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8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO
9

10 PEOPLE OF THE STATE OF CALIFORNIA) Case No.: FVIVS017597
11)
12) Petitioner)
13) vs.) NOTICE OF MOTION AND MOTION
14)) TO DISMISS CURRENT PETITION,
XXXXXXXXXXXXX) AND ORDER RELEASE OF
15)) RESPONDENT; ALTERNATIVELY,
Respondent) FOR AN ORDER THAT
16)) DEPARTMENT OF MENTAL HEALTH
EVALUATIONS ARE/WERE
17)) INFECTED WITH MATERIAL LEGAL
ERROR; MEMORANDUM OF POINTS
& AUTHORITIES
18))
19)) DATE: November 21, 2008
20)) TIME: 8:30 a.m.
DEPT: S-9

21 **INTRODUCTION**

22 Before a person can be committed as a sexually violent predator, *Welfare and*
23 *Institutions Code* [hereafter *WIC*] § 6601, subdivision (d) requires that he be evaluated by two
24 practicing psychiatrists or psychologists “in accordance with a standardized assessment
25 protocol, developed and updated by the State Department of Mental Health [hereafter DMH],
26 to determine whether the person is a sexually violent predator as defined in this article.” (*WIC*
27 §. 6601 (c.)
28

1 A petition to commit a person under this article can only be filed if there are two concurring
2 evaluations so performed opining that the individual meets the criteria of the statute. (WIC §
3 6601 (d) and (f).

4 To implement these procedures, DMH did not formally enact specific evaluation
5 procedures. Instead, DMH published a handbook (entitled ‘Clinical Evaluator Handbook and
6 Assessment Protocol’) for the Department of Mental Health’s sexually violent predator
7 evaluators to follow in performing these evaluations, outlining how to conduct the evaluations,
8 the format to adhere to, what matters to be considered and how to arrive at their conclusions.

9 On August 15, 2008, the California Office of Administrative Law (hereafter OAL)
10 determined that portions of the DMH handbook or assessment protocol constituted an
11 underground regulation. Under well established California law, those regulations are void.
12 Consequently, the current petition is invalid and illegal because the evaluations giving rise to,
13 and forming the basis for, the petition are illegal.

14
15 **THE EVALUATOR HANDBOOK (PROTOCOL) HAS BEEN DETERMINED TO BE AN**
16 **ILLEGALLY ADOPTED (UNDERGROUND) REGULATION**

17 Under the *Administrative Procedure Act* [APA], the OAL is tasked with determining
18 whether state agencies comply with the applicable California laws when they enact
19 regulations. In a determination issued on August 15, 2008, the OAL explained the limits of its
20 authority to conduct such a rule:

21
22 Our review is limited to the sole issue of whether the challenged rule meets the
23 definition of a “regulation” as defined in Government Code section 11342.600 and is
24 subject to the Administrative Procedure Act (APA). If a rule meets the definition of a
25 “regulation,” but was not adopted pursuant to the APA and should have been, it is an
26 “underground regulation” as defined in California Code of Regulations, title 1, section
27 250.

28 (2008 OAL Determination, attached hereto as Exhibit “A”, p. 1).

1 In this 2008 determination, the OAL was called upon to decide whether portions of the
2 DMH's "Clinical Evaluator Handbook Standardized Assessment Protocol (2007¹)" (hereafter
3 "Protocol") constituted an underground regulation. A copy of the Handbook/protocol is
4 attached as Exhibit "B". The OAL's determination addressed ten specific elements of the
5 Protocol that qualified as underground regulations:
6

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

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

13
14 3. Page 4, section titled "Special requests from Courts & Attorneys": "DMH expects
15 that evaluators will notify the SOCP [Sex Offender Commitment Program] Unit in
16 Sacramento of all Court Orders and Attorney Requests that do not conform to the
17 policies and procedures. DMH will then direct the evaluator in his/her response to
18 such orders/requests."
19

20
21 4. Pages 9-11, section titled "The Clinical Interview": This section instructs the
22 evaluator how to conduct the interview.

