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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DANIEL JAMES MACY, Petitioner, v. THE SUPERIOR COURT OF SANTA CRUZ COUNTY Respondent, THE PEOPLE, Real Party in Interest.	H037138 (Santa Cruz County Super. Ct. No. ME-43)

The central issue in this original writ proceeding is whether the trial court was legally obligated to dismiss commitment proceedings brought against petitioner Daniel James Macy pursuant to the Sexually Violent Predator Act ("SVPA" or "Act") (Welf. & Inst. Code, § 6600 et seq.)[1] because the original concurring evaluations were conducted using an invalid standardized assessment protocol and presently there is no pair of concurring evaluations.

A concurring pair of evaluations is a prerequisite to the filing of a petition to commit an individual as a sexually violent predator ("SVP"). (§ 6601, subds. (d)-(g); see *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 909 ("*Ghilotti*").) The

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

purpose of this requirement is to screen out persons unlikely to qualify as SVP's. (See *People v. Medina* (2009) 171 Cal.App.4th 805, 814; see also *People v. Superior Court* (*Preciado*) (2001) 87 Cal.App.4th 1122, 1130 ("*Preciado*").) The evaluations mandated by section 6601 must be conducted "in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator . . . ."[2] (§ 6601, subdivision (c).)

In 2008, the Office of Administrative Law (OAL) determined that challenged provisions in the "Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)" ("2007 Protocol") issued by the Department of Mental Health ("DMH") met the definition of a regulation as defined by Government Code section 11342 and should have been adopted pursuant to the Administrative Procedures Act (APA) (Gov. Code, § 11340 et seq.) (2008 OAL Determination No. 19.)[3] Under the OAL's determination, the 2007 protocol constituted an "underground regulation" (Cal. Code of Regs, tit. 1, § 250).[4]

In re Ronje (2009) 179 Cal.App.4th 509 ("*Ronje*") created a remedy for the petitioner who was seeking habeas "relief on the ground his evaluations under section 6601 leading to the SVPA commitment petition were conducted under a standardized

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[2] Section 6601, subdivision (c), further provides: "The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder."

[3] We have taken judicial notice of the 2007 Protocol and the 2008 OAL Determination No. 19. (Evid. Code, §§ 452, subd. (c), 459, subd. (a).) We have also taken judicial notice of a subsequently issued "Standardized Assessment Protocol for Sexually Violent Predator Evaluations." (*Ibid*.)

[4] Section 250, subdivision (a), of the California Code of Regulations, title 1, provides: " 'Underground regulation' means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA."

assessment protocol later determined by the [OAL] to constitute an invalid 'underground' regulation under California Code of Regulations, title 1, section 250." (*Id*. at p. 513.) The remedy involved new evaluations using a valid assessment protocol and a new probable cause hearing under section 6602, subdivision (a), based on those new evaluations. (*Id*. at pp. 514, 521.) *Ronje* did not discuss what should happen if the new evaluations produced a split of opinion.

In the present case, updated evaluations conducted pursuant to section 6603 produced conflicting opinions regarding whether petitioner presently met the criteria for commitment as an SVP. Upon petitioner's motion pursuant to *Ronje*, the court ordered a new probable cause hearing but no further evaluations. Since each pair of evaluators continued to divide over whether petitioner met the SVP criteria, petitioner brought a motion for dismissal of the SVP petition, which the trial court denied. While we agree that automatic dismissal is not the appropriate remedy in this case, we conclude that the *Ronje* remedy must be fine-tuned.

We will deny the petition without prejudice to petitioner seeking further relief in the trial court in accordance with this opinion.

I

Procedural Background

A petition to commit petitioner Macy as an SVP was filed in December 2004. It alleged that two evaluators had determined that petitioner had "a diagnosed mental disorder such that he is likely to engage in acts of sexual violence without appropriate treatment and custody within the meaning of Welfare and Institutions Code Section 6600 *et seq.*" and he "poses a danger to the health and safety of others, and is predatory within the meaning of [those provisions.]"

In June 2005, a probable cause hearing was held. The petition states, and the People do not dispute, that "at the conclusion of that hearing, respondent court found

probable cause to believe that petitioner was likely to engage in sexually violent predatory criminal behavior upon his release from custody."

In March 2010, petitioner filed a notice of motion to dismiss the commitment petition or, alternatively, to grant a new probable cause hearing.[5] The motion to dismiss was based on the ground that two separate pairs of evaluators had been unable to agree that petitioner met the SVP criteria. The alternative motion for a new probable cause hearing was based on the ground that the assessment protocol relied upon by the evaluators who testified at the probable cause hearing was an improper "underground" regulation as found by *Ronje*, *supra*, 179 Cal.App.4th 509. Numerous exhibits were attached to the motion.

In June 2010, petitioner filed a "supplement" to his motion, requesting in the further alternative "two additional evaluations by two new and different evaluators." He set forth additional facts that had occurred subsequent to the filing of the motion. He submitted three new exhibits. Petitioner continued to maintain that the double split of opinion between evaluators required dismissal.

In its opposition filed in July 2010, the People acknowledged that *Ronje* required a new probable cause hearing but asserted that updated evaluations had already been prepared by Drs. Jeremy Cole and John Hupka and, therefore, it was unnecessary for the court to order additional evaluations or to dismiss. The People recommended that the court conduct a new probable cause hearing based on those evaluations.

