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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

REPLY BRIEF ON THE MERITS

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

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

To the Honorable Patricia Guerrero, Chief Justice and the Associate Justices of the California Supreme Court:

INTRODUCTION

The Legislature defined the duty of the People to protect the public in prosecuting Sexually Violent Predator Act (SVPA) cases.

> It is the intent of the Legislature that once identified, [potential sexually violent predator], if found to be likely to commit acts of sexually violent criminal behavior beyond a reasonable doubt, be confined and treated until such time that it can be determined that they no longer present a threat to society.

(Legis. Counsel's Dig., Sen. Bill No. 1143 (1995-1996 Reg. Sess.) Summary Dig., emphasis added.) Treatment requires that the

sexually violent predator (SVP) be committed to the Department of State Hospitals (DSH) who administers sex offender treatment. Respondent has stayed at Orange County Jail since the filing of his petition for commitment, so he has not received the benefit of sex offender treatment.

The Court of Appeal in this case ruled that the People cannot retain experts to testify at respondent's commitment trial because a retained expert violates the SVPA. This ruling is erroneous and should be overturned. Case law has already held that the SVPA does not address the People's retained experts, but that the Civil Discovery Act, which allows for the retention of experts applies to SVPA cases. (*People v. Landau* (2013) 214 Cal.App.4th 1, 25.)

This Court in *People v. Superior Court* (*Smith*) (2018) 6 Cal.5th 457 also found that the People can utilize retained experts and share an alleged SVP's medical records with that experts who can then "offer an opinion about the potential SVP's mental health." (*Id.* at p. 472.) That opinion would only be useful during the commitment trial, where People must prove beyond a reasonable doubt that the alleged SVP suffers from a mental

health condition that currently makes him likely to engage in sexual violence. (Welf. & Ins. Code, §§ 6603-6004.) Given that there would be no reason to obtain expert opinions other than to admit them at trial, this Court tacitly approved the use of the People's retained experts at trial. The People seek to use their retained expert's opinion in this case to finally bring respondent to trial so that he can get the treatment he needs.

1. THE ONLY LOGICAL CONCLUSION FROM THIS COURT'S DECISION IN *SMITH* IS THAT EXPERTS RETAINED BY THE PEOPLE CAN RENDER THEIR OPINIONS AT TRIAL.

This Court in *Smith* already answered whether the People may retain an expert and the many potential uses of that expert in SVPA cases. (*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457.) In *Smith*, this Court decided that the People may share an SVP's confidential medical records with their retained experts. (*Id*. at p. 462.) The *Smith* Court reasoned that a knowledgeable retained expert for the People was necessary to cross-examine opposing experts; to assist with "prosecuting the SVP petition[]" (*ibid*.); and "to examine the relevant records to

offer an opinion about the potential SVP's mental health. [Citation.]" (*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 472.)

Respondent wants to limit this Court's language as "an acknowledgment that, in order to properly assist a prosecutor in preparing for trial, a retained expert would need sufficient information to form an opinion of his or her own." (*Needham v. Superior Court* (2022) 82 Cal.App.5th 114, 128.) Respondent does not explain why the People would pay an expert to review thousands of pages of medical records simply to render an opinion that cannot be used at trial. The opinion of a non-testifying expert provides no benefit to the People or a jury. Justice Goethals correctly concluded that under respondent's interpretation, "much of the *Smith* opinion becomes mere dictum." (*Needham v. Superior Court*, *supra*, 82 Cal.App.5th 114, 128 (dis. opn. of Goethals, J.).)

Justice Goethals reached the logical conclusion from *Smith*. He concluded that if an expert can examine medical records to offer an opinion about the alleged SVP's mental health, "a testifying expert may also access such records" (*Needham v. Superior Court*, *supra*, 82 Cal.App.5th 114, 130 (dis. opn. of Goethals, J.)). The only logical inference from this Court's language in *Smith* is that the People's retained expert can examine the records, render an opinion, and can testify to that opinion at trial.

Respondent's narrow reading of *Smith* unnecessarily ties the People's hands at trial. There are many qualified experts in the SVP area, including a pool of "independent" experts the DSH uses when independent opinions are required under Welfare and Institutions Code section 6601, subdivision (e). The same experts can be retained by the People (and SVP respondents) to testify at trial when necessary. As respondent admits, Dr. King is exactly that kind of expert. (Petitioner's Reply to Real Party's Return to Petn. for Writ of Mandate/Prohibition, p. 7, ¶ II, § 1.)

