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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**

10 THE PEOPLE OF THE STATE OF)
11 CALIFORNIA,)
12)
Plaintiff,)
13)
v.)
14)
JOSEPH GENTILE)
15)
Respondent.)
16)

Case No.: MH 101-020

MOTION TO DISMISS

Date: September 10, 2008
Time: 9:00 a.m.
Dept.: 11

17
18 **TO: THE HONORABLE JUDGE OF THE SUPERIOR COURT, THE PLAINTIFF**
19 **ABOVE-NAMED AND ITS ATTORNEY, BONNIE DUMANIS AND HER**
DESIGNATED REPRESENTATIVE:

20 JOSEPH GENTILE, by and through his attorney, hereby submits the following motion and
21 points and authorities in support of his motion to dismiss.
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1 **THIS CASE SHOULD BE DISMISSED BECAUSE THE DEPARTMENT OF MENTAL**
2 **HEALTH ILLEGALLY USED “UNDERGROUND REGULATIONS” WHILE**
3 **EVALUATING MR. GENTILE .**

4 Before a person can be committed as a sexually violent predator (SVP), he must be
5 evaluated by two practicing psychiatrists or psychologists “in accordance with a standardized
6 assessment protocol, developed and updated by the State Department of Mental Health, to
7 determine whether the person is a sexually violent predator as defined in this article.” (Welfare and
8 Institutions Code § 6601, subd. (c).)

9 After the passage of the SVP law in 1996, the Department of Mental Health (DMH) never
10 formally developed an evaluation protocol. Instead, DMH published a handbook for the state’s
11 SVP evaluators. In Mr. Gentile’s case, each of the state evaluators scrupulously followed the
12 dictates of the handbook in determining whether Mr. Gentile is an SVP.

13 On August 15, 2008, the Office of Administrative Law determined that the evaluators’
14 handbook was not adopted in conformance with California law, and that it contains numerous
15 illegal underground regulations. (See 2008 OAL Determination No. 19, Attachment A.) As a
16 result, those regulations are void.

17 An analysis of the role of the Office of Administrative Law, its determination regarding the
18 DMH evaluator handbook, and the consequences of DMH’s illegal activity, follow.

19 **A. THE ROLE OF THE OFFICE OF ADMINISTRATIVE LAW**

20 The Administrative Procedure Act (APA) establishes the procedure by which state agencies
21 may adopt regulations. A state agency must give the public notice of its proposed regulatory
22 action; issue a complete text of the proposed regulation with a statement of the reasons for it; give
23 interested parties an opportunity to comment on the proposed regulation; respond in writing to
24 public comments; and forward a file of all materials on which the agency relied in the regulatory
25 process.

1 process to the Office of Administrative Law (OAL), which reviews the regulation for consistency
2 with the law, clarity, and necessity. (Gov. Code §§ 11346 and 11347.)

3 In addition to acting as a clearing-house, reviewing regulations for consistency with the law,
4 clarity, and necessity, the Office of Administrative Law may be asked to determine, after a
5 regulation has been enacted, whether the enacting state agency complied with California law. In the
6 determination issued on August 15, 2008, the OAL explained the scope of its authority in the case
7 before it:

8
9 Our review is limited to the sole issue of whether the challenged rule meets the definition of
10 a “regulation” as defined in Government Code section 11342.600 and is subject to the
11 Administrative Procedure Act (APA). If a rule meets the definition of a “regulation,” but
12 was not adopted pursuant to the APA and should have been, it is an “underground
13 regulation” as defined in California Code of Regulations, title 1, section 250. (2008 OAL
14 Determination No. 19 at 1.)

15 These safeguards exist in part to give the public, particularly those who will be affected by
16 the regulation, an opportunity to present information which may shape the regulation that is
17 ultimately enacted:

18 One purpose of the APA is to ensure that those persons or entities whom a regulation will
19 affect have a voice in its creation (Armistead v. State Personnel Board (1978) 22 Cal.3d 198,
20 204-205), as well as notice of the law’s requirements so that they can conform their conduct
21 accordingly (Ligon v. State Personnel Bd. (1981) 123 Cal.App.3d 583, 588).