In his reply filed July 2010, petitioner pointed out that, although Drs. Cole and Hupka, the two initial evaluators, had originally agreed that he met the SVP criteria, as a result of a March 2009 update evaluation, a split of opinion occurred when Dr. Hupka

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[5] The exhibits submitted in support of the petition do not explain why the matter did not proceed to trial before March 2010. Petitioner does not raise any issues related to delay.

concluded that he did *not* meet the criteria. The reply explained that, as required by section 6603, subdivision (c)(1), two additional evaluations had been conducted.

The reply reported that the new evaluators, Drs. Dana Putnam and Nancy Rueschenberg, also produced a split of opinion with Dr. Putnam concluding in her initial report that petitioner met the SVP criteria and Dr. Rueschenberg concluding in her initial report and addendum that he did not. In an updated evaluation report dated May 10, 2010, Dr. Putnam continued to conclude that petitioner met the SVP criteria.

Petitioner's reply indicated that, meanwhile, in a letter dated March 31, 2010 to Assistant Deputy District Attorney Celia Rowland, Dr. Hupka changed his conclusion in light of additional information and determined petitioner *did* meet the SVP criteria. Then, in an update evaluation report dated May 17, 2010, Dr. Coles changed his opinion and determined petitioner did *not* meet the SVP criteria, thereby creating a reverse split of opinion between himself and Dr. Hupka.

In his reply, petitioner further argued that section 6603, subdivision (c)(1), required, at a minimum, two additional evaluations by "two new and different evaluators." Petitioner continued to assert that the probable cause hearing was invalid and he was entitled to a new probable cause hearing based upon new evaluations using a valid protocol.

On August 5, 2010, the Santa Cruz Superior Court granted petitioner's motion for a new probable cause hearing but denied his requests for a dismissal or new evaluations.

On March 28, 2011, petitioner filed a second motion to dismiss the commitment petition, emphasizing that no separate pair of evaluators had agreed that he met the SVP criteria since the trial court had issued its order for a new probable cause hearing pursuant to *Ronje*. Updated evaluation reports of Drs. Putnam, Rueschenberg, and Coles were attached as exhibits. Dr. Putnam concluded in a November 2010 report that petitioner met the SVP criteria. Dr. Rueschenberg concluded in a December 2010 report that petitioner did *not* meet that criteria. Dr. Coles also concluded in a December 2010 report

that petitioner did *not* meet that criteria. Dr. Hupka had apparently retired. Petitioner argued that, since no pair of evaluators had been able to agree that petitioner met the SVP criteria based upon a valid assessment protocol, the court was required to dismiss the petition. He further contended that section 6604.1, subdivision (b),[6] as amended by the adoption of Proposition 83, means that an SVP proceeding does not go forward, and must be dismissed, where a second set of evaluators do not concur.

The People filed opposition, conceding *Ronje* required a new probable cause hearing but not dismissal. Petitioner filed a reply.

On May 31, 2011, the court denied petitioner's second motion to dismiss. It set the matter for a new probable cause hearing based on the updated evaluations.

On July 14, 2011, petitioner filed a petition for writ of mandate in this court seeking to compel the superior court to set aside its May 31, 2011 order denying his motion to dismiss and to enter a new order granting the motion. The petition also requests "such other and further relief as may be appropriate and just."

This court summarily denied the petition. Petitioner filed a petition for review in the Supreme Court. The Supreme Court granted the petition for review and transferred the matter to this court with "directions to vacate our order denying mandate and to issue an order directing respondent to show cause why the relief sought in the petition should not be granted based on evaluations conducted under the protocol that was adopted by the Department of Mental Health following the decision in *In re Ronje* (2009) 179 Cal.App.4th 509."

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[6] Section 6604.1, subdivision (b), provides: "The person shall be evaluated by two practicing psychologists or psychiatrists, or by one practicing psychologist and one practicing psychiatrist, designated by the State Department of Mental Health. The provisions of subdivisions (c) to (i), inclusive, of Section 6601 shall apply to evaluations performed for purposes of extended commitments. The rights, requirements, and procedures set forth in Section 6603 shall apply to all commitment proceedings."

This court complied with the transfer order and issued an order to show cause on November 30, 2011.

II

Discussion

A. *Ronje*

1. *The Ronje decision*

The appellate court in *Ronje* concluded that the "2008 OAL Determination No. 19 was correct under *Tidewater*" (*Ronje, supra,* 179 Cal.App.4th at p. 516) and the standardized assessment protocol at issue was an invalid underground regulation.[7] (*Id.* at p. 517.) *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 is the leading case considering the meaning of the term "regulation" under the APA.

In finding that an individual initially evaluated under an invalid protocol was entitled to relief, the *Ronje* court was guided by *People v. Pompa–Ortiz* (1980) 27 Cal.3d 519 (*Pompa–Ortiz*), which discussed the standard for reviewing challenges to irregularities in preliminary examinations. (*Ronje, supra,* 179 Cal.App.4th at p. 517 ["The *Pompa–Ortiz* rule applies to denial of substantive rights and technical irregularities in proceedings and to SVPA proceedings. [Citations.]"].) Before *Ronje,* the California Supreme Court had stated: "[A] section 6602 hearing is analogous to a preliminary hearing in a criminal case; both serve to ' " 'weed out groundless or unsupported charges

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[7] In *Ronje,* the reviewing court ordered the petitioner, whose initial evaluations "likely were conducted in early 2006 or in 2005," "to augment the record with the assessment protocol used for his evaluations so [the court] could compare it with the one determined by the OAL to constitute an underground regulation." (*Ronje, supra,* 179 Cal.App.4th at p. 516.) "Ronje responded by augmenting the record with a copy of the 2004 assessment protocol used for his evaluations." (*Ibid.*) The reviewing court determined: "The 2004 assessment protocol is substantially the same as the 2007 version determined by the OAL to constitute an invalid regulation. The relevant portions of the 2004 version differ only in a few, nonsubstantive respects from the corresponding portions in the 2007 version that were the basis for 2008 OAL Determination No. 19." (*Ibid.*) The parties in this case are not arguing otherwise.