In spite of this, respondent claims that this Court's language in *Smith* precludes Dr. King from sharing his opinion with the jury because that would violate the non-punitive goals of the SVPA and debase its entire purpose. (Answer brief, p. 42.) The SVPA is Constitutional because the alleged SVPs are civilly committed for treatment of their mental health condition until they are not currently dangerous. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1169.) Nothing about retaining an expert changes the nature of the commitment or the treatment an SVP will receive. Respondent claims, but does not explain, how the retained expert would make the commitment a punitive one. A retained expert is especially critical in SVPA cases where the People must prove someone's mental condition and their future likelihood of committing sexually violent crimes. (*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 471.) This Court in *Smith* found that the People can use an expert to opine about an SVP's mental health. (*Id.* at p. 472.) The People should be permitted to use that opinion to provide the true value it offers: evidence at trial.

2. THE TESTIMONY BY A RETAINED EXPERT DOES NOT IMPACT RESPONDENT'S DUE PROCESS RIGHTS, WHICH ARE LIMITED IN SVPA CASES DUE TO THEIR CIVIL NATURE.

A. The Constitutionality of the SVPA is based on the civil nature of the commitment and its limited application to those with a current mental disorder who are currently dangerous.

The Constitutionality of the SVPA has been upheld by this Court based on its requirements that the People prove that the alleged SVP has a current mental disorder that makes him currently dangerous if released.

> In upholding the constitutionality of the SVPA against various challenges, we repeatedly stressed in *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, that in order for a person to be civilly committed for treatment under this legislation, the government must establish beyond a reasonable doubt that the person suffers from a " '*current*' mental disorder" that makes him or her *presently* dangerous and likely to reoffend in the future. [Citation.]

(*Albertson v. Superior Ct.* (2001) 25 Cal. 4th 796, 802, emphasis in original.) The constitutionality of the SVPA has never relied on the fact that DSH evaluators identify potential SVPs or that DSH evaluators perform updated or replacement evaluations. (Welf. & Inst. Code, §§ 6601 & 6603.)

Further, no court considered the “independent” nature of evaluators as a requirement for the SVPA’s constitutionality until the lower court imposed the requirement in this case. This is because evaluators are not required to be “neutral and independent” under the SVPA. The initial evaluators are merely described as two practicing psychiatrists or psychologists (or one of each) designated by the Director of State Hospitals. (Welf. & Inst., § 6601, subd. (d).) “Independence” is not required from evaluators until secondary evaluations are performed due to a split of opinions. Then, “two independent professionals,” are selected by the Director of State Hospitals. (Welf. & Inst. Code, § section 6601, subd. (d).) However, “independent” is merely defined to be “not a state government employee.” (Welf. & Inst. Code, § 6601, subd. (g).) No definition of independent includes the requirement to be “not retained” under the SVPA.

Respondent's argument that retained experts render a trial unfair defies the very language of the SVPA. An alleged SVP has a statutory right to retained experts. (Welf. & Inst. Code § 6603, subd. (a).) Does that mean that the People are not getting a fair trial in any case where the alleged SVP elects to use a retained expert? A retained expert is a tool in nearly every trial lawyer's toolbox to ensure they can fairly present their case to a jury, who can then evaluate and compare the information provided by both sides to render a decision. The People only seek an even the playing field by using their own retained experts to meet their burden to prove the case beyond a reasonable doubt.

B. Application of the *Otto* factors upholds the constitutionality of the use of retained experts under the SVPA.

Respondent argues that he is entitled, as a part of his Due Process rights, to prevent the People from calling a retained expert. Due Process rights in SVPA cases, however, are limited. Specifically,

> In SVPA proceedings, "due process ... is not measured by the rights accorded a defendant in criminal proceedings, but by the standard applicable to civil proceedings [.]" (*People v. Superior Court* (*Howard*) (1999) 70 Cal.App.4th 136, 154, 82 Cal.Rptr.2d 481.) In civil proceedings, including SVPA proceedings, " '**[d]ue process requires only that the procedure adopted comport with fundamental principles of fairness and decency.**

(*People v. Dean* (2009) 174 Cal.App.4th 186, 204, emphasis added [holding that Due Process does not require the appointment of more than one expert for an alleged SVP].)

This Court in *People v. Otto* (2001) 26 Cal.4th 200 examined the procedural due process rights of SVPA respondents. This Court applied a four part test to rule on the constitutionality of the SVPA's use of hearsay statement.

> We have identified four relevant factors: (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. [Citation.]

(*Id*. at p. 210.) Respondent refers to the standard but misapplies

its analysis.

(1) The private interest that will be affected by the official action.

In *Otto*, this court described the private interest affected as "the significant limitations on [an SVP]'s liberty, the stigma of being classified as an SVP, and subjection to unwanted treatment. [Citation.]" (*People v. Otto*, *supra*, 26 Cal.4th 200, 210.) The private interest is the same in nearly any SVP commitment case.

(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.

Respondent claims that because an expert is retained, the expert must form opinions whether respondent is an SVP before reviewing the relevant materials. (Answer Brief, p. 29.) That is not how the People's process in selecting experts works.

