Filed 11/14/14 Arnold v. Superior Court CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

STEPHEN ARNOLD, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Parties in Interest.	B254887 (Super. Ct. No. ZM011449) (Susan M. Speer, Judge)

Original proceeding. Petition for Writ of Mandate. Denied with directions.

Ronald L. Brown, Public Defender of Los Angeles County, Albert J. Menaster, Ellen Coleman and Jack T. Weedin, Deputy Public Defenders, for Petitioner.

Jackie Lacey, District Attorney of Los Angeles County, Roberta Schwartz and Matthew Brown, Deputy District Attorneys, for Real Party in Interest.

I. INTRODUCTION

Defendant, Stephen Arnold, is the subject of a commitment petition under the Sexually Violent Predator Act, Welfare and Institutions Code[1] section 6600 et seq. Defendant's mandate petition challenges an order authorizing a mental examination by Dr. Richard Romanoff, a psychologist retained by the Los Angeles County District Attorney (district attorney). Consistent with *People v. Landau* (2013) 214 Cal.App.4th 1, 24-27 (*Landau*), we hold the respondent court had discretion to order a mental evaluation of an alleged sexually violent predator by Dr. Romanoff. But because no proper order has been issued by the respondent court, we address no issues concerning whether an abuse of discretion has occurred. That question plus issues relating to documents that may be reviewed by Dr. Romanoff are not presently ripe for decision. Once the remittitur issues, the respondent court may exercise its discretion on those matters.

II. THE SEXUALLY VIOLENT PREDATOR ACT

The trial in this matter is pending. Several essential steps precede an alleged sexually violent predator's civil commitment trial. (§§ 6601-6603; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1144-1147.) First, the Department of Corrections and Rehabilitation screens inmates in its custody to determine whether an individual is likely to be a sexually violent predator. (§ 6601, subds. (a) & (b).) Section 6601, subdivision (b) states that an inmate who is likely to be a sexually violent predator is then referred to the State Department of State Hospitals (hospitals department). (§ 6601, subd. (b).) The hospitals department is to then evaluate the inmate to determine whether the person is a

---

[1] Further statutory references are to the Welfare and Institutions Code except where otherwise noted.

sexually violent predator. (§ 6601, subd. (c).[2]) Prior to June 27, 2012, the evaluation of an inmate referred by the Department of Corrections and Rehabilitation was performed by the former State Department of Mental Health (mental health department). However, effective June 27, 2012, the mental health department was eliminated. (Sen. Com. on Budget and Fiscal Review, Analysis of Assem. Bill No. 1470 (2011-2012 Reg. Sess.), as amended June 13, 2012, p. 1; Sen. Rules Com., 3d reading analysis of Assem. Bill No. 1470 (2011-2012 Reg. Sess.), as amended June 13, 2012, p. 1; Assem. Budget Com. Assem. Floor Analysis of Assem. Bill No. 1470 (2011-2012 Reg. Sess.), as amended June 13, 2012, concurrence in Sen. Amendments, p. 1.) The hospitals department was created and it now conducts the sexually violent predator evaluations. (Stats. 2012, ch. 24, §§ 63, 139.) Later in our opinion, references will be made to evaluations performed under the aegis of the former mental health department. Those evaluations are the ones now performed by the hospitals department.

Second, the hospitals department evaluates the individual to determine whether he or she meets the criteria for commitment as a sexually violent predator. (§ 6601, subd. (c).) Those criteria are set forth in section 6600, subdivision (a)(1): "'Sexually violent

---

[2] Section 6601, subdivisions (b) and (c) state: "(b) The person shall be screened by the Department of Corrections and Rehabilitation and the Board of Parole Hearings 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. This screening shall be conducted in accordance with a structured screening instrument developed and updated by the State Department of State Hospitals in consultation with the Department of Corrections and Rehabilitation. If as a result of this screening it is determined that the person is likely to be a sexually violent predator, the Department of Corrections and Rehabilitation shall refer the person to the State Department of State Hospitals for a full evaluation of whether the person meets the criteria in Section 6600. [¶] (c) The State Department of State Hospitals shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of State Hospitals, to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder."

predator' means a person [(1)] who has been convicted of a sexually violent offense against one or more victims and [(2)] 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." Only the second of the two elements is at issue in the present case. Hospitals department evaluations are conducted pursuant to a "standardized assessment protocol." (§ 6601, subd. (c).) Section 6601, subdivision (c) describes the protocol: "The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." To that end, the hospitals department issues a Clinical Evaluator Handbook and Standardized Assessment Protocol. (See <http://www.defenseforsvp.com/Resources/EvaluatorsHandbook/11-08EvaluatorHandbookRevised_pdf> [as of October 15, 2014].)

