16, 18

Bagration v. Superior Court (2003) 110 Cal.App. 1677 22

Foucha v. Louisiana (1992) 504 U.S. 71 ..... 27, 30

Gray v. Superior Ct. (2002) 95 Cal.App.4th 322 ..... 34, 35, 36

Hubbart v. Superior Ct. (1999) 19 Cal.4th 1138 ..... 7, 20, 22, 26

Leake v. Superior Ct., (2001) 87 Cal.App.4th 675 ..... 21, 22

Moore v. Superior Ct. (2010) 50 Cal.4th 802 27

Murillo v. Superior Court (2006) 143 Cal.App.4th 730 ..... 24, 31, 32

Needham v. Superior Ct. (2022) 82 Cal.App.5th 114 ..... 7, 11, 15

People v. Dekraai (2016) 5 Cal.App.5th 1110 29

People v. Force (2019) 39 Cal.App.5th 506, fn. 2 27

People v. Hill (1998) 17 Cal.4th 800 29

People v. Hurtado (2002) 28 Cal.4th 1179 27

People v. Jackson (2022) 75 Cal.App.5th 1 ..... 24, 25, 26

People v. Krah (2003) 114 Cal.App.4th 543 33

People v. McKee (2010) 47 Cal.4th 1172 20

People v. Otto (2001) 26 Cal.4th 200 ..... 28, 32

People v. Superior Court (Cheek) 94 Cal.App.4th 980 22

People v. Superior Ct. (Ghilotti) (2002) 27 Cal.4th 888 ..... 33, 38

People v. Superior Ct., (Smith) (2018) 6 Cal.5th 457 .....passim

People v. Superior Ct. (Vasquez) (2018) 27 Cal.App.5th 36 .....20, 21

People v. Tindall (2000) 24 Cal.4th 767 .....12, 14

People v. Yartz (2005) 37 Cal.4th 529 .....12, 21

Reilly v. Superior Court (2013) 57 Cal.4th 641 .....27, 36

Sporich v. Superior Ct. (2000) 77 Cal.App.4th 422 15

United States v. Edwards (E.D.N.C. 2011) 777 F.Supp.2d 985 30

Vitek v. Jones (1980) 445 U.S. 480 28

Statutes

Code Civ. Proc., § 2016.010 11

Code of Civ. Proc., § 437c 23

Code of Civil Proc., § 2016 23

Code of Civil Proc., § 2019.010 24

Code of Civil Proc., § 2034.00 24

Code of Civil Proc., § 2034.300 25

Welf. & Inst. Code, § 6600 9

Welf. & Inst. Code, §§ 6601 & 6603 .....9, 12

Welf. & Inst. Code, § 6601, subd. (d) 12

Welf. & Inst. Code, § 6601, subd. (d), (h)(1) 13

Welf. & Inst. Code, § 6601, subds. (a)(1) & (b) 12

Welf. & Inst. Code, § 6601, subds. (e), (g) 13

Welf. & Inst. Code, § 6601, subds. (e), (g), (f) 13

Welf. & Inst. Code, § 6603, subds. (d)(1) 13, 14

Welf. & Inst. Code, §§ 6600, subd. (a)(1), 6601, subds. (c) & (d) 12

Rules

California Rules of Court, Rules 8.204(c)(1), 8.504(d)(1)..... 43

Regulations

Cal. Code Regs. tit. 9, § 4020.1, subd. (a)(2)..... 31

Other Authorities

Senate Bill No. 2018..... 15, 16

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NICHOLAS NEEDHAM *Petitioner,* v. **THE SUPERIOR COURT OF ORANGE COUNTY** *Respondent.* **PEOPLE OF THE STATE OF CALIFORNIA** *Real Party In Interest*	**No. S276395** Court of Appeal No. G060670 Orange County Sup. Ct. No. M-16870 **ANSWER BRIEF ON THE MERITS**

TO: THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

INTRODUCTION

In enacting the Sexually Violent Predator Act ("SVPA") (Welfare and Institutions Code[1] section 6600 et seq.), our Legislature "disavowed any 'punitive purpose[ ],' and declared its intent to establish 'civil commitment' proceedings in order to provide 'treatment' to mentally disordered individuals who cannot control sexually violent criminal behavior. The Legislature also made clear that, despite their criminal record, persons eligible for commitment and treatment as SVP's are to be viewed 'not as criminals, but as sick persons.' Consistent with these remarks, the SVPA was

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

placed in the Welfare and Institutions Code, surrounded on each side by other schemes concerned with the care and treatment of various mentally ill and disgabled groups." (*Hubbart v. Superior Ct.* (1999) 19 Cal.4th 1138, 1171, internal citations omitted.)

The People[2] have no role in the commitment evaluation process under the SVPA. If the People need additional evaluations to "properly present the case for commitment," the People may request the California Department of State Hospitals ("DSH") to conduct updated or replacement evaluations. (§ 6603, subd. (d)(1).) Nothing in the SVPA authorizes the People to retain private experts to conduct evaluations and testify at trial that a defendant meets Sexually Violent Predator ("SVP") commitment criteria. The lower court correctly held that the People's use of such experts violates the SVPA's "carefully calibrated and limited procedure[s] to ensure that an extraordinary deprivation of liberty has as many safeguards as possible." (*Needham v. Superior Ct.* (2022) 82 Cal.App.5th 114, 127 (*Needham*).) The lower court's holding is consistent with precedent interpreting the relationship between the Civil Discovery Act and the SVPA; while the former generally applies to SVPA proceedings, it is subject to the specific provisions of the SVPA and a defendant's constitutional rights.

The People claim that because the Civil Discovery Act allows parties to retain and designate trial witnesses, the People can hire private experts to evaluate an alleged SVP and testify at trial that he meets commitment criteria. The People's position contravenes the plain language of the SVPA and

---

[2] For purposes of this brief, "the People" refers to real party in interest, the Orange County District Attorney's Office, and more generally to the prosecuting attorney in SVPA proceedings.

violates a key due process protection of the statute. The SVPA's reliance on neutral, independent experts, using a standardized protocol developed and overseen by DSH, is central to ensuring that the evaluations are as objective and accurate as possible. The People's privately retained experts are neither neutral nor independent. Rather, those experts are hired to present a specific opinion at the People's behest, regardless of what the evidence sanctioned under the statute might otherwise indicate.

The purpose of the SVPA is not to punish individuals for their past conduct. Rather, the purpose is to identify, confine, and treat those that are currently dangerous as a result of a diagnosed mental disorder. Neutral, independent mental health professionals are best equipped for this task—not the agency prosecuting the petition. Our Legislature placed careful limits on who conducts and controls commitment evaluations under the SVPA. Those limits are essential for realizing the non-punitive objectives of the statute and preventing an erroneous deprivation of liberty. The People's use of private experts to evaluate a defendant and testify at an SVP trial that he meets commitment criteria undermines the entire purpose of the SVPA and violates a defendant's due process right to a fair SVP trial. Accordingly, this Court should affirm the Court of Appeal's decision in this case.

QUESTION GRANTED REVIEW

Does the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 et seq.) allow the People to retain a private expert to testify at trial as to whether a defendant is a sexually violent predator, or are the expert witnesses limited to those designated by the State Department of State Hospitals (Welf. & Inst. Code, §§ 6601 & 6603)?

PROCEDURAL AND FACTUAL HISTORY

On November 17, 2016, the People filed a "Petition for Commitment as a Sexually Violent Predator" under section 6602 in case number M-16870 against Nicholas Needham ("Needham"). Attached to the Petition for Commitment as an SVP were the evaluations of Dr. Jeremy Coles and Dr. Michael Mussaco.