23 5. Page 9, section titled "Beginning the SOCP Evaluation": "In 'update' or 'replacement
24 interview,' the court may issue an order that the evaluation be tape recorded, and/or an
25 attorney be allowed to be present. The evaluator should comply with that order...."
26
27

28

¹ The DMH protocol, which was in effect when the original petition was filed and/or
when updated evaluations were completed, is similar or identical to the 2007 version

1 6. Page 11, section titled “Historical Information”: “Reliable history and prior clinical
2 evaluations from the inmate’s records should be used to provide a basis for decision
3 making in [Sexually Violent Predator] evaluation.”
4

5 7. Page 14, section titled “Subpoenas & Depositions”: “If you receive such a
6 subpoena, notify DMH who will advise you how to proceed.”
7

8 8. Page 20, section titled “Psychological Testing”: “While evaluators may organize
9 their risk assessment in their own unique way, they must rely on the guidelines of this
10 protocol and include the following elements of risk assessment.”
11

12 9. Pages 16-32, section titled “SOCP Clinical Evaluation Protocol (Annotated)”: this
13 section contains detailed mandatory instructions in every facet of the clinical evaluation.
14

15 10. Page 35, section titled “[Sexually Violent Predator] Commitment Extension
16 Evaluations”: “Since the person has been committed as [a Sexually Violent Predator]
17 by the court for ‘appropriate treatment’ (Welf. & Inst. Code § 6604), the department
18 believes that a person must finish the program, including the completion of a period of
19 outpatient supervision....”
20

21 (2008 OAL Determination, Exhibit “A”, p. 2). Although DMH contended that none of these
22 items qualified as regulations, the OAL disagreed. Instead, the OAL noted that under
23 California Supreme Court precedent, a regulation is subject to the APA found in *Government*
24 *Code* § 11340 et seq. if it
25

26 has two principle identifying characteristics. First, the agency must intend its rule to
27 apply generally, rather than in a specific case. The rule need not, however, apply
28

in respects pertinent to the OAL determination.

1 universally; a rule applies generally so long as it declares how a certain class of cases
2 will be decided. Second, the rule must implement, interpret, or make specific the law
3 enforced or administered by the agency, or govern the agency's procedure.

4 (*Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571, quoted at
5 2008 OAL Determination Exhibit "A" at 6.). As for the first principle, the OAL determined that
6 each of the ten challenged elements applied generally either to all evaluators or all inmates
7 referred by the CDC for evaluation or both. (2008 OAL Determination, Exhibit "A" at 6-9.) .

8 In evaluating the second *Tidewater* element, the OAL noted that the
9 Handbook/protocol, itself, stated, on page 2,
10

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

18 (2008 OAL Determination No. 19 at 9. Emphasis added by OAL.) Thus, the OAL concluded
19 that the challenged provisions of the Protocol were implementing or making specific the
20 provisions of the SVP Law and dictated that the procedures the DMH would use to implement
21 the law. Therefore, OAL determined the second *Tidewater* criteria was met. (2008 OAL
22 Determination, Exhibit "A" at 9-10.)

23 Finally, the OAL noted that the Department of Mental Health did not contend that the
24 Handbook/protocol fit within any exceptions to the requirements relating to the enactment of
25 administrative procedures. Nor does the *WIC* expressly exempt the Protocol from the APA .
26 "When the legislature has intended to exempt regulations from the APA, it has done so by
27
28

1 clear, unequivocal language.” *United Sys. of Ark. v. Stamison*, 63 Cal. App. 4th, 1001, 1010.
2 Nothing in the language of the statute or in the legislative history indicates that the legislature
3 intended to exempt the Protocol from the APA. *See Cal. Wel. & Inst. Code*, §§ 6600 and
4 6601. As a result, the OAL concluded that the Protocol met “the definition of a ‘regulation’ as
5 defined in *Government Code* § 11342.600 that should have been adopted pursuant to the”
6
7 Administrative Procedures Act. (2008 OAL Determination, Exhibit “A” at 13.). At a minimum,
8 the adoption of the regulations (Handbook/protocol) should have followed the established APA
9 procedures:

10 The APA establishes the procedures by which state agencies may adopt regulations.

11 The agency must give the public notice of its proposed regulatory action (*Gov. Code*,
12 §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a
13 statement of the reasons for it (*Gov. Code*, § 11346.2, subds. (a), (b)); give interested
14 parties an opportunity to comment on the proposed regulation (*Gov. Code*, § 11346.8);
15 respond in writing to public comments (*Gov. Code*, §§ 11346.8, subd. (a), 11346.9);
16 and forward a file of all materials on which the agency relied in the regulatory process
17 to the Office of Administrative Law (*Gov. Code*, § 11347.3, subd. (b)), which reviews
18 the regulation for consistency with the law, clarity, and necessity (*Gov. Code*, §§
19 11349.1, 11349.3).

20
21 (*Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal. 4th 557, 568-569). The
22 APA procedures for adoption of regulations were not followed by DMH.

23
24 While the OAL’s determination that the Protocol was an invalid, underground regulation
25 is not binding on this court, it is, under California law, “entitled to due deference.” (*Grier v.*
26 *Kizer* (1990) 219 Cal.App.3d 422, 428, overruled on other grounds) However, case law
27 affirms that unless the agency promulgates a regulation in substantial compliance with the
28 APA, the regulation is without legal effect (*Armistead v. State Personnel Board*, (1978) 22

1 Cal.3d 198) and is entitled to no weight. (*Jones v. Tracy School Dist.* (1980) 27 Cal. 3d 99,
2 107). Moreover, the analysis of the OAL in its determination is legally unassailable. It is
3 impossible to reasonably claim that the challenged provisions of the protocol were not
4 intended by DMH to apply generally rather than to a specific case, or that they were not
5 intended the implement a law enforced or administered by the agency. As the OAL's
6 determination noted, the Handbook/protocol, itself, specifically stated that it contained the
7 "required standardized assessment protocol" required under *WIC* § 6601, subdivision (c).
8 (Exhibit "A" at 9.) Given this admission in the protocol itself, and the failure of DMH to claim
9 that they were excused from complying with the APA, the binding effect of the OAL's
10 determination is really beside the point. The provisions of the protocol challenged in the OAL
11 determination were illegally adopted underground regulations.
12

13
14 Since underground regulations are invalid (*Morning Star Company v. State Board of*
15 *Equalization* (2006) 38 Cal.4th 324, 328) and are "void and not entitled to any deference."
16 (*Tidewater, supra, 14 Cal.4th at 577*) the protocol which DMH created in response to *WIC* §
17 6601, subdivisions (c) and (d) for the purpose evaluating individuals to determine whether they
18 qualify as sexually violent predators is invalid, void, and entitled to no deference.
19

20
21 **THE REGULATION BEING INVALID, VOID AND ENTITLED TO NO DEFERENCE, THE**
22 **EVALUATIONS SUPPORTING THE PETITION(S) ARE NULL RESULTING IN THE**
23 **PETITION(S) BEING VOID**

24
25 *WIC* § 6601, subdivision (c), requires that a potential sexually violent predator be
26 evaluated "in accordance with the standardized assessment protocol, developed and updated
27 by the State Department of Mental Health." The standardized protocol that purportedly fulfilled
28 this statutory requirement is now established as a nullity and completely void. As a result,

1 DMH and the State of California in general, failed to comply with *WIC* § 6601, subdivision (c)
2 in the course of committing respondent as a sexually violent predator.