The hospitals department designates two licensed psychologists or psychiatrists to evaluate the alleged sexually violent predator. If those two professionals agree the individual meets the sexually violent predator criteria, the hospitals department asks the district attorney to file a commitment petition. (§ 6601, subd. (d).) If the two hospitals department designated professionals do not agree, it must select two non-state government professionals to evaluate the alleged sexually violent predator. In order for a commitment petition to be filed, the two independent professionals must agree that the alleged sexually violent predator meets the specified criteria. (§ 6601, subds. (e) & (f).) When the hospitals department requests that the prosecutor file a commitment petition, copies of the evaluation reports and supporting documents must be made available to the prosecuting attorney. (§ 6601, subds. (d) & (h).)

Third, the prosecuting attorney's office determines whether it concurs with the professional evaluations. (§ 6601, subd. (i).) In performing this function, the prosecuting attorney must have access to records relied on by the evaluators. (*People v. Dixon* (2007)

148 Cal.App.4th 414, 428-429; *People v. Martinez* (2001) 88 Cal.App.4th 465, 480.) If the prosecuting attorney determines it appropriate, a commitment petition is filed. (§ 6601, subd. (i).) Fourth, a superior court judge reviews the petition. The superior court judge determines whether there is probable cause to believe the named individual, if released from custody, is likely to engage in sexually violent predatory criminal conduct. (§ 6602, subd. (a).) If probable cause is not present, the commitment petition is dismissed. If probable cause is found, the matter proceeds to trial. (§ 6602.)

At trial, the alleged sexually violent predator is entitled to enumerated statutory rights: "A person subject to this article shall be entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf." (§ 6603, subd. (a).) The trier of fact must find *beyond a reasonable doubt* that the person is a sexually violent predator. (§ 6604.) The trier of fact must find the alleged sexually violent predator has a *currently diagnosed* mental disorder that makes him or her *presently* dangerous and likely to reoffend. (*Albertson v. Superior Court* (2001) 25 Cal.4th 796, 802; *Hubbart v. Superior Court, supra*, 19 Cal.4th at p. 1169.) In a jury trial, the verdict must be unanimous. (§ 6603, subd. (f).)

In the present case, as discussed below, defendant was evaluated by the hospitals department in 2007. But as of September 2013, his case had not been tried. Prior to 2000, the Sexually Violent Predator Act did not specifically provide for any updated or replacement evaluations when, as here, trial was delayed. In *Sporich v. Superior Court* (2000) 77 Cal.App.4th 422, 424, an alleged sexually violent predator had been awaiting trial for several years. The delay occurred while the constitutionality of the Sexually Violent Predator Act was being litigated in other courts. When a trial date became imminent, the district attorney successfully sought to compel a further post-probable-cause determination mental examination. (*Ibid.*) On appeal from the trial court's order,

Division Six of the Court of Appeal for this appellate district held section 6601, subdivisions (c)–(e) did not provide for any further examinations. Therefore, our Division Six colleagues held the trial court abused its discretion in granting the district attorney's motion. (*Sporich v. Superior Court, supra,* 77 Cal.App.4th at pp. 425-427.) The Court of Appeal further held, assuming without deciding that the Civil Discovery Act applied, the district attorney had not shown good cause for a further examination. (*Id.* at pp. 427-428, citing former Code Civ. Proc., § 2032, subd. (d).) Section 6603, subdivision (c) was amended in response to the *Sporich* decision to permit the prosecutor to secure updated evaluations under specified circumstances. (Stats. 2000, ch. 420, § 2, pp. 3138-3139B[3]; Assem. Com. on Public Safety, Analysis of Sen. Bill No. 2018 (1999-2000 Reg. Sess.) as amended May 1, 2000, pp. 6-8; Sen. Com. on Public Safety, Rep. on Sen. Bill No. 2018 (1999-2000 Reg. Sess.) as amended Apr. 11, 2000, p. 6.) Section 6603 has been subsequently amended on a number of occasions. The current version became effective on September 29, 2012. (Stats. 2012, ch. 790, § 2.)

---

3 Section 6603, subdivision (c) provided after the 2000 amendment: "If the attorney petitioning for commitment under this article determines that updated evaluations are necessary in order to properly present the case for commitment, the attorney may request the State Department of Mental Health to perform updated evaluations. If one or more of the original evaluators is no longer available to testify in court proceedings, the attorney petitioning for commitment under this article may request the State Department of Mental Health to perform replacement evaluations. When a request is made for an updated or replacement evaluation, the State Department of Mental Health shall perform the requested evaluations and forward them to the petitioning attorney. However, updated or replacement evaluations shall not be performed except as necessary to update one or more of the original evaluations or to replace the evaluation of an evaluator that is no longer available for testimony. These updated or replacement evaluations shall include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews of the person being evaluated, either voluntarily or by court order. If an updated or replacement evaluation results in a split opinion as to whether the subject meets the criteria for commitment, the State Department of Mental Health shall conduct two additional evaluations in accordance with subdivision (f) of Section 6601." (Stats. 2000, ch. 420, § 2, pp. 3138-3139.)