On November 28, 2016, the Honorable Kimberly Menninger found that the Petition for Commitment as a SVP stated sufficient facts that, if true, would constitute probable cause to believe that Needham is likely to engage in sexually violent predatory criminal behavior upon his release. On May 14, 2018, the Honorable Kathleen Roberts made a probable cause finding pursuant to section 6602 that Needham is likely to engage in sexually violent predatory criminal behavior upon his release.

When the Petition for Commitment as an SVP was filed in November of 2016, both DSH evaluators, Dr. Coles and Dr. Musacco, opined that Needham qualified as an SVP. However, on January 31, 2018, Dr. Coles changed his opinion and found that Needham no longer met the legal criteria. Since Dr. Coles and Dr. Musacco had different opinions regarding Needham's status as an SVP, two new DSH evaluators were directed to evaluate Needham: Dr. Korpi and Dr. Yanofsky.

In 2018, Dr. Korpi opined that Needham did not meet the criteria for commitment as an SVP, while Dr. Yanofsky opined that he did. On April 21, 2019, Dr. Yanofsky changed his opinion and found that Needham no longer met the criteria of an SVP.

On June 3, 2019, the People moved to continue Defendant's trial in order to find and retain an expert. In July of 2019, the People informed the court that they had retained Dr. Craig King as an expert witness and requested a protective order so that the People could provide him with Needham's confidential records and interview him at the Orange County Jail. Needham objected.

Needham filed multiple motions to exclude Dr. King from testifying at trial about whether Needham met commitment criteria. On July 7, 2021, the Honorable Elizabeth Macias, heard and denied Needham's motions to exclude Dr. King as an expert witness for trial.

On September 7, 2021, Needham filed a Petition for Writ of Mandate/Prohibition, which was summarily denied by the Court of Appeal on September 30, 2021. Needham filed a Petition for Review with this Court on October 5, 2021, in case number S271210. On December 15, 2021, this Court granted the Petition and transferred the matter to the Court of Appeal.

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

POINTS, AUTHORITIES AND ARGUMENT

I. THE LOWER COURT CORRECTLY DETERMINED THAT THE SVPA DOES NOT ALLOW THE PEOPLE TO RETAIN PRIVATE EXPERTS TO EVALUATE AN ALLEGED SVP AND TESTIFY AT TRIAL THAT HE MEETS COMMITMENT CRITERIA.

A. The plain language and non-punitive objectives of the SVPA supports the lower court's holding that the statute does not permit the People to use testifying experts at trial to prove a person is an SVP.

The People argue that the Civil Discovery Act of 1986 (Code Civ. Proc., § 2016.010 et seq.), which authorizes parties to retain and designate expert trial witnesses, allows the People to use testifying experts to prove that a person meets commitment criteria at an SVP trial.[3] (Opening Brief, pp. 41-48.) The lower court correctly rejected this argument because it is inconsistent with the "carefully calibrated and limited procedure[s]" of the SVPA, which are designed "to ensure that an extraordinary deprivation of liberty has as many safeguards as possible." (*Needham, supra,* 82 Cal.App.5th at p. 127.) The People's interpretation of the SVPA contravenes the plain language of the statute and its non-punitive objectives to confine only those who are presently dangerous under specific statutory criteria.

The basic principles used by courts in construing statutes are described in *People v. Yartz* (2005) 37 Cal.4th 529, 537-538 as follows:

> "'In construing a statute, our task is to determine the Legislature's intent and purpose for the enactment. (*People v. Tindall* (2000) 24 Cal.4th 767, 772 [citations].) We look first

---

[3] Specifically, the People argued in the trial court that section 2032.020 of the Code of Civil Procedure authorizes the People's expert to evaluate Needham. (Writ Petn., Ex. B, pp. 37-41.)

> to the plain meaning of the statutory language, giving the words their usual and ordinary meaning. (*Ibid*.) If there is no ambiguity in the statutory language, its plain meaning controls; we presume the Legislature meant what it said. (*Ibid*.) 'However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.' [Citations.]'"

The language of the SVPA is clear: The People have no role in the commitment evaluation process; DSH evaluators reach findings on whether an individual meets the criteria for an SVP. (§§ 6601, 6603.) If the Secretary of the Department of Corrections and Rehabilitation determines that a prison inmate is likely to be an SVP, the inmate is referred to DSH for a full evaluation. (§ 6601, subds. (a)(1) & (b).) DSH then designates two mental health professionals, either psychologists or psychiatrists, to conduct the evaluation. (§ 6601, subd. (d).) Those experts must evaluate the inmate in accordance with a standardized assessment protocol to determine whether he meets commitment criteria under the statute. In other words, the two experts must determine whether he is a person "who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§§ 6600, subd. (a)(1), 6601, subds. (c) & (d).)

If the two initial evaluators agree that the inmate is an SVP, DSH forwards a request to the county that imposed the inmate's sentence to file a petition for commitment. (§ 6601, subd. (d), (h)(1).) If the two evaluators, however, do not agree that the inmate is an SVP (i.e., split), the statute requires DSH to appoint *two* independent professionals to conduct further

evaluations. (§ 6601, subds. (e), (g).) The statute further provides that the independent professionals cannot be state employees and must have at least five years of experience diagnosing and treating mental disorders. (§ 6601, subds. (e), (g).) A petition for commitment may only be filed if both of the independent professionals agree that the inmate meets commitment criteria. (§ 6601, subds. (e), (g), (f).

Following the initial round of evaluations, the People can, under certain circumstances, request DSH to perform "updated" or "replacement" evaluations. (§ 6603, subds. (d)(1).) Section 6603, subdivision (d)(1) states:

> 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 State Hospitals 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 State Hospitals to perform replacement evaluations. When a request is made for updated or replacement evaluations, the State Department of State Hospitals shall perform the requested evaluations and forward them to the petitioning attorney and to the counsel for the person subject to this article. However, updated or replacement evaluations shall not be performed except as necessary to update one or more of the original evaluations or to replace the evaluation of an evaluator who is no longer available to testify for the petitioner in court proceedings. These updated or replacement evaluations shall include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews of the person being evaluated, either voluntarily or by court order. 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 State Hospitals shall conduct two additional evaluations in accordance with subdivision (f) of Section 6601.

Thus, section 6603, subdivision (d)(1) provides that the People can request updated or replacement evaluations if they determine its necessary to prosecute the petition or if one or more of the original evaluators becomes unavailable to testify. When the People make this request, DSH is required to perform the evaluations. (§ 6603, subds. (d)(1).) If an updated or replacement evaluation results in a split opinion as to whether the person meets commitment criteria, DSH must, again, appoint two psychiatrists or psychologists to evaluate the alleged SVP. (*Ibid.*) Additionally, the updated or replacement evaluations shall include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews of the person being evaluated, either voluntarily or by court order. (*Ibid*.)

Accordingly, the SVPA provides that if the People need additional evaluations to prosecute the petition, DSH is required to perform the evaluations. The People assert, however, that in order to prosecute the petition beyond a reasonable doubt, they must be allowed to retain experts to evaluate an alleged SVP and present their opinion at trial. (Opening Brief, pp. 37-38.) The People's assertion is in direct conflict with the plain language of section 6603, subdivision (d)(1).

Section 6603, subdivision (d)(1) states that: "updated or replacement evaluations *shall not be performed* except as necessary to update one or more of the original evaluations or to replace the evaluation of an evaluator who is no longer available to testify for the petitioner in court proceedings." (Emphasis added.) In this case, the lower court correctly found that, "[t]he language "shall not be performed" is mandatory language that prohibits any replacement evaluations except on the terms specified in the statute. If the People could retain their own expert at that stage, they would essentially be

providing a replacement evaluation free of the restrictions the Legislature imposed in subdivision (d)(1)." (*Needham*, supra, 82 Cal.App.5th at p. 126.)

