

1 LAW OFFICES OF THE PUBLIC DEFENDER
2 MARY J. GREENWOOD, #99728
3 PATRICK HOOPES, #191618
4 County of Santa Clara
120 W. Mission St.
San Jose, California 95110
Telephone: 299-7754

5 Attorneys for Respondent

(ENDORSED)
FILED
SEP 15 2008
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY
BUSIE DURAN

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SANTA CLARA

11 PEOPLE OF THE STATE OF CALIFORNIA, No. 196824

12 Petitioner,

13 -vs-

14 NOTICE OF MOTION AND MOTION
TO DISMISS, MEMORANDUM OF
POINTS AND AUTHORITIES

15 JERRY HOWARD,

16 Respondent.

17 Date: October 3, 2008
Time: 09:00 a.m.
Dept.: 41
Time Est.: 30 minutes

18
19 TO THE CLERK OF THE ABOVE-ENTITLED COURT, AND
20 TO THE DISTRICT ATTORNEY FOR SANTA CLARA COUNTY:

21 NOTICE IS HEREBY GIVEN that on the 3rd day of October, 2008, at 09:00 a.m., in
22 Department 41 of the above-entitled court, the above-named Respondent will move the court to
23 dismiss the petition filed in the above-entitled matter on the grounds that the petition is void for
24 failure to comply with Welf. & Inst. Code § 6601(c) and for want of due process.

25 It is anticipated this motion will be based upon this notice, the attached Memorandum of
26 Points and Authorities, and oral argument. The motion will require an estimated 30 minutes to
27 hear, argue and submit.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATEMENT OF FACTS

On March 27, 2006, a jury found true a petition alleging that Jerry Howard was a “sexually violent predator” within the meaning of Welfare and Institutions Code §§ 6600 *et seq.* On the same day the court committed Mr. Howard to a two-year term in the state hospital.

On June 8, 2006, the District Attorney filed a petition seeking to extend Mr. Howard’s commitment for two more years. Then on November 7, 2006, voters enacted Proposition 83, or “Jessica’s Law.” Proposition 83 amended the Sexually Violent Predator Act, providing for an indeterminate term in the California Department of Mental Health for anyone found to be a “sexually violent predator” within the meaning of the amended Welfare and institutions Code §§ 6600, *et. seq.* The District Attorney amended the June 8, 2006 petition to seek a commitment for the term prescribed by law.

Then in May, 2007, the Santa Clara County District Attorney filed a non-statutory “Motion to Retroactively Apply Indeterminate Term to Respondent.” In the motion, the District Attorney urged the court to convert Respondent’s commitment to an indeterminate term in the State Department of Mental Health. On June 1, 2007, the Honorable Alfonso Fernandez granted the District Attorney’s motion and ordered Respondent committed to an indeterminate term in the state Department of Mental Health. The court, over defense objection, stayed the June 8, 2006 petition pending appeal of the indeterminate commitment. On May 29, 2008, the Sixth District Appellate Court reversed the retroactive indeterminate commitment, and allowed the District Attorney to proceed on the previously stayed petition.

On August 15, 2008, the California Office of Administrative Law ruled that the Clinical Evaluator SVP Handbook was an “underground” regulation, i.e. did not meet the definition of a

1 valid "regulation" within the meaning of the California Government Code § 11342.600 under
2 the Administrative Procedure Act.

3
4
5 **I. BECAUSE THE INSTANT EVALUATIONS WERE NOT**
6 **PERFORMED ACCORDING TO A STANDARDIZED**
7 **ASSESSMENT PROTOCOL AS REQUIRED BY WELFARE AND**
8 **INSTITUTIONS CODE § 6601(c), BUT PURSUANT TO THE**
9 **MANDATORY PROVISIONS OF AN INVALID UNDERGROUND**
10 **REGULATION, THE PETITION IS VOID AND MUST BE**
11 **DISMISSED**

12 Welfare and Institutions Code § 6600, *et seq.* (the "Sexually Violent Predator Act")
13 requires that any individual serving a determinate prison sentence in the state Department of
14 Corrections, who has been previously convicted of enumerated serious sex offenses, be referred
15 to the state Department of Mental Health [DMH] for screening as a "sexually violent predator."
16 (Welfare and Institutions Code § 6601(a).) The DMH evaluates the inmate to determine
17 whether he has a "diagnosed mental disorder" within the meaning of the statute, i.e. "a
18 congenital or acquired condition affecting the emotional or volitional capacity that predisposes
19 the person to the commission of criminal sexual acts in a degree constituting the person a
20 menace to the health and safety of others." (Welfare and Institutions Code §§ 6600, *et seq.*) In
21 order for a commitment petition to be filed, the Department of Mental Health must have two
22 qualified psychologists or psychiatrists examine the person. (§ 6601, subds. (c) & (d).) The
23 Legislature has required that the evaluations be conducted "in accordance with a standardized
24 assessment protocol, developed and updated by the State Department of Mental Health"
25 (§ 6601, subd. (c).)