The People prepare a hypothetical summarizing the facts relating to the person's SVP status to present to potential experts. From that, the expert determines whether he might be able to assist the People. If he believes he can, the People obtain

a protective order permitting the expert's review of the records. Only after the review do the experts actually provide an opinion as to whether an alleged SVP meets the statutory criteria. (Writ Petn., Exh. H, p. 189.)

The experts are selected from the same pool as the DSH's "independent" evaluators. They utilize the DSH's guidelines and they could well have been selected by the Director of State Hospitals to perform the evaluations. So, this process poses no greater risk of an improper commitment than the process utilized by the DSH.

As respondent admits, a retained expert's opinion can be challenged on cross-examination. Respondent can also challenge the admissibility of an unqualified expert. Respondent contends that these rights "do not render an SVP trial fundamentally fair." (Answer Brief, p. 30.) Confronting and cross-examining the People's witnesses form the very basis of the Due Process rights in the adversarial setting. These are the rights upon which criminal defendants rely to ensure they get a fair trial, including at each SVP's criminal trial. During the criminal trials, the People regularly retain and call expert witnesses to testify. Yet

no case holds that the use of retained experts in the criminal context violates Due Process. It is difficult to imagine how the same rights afforded during a civil commitment process, with a lesser Due Process standard, would be insufficient.

Respondent tries to limit the evaluations available to the People. He argues that in lieu of retained experts, old evaluations must be updated. Updated evaluations are one option under the SVPA, but the statute uses permissive language. If the People believe them to be necessary, the People "**may** request the State Department of State Hospitals to perform updated evaluations. (Welf. & Inst. Code, § 6603, subd. (d)(1), emphasis added.)

There are many reasons the People may decide to retain experts. More experienced evaluators or particular areas of expertise may be necessary to explain why someone is an SVP. Some evaluators are better able to explain their analysis in an understandable way. Evaluators may become unable to testify but not legally unavailable under Welfare and Institutions Code section, 6603, subdivision (d)(2). Some have particular biases which the People feel may unfairly impact their opinions, or cause

them to render inaccurate opinions. At times, an expert evaluation is necessary faster than the DSH evaluators can provide.

When it comes to an alleged SVP who is particularly dangerous, it behooves the People to present their most qualified and most helpful witnesses to the jury. Case law is in accord. This Court stated that the SVPA does not “dictate how the county’s counsel should present [evaluations] to the court or even require the attorney to do so. The People may choose to establish the facts underlying the petition by other means.” (*Walker v. Superior Court* (2021) 12 Cal. 5th 177, 196, as mod. on denial of rehg. (Oct. 13, 2021).) The People’s selection of expert witnesses fits squarely in this. The People may prove respondent’s SVP status through means other than the DSH evaluator.

Interestingly, respondent again argues that evaluations must be done by “independent” evaluators for Due Process to be met. As discussed *supra* in Section 2A, p. 15, the SVPA does not require this.   The SVPA does not contemplate “independent” evaluators in the sense respondent suggests.

The opportunity for respondent to confront and cross-examine any of the People's retained experts affords the highest level of Due Process protection the Constitution requires. This process is what protects against the risk of an erroneous deprivation of respondent's liberty interest.

(3) The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The government interest in SVPA cases is aptly summarized by this court in *Walker v. Superior Court*.

> "In describing the underlying purpose" of the SVPA, "the Legislature expressed concern over a select group of criminal offenders who are extremely dangerous as the result of mental impairment, and who are likely to continue committing acts of sexual violence even after they have been punished for such crimes." (*Hubbart, supra*, 19 Cal.4th at pp. 1143–1144, 81 Cal.Rptr.2d 492, 969 P.2d 584.)

(*Walker v. Superior Court*, *supra*, 12 Cal. 5th 177, 190.) The finding that someone is an SVP is rare. As an example, through June 15, 1999, out of approximately 27,000 inmates screened, only 2,702 were referred to DSH for evaluation and only 679 were

referred to the District Attorney for petitions for commitment. (Assem. Com. on Public Safety on Sen. Bill No. 2018 (1999-2000 Reg. Sess.) June 22, 2000, p. 4.) While only a small percentage of potential SVPs are found to meet the statutory criteria, the danger posed by these individuals is great. They commit the most violent and emotionally damaging crimes on some of society's most vulnerable victims. The State's interest in making sure those who currently pose a danger if released get committed for treatment is exceptionally high. And if there are qualified experts who agree that an individual meets the criteria as an SVP, the People should present that opinion to the jury.