The legislative history of section 6603, subdivision (d)(1) further supports the lower court's holding. Until 2000, the SVPA did not contain any provision addressing the People's right to obtain updated and replacement evaluations. Senate Bill No. 2018, which amended section 6603 to create subdivision (c),[4] was a response to *Sporich v. Superior Ct.* (2000) 77 Cal.App.4th 422, 426-427, superseded by statute as stated in *Albertson v. Superior Court* (2001) 25 Cal.4th 796 (*Albertson*), which held that the SVPA did not authorize the People to obtain updated and replacement evaluations. Consequently, the People were often forced to go to trial with stale evaluations. (*Albertson, supra*, 25 Cal.4th at pp. 802-803, 805.) The People in *Albertson* explained the need for updated evaluations as follows:

> '[I]n order to get the best diagnosis of someone's mental condition, [the mental health evaluator needs] to speak to that person. We want the best information going to the jury because to ask the jury to commit somebody as a sexually violent predator based on an evaluation that's two plus years old or a year or more old is not the best information we can give to the jury. Unlike criminal cases or most civil cases where the facts are the facts and they don't change over time, mental condition can.'

(*Id.* at p. 800.)

Thus, in response to the *Sporich* decision, the Legislature drafted Senate Bill No. 2018 with the clear purpose of addressing the People's inability to obtain evidence of an alleged SVP's currently diagnosed mental disorder under the SVPA. According to the author of SB 2018:

---

[4] Which is now subdivision (d)(1) of section 6603.

> SB 2018 would permit the prosecuting attorney to request DMH to prepare updated evaluations to support the filing of a SVP commitment or recommitment petition. These updates are occasionally necessary, for instance, where an evaluation has become stale with the passage of time or because the treating doctor is no longer available to testify in court. Without the update, the petition could be denied, or at least delayed until a new evaluation is obtained. In such instances, SB 2018 would avoid foreseeable delays by allowing the state's attorney to request updated evaluations in needed cases. For further clarification, the bill would specify that these updated evaluations shall include review of available medical and psychological records, consultation with current treating clinicians, and interviews with the person being evaluated. These updated evaluations will help ensure that those who are still dangerous will be committed, and those who do not meet the SVP criteria will not be committed inappropriately.
>
> . . .
>
> Occasionally, there is a substantial length of time between an evaluation of the person and the actual commitment hearing, sometimes resulting in either defense objections that the evaluations are outdated or one of the two evaluators becoming unavailable. *Supporters argue that SB 2018 is necessary because it allows the district attorney to request that DMH provide an updated or replacement evaluation.*

(Sen. Rules Com., Off. of Sen. Floor Analysis, Unfinished Business, 8/22/00, Sen. Bill No. 2018 (1999-2000 Reg. Sess.) as amended June 22, 2000; emphasis added.)

It follows that, section 6603, subdivision (d)(1) was added to the SVPA to ensure that the People had a "a fair opportunity to satisfy its own statutory and constitutional burden in SVPA litigation." (*Albertson, supra,* 25 Cal.4th at p. 803.) The Legislature provided the People with resources to obtain current information on a person's mental condition to present the case for commitment, and choose *only* to provide for mental examinations by DSH-designated evaluators. Had the Legislature intended to grant the People

broader power to retain non-DSH-designated experts to conduct additional evaluations it would have done so.[5]

Section 6603, subdivision (a), which addresses the use of experts at trial, further supports the lower court's holding. Section 6603, subdivision (a) provides that an alleged SVP has the right to retain experts to assist on his behalf. Yet, no similar right is granted to the People. (§ 6603, subds. (a).) The lower court aptly interpreted this language to mean the following:

> This provision invokes the 'principle, commonly known under the Latin name of *expressio unius est exclusio alterius*, ... that the expression of one thing in a statute ordinarily implies the exclusion of other things.' Although this principle does not apply invariably, here it supports a common sense reading of the statute. If the Legislature envisioned *both* parties retaining testifying experts, why only say defendant? The clear inference is that this is a one-sided right.

(*Needham*, *supra*, 82 Cal. App. 5th at pp. 125–26, internal citations omitted, italics in original.)

As indicated by the lower court, two other subdivisions of section 6603 support its reading of section 6603, subdivision (a). Section 6603, subdivision (e), states, "[t]his section does not prevent *the defense* from presenting otherwise relevant and admissible evidence." (Emphasis added.) And again, there is no similar reference to the People's case. As emphasized by the lower court:

> Under the principle of *expression unius est exclusio alterius*, this provision undermines the dissent's rationale. The dissent's rationale is, essentially, the SVPA does not prohibit the state from retaining experts, and thus anything otherwise available

---

[5] Additionally, if the People had the inherent authority to retain private experts to conduct evaluations of alleged SVP's and testify at trial that they met commitment criteria, it would not have been necessary to amend the SVPA to add what is now subdivision (d)(1) of section 6603.

> in the Civil Discovery Act is permitted. But the statute expressly addresses that very rationale and applies it only to a defendant. This strongly suggests that the People, by contrast, are confined to the evidence that the SVPA carefully designates.

(*Needham*, *supra*, 82 Cal. App. 5th at p. 127.)

Additionally, as noted by the lower court, section 6603, subdivision (k)(3), states, "[t]his subdivision does not affect any right of a party to seek to obtain other records regarding the person subject to this article." Thus, the Legislature's use of the word "party" to indicate either party "demonstrates that its prior delegations specifically to the defendant were intentional." (*Needham*, *supra*, 82 Cal. App. 5th at p. 127.) Moreover, subdivision (k)(3) entitles either party to "obtain other records," not to retain other experts. (*Ibid*.)

In support of its holding, the lower court also focused on the relationship between subdivisions (a) and (b) of section 6603, and the sections that address release provisions. The court noted that subdivision (b) provides that, "[t]he attorney petitioning for commitment under this article has the right to demand that the trial be before a jury." (§ 6603, subd. (b).) That subdivision expressly addresses the People's rights at trial and says nothing about the right to retain experts. Notably, the statute *does* provide the People this right at a much later stage in the context of release proceedings. Under section 6605, subdivision (a)(3), which addresses petitions for unconditional release, the statute specifically grants the People various rights, including the right to a jury trial and the right "to have a committed person evaluated by experts chosen by the state."[6] This language

---

[6] The same language appears in section 6608, subdivision (g).

indicates that where the People disagree with DSH on release, it can choose its own experts.[7] No such right is provided to the People if they disagree with DSH on the issue of *commitment*. As the lower court reasoned, "[t]he fact that the Legislature expressly authorized the People to retain an expert at a later stage of the proceeding demonstrates that the omission of that right earlier in the proceeding was intentional." (*Needham*, *supra*, 82 Cal. App. 5th at p. 126.)

As such, the language of the SVPA is clear and the lower court correctly determined that the People's use of testifying experts at trial is inconsistent with the statutory scheme. Nonetheless, the People argue that the court's holding undermines the integrity of the SVPA and invites gamesmanship by encouraging the defense to age cases as long as possible until the evaluators "flip." (Opening Brief, pp. 33-34.) The People fundamentally misconstrue the statute's purpose.

This Court has repeatedly emphasized that "[t]he [SVPA] was 'designed to ensure that the committed person does not "remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness." [Citation.]' [Citation.]" (*People v. McKee* (2010) 47 Cal.4th 1172, 1186, citing *Hubbart v. Superior Ct.*, *supra*, 19 Cal.4th at p. 1177.) After a person has been committed as an SVP, DSH is required to conduct yearly examinations of the person's mental condition to determine if they still meet commitment criteria and whether release is appropriate. (§

---

[7] Alternatively, the experts "chosen by the state" are the experts assigned by the DSH. Use of the words "chosen by the state" instead of "chosen by the attorney" supports this conclusion. If this is the case, then there is no statutory provision in any situation that allows the People to retain private, testifying experts.