3 Action undertaken by state agencies pursuant to underground regulations has been
4 found to be void, (*Union of American Physicians & Dentists v. Kizer*,(1990) 223 Cal. App. 3d
5 490, 502; *Ligon v. State Personnel Board* (1981) 123 Cal.App. 3d 5583; *Morningstar*
6 *Company, supra*, 38 Cal. 4th, 324; *Grier v. Kizer, supra*, 219 Cal.App. 3d 422). In this case,
7 *WIC* 6601, subdivision (d) authorizes the district attorney to file a petition seeking the
8 commitment of a person as a sexually violent predator only after the person has been found to
9 be a sexually violent predator by two qualified evaluators in accordance with the Department
10 of Mental Health's protocol. Since the protocol is void, these evaluators could not, and did
11 not, evaluate respondent in compliance with this statutory requirement. As a result, the district
12 attorney did not have the authority, under the statute, to file a petition seeking respondent's
13 commitment. The evaluations forming the basis for the petition were void, resulting in the
14 petition itself being a nullity. Consequently, all proceedings conducted pursuant to the null and
15 void petition herein are invalid and the petition should be dismissed.
16
17
18
19

20 **THE EVALUATIONS ARE AND WERE INFECTED WITH MATERIAL LEGAL ERROR**

21 In a sense, the situation in respondent's case is the flip side of the situation in *People v.*
22 *Superior Court (Ghilotti)* (2002) 27 Cal.4th 888. In *Ghilotti*, the Supreme Court determined
23 that the Department of Mental Health did not have the authority to seek a sexually violent
24 predator commitment in the absence of valid, legal findings by two experts that the defendant
25 qualified as a sexually violent predator. (*Ghilotti, supra*, 27 Cal.4th at 908-909.) The Supreme
26 Court specifically determined that "a petition for commitment or recommitment may not be filed
27 unless two evaluators, appointed under the procedures specified in section 6601, subdivisions
28

1 (d) and (e), have concurred that the person currently meets the criteria for commitment under
2 the SVPA.” (*Ghilotti, supra*, 27 Cal.4th at 909.) Here, being that the evaluators in
3 respondent’s case did not comply with the procedures from section 6601, subdivision (d), the
4 district attorney, based upon the analysis of the California Supreme Court, could not file a
5 petition.
6

7 The *Ghilotti* court then determined that when the Department does not receive two
8 evaluations finding that the defendant qualifies as a sexually violent predator, it may still
9 request the filing of a petition if it believes that one or both of the evaluations is infected with
10 material legal error. (*Ghilotti, supra*, 27 Cal.4th at 912-913.) The Supreme Court also held
11 that
12

13 Similarly, if the Director has obtained reports that do concur the person meets the
14 criteria for commitment or recommitment, and a petition is filed on that basis, the
15 evaluators’ reports should also be attached to the petition. The person may then file a
16 pleading challenging the petition’s validity on grounds that one or more of the
17 supposedly concurring reports are infected by legal error.
18

19 (*Ghilotti, supra*, 27 Cal.4th at 913. Emphasis in original.) The *Ghilloti* court further explains:

20 On the other hand, the statute does not allow the evaluators utter free rein. Instead, it
21 imposes certain specific standards on their assessments. They must examine the
22 person "**in accordance with a standardized assessment protocol**" that considers
23 "diagnosable mental disorders, as well as various factors," including "criminal and
24 psychosexual history, type, degree, and duration of sexual deviance, and severity of
25 mental disorder," which factors are "known to be associated with the risk of reoffense
26 among sex offenders." (§ 6601, subd. (c)). On this basis, the evaluators are to answer
27 a crucial question, i.e., whether "the person has a diagnosed mental disorder so that he
28

1 or she is *likely* to engage in acts of sexual violence *without appropriate treatment and*
2 *custody.*" (*Id.*, subd. (d), italics added.) The evaluators' *professional* judgment is
3 therefore to be exercised within **a specified legal framework**, and their legally
4 accurate understanding of the statutory criteria is crucial to the Act's proper operation.
5 (*Ghilloti*, supra, 27 Cal.4th at 963-964 [emphasis added]).
6

7 The fact that the evaluations were based upon a protocol that was illegally adopted
8 and, for that reason, void, means that those evaluations were infected with material legal
9 error. As the Supreme Court held in *Ghilloti*, absent legal evaluations, there is no authority in
10 the statute to file a petition.
11