This comports with this Court's holding in *Reilly v. Superior Court* (2013) 57 Cal.4th 641, where the Court ruled that the trier of fact is to be the arbiter of conflicting professional opinions. (*Id*. at p. 655, fn. 2.) As a result, this Court explained that dismissal is not required even when both updated state "evaluators conclude the individual does not meet the criteria for commitment. [Citation.]" (*Id*. at p. 648.)

Reilly followed the reasoning of *Gray v. Superior Court*, which held that dismissal was not required when no pair of DSH evaluators found Gray to be an SVP. (*Gray v. Superior Court* (2002) 95 Cal.App.4th 322.) The Court of Appeal found that the conflicting evaluations should still be presented to a jury to compare the quality and persuasiveness of the assessments. (*Id.* at p. 329.) Under *Gray*, even multiple negative evaluations do not bar prosecution of the SVP petitions. (*Id.* at p. 329.) The court's rationale was that "**[t]he question of whether a person is a sexually violent predator should be left to the trier of fact** *unless* the prosecuting attorney is satisfied that proceedings should be abandoned." (*Gray v. Superior Court, supra*, 95 Cal.App.4th 322, 329, first emphasis added.)

Respondent's claim that the People must challenge an evaluator for legal error under *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888 does not provide adequate protection for the public. First, even assuming the People prevail that there was legal error and not just a difference of judgment, the evaluator could be impeached with both the fact that he was found to have committed legal error and that he had expressed a different

opinion previously. This undermines the People's confidence in the evaluations. Second, the evaluator would be unlikely to convincingly present an opinion he was ordered to modify. Third, evaluations are subjective, even with the standardized protocols adopted by the DSH, making their results inconsistent at best.

> [T]he 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.' " [Citation.]

(*People v. Superior Court* (*Smith*), *supra*, 6 Cal.5th 457, 471.) An evaluator finding that someone does not meet the criteria as an SVP is merely one person's opinion. When presented with the same facts, another evaluator may find to the contrary. Leaving decisions about the release of someone who has a mental disorder which makes them dangerous to the "fortuitous timing of conflicting opinions" (*Gray v. Superior Court*, *supra*, 95 Cal.App.4th 322, 329) does not serve the policy of the SVPA to protect the public. It makes the DSH the final arbiter of whether someone should be committed. If that were legislative scheme, the SVPA would never have been drafted. DSH would simply have been given authority to release someone when they find SVPA criteria are not met. That is not the system in place.

In sum, there is no substitute for a well-reasoned evaluator who can effectively explain why a person meets the SVP criteria to a jury. The People's case should not be relegated to court-ordered modifications of evaluations that are impeachable and potentially flawed from the start. The government interest in ensuring those who meet the SVP criteria be properly committed for treatment until they are no longer dangerous requires that the People be permitted to retain expert evaluators both to evaluate some potential SVPs and to present their case to a trier of fact.

(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.

As to this element of the Due Process analysis, the Court in *Otto* found that "reliance on the hearsay evidence does not impede Otto's dignitary interest in being informed of the nature, grounds, and consequences of the SVP commitment proceeding, or disable him from presenting his side of the story before a responsible government official." (*People v. Otto, supra*, 26 Cal.4th 200, 215.) Similarly, the People's use of retained experts does not impact

respondent's dignitary interests. He would still be advised of the nature, grounds and consequences of the action. He would still have the ability to present his side of the story through his own retained expert. Respondent does not explain how the use of retained experts would detract from respondent's dignitary interest.

C. Others states with sexually violent predator statutes permit retained experts without constitutional infirmity.

Several states have elected to specifically authorize those prosecuting sexually violent predator cases to retain private experts. For example, Illinois allows "[t]he State to have the person evaluated by experts chosen by the State." (Ch. No. 725, Ill. Comp. Stat. Ann. act no. 207/§ 15725, subd. (f) (West 2017).) In Kansas, "at any proceeding conducted under the Kansas sexually violent predator act, the parties shall be permitted to call expert witnesses." (Kan. Stat. Ann. § 59-29a06, subd. (c) (West 2022).) The New Hampshire statute grants the People the right to a retained expert if the alleged SVP elects to use one.

> If the defendant retains an expert to perform a mental health examination, the person shall also submit to an examination by an expert of the state's choosing.

(N.H. Rev. Stat. Ann. § 135-E:9 (West 2007).)

In Texas "[t]he person and the state are each entitled to an immediate clinical interview of the person by an expert," without a showing of good cause. (Tex. Health & Safety Code Ann. § 841.061, subd. (c) (West 2021); *In re Commitment of Hatchell* (Tex. App. 2011) 343 S.W.3d 560, 563.) The statute was found to be "facially constitutional." (*In re Commitment of Adams* (Tex. App. 2003) 122 S.W.3d 451, 452.)