6604.5, subd. (a)-(b).) Section 6604.5, subdivision (d) provides that an SVP is permitted to petition the court for release if DSH determines that "the person's condition has so changed that the person no longer meets the definition of a sexually violent predator and should, therefore, be considered for unconditional discharge, or (2) conditional release to a less restrictive alternative is in the best interest of the persona and conditions can be imposed that adequately protect the community[.]"

Accordingly, the SVPA assumes, and has been interpreted to assume, that a person receiving treatment under the statute can get better with time. The People, however, appear unwilling to accept this fundamental fact. The People instead assume that DSH-evaluations always turn positive to negative with the passage of time, not because of mental health improvements. (Opening Brief, p. 33.) The People cite *People v. Superior Ct. (Vasquez)* (2018) 27 Cal.App.5th 36 to argue that the lower court's holding will incentivize defendants to continue their cases as long as possible, which will result in extraordinary delays of SVP trials that may lead to dismissals. However, *Vasquez* is inapposite. In that case, the court held that a 17-year delay in bringing an SVP case to trial violated the defendant's due process right to a timely trial because the delay was attributed to the state; the delay resulted from a systemic breakdown of the public defender's system. (*Id*. at p. 41.) Furthermore, in *Vasquez*, DSH conducted 24 evaluations and all but one was positive, indicating that DSH-evaluations do not always turn negative with time. (*Id*. at p. 45.)

Furthermore, once a court determines that there is probable cause to believe that an individual is an SVP, the "judge shall order that the person remain in custody in a secure facility until a trial is completed." (§ 6602, subd. (a).) A person awaiting trial is thus held without bail in Coalinga State

Hospital, while receiving treatment. (§§§ 6602, subd. (a.); 6602.5, subd. (a); 6600.05, subd. (a).) The statute's purpose of confining those that are dangerous and need treatment is effectuated while that person awaits trial. Thus, if a person's mental condition materially improves to the point that they no longer meet commitment criteria, that is the result of psychological treatment, *not gamesmanship*.

B. While generally applicable to SVPA proceedings, the Civil Discovery Act of 1986 is subject to the specific provisions of the SVPA and a defendant's constitutional rights.

The SVPA, with the exception of providing "access to all relevant medical and psychological records and reports", does not contain any provision in regards to discovery rights or procedures. (§ 6603, sub. (a).) Thus, courts have held that the Civil Discovery Act of 1986 applies to the SVPA, subject to the specific provisions of the SVPA and a defendant's constitutional rights.

In *Leake v. Superior Ct.* (2001) 87 Cal.App.4th 675, 608 (*Leake*), disapproved of on other grounds in *People v. Yartz*, *supra*, 37 Cal.4th 529, the court held that the Civil Discovery Act of 1986 applied to SVPA proceedings. The *Leake* court reasoned that the Legislature designed the SVPA as a civil action or special proceeding of a civil nature, as it placed the SVPA in the Welfare and Institutions Code, which includes other civil commitment statutes. (*Id*. at p. 680.) For this reason and others, courts have interpreted the SVPA as a civil commitment statute, designed to provide treatment, not punishment. (*Ibid.*, citing *Hubbart v. Superior Ct.*, *supra*, 19 Cal.4th at p. 1142.) Because the Legislature was aware that the Civil Discovery Act applies to civil actions and special proceedings of a civil

nature, it necessarily intended to apply civil discovery to SVPA proceedings. (*Ibid*.) Therefore, the court in *Leake* found that the defendant in that case was entitled to the exchange of expert witness information. (*Id*. at pp. 682-683.)

The court in *People v. Superior Court (Cheek)* 94 Cal.App.4th 980, 987 also held that the Civil Discovery Act applied in SVPA proceedings. The court concluded that "the right to discovery in SVPA proceedings is subject to those provisions of the Civil Discovery Act that expressly authorize the trial court to manage discovery and to prevent misuse of discovery procedures." (*Id*. p. 987.) In other words, "[t]he Civil Discovery Act provides the trial court with the authority and the procedures for management of discovery, so that discovery can serve its purpose in SVPA proceedings." (*Id*. at p. 991.) The *Cheek* court concluded that the deposition method of discovery is available in SVPA proceedings. (*Id*. at p. 996.)

Nonetheless, the lower court's finding that certain expert-witness provisions of the Civil Discovery Act conflict with the SVPA, and thus do not apply to SVP proceedings, is consistent with several other cases addressing the relationship between the two statutes. Despite the general applicability of the Civil Discovery Act to the SVPA, multiple courts have held that specific provisions of the Code of Civil Procedure are inherently inconsistent with the SVPA, and thus are inapplicable to SVPA proceedings. In *Bagration v. Superior Court* (2003) 110 Cal.App. 1677 (*Bagration*), the court held that summary judgement procedures under Code of Civil Procedure section 437c do not apply to SVPA proceedings. The court stated:

> In the same manner as the Civil Discovery Act of 1986 has been found applicable to SVP Act proceedings because Code of Civil Procedure section 2016 defines a special proceeding of a civil nature as an "action" within the meaning of the Civil Discovery Act, summary judgment procedures have been found applicable to special proceedings of a civil nature under

> a former version of Code of Civil Procedure section 437c that defined "action" to "include all types of proceedings." [¶] But it does not follow that because the Civil Discovery Act applies to SVP Act proceedings that summary judgment procedures also apply. Application of the Civil Discovery Act to SVP proceedings *clarified* procedures whereby the respondent in a SVP proceeding would have "access to all relevant medical and psychological records and reports" that the SVP Act requires. Applying summary judgment procedures to SVP proceedings involves no similar resolution of ambiguity.

(*Id.* at pp. 1686-87, italics in original, internal citations and footnote omitted.)

The *Bagration* court noted that the purpose of summary judgement is to cut through the parties' pleadings to determine the necessity of trial. (*Bagration*, *supra*, 110 Cal.App. at p. 1687.) Since Code of Civil Procedure section 437c provides that any party may move for summary judgement, such procedures could supplant the SVPA requirement of a probable cause hearing and trial; a person could be committed without the benefits of a unanimous jury trial applying the standard of beyond a reasonable doubt—fundamental due process protections of the SVPA. (*Id*. at pp. 1688-89.) Because summary judgement proceedings are inherently inconsistent with the statute's directives, they do not apply to proceedings under the SVPA. (*Ibid*.)

Similarly, in *Murillo v. Superior Court* (2006) 143 Cal.App.4th 730 (*Murillo*), the court considered whether requests for admissions, a discovery method under Code of Civil Procedure section 2019.010, can be used in proceedings under the SVPA. In that case, the prosecutor served the alleged SVP with 14 requests for admissions, asking him to admit each element necessary to support his commitment under the statute. (*Id*. at p. 738.) The court held that requiring an alleged SVP to respond would violate his due

process rights to a jury trial, a unanimous verdict, and proof beyond a reasonable doubt. (*Id*. at p. 740.) The court reasoned that an alleged SVP is entitled to due process protections because civil commitment involves a significant deprivation of liberty. "These serious consequences militate against a potentially adverse judgment being rendered without having the district attorney prove the case beyond a reasonable doubt and obtain the verdict of a unanimous jury." (*Id*. at p. 738.) The court emphasized that the SVPA and cases interpreting the statute have created procedural safeguards to protect due process rights; requests for admissions violate those safeguards and thus are not permitted. (*Id*. at p. 740.)