III. Proceedings In The Present Case

The Department of Corrections and Rehabilitation found defendant was likely to be a sexually violent predator. Defendant was referred to the mental health department. In early 2007, two psychologists under contract with the mental health department, Dr. Mark Miculian and Dr. Romanoff, evaluated defendant pursuant to section 6601, subdivision (c). Drs. Miculian and Romanoff both found defendant met the criteria for commitment as a sexually violent predator under section 6600, subdivision (a). On March 22, 2007, the Los Angeles County District Attorney filed a commitment petition. On April 24, 2007, the respondent court found probable cause to believe defendant was likely to engage in sexually violent predatory criminal behavior upon his release from custody. (§ 6601.5.) Neither the court nor the litigants made an effort to resolve the petition until September 2013. Dr. Romanoff's contract with what by then had become the hospitals department ended effective December 31, 2013. The record sheds no light on Dr. Miculian's status.

On September 10, 2013, Deputy District Attorney Paula Gonzales requested replacement evaluations pursuant to section 6603, subdivision (c)(1). Ms. Gonzales's request was granted and defendant was examined by hospitals department evaluators, Drs. George Joseph Grosso and Laljit Sidhu. Each evaluator explained to defendant the purpose of the evaluation including confidentiality and mandatory reporting aspects. Defendant signed a "Notice of Evaluation as a Sexually Violent Predator." By reports dated November 30 and December 3, 2013, respectively, Drs. Grosso and Sidhu concluded defendant did *not* meet the criteria for commitment as a sexually violent predator. Hence, the replacement evaluators disagreed with the pre-petition evaluators. Dr. Sidhu's report lists the records that were reviewed in preparing the evaluation. Dr. Grosso's report states, "In preparation for this evaluation, all provided documents (approximately 22 volumes) in the patient's hospital record were reviewed and selected records utilized as pertinent."

The district attorney's office then independently retained Dr. Romanoff, one of the pre-petition evaluators. As noted above, Dr. Romanoff's contract with the hospitals department had ended on December 31, 2013. On January 17, 2014, Ms. Gonzales filed a motion pursuant to Code of Civil Procedure section 2032.020, subdivision (a) to permit Dr. Romanoff "to conduct mental examinations" and review defendant's records. Ms. Gonzales requested that Dr. Romanoff be given access to, "[A]ll medical records that were reviewed by all past and present evaluators. . . ." In support of the motion Ms. Gonzales declared: "The scope of the evaluation is to determine whether [defendant] meets the criteria of a Sexually Violent Predator and a review of all medical records/criminal history and institutional records at Coalinga State Hospital and a clinical interview. Also an application of current actuarial instruments to determine sexual recidivism." Ms. Gonzales attached proposed orders authorizing release to Dr. Romanoff of "records that fall under [sections] 6601, 6603." Ms. Gonzales also sought a protective order: "IT IS HEREBY ORDERED that any party or person receiving medical records, in conjunction with the above entitled case, is prohibited from using or disclosing the protected health and treatment information for any purpose other than litigation or proceedings relating to the [defendant] for which such information was requested."

Defendant opposed the motion. Defendant's opposition raised two points. First, defendant argued there was no legal authority for a mental examination by a professional independently retained by the district attorney. Second, defendant argued his medical and psychological records were privileged and confidential. Defendant asserted his records were not subject to review by Ms. Gonzales or Dr. Romanoff.

The hearing on the motion was held on January 28, 2014. At the hearing, defendant's attorney, Deputy Public Defender Ellen Coleman, asserted only hospitals department evaluators are authorized to examine alleged sexually violent predators. Ms. Coleman reasoned this was because hospitals department evaluators are contractually obligated to undergo training and to follow an established protocol. That protocol is established by the hospitals department. Ms. Coleman argued in part, "[Dr. Romanoff] is required by statute to follow [hospitals department protocol] and be current and

authorized by the [hospitals department] in order for him to be allowed to do this type of interview."

