**APPENDIX A**

**NOT FOR PUBLICATION**

FILED

OCT 7 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| SAMMY L. PAGE,<br><br>Petitioner-Appellant,<br><br>v.<br><br>AUDREY KING, Acting Exec Dir, CA Dept of Mental Health,<br><br>Respondent-Appellee. | No. 20-17073<br><br>D.C. No.<br>1:16-cv-00522-AWI-JLT<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted August 12, 2021
San Francisco, California

Before: SILER,** CHRISTEN, and FORREST, Circuit Judges.

Sammy L. Page is currently confined as a Sexually Violent Predator (SVP) awaiting trial for recommitment under California's Sexually Violent Predator Act (SVPA), California Welfare & Institutions Code § 6600 et seq. In 2012, Page filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

the State violated his Fourteenth Amendment due process rights by detaining him pretrial based on an outdated and scientifically invalid probable cause finding involving a Paraphilia Not Otherwise Specified (NOS) diagnosis.

The Northern District of California abstained, *Page v. King*, 2015 WL 5569434 (N.D. Cal. Sept. 21, 2015), but we vacated and remanded the matter for further proceedings. The case was then transferred to the Eastern District of California, and Page filed a first amended petition. The Eastern District also abstained, *Page v. King*, 2017 WL 11373232 (E.D. Cal. Feb. 24, 2017), but we vacated and remanded again and, in doing so, suggested that any constitutional claims Page might have regarding his confinement should be brought under the Fourth Amendment, as opposed to the Fourteenth Amendment. *Page v. King*, 932 F.3d 898, 905 (9th Cir. 2019).

Following remand, Page filed a brief on his Fourteenth Amendment claim, a motion for leave to file a second amended petition to include a Fourth Amendment claim, and a motion to declare state court exhaustion of his Fourth Amendment claim unnecessary or excused. In 2020, the magistrate judge issued findings and recommendations that Page's motion be denied and that the State's motion to dismiss be granted, which the district court adopted. Page subsequently appealed. The district court issued a certificate of appealability (COA) as to whether Page's "continued pretrial detention pursuant to California's [SVPA] violates his rights

under the Fourth Amendment or the due process clause of the Fourteenth Amendment."[1]

We review de novo the district court's denial of habeas relief. *Juan H. v. Allen*, 408 F.3d 1262, 1269 n. 7 (9th Cir. 2005). Page has not asserted a viable Fourteenth Amendment claim under *Manuel v. City of Joliet*, 137 S. Ct. 911, 919 (2017), which held that "[i]f the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment," not the due process clause. Page claims, as the plaintiff did in *Manuel*, that there was no probable cause to support his detention and such finding was due to fraud perpetrated on the court.

Page filed a motion for leave to file a second amended petition to assert his legal theories under the Fourth Amendment, but such amendment would be futile because his theories fail under the Fourth Amendment for the same reasons that they fail under the Fourteenth Amendment. "Denial of leave to amend is reviewed for an abuse of discretion." *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011). "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment."

[1] The State argues that Page raises several issues that are uncertified for appeal. It is true that the district court's order granting COA mainly discussed whether Paraphilia NOS is highly controversial and consideration of the diagnosis as a predicate for the deprivation of liberty by the State is warranted. However, the court ultimately presented a broader issue in the order that encompasses Page's arguments on appeal.

*Thinket Ink Info Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). But a "district court does not err in denying leave to amend where the amendment would be futile." *Id.* (internal citation omitted). An amendment is futile when "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

First, Page argues that his recommitment proceedings should be dismissed because his diagnoses of Paraphilia NOS and Anti-Social Personality Disorder (ASPD)[2] are medically invalid under California law. However, "federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (citing *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). And federal precedent does not require a civil commitment to be based upon a uniformly recognized mental health disorder. *See Kansas v. Hendricks*, 521 U.S. 346, 359 (1997). States may, in defining who may be civilly committed, employ mental health categories that "do not fit precisely with the definitions employed by the medical community." *Id.*

[2] Page also argues that his ASPD diagnosis is invalid because the state abandoned the diagnosis and the court based its 2006 probable cause finding exclusively on his Paraphilia NOS diagnosis. However, as Page failed to raise this argument in the district court, he forfeited it on appeal. *Smith v. Swarthout*, 742 F.3d 885, 893 n.3 (9th Cir. 2014).

Second, Page argues that the probable cause finding is based on stale evaluations because they no longer meet the SVPA's requirement of current diagnoses and two concurring expert opinions.[3] However, this issue presents a state law violation that is not grounds for federal habeas relief. *See Estelle*, 502 U.S. at 67–68.

Finally, Page alleges that the recommitment proceedings are based on insufficient evidence because the probable cause finding was based on written reports without live testimony. Construed as a sufficiency of the evidence claim or a confrontation clause claim, Page's argument fails either way.

On federal habeas corpus review, the court's inquiry into the sufficiency of evidence is limited. The standard of review has long been "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements . . . beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Although the United States Supreme Court has not specifically addressed the standard of proof required to support a civil commitment under a state's SVPA, it has held that, "[t]o meet due process demands," the standard of proof must be higher than the preponderance-of-the-

[3] Page contends that the district court improperly treated the Northern District's 2015 decision, which we vacated and remanded, as persuasive authority. However, a vacated opinion may still be persuasive, even if not binding. *See Spears v. Stewart*, 283 F.3d 992, 1017 n. 16 (9th Cir. 2002) ("Vacated opinions remain persuasive, although not binding authority.").

evidence standard but may be lower than the beyond a reasonable doubt standard. *Addington, v. Texas*, 441 U.S. 418, 430–33 (1979).

Page does not set forth facts that guide this analysis and we cannot determine whether the state's proceeding violated state law. *See Estelle*, 502 U.S. at 67. The court's decision did not involve an unreasonable application of clearly established Supreme Court precedent. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006) (where Supreme Court precedent gives no clear answer, "it cannot be said that the state court 'unreasonab[ly] appli[ed] clearly established Federal law.'").