22 The Legislature wisely perceived that the party subject to regulation is often in the best
23 position, and has the greatest incentive, to inform the agency about possible unintended
24 consequences of a proposed regulation. Moreover, public participation in the regulatory
25 process directs the attention of agency policymakers to the public they serve, thus providing
26 some security against bureaucratic tyranny. (*Citation omitted.*) (Tidewater Marine Western
27 v. Bradshaw, 14 Cal.4th 557, at 568-569).

28 When a regulation has been enacted in violation of the APA, it is invalid. (Morning Star
Company v. State Board of Equalization (2006) 38 Cal.4th 324, 328.) When the OAL determines
that a regulation is “underground”, it is “void and not entitled to any deference.” (Tidewater, supra,
14 Cal.4th at 577.)

1 **B. THE OAL DETERMINATION REGARDING THE DMH EVALUATOR**
2 **HANDBOOK**

3 In January of 2008, the OAL was called upon to decide whether portions of the DMH
4 “Clinical Evaluator Handbook Standardized Assessment Protocol (2007)” constituted an
5 underground regulation. The OAL’s determination addressed ten specific elements of the protocol,
6 including:

7 Page 2, section titled “Evaluator Panel”: “Evaluators are required to interview and evaluate
8 persons in accordance with the protocol contained within this handbook....”

9 Page 2, section titled “Standardized Assessment Protocol”: “This handbook and all
10 supplemental instructions to DMH staff and contractors in the implementation of the [SVP]
11 law is the required standardized assessment protocol.”

12 Pages 9-11, section titled “The Clinical Interview”: This section instructs the evaluator how
13 to conduct the interview.

14 Page 20, section titled “Psychological Testing”: “While evaluators may organize their risk
15 assessment in their own unique way, they must rely on the guidelines of this protocol and
16 include the following elements of risk assessment.”

17 Pages 16-32, section titled “SOCP Clinical Evaluation Protocol (Annotated)”: this section
18 contains detailed mandatory instructions in every facet of the clinical evaluation.

19 (2008 OAL Determination No. 19 at 2.)

20 The OAL concluded that the protocol met the definition of a “regulation” as defined in
21 Government Code section 11342.600, and that any such regulation should have been adopted
22 pursuant to the APA. (2008 OAL Determination No. 19 at 13.) In other words, the process used to
23 evaluate a person as a potential SVP should have been subject to public vetting.

24 **C. CONSEQUENCES OF THE OAL DECISION**

25 Under California law, an underground regulation, enacted in violation of the APA, is
26 invalid. (Morning Star Company v. State Board of Equalization (2006) 38 Cal.4th 324, 333.)
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1 Further, underground regulations are “void and not entitled to any deference.” (Tidewater, supra,
2 14 Cal.4th at 577.) Therefore, the protocol which the Department of Mental Health created in
3 response to Welfare and Institutions Code section 6601, subdivisions (c) and (d) for the purpose
4 evaluating individuals to determine whether they qualify as SVPs is invalid, void, and entitled to no
5 deference.

6
7 Having established that the protocol is a void underground regulation, the question becomes:
8 what are the consequences of such a determination? The illegality of the protocol means that the
9 petition against Mr. Gentile must be dismissed.

10 The Welfare and Institutions Code requires that a potential sexually violent predator be
11 evaluated “in accordance with the standardized assessment protocol, developed and updated by the
12 State Department of Mental Health.” Rather than follow the process required by law, DMH created
13 a handbook that has now been deemed void. The state evaluators in this case used a protocol that
14 has been deemed illegal.

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16 There are a number of cases dealing with the consequences of underground regulations. In
17 Morning Star, the Supreme Court determined that the regulations relating to the payment of
18 hazardous materials fees by California corporations were not adopted in compliance with the APA
19 procedures. Rather than strike down the regulations in their entirety and permit the plaintiff to
20 avoid paying any hazardous materials fees, the court remanded the matter to give the state agency
21 time to comply with APA procedures. Once the agency had done so, the plaintiff’s administrative
22 proceedings would continue in light of the new regulations. (Morning Star, supra, 38 Cal.4th at
23 342.)

24 A similar procedure might be appropriate in this case. If so, this court would have to order
25 the case delayed for long enough to allow DMH to comply with the APA.

26 However, in order to enact a protocol in a proper fashion, the DMH will have to conduct
27 public hearings and give those affected “a voice in its creation”. (Tidewater, supra.)

1 The process of adopting regulations will take, at the very least, several months, and possibly
2 years. While delays such as these might be perfectly acceptable in a case such as Morning Star
3 where the dispute is over how much money a business must pay the government, it is completely
4 different to put Mr. Gentile into limbo indefinitely while DMH corrects its error.

5 This inevitable, but lengthy, delay would violate Mr. Gentile's state and federal due process
6 rights and liberty rights. Under any reasonable due process analysis, the state cannot justify
7 detaining Mr. Gentile indefinitely, but illegally, to address its own failures. Mr. Gentile is currently
8 being illegally confined based upon an attempt by DMH to commit him pursuant to illegally
9 adopted, void, underground regulations.

10 Recently, in People v. Litmon (2008) 162 Cal.App.4th 383, the court considered the
11 consequences of a due process problem in the context of an overly delayed SVP trial. As the court
12 noted, "the Due Process Clause provides that certain substantive rights—life, liberty, and
13 property—cannot be deprived except pursuant to constitutionally adequate procedures." (Litmon,
14 supra, 162 Cal.App.4th at 395 quoting Cleveland Board of Education v. Loudermill (1985) 470 U.S.
15 532, 541.) The procedures followed in this case cannot be viewed as constitutionally adequate. In
16 effect, Mr. Gentile, instead of being released from prison as scheduled, was evaluated pursuant to
17 illegally adopted underground regulations. Based upon that illegal procedure, the state petitioned to
18 commit him to the Department of Mental Health indefinitely.¹

19 There is a further, fundamental jurisdictional problem. Recently in People v. Superior Court
20 (Small) (2008) 159 Cal.App.4th 301, the court determined that when an untimely petition is filed,
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25 ¹ It is worth noting that, assuming it follows a fair regulation adoption process, DMH may adopt
26 regulations that create a completely different protocol for SVP evaluations. If so, it is impossible to
27 predict whether Mr. Gentile will be found to qualify as a sexually violent predator under the new
28 protocol.

1 after the 45 day hold period permitted under Welfare and Institutions Code § 6601.3, the petition
2 must be dismissed unless the person remains in custody at the time of the filing of the petition
3 because of “a good faith mistake of fact or law.” (Small, supra, 159 Cal.App.4th at 309.) In Small,
4 the petition did not meet this requirement because it was late due to a failure by the Department of
5 Corrections and DMH to process his case in a timely fashion. In Mr. Gentile’s case, the state may
6 claim that DMH adopted its protocol and implemented it in good faith so that any mistake in the
7 process constitutes a good faith mistake of law. Mr. Gentile disagrees.

9 As the analysis in the OAL’s Determination reveals, the question of whether or not the
10 protocol was legally valid and properly adopted is not a close question. DMH made no attempt to
11 follow the procedures required by the APA. Instead, their only argument was a legally untenable
12 claim that the protocol was not, in fact, a regulation. This was not a good faith mistake of law, but a
13 bad faith dereliction of duty.

15 Even if this court disagrees and believes that the mistake can be viewed as a good faith one,
16 that good faith ended with the OAL’s determination. Even if Mr. Gentile were being held pursuant
17 to a good faith mistake of law on August 18, 2008, on August 19, 2008, he was being held illegally
18 with no good faith justification. Yet, of course, he continues to be held, and the state has taken *no*
19 *steps* to remedy his situation.

21 Under Welfare and Institutions Code section 6601, subdivision (h), the Department of
22 Mental Health can only request that a district attorney file a petition for commitment if DMH has
23 determined that a person is a n SVP following the procedures in section 6601. In Mr. Gentile’s
24 case, because DMH used an illegal underground regulation to create its protocol, the referral to the
25 district attorney was invalid. This means that the petition, itself, was unauthorized. As a result,
26 there is no longer any jurisdiction to file a petition seeking his continued commitment.

1 **CONCLUSION**

2 Instead of complying with California law and following the mandatory procedures of the
3 APA, DMH created illegal underground regulations which are void and invalid. As a result, the
4 determination of the state evaluators that Mr. Gentile qualifies as a sexually violent predator was
5 not made in compliance with explicit statutory instructions. The current petition against him should
6 be dismissed, and he should be released.
7

8 Respondent respectfully requests that his motion to dismiss be granted.

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10 Dated: _____

11 Respectfully submitted,
12 STEVEN J. CARROLL
13 Public Defender

14 By: _____
15 MARIAN GASTON
16 Deputy Public Defender
17 Attorneys for Defendant
18 JOSEPH GENTILE
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