. . . and to relieve the accused of the degradation and expense of a . . . trial.' " ' [Citation.] Like a criminal preliminary hearing, the only purpose of the probable cause hearing is to test the sufficiency of the evidence supporting the SVPA petition. (*Hurtado, supra,* 28 Cal.4th at p. 1186 . . . .)" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 247.) The *Ronje* court, relying on *Pompa-Ortiz,* concluded that the proposed committee was not required to show actual prejudice because he was "making a pretrial challenge to the evaluations leading to the commitment petition . . . ." (179 Cal.App.4th at p. 518.)

Nevertheless, *Ronje* concluded that dismissal was not the appropriate remedy because "[u]se of the evaluations based on the invalid assessment protocol, though erroneous, does not deprive the trial court of fundamental jurisdiction over the SVPA commitment petition." (179 Cal.App.4th at p. 518.) Relying on *Ghilotti, supra,* 27 Cal.4th 888 and *Preciado, supra,* 87 Cal.App.4th 1122, *Ronje* reasoned that "the proper remedy is to cure the underlying error." (*Ronje, supra,* 179 Cal.App.4th at p. 518.) It concluded that "the proper remedy here is to remand the matter to the trial court with directions to (1) order new evaluations of Ronje using a valid assessment protocol, and (2) conduct another probable cause hearing under section 6602, subdivision (a) based on those new evaluations." (*Id*. at p. 519.)

2. *No Forfeiture of Claim that Ronje Wrongly Accepted Protocol was a Regulation*

In their opposition, the People assert for the first time that *Ronje* and OAL incorrectly determined that the 2007 Protocol was a regulation and, therefore, petitioner is not entitled to *Ronje* relief. Petitioner argues that "[i]n a writ proceeding, . . . the real party cannot raise for the first time in its opposition to the writ petition an issue that was never raised and argued in the trial court." He cites two cases, both involving a warrantless search or seizure presumptively unreasonable under the Fourth Amendment where the burden is on the government to prove an exception to the warrant requirement and the general rule is that the government cannot raise new theories on review. (See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640-641; see also *Reinert v. Superior*

Court (1969) 2 Cal.App.3d 36, 42.) Those cases are inapt. Moreover, even in search and seizure cases, reviewing courts may rely on a new theory not raised below in sustaining a ruling "[w]hen . . . the record fully establishes another basis for affirming the trial court's ruling and there does not appear to be any further evidence that could have been introduced to defeat the theory . . . ." (*Green v. Superior Court* (1985) 40 Cal.3d 126, 138–139, fn. omitted.)

This is an original mandamus proceeding, not an appeal. "Mandamus will lie to compel a public official to perform an official act required by law. (Code Civ.Proc., § 1085.) Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. Mandamus may issue, however, to compel an official both to exercise his discretion (if he is required by law to do so) and to exercise it under a proper interpretation of the applicable law. (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 118 . . . ; *Anderson v. Phillips* (1975) 13 Cal.3d 733, 737 . . . .)" (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442.)

We will consider the People's contention that the 2007 Protocol was not subject to the APA because it was not a regulation.

3. Protocol Qualified as Regulation

The People now maintain that the challenged assessment protocol was not a "regulation" within the meaning of the APA because it fails to refer to a "clearly defined class of persons or situations" as required by *Tidewater, supra*, 14 Cal.4th at p. 571. The People argue: "The protocol left up to the evaluator's independent professional judgment whether or not an individual meets the SVP criteria. The protocol did not declare how all SVP evaluations (or 'class of cases') should be decided." The People point to provisions in the 2007 Protocol that provide for the broad discretion with regard to the interview

component of an evaluation[8] and state that "the 'Clinical Interview' portion of the DMH protocol did not 'declare[] how a certain class of cases will be decided.' (*Tidewater, supra,* 14 Cal.4th at p. 571.)"

Contrary to the People's assertion, *Tidewater* did not establish that an administrative "regulation" may not confer discretion (cf. e.g. *Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 534 [regulation required agency to provide counsel "as needed" conferred discretion on adoption worker to determine what counseling was needed]) or that a regulation necessarily dictates a particular outcome. *Tidewater* addressed the completely different question whether a written enforcement policy promulgated by the state Division of Labor Standards Enforcement (DLSE) that interpreted wage orders of the Industrial Welfare Commission (IWC) was a "regulation" subject to the APA. (*Tidewater, supra,* 14 Cal.4th at p. 571.)

In *Tidewater*, the Supreme Court recognized the broad scope of the APA.[9] (14 Cal.4th at pp. 570-571.) It also observed the comprehensive definition of the word

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[8] The 2007 protocol provided: "The evaluation outcome decision is based on several factors including, but not limited to: 1) a review of records, 2) a clinical interview, if possible, 3) diagnostic formulation and 4) a risk assessment targeting sexual recidivism." It also stated: "There are various approaches to interviewing sex offenders, and the determination of how to approach and structure the interview is made by the evaluator. . . . The interview will vary depending on many factors, such as the type of offense, the inmate's history, and his/her willingness to discuss case factors. The DMH makes available to evaluators an interview schedule that may be used in whole or part."