In Missouri, although the statute only authorizes evaluations by the DSH and the alleged SVP's evaluator (Mo. Ann. Stat. § 632.489, subd. (4) (West 2009)), case law found that it was proper for the State to obtain their own expert evaluation. In *In re Doyle*, the alleged SVP argued that "because the statute explicitly grants the respondent in an SVP commitment proceeding the right to obtain subsequent examinations by his or her expert of choice, but not the State; the State had no authority to retain a private expert." (*In re Doyle* (Mo. Ct. App. 2014) 428 S.W.3d 755, 760.) The Court found that because Missouri's

SVPA charges the cost of subsequent evaluations to the party requesting it, "either party has the right to request such an evaluation." (*Id*. at p. 761, accord *Matter of Care & Treatment of Lester Bradley v. State* (Mo. Ct. App. 2018) 554 S.W.3d 440, 453. [Missouri's SVPA did not bar the state's retained expert from testifying and the statute comports with Due Process.].)

Many states permit the People's use of retained experts in SVPA cases. No constitutional infirmity has been found in these processes. Respondent's argument that allowing the People to use retained experts violated his Due Process rights is not supported by law. The use of retained experts is so common across many civil cases, including SVPA, that Justice Goethals commented, that "many civil trials evolve into battles of expert witnesses." (*Needham v. Superior Court*, *supra*, 82 Cal.App.5th 114, 130.) The People should not be expected to enter that battle unarmed.

3. BECAUSE THE SVPA DOES NOT ADDRESS THE ISSUE, THE CIVIL DISCOVERY ACT APPLIES AND PERMITS THE USE OF RETAINED EXPERTS.

A. A facial reading of the SVPA does not address whether the People can retain experts.

The basic rules of statutory construction are well established.

> We first consider the words of the statute, as statutory language is generally the most reliable indicator of legislation's intended purpose. [Citation.] We consider the ordinary meaning of the relevant terms, related provisions, terms used in other parts of the statute, and the structure of the statutory scheme. [Citation.]

(*Walker v. Superior Court*, *supra*, 12 Cal. 5th 177, 194, as mod. on denial of rehg. (Oct. 13, 2021).) A facial reading of Welfare and Institutions Code sections 6603 and 6604, which govern the trial of SVPA commitment petitions, reveal no statutory position on the People's retained experts.

Respondent argues that the SVPA's plain language bars the People's retention of expert witnesses. (Answer Brief, p. 11.) In support of his argument, respondent discusses the process by which potential SVPA cases get identified and evaluated. (Answer Brief, pp. 11-13). This process has no logical bearing on the People's right to retain expert witnesses at trial. Respondent then discusses the process for obtaining updated and replacement evaluations by the DSH under Welfare and Institutions Code section 6603, subdivision (d) to argue that the "People's assertion [that they may retain testifying experts;] is in direct conflict with the plain language of section 6603, subdivision (d)(1)." (Answer Brief, p. 14.) However, respondent cites no language that actually conflicts with the People's right to call a retained expert to testify. There is no "direct conflict."

Respondent also claims that because the People can get updated and replacement examinations from the DSH, they are barred from using retained experts. (Answer Brief, pp. 14-15.) Respondent argues that because "updated or replacement evaluations shall not be performed except as necessary ..." (Welf. & Inst. Code, § 6603, subdivision (d)(1)), a privately retained

expert cannot perform an evaluation at all. Again, these concepts are distinct. A privately retained expert does not perform updated or replacement evaluations. They conduct evaluations completely independently. The performance of updated and replacement evaluations is completely reconcilable with the retention of private experts by the People. Both DSH evaluators and retained experts can testify without violating the SVPA's language.

Furthermore, when updated and replacement evaluations were added into the SVPA,[1] the Legislature understood that the People were using retained experts.

> 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.**

(Assem. Com. on Public Safety on Sen. Bill No. 2018 (1999-2000 Reg. Sess.) June 22, 2000, p. 3, emphasis added.) The

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[1] Updated and replacement evaluations were added to the SVPA in response to *Sporich v. Superior Court* (2000) 77 Cal.App.4th 422, 427, superseded by statute on another ground as stated in *Albertson v. Superior Court*, *supra*, 25 Cal.4th 796 which held updated evaluations were not available from DSH without authorizing language.

Legislature's concern that petitions could be "delayed until a new evaluation is obtained" demonstrates that the Legislature recognized that the People were obtaining retained experts prior to the amendment. If the DSH's evaluations were outdated, any "new evaluation" had to be through retained experts. When enacting the amendment, the Legislature had the opportunity to specify that the People should no longer retain those private experts. It chose not to do so.

Respondent's argument was made and rejected in *People v. Landau*, wherein Landau argued that the SVPA "does not authorize evaluation [of the alleged SVP] by an expert *retained* by the prosecution." (*People v. Landau*, *supra*, 214 Cal.App.4th 1, 24, emphasis in original.) The court found that the section does not address evaluation by the People's retained experts.