Recently, the court in *People v. Jackson* (2022) 75 Cal.App.5th 1 (*Jackson*), addressed the intersection between the Civil Discovery Act and an individual's due process and statutory right to present evidence in an SVPA trial. In that case, the Orange County District Attorney's Office argued that Code of Civil Procedure section 2034.00 required the court to exclude the defense's expert witness because the defense had violated expert witness disclosure requirements under the Civil Discovery Act. (*Id*. at pp. 23-24.) The trial court agreed and excluded the defense's expert witness. The Court of Appeal reversed, finding that the trial court's reading of section 2034.300 infringed on the defendant's right to present an expert witness at his SVP trial under section 6603, subdivision (a), and his due process right to present such evidence in his defense. (*Id*. at p. 24.) The court rejected the prosecution's argument that Code of Civil Procedure section 2034.300, which mandates exclusion of a party's expert witness for certain discovery violations, is dispositive on whether exclusion was warranted. (*Ibid*.) Rather, "the Civil Discovery Act must be applied in each SVP proceeding in light

of section 6603 and the constitutional due process rights at stake." (*Id.* at p. 27.)

II. A DEFENDANT SUBJECT TO THE SVPA HAS A DUE PROCESS RIGHT TO A FAIR SVP TRIAL, WHICH IS VIOLATED WHEN THE PEOPLE BYPASS STATUTORY DIRECTIVES AND USE TESTIFYING EXPERTS AT TRIAL TO PROVE THAT A DEFENDANT IS AN SVP.

The People's use of privately retained experts to conduct non-DSH evaluations and present their opinions at trial is not only inconsistent with the plain language of the SVPA, but it is also entirely inconsistent with the SVPA's purpose. It undermines the non-punitive objectives of the statute and violates a defendant's due process right to a fair SVP trial.

This Court has repeatedly stressed the non-punitive purpose of the SVPA in its interpretation of the statute. In determining the constitutionality of the SVPA, this Court emphasized that that:

> [T]he Legislature had 'disavowed any "punitive purpose[ ]," and declared its intent to establish "civil commitment" proceedings in order to provide "treatment" to mentally disordered individuals who cannot control sexually violent criminal behavior. [Citations.] The Legislature also made clear that, despite their criminal record, persons eligible for commitment and treatment as SVP's are to be viewed "not as criminals, but as sick persons." [Citation.] Consistent with these remarks, the [Act] was placed in the Welfare and Institutions Code, surrounded on each side by other schemes concerned with the care and treatment of various mentally ill and disabled groups.' [Citation.]

(*People v. McKee*, *supra*, 47 Cal. 4th at p. 1194, quoting *Hubbart v. Superior Ct.*, *supra*, 19 Cal.4th at p. 1171.)

To achieve these objectives, the entire statutory scheme relies on the opinions of neutral, DSH evaluators that determine whether a person meets

SVP criteria based on a standardized protocol developed and updated by DSH. (§§ 6601, subds, (b), (c), and (d).) When there is a split of opinion, the statute provides further examination by two *independent* professionals. (§ 6601, subds. (e) and (g).) The SVPA's requirement of neutral, independent evaluators, designated by DSH, helps ensure that SVP proceedings are fundamentally fair. As the lower court explained:

> Taken as a whole, the above provisions evince a carefully calibrated and limited procedure to ensure that an extraordinary deprivation of liberty has as many safeguards as possible. Virtually the entire scheme revolves around the *independent* experts who evaluate the defendant and testify concerning defendant's mental state. It would largely undermine those safeguards if the People could bypass them by presenting testimony from their own retained expert who had to do no more than satisfy the basic expert witness requirements of the Civil Discovery Act. To permit the People to retain a testifying expert would create the possibility that an expert with a clear bias—an expert hired to support the People's view, rather than provide an independent analysis—could lead to the deprivation of a person's liberty even where some independent experts find it unwarranted, or for reasons independent experts find unconvincing. That result is inconsistent with the design of the SVPA procedure.

(Needham, *supra*, 82 Cal. App. 5th at p. 127.)

Accordingly, the People's argument undermines a key due process protection of the SVPA. The People's privately retained experts are neither neutral nor independent. Rather, those experts are hired to present a specific opinion at the People's behest, contrary to what the objective evidence sanctioned under the statute might overwhelmingly indicate. Thus, the People's use of privately retained experts to conduct non-DSH evaluations and present their opinions at trial is entirely inconsistent with the SVPA's

purpose, as it undermines the non-punitive objectives of the statute and violates a defendant's due process right to a fair SVP trial.

A defendant in an SVP proceeding "is entitled to certain due process protections" because civil commitment involves significant restraint on a defendant's liberty. (*Moore v. Superior Ct.* (2010) 50 Cal.4th 802, 818.) As this Court explained in *People v. Hurtado* (2002) 28 Cal.4th 1179, 1192, "proceedings under the SVPA, in common with proceedings under other civil commitment statutes, are civil proceedings with consequences comparable to a criminal conviction—involuntary commitment, often for an indefinite or renewable period, with associated damage to the defendant's name and reputation." (See *People v. Force* (2019) 39 Cal.App.5th 506, 514, fn. 2, citing *Reilly v. Superior Court* (2013) 57 Cal.4th 641, 648 (*Reilly*) ["Though civil in nature, SVP proceedings are rooted in criminal convictions and therefore retain the due process rights associated with criminal trials."]; see generally *Addington v. Texas* (1979) 441 U.S. 418, 425 ["This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"]; *Foucha v. Louisiana* (1992) 504 U.S. 71, 80 (dis. opn. of Kennedy, J.) ["As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution"]; *Vitek v. Jones* (1980) 445 U.S. 480, 491-92 ["commitment to a mental hospital produces 'a massive curtailment of liberty,' [citation] and in consequence 'requires due process protection'"].)

Since a defendant in an SVP proceedings is entitled to due process protections, " 'the question remains what process is due.' " (*People v. Otto*

(2001) 26 Cal.4th 200, 210 (*Otto*).) To make this determination, this Court identified four factors to consider: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." (*Ibid*.)

For the first factor, it is undisputed that "the private interests that will be affected by the official action [civil commitment under the SVPA] are the significant limitations on [a person's] liberty, the stigma of being classified as a sexually violent predator, and subjection to unwanted treatment." (*Otto*, *supra*, 26 Cal.4th at p. 210.)

The second factor addresses the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute safeguards. Unlike DSH-designated evaluators, the People's retained, testifying experts are neither neutral nor independent—they are presented to the jury for the sole purpose of winning,[8] not because a

---

[8] See generally *People v. Hill* (1998) 17 Cal.4th 800, 820 ["As the United States Supreme Court has explained, the prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"]; *People v. Dekraai* (2016) 5 Cal.App.5th 1110, 1116 ["'[W]e must rely on our prosecutors to carry out their fiduciary obligation to exercise their discretionary duties fairly and justly—to afford every defendant, whether

defendant objectively meets commitment criteria. The facts from this case are illustrative. In moving papers filed with the trial court, the People stated that they retained Dr. King as their expert witness *to prove* that Needham was an SVP, and therefore, Dr. King needed to review all relevant records, including Needham's file at Coalinga State Hospital, and conduct an evaluation. (Writ Petn., Ex. I, p. 37.) This suggests that Dr. King agreed—tacitly or otherwise—that he could testify that Needham met commitment criteria before he reviewed any records or evaluated Needham. (Writ Petn., Ex. C, p. 49.) This is the inverse of how expert evaluations are supposed to be conducted under the SVPA; nothing in the statute directs evaluators to reach conclusions or probable conclusions before examining the evidence. This is not only consistent with scientific principles, but also the purpose of the SVPA to not punish defendants for their past conduct, but to identify, confine, and treat those who are currently dangerous as a result of a diagnosed mental disorder. Thus, neutral mental health professionals, using a standardized assessment protocol developed and updated by DSH, should make that determination.[9]

It is true that the People's expert would be "subjected to the crucible of cross-examination[,]" and if that expert did not follow DSH assessment

---

suspected of crimes high or petty, equal treatment under the law.' [Citation.] 'The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, *but in the integrity of the prosecutor*.' [Citation.]", italics in original.)