26
27 The SVP statute declares:
28

1 “[t]he State Department of Mental Health shall evaluate the person in accordance
2 with a standardized assessment protocol, developed and updated by the State
3 Department of Mental Health, to determine whether the person is a sexually
4 violent predator as defined in this article. The standardized assessment protocol
5 shall require assessment of diagnosable mental disorders, as well as various
6 factors known to be associated with the risk of reoffense among sex offenders.
7 Risk factors to be considered shall include criminal and psychosexual history,
8 type, degree, and duration of sexual deviance, and severity of mental disorder.”
9 (Welfare and Institutions Code § 6601(c).)]

10 If there is a split of opinions, the Department shall have two more qualified evaluators examine
11 the person. If at least two evaluators agree he should be committed (§ 6601, subs. (e) & (f)),
12 then the Director of Mental Health can “forward a request for a petition for commitment under
13 section 6602” to commit the person. (§ 6601, subd. (d).) Only then can an SVP petition be
14 filed. A “petition for commitment or recommitment may not be filed unless two evaluators,
15 appointed under the procedures specified in section 6601, subdivisions (d) and (e), have
16 concurred that the person currently meets the criteria for commitment under the SVPA.”
17 (*Ghilotti, supra*, 27 Cal.4th at p. 909; *Peters v. Superior Court* (2000) 79 Cal.App.4th 845, 848.)

18 **A. The Office Of Administrative Law’s Determination.**

19 The California Office of Administrative Law is charged with ensuring that internal rules
20 and regulations of state agencies are “clear, necessary, legally valid, and available to the
21 public.”¹ According to the OAL, it has neither the legal authority nor the expertise to evaluate
22 the wisdom or the underlying policy behind those rules. [Exhibit A, p. 1.] On August 15, 2008,
23 the State of California Office of Administrative Law [hereinafter “OAL”] made a critical ruling
24 _____

25
26 ¹ According to the agency’s website, the Office of Administrative Law is charged with the task of ensuring “that agency
27 regulations are clear, necessary, legally valid, and available to the public. OAL is responsible for reviewing administrative
28 regulations proposed by over 200 state agencies for compliance with the standards set forth in California’s Administrative
 Procedure Act (APA), for transmitting these regulations to the Secretary of State and for publishing regulations in the
 California Code of Regulations.” (See <http://www.oal.ca.gov>.)

1 with regard to the Clinical Evaluator SVP Handbook and Standardized Assessment Protocol
2 from 2007 [hereinafter "DMH Handbook" or "Exhibit B."] The DMH Handbook is a
3 mandatory rulebook that all SVP evaluators are required to use to assess whether alleged SVPs
4 qualify under the SVP Act. [See Exhibit B, p. 2.] Significantly, the OAL ruled that the DMH
5 Handbook was an "underground" regulation. [Exhibit A, p. 13] In other words, the OAL ruled
6 that the DMH Handbook did not meet the definition of a valid "regulation" within the meaning
7 of the California Government Code § 11342.600 under the Administrative Procedure Act.
8

9 According to the OAL Ruling of August 15, 2008, Section 11340.5 of the Government
10 Code states:
11

12 "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any
13 guideline, criterion, bulletin, manual, instruction, order, standard of general
14 application, or other rule, which is a regulation as defined in [Government Code]
15 Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction,
16 order, standard of general application, or other rule has been adopted as a
regulation and filed with the Secretary of State pursuant to [the APA]." [Exhibit
A, p. 5.]

17 The ruling further states:

18 "When an agency issues, utilizes, enforces, or attempts to enforce a rule in
19 violation of section 11340.5 it creates an underground regulation as defined in title
20 1, California Code of Regulations, section 250." [Exhibit A ,p. 5]

21 The ruling allows that:

22 "[the] OAL may issue a determination as to whether or not an agency issued,
23 utilized, enforced, or attempted to enforce a rule that meets the definition of a
24 'regulation' as defined in section 11342.600 that should have been adopted
25 pursuant to the APA. OAL's determination that an underground regulation was
26 created is not enforceable against the agency through any formal administrative
27 means, but is entitled to 'due deference' in any subsequent litigation of the issue
28 pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422." [Exhibit A, p. 5.]