> Neither is there anything in section 6603, subdivision (c)(1) to support appellant's argument that the court cannot order an alleged SVP to submit to a mental examination by an expert retained by the district attorney. That section speaks to the issue of examinations by initial evaluators and their replacements. While [Welf. & Inst. Code, § 6603, subd. (d)] provides the exclusive procedure for updated or replacement evaluations of initial evaluators ... **the section does not address examination by other experts.**

(*People v. Landau*, *supra*, 214 Cal.App.4th 1, 25, emphasis added.) Thus, the Court of Appeal recognized that examination by non-DSH experts was possible, and that the process of obtaining updated and replacement evaluation was separate from evaluations completed by a retained expert. (*Ibid*.)

Finally, respondent argues that because the People have "no role" in the "commitment evaluation process," the facial reading of the statute is that the People cannot retain experts. (Answer Brief p. 12.) However, a petition for commitment is only brought if the attorney for the county "concurs with the recommendation ..." of the DSH. (Welf. & Inst. Code, § 6601, subd. (i).) While DSH evaluation reports provide a gatekeeping function in the filing of an SVPA petition, their significance wanes once the case is submitted to the district attorney.

> To begin, the SVPA does not appear to require consideration of the evaluation reports. It requires only that these reports be prepared as a predicate to filing an SVPA petition and then be made available to the county's designated counsel, who then decides whether to file a petition and what to include in it. [Citations.] Although the evaluations are often attached as exhibits to the petition [Citations], the statutory provisions governing the evaluations do not dictate how the county's counsel should present them to the court or even require the attorney to do so. **The People may choose to establish the facts underlying the petition by other means.** In view of these considerations, which tend to suggest that the evaluation reports largely play a "discrete and preliminary" gatekeeping role in the SVPA commitment process [Citations] ....

(*Walker v. Superior Court*, *supra*, 12 Cal.5th 177, 196, emphasis added.) Thus, the People may select the manner of proof supporting the petitions, including retaining experts to testify at trial when necessary to meet their burden of proof.

B. The principle that "the expression of one thing in a statute ordinarily implies the exclusion of other things" leads to absurd interpretations under the SVPA.

Respondent next argues that because there is no mention of a retained expert by the People, it must not be permitted in SVPA proceedings. The lower court adopted respondent's argument while attempting to apply the concept that " 'the expression of one

thing in a statute ordinarily implies the exclusion of other things' [Citation]" also known as *expressio unius est exclusio alterius*. (*Needham v. Superior Court*, *supra*, 82 Cal.App.5th 114, 126.) However, the application of this principle in interpreting the SVPA leads to absurd results. The principle cannot be applied under the circumstances.

> And we have said that courts do not apply the *expressio unius est exclusio alterius* principle "if its operation would contradict a discernible and contrary legislative intent." [Citations.] More generally, we have often said that courts will not give statutory language a literal meaning if doing so would result in absurd consequences that the Legislature could not have intended. [Citations.]

(*In re J.W.* (2002) 29 Cal.4th 200, 209-210.)

The principle leads to absurd consequences when used to interpret the SVPA. For instance, the SVPA grants an alleged SVP the right to "retain experts or professional persons to perform an examination on the person's behalf." (Welf. & Inst. Code, § 6603, subd. (a).) There is no mention of the right to call those retained experts at trial. However, "[i]f the person is indigent, the court shall ... assist the person in obtaining an expert or professional person to perform an examination **or**

participate in the trial on the person's behalf." (Welf. & Inst. Code, § 6603, subd. (a), emphasis added.) Applying the principle of *expressio unius est exclusio alterius* would mean that an alleged SVP's retained expert cannot testify or participate in the trial **unless** the SVP is indigent. Plainly, this was not the intent of the Legislature. Similarly, because the statute provides for a retained expert to be appointed for indigents, should the alleged SVP be foreclosed from calling an expert from the DSH since that right is not specifically given identified in the statute? The SVPA must be interpreted through the lens of common sense, not constraining maxims that lead to absurd results.

The SVPA does not, and cannot, delineate all the rules applicable to proceedings. For example, while the SVPA "provides instructions ... for conducting the probable cause hearing[,]" they are "only spare ones." (*Walker v. Superior Court*, *supra*, 12 Cal.5th 177, 191.) In *Walker*, this Court found that the rules of evidence, including the hearsay rule where not specifically exempted, applied to probable cause hearings under the SVPA. (*Ibid.*) The *Walker* Court reasonably found the Evidence Code to supplement the SVPA's guidelines, because the SVPA could not

identify all of the applicable procedures.