[9] Ultimately, it is the jury that determines whether a defendant is an SVP. However, neutral, independent experts, designated by DSH, are best equipped to evaluate an alleged SVP and testify about his mental health. The jury can then decide if the opinions of the DSH-designated evaluators are persuasive.

protocols the defense could challenge the admissibility of the evidence prior to trial. (*Needham*, *supra*, 82 Cal. App. 5th at p. 130 (dis. opn. of Goethals, J.).) However, that does not render an SVP trial fundamentally fair. SVP cases while civil in nature, are unlike other civil proceedings. At stake in an SVP trial is a fundamental liberty interest—indefinite confinement.

Moreover, considering that alleged SVP's have been convicted of heinous sexual offenses, often against children, and thus are "among the most villainous in our society[]", it is not surprising that the Legislature built safeguards into the commitment evaluation procedures to ensure the fundamental fairness of SVP trials. (*United States v. Edwards* (E.D.N.C. 2011) 777 F.Supp.2d 985, 995-996.) While the SVPA espouses only non-punitive objectives, the potential for abuse and erroneous commitments is substantial given the class of offenders subject to the statute. (See generally *Ibid*. ["the Courts have a duty to protect the rights of even the most despised among us. Alleged sexual predators have no social sympathy, making their rights especially vulnerable. Allowing the Government to trample the rights of one group weakens the rights of all of society."].) The likelihood that SVPA proceedings will become retributive actions increases when the same government agency that prosecuted the underlying criminal case prosecutes the petition. Logically, the Legislature set careful limits on who conducts evaluations and who controls the process, which is the Department of State Hospitals, not the People. These limits protect against an erroneous deprivation of liberty, and thus are vital to ensuring that SVP trials are fundamentally fair.

" 'A foundational purpose of the Civil Discovery Act is to avoid gamesmanship in litigation.' " (*Murillo, supra,* 143 Cal.App.4th at p. 739.) Ironically, the People's position—that they have a right to retain testifying

experts in an SVPA trial because the Civil Discovery Act allows parties to retain and designate expert trial witnesses—invites, rather than prevents gamesmanship.

For instance, the People maintain that they need a testifying expert to meet their burden of proof at an SVP trial. (Opening Brief, pp. 9-10.) When the SVP petition was filed in November of 2016, Dr. Coles and Dr. Musacco opined that Needham meet commitment criteria. (Opening Brief, pp. 11-12.) On January 31, 2018, Dr. Coles changed his opinion, concluding that Needham no longer met statutory criteria. (*Ibid*.) Pursuant to statutory directives, DSH then appointed two new experts to evaluate Needham, Dr. Korpi and Dr. Yanofsky. (Opening Brief, pp. 11-12.) Yet, in spite of their claim that they need a testifying expert to meet their burden of proof at an SVP trial, the People have never requested DSH to update Mr. Musacco's evaluation. (See Cal. Code Regs. tit. 9, § 4020.1, subd. (a)(2) ["When update evaluations of the original evaluations are requested by the petitioner … and an independent evaluation has previously been conducted to address a difference of opinion post-petition pursuant to subdivision (a)(1), the independent evaluations under subdivision (a)(1) and the original evaluations may be updated."].)

Rather than request DSH to update Dr. Musacco's evaluation, the People retained a private expert. This undermines the People's argument that "proving the petition beyond a reasonable doubt requires that the People present experts who reviewed all the relevant material, considered all the relevant facts, and ignored improper factors in forming an opinion about an SVP's status. (Opening Brief, pp. 37-38.) If this were true, then why not update Dr. Musacco's evaluation? The reason is simple—the People want to control the evaluation process. If Dr. Musacco's evaluation comes back

negative, that undermines the People's case and gives the defense further evidence. Rather than risk a negative evaluation, the People retained Dr. King because he will undoubtably testify that Needham is an SVP—against the position of every DSH-designated evaluator. The People's focus on 'winning' undermines the non-punitive objectives of the SVPA to confine and treat only those who meet statutory criteria. For this reason, the Legislature put limits on the People's ability to retain testifying experts. Allowing the People "to engage in maneuvers designed to avoid the impact of the statutory scheme" (*Murillo, supra,* 143 Cal.App.4th at p. 739), risks the jury erroneously finding that Needham is an SVP. Accordingly, the statutory scheme is vital to ensuring that SVP trials are fundamentally fair.

The third factor considers the government's interest, along with fiscal and administrative burdens associated with the procedural requirements. (*Otto*, *supra*, 26 Cal.4th at p. 210.) "The express purpose of the SVPA articulates the strong government interest in protecting the public from those who are dangerous and mentally ill." (*Id*. at p. 214.) The People argue that privately retained evaluators are necessary to effectuate this purpose; in order to meet their burden of proof, the People must be able to present evidence to refute the legal and factual mistakes of DSH-designated evaluators. (Opening Brief, pp. 37-38.) The People assert that in this case, the evaluations of Dr. Korpi and Dr. Yanofsky illustrate this problem, since they determined that Needham was not dangerous because he would be on lifetime parole upon his release.[10] (Opening Brief, p. 38; See *People v. Krah* (2003) 114

---

[10] The defense does not agree with the People's characterization of Dr. Korpi and Dr. Yanofsky's evaluations and the basis of their conclusions. Nonetheless, the People have the option of presenting their views and

Cal.App.4th 543, 544 ["[e]vidence of the terms and conditions of parole release is simply not relevant to the determination whether the defendant has the type of medical condition that is an element of the definition of a sexually violent predator"].)

Nonetheless, the People have a remedy if they believe that an evaluator's opinion is legally unsound or based on impermissible criteria. In *People v. Superior Ct. (Ghilotti)* (2002) 27 Cal.4th 888, 910, this Court held that DSH evaluations under the SVPA are subject to judicial oversight because evaluators' professional judgement must "be exercised within a specified *legal* framework, and their legally accurate understanding of the statutory criteria is crucial to the Act's proper operation." (Italics in original.) "If the court finds material legal error in an evaluator's report, the court shall provide the evaluator opportunity promptly either to correct the report or to prepare a new report, so as to set forth the conclusions the evaluator reaches under correct legal principles." (*Id*. at pp. 913-914.) This remedy protects the public by ensuring that evaluators apply appropriate factors in determining whether a person meets SVP criteria.

Moreover, the statutory scheme, which only permits the People to use DSH-designated evaluators in SVP trials, does not weaken the SVPA's purpose of public safety. DSH is best equipped to determine who is an SVP—not a prosecutorial agency with a vested interest in the trial's outcome. The statute's reliance on neutral, independent experts, using a standardized protocol developed and overseen by DSH, helps ensure that the evaluations are as objective and accurate as possible. After all, the government has no

---

litigating this issue before a court. The People have never done so in this case.

interest in confining and treating non-SVP's. Accordingly, the statutory scheme furthers—not undermines—the SVPA's non-punitive objectives to identify, confine, and treat those that are currently dangerous pursuant to the statute's criteria.

It is true that this Court has recognized some problems with DSH's oversight of mental health evaluations under the SVPA. (See *People v. Superior Ct. (Smith)* (2018) 6 Cal.5th 457, 471 ["Unfortunately, as the legislative history suggest, the SDSH ' "has not ensured that it conducts these evaluations in a consistent manner" ' and sometimes ' "evaluators did not demonstrate that they considered all relevant information." ' "].) However, the statute's reliance on the opinions of *multiple* experts lessens the deleterious effects of human error and the general "imprecision of psychiatric determination." (*Gray v. Superior Ct.* (2002) 95 Cal.App.4th 322, 330 (*Gray*)) If later evaluators reach differing conclusions that a person no longer meets commitment criteria, the statute does not require dismissal. (*Id*. at p. 328.) Rather, it is the trier of fact that decides whether someone is an SVP. "[I]t is not the number of opinions that matters, but their persuasiveness." (*Id*. at p. 329.)