1 Citing *Tidewater Marine Western Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571.
2 the OAL concluded that because the extra-statutory rules contained in the DMH Handbook (1)
3 *applied generally*, that is, to every evaluator and every inmate being interviewed, and because
4 (2) the rules *governed* the DMH's procedure, the DMH handbook met the definition of a
5 "regulation" within the meaning of Government Code § 11342.600. [Exhibit A, pp. 6-10.] In
6 support of their ruling, the OAL cited numerous passages from the DMH Handbook, including
7 the following:
8

9
10 WIC Section 6601(c) requires that a person referred from CDCR be evaluated in
11 accordance with a standardized assessment protocol, developed and updated by the
12 DMH. This clinical evaluator handbook is the centerpiece of that protocol. This
13 handbook may be supplemented by additional instructions to clinical evaluators as
14 necessary. This handbook and all supplemental instructions to DMH staff and
15 contractors in the implementation of the SVP law is the required standardized
16 assessment protocol.

17 [Exhibit B, p. 2.]

18 Because the DMH Handbook was not adopted pursuant to the Administrative Procedure
19 Act and filed with the Secretary of State, it was ruled to be an illegitimate "underground"
20 regulation. [Exhibit A, pp. 5, 13.]

21 **B. The Petition is Invalid and Void.**

22 The OAL's ruling is entitled to "due deference" in any subsequent litigation. (*Id.* quoting
23 *Grier v. Kizer* (1990) 219 Cal.App.3d 422.) *Tidewater Marine W. v. Bradshaw* (1996) 14 Cal.
24 4th 557, 571, held that a state agency's policy for determining whether to apply certain wage
25 orders to maritime employees constituted a "regulation" within the meaning of the APA and was
26 void for failure to comply with the Act. The court rejected the argument that the agency's
27 interpretation was entitled to deference since it had been in effect for more than 80 years. "[I]o
28

1 give weight to [an improperly adopted regulation] in a controversy that pits [the agency] against
2 an individual member of exactly that class the APA sought to protect . . . would permit an
3 agency to flout the APA by penalizing those who were entitled to notice and opportunity to be
4 heard but received neither.” (*Ibid.*)

5
6 In *Simi Valley Adventist Hosp. v. Bonta* (2000) 81 Cal. App. 4th 346, the court remanded
7 a case to the trial court to determine whether a reimbursement method used by an administrative
8 agency was an “underground regulation” and therefore “void *ab initio*.” The court recognized
9 that “[r]ulemaking by an administrative agency is quasi-legislative in character and has the same
10 force and effect of law.” (*Id.*, citing *Dabis v. San Francisco Redevelopment Agency* (1975) 50
11 Cal. App. 3d 704.) The *Simi* court recognized that “[v]arious appellate cases discuss the
12 province of the court to provide judicial review of administrative regulations.” (*Id.*) “In *Grier v.*
13 *Kizer* (1990) 219 Cal. App. 3d 422, disapproved on other grounds in *Tidewater Marine Western,*
14 *Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 577, the petitioner physician challenged the
15 Department's audit methodology as not authorized by any administrative regulation.” (*Id.*) The
16 Court of Appeal upheld the Office of Administrative Law ruling that the audit method was
17 invalid as an improper ‘underground’ regulation which had not been properly adopted pursuant
18 to the Administrative Procedures Act.” (*Id.*)

19
20
21
22 In a sense, the situation in the instant matter is the flip side of the situation in *People v.*
23 *Superior Court (Ghilotti)* (2002) 27 Cal.4th 888. In *Ghilotti*, the Supreme Court determined that
24 the Department of Mental Health did not have the authority to seek a sexually violent predator
25 commitment in the absence of findings by two experts that the defendant qualified as a sexually
26 violent predator. (*Ghilotti, supra*, 27 Cal.4th at 908-909.) The Supreme Court specifically
27
28

1 determined that "a petition for commitment or recommitment may not be filed unless two
2 evaluators, appointed under the procedures specified in section 6601, subdivisions (d) and (e),
3 have concurred that the person currently meets the criteria for commitment under the SVPA."
4 (*Ghilotti, supra*, 27 Cal.4th at 909.) Since the evaluators, in the instant case, did not comply
5 with the procedures from section 6601, subdivision (d), the district attorney, based upon the
6 analysis of the California Supreme Court, could not file a petition.
7

8 Instead of complying with California law and following the mandatory procedures of the
9 APA to prepare and adopt the regulations applicable to the screening and evaluation process to
10 determine whether appellant qualified as a sexually violent predator, the Department of Mental
11 Health created illegal, underground regulations which are void and invalid. As a result, the
12 determination that appellant qualified as a sexually violent predator was not made in compliance
13 with the explicit statutory instructions requiring a standardized assessment protocol, and the
14 petition is thus invalid and void.
15
16