Even the mention of particular types of evidence in the Welfare and Institutions Code has not been interpreted to limit evidence to be admitted. The Court in *People v. Fulcher* held that the SVPA's authorization to use documentary evidence in place of the victim's testimony does not prevent the People from calling the crime victim in a predicate offense to testify. (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 49-50 [The SVPA does not preclude all other relevant evidence, such as the testimony of a victim.]

Respondent's argument that the People's rights must all be delineated in the SVPA itself would mean the People are not entitled to have an expert at all. But, that issue has already been decided to the contrary by this Court in *Smith*. As discussed in Section 1 *ante*, this Court found that a retained expert can assist in several ways, including rendering "an opinion about the potential SVP's mental health. [Citation.]" (*Id*. at p. 472.) Therefore, this Court has already found respondent's reading of the SVPA to be erroneous. If respondent's reading were correct, the People could not use a retained expert at all.

Respondent also claims that because Welfare and Institutions Code section 6605, which governs the unconditional release of committed SVPs, mentions the People's retained experts, the Legislature's failure to include similar language in Welfare and Institutions Code section 6603 shows an intent to disallow the People's retained experts during the commitment process. A complete reading of Welfare and Institutions Code section 6605 shows that the limitation is only intended to control the timing of retained expert evaluations.

Welfare and Institutions Code section 6605 requires a two-step process from the Court. First, the court orders a show cause hearing to consider the petition and any documentation provided. (Welf. & Inst. Code, § 6605, subd. (a)(1).) Second, if probable cause is found, the court holds an evidentiary hearing under (Welf. & Inst. Code, § 6605, subd. (a)(2).) The Court of Appeal has ruled that the SVP is not entitled to obtain a retained expert for the probable cause hearing, only for the evidentiary hearing. (*People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1398.) Essentially, the legislature did not want retained experts by either side at the probable cause hearing. So, they only permitted

the People to retain an expert in the procedures governing the evidentiary hearing so as to correspond with the SVP's right to an expert. This does not impact the People's retained experts at commitment proceedings which follow different protocols altogether.

Given that the SVPA is not a compete recitation of all the rights of the parties and the procedures to be followed in SVPA cases, respondent's argument to exclude any rights not specifically delineated in the specific language of the SVPA leads to absurd results and should not be followed.

C. The Civil Discovery Act applied to SVPA proceedings, so that the parties may retain testifying experts and conduct discovery about them.

It is undisputed that "[T]he Civil Discovery Act applies to SVPA proceedings." (*People v. Landau*, *supra*, 214 Cal.App.4th 1, 25.) Nonetheless respondent argues that the Civil Discovery Act's expert witness provisions should not apply because they conflict with the SVPA. However, no other case has so broadly precluded entire articles of the Civil Discovery Act from use in SVPA cases. Courts have construed the language narrowly and only found only those portions of the Civil Discovery Act in direct conflict

with the SVPA to be inapplicable.

Respondent relies on the Court of Appeal's opinion in *People v. Jackson* (2022) 75 Cal.App.5th 1. In *Jackson*, the alleged SVP did not properly comply with the exchange of expert information required by Code of Civil Procedure section 2034.210 et seq, so the trial court excluded the expert. (*Id*. at pp. 16-19.) The Court of Appeal acknowledged that the Civil Discovery Act applied and that under its provisions "a party is permitted to retain and designate 'expert trial witnesses.' [Citation.]" (*Id*. at p. 8.) However, it found that the remedy of exclusion under Code of Civil Procedure section 2013.300 for the failure to comply with the expert witness exchange provisions was impermissible because excluding the expert would violate the alleged SVP's rights under Welfare and Institutions Code section 6603, subdivision (a) and Due Process right to have a retained expert testify at trial. (*People v. Jackson*, *supra*, 75 Cal.App.5th 1, 23.) So, the provision of the Civil Discovery Act's exclusion of the expert was in direct violation of a provision of the SVPA

In *People v. Murillo* (2006) 143 Cal.App.4th 730, the court held that requiring an SVP to respond to requests for admission

under the Civil Discovery Act was impermissible because the admissions would eliminate one of the primary safeguards built into the SVPA – his right to have the People prove that he is an SVP beyond a reasonable doubt to a unanimous jury. (*People v. Murillo*, *supra*, 143 Cal.App.4th 730, 738.) The Court of Appeal did, however find that the Civil Discovery Act applied to SVPA cases. (*Id.* at p. 736.)