[9] Government Code section 11340.5, subdivision (a), generally provides: "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." Of course, the Legislature remains free to exempt regulations from the APA (see e.g. Food & Agr. Code, § 27561 ["The policy manual is not subject to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code"]; Health & Saf. Code, § 130253, subd. (b) ["The policies and procedures developed pursuant to this section are exempt from the Administrative Procedure Act

"regulation": "The APA . . . defines 'regulation' very broadly to include 'every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.' ([Former] Gov. Code, § 11342, subd. (g) [now § 11342.600].)" (*Id*. at p. 571; see Law Revision Com. com., 32D Gov. Code Ann. (2005 ed.) foll. § 11342.600, p. 115 ["Section 11342.600 continues part of former Section 11342(g) without substantive change"].)

Tidewater discussed the chief characteristics of a "regulation" within the meaning of the APA. "A regulation subject to the APA . . . has two principal identifying characteristics. [Citation] First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation.] Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.' ([Former] Gov.Code, § 11342, subd. (g) [now § 11342.600].)" (*Tidewater, supra,* 14 Cal.4th at p. 571.) The People do not dispute that the challenged assessment protocol "implements" or "makes specific" the SVPA.

Tidewater offered case examples of policies held to be regulations: "(1) an informational 'bulletin' defining terms of art and establishing a rebuttable presumption (*Union of American Physicians & Dentists v. Kizer, supra,* 223 Cal.App.3d at p. 501);

(Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code)"]; Water Code, § 13178 ["The development of source investigation protocols pursuant to paragraph (1) is not subject to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code"]) but it has not done so with respect to the DMH's standardized assessment protocol. The People have not identified any applicable statutory exemption.

(2) a 'policy of choosing the most closely related classification' for determining prevailing wages for unclassified workers (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114); and (3) a policy memorandum declaring that work performed outside one's job classification does not count toward qualifying for a promotion (*Ligon, supra,* 123 Cal.App.3d at p. 588)." (*Id*. at pp. 571-572.) It also provided "examples of policies that courts have held not to be regulations . . . : (1) a Department of Justice checklist that officers use when administering an intoxilyzer test (*People v. French* (1978) 77 Cal.App.3d 511, 519); (2) the determination whether in *a particular case* an employer must pay employees whom it requires to be on its premises and on call, but whom it permits to sleep (*Aguilar, supra,* 234 Cal.App.3d at pp. 25–28); (3) a contractual pooling procedure whereby construction tax revenues are allocated among a county and its cities in the same ratio as sales tax revenues (*City of San Joaquin v. State Bd. of Equalization* (1970) 9 Cal.App.3d 365, 375); and (4) resolutions approving construction of the Richmond–San Rafael Bridge and authorizing issuance of bonds (*Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 323–324)." (*Id*. at p. 572, italics added.)

The court explained: "Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases. [Citations.] Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. ([Former] Gov.Code, §§ 11343, subd. (a)(3), 11346.1, subd. (a).) Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations. [Citation.].) A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes." (*Id*. at p. 571.)

The Supreme Court ultimately concluded in *Tidewater*: "The policy at issue in this case was expressly intended as a rule of general application to guide deputy labor commissioners on the applicability of IWC wage orders to a particular type of employment. In addition, the policy interprets the law that the DLSE enforces by determining the scope of the IWC wage orders. Finally, the record does not establish that the policy was, either in form or substance, merely a restatement or summary of how the DLSE had applied the IWC wage orders in the past. Accordingly, the DLSE's enforcement policy appears to be a regulation within the meaning of [former] Government Code section 11342, subdivision (g), and therefore void because the DLSE failed to follow APA procedures." (*Id*. at p. 572.)

The OAL had statutory authority to determine whether the DMH's protocol was a regulation subject to the APA. (Gov. Code, § 11340.5, subd. (b).)[10] While the OAL's determination that language in the 2007 Protocol constituted a regulation is not binding on the courts, it is entitled to deference. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 435, disapproved on other grounds in *Tidewater, supra*, 14 Cal.4th at p. 577; see also *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8.)

The OAL noted in the 2008 Determination that the 2007 Protocol stated that "[e]valuators are required to interview and evaluate persons in accordance with the protocol contained within this handbook . . . ." It concluded: "Evaluators are a clearly defined class of persons. Additionally, the provision applies to all CDCR inmates

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[10] "If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in Section 11342.600." (Gov. Code, § 11340.5, subd. (b).)

referred to DMH for evaluation pursuant to the SVP law because it mandates how the evaluation is to be conducted."

The 2007 Protocol specified procedures to be included in any interview, identified the essential questions that evaluators needed to answer and the relevant factors that evaluators should consider, and established an evaluation format. It did not give evaluators the authority to dispense with an interview but rather recognized that not all interviewees would be cooperative.[11]

The People have not shown that the challenged protocols did not apply generally to SVP evaluations (the general class), did not establish broad guidelines for evaluators, merely restated applicable law or past court decisions, or applied to only particular cases. In light of the broad scope of the APA and its expansive statutory definition of "regulation," the People have failed to persuade us that the 2008 OAL Determination No. 19 and *Ronje* erred by determining that language in the assessment protocol at issue was a "regulation" within the meaning of the APA.

B. Davenport v. Superior Court

As mentioned, *Ronje* did not address the problem that arises if remedial evaluations, ordered pursuant to that decision, result in a split of opinion. That problem arose in the recent case of *Davenport v. Superior Court* (2012) 202 Cal.App.4th 665 (*Davenport*).

In *Davenport*, the trial court ordered two new evaluations in light of *Ronje*. (*Davenport*, *supra*, 202 Cal.App.4th at p. 668.) The new evaluations resulted in a split of opinion regarding whether Davenport met the SVP criteria. (*Ibid*.) "The DMH therefore

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[11] The 2007 Protocol stated: "Although the inmate may view the clinical interview as adversarial, the evaluation is, in fact, one of several steps required before a court considers the matter of a civil commitment." It also gave specific directions to evaluators regarding what to do when an inmate attends the interview but refuses to be interviewed or refuses to attend the interview.

appointed two new mental health professionals to evaluate Davenport," which resulted in a second split of opinion. (*Ibid*.) "Davenport moved to dismiss the proceedings on the ground the SVP petition was not supported by two valid concurring mental health evaluations. The trial court denied the motion and ordered a new probable cause hearing." (*Ibid*.) Davenport then filed a writ petition in the Court of Appeal (First District) seeking to compel the trial court to grant his motion to dismiss the SVP proceedings. (*Ibid*.) After the appellate court summarily denied the petition and Davenport filed a petition for review in the Supreme Court (*ibid*.), the Supreme Court granted review and transferred the case back to the First District with directions to issue an order to show cause. (*Ibid*.)

The First District rejected Davenport's argument that, under *Ronje*, "the government was required 'to go back to the beginning' and assess him in accordance with section 6601 with a legally valid protocol." (*Id*. at p. 671.) The court reasoned that the *Ronje* court could have, but did not, direct the superior court to dismiss the commitment petition and the initial evaluations "had served their purpose by the time the Director of the DMH forwarded the request to file a commitment petition." (*Ibid*.) It found that "[t]he new evaluations prepared in this case pursuant to *Ronje* are comparable to updated or replacement evaluations authorized by section 6603, subdivision (c)." (*Ibid*.) Relying upon *Gray v. Superior Court* (2002) 95 Cal.App.4th 322, which had addressed the effect of a split opinion of updated evaluations under subdivision (c) of section 6603, the First District concluded in *Davenport* that a split of new *Ronje* evaluations did not compel dismissal. The court stated: "Given the procedural safeguards in place—a probable cause hearing, a jury trial, a unanimous verdict—there is no need to dismiss the commitment petition and start the SVP evaluation process from the beginning in this case." (*Id*. at p. 673.)

The *Davenport* decision overlooks fundamental differences between section 6601 and section 6603. Section 6603 mainly concerns trial. Subdivision (c)(1) of section 6603

provides: "*If the attorney petitioning for commitment under this article determines that updated evaluations are necessary in order to properly present the case for commitment*, the attorney may request the State Department of Mental Health to perform updated evaluations."[12] (Italics added.)

In Gray, the appellate court stated: "As the Supreme Court noted in *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 805–806, . . . (*Albertson*), subdivision (c) of section 6603 was enacted in response to a decision by the Court of Appeal (*Sporich v. Superior Court* (2000) 77 Cal.App.4th 422 . . .) which held that the People were not entitled to obtain new or updated evaluations, even if trial on a petition was delayed for months or (as in this case) years." (*Gray, supra*, 95 Cal.App.4th at p. 326.) After observing that section 6603, subdivision (c), "does not, on its face, provide any

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[12] Section 6603, subdivision (c)(1), further provides: "If one or more of the original evaluators is no longer available to testify for the petitioner in court proceedings, the attorney petitioning for commitment under this article may request the State Department of Mental Health to perform replacement evaluations. When a request is made for updated or replacement evaluations, the State Department of Mental Health 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 Mental Health shall conduct two additional evaluations in accordance with subdivision (f) of Section 6601." Section 6603, subdivision (c)(2), provides: "For purposes of this subdivision, 'no longer available to testify for the petitioner in court proceedings' means that the evaluator is no longer authorized by the Director of Mental Health to perform evaluations regarding sexually violent predators as a result of any of the following: [¶] (A) The evaluator has failed to adhere to the protocol of the State Department of Mental Health. [¶] (B) The evaluator's license has been suspended or revoked. [¶] (C) The evaluator is unavailable pursuant to Section 240 of the Evidence Code."

consequences for a split of opinion between the second set of evaluators" (*id* at p. 328, fn. omitted) and "the Legislature certainly knows how to provide for dismissal when it wishes to do so" (*ibid*.), the court found it "more likely that the required new evaluations are intended for informational and evidentiary purposes." (*Ibid*.)

The *Gray* court further reasoned: "[O]nce the Act has been satisfied by sufficient expert opinion that the subject person meets the Act's criteria, little in the way of justice would be gained by permitting proceedings to be derailed by the possibly fortuitous timing of conflicting opinions. As the People point out, a purely numerical standard for the continuation of a proceeding would deprive the trier of fact of the opportunity to make a *qualitative* assessment of the experts' opinions. As the opinions accumulate, such an analysis becomes ever more important and desirable; it is not the number of opinions that matters, but their persuasiveness." (*Id*. at p. 329.) It added that "if new evaluations were avoided due to the potential for mandatory dismissal, the subject person would lose the possible benefit that such evaluations would persuade the prosecuting attorney to dismiss the proceeding under the Act." (*Id*. at p. 330.) The court concluded that "once a petition has been *properly filed* and the court has obtained jurisdiction, the question of whether a person is a sexually violent predator should be left to the trier of fact *unless* the prosecuting attorney is satisfied that proceedings should be abandoned." (*Id*. at p. 329, first italics added.)

It is reasonable to conclude, as the court did in *Gray*, that evaluations produced pursuant to section 6603, subdivision (c), are merely evidentiary and have no procedural consequence. In contrast, section 6601 concerns the initiation of SVP proceedings based on the concurrence of two evaluators. As stated by the Supreme Court in *Ghilotti*: "When subdivisions (c) through (h) of section 6601 are read together, they ascribe the [Secretary's] authority as follows: Before requesting a petition, the [Secretary] *must* designate two mental health professionals to evaluate the person. If these two evaluators agree that the person meets the criteria for commitment, the [Secretary] *must* request a

petition. If, however, these first two evaluators do not agree on that issue, the [Secretary] *must* arrange a further examination by two *independent* professionals. If these independent professionals also do not concur that the person meets the criteria for commitment, the [Secretary] *may not* request the filing of a petition." (*Ghilotti*, *supra*, 27 Cal.4th at pp. 906-907.) Thus, "a petition for commitment or recommitment may not be filed unless two evaluators, appointed under the procedures specified in section 6601, subdivisions (d) and (e), have concurred that the person currently meets the criteria for commitment under the SVPA." (*Id.* at p. 909.)

We disagree with *Davenport*'s conclusion that new *Ronje* evaluations, which are aimed at remedying the error or irregularity of the original concurring evaluators use of an invalid assessment protocol, are necessarily analogous to evaluations prepared pursuant to section 6603, subdivision (c), and, therefore, merely evidentiary in all circumstances. "The purpose of . . . [the initial] evaluation is not to identify SVP's but, rather, to screen out those who are not SVP's. 'The Legislature has imposed procedural safeguards to prevent meritless petitions from reaching trial.' " (*People v. Medina*, *supra*, 171 Cal.App.4th at p. 814.) Thus, where an individual is asserting that a petition was not properly filed because the concurring evaluations were conducted based upon an invalid assessment protocol, it is not at all clear that the new *Ronje* evaluations serve the same purpose as updated evaluations generated pursuant to section 6603.[13]

[13] Three post-*Davenport* SVPA cases concerning the application of *In re Ronje*, *supra*, 179 Cal.App.4th 509 are presently pending before the Supreme Court in *Wright v. Superior Court*, review granted June 13, 2012, S202320, *Boysel v. Superior Court*, review granted June 13, 2012, S202324, and *Reilly v. Superior Court*, review granted June 13, 2012, S202280.

C. Refinement of the Ronje Remedy

1. *Pompa-Ortiz*'s *Progeny*

In crafting a remedy where an individual challenges an evaluator's use of an invalid assessment protocol after the probable cause hearing, *Ronje* considered *Pompa–Ortiz*, *supra*, 27 Cal.3d 519. We additionally examine its progeny, which are instructive.

In *Pompa–Ortiz*, the California Supreme Court stated: "It is settled that denial of a *substantial right* at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion. [Citations.]" (*Pompa–Ortiz*, *supra*, 27 Cal.3d at p. 523, italics added; *id*. at p. 526 [defendant's right to a public preliminary hearing was a substantial right].) The court went on to establish an additional rule: "[In criminal proceedings,] irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects." (*Id*. at p. 529.)

In *People v. Konow* (2004) 32 Cal.4th 995, the People appealed from the superior court's order setting aside the information under Penal Code section 995. (*Id*. at p. 1012.) In that case, the magistrate had "expressed a strong desire to dismiss the complaint in furtherance of justice under section 1385 in light of the particular facts of the case" but incorrectly believed he could not do so. (*Id*. at p. 1026.) The California Supreme Court applied the part of the *Pompa-Ortiz* rule stating that " 'denial of a substantial right at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion' (*People v. Pompa–Ortiz, supra,* 27

Cal.3d. at p. 523 . . .)." (*Id*. at p. 1023.) The court held that "a defendant is denied a substantial right affecting the legality of the commitment when he or she is subjected to prejudicial error, that is, *error that reasonably might have affected the outcome* [citation]." (*Id*. at p. 1024, italics added.) The court further determined that "a magistrate denies a defendant a substantial right affecting the legality of the commitment by erroneously and prejudicially failing to consider whether to dismiss a complaint in furtherance of justice under section 1385." (*Id*. at p. 1025.) It directed the Court of Appeal to affirm the order of the superior court setting aside the information under section 995. (*Id*. at p. 1028.)

In *People v. Standish* (2006) 38 Cal.4th 858, the People appealed from a judgment of dismissal and challenged the superior court's order setting aside the information under Penal Code section 995 on the ground that the defendant should have been released on his own recognizance (OR). (*Id*. at p. 866) The Supreme Court declared: "Our decision in *People v. Pompa–Ortiz* must not be read overbroadly. That case did not establish that *any and all* irregularities that precede or bear some relationship to the preliminary examination require that the information be set aside pursuant to section 995 . . . ." (*Id*. at p. 885.) It concluded that the erroneous refusal to grant an "OR release pending the preliminary examination did not amount to denial of a substantial right at the preliminary examination within the meaning of section 995, in the absence of evidence that *the error reasonably might have affected the outcome of that hearing*." (*Id*. at p. 863, italics added.) The court concluded that a superior court may not "set aside an information pursuant to section 995 when a magistrate refuses (in violation of section 859b) to grant OR release to an in-custody defendant" "in the absence of a determination that the error reasonably might have affected the outcome of the preliminary examination." (*Id*. at p. 882.)

The *Standish* court recognized that "[a]lthough some errors such as denial of the right to counsel by their nature constitute a denial of a substantial right, the present case

does not fall into that category." (*Id*. at p. 882.) The court also distinguished some other cases: "We acknowledge that the *Wilson* decision cited in *People v. Pompa–Ortiz, supra,* 27 Cal.3d 519 . . . , and other cases noted by defendant have declared that, prior to trial, an incarcerated defendant may prevail on a motion to dismiss premised upon a violation of his or her speedy trial rights—specifically, a violation of section 1382—without any showing of prejudice. These cases are distinguishable from the present case, however, because they were based in large part on the circumstance that the relevant statute required dismissal as the proper remedy when, without a showing of good cause, the defendant had not been brought to trial within the statutory period. (See *Serna v. Superior Court* (1985) 40 Cal.3d 239, 263 . . . ; *People v. Wilson, supra,* 60 Cal.2d at p. 151 . . . .)" (*Id*. at pp. 885-886.)

The reasoning of these cases leads us to conclude that, where an individual challenges a probable cause hearing on the ground that the section 6601 evaluations leading to the filing of the petition were conducted using an assessment protocol that was invalid under the APA, the person must show that this error or irregularity "reasonably might have affected the outcome" of that probable cause hearing.

2. *People v. Superior Court* (*Ghilotti*)

Ghilotti, supra, 27 Cal.4th 888 also provides guidance as to the appropriate remedy. In that case, the Supreme Court determined that "a court entertaining a petition for an involuntary civil commitment has the implicit authority to review for legal error the expert evaluations which are a prerequisite to the filing of such a petition." (*Id*. at p. 910.) It established for the future the following procedure in the event of a facial defect in evaluators' concurring reports: "[I]f the Director [of the DMH] has obtained reports that *do concur* the person meets the criteria for commitment or recommitment, and a petition is filed on that basis, the evaluators' reports should also be attached to the petition. The person may then file a pleading challenging the petition's validity on grounds that one or more of the supposedly concurring reports are infected by legal error.

[¶] We stress that such judicial review is limited to whether one or more evaluators' reports are infected by material legal error. An evaluator's report is infected with legal error if, on its face, it reflects an inaccurate understanding of the statutory criteria governing the evaluation. [¶] On the other hand, judicial review of an evaluator's report does not extend to matters of debatable professional judgment within an evaluator's expertise. The professional determinations of an evaluator, insofar as based on consideration and application of correct legal standards, is conclusive at the initial screening stage set forth in section 6601." (*Id.* at p. 913.)

In *Ghilotti*, the Supreme Court established a materiality standard: "If the court concludes that one or more evaluators has committed legal error in reaching his or her conclusions, the court must further determine whether the error is *material.*" (27 Cal.4th at p. 913.) In the case of concurring evaluations leading to the filing of a petition, an evaluator's legal error cannot be deemed material unless there is "a reasonable probability, sufficient to undermine confidence in the outcome, that the error affected the evaluator's ultimate conclusion" and "a change in the evaluator's conclusion would . . . dissolve . . . the necessary concurrence . . . ." (*Ibid.*)

Ghilotti strongly suggests that, where an individual is also challenging the filing of the commitment petition on the ground that the section 6601 evaluations were conducted using an invalid assessment protocol, the person must show that this error or irregularity resulted in a material defect in those evaluations.

3. *Judicial Relief in Cases Involving Invalid Regulation under the APA*

As *Ronje* recognizes and Supreme Court precedent establishes, an underground regulation is void. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 340 ("*Morning Star*"); *Tidewater, supra,* 14 Cal.4th at pp. 561, 572, 576-577.) But an invalid regulation does not necessarily impede proper proceedings going forward.

In *Tidewater,* the Supreme Court disregarded the DSLE's void policy and independently determined whether the IWC's wage orders applied to certain activities.

(*Tidewater, supra*, 14 Cal.4th at p. 577.) It concluded that "[c]ourts must enforce those wage orders just as they would if the DLSE had never adopted its policy." (*Ibid*.)

In *Morning Star, supra*, 38 Cal.4th 324, a corporation challenged a regulation promulgated by the Department of Toxic Substances Control (DTSC) that required it to pay an annual hazardous materials fee. (*Id*. at pp. 327-328.) It had unsuccessfully sought a refund of such fees, paid under protest, from the State Board of Equalization (SBE). (*Id*. at pp. 328, 331.) The Supreme Court found DTSC's regulation was invalid for failure to comply with the APA's requirements. (*Id*. at pp. 328, 335, 340.) The court directed the SBE to conduct further administrative proceedings on the corporation's refund request without relying upon the invalid regulation but, at the same time, directed the superior court to issue a stay order allowing a reasonable time for the department "to promulgate valid regulations under the APA" while maintaining the current hazardous materials fee program that was "of critical importance to the State of California" in the interim. (*Id*. at pp. 340-342.) The court indicated that the administrative refund proceedings should resume once the DTSC had complied with the APA. (*Id*. at p. 342.)

These cases suggest that a court reviewing a challenge to a regulation that is invalid under the APA has broad discretion to devise a fitting remedy that avoids disruption of important state programs or laws.

4. *Revision of the Ronje Remedy*

Our conclusion that the *Ronje* remedy should be fine-tuned in light of the foregoing case authorities is also buttressed by a number of considerations. First, evaluations performed pursuant to section 6601 using an invalid protocol do not deprive the superior court of fundamental jurisdiction over an SVP proceeding. (*Ronje, supra*, 179 Cal.App.4th at p. 518; see *People v. Medina, supra*, 171 Cal.App.4th at p. 816.) Second, the People are not required to prove at the probable cause hearing that the filing of the petition was predicated on two concurring evaluations conducted pursuant to section 6601, much less that the evaluators used an assessment protocol properly adopted

under the APA. (See § 6602, subd. (a); see also *Cooley v. Superior Court*, *supra*, 29 Cal.4th at pp. 248-250.) A probable cause hearing is a screening step superseding the DMH's concurring evaluations pursuant to section 6601. While the evaluators' "[u]se of the invalid assessment protocol constitutes an error or irregularity in the SVPA proceedings" (*Ronje*, *supra*, 179 Cal.App.4th at p. 517), that error or irregularity does establish that the concurring evaluators misapplied the law or reached legally invalid conclusions or that the probable cause hearing itself was defective. Third, the SVPA does not provide for an automatic dismissal if the original evaluators relied on an assessment protocol that is later determined to be invalid because it was not promulgated in compliance with the APA. The Legislature certainly knows how to require a court to dismiss an SVP petition. (Cf. § 6602 ["If the judge determines there is not probable cause, he or she shall dismiss the petition . . . ."].) Fourth, it is important that courts avoid creating remedial procedures that unnecessarily disrupt SVP proceedings and delay trial. (Cf. *Moore v. Superior Court* (2010) 50 Cal.4th 802, 819-820 ["the strong governmental interest in protecting the public through the proper confinement and treatment of SVP's . . . would be substantially impeded by recognizing an SVP's right to delay or avoid targeted confinement and treatment for a sexually violent mental disorder because his mental problems make him incompetent to stand trial"].) Fifth, as this court has previously observed, "the state has no interest in the involuntary civil confinement of persons who have no mental disorder or who are not dangerous to themselves or others. [Citations.]" (*People v. Litmon* (2008) 162 Cal.App.4th 383, 401.)

Keeping in mind the essential purposes of the SVPA to protect the public and treat qualifying mental disorders (see *People v. McKee* (2010) 47 Cal.4th 1172, 1203; *Ghilotti*, *supra*, 27 Cal.4th at p. 921; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1153, fn. 20), we refine the *Ronje* remedy to better effectuate the purpose of the law. When an individual seeks *Ronje* relief after a probable cause hearing but before trial, the person must affirmatively show (1) the concurring section 6601 evaluations that were the basis

for filing of an SVP petition were conducted using an invalid assessment protocol and (2) this error or irregularity "reasonably might have affected the outcome" of the probable cause hearing. If the person is unable to make such a showing, the court should deny relief. If such a showing is made, the court should allow a reasonable time for the DMH to put in place a valid standardized assessment protocol, if that has not already occurred, and to obtain new evaluations using a valid protocol. If the individual additionally establishes that the use of an invalid assessment protocol resulted in a material defect in either of the concurring evaluations that were the basis for filing the commitment petition, new concurring evaluations must be produced pursuant to section 6601 to cure the defect. In this latter situation, the new evaluations are not merely evidentiary because the person is directly challenging the commencement of the SVP proceedings. As *Ghilotti* states, however, "[t]he professional determinations of an evaluator, insofar as based on consideration and application of correct legal standards, is conclusive at the initial screening stage set forth in section 6601." (*Ghilotti*, *supra*, 27 Cal.4th at p. 913.)

Where refined *Ronje* relief is ordered and the DMH satisfies the applicable requirements, the court must hold a new probable cause hearing pursuant to section 6602. If the rare situation arises where the DMH cannot meet those requisites, the court must dismiss the commitment petition.

D. *Application of Refined Ronje Remedy to this Case*

Petitioner has not shown that the several splits of opinion resulted from evaluations ordered by the trial court to effectuate a *Ronje* remedy. As far as we can tell from the record presented, those new conflicting evaluations were generated pursuant to section 6603, subdivision (c). As *Gray v. Superior Court*, *supra*, 95 Cal.App.4th 322 makes clear, such disagreement does not mandate dismissal. Petitioner has not established that any error or irregularity, which was occasioned by the initial concurring evaluators' utilization of an invalid protocol in conducting evaluations pursuant to section 6601, "reasonably might have affected the outcome" of the probable cause hearing.

Neither has he shown that such error or irregularity resulted in a material defect in either of the concurring evaluations leading to the filing of the SVP petition.

DISPOSITION

We deny the petition for writ of mandate without prejudice to petitioner seeking further relief in accordance with this opinion.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

_____

MIHARA, J.

Macy v. Superior Court; RPI: People
H037138

Trial Court:	Santa Cruz County Superior Court
Trial Judge:	Hon. Ariadne J. Symons
Attorneys for Petitioner:	Page, Salisbury & Dudley and Arthur Dudley
No appearance for Respondent	
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Macy v. Superior Court; RPI: People

H037138