For instance, in *Gray*, *supra*, 95 Cal.App.4th 322, the court rejected a defense argument that dismissal is mandated under the SVPA when the most recent expert evaluations reflect a difference of opinion about whether a person meets SVP criteria. In that case, there were multiple opinions by multiple evaluators, some positive and some negative, with the final pair of evaluators split. (*Id*. at p. 324.) In rejecting the defense's argument that in those circumstances, dismissal was statutorily required, the court noted the following:

> 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.

(*Id.* at pp. 327–28, italics in original.)

The court acknowledged that the defense's interpretation of the statute—that dismissal is required when updated evaluations split—was not implausible; the statute recognizes that a person's mental state may change during the pendency of proceedings, especially if those proceedings are protracted. (*Gray*, *supra*, 95 Cal. App. 4th at p. 328.) If the factors that initially supported the filing of the petition no longer exist, arguably the petition should be dismissed. (*Id*. at p. 328.) However, because former section 6603, subdivision (d)(1) did not provide any consequences, on its face, for a split of opinion between the second set of evaluators, the court was "unwilling to imply the drastic requirement of dismissal." (*Ibid*.) The court also noted that the Legislature knows how to provide for dismissal when it desires to do so, as in section 6602, subdivision (a), which provides that if a judge determines there is no probable cause to believe a person is an SVP after the hearing, "he or she shall dismiss the petition …" (*Ibid*.) Accordingly, the court in *Gray* found it "unlikely that the silence in the statutes [the court] was considering reflects a legislative intent for dismissal."

(*Ibid*.) Rather, the court reasoned that the statute's requirement for new evaluations was "intended for informational and evidentiary purposes." (*Ibid*.)

The court in *Gray* noted that during the five years since the filing of the petition, experts consistently disagreed about whether the defendant met commitment criteria. (*Gray*, *supra*, 95 Cal. App. 4th at p. 330.) The defendant had refused to be interviewed since the initial evaluations and minimally participated in therapy. (*Ibid*.) The court surmised that "the current divergence of expert views therefore demonstrates more the imprecision of psychiatric determination than the likelihood that Gray's mental condition has actually altered for the better." (*Ibid*.) The court concluded that mandatory dismissal would deprive the jury "of the opportunity to make a qualitative assessment of the experts' opinions[,]" which is particularly important as those opinions accumulate over time. (*Id.* at p. 329.)

Furthermore, in *Reilly*, *supra*, 57 Cal.4th at pp. 648-655, this Court reiterated *Gray's* position that the prosecuting attorney is not bound by the results of later evaluations, but rather may proceed and allow the trier of fact to decide what weight to give older or less current evaluations. The People argue that "the only logical extension" of *Gray* and *Reilly* is "that the People's retained expert can offer affirmative opinion evidence to the jury by testifying at trial." (Opening Brief, pp. 32-33.) Similar to the defense's argument in *Gray*, the People's position would require this Court to insert language into the statute that does not exist. If the People need additional evaluations "to properly present the case for commitment," they may request DSH to conduct updated or replacement evaluations under section 6603, subdivision (d)(1). Nothing in that section—or elsewhere in the statute—

allows the People to obtain additional reports until they get a positive evaluation that supports commitment.[11] The statute is clear that "updated or replacement evaluations *shall not be performed except as necessary to update one or more of the original evaluations or to replace the evaluation of an evaluator who is no longer available to testify for [the People] in court proceedings*. (§ 6603, subd. (d)(1), emphasis added.) The lower court correctly reasoned that, "[i]f the People could retain their own expert at that stage, they would essentially be providing a replacement evaluation free of the restrictions the Legislature imposed in subdivision (d)(1)." *(Needham*, *supra*, 82 Cal. App. 5th at p. 126.)

Moreover, as noted by the lower court, the Legislature was generous in the options available to the prosecuting attorney: "[B]y this point in the proceeding, as many as *eight* independent experts may have weighed in (the two original experts, two more if they disagreed, two more for updated/replacement reports, and two more if the updated reports disagree)." (*Needham*, *supra*, 82 Cal. App. 5th at p. 127, italics in original.) Under the SVPA, as interpreted by *Gray* and *Reilly*, the People can *disagree* with these experts and proceed to trial, even when the updated evaluations are negative. However, nothing in the statute allows the People to *create* opinions that a person is an SVP. The opposite conclusion contravenes the plain language of the SVPA and violates a defendant's due process right to a fair SVP trial.

---

[11] In another SVP case, the same prosecutor in Needham's case, told the trial court that he generally finds a testifying expert by contacting numerous DSH or DSH-contracted evaluators via email, and asks them general questions about the case to ascertain whether they can 'help' the prosecution. (Writ Petn., Ex. H, pp. 188-196)

The statutory scheme of the SVPA, which sets limits on the People's use of testifying experts at trial, furthers the government's interest of confining SVP's—and only SVP's. The statute gives the People every tool they need to properly present the case for commitment, and as the lower court stated, the Legislature was "generous in the possibilities[.]" (*Needham*, *supra*, 82 Cal. App. 5th at p. 127.) Moreover, the statute's reliance on neutral, independent experts is necessary to ensure that the evaluations are as objective and accurate as possible, and that the non-punitive objectives of the SVPA are upheld. If the People disagree with DSH-designated experts, they can ask the court to review the evaluations for material legal error. (*Ghilotti*, *supra*, 27 Cal.4th at p. 910.) If updated evaluators split or find that a person no longer meets commitment criteria, the People are not bound by those conclusions. Rather, the case goes to the trier of fact, which ultimately determines which opinions are the most persuasive. The statutory scheme is careful and deliberate—the Legislature gave the People what they need to commit an SVP, but nothing more.

The last *Otto* factor considers whether the right to a fair SVP trial is necessary to protect a defendant's "dignitary interest" in an SVP trial. A person subject to the SVPA has a "dignitary interest in being informed of the nature, grounds, and consequences of the SVP commitment proceeding" and in "presenting his side of the story before a responsible government official." (*Otto*, *supra*, 26 Cal. 4th at p. 215.) If the People are allowed to circumvent the expert evaluation process of the SVPA, and retain witness to testify that a person is an SVP against the position of DSH, there is a substantial risk that SVP proceedings will be transformed into punitive actions, whereby the People seek civil commitment because of a defendant's past conduct, not because he is dangerous under statutory criteria. Such an outcome

fundamentally changes the purpose of the SVPA, and thus infringes a person's dignitary interest in being informed of the nature, grounds, and consequences of SVP commitment. Allowing the People to change the rules in the middle of the game offends basic due process and renders SVP trials fundamentally unfair.

Application of the *Otto* factors demonstrates that a person subject to the SVPA has a due process right to a fair SVP trial; that right is violated when the People bypass the statute's "carefully calibrated and limited procedure to ensure that an extraordinary deprivation of liberty has as many safeguards as possible." (*Needham*, supra, 82 Cal. App. 5th at p. 127.)

III. THIS COURT IN *SMITH* APPROVED THE PEOPLE'S USE OF CONSULTING EXPERTS TO ASSIST IN SVP PROCEEDINGS, WHICH IS CONSISTENT WITH THE PLAIN LANGUAGE AND NON-PUNITIVE OBJECTIVES OF THE SVPA.

The People argue that in *Smith, supra,* 6 Cal.5th 457, this Court tacitly approved the People's use of retained testifying experts at an SVP trial. (Opening Brief, p. 24.) The People misconstrue the SVPA and this Court's analysis in *Smith*, which approved the People's use of consulting, rather than testifying experts.