Further, the Sixth Amendment's confrontation clause does not attach in civil commitment proceedings. *Carty v. Nelson*, 426 F.3d 1064, 1073 (9th Cir. 2005). The "fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment." *Middendorf v. Henry*, 425 U.S. 25, 37 (1976).

Accordingly, the district court's denial of Page's motion for leave to file a second amended petition and granting of the state's motion to dismiss are **AFFIRMED**. Page's Motion to Enlarge or Supplement the Record is **DENIED**.

**APPENDIX B**

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

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| SAMMY L. PAGE,<br><br>Petitioner,<br><br>v.<br><br>AUDREY KING,<br><br>Respondent. | Case No.: 1:16-cv-00522-AWI-JLT (HC)<br><br>ORDER ADOPTING FINDINGS AND RECOMMENDATIONS IN FULL<br><br>(Doc. 147) |

Petitioner is currently confined as a Sexually Violent Predator awaiting trial for recommitment under the California Sexually Violent Predator Act, Cal. Welf. & Inst. Code § 6600 *et seq*. Petitioner was originally committed as an SVP in 2004 for a two-year commitment period. The State of California filed a petition to re-commit Petitioner for a second two-year period in 2006. After a change in California law, the prosecutor amended the petition to provide for an indefinite commitment. Petitioner filed a petition for habeas corpus, alleging that the state is violating his Fourteenth Amendment due process rights by continuing to detain him pretrial based on an outdated and scientifically invalid probable cause finding. This Court dismissed the petition according to the abstention doctrine set forth in Younger v. Harris, 401 U.S. 37 (1971). The Ninth Circuit Court of Appeals vacated and remanded the matter for further proceedings.

On June 9, 2020, the Court issued findings and recommendations that Petitioner's motion for leave to amend be denied, Petitioner's motion regarding exhaustion be denied as moot and

Respondent's motion to dismiss be granted. (Doc. 147.) On July 9, 2020, Petitioner filed objections to the findings and recommendations.[1] (Doc. 150.) Respondent filed a response on July 20, 2020. (Doc. 151.)

As pointed out by Respondent, "[t]he bulk of the objections regurgitate arguments Petitioner previously made in his post-remand brief and motion to amend." (Doc. 151 at 1.) However, the objections also appear to set forth new substantive claims. Because Petitioner failed to raise these claims in his petition, the court should disregard the claims. See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (a traverse is not the proper pleading to raise additional grounds for relief). However, subsequent case law holds that a district court "has discretion, but is not required," to consider evidence and claims raised for the first time in objections to a magistrate judge's report. United States v. Howell, 231 F.3d 615, 621 (9th Cir. 2000); see also Brown v. Roe, 279 F.3d 742, 745 (9th Cir. 2002) (remanded for district court to exercise discretion whether to review new claim raised in objections). The district court must, however, "actually exercise its discretion" and not merely accept or deny the new claims. Howell, 231 F.3d at 622. In light of this discretion, the court will review this claim. However, as Respondent contends, the new claims fail to present a cognizable federal claim for relief.

For example, Petitioner objects to the findings and recommendations' acceptance of Respondent's alternative argument that the 2006 probable cause finding was valid based on the anti-social personality diagnoses, claiming that Petitioner has maintained that diagnosis to be invalid and stale. (Doc. 150 at 20-22.) Petitioner appears to claim that his antisocial personality diagnosis is "stale" for the same reason that his paraphilia NOS diagnosis is, specifically, because the 2012 update evaluations did not unanimously concur that he still had that diagnosis. (Id.) However, as addressed in the findings and recommendations, this claim relies on Petitioner's interpretation of state law, and California case law has rejected Petitioner's rationale. (Doc. 147 at 13-14.)

[1] Petitioner filed a separate request for oral argument on the objections to the findings and recommendations. (Doc. 152.) However, because Petitioner had sufficient opportunity to present arguments, through briefing and oral argument, Petitioner's request is DENIED.

Petitioner also objects to the findings and recommendations' excusal of the prosecution's use of the paraphilia diagnosis in 2006, even though it did the same thing in 2012, after notifying evaluators that the diagnosis was unreliable, and admonishing them not to use it. (Doc. 150 at 22-24.) Specifically, Petitioner contends that the prosecution knew the update evaluations conducted in 2012 relied on the scientifically invalid diagnosis of paraphilia NOS. (Id.) Respondent argues that this argument is similar to the contentions he made about his 2006 diagnosis in the post-remand briefing and proposed second amended petition and fails to state a federal claim for similar reasons. (Doc. 151 at 3.) As set forth in the findings and recommendations, the federal constitutional right to due process does not require civil commitment of an SVP to be based upon a uniformly recognized mental health disorder. (Doc. 147 at 6, quoting Page v. King, No. C 13-5352 WHA (PR), 2015 U.S. Dist. LEXIS 126069, at *23 (N.D. Cal. Sep. 18, 2015).) "States may, in defining who may be civilly committed, employ mental health categories that 'do not fit precisely with the definitions employed by the medical community.'" (Id., quoting Kansas v. Hendricks, 521 U.S. 346, 359 (1997).) "California does not define an SVP in lock-step with mental disorders recognized by the DSM." (Id.) Respondent asserts that California recognizes paraphilia NOS as a qualifying mental disorder for an SVP commitment, and accordingly, the prosecutor presented evidence of a valid qualifying diagnosis. (Doc. 151 at 3.)

Moreover, as Respondent argues, Petitioner's contention regarding the 2012 updates are irrelevant to whether or not the California superior court made a valid probable cause finding in 2006. (Doc. 151 at 3.) As set forth in the findings and recommendations, "[a] split of experts performing updated evaluations, after the initial petition to commit or re-commit, does not mean that the subject is no longer an SVP and does not require dismissal of the petition under the SVPA." (Doc. 147 at 14, quoting Page v. King, 2015 U.S. Dist. LEXIS 126069, at *31). Rather, the "updated evaluations' primary purpose is evidentiary or informational." (Id., quoting Reilly v. Superior Court, 57 Cal. 4th 641, 648 (2013).) Accordingly, Petitioner fails to state any new federal claim in his objections.