On January 28, 2014, the respondent court granted the motion. The respondent court orally ruled, "[T]he Court is granting that Dr. Romanoff be allowed to evaluate the defendant pursuant to [Code of Civil Procedure section] 2032.020(A) . . . ." The respondent court's minute order states, "The Court grants the appointment of Dr. Stephen [*sic*] Romanoff to evaluate the [defendant]." The respondent court stayed its order to allow defendant to seek review. The respondent court did not expressly rule on Dr. Romanoff's access to defendant's Coalinga State Hospital records. The respondent court did not issue any written orders. The respondent court did not comply with Code of Civil Procedure section 2032.320, subdivision (d) by specifying the scope of the examination and other matters.

On February 27, 2014, one month after it ruled, the respondent court supplemented the record to include a declaration by Mark Hellman, the deputy director of hospitals department's Forensic Services Unit. The Forensic Services Unit implements the Sex Offender Commitment Program. (<http://www.dsh.ca.gov/Forensics/SOCP.asp> [as of Oct. 15, 2014].) Mr. Hellman's February 20, 2014 declaration states: "It is the [hospitals department's] position that: [¶] a. The Sexually Violent Predator Act (SVPA) requires that petitions for commitment as a Sexually Violent Predator (SVP) be based on evaluations performed by evaluators designated by the [hospitals department director]. [¶] b. The [Sexually Violent Predator Act] allows for updates on the evaluations prior to trial. [¶] c. The [Sexually Violent Predator Act] requires that evaluators who are no longer available be replaced. [¶] d. The [Sexually Violent Predator Act] does not authorize the petitioning party to use any experts other than those evaluators designated by the [hospitals department's director]. [¶] e. The [Sexually Violent Predator Act] does not authorize the petitioning party to hire an evaluator who is no longer available under the [Sexually Violent Predator Act] due to expiration of the evaluator's contract with [the hospitals department]." The mandate petition was filed on March 13, 2014, after the filing of Deputy Director Hellman's declaration.

IV. DISCUSSION

A. Defendant's Contentions And The Issues Cognizable At This State Of The Proceedings

In support of his mandate petition, defendant argues: *Landau, supra,* 214 Cal.App.4th at pages 24-27, was wrongly decided in holding the prosecuting attorney may independently retain evaluators; the Sexually Violent Predator Act comprehensively and preemptively governs evaluations; the Sexually Violent Predator Act controls access to medical records; even if Code of Civil Procedure section 2032.320, subdivision (a) is applicable, the district attorney did not establish good cause for a mental examination as statutorily required; and defendant's Coalinga State Hospital records are privileged and confidential.

At oral argument, we questioned whether some of the foregoing issues were properly before us. The respondent court never signed an order pursuant to Code of Civil Procedure section 2032.320, subdivision (d) specifying: the time, place and manner of the examination; the diagnostic tests and procedures that were to be followed; and the conditions, scope and nature of the mental examination. Code of Civil Procedure section 2032.320, subdivision (d) states in part, "An order granting a . . . mental examination shall specify the person or persons who may perform the examination, as well as the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination." (See *Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249, 252-253, 259-262.) Hence, any issues concerning the scope of the examination and attendant questions of an abuse of discretion are not ripe for determination until the respondent court actually issues an order.

Further, during oral argument, we explained we had no record concerning documents that were to be reviewed by Dr. Romanoff. In the respondent court, defendant objected generally to the release of his state hospital records. He did not specify any particular records as privileged or confidential. No privilege log was submitted. On

January 28, 2014, the issue of an unspecified number of records was raised by the respondent court. The respondent court indicated that the unidentified records were in an envelope. The respondent court stated it had opened the envelope without reading the documents. The respondent court then indicated that it would review the documents for any privileged or inadmissible material. The parties stipulated the respondent court could review the documents. Those documents have not been provided to us. There is no evidence of a ruling by the respondent court in connection with any privilege question. We cannot resolve the privacy, constitutional and federal statutory issues raised by defendant without the challenged documents and the respondent court's ruling. (Cal. Rules of Court, rule 8.486(b)(1)(A)-(C); *Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186-187; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 15:188 et seq., pp. 15-94 et seq.)

There was extensive discussion at oral argument concerning our ability to determine whether an abuse of discretion had occurred. The written order specifying the conditions of the mental examination had not been prepared. We do not have defendant's unspecified documents reviewed by the respondent court. Nor do we have any ruling from the respondent court concerning those documents. During the discussion, we explained that other than the issue of the power of the court to order a mental examination, other controlling questions were not ripe for review. Defense counsel indicated that he wished to pursue the issue of whether the respondent court had the authority under any circumstances to order a mental examination. That issue is squarely ripe for review. And we explained during oral argument that other issues, once the respondent court rules, will be reviewable at that time. So it is clear, the only issue we will decide is whether a trial court conducting sexually violent predator proceedings has the legal authority to order a mental examination. Other issues remain for determination by the respondent court once the remittitur issues and, if a party is dissatisfied with that ruling, for our subsequent review.

B. Mental Examination

1. Standard of review

The controlling question before us is whether the respondent court had the power to order a mental examination by a psychologist retained by the district attorney. We determine that issue as a matter of law. (See, e.g., *People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071; *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 485; *People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347, 356.)

2. *Landau* is consistent with existing authority

Landau, supra, 214 Cal.App.4th at pages 24-27, involves an appeal from a Sexually Violent Predator Act commitment. In *Landau*, the defendant argued it was an abuse of discretion to compel a mental examination by Dr. Park Dietz who was independently retained by the prosecuting attorney. The petition had been pending for more than seven years. (*Id*. at p. 8.) The defendant had been tried three times. The first two trials ended in mistrial. (*Id.* at pp. 9-11.) Two mental health department evaluators initially found the defendant met the commitment criteria. (*Id.* at p. 9.) In subsequent years, the defendant had been examined multiple times by both mental health department evaluators and independently retained experts. At the third trial, Dr. Deitz testified for the prosecuting attorney. (*Id.* at p. 13.) Drs. Romanoff (then under a mental health department contract) and Theodore Donaldson testified for the defense. The Court of Appeal held the trial court did not abuse its discretion in compelling the defendant to undergo an examination by Dr. Dietz. (*Id.* at pp. 25-26.) The Court of Appeal reasoned: the Civil Discovery Act applied; Code of Civil Procedure section 2032.030, subdivision (a) authorizes a party to obtain a mental examination of another litigant when the mental condition of that party is in controversy; section 6603, subdivision (c)(1) does not

preclude requiring an alleged sexually violent predator to submit to a mental examination by a medical professional retained by the prosecuting attorney; and the trial court found good cause for the examination. (*People v. Landau*, *supra*, 214 Cal.App.4th at pp. 25-26.) The Court of Appeal concluded: "[W]e cannot say the [trial] court abused its discretion as a matter of law. Although repetitive examinations may become unduly burdensome in any case, they 'are permissible if there is a showing of good cause.' [Citation.] [A Sexually Violent Predator Act] case requires a *current* mental condition, and when resolution of the case spans several years, multiple examinations are likely to be the rule rather than the exception." (*Id.* at p. 26.) We agree with *Landau* insofar as it holds a trial court has the discretion to order a mental examination by a psychiatrist or psychologist independently retained by the prosecuting attorney.

We are unpersuaded by defendant's attempts to distinguish *Landau* or otherwise challenge its validity. First, *Landau* is consistent with statutory and decisional authority to the effect that the Civil Discovery Act applies in sexually violent predator litigation. The Legislature made no express provision for discovery in sexually violent predator litigation. (*Lee v. Superior Court* (2009) 177 Cal.App.4th 1108, 1123; *Sporich v. Superior Court*, *supra*, 77 Cal.App.4th at p. 427, fn. 2.) But sexually violent predator litigation is a special proceeding of a civil nature. (*People v. Yartz* (2005) 37 Cal.4th 529, 536-537; *People v. McDonald* (2013) 214 Cal.App.4th 1367, 1374; *People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 988.)

The Civil Discovery Act applies to litigation in "action[s]" including "special proceeding[s] of a civil nature." (Code Civ. Proc., §§ 2016.020, subd. (a), 2017.010.) Our Supreme Court has defined a special proceeding as follows: "Special proceedings . . . generally are 'confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity. [Citations.]' (*Tide Water Assoc. Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 822.) Special proceedings instead are established by statute. (3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 13, p. 66; see *In re Rose* (2000) 22 Cal.4th 430, 452.) The term 'special proceeding' applies only to a proceeding that is distinct from, and not a mere part of, any

underlying litigation. (*Avelar v. Superior Court* [(1992)] 7 Cal.App.4th 1270, 1275.) The term 'has reference only to such proceedings as may be commenced independently of a pending action by petition or motion upon notice in order to obtain special relief. [Citations.]' (*In re Sutter-Butte By-Pass Assessment* (1923) 190 Cal. 532, 537.)" (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 725; see 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 64, p. 135 ["The two chief characteristics of special proceedings are: (a) They are established by statute, and (b) the statutes usually (though not invariably) create new remedies unknown to the common law or equity courts"].) Obviously, sexually violent predator proceedings were not under the common law or equity practice a legal or equitable action. And the sexually violent predator statutes created new remedies unknown to the common law or equity courts. Thus, they fall within the ambit of Code of Civil Procedure section 2016.020, subdivision (a).

Decisional authority also holds the Civil Discovery Act generally applies in Sexually Violent Predator Act proceedings. (Code Civ. Proc., §§ 2016.010-2036.050; *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 381; *Lee v. Superior Court, supra,* 177 Cal.App.4th at pp. 1123-1124; *People v. Dixon* (2007) 148 Cal.App.4th 414, 442; *People v. Burns* (2005) 128 Cal.App.4th 794, 804; *Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677, 1686 [but summary judgment process inapplicable to sexually violent predator proceedings]; *People v. Angulo* (2005) 129 Cal.App.4th 1349, 1358, 1368; *People v. Superior Court* (*Cheek*), *supra,* 94 Cal.App.4th at pp. 987-988; *Leake v. Superior Court* (2001) 87 Cal.App.4th 675, 679, disapproved on another point in *People v. Yartz, supra,* 37 Cal.4th at p. 537; 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 163, p. 281; 2 Witkin, Cal. Evidence (5th ed. 2012) Discovery, § 6, p. 991; Couzens et al., Sex Crimes: Cal. Law and Procedure (2014) § 14:3 (4)(d)(i), p. 21; cf. *Baqleh v. Superior Court, supra,* 100 Cal.App.4th at pp. 490-491; but see *Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 738-740 [alleged sexually violent predator cannot be required to respond to admissions requests under Code of Civil Procedure section 2033.210].) The Civil Discovery Act, Code of Civil Procedure sections

2032.020, subdivision (a), and 2032.320, subdivision (a), authorizes a trial court to order a mental examination for good cause shown.

Further, an alleged sexually violent predator's mental condition is always at issue in proceedings such as this. (*People v. Angulo*, *supra*, 129 Cal.App.4th at p. 1366; see *People v. Gonzales* (2013) 56 Cal.4th 353, 387.) The permissible scope of discovery in the proceeding before us extends to information relevant to whether: the inmate has a "diagnosed mental disorder"; that disorder makes the inmate a danger to the health and safety of others; and the danger arises from the fact it is likely the inmate will engage in sexually violent criminal behavior. (§ 6600, subd. (a)(1); *Lee v. Superior Court*, *supra*, 177 Cal.App.4th at p. 1124; *People v. Superior Court* (*Cheek*), *supra*, 94 Cal.App.4th at pp. 989-990, 996.) As the Court of Appeal observed in *People v. Superior Court* (*Cheek*), *supra*, 94 Cal.App.4th at page 989, "In [Sexually Violent Predator Act] proceedings, the primary purpose of discovery most likely will be to assist the parties in preparing for trial. . . ." (Accord, *Lee v. Superior Court*, *supra*, 177 Cal.App.4th at p. 1124, fn. 4.) In *Lee*, the Court of Appeal held: "Th[is] purpose[] [is] served in [a Sexually Violent Predator Act] proceeding when the information sought by civil discovery methods is relevant to the two narrow issues presented at trial. [(*People v. Superior Court (Cheek)*, *supra*, 94 Cal.App.4th at p. 989.)]" (*Lee v. Superior Court*, *supra*, 177 Cal.App.4th at p. 1124, fn. 4.) The court trying the alleged sexually violent predator has the discretion to manage discovery under the Civil Discovery Act keeping in mind the narrow scope of the two issues to be decided. (*People v. Superior Court* (*Cheek*), *supra*, 94 Cal.App.4th at pp. 988-989, 991.)

Second, *Landau* is consistent with authority allowing, subject to the trial court's discretion, both the prosecuting attorney and the alleged sexually violent predator to present opinion-based testimony at trial. (§ 6603, subds. (a), (c); *People v. Lowe* (2012) 211 Cal.App.4th 678, 684; see *People v. Flores* (2006) 144 Cal.App.4th 625, 632-633.) Pursuant to section 6603, subdivision (a), "A person subject to this article shall be entitled . . . to the right to retain experts or professional persons to perform an examination on his or her behalf . . . ." At trial, a qualified professional may give an

opinion on why an inmate meets the criteria for commitment as a sexually violent predator. (*People v. Lowe, supra,* 211 Cal.App.4th at p. 684; *People v. Therrian* (2003) 113 Cal.App.4th 609, 615-616; *People v. Ward* (1999) 71 Cal.App.4th 368, 374; 3 Witkin & Epstein, Cal. Criminal Law, *supra,* Punishment, § 160, p. 277.) Whether to admit such opinion-based testimony from medical and psychological professionals is within the trial court's discretion. (*People v. Jones* (2013) 57 Cal.4th 899, 946; *People v. McDowell* (2012) 54 Cal.4th 395, 426.) And it is for the trier of fact to evaluate such testimony. (*People v. Flores, supra,* 144 Cal.App.4th at p. 633; *People v. Lowe, supra,* 211 Cal.App.4th at pp. 685-686; *People v. Ward, supra,* 71 Cal.App.4th at pp. 374-375; see *People v. Therrian, supra,* 113 Cal.App.4th at p. 616.) Moreover, medical and psychological professionals are not restricted to one methodology. (*People v. Ward, supra,* 71 Cal.App.4th at pp. 374-375; see *People v. Lowe, supra,* 211 Cal.App.4th at p. 685; *People v. Therrian, supra,* 113 Cal.App.4th at pp. 615-616.)