In *Smith*, this Court addressed whether the People may obtain treatment records supporting updated or replacement evaluations under the SVPA, and then disclose those records to its retained expert. (*Smith*, *supra*, 6 Cal.5th at pp. 461-62.) This Court held that a then-recent amendment to the SVPA permitted the People to obtain and disclose those otherwise confidential records to its retained expert "to assist in the cross-examination

of the [DSH] evaluators or mental health professionals retained by the defense and, more generally, in prosecuting the SVP petition." (*Id*. at p. 462.) Under amended subdivision (j)(1)[12] of section 6603, attorneys for either side "may use the [treatment records supporting updated or replacement evaluations] in proceedings under this article and shall not disclose them for any other purpose." (*Id*. at p. 469.) This Court reasoned that "[g]iven the 'critical' importance of expert testimony in an SVP proceeding—and the likelihood that counsel will need expert assistance to grasp the scientific nuances underlying another expert's opinion—the disclosure most needed by each party 'in proceedings under this article' would almost certainly be to its retained expert." (*Ibid.*, p. 469, internal citations omitted.)

The People assert that the language "more generally, in prosecuting the SVP petition[,]" differentiates a consulting expert from a testifying expert, and thus, this Court tacitly approved the People's use of testifying experts at trial. (Opening Brief, p. 24.) However, this Court's analysis focused on the "text, structure, and purpose of the entire SVPA", concluding that "nothing in the text of the SVPA bars the government from sharing otherwise confidential information in its possession with the expert it has retained for the purpose of assisting in an SVP proceeding." (*Smith*, *supra*, 6 Cal.5th at pp. 470, 472.) This reasoning is contrary to the People's argument. The text, structure, and purpose of the entire SVPA bars the People from using testifying experts to prove that a person is an SVP. Nothing in section 6603, subdivision (d)(1)—or any other part of the statute—authorizes the People to retain such experts for trial. This limitation is consistent with the non-punitive objectives of the SVPA to identify, confine, and treat only those

---

[12] Now subdivision (k)(1) of section 6603.

who are dangerous under specific statutory criteria—the government has no interest in committing people that are not dangerous.

By contrast, the People's use of consulting experts to assist in SVPA proceedings is consistent with the statute's text and purpose. The government has a legitimate interest in protecting society by confining people that are dangerous under SVPA criteria. (*Smith*, *supra*, 6 Cal.5th at p. 470.) To fulfill this purpose, the People need the assistance of consulting experts in SVPA trials, where "the bulk of the evidence … typically focuses on whether the person has a diagnosed mental disorder that makes it likely he or she will engage in sexually violent behavior. Accordingly, … the trial usually turns on the quality and credibility of the expert witnesses and the extent to which their evaluations are persuasive." (*Id.*, pp. 470-71, internal citation omitted.) Accordingly, expert assistance would be vital to the People for the following reasons:

> Cross-examination may assist the trier of fact in determining whether the evaluator has 'accurately understood the statutory criteria.' But that opportunity would be a hollow one if the district attorney does not have the assistance of an expert to interpret and explain the significance of the specialized information at issue. Without an expert's assistance in preparing the cross-examination of adverse witnesses, 'the risk of an inaccurate resolution … is extremely high.' An expert would also need to examine the relevant records to offer an opinion about the potential SVP's mental health.

(*Id.* at pp. 471-72, internal citations omitted.)

Nonetheless, the People focus on the Court's last sentence—"to offer an opinion about the potential SVP's mental health[]" to argue that this Court approved the People's use of testifying experts at trial. (Opening Brief, pp. 25-26.) The People assert that the "the only use the People have for a retained expert's opinion is to introduce that opinion before the jury at trial to prove

their case beyond a reasonable doubt." (Opening Brief, p. 25.) On the contrary, the People may want to consult an outside expert to determine whether the reports of the DSH-designated evaluators contain material legal error, which may call for an opinion about the potential SVP's mental health. However, this is categorically different from the People's use of testifying experts to conduct non-DSH evaluations and to testify that the person meets SVP criteria. The People violate the plain language of the statute and debase the entire purpose of the SVPA when they present paid witnesses to testify against the opinions of DSH evaluators. The use of consulting experts to assist the People in SVP proceedings—as described by this Court in *Smith*—does not implicate these concerns.

CONCLUSION

The mentality of the Orange County District Attorney's Office is clear—a defendant subject to the SVPA should be confined as long as possible, regardless of what the objective evidence sanctioned under the statute might indicate. The Legislature never intended this to happen, and thus limited the People's ability to use retained experts to testify at trial that a defendant meets SVP commitment criteria. The lower court recognized that the SVPA's commitment evaluation procedures protect against an erroneous deprivation of liberty and ensure that the government only confines those who are presently dangerous under specific statutory criteria. Accordingly, the SVPA's safeguards are essential to safeguarding a defendant's due process right to a fair SVP trial. The lower court's decision should be affirmed.

Dated: February 23, 2023

Respectfully submitted,
MARTIN SCHWARZ
Public Defender
LAURA JOSE
Chief Deputy Public Defender
ADAM VINING
Assistant Public Defender

Elizabeth Khan
ELIZABETH KHAN
Deputy Public Defender

WORD COUNT

(California Rules of Court, Rules 8.204(c)(1), 8.504(d)(1))

I, Elizabeth Khan, declare as follows:

I represent Petitioner on the matter pending in this Court. This Petition for Review was prepared in Microsoft Word, and according to that program's word count, it contains 11,855 words up to and including the signature block above.

I declare under penalty of perjury the above is true and correct. Executed on February 23, 2023, in Santa Ana, California.

Elizabeth Khan

ELIZABETH KHAN
Deputy Public Defender

DECLARATION OF SERVICE

Needham v. Orange County Superior Court (S.C. Case No. S276395; Court of Appeal Case No. G060670; O.C. Super. Ct. No. M-16870)

STATE OF CALIFORNIA)
)ss
COUNTY OF ORANGE)

I, Kyle Buller declare that I am a citizen of the United States, over the age of 18 years, not a party to the above-entitled action, and an employee of the Orange County Public Defender with a business address at 801 W. Civic Center Dr., # 400, Santa Ana, California 92701.

On February 23, 2023, I electronically served the attached ANSWER BRIEF ON THE MERITS by transmitting a true copy via this Court's TrueFiling system, and I placed a true copy thereof enclosed in sealed envelopes, postage fully prepaid, in the United States Mail in Santa Ana, California, said envelopes addressed as follows:

Deputy County Clerk, Attn: Hon. Elizabeth Macias (Dept. C38), Orange County Superior Court, Central Justice Center, 700 Civic Center Drive West, Santa Ana, CA 92701

Attn: Yvette Patko, Orange County District Attorney, 300 N. Flower Street, Santa Ana, CA 92703, yvette.patko@ocdapa.org

California Attorney General, P.O. Box 85266-5299, San Diego, CA 92186-5266

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

Executed on this February 23, 2023, at Santa Ana, California.

Kyle Buller
Kyle Buller

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 2/23/2023 by LaNae Brooks, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

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

2. My email address used to e-serve: **elizabeth.khan@pubdef.ocgov.com**

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

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Answer Brief_Needham FINAL

Service Recipients:

Person Served	Email Address	Type	Date / Time
Yvette Patko Office of the District Attorney 161892	yvette.patko@da.ocgov.com	e-Serve	2/23/2023 4:17:36 PM
Elizabeth Khan Office of the Public Defender 292041	elizabeth.khan@pubdef.ocgov.com	e-Serve	2/23/2023 4:17:36 PM
Kyle Buller	Kyle.Buller@pubdef.ocgov.com	e-Serve	2/23/2023 4:17:36 PM
ELIZABETH MCALONEY ORANGE COUNTY PUBLIC DEFENDER	elizabeth.mcaloney@pubdef.ocgov.com	e-Serve	2/23/2023 4:17:36 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

2/23/2023
Date

/s/Kyle Buller
Signature

Khan, Elizabeth (292041)
Last Name, First Name (PNum)

Orange County Public Defender
Law Firm