Additionally, Petitioner contends that treating the Northern District's 2015 decision as persuasive authority is improper. (Doc. 150 at 3-6.) However, Respondent notes in his response that "the Ninth Circuit has long recognized that vacated opinions remain persuasive authority." (Doc. 151 at 1-2, citing Roe v. Anderson, 134 F.3d 1400, 1404 (9th Cir. 1998).) Petitioner also objects to the

findings and recommendations' finding against his stale evaluations claim. (Doc. 150 at 24-25.) Specifically, Petitioner argues that his stale evaluations claim has been deemed meritorious by the Ninth Circuit in its opinion. (See id. at 18, 25.) However, as Respondent contends, the Ninth Circuit stated expressly that it was not reaching the merits of the claim before it. (Doc. 151 at 2.) Petitioner further objects to the findings and recommendations' finding against his claim that the evidence was insufficient to support the 2006 probable cause finding. (Doc. 150 at 25-27.) In that Petitioner is arguing that the findings and recommendations employed the wrong standard when addressing the sufficiency of the evidence claim, as Respondent points out, the reference to AEDPA in its recitation of law is inapplicable to this section 2241 proceeding. (Doc. 150 at 26; Doc. 151 at 2.)

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C) and Britt v. Simi Valley United School Dist., 708 F.2d 452, 454 (9th Cir. 1983), this Court conducted a *de novo* review of the case. Having carefully reviewed the file, the Court finds the findings and recommendations are supported by the record and proper analysis.

Accordingly, the Court **ORDERS**:

1. The findings and recommendations dated June 9, 2020 (Doc. 147) are **ADOPTED IN FULL**;
2. Petitioner's motion for leave to file second amended petition (Doc. 125) is **DENIED**;
3. Petitioner's motion to declare state court exhaustion of Fourth Amendment claim to be unnecessary or excused, or alternatively, to stay and abey the instant proceedings pending exhaustion (Doc. 127) is **DENIED AS MOOT**; and
4. Respondent's motion to dismiss the first amended petition (Doc. 139) is **GRANTED**.

IT IS SO ORDERED.

Dated: September 28, 2020

SENIOR DISTRICT JUDGE

**APPENDIX C**

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

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| SAMMY L. PAGE,<br><br>Petitioner,<br><br>v.<br><br>AUDREY KING,<br><br>Respondent. | Case No.: 1:16-cv-00522-AWI-JLT (HC)<br><br>FINDINGS AND RECOMMENDATION TO DENY PETITIONER'S MOTION FOR LEAVE TO AMEND, DENY AS MOOT PETITIONER'S MOTION REGARDING EXHAUSTION, AND GRANT IN PART RESPONDENT'S MOTION TO DISMISS; ORDER DENYING REQUEST FOR SUPPLEMENTAL BRIEFING<br>(Docs. 123, 125, 127, 139, 146) |

Petitioner is currently confined as a Sexually Violent Predator awaiting trial for recommitment under the California Sexually Violent Predator Act, Cal. Welf. & Inst. Code § 6600 *et seq*. Petitioner was originally committed as an SVP in 2004 for a two-year commitment period. The State of California filed a petition to re-commit Petitioner for a second two-year period in 2006. After a change in California law, the prosecutor amended the petition to provide for an indefinite commitment. Petitioner filed a petition for habeas corpus, alleging that the state is violating his Fourteenth Amendment due process rights by continuing to detain him pretrial based on an outdated and scientifically invalid probable cause finding. This Court dismissed the petition according to the abstention doctrine set forth in Younger v. Harris, 401 U.S. 37 (1971). The Ninth Circuit Court of Appeals vacated and remanded the matter for further proceedings.

Before the Court is Petitioner's motion for leave to file a second amended petition, Petitioner's motion to declare state court exhaustion of Fourth Amendment claim to be unnecessary or excused, or

to stay and abey the instant proceedings pending exhaustion, and Respondent's motion to dismiss the first amended petition.[1] (Docs. 125, 127, 139.) For the following reasons, the Court recommends that Petitioner's motion for leave to amend be denied, Petitioner's motion regarding exhaustion be denied as moot and Respondent's motion to dismiss be granted.

## BACKGROUND

The Ninth Circuit set forth the relevant factual and procedural history as follows:

> **A. Page's State SVPA Proceedings**
>
> From 1971 to 1987, Page committed three brutal rapes during home invasion robberies. *See People v. Page*, 2005 Cal. App. Unpub. LEXIS 5503, 2005 WL 1492388, at *3-5 (Cal. Ct. App. June 24, 2005). In 2004, he was adjudicated a Sexually Violent Predator ("SVP") under the SVPA and civilly committed for two years. 2005 Cal. App. Unpub. LEXIS 5503, [WL] at *1-3.
>
> In February 2006, the state filed a petition to recommit Page as an SVP. The state supported its petition with two psychiatric evaluations diagnosing Page with Paraphilia Not Otherwise Specified ("NOS") based on his affinity for nonconsensual sex and concluding that he qualified as an SVP. In May 2006, the state court found probable cause to detain Page pretrial. Page has been detained awaiting trial ever since. The state court minute orders and the July 21, 2015 declaration of David C. Cook, an SVPA prosecutor, set forth the relevant timeline. . . .
>
> On March 16, 2006, a public defender was appointed to represent Page. The case was continued until December 15, 2006 to permit the parties to prepare for trial. On December 15, the state filed a motion based on a recent amendment to the SVPA. The court granted the motion and continued the case to March 2, 2007.
>
> The case was repeatedly delayed over the next two years. Defense counsel requested one continuance, but no explanation for the other continuances appears in the record. The case then was continued throughout 2009 to permit the parties to litigate defense motions, including Page's motion for substitute counsel. On March 12, 2010, Cook "informed the court and Page's counsel that [the state] was ready for the case to be set for trial." The case nonetheless was continued to May 2012 so that two additional defense motions could be briefed and decided.
>
> One of the defense motions sought a new probable cause hearing, new mental health evaluations, and new mental health evaluators. In a supporting declaration, Dr. Allen Francis opined that "Paraphilia NOS, nonconsent" is an "incompetent" and "psychiatrically unjustified" diagnosis upon which the psychiatric community had recently cast doubt, most notably by rejecting proposals to include it in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, or "DSM-V." The court granted the motion for new evaluations and a new probable cause hearing, and continued the case to November 2012 to allow the new evaluations to take place.
>
> Four mental health professionals were retained to perform the new evaluations. The