As *Jackson* and *Murillo* demonstrate, the Civil Discovery Act applies to SVPA cases. Only when there is a direct conflict with a specific right granted under the SVPA has the court found that a particular portion of the Civil Discovery Act does not apply. The lower court in this case held that the "expert witness provisions" of the Civil Discovery Act did not apply to SVPA cases.[2] This ruling is not supported by the narrow exceptions

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[2] For reasons which it did not explain, the Court of Appeal in this case ruled that all the expert witness provisions of the Civil Discovery Act did not apply in SVPA case. (*Needham v. Superior Court*, *supra*, 82 Cal.App.5th 114, 120) The expert witness provisions have two relevant parts. One allows compelled mental health examination of parties where their mental health is at issue in a proceeding. (Code Civ. Proc., § 2032.010, et seq.) The other allows parties to conduct discovery about the other sides experts, including obtaining their identify, their reports and writings and deposing that expert. (Code Civ.
(continued...)

created by *Jackson* and *Murillo*. The language of the SVPA does not foreclose the possibility of the People calling an expert retained and designated under the Civil Discovery Act.

Respondent's reliance on *Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677 to argue that the Civil Discovery Act does not control in this case is even more misplaced. (Answer Brief, p. 22.) *Bagration* found that the summary judgment procedures under Code of Civil Procedure section 437c did not apply to SVPA proceedings because a summary judgment motion is inherently inconsistent with the requirement for a jury trial under the SVPA. (*Bagration v. Superior Court*, *supra*, 110 Cal.App.4th 1677, 1688-689.) Notably, the summary judgment proceeding is not a part of the Civil Discovery Act, which is contained in Code of Civil Procedure section 2016.10 through section 2036.050. *Bagration* does not apply in this case.

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[2] (...continued)
Proc., §§ 2034.210, et seq. & 2034.410, et seq.) Finding none of these provisions apply leaves the People at a particular disadvantage because it permits the alleged SVP to spring retained experts on the People during trial.

Like in *Murillo*, courts have consistently applied the expert witness provisions of the Civil Discovery Act to SVPA cases. In *Sporich*, the Court applied mental health examinations under the Civil Discovery Act applied in SVPA cases, but found the People did not present good cause for the court to order an examination. (*Sporich v. Superior Court*, *supra*, 77 Cal.App.4th 422, 425.) In *People v. Landau*, *supra*, 214 Cal.App.4th 1, the court also applied Code of Civil Procedure section 2032.020 of the Civil Discovery Act to compel a mental health examinations by the People's retained expert on the eve of trial. (*Id*. at pp. 25-27.)

Until the decision of the lower court in our case, no published opinion disallowed the People's retained expert witnesses. Rather, courts have applied the provisions of the Civil Discovery Act to permit the People to compel mental health examinations of an alleged SVP. This allows the People the opportunity to present evidence to the jury when the DSH's evaluators did not adequately protect public by considering extraneous materials, or when additional testimony was helpful to the jury in explaining why a subject was an SVP. The Court of Appeal misinterpreted the SVPA to exclude the testimony of the

People's retained expert. Their decisions should be overturned.

CONCLUSION

For the foregoing reasons this Court should overturn the decision of the Court of Appeal.

Dated this 4th day of April, 2023.

Respectfully submitted,

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

/s/ *Yvette Patko*

By:________________________________
Yvette Patko
Senior Deputy District Attorney

CERTIFICATE OF WORD COUNT

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

The text of the Reply Brief on the Merits consists of 6,894 words as counted by the word-processing program used to generate this brief.

Dated this 4th day of April, 2023.

Respectfully submitted,

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

/s/ *Yvette Patko*

By:_______________________________
Yvette Patko
Senior Deputy District Attorney

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

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

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

On April 4, 2023, I served the REPLY BRIEF ON THE MERITS on the interested parties in said action by placing a true copy thereof enclosed in a sealed envelope, in the United States mail at Santa Ana, California, that same day, in the ordinary course of business, postage thereon fully prepaid, addressed as follows:

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

Executed on April 4, 2023, at Santa Ana, California.

/s/ *Catherine McDorman*

Catherine McDorman
Attorney Clerk II

PROOF OF ELECTRONIC SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

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

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

On April 4, 2023, I served the REPLY BRIEF ON THE MERITS on the interested party listed below. I caused a true electronic copy of said document to be E-Filed with the court, via TrueFiling, at the following address:

District Court of Appeal
Fourth Appellate District, Division Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 4, 2023, at Santa Ana, California.

/s/ *Catherine McDorman*

____

Catherine McDorman
Attorney Clerk II

PROOF OF ELECTRONIC SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

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

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

On April 4, 2023, I electronically served the REPLY BRIEF ON THE MERITS on the interested parties in said action by transmitting a true copy via electronic mail as follows:

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

Executed on April 4, 2023, at Santa Ana, California.

/s/ *Catherine McDorman*

Catherine McDorman
Attorney Clerk II

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 4/4/2023 by M. Alfaro, 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: **yvette.patko@da.ocgov.com**

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APPLICATION TO FILE OVER-LENGTH BRIEF	NeedhamNicholas_S276395 SupremeCourtApp.Over-Length Brief

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

Orange County District Attorney's Office
Law Firm