Third, the prosecuting attorney must prove *beyond a reasonable doubt* (§ 6604) the presence of a *currently diagnosed* mental disorder making the alleged sexually violent predator *presently* dangerous and likely to reoffend. (§ 6600, subd. (a)(3); *Albertson v. Superior Court, supra,* 25 Cal.4th at p. 802; *Hubbart v. Superior Court, supra,* 19 Cal.4th at p. 1169). The prosecuting attorney must have a fair opportunity to meet that burden of proof. (See *Albertson v. Superior Court, supra,* 25 Cal.4th at p. 803.) When, as here, a commitment proceeding has languished for years after a sexually violent predator petition has been filed and probable cause found, a current evaluation is critical. (*Albertson v. Superior Court, supra,* 25 Cal.4th at pp. 802-803; *Gray v. Superior Court* (2002) 95 Cal.App.4th 322, 326.)

As our Supreme Court observed in *Albertson,* "[I]t is evident why the district attorney . . . , faced with an evaluation of petitioner that was more than one year old, considered it of vital importance to obtain a current evaluation, supported by a current interview and access to current treatment information, concerning petitioner's current mental condition. . . . [A] county seeking [a Sexually Violent Predator Act] commitment would be placed in an untenable position were it precluded from obtaining access to

information concerning an individual's current mental state. . . . [A] county seeking commitment needs information concerning an alleged [sexually violent predator's] current mental status in order to have a fair opportunity to satisfy its own statutory and constitutional burden in [Sexually Violent Predator Act] litigation." (*Albertson v. Superior Court, supra,* 25 Cal.4th at pp. 802-803; accord, *Gray v. Superior Court, supra,* 95 Cal.App.4th at p. 326.)

At the same time, additional professional evaluation may work in favor of the alleged sexually violent predator. This is so because the prosecuting attorney may elect to dismiss the proceeding. (*Gray v. Superior Court, supra,* 95 Cal.App.4th at pp. 328-329; see *Reilly v. Superior Court* (2013) 57 Cal.4th 641, 655.) Our Supreme Court in *Albertson* observed: "The district attorney has an interest in obtaining information concerning the individual's current mental state for two reasons: to avoid committing a person who does not currently suffer from a qualifying mental disorder, and to support the commitment of a person who does suffer from a qualifying mental disorder." (*Albertson v. Superior Court, supra,* 25 Cal.4th at p. 802.) Here, the two hospitals department replacement evaluations reached the conclusion defendant did not meet the criteria for commitment. The conflict between the two pre-petition evaluations and the two replacement evaluations does not require the petition be dismissed. (*Reilly v. Superior Court, supra,* 57 Cal.4th at p. 655; *Gray v. Superior Court, supra,* 95 Cal.App.4th at p. 328.) Once the pre-petition safeguards have been met, any post-petition conflict is for the trier of fact to decide unless the prosecuting attorney elects to abandon the proceeding. (*Davenport v. Superior Court* (2012) 202 Cal.App.4th 665, 672-673, disapproved on another point in *Reilly v. Superior Court, supra,* 57 Cal.4th at p. 655; *Gray v. Superior Court, supra,* 95 Cal.App.4th at p. 330.) But the prosecuting attorney would be hard pressed to meet the beyond a reasonable doubt standard of proof absent evidence of a *currently diagnosed* mental disorder. And, if a third evaluator concludes defendant does *not* meet the criteria for commitment, the district attorney may decide to dismiss the petition. Hence, allowing a prosecuting attorney to pursue a further opinion consistent with *Landau* has the potential to favor either the prosecution or the alleged

sexually violent predator. As the Court of Appeal observed in *Gray v. Superior Court, supra,* 95 Cal.App.4th at page 330: "Where trial has been delayed, an updated [or replacement] evaluation may be essential if the People are to carry their burden of establishing that the subject person meets the criteria of the [Sexually Violent Predator Act] beyond a reasonable doubt. (§ 6604.) If the new evaluation created a split of opinion, and if that split could lead to the unraveling of the prosecution without any further qualitative consideration of the evaluations—either by the court or another trier of fact—then the prosecuting attorney might simply elect to stand on the existing opinions, however stale and, for that reason, potentially unpersuasive. Not only would this threaten prejudice solely to the prosecuting attorney; . . . if new evaluations were avoided due to the potential for mandatory dismissal, the subject person would lose the possible benefit that such evaluations would persuade the prosecuting attorney to dismiss the proceeding under the [Sexually Violent Predator Act]." (Fn. omitted.)

3. The prosecutor petitioning for commitment is not required to rely solely on hospitals department evaluators

Defendant asserts the district attorney is improperly attempting to sidestep the comprehensive evaluation provisions of section 6601, subdivisions (b) through (h). Defendant argues that the district attorney cannot use an evaluator other than one designated by the hospitals department. It is true that a sexually violent predator petition cannot be *filed* until two qualified professionals designated or selected by the hospitals department agree that the alleged sexually violent predator meets the criteria. (§ 6601, subds. (d), (e).) Pursuant to section 6601, subdivision (d), "If both [original] evaluators concur," then the hospitals department must ask the district attorney to file a commitment petition. Section 6601, subdivision (e) describes what happens when the two professionals selected by the hospitals department disagree. Then, the Director of State Hospitals arranges for the inmate's examination by two independent professionals. Those two independent professionals are selected pursuant to the procedure set forth in

section 6601, subdivision (g). However, after the sexually violent predator petition is filed a prosecutor may request updated evaluations from the hospitals department in order to properly present the case for commitment. (§ 6603, subd. (c)(1).) Section 6603, subdivision (c)(1) describes these as *updated evaluations* (so the prosecutor can properly present the case). Further, if one or more of the original evaluators is no longer available, the prosecutor may request the hospitals department to perform *replacement evaluations*. (§ 6603, subd. (c)(1).) Section 6603, subdivision (c)(1) describes these as replacement evaluations (when an evaluator is no longer available to testify for the prosecuting attorney).

We construe the foregoing language in section 6603, subdivision (c)(1) employing a commonsense interpretation and according to the usual and ordinary import of the words used. (*People v. Cornett* (2012) 53 Cal.4th 1261, 1271, fn. 8; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1406.) That the prosecuting attorney *may* ask the hospitals department to update or replace an original evaluation does not mean that the district attorney *must* do so. (See *Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 542; *Common Cause of California v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.) Nor does it by its terms prevent the district attorney from seeking professional medical or psychological opinions independent of the hospitals department. Here, the district attorney did request replacement evaluations. The two replacement evaluators both concluded defendant did *not* meet the criteria to be a sexually violent predator. The district attorney's office did not sidestep any provision of section 6600 et seq. when it independently sought further evaluation. Nothing in section 6603, subdivision (c) requires the district attorney to go to trial without first having an opportunity to produce evidence defendant has a currently diagnosed mental disorder.

Defendant relies upon the declaration filed by Mr. Hellman. Mr. Hellman's declaration was filed on February 27, 2014, after the respondent court granted the prosecutor's motion on January 28, 2014. Mr. Hellman is the deputy director of the forensic services unit within the hospitals department. As noted, Mr. Hellman's

declaration states: it is the hospital department's position that the Sexually Violent Predator Act *only* allows for updated and replacement declarations; the Sexually Violent Predator Act does not authorize a prosecutor to use "any experts other than those evaluators" designated by the hospitals department director; and the Sexually Violent Predator Act does not authorize the prosecutor to retain an evaluator who is no longer under contract with the hospitals department. Mr. Hellman's declaration was not before the respondent court prior to the time it ruled. Therefore, the post-ruling declaration is not properly before us. (*Pomona Valley Hospital Medical Center v. Superior Court* (2013) 213 Cal.App.4th 828, 835, fn. 5 ["Writ review does not provide for consideration of evidence not before respondent court at the time of its ruling"]; *BGJ Associates v. Superior Court* (1999) 75 Cal.App.4th 952, 957-958 [post-ruling "discovery" evidentiary matters may not be considered when conducting writ review].)

C. CONCLUSION

We conclude a trial court conducting a sexually violent predator proceeding may order a mental examination. Until a final ruling has been entered by the respondent court, we decline to determine whether an abuse of discretion has occurred. Once a ruling compliant with Code of Civil Procedure section 2032.320, subdivision (d) is entered, that issue will become ripe for appellate review. Further, once the respondent court determines what documents may be reviewed by Dr. Romanoff, then we can conduct appellate review.

V. DISPOSITION

The mandate petition is denied. Upon remittitur issuance, the trial court is to issue an order that is fully compliant with Code of Civil Procedure section 2032.320, subdivision (d).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J.

MINK, J.*

---

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.