[1] On January 30, 2020, Petitioner filed an unopposed motion to excuse one-day lateness in filing of Petitioner's papers (Doc. 123), which is **GRANTED**.

first two evaluators disagreed as to whether Page met SVP criteria, necessitating two additional evaluators, who also disagreed. In the end, two evaluators, including one that had recommended recommitment in 2006, concluded that Page no longer met SVP criteria. They based their determinations in part on Page's lengthy pretrial detention, reasoning that he had aged and had not committed any further sexual or violent acts. The two other evaluators came to the opposite conclusion, finding that Page continued to meet SVP criteria. One of those evaluators diagnosed Page with Paraphilia NOS.

The case was continued from November 2012 to May 2013 so that defense motions related to the new evaluations could be filed, briefed, and decided. On July 26, 2013, the state requested a continuance to file a motion based on *Reilly v. Superior Court*, 57 Cal. 4th 641, 160 Cal. Rptr. 3d 410, 304 P.3d 1071 (Cal. 2013), which called into question Page's entitlement to a new probable cause hearing. Defense counsel then sought several continuances to respond to the state's *Reilly* motion. The court granted the *Reilly* motion on April 18, 2014 and rescinded its prior order calling for a new probable cause determination.

The case was repeatedly continued until June 2, 2017 to allow defense counsel to litigate additional motions. The minute orders from July 28, 2017 through November 3, 2017 reference a "motion" but provide no further detail. The case was continued on January 5, 2018 "[b]y agreement of counsel" and again on May 4, 2018 for unknown reasons.

Cook averred in his declaration that he "remain[s] ready to set this matter for trial" and that, to his knowledge, "neither Page nor his trial counsel has ever requested that Page's case be set for trial." Cook further averred that he requested only one continuance after calling ready for trial on March 12, 2010.

**B. Page's Federal Habeas Proceedings**

Page filed the present federal habeas petition in the Northern District of California on July 16, 2012. He alleged that his due process rights were violated by the state court when it based its pretrial detention probable cause finding on pseudoscience; by the prosecution when it introduced pseudoscientific evidence at the probable cause hearing; and by the state when it continued to detain him based on the 2006 probable cause finding even though the 2012 evaluations suggested that the 2006 evaluations had become outdated. The district court abstained under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). *See Page v. King*, 2015 U.S. Dist. LEXIS 126069, 2015 WL 5569434 (N.D. Cal. Sept. 21, 2015). We vacated and remanded, instructing the district court to consider whether it had jurisdiction to decide the petition.

On remand, the district court transferred the case to the Eastern District of California, which again abstained under *Younger*, dismissed Page's petition, and declined to issue a certificate of appealability. *See Page v. King*, 2017 U.S. Dist. LEXIS 223275, 2017 WL 11373232 (E.D. Cal. Feb. 24, 2017). Page appealed. We granted a certificate of appealability on the issue whether the district court properly abstained under *Younger*.

Page v. King, 932 F.3d 898, 900-01 (9th Cir. 2019).

The Ninth Circuit reversed, holding that this Court erred in abstaining under Younger. Page v. King, 932 F.3d 898 (9th Cir. 2019). After remand and appointment of counsel, the Court ordered

parties to brief Petitioner's due process claim. (Doc. 110.) Petitioner's counsel filed a post-remand brief on the due process claim (Doc. 124), a motion for leave to file a second amended petition (Doc. 125), and a motion to declare state court exhaustion of Fourth Amendment claim to be unnecessary or excused, or to stay and abey the instant proceedings pending exhaustion (Doc. 127). Respondent opposed the motions and filed a motion to dismiss the first amended petition (Docs. 139, 140.) Petitioner filed an opposition to Respondent's motion to dismiss (Doc. 141) to which Respondent filed a reply (Doc. 142). Petitioner filed a reply to the opposition to the motions to amend and to declare exhaustion unnecessary. (Doc. 143.) Petitioner also filed a reply to Respondent's post-remand briefing. (Doc. 144.)

**DISCUSSION**

A. Motion for Leave to Amend

Under Fed. R. Civ. P. 15(a), a party may amend a pleading once as a matter of course within 21 days of service, or if the pleading is one to which a response is required, 21 days after service of a motion under Rule 12(b), (e), or (f). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).

Granting or denying leave to amend a complaint is in the discretion of the Court, Swanson v. United States Forest Service, 87 F.3d 339, 343 (9th Cir. 1996), though leave should be "freely give[n] when justice so requires." Fed. R. Civ. P. 15(a)(2). "In exercising this discretion, a court must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities." United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981). Consequently, the policy to grant leave to amend is applied with extreme liberality. Id.

There is no abuse of discretion "in denying a motion to amend where the movant presents no new facts but only new theories and provides no satisfactory explanation for his failure to fully develop his contentions originally." Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995); see also Allen v. City of Beverly Hills, 911 F.2d 367, 374 (9th Cir. 1990). After a defendant files an answer, leave to amend should not be granted where "amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay." Madeja v. Olympic Packers, 310 F.3d 628, 636

(9th Cir. 2002) (citing Yakama Indian Nation v. Washington Dep't of Revenue, 176 F.3d 1241, 1246 (9th Cir. 1999)).

In the motion for leave to file a second amended petition filed on January 30, 2020, Petitioner requests leave to amend the first amended petition to present his petition as being grounded in the Fourth Amendment, as an alternative to the pending Fourteenth Amendment ground. (Doc. 125.) The operative pleading is the first amended petition, which alleges violation of Petitioner's due process rights under the Fourteenth Amendment. (Doc. 80.) Petitioner argues that he has been diligent and no party will be prejudiced by the proposed amendment. (Doc. 125 at 5-8.) Petitioner states that the only new claim added to the proposed petition is the Fourth Amendment claim. (Doc. 125 at 6.) Petitioner also argues that the proposed amendment presents "nothing additional in the way of evidence or discovery." (Doc. 125 at 8.) Petitioner notes that Respondent has not yet filed an answer and contends that Respondent would not be prejudiced by allowing Petitioner to file the proposed second amended petition. (Doc. 125 at 5, 8.)