12 The SVPA certainly has statutory provisions calling for the evaluation and commitment
13 of sexually violent predators; however, those statutes cannot be applied without the illegally
14 adopted underground regulations. Without the DMH's protocol, the rest of the statute is
15 inoperative. It is the procedures, and only the procedures, that were illegally adopted that
16 permitted the determination that respondent was a sexually violent predator and the filing of
17 the petition seeking his commitment.
18

19 Under *WIC* § 6601, subdivision (h), DMH can only request that a district attorney file a
20 petition for commitment if DMH has determined that a person is a sexually violent predator
21 following the procedures in section 6601. In respondent's case, because the Department of
22 Mental Health used an illegal underground regulation to create its standardized assessment
23 protocol, the referral to the district attorney was invalid. This means that the petition, itself,
24 was unauthorized. Yet, XXXXXXXXXXXXX has been incarcerated under the auspices of the
25 DMH since the original invalid petition was filed in 2003. Even if the matter were remanded for
26 new evaluations because the underlying evaluations were/are infected with legal error, it is
27 now too late to file a petition. *WIC* 6601(a)(2) only allows a petition to be filed if the person is
28

1 serving a prison sentence, a parole revocation term or a hold placed pursuant to *WIC*
2 §6601.3. None of these custody requirements are currently in effect. Respondent's prison
3 sentence has expired and there is no valid civil commitment in effect at this time. As a result,
4 there is no longer any jurisdiction to file a valid petition seeking his continued commitment.
5

6 **THE CIVIL COMMITMENT OF XXXXXXXXXXXXX PREDICATED ON THE**
7 **EVALUATIONS MADE UNDER THE INVALID PROTOCOL IS A VIOLATION OF HIS**
8 **RIGHT TO DUE PROCESS**

9 The proceedings to determine whether XXXXXXXXXXXXX is in fact a SVP under the
10 *WIC* are predicated on the psychological evaluations and determinations made by the
11 psychological evaluators. Those psychological evaluations were made pursuant to the invalid
12 Protocol. The proceedings and evaluations may lead to XXXXXXXXXXXXX's
13 institutionalization for an indeterminate period of time. Where XXXXXXXXXXXXX's individual
14 liberty is at stake, he has a clear right to due process protection. XXXXXXXXXXXXX's
15 institutionalization based on the invalid Protocol is a direct violation of his due process rights.

16 In *People v. Carmony*, the court agreed that the transfer of a prison inmate to a mental
17 hospital for involuntary treatment is a deprivation of liberty that requires due process
18 protection. 99 Cal. App. 4th 317, 326 (2002) (*citing Vitek v. Jones*, 445 U.S. 480, 493-494
19 (1980)). There are four relevant factors to determining what process is due:

20 "1) the private interest that will be affected by the official action; 2)
21 the risk of an erroneous deprivation of such interest through the
22 procedures used; 3) the government's interest, including the
23 function involved and the fiscal and administrative burdens that the
24 additional or substitute procedural requirement would entail; and 4)
25 the dignitary interest in informing individuals of the nature, grounds,
26 and consequences of the action and in enabling them to present
27 their side of the story before a responsible government."
28

1 *People v. Otto*, 26 Cal.4th 200, 210 (2001) (citing *In re Malinda S.* 51 Cal.3d 368, 383
2 (1990)).

3 **1. XXXXXXXXXXXXX's Freedom Is A Compelling Private Interest That**
4 **Will Be Affected By The Official Action.**

5 Private interests affected by the official action are the significant limitations on the
6 individual's liberty, the stigma of being classified as an SVP, and subjection to unwanted
7 treatments. *Id.*; see also *Vitek*, *supra*, 445 U.S. at 495. XXXXXXXXXXXXX will be deprived of
8 such liberties as the freedom to find gainful employment, the freedom to reside with his family,
9 and the opportunity to rejoin society. These liberties are extremely valuable and protected by
10 the Fifth and Fourteenth Amendments of the Constitution.

11
12 **2. Under The Current Procedures, There Is A High Risk Of An**
13 **Erroneous Deprivation Of XXXXXXXXXXXXX's Liberty.**

14 Failure of the Protocol to comply with the APA will lead to an erroneous deprivation of
15 XXXXXXXXXXXXX's liberty interest. Had the Department of Mental Health complied with the
16 APA, an opportunity would have been given for interested parties to comment on the
17 proposed regulation. Since its promulgation, the Protocol has received criticism from many
18 attorneys and experts. The Protocol is filled with flaws such as the failure to include relevant
19 case law and literature.

20
21 One example is the Protocol's instructions to evaluators on how to evaluate an
22 individual's volitional impairment. The Protocol defines volitional impairment as "a condition in
23 which individuals have difficulty in controlling their behavior." (2007 Protocol, Exhibit "A", page
24 8). Yet nowhere does the Protocol include the pertinent fact that the condition must be
25 current. *WIC* § 6600(a)(3). The Protocol goes on to cite case law for the purpose of providing
26 clarification on the issue. (Exhibit "A", page 19). However, the Protocol fails to mention
27 important, relevant cases, which are necessary in order to make a complete and accurate
28 evaluation based on current law. See *People v. Williams*, 31 Cal. 4th 757 (2003) [where

1 Respondent showed obvious recent problems controlling himself]; *In re Anthony C.*, 138 Cal.
2 App. 4th 1493 (2006) [clarifying that moderate risk for re-offense cannot be construed as
3 serious difficulty in controlling behavior]; *People v. Galindo* 142 Cal. App. 4th 531 (2006)
4 [where commitment pursuant to Cal. *Wel. & Inst. Code*, § 1800 required showing Respondent
5 attempted to control his behavior, failed to do so, and acted out]; *People v. Bowers*, 145 Cal.
6 App. 4th 870 (2006) and *People v. Zapisek*, 147 Cal. App. 4th 1151 (2007) [both as examples
7 where Respondent showed actual symptoms of current mental disorder and resulting behavior
8 reflected serious difficulty in control].

9 Instead of including the pertinent case law, the Protocol gives instructions and
10 examples for evaluating the individual's volition that are inconsistent with the findings in these
11 cases. (Exhibit "A", page 19). The court in *Kansas v. Crane* makes it clear that there must be
12 current indicia of serious difficulty in controlling behavior. 534 U.S. 407 (2002). However, the
13 examples provided in the Protocol are not examples of current serious difficulty in controlling
14 behavior, but rather based on past behavior that may or may not be a result of current serious
15 difficulty in controlling behavior.

16 The Protocol also requires a determination of the inmate's likelihood to engage in future
17 sexually violent predatory behavior based upon the presence of a diagnosed mental disorder.
18 (Exhibit "A", page 29). The outlined approach for making this determination contains many
19 problems.

20 The Protocol instructs the evaluators to use the Static-99 risk assessment instrument to
21 make an actuarial risk estimate. (Exhibit "A", page 21). The Protocol then lists other risk
22 assessment instruments the evaluators may use in addition to Static-99, described as
23 "validated" and "appropriate". (Exhibit "A", page 21). However, the Protocol makes no
24 mention of the significant limitation of these instruments or that commentators have deemed
25 the use of multiple actuarials inappropriate and misleading. Once the evaluators have made
26 an estimate from the actuarial instrument, the Protocol allows them to adjust that figure up or
27 down based on the presence or absence of risk factors for sexual recidivism. (Exhibit "A",
28 pages 21- 23). This amounts to using unaided clinical judgment to adjust an actuarial. There

1 is no support for this method. In addition, using the same factors to adjust the actuarial which
2 were already factors used in determining the base level of risk under Static-99 amounts to
3 double counting.

4 In addition to the static risk factors, the evaluators are to consider additional risk
5 factors, referred to as “dynamic risk factors,” found in the Stable-2000. (Exhibit “A”, page 23
6 (now “Stable-2007”). However, the Protocol admits to the serious limitations of the Stable-
7 2000 and notes that it was based on a completely different community sample. Nevertheless,
8 the Protocol recommends its use to the evaluators as a guide for assessing dynamic risk
9 factors. (Exhibit “A”, page 23). The serious limitations of the Stable-2000 clearly indicate that it
10 should not be used whatsoever in making the determination.

12 These examples are just a few of the many areas where the Protocol is flawed and
13 significantly affect the assessment of XXXXXXXXXXXX. Had there been an opportunity for
14 public comment, many of the inconsistencies and the lack of pertinent information in the
15 Protocol would have been brought to the attention of the Department of Mental Health who is
16 required to report that information to the OAL. This process may result in significant changes
17 and modifications to the existing Protocol.

19 Before an SVPA commitment proceeding may be filed, the evaluators must make a
20 concurrent recommendation that the person meets the criteria for commitment. *People v.*
21 *Superior Court (Ghilotti)*, 27 Cal 4th 888 (2002). The evaluators use the then-existing invalid
22 Protocol to form the basis of their opinion. If there appears a reasonable probability that the
23 evaluator’s opinion was influenced by the evaluator’s legal error or misrepresentation of the
24 likely to re-offend standard, then the evaluator’s recommendation is invalid. *Id.*; *see also Otto*,
25 26 Cal.4th at 210, 211 (citing *Addington v. Texas*, 441 U.S. 418, 429 (1979) [If the facts used
26 by the expert psychiatrists and psychologists to determine whether the individual is in need of
27
28

1 commitment are unreliable, a significant portion of the foundation of the resulting SVP finding
2 is suspect]. Had there been changes made to the Protocol after the period for public comment,
3 the entire basis upon which the evaluators made their determinations would have been
4 different. A differing Protocol may result in a determination by the evaluators that
5 XXXXXXXXXXXXX was not an SVP and thus not subject to trial. Even if the evaluators were to
6 reach the same conclusion as to XXXXXXXXXXXXX, their testimony at trial may differ had the
7 Protocol been altered or corrected pursuant to appropriate adoption procedures.

9 **3. The Fiscal And Administrative Burdens To The Government Are**
10 **Minimal For Ensuring That XXXXXXXXXXXXX's Due Process Rights Are**
11 **Not Violated.**

12 In order to follow the requirements of the APA, all agencies will undergo some financial
13 costs. However, any small financial burden that the government may endure in order to
14 comply with the APA is heavily outweighed by XXXXXXXXXXXXX interest in maintaining his
15 freedom and in not having to suffer the stigma and effects of being classified a SVP.

16 **4. There Is A Strong Interest In Informing Individuals Of The Nature,**
17 **Grounds, And Consequences Of The Action And In Enabling Them**
18 **To Present Their Side Of The Story Before A Responsible**
19 **Government.**

20
21 "A major aim of the APA was to provide a procedure whereby people to be affected
22 may be heard on the merits of the proposed rules." *Armistead*, 22 Cal. 3d at 204. As
23 discussed above, the public was never afforded the opportunity to be heard on the Protocol.
24 Another aim was to provide those to be affected by the regulation with notice of the law's
25 requirements. *Ligon v. State Personnel Board* (1981) 123 Cal. App. 3d 583, 204-205. Neither
26 the inmates nor the psychological evaluators received such notice prior to the Protocol's
27 promulgation
28

1 **CONCLUSION**

2 Instead of complying with California law and following the mandatory procedures of the
3 APA to prepare and adopt the regulations applicable to the screening and evaluation process
4 to determine whether respondent qualified as a sexually violent predator, the Department of
5 Mental Health created illegal, underground regulations which are void and invalid. As a result,
6 the determination that respondent qualified as a sexually violent predator was not made in
7 compliance with the explicit statutory instructions. Moreover, the reliance by DMH and its
8 evaluators on the invalid, illegal protocol violates Respondent’s right to due process.
9

10 Because respondent’s legal time of confinement has long since expired, it is now too
11 late to file a new petition seeking his commitment as a sexually violent predator. Therefore,
12 the illegal and void petition herein should be dismissed and respondent must be released.
13

14
15 Dated: October 2, 2008

16 Respectfully Submitted:
17 DOREEN B. BOXER
18 Public Defender

19 By:

20 _____
21 JEFFREY A. LOWRY
22 Deputy Public Defender
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