17
18 **II. BECAUSE THE INSTANT EVALUATIONS WERE PERFORMED**
19 **PURSUANT TO THE MANDATORY PROVISIONS OF AN**
20 **INVALID "UNDERGROUND" REGULATION, THE PETITION**
21 **MUST BE DISMISSED FOR WANT OF DUE PROCESS**

22 In the instant matter, implicit in the OAL ruling is that it is *beyond* the authority of the
23 DMH to evaluate alleged SVPs such as Mr. Howard according to a protocol that was not
24 properly adopted through the Administrative Procedure Act. The OAL ruling demonstrates that
25 the procedure used to evaluate Mr. Howard as an SVP was thus invalid and *ultra vires*, in
26 violation of Mr. Howard's 14th Due Process rights. The recent case of *People v. Litmon* (2008)
27 162 Cal. App. 4th 383 helped to clarify the procedural due process rights of alleged SVPs. The
28

1 instant petition is void for want of procedural due process, as the instant evaluations by Drs.
2 Jack Vognesen and Dale Arnold were prepared according to the mandatory provisions of the
3 invalid, underground DMH Handbook.

4 The recent case of *People v. Litmon* (2008) 162 Cal. App. 4th 383, held that a trial court
5 should have dismissed an SVP petition where an alleged SVP objected to a delay of his jury trial
6 for over a year after a mistrial. (*Id.* at p. 406.) The court's holding was predicated on Mr.
7 Litmon's 14th Amendment Procedural Due Process rights. (*Id.*) The court declared "[i]f the
8 constitutional right to procedural due process is not to be an empty concept in the context of
9 involuntary SVP commitment proceedings, it cannot be dispensed with so easily." (*Id.* at p.
10 406.) The court applied the balancing test of *Mathews v. Eldridge* (1976) 424 U.S. 319, 333 to
11 determine whether an alleged SVP has a protected liberty interest under the 14th Amendment
12 Due Process Clause. (*Litmon, supra*, 162 Cal.App.4th at p. 399.) According to that test, Due
13 Process requires the court to consider (1) the private interest at stake, (2) the risk of an erroneous
14 deprivation of such interest, (3) the government's interest, including (4) the relative fiscal or
15 administrative burdens that the procedural requirement would entail. (*Litmon, supra*, 162
16 Cal.App.4th at p. 396, quoting *Mathews v. Eldridge, supra*, 424 U.S. at p. 333.)

17 Applying the *Mathews v. Eldridge* balancing test to the issue at hand, first, Mr. Howard's
18 private interest, i.e. his liberty interest, or the right to be free of involuntary restraint by his own
19 government (See *Litmon, supra*, 162 Cal.App.4th at p. 399) is not only substantial, it is
20 *fundamental*. Secondly, the risk of erroneous deprivation of Mr. Howard's liberty interest is
21 enormous, if Mr. Howard is evaluated not according to an OAL approved "standardized
22 assessment protocol," but according to an *ultra vires*, underground regulation. Thirdly, while
23
24
25
26
27
28

1 the state has a significant interest in confining persons who are a danger by reason of their
2 mental disorders, the state has no interest in confining non-dangerous persons or persons of
3 questionable dangerousness erroneously found to be SVPs owing to a mandatory, underground
4 protocol. (See *Litmon*, *supra*, 162 Cal.App.4th at p. 401.) Finally, the fiscal or administrative
5 burden on the Department of Mental Health in securing a proper OAL approved regulation.
6 while not entirely quantifiable, is negligible at best, and can hardly be said to come close to
7 counter-balancing the enormous interests at stake. On balance, Mr. Howard's interest in his
8 liberty, and the risk of erroneous deprivation of that liberty drastically outweighs the Department
9 of Mental Health's interest in confining persons determined to be SVPs through an invalid,
10 underground regulation, and the Department's minute fiscal and/or administrative burden in
11 adopting a validly approved protocol.

14 Accordingly, the 14th Amendment Due Process Clause compels dismissal of the instant
15 petition, as the instant evaluations are flawed and void for want of procedural due process.

17 CONCLUSION

18 For the foregoing reasons, the January, 2007 Petition to Extend Mr. Howard's
19 commitment must be dismissed. The instant petition is void for failure to comply with the SVP
20 statute and for want of procedural due process, as the state evaluators prepared the current
21 evaluations according to the mandatory provisions of an invalid, underground regulation
22 otherwise known as the Clinical Evaluator SVP Handbook. Because Mr. Howard has a
23 constitutionally protected liberty interest, the court must dismiss the instant petition.

24 Dated: September 12, 2008