Petitioner argues that justice requires that Petitioner be permitted to amend his petition to include the Fourth Amendment claim to ensure cognizability of his constitutional challenge to the continued detention based on invalid probable cause. (Doc. 125 at 8.) Specifically, Petitioner alleges that the law is unsettled whether Petitioner's claim would fall under the Fourth Amendment, the Fourteenth Amendment or both, and the proposed amendment would facilitate decision on the merits, rather than on the pleadings or technicalities. (Doc. 125 at 8.)

Respondent argues that amendment would be futile for several reasons. (Doc. 140 at 7-14.) First, Respondent contends that Petitioner's claim that his diagnosis of paraphilia NOS is not medically valid does not state a federal theory for relief. (Doc. 140 at 7-9.) Respondent argues, "how California defines a mental disorder is a matter of state law, and does not raise a constitutional claim." (Doc. 140 at 8.) The Court agrees that federal habeas relief is not available to state prisoners challenging state law. Estelle v. McGuire, 502 U.S. 62, 67 (1991) ("We have stated many times that federal habeas corpus relief does not lie for errors of state law"); Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1997) ("alleged errors in the application of state law are not cognizable in federal habeas corpus" proceedings).

The United States District Court for the Northern District of California previously addressed this issue, finding that this claim lacks merit as well:

> The federal constitutional right to due process does not require civil commitment of an SVP to be based upon a uniformly recognized mental health disorder. States may, in defining who may be civilly committed, employ mental health categories that "do not fit precisely with the definitions employed by the medical community." *Hendricks*, 521 U.S. at 359. The scientific debate over paraphilia NOS, non-consent, including its exclusion from the DSM, does not mean that the diagnosis is "too imprecise a category" such that commitment of individual as an SVP based on such a diagnosis [r]uns afoul of due process. *McGee v. Bartow*, 593 F.3d 556, 570, 581 (7th Cir. 2010) (citing *Hendricks*, 521 U.S. at 373) ("we cannot conclude that the diagnosis of a rape-related paraphilia [i.e. paraphilia NOS] is so empty of scientific pedigree or so near-universal in its rejection by the mental health profession that civil commitment cannot be upheld as constitutional when this diagnosis serves as a predicate"); *see also People v. Johnson*, 235 Cal. App. 4th 80, 185 Cal. Rptr. 3d 135, 142-43 (Cal. Ct. App. 2015) ("Even if the latest edition of the DSM "reflects a growing skepticism in the psychiatric community about paraphilic coercive disorder, we cannot conclude that a commitment based on that disorder violates due process" ). Even California does not define an SVP in lock-step with mental disorders recognized by the DSM. The assessment of an SVP is based upon "diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders, including criminal and psychosexual history, type degree, and duration of sexual deviance, and severity of mental disorder." *Reilly*, 57 Cal. 4th at 647 (quoting California Welfare and Institutions Code Section 6601(c)) (internal quotations omitted). For the persuasive reasons discussed in *McGee* and *Johnson*, the existence of a disagreement between the doctors who found petitioner to be an SVP on the one hand, and Dr. Frances and the DSM on the other, does not render petitioner's commitment violative of due process.

Page v. King, No. C 13-5352 WHA (PR), 2015 U.S. Dist. LEXIS 126069, at *23-25 (N.D. Cal. Sep. 18, 2015)

Second, Respondent argues that “even if Petitioner successfully showed that paraphilia NOS diagnosis could not form the basis of the probable cause holding, there would still be probable cause based on the anti-social personality disorder diagnosis.” (Doc. 140 at 9.) Notably, both evaluators in 2006 also diagnosed Petitioner with anti-social personality disorder. (Doc. 140 at 9.) In Hubbart v. Superior Court, 19 Cal. 4th 1138 (Cal. 1999), the California Supreme Court rejected the appellant's request to strike down the SVPA because it does not expressly exclude antisocial personality disorders or other conditions characterized by an inability to control violent behavior, such as paraphilia, from being categorized as a "diagnosable mental disorder." In so ruling, the court necessarily found that these conditions can be mental disorders under the SVPA if coupled with a finding of current dangerousness. Likewise, in an unpublished opinion, the California Court of Appeals rejected the

contention that an antisocial personality disorder diagnosis cannot provide the basis of an SVPA commitment. People v. Swain, 2010 WL 717687, at *3 (Cal. Ct. App. Mar. 3, 2010). In Swain, the court held, "We have found no authority to support Swain's position that an antisocial personality disorder alone cannot form the basis of an SVP commitment where, like here, the jury makes the required finding that the disorder makes him a danger to the public because, as a result of the disorder, it is likely that he will engage in sexually violent predatory conduct." In rejecting that anti-social personality disorder cannot, standing alone, be a "qualifying mental disorder" for purposes of the SVPA, the Court held, "An instruction that antisocial personality disorder is never a qualifying mental disorder under the statutory definition is an incorrect statement of the law and would properly have been refused if requested." Id. at *3. See also Rainwater v. King, 2017 WL 6040425, at *9, n. 2 (E.D. Cal. Dec. 6, 2017); Leonard v. King, 2014 WL 7239453, at *8, n. 6 (E.D. Cal. Dec. 17, 2014).[2]

At the hearing, petitioner's attorney observed that People v. Krebs, 8 Cal.5th 265, 325 (2019) informs this topic. The Court disagrees. Krebs merely considered whether a psychiatrist's testimony about the volitional nature of a certain form of paraphilia squared with the requirements of the SVP Act. Id. at 323-327. At the urging of the petitioner, the court evaluated whether the doctor's testimony was false. Id. at 323-324. In finding that the doctor did not testify falsely, the Court relied on Ake v. Oklahoma (1985) 470 U.S. 68, 81 for the proposition that "Psychiatry is not ... an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion ..., juries remain the primary factfinders [and] ... must resolve differences in opinion within the

[2] When questioned about Mr. Page's position on this argument, counsel stated that she didn't note this second diagnosis as an issue in this case and admitted that none of Mr. Page's briefs countered this argument. Indeed, Petitioner has ignored this second diagnosis throughout his various habeas proceedings. Despite recognizing this second diagnosis in the post-remand brief (Doc. 124 at 5), petitioner did not address its import though his counsel conceded at the hearing that if probable cause exists based upon this second diagnosis, the entire petition fails.

In addition to petitioner recognizing this second diagnosis in the post-remand brief, the issue was raised squarely by the respondent in opposition to the motion to amend (Doc. 140 at 9) and in the motion to dismiss; Doc. 139 at 15, 17). Apparently, petitioner made a tactical decision to focus his efforts on other topics (See Doc. 146 [offering no explanation for the failure to address the issue), and the Court cannot question these tactics. Nevertheless, in this remanded action, he has had three briefing opportunities to address the issue; that is enough. Thus, petitioner's request to file another brief (Doc. 146) is **DENIED**.

psychiatric profession on the basis of the evidence offered by each party."

Third, Respondent argues that Petitioner's fraud claim fails to state a colorable claim. (Doc. 140 at 9.) Petitioner argues that "state officials knew that a diagnosis of 'Paraphilia NOS, nonconsent' lacks scientific reliability, but sought his commitment and recommitment based on the false evidence that Paraphilia NOS qualifies as a diagnosed mental disorder required under the SVPA." (Doc. 125-1 at 22.) Respondent contends that Petitioner fails to provide evidence showing that state officials knew in 2006 about the unreliability of a paraphilia NOS diagnosis. (Doc. 140 at 9.) Petitioner cites to a notice issued by the California Department of Health in 2011 and Petitioner's updated evaluations conducted in 2012 (Doc. 125-1 at 22-23), and Respondent correctly alleges that none of these documents have any bearing on what the government knew in 2006.[3] (Doc. 140 at 9.)

Fourth, Respondent argues that Petitioner's "stale evaluations claim" is meritless.[4] (Doc. 140 at 9-12.) As discussed further below, the Northern District previously reviewed this issue noting first that any violation of the SVPA is a state law violation that is not grounds for federal habeas relief. See Estelle, 502 U.S. at 67-68; Page v. King, 2015 U.S. Dist. LEXIS 126069, at *30. Even assuming that Petitioner had a constitutionally protected liberty interest arising from the SVPA provisions requiring two concurring expert opinions, the Northern District found that there was no violation of those provisions. See Page v. King, 2015 U.S. Dist. LEXIS 126069, at *30-31. The Court agrees with and adopts this rationale. Accordingly, because no violation of California law occurred, Petitioner fails to demonstrate that he was denied his due process rights by a violation of state law.

Fifth, Respondent contends that Petitioner's sufficiency of the evidence claim is meritless. (Doc. 140 at 12-13.) Respondent notes that Petitioner does not argue that the admitted evidence was insufficient, but that the psychiatric reports should not have been admitted because they were hearsay and violated Petitioner's confrontation rights. (Doc. 140 at 12; see Doc. 125-1 at 26.) Respondent alleges that regardless of whether the claim is construed as a sufficiency of the evidence claim or a

[3] Even if it did, petitioner fails to show that the failure to follow the policy necessarily violates the state law. Even if the Court believes that it *does* violate state law, this does not present federal habeas jurisdiction. Estelle, 502 U.S. at 67-68.
[4] As noted by Respondent, Respondent's arguments in opposition to the motion to amend largely duplicate arguments presented in the motion to dismiss, arguing that the claims are meritless. (Doc. 139 at 7, n.1.; Doc. 140 at 6, n.1.) The Court will address the same arguments only once.

confrontation claim, Petitioner does not present a colorable theory for relief. (Doc. 140 at 12-13.)

The law on sufficiency of the evidence is clearly established by the United States Supreme Court. In Jackson v. Virginia, 443 U.S. 307 (1979), the Court announced that on habeas review, the court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319; see also Lewis v. Jeffers, 497 U.S. 764, 781 (1990). Thus, only if "no rational trier of fact" could have found proof of guilt beyond a reasonable doubt will a petitioner be entitled to habeas relief. Jackson, 443 U.S. at 324. Sufficiency claims are judged by the elements defined by state law. Id. at 324, n. 16.

If confronted by a record that supports conflicting inferences, a federal habeas court "must presume–even if it does not affirmatively appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Id. at 326. Circumstantial evidence and inferences drawn from that evidence may be sufficient to sustain a conviction. Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995).

After the enactment of the AEDPA, a federal habeas court must apply the standards of Jackson with an additional layer of deference. Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In applying the AEDPA's deferential standard of review, this Court must presume the correctness of the state court's factual findings. 28 U.S.C. § 2254(e)(1); Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986).

In Cavazos v. Smith, 565 U.S. 1 (2011), the United States Supreme Court further explained the highly deferential standard of review in habeas proceedings, by noting that Jackson,

> makes clear that it is the responsibility of the jury - not the court - to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. What is more, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was "objectively unreasonable."
>
> Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold.

Id. at 2. Though Petitioner states it as a sufficiency of the evidence claim, he fails to set forth facts sufficient to support such a claim.

Furthermore, the Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. Const., Amend. VI. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant . . . had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53–54 (2004); Davis v. Washington, 547 U.S. 813, 821 (2006). The Confrontation Clause applies only to "'witnesses' against the accused, i.e., those who 'bear testimony.'" Crawford, 541 U.S. at 51 (citation omitted); Davis, 547 U.S. at 823–24. "'Testimony,' in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford, 541 U.S. at 51 (citation and some internal punctuation omitted); Davis, 547 U.S. at 824. Nevertheless, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. at 59 n. 9. Additionally, a Confrontation Clause violation is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). A Confrontation Clause violation is harmless and does not justify habeas relief, unless it had substantial and injurious effect or influence in determining the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

The "fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment." Middendorf v. Henry, 425 U.S. 25, 37 (1976). Involuntary civil commitment "constitutes a significant deprivation of liberty that requires due process protection" (Addington v. Texas, 441 U.S. 418, 425 (1979)), but the Sixth Amendment right to confrontation does not attach in civil commitment proceedings. Cf. United States v. Sahhar, 917 F.2d 1197, 1205-06 (9th Cir. 1990) ("Federal commitment serves a regulatory, rather than punitive, purpose and section 4246 [permitting civil commitment of mentally incompetent prisoners due for release] need not incorporate the right to a jury trial."). Indeed, "the procedures required for a civil commitment are not nearly as rigorous as those for criminal trials, or even juvenile proceedings." Id. at 1206 (internal citations omitted). The Court therefore rejects Petitioner's argument

that his Sixth Amendment rights were violated by his 2006 probable cause finding. See Gerstein v. Pugh, 420 U.S. 103, 121-22 (1975). Accordingly, regardless of whether the claim is construed as a sufficiency of evidence claim or confrontation clause claim, Petitioner does not present a colorable claim for relief.

Respondent further contends that Petitioner cannot challenge his pre-commitment detainment on federal due process grounds (Doc. 140 at 13-14), and he cannot transform his state law claims into federal claims by invoking the Fourth Amendment. (Doc. 140 at 14.) As discussed more fully below in granting Respondent's motion to dismiss in part, Petitioner's challenge is appropriate under the Fourth Amendment and not the due process clause.

Accordingly, it appears that amendment would be futile as Respondent argues. Because the claims in the proposed second amended petition fail to invoke federal habeas jurisdiction because they raise only issues of state law, the Court recommends denying Petitioner's motion for leave to amend.

B. Motion to Declare Exhaustion Unnecessary, or Alternatively, Stay and Abey the Proceedings

Petitioner contends that exhaustion of his Fourth Amendment claim is unnecessary or should be excused, based on the same extraordinary circumstances on which the Ninth Circuit found Petitioner's factual circumstances o fall within the irreparable harm exception to Younger abstention. (Doc. 127 at 5.) Specifically, the Ninth Circuit held that the irreparable harm posed by Petitioner's circumstances are precisely what calls for an exception from the usual deference to comity, and Petitioner argues that the same rationale applies to exhaustion. (Doc. 127 at 6.) Alternatively, Petitioner argues that if Petitioner is required to exhaust this ground in state court, he should be granted a stay and abeyance of the instant federal proceedings to allow time to do so. (Doc. 127 at 6.)

Respondent argues that "the Ninth Circuit's finding of an exception to abstention does not constitute an exception to exhaustion." (Doc. 140 at 15.) Respondent contends that the Ninth Circuit did not hold that Petitioner lacked an effective state court venue to raise his claims. (Doc. 140 at 15.) To the contrary, Respondent argues, Petitioner has filed and received rulings on multiple state habeas petitions during his pre-commitment confinement. (Doc. 140 at 15.) Additionally, Respondent argues that "all of Petitioner's claims require the resolution of state law issues, and therefore both judicial economy and comity would be served by having Petitioner first fairly present his claims to the state

court." (Doc. 140 at 15.) The Court agrees. However, because the Court denies Petitioner's motion to amend, the Court recommends that Petitioner's motion to declare state court exhaustion of Fourth Amendment claim to be unnecessary or excused be denied as moot.

C. Motion to Dismiss

In the motion to dismiss, Respondent argues that (1) abstention applies to the relief Petitioner requests, (2) the claims are unexhausted, and (3) the claims fail to state a cognizable federal claim.

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it "plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court. . ." Rule 4 of the Rules Governing Section 2254 Cases.

The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for state procedural default). Thus, a respondent can file a motion to dismiss after the court orders a response, and the court should use Rule 4 standards to review the motion.

1. Failure to state a cognizable federal claim

Respondent makes several arguments in the motion to dismiss that the claims in the first amended petition and post-remand brief fail to state a federal claim for relief. (Doc. 139 at 10-19.)

*a. Claims in the first amended petition*[5]

Respondent contends that Petitioner's claim that the 2006 commitment proceeding is invalid because the regulations governing his evaluations were "invalid" fails to state a federal theory for relief. (Doc. 139 at 10-12.) As stated above, federal habeas relief is not available to state prisoners challenging state law. Estelle, 502 U.S. 62 at 68 (1991); Gilmore v. Taylor, 508 U.S. 333, 348-49 (1993) (O'Connor, J., concurring) ("mere error of state law, one that does not rise to the level of a constitutional violation, may not be corrected on federal habeas"). The Northern District previously

[5] Fn. 1.

rejected a similar claim, noting that Petitioner's contentions were only matters of state law and lacked merit:

> Petitioner's claim boils down to two arguments. First, the mental health evaluations are "invalid" under Welfare and Institutions Code Section 6601(a)(1) because they were performed in 2004-2006, when he was no longer a prisoner. This is a claim for the violation of state law that is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Petitioner asserts that this violated his right to due process, but he cannot "transform a state-law issue into a federal one merely by asserting a violation of due process." *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996). The argument does not appear to have any merit in any event. Section 6601(a)(1) requires the state to refer anyone in prison who may be an SVP for an "initial screening" six months before they are released. *See Reilly v. Superior Court*, 57 Cal.4th 641, 646, 160 Cal. Rptr. 3d 410, 304 P.3d 1071 (2013) (citing Sections 6601(a)(1),(b)). This does not mean that any future mental health evaluations conducted by the state to determine whether the subject is in fact and remains an SVP are "invalid." *See id.* at 646-47 (describing subsequent "full" evaluations and re-evaluations authorized by SVPA).
>
> The second argument is that his commitment violates due process because in 2008, California's Office of Administrative Law ("OAL") determined that the protocol used in 2007 to assess whether a subject is an SVP was procedurally invalid as an "underground regulation." Petitioner's "underground regulation" argument is based on his assertion that the state officials did not comply with the California Administrative Procedures Act. *See Reilly*, 57 Cal.4th at 648-49. As such, the asserted error is a state law error that may not be the basis of federal habeas relief. *Estelle*, 502 U.S. at 67-68. In any event, the OAL determination concerned the 2007 protocol, *see Reilly*, 57 Cal.4th at 648-50, whereas the mental health evaluations challenged here were conducted earlier, in 2004-2006, pursuant to a different protocol. Moreover, the state courts have determined that any error that occurred under the invalid 2007 protocol would have to be "material" to warrant dismissal, *see id.* at 646, a showing that petitioner does not attempt to make here. Accordingly, petitioner has not shown that his mental health evaluations were invalid or violated his right to due process.

Page v. King, 2015 U.S. Dist. LEXIS 126069, at *19-21. Accordingly, Petitioner's argument that the evaluations were based on an "invalid" regulation is an interpretation of state law and lacks merit.

Respondent next contends that Petitioner's claim that he must be released because his 2006 evaluations are "stale" does not state a federal claim for relief. (Doc. 139 at 12-15.) The gist of Petitioner's argument is that in 2012, he could no longer be deemed SVP under Sections 6601(d)-(f) because two experts no longer agreed that he remained an SVP. The Northern District also previously reviewed this issue noting first that any violation of the SVPA is a state law violation that is not grounds for federal habeas relief. See Estelle, 502 U.S. at 67-68; Page v. King, 2015 U.S. Dist. LEXIS 126069, at *30. Even assuming that Petitioner had a constitutionally protected liberty interest arise from the SVPA provisions requiring two concurring expert opinions, the Northern District found that

there was no violation of those provisions:

> Under the SVPA, two concurring expert opinions are only required to support the initial petition to commit or re-commit. *See* Cal. Welf. & Inst. Code. §§ 6601(d)-(f); *Reilly*, 57 Cal. 4th at 646-47. Petitioner's initial re-commitment petition in 2006 was based on the concurrence at that time of two mental health experts (Dr. Coles and Dr. Hupka) that he was an SVP. The later split of experts did not occur until 2012, when petitioner received updated evaluations pursuant to Section 6603(c). A split of experts performing updated evaluations, after the initial petition to commit or re-commit, does not mean that the subject is no longer an SVP and does not require dismissal of the petition under the SVPA. *See* Cal. Welf. & Inst. Code § 6603(c); *Reilly*, 57 Cal.4th at 648; *Gray v. Superior Court*, 95 Cal. App.4th 322, 328, 115 Cal. Rptr. 2d 477 (2002). Rather, the "updated evaluations' primary purpose is evidentiary or informational." *Reilly*, 57 Cal.4th at 648. Therefore the failure to conduct judicial review or release petitioner following the split expert opinions on petitioner's updated evaluations in 2012 did not violate either the SVPA or any constitutionally protected liberty interest that it may have created.

Page v. King, 2015 U.S. Dist. LEXIS 126069, at *30-31. The Court agrees. Accordingly, because no violation of California law occurred, Petitioner fails to demonstrate that he was denied his due process rights by a violation of state law. Therefore, the Court recommends that Respondent's motion to dismiss be granted.

*b. Challenge to pre-commitment detainment on federal due process grounds*

Respondent contends that Petitioner cannot challenge his pre-commitment detention on federal due process grounds. (Doc. 139 at 18-19.) Petitioner maintains that he can assert a claim under the due process clause based on "long-established precedent in challenging SVP commitments." (Doc. 124 at 12-15; Doc. 144 at 5-8.) In holding that this Court erred in abstaining under Younger, the Ninth Circuit stated that:

> [W]e do not speak to the merits of Page's due process claim. Indeed, the Supreme Court's recent opinion in *Manuel v. City of Joliet*, 137 S. Ct. 911, 197 L. Ed. 2d 312 (2017)—which held that "[i]f the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment," not the Due Process Clause, *id.* at 919—may doom Page's petition unless he is permitted to amend to allege a Fourth Amendment violation.

Page v. King, 932 F.3d 898, 905 (9th Cir. 2019).

In Manuel, 137 S.Ct. at 914-16, the plaintiff asserted in an § 1983 action that his Fourth Amendment rights were violated when he was arrested and detained on a probable cause determination "based entirely on made-up evidence." Id. at 916. Both the district court and the Seventh Circuit viewed the Fourth Amendment as inapplicable to the latter charge, but the Supreme Court

disagreed. Id. at 916-17, 919. The Court held that a Fourth Amendment violation can occur after "the start of legal process," when fabricated evidence taints that process; in such a case, though "[l]egal process has gone forward, . . . it has done nothing to satisfy the Fourth Amendment's probable cause requirement." Id. at 918-19. "If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment." Id. at 919.

Courts have noted that Manuel does not hold expressly that the Fourth Amendment provides the exclusive basis for a claim asserting pre-trial deprivations based on fabricated evidence. Petitioner relies in part on Cole v. Carson, 935 F.3d 444, 451 n.25 (5th Cir. 2019) for the argument that he may also assert error under the Fourteenth Amendment (Doc. 124 at 15). However, without analysis of Manuel, Cole merely cites to its earlier opinion in Jauch v. Choctaw Cty., 874 F.3d 425, 429 (5th Cir. 2017), and then extends Jauch, without explanation, to support its position that a Fourteenth Amendment claim may be brought on facts similar[6] to those of Manuel. However, Jauch does not support that proposition. In Jauch, the plaintiff admitted that her arrest was supported by probable cause but asserted that her detention was unlawful because she was not brought before the court in a timely manner. Id. at 427. Rather than finding Manuel did not apply, the court found Manuel comported with its prior analysis of the interplay between the Fourth and Fourteenth Amendments. The Jauch court found,

> The district court treated Jauch's due process claim as a Fourth Amendment claim, reasoning that "[b]ecause an arrest is a seizure, ... the more particularized Fourth Amendment analysis [is] appropriate" and concluding that because probable cause supported Jauch's arrest, there was no constitutional violation. This analysis dooms Jauch's claim and seemingly means the Constitution is not violated by prolonged pretrial detention so long as the arrest is supported by probable cause.
>
> While this appeal was pending, the Supