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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES WRIGHT, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	G045203 (Super. Ct. No. M10012) O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Richard M. King, Judge. Petition denied.

Deborah A. Kwast, Public Defender, Frank Ospino, Interim Public Defender, Jean Wilkinson, Chief Deputy Public Defender, Denise Gragg and Mark S. Brown, Assistant Public Defenders, for Petitioner.

No appearance for Respondent.

Tony Rackauckas, District Attorney, and Elizabeth Molfetta, Deputy District Attorney, for Real Party in Interest.

INTRODUCTION

In *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*), we held the use of an invalid assessment protocol in conducting mental evaluations of a person suspected to be a sexually violent predator constituted an error or irregularity in a commitment proceeding under the Sexually Violent Predator Act, Welfare and Institutions Code section 6600 et seq. (SVPA).[1] As a remedy, we directed the trial court to order new evaluations pursuant to section 6601 using a valid assessment protocol.

In three related cases, we address the effect of post-*Ronje* evaluations in different scenarios. In this case, the two initial post-*Ronje* evaluators disagreed whether James Wright, the person named in the SVPA commitment petition, met the criteria for commitment as a sexually violent predator, but there is no evidence in the record that two independent post-*Ronje* evaluators have been appointed pursuant to section 6601, subdivision (e). We deny Wright's petition for writ of mandamus/prohibition without prejudice to renewing the challenge to the SVPA commitment petition when the post-*Ronje* evaluation process is completed.

In *Boysel v. Superior Court* (Mar. 28, 2012, G045202) __ Cal.App.4th __, the two initial post-*Ronje* evaluators disagreed whether the person named in the SVPA commitment petition met the criteria for commitment as a sexually violent predator. Although two independent post-*Ronje* evaluators had been appointed, their reports were not before the trial court when it denied the challenge to the SVPA commitment petition. As in this case, we deny the petition for writ of mandamus without prejudice. In *Reilly v.*

[1] Further code references are to the Welfare and Institutions Code unless otherwise indicated.

Superior Court (Mar. 28, 2012, G045118) __ Cal.App.4th __, the two initial post-*Ronje* evaluators agreed the person named in the SVPA commitment petition no longer met the criteria for commitment as a sexually violent predator, and, therefore, we are compelled by the SVPA to grant the writ petition in that case.

SUMMARY OF OPINION

Wright was the subject of an SVPA commitment petition filed in September 2003 and has been held in civil detention since that time. The commitment petition was based on two evaluations that concluded he met the criteria for commitment as a sexually violent predator, but which were conducted according to the invalid assessment protocol. Following our decision in *Ronje*, the trial court in this matter ordered new evaluations of Wright to be conducted according to a validly approved assessment protocol. One of those evaluations concluded Wright continued to meet the criteria for commitment as a sexually violent predator, while the other concluded he no longer met those criteria. When there is such a difference of opinion, section 6601, subdivision (e) requires the appointment of two independent professionals to conduct an examination of the suspected sexually violent predator.

Before the post-*Ronje* independent evaluators were appointed, and before the post-*Ronje* probable cause hearing, Wright filed a plea in abatement seeking dismissal of the SVPA commitment petition on the ground two initial post-*Ronje* evaluators had not concurred he met the criteria for commitment as a sexually violent predator. The trial court denied the plea in abatement, as well as those brought on the same or similar grounds by nine other persons named in SVPA commitment petitions. A different trial court denied a motion to dismiss brought by an 11th person named in an SVPA petition. Wright and the 10 others brought petitions for writ of mandate or prohibition to overturn the trial court's orders and have their SVPA commitment petitions dismissed.

We deny Wright's writ petition without prejudice to renewing his challenge to the SVPA commitment petition when the post-*Ronje* evaluation process is completed. In so doing, we address three issues: (1) whether, before the probable cause hearing, a person named in an SVPA commitment petition may challenge the petition on the ground of lack of concurring evaluators by means of a plea in abatement, nonstatutory motion to dismiss, or nonstatutory pleading; (2) whether the trial court erred by denying Wright's plea in abatement based on the post-*Ronje* evaluations presented to the court; and (3) whether an SVPA petition may be dismissed if the post-*Ronje* evaluations do not produce the required concurrence of either the two initial evaluators or the two independent evaluators.

On the first issue, we conclude that *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 912-913 (*Ghilotti*) authorizes the use of a nonstatutory pleading to challenge an SVPA commitment proceeding, before the probable cause hearing, on the ground of lack of the required concurring evaluations. We deem Wright's plea in abatement to have constituted such a nonstatutory pleading.

On the second issue, we conclude the trial court did not err by denying Wright's plea in abatement based on the evaluation reports before the court. The SVPA permits a commitment petition to be filed if both of the initial evaluators or both of the independent evaluators concur the person named in the petition meets the criteria for commitment as a sexually violent predator. (§ 6601, subds. (d), (f), (i).) In this case, the prefiling requirements had not been met when the petition was filed in September 2003 because the evaluations supporting the petition were based on invalid assessment protocols. The two initial post-*Ronje* evaluators disagreed on whether Wright met the statutory criteria for commitment as a sexually violent predator. As a consequence, it was necessary to appoint two independent evaluators to examine him and determine whether he met those criteria. The record presented to us does not reveal whether two

independent evaluators have been appointed and, if so, whether they have examined Wright and prepared reports.

On the third issue, we conclude an SVPA commitment petition may be dismissed if the post-*Ronje* evaluations do not produce the concurrence of evaluators necessary under section 6601 to support the filing of a commitment petition in the first instance. We discuss the procedures for such dismissal as set forth in *Ghilotti* in part I. of the Discussion section.

We therefore deny Wright's petition for writ of mandate/prohibition, but without prejudice to Wright challenging the SVPA commitment petition based on the results of all post-*Ronje* evaluations once the evaluation process is completed.

OVERVIEW OF THE SVPA

The SVPA provides for involuntary civil commitment of an offender immediately upon release from prison if the offender is found to be a sexually violent predator. (*People v. Yartz* (2005) 37 Cal.4th 529, 534.) The SVPA "was enacted to identify incarcerated individuals who suffer from mental disorders that predispose them to commit violent criminal sexual acts, and to confine and treat such individuals until it is determined they no longer present a threat to society." (*People v. Allen* (2008) 44 Cal.4th 843, 857; see *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1171 [SVPA proceedings are designed "to provide 'treatment' to mentally disordered individuals who cannot control sexually violent criminal behavior"].) "'[A]n SVPA commitment proceeding is a special proceeding of a civil nature, because it is neither an action at law nor a suit in equity, but instead is a civil commitment proceeding commenced by petition independently of a pending action.'" (*People v. Yartz*, *supra*, 37 Cal.4th at p. 536.)

A sexually violent predator is defined as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is

likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) A "diagnosed mental disorder" is defined to include "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).)

The procedure for determining whether a convicted sex offender is a sexually violent predator typically begins when an inmate is scheduled to be released from custody. (*Turner v. Superior Court* (2003) 105 Cal.App.4th 1046, 1054.) "'Under section 6601, whenever the Director of Corrections determines that a defendant serving a prison term may be a sexually violent predator, the Department of Corrections and the Board of Prison Terms undertake an initial screening "based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history." (§ 6601, subd. (b).)'" (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1182-1183.)

The screening is conducted in accord with an assessment protocol developed by the State Department of Mental Health (DMH). (*People v. Hurtado*, *supra*, 28 Cal.4th at p. 1183.) "'If that screening leads to a determination that the defendant is likely to be a sexually violent predator, the defendant is referred to the Department of Mental Health for an evaluation by two psychiatrists or psychologists. (§ 6601, subds. (b) & (c).) If both find that the defendant "has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody" (§ 6601, subd. (d)), the department forwards a petition for commitment to the county of the defendant's last conviction (*ibid.*). If the county's designated counsel concurs with the recommendation, he or she files a petition for commitment in the superior court. (§ 6601, subd. (i).)'" (*Ibid.*)

"[A] petition seeking the commitment or recommitment of a person as a sexually violent predator cannot be filed unless two mental health professionals,

specifically designated by the Director under statutory procedures to evaluate the person for this purpose, have agreed, by correct application of the statutory standards, that the person 'has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody.'" (*Ghilotti*, *supra*, 27 Cal.4th at p. 894.)

If one of the two professionals performing the evaluation does not conclude the person meets the criteria for commitment as a sexually violent predator, and the other concludes the person does meet those criteria, then the DMH "shall arrange for further examination of the person by two independent professionals selected in accordance with subdivision (g)." (§ 6601, subd. (e).) If an evaluation by two independent professionals is conducted, a petition for commitment may be filed only if both concur the person meets the criteria for commitment as a sexually violent predator. (§ 6601, subd. (f).)

Upon filing of the SVPA commitment petition, the superior court must review the petition and determine "whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." (§ 6601.5.) If the court determines the petition on its face supports a finding of probable cause, then it orders the person named in the petition to be kept in a secure facility until a probable cause hearing under section 6602 is conducted. (§ 6601.5.) The probable cause hearing must be conducted within 10 calendar days of the issuance of the order finding the petition would support a finding of probable cause. (*Ibid.*)

The purpose of the probable cause hearing is to determine whether "there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." (§ 6602, subd. (a).) The probable cause hearing is an adversarial hearing where the person named in the petition has the right to counsel. (*Ibid.*) If the court finds probable cause, it orders a trial to determine whether the person is a sexually violent predator under section 6600.

(§ 6602, subd. (a).) The person named in the petition must remain in a secure facility between the time probable cause is found and the time trial is completed. (*Ibid.*)

The person named in the petition is entitled to a trial by jury, and the jury's verdict must be unanimous. (§ 6603, subds. (a) & (f).) The person named in the petition also is entitled to retain experts or professional persons to perform an examination on his or her behalf. (§ 6603, subd. (a).) At trial, the trier of fact determines whether, beyond a reasonable doubt, the person named in the petition is a sexually violent predator. (§ 6604.) If the trier of fact determines the person named in the petition is a sexually violent predator, the person is committed for an indefinite term to the custody of the DMH for appropriate treatment and confinement in a secure facility. (*Ibid.*)

ALLEGATIONS OF THE PETITION AND THE RETURN

In September 2003, the Orange County District Attorney filed a petition for commitment as a sexually violent predator (the SVPA Petition), alleging Wright was a sexually violent predator under the SVPA. The SVPA Petition was based on an evaluation from Dana Putnam, Ph.D., dated May 22, 2003, and an evaluation conducted by Charles Jackson, Ph.D., dated July 25, 2003.

Also in September 2003, Judge Daniel J. Didier reviewed the SVPA Petition and found it stated sufficient facts which, if true, would constitute probable cause to believe Wright was likely to engage in sexually violent predatory criminal behavior on his release from prison. As a consequence, Judge Didier ordered Wright to be detained pursuant to section 6601.5 in a secured facility until the probable cause hearing.

Over two days in early 2004, Judge Richard F. Toohey conducted a probable cause hearing, at the conclusion of which Judge Toohey found, pursuant to section 6602, probable cause existed to believe Wright met the criteria for commitment as a sexually violent predator. A trial on the SVPA Petition has not been held.

In August 2008, the state Office of Administrative Law (OAL) issued 2008 OAL Determination No. 19, in which the OAL determined the 2007 version of the DMH's assessment protocol amounted to an "underground regulation" because portions of the assessment protocol, though regulatory in nature, had not been adopted pursuant to the Administrative Procedure Act, Government Code section 11340.5. (See *Ronje*, *supra*, 179 Cal.App.4th at p. 515.) In *Ronje*, *supra*, 179 Cal.App.4th at pages 516-517, we agreed with the OAL and likewise concluded the 2007 assessment protocol was invalid as an underground regulation.

In 2009, the DMH drafted a new standardized assessment protocol for SVPA evaluations. Pursuant to Government Code section 11349.6, subdivision (d), the OAL approved the new assessment protocol in September 2009.

In March 2010, Wright filed a motion requesting, among other things, that, in light of *Ronje*, the trial court order new evaluations to be conducted to determine whether he is a sexually violent predator. In November 2010, Judge Patrick Donahue granted the motion and ordered new evaluations of Wright, pursuant to section 6601, and a new probable cause hearing pursuant to *Ronje* based on the new evaluations.

In compliance with the court order, the DMH reassigned Dr. Putnam and assigned Christopher Matosich, Ph.D., to evaluate Wright. In a report dated February 3, 2011, Dr. Putnam concluded Wright no longer met the criteria for commitment as a sexually violent predator. In a report dated February 28, 2011, Dr. Matosich concluded Wright met those criteria.

In April 2011, Wright filed a plea in abatement seeking dismissal of the SVPA Petition on the ground two evaluators had not concurred he met the criteria for commitment. The district attorney filed opposition.

Later in April 2011, Judge Richard M. King issued an order denying the pleas in abatement filed by Wright and nine others. The next month, Wright filed his

petition for writ of mandate/prohibition challenging that order. We issued an order to show cause and stayed the trial court proceedings.

DISCUSSION

I.

An SVPA Commitment Petition May Be Challenged Before the Probable Cause Hearing by a Nonstatutory Pleading Authorized by *Ghilotti*.

Wright argues a person named in an SVPA commitment petition may challenge the validity of the petition, on the ground of lack of concurring evaluators, by means of a plea in abatement, a nonstatutory motion to dismiss, or a pleading challenging the validity of the petition. The district attorney argues the person named in the petition cannot challenge the validity of the petition based on the lack of concurring evaluators until the probable cause hearing.

A. *Plea in Abatement, Motion to Dismiss, Statutory Motions*

The SVPA does not expressly provide a means to challenge a commitment petition, either before or at the probable cause hearing, for defects in or lack of evaluations. Several cases nonetheless have authorized motions or pleadings to challenge an SVPA commitment petition.

In *People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1125, 1127-1128, the person named in the SVPA commitment petition moved to dismiss the petition on the ground it was filed without the required concurrence of two evaluators. The Court of Appeal concluded the person named in the petition could challenge the petition on that ground by means of a plea in abatement. (*Id.* at pp. 1128-1129.) The *Preciado* court stated the defect in lack of concurring evaluators "was not one going to the substantive validity of the complaint, but rather was merely in the nature of a plea in abatement, by which a defendant may argue that for collateral reasons a complaint should not proceed. [Citation.]" (*Id.* at p. 1128.)

In *Peters v. Superior Court* (2000) 79 Cal.App.4th 845, 847, the person named in the SVPA recommitment petition moved to dismiss it on the ground the evaluation under section 6601 was made by only one mental health evaluator. The trial court denied the motion to dismiss. (*Peters v. Superior Court*, *supra*, at p. 847.) The Court of Appeal issued a peremptory writ of mandate directing the trial court to dismiss the SVPA recommitment petition. (*Id.* at p. 851.)

In *Butler v. Superior Court* (2000) 78 Cal.App.4th 1171, 1174, 1177-1178, the persons named in the SVPA recommitment petitions moved at the probable cause hearing to dismiss the petition on the ground each was supported by a single evaluation. The trial court denied the motions and found probable cause. (*Id.* at p. 1178.) The persons named in the petitions sought writs of mandate to overturn the probable cause orders. (*Ibid.*) The district attorney argued the procedures specified in section 6601 do not apply to recommitment petitions and therefore a recommitment petition may be filed without a full evaluation by two mental health professionals. (*Butler v. Superior Court*, *supra*, at pp. 1180-1181.) The Court of Appeal rejected that argument and concluded the DMH must conduct a full evaluation under section 6601 before a petition for recommitment may be filed. (*Butler v. Superior Court*, *supra*, at pp. 1181-1182.) The Court of Appeal issued peremptory writs of mandate directing the trial court to vacate the probable cause orders and dismiss the petitions. (*Id.* at p. 1182.)

Arguably contrary to those cases is *Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677 (*Bagration*), in which the court concluded Code of Civil Procedure section 437c does not operate in SVPA proceedings. In *Bagration*, the person named in the SVPA commitment petition brought a motion for summary judgment asserting his criminal convictions did not qualify as sexually violent offenses necessary to file a commitment petition. (*Bagration*, *supra*, at p. 1681.) After the trial court denied the summary judgment motion, the person named in the petition sought a writ of a mandate. (*Id.* at p. 1682.)

Denying the writ petition, the Court of Appeal explained that Code of Civil Procedure section 437c is located in part 2 of the Code of Civil Procedure which, as the California Supreme Court had held, did not generally extend to a special proceeding (such as an SVPA commitment proceeding) unless expressly incorporated by the statutes establishing the special proceeding. (*Bagration*, *supra*, 110 Cal.App.4th at p. 1685.) The SVPA did not expressly incorporate part 2 of the Code of Civil Procedure; therefore, summary judgment was not permitted in an SVPA commitment proceeding. (*Bagration*, *supra*, at pp. 1685-1686.) Although Code of Civil Procedure section 437c, subdivision (a) provides that summary judgment is available in "any . . . proceeding," the *Bagration* court concluded section 437c "is inherently inconsistent with the SVP Act because the *mutual* summary procedures set forth in Code of Civil Procedure section 437c, if applied to SVP Act proceedings, would allow an individual to be adjudicated a sexually violent predator without benefit of the required beyond a reasonable doubt burden of proof and, in the case of a jury trial, a unanimous verdict—impairing the requirements that are at the heart of the statute's due process protections." (*Bagration*, *supra*, at pp. 1688-1689.)

B. *Nonstatutory Pleading Under* Ghilotti

While *Bagration* in effect holds statutory motions and pleadings under part 2 of the Code of Civil Procedure are not applicable to SVPA commitment proceedings, the California Supreme Court in *Ghilotti*, *supra*, 27 Cal.4th at page 893, authorized a *nonstatutory* pleading to challenge a commitment proceeding before the probable cause hearing. In *Ghilotti*, the district attorney filed a petition under the SVPA seeking the recommitment of Patrick Henry Ghilotti even though both designated evaluators concluded he no longer met the statutory criteria for commitment. (*Ghilotti*, *supra*, at pp. 893-894.) The district attorney did not attach the evaluators' reports to the petition and did not ask the trial court to review the reports; instead, the district attorney

argued the director of the DMH may disregard the evaluators' recommendations and request the filing of a commitment petition if the director independently concludes the candidate meets the SVPA commitment criteria. (*Id.* at p. 894.) The trial court expressed concern the designated evaluators had incorrectly applied the statutory criteria, but rejected the district attorney's argument and dismissed the SVPA petition for recommitment. (*Ibid.*) The Court of Appeal summarily denied the district attorney's request for a writ of mandamus and temporary stay. (*Ibid.*)

The California Supreme Court concluded an SVPA commitment or recommitment petition cannot be filed unless, pursuant to section 6601, two mental health professionals agree the person qualifies as a sexually violent predator. (*Ghilotti, supra*, 27 Cal.4th at pp. 894, 905.) The trial court may review an evaluator's assessment report for legal error and, if the court finds material legal error on the face of the report, must direct that the "erring evaluator prepare a new or corrected report applying correct legal standards." (*Id.* at p. 895.) The Supreme Court remanded the matter to the Court of Appeal with directions to issue a writ of mandamus vacating the trial court's order dismissing the recommitment petition and to remand the matter to the trial court. (*Ibid.*) On remand, the trial court was directed to review the designated evaluators' reports for material legal error and, if necessary, direct the evaluators to prepare new or corrected reports under the correct standard. (*Id.* at pp. 895, 929.)

The Supreme Court set forth the following procedure for challenging commitment petitions on the ground of lack of evaluations recommending commitment: "Thus, in future cases like this one, when the Director [of the DMH] (1) receives one or more formal evaluations that recommend against commitment or recommitment, (2) disagrees with those recommendations, (3) believes they may be infected with material legal error, and (4) does not choose, or is not permitted within the statutory scheme, to seek additional evaluations, he may nonetheless forward a request that an SVPA commitment or recommitment petition be filed, and the county's attorney may

submit such a petition for filing, with copies of the evaluators' reports attached. [Citation.] *The person named in the petition may then file a pleading challenging the validity of the petition on grounds that it is not supported by the concurrence of two evaluators under section 6601, subdivisions (d) through (f).* In response, the petitioning authorities may defend the petition by asserting that one or more nonconcurring reports are infected by legal error." (*Ghilotti*, *supra*, 27 Cal.4th at pp. 912-913, italics added.)

Therefore, *Ghilotti*, a Supreme Court decision, permits the person named in the SVPA commitment petition to file a pleading to challenge the validity of the petition on the ground it is not supported by the concurrence of two evaluators. *Ghilotti* does not explain the name and nature of that pleading, which we will refer to as a *Ghilotti* pleading. Apparently following *People v. Superior Court (Preciado)*, Wright challenged the SVPA Petition by plea in abatement. We treat the plea in abatement as an authorized *Ghilotti* pleading.

II.

The Trial Court Did Not Err by Denying Wright's Plea in Abatement Because the Post-*Ronje* Evaluation Process Has Not Been Completed.

Having concluded Wright could challenge the validity of the SVPA Petition before the probable cause hearing, we address whether the trial court erred to the extent it denied his *Ghilotti* pleading on the merits. Wright argues the trial court erred and the SVPA Petition must be dismissed because the two post-*Ronje* evaluators did not concur he met the statutory requirements for commitment as a sexually violent predator. The district attorney argues the matter must proceed to the probable cause hearing. Neither Wright nor the district attorney is correct.

A. *SVPA Screening and Evaluation Requirements*

We start by reviewing the screening and evaluation requirements of the SVPA. The commitment proceeding begins when a defendant is screened while in prison. If the initial screening leads to a determination the defendant is likely to be a

sexually violent predator, the defendant is referred to the DMH for evaluation by two psychiatrists or psychologists, or one psychiatrist and one psychologist. (§ 6601, subds. (b) & (c).) These evaluations lead to one of three results: (1) both evaluators conclude the defendant is a sexually violent predator, (2) both evaluators conclude the defendant is not a sexually violent predator, or (3) one evaluator concludes the defendant is a sexually violent predator and the other evaluator concludes the defendant is not a sexually violent predator.

In the first case, when both evaluators conclude the defendant is a sexually violent predator, the DMH forwards a petition for commitment to the district attorney of the county of the defendant's last conviction. (§ 6601, subd. (d).) If the district attorney agrees with the recommendation, the district attorney may file a petition for commitment in the superior court. (§ 6601, subds. (d) & (i).)

In the second case, when both evaluators conclude the defendant is not a sexually violent predator, a petition for commitment may not be filed. (§ 6601, subd. (d).) "Without the concurrence of two evaluators, as set forth in the statute, no such petition may be filed, and the person must be unconditionally released without further proceedings to determine if he or she is an SVP." (*Ghilotti, supra,* 27 Cal.4th at p. 910.)

In the third case, when there is a split decision between the evaluators, the next step in the proceedings is to appoint two independent professional evaluators to evaluate the defendant in accordance with the standardized assessment protocol. (§ 6601, subds. (c) & (e).) If independent evaluators are appointed, an SVPA commitment petition may be filed only if both of the independent evaluators conclude the defendant is a sexually violent predator. (§ 6601, subd. (f).) Section 6601, subdivision (f) states: "If an examination by independent professionals pursuant to subdivision (e) is conducted, a petition to request commitment under this article shall only be filed if both independent professionals who evaluate the person pursuant to subdivision (e) concur that the person meets the criteria for commitment specified in subdivision (d)." (See *Ghilotti*, *supra*, 27

Cal.4th at p. 907 ["[i]f these independent professionals also do not concur that the person meets the criteria for commitment, the Director *may not* request the filing of a petition"].)

Thus, a petition for commitment under the SVPA may be filed only if both initial evaluators or both independent evaluators conduct evaluations according to valid assessment protocols and conclude the person named in the petition meets the criteria for commitment as a sexually violent predator. The following table displays the possible outcomes when the evaluations are conducted pursuant to a valid assessment protocol:

Yes = Evaluator concludes the person named in the petition meets the criteria for commitment under the SVPA

No = Evaluator concludes the person named in the petition does not meet the criteria for commitment under the SVPA

	Evaluator 1	**Evaluator 2**	**Independent Evaluator 1**	**Independent Evaluator 2**	**Result**
1.	Yes	Yes	Not Required	Not Required	Petition may be filed
2.	No	No	Not permitted	Not permitted	Petition may *not* be filed
3.	Yes	No	Yes	Yes	Petition may be filed
4.	Yes	No	No	No	Petition may *not* be filed
5.	Yes	No	Yes	No	Petition may *not* be filed

By statute, a petition for commitment may only be filed under categories 1 and 3.

B.

The Post-Ronje *Independent Evaluations of Wright Have Not Been Conducted.*

In this case, the two initial post-*Ronje* evaluators did not concur:

Dr. Matosich concluded Wright continued to meet the criteria for commitment as a

sexually violent predator, and Dr. Putnam concluded Wright no longer met those criteria. Thus, it was necessary, under section 6601, subdivision (c), to appoint two post-*Ronje* independent evaluators to examine Wright and determine whether he met the statutory criteria for commitment as a sexually violent predator. The record presented to us does not disclose whether those independent evaluators were appointed and, if so, whether they have examined Wright and submitted reports. The trial court did not err by denying Wright's plea in abatement because the statutorily required evaluation process had not been completed.

III.

An SVPA Commitment Petition Is Subject to Dismissal If the Post-*Ronje* Evaluations Do Not Produce the Requisite Concurrence of Evaluators Under Section 6601.

Our decision to deny Wright's writ petition is without prejudice to challenging the SVPA Petition on completion of the post-*Ronje* evaluation process if the evaluations do not produce the required concurrence. To reach that decision, we discuss our decision in *Ronje*, the earlier Court of Appeal opinion in *Gray v. Superior Court* (2002) 95 Cal.App.4th 322 (*Gray*), and the recent opinion in *Davenport v. Superior Court* (2012) 202 Cal.App.4th 665 (*Davenport*).

A. Ronje

The district attorney argues the statutory prefiling requirements of section 6601 were met when the SVPA Petition was filed because two evaluators had concluded Wright met the criteria for commitment as a sexually violent predator. The post-*Ronje* evaluations, the district attorney argues, cured the procedural defect in the initial evaluations and satisfied the statutory prefiling requirements of section 6601. Under the district attorney's interpretation of *Ronje*, the SVPA Petition must proceed to the probable cause hearing regardless of the results of the post-*Ronje* evaluations.

In *Ronje*, *supra*, 179 Cal.App.4th at page 516, the person named in the SVPA commitment petition had been evaluated under the 2007 assessment protocol that the OAL later determined to be invalid. We agreed with the OAL and concluded the 2007 assessment protocol was invalid as an underground regulation and "[u]se of the invalid assessment protocol therefore constitutes an error or irregularity in the SVPA proceedings." (*Ronje*, *supra*, at pp. 516-517.) We also concluded the use of invalid assessment protocols did not deprive the trial court of fundamental jurisdiction; that is, the "'legal power to hear and determine a cause'" and, therefore, outright dismissal was not the appropriate remedy. (*Id.* at p. 518.) Instead, the remedy we prescribed for this irregularity in proceedings was to prepare *new evaluations* in accordance with valid assessment protocols and to conduct another probable cause hearing under section 6602, subdivision (a) based on the new evaluations. (*Ronje*, *supra*, at p. 519.)

The prefiling requirements had not been met in *Ronje* because the initial evaluations were made in accordance with an invalid assessment protocol. The new evaluations based on the valid assessment protocol were intended to fulfill the statutory prerequisite for filing the SVPA commitment petition. New evaluations, conducted according to the valid assessment protocol, would not be a meaningful remedy if the only purpose of the exercise was to legitimize the conclusions reached by prior evaluations made in accordance with the invalid assessment protocol. Indeed, under the district attorney's theory, the new evaluations under valid assessment protocols would serve no purpose at all.

In this case, the prefiling requirements had not been met when the SVPA Petition was filed in September 2003, because the evaluations supporting the SVPA Petition were based on an invalid assessment protocol. It was therefore necessary to complete a new evaluation process under section 6601, as required by *Ronje*. The record presented to us does not disclose whether the post-*Ronje* evaluation process had been completed when the trial court denied Wright's plea in abatement.

B. Gray

The district attorney argues the holding and analysis of *Gray, supra*, 95 Cal.App.4th 322, are instructive on the issue whether the SVPA Petition should be dismissed in light of the post-*Ronje* evaluations. As we discuss, *Gray* supports our analysis.

In *Gray*, an SVPA commitment petition was brought against Samuel Lee Gray in 1996, based on two evaluations concluding he met the criteria for commitment as a sexually violent predator. (*Gray*, *supra*, at p. 324.) In 1999, three new evaluations of Gray were conducted, two of which concluded he no longer met those criteria. (*Ibid.*) In 2001, four more evaluations were conducted, two of which concluded Gray met the criteria for commitment, and two of which concluded he did not meet those criteria. (*Ibid.*) Gray moved for summary judgment on the ground the postpetition evaluations created a split of evaluators. (*Id.* at pp. 324-325.) The trial court denied the motion, and Gray challenged the court's decision by a petition for writ of mandate. (*Id.* at p. 325.)

In the writ proceeding, Gray argued that one of the 1999 evaluators who concluded he was not a sexually violent predator was a replacement for an initial evaluator under section 6603, subdivision (c), thereby creating a split of opinion requiring additional evaluations. (*Gray*, *supra*, 95 Cal.App.4th at pp. 325-326.) Gray argued the other two 1999 evaluations constituted those additional evaluations. (*Id.* at p. 326.) Because the opinions of the other two evaluators differed, Gray argued the SVPA commitment petition no longer was viable. (*Ibid.*)

The Court of Appeal rejected this argument based on its interpretation of sections 6603, subdivision (c) and 6601, subdivision (f). (*Gray*, *supra*, 95 Cal.App.4th at pp. 327-329.) Section 6603, subdivision (c) states that if a replacement or updated evaluation results in a split decision, then "the [DMH] shall conduct two additional evaluations in accordance with subdivision (f) of Section 6601." The court concluded this passage meant the additional evaluations mandated by section 6603, subdivision (c)

must be conducted in the manner provided by section 6601, subdivision (f), but section 6603, subdivision (c) "does not, on its face, provide any consequences for a split of opinion between the second set of evaluators." (*Gray*, *supra*, at p. 328.) Neither section 6601, subdivision (f) nor section 6603, subdivision (c) states a petition must be dismissed if updated or replacement evaluations create a split of opinion as to whether the person in the petition meets the criteria for commitment as a sexually violent predator. (*Gray*, *supra*, at p. 328.)

In *Gray*, the SVPA commitment petition was properly filed because it was based on two concurring evaluations meeting statutory requirements. Later updated and replacement evaluations ended the concurrence. The *Gray* court reasoned that because conditions to filing the petition were already met with two concurring evaluations, the petition could not be dismissed when those conditions later ceased to exist. (*Gray, supra*, 95 Cal.App.4th at p. 328.)

The post-*Ronje* evaluations in this case were new evaluations under section 6601, not updated or replacement evaluations under section 6603, subdivision (c), as in *Gray*. Acknowledging this distinction, the district attorney argues several legal principles enunciated in *Gray* are applicable to this case and support the trial court's decision to deny the request to dismiss the SVPA Petition. First, the *Gray* court stated, in rejecting Gray's interpretation of section 6601, subdivision (f): "To say that a petition may not be filed unless certain conditions are met is not the same as to say that proceedings 'may not go forward' if those conditions cease to exist." (*Gray*, *supra*, 95 Cal.App.4th at p. 328.) Second, the *Gray* court concluded: "Once a petition under the [SVPA] has been filed, and the trial court (as here) has found probable cause to exist, the matter should proceed to trial. In other words, once a petition has been properly filed and the court has obtained jurisdiction, the question of whether a person is a sexually violent predator should be left to the trier of fact *unless* the prosecuting attorney is satisfied that proceedings should be abandoned." (*Id.* at p. 329.)

Although these principles do apply here, they support our decision to deny the writ petition without prejudice to a renewed challenge to the SVPA Petition. Here, in sharp contrast to *Gray*, the "certain conditions" (*Gray*, *supra*, 95 Cal.App.4th at p. 328) to filing the SVPA Petition were not met because the initial evaluations were conducted under an invalid assessment protocol. Hence, the SVPA Petition here was not "properly filed" (*Gray*, *supra*, at p. 329) in the first instance. While the defect did not deprive the trial court of fundamental jurisdiction—meaning the power to hear the case—the defect had to be cured for the SVPA Petition to be viable under section 6601.

We concluded in *Ronje* the remedy for the error in use of the invalid assessment protocol included a new probable cause hearing based on the new evaluations. Implicit in that conclusion, however, was that the new evaluations would produce the concurrence of evaluators required by the SVPA and *Ghilotti* to permit the filing of a commitment petition. Both section 6601 and *Ghilotti* stress that a commitment petition may not be filed unless both the initial evaluators or both the independent evaluators conclude the person suspected to be a sexually violent predator meets the criteria for commitment as a sexually violent predator. Without the required concurrence of one pair of evaluators, a probable cause hearing would not be statutorily authorized because the SVPA commitment petition could not have been filed in the first place.

C. Davenport

In *Davenport*, *supra*, 202 Cal.App.4th 665, Division Four of the First District Court of Appeal interpreted the SVPA and *Ronje* and applied them to issues similar to those presented here. The facts of *Davenport* also were similar to those of this case. While Roger Davenport was serving a prison term, a petition under the SVPA was filed against him. (*Davenport*, *supra*, at p. 667.) The petition was supported by two evaluations concluding he met the criteria for commitment as a sexually violent predator. (*Ibid.*) After the trial court found probable cause, and while the matter awaited trial, we issued our opinion in *Ronje*. (*Davenport*, *supra*, at p. 667.) The evaluations of

Davenport had been conducted under the assessment protocol we concluded in *Ronje* to be invalid. (*Davenport*, *supra*, at p. 668.)

In light of *Ronje*, the trial court ordered new evaluations of Davenport. (*Davenport*, *supra*, 202 Cal.App.4th at p. 668.) One evaluator concluded he continued to meet the criteria for commitment as a sexually violent predator; the other concluded he no longer met those criteria. (*Ibid.*) Due to the split of opinion, the DMH appointed two independent mental health professionals to evaluate Davenport. The independent evaluators likewise reached a split decision. (*Ibid.*)

Davenport moved to dismiss the SVPA commitment petition on the ground it was not supported by the necessary concurring evaluators. (*Davenport, supra*, 202 Cal.App.4th at p. 668.) The trial court denied the motion and ordered a new probable cause hearing, and Davenport challenged the court's order by a petition for writ of mandate. (*Ibid.*) The Court of Appeal summarily denied the petition, but the Supreme Court granted review and transferred the case back to the Court of Appeal with directions to issue an order to show cause. (*Ibid.*)

After issuing an order to show cause, the Court of Appeal denied Davenport's writ petition. (*Davenport, supra*, 202 Cal.App.4th at p. 667.) The Court of Appeal assumed the OAL assessment protocol used to evaluate Davenport was invalid, but interpreted *Ronje* as not permitting dismissal in this situation because use of the invalid assessment protocol did not deprive the trial court of jurisdiction over the SVPA commitment petition. (*Davenport*, *supra*, at pp. 670-671.)

The Court of Appeal in *Davenport* concluded the new evaluations prepared pursuant to *Ronje* were comparable to updated or replacement evaluations under section 6603, subdivision (c). (*Davenport*, *supra*, 202 Cal.App.4th at p. 671.) Although updated or replacement evaluations might result in a lack of concurring evaluations, the court followed *Gray*, *supra*, 95 Cal.App.4th 322, which held that neither section 6601, subdivision (f) nor section 6603, subdivision (c) states an SVPA commitment petition

must be dismissed if updated or replacement evaluations create a split of opinion as to whether the person in the petition meets the criteria for commitment as a sexually violent predator. (*Davenport, supra,* at pp. 671-672.)

Finding *Gray* persuasive, the court in *Davenport* concluded the SVPA commitment petition was properly filed and the effect of the post-*Ronje* evaluations "was not to begin the proceedings anew." (*Davenport, supra*, 202 Cal.App.4th at p. 673.) Important to the court's conclusion was Davenport's failure to identify any substantive defect in the assessment protocol found to be invalid in *Ronje* and the lack of evidence the use of that protocol had any material effect on the conclusions in the original evaluations. (*Davenport, supra,* at p. 673.) The court also found persuasive *People v. Superior Court (Salter)* (2011) 192 Cal.App.4th 1352, a case decided under the Mentally Disordered Offender Act, Penal Code section 2960 et seq. Although, as *Davenport* notes, the SVPA and the Mentally Disordered Offender Act have similar purposes, they are different statutory schemes, with differing procedures and requirements.

We respectfully must conclude our colleagues in *Davenport* misinterpreted the SVPA and *Ronje* in several important respects. *Davenport* states that in *Ronje*, we did not intend to start the evaluation process anew because we concluded dismissal was not an appropriate remedy. We did intend to start the evaluation process anew. In *Ronje*, we concluded only that use of the invalid assessment protocol did not deprive the trial court of *fundamental jurisdiction*, and, therefore, dismissal outright before new evaluations could be conducted was not an appropriate remedy. (*Ronje, supra,* 179 Cal.App.4th at p. 518.) The remedy we expressly ordered in *Ronje* to cure the underlying error was new evaluations under section 6601 including, if required, evaluations conducted by two independent evaluators, not updated or replacement evaluations under section 6603, subdivision (c). (*Ronje*, *supra*, at p. 519.) The express words of the SVPA and *Ghilotti* require dismissal of the SVPA commitment petition if the new evaluations

failed to produce the concurrence required to support the filing of an SVPA commitment petition.

DISPOSITION

The petition for writ of mandate/prohibition is denied and the stay of the trial court proceedings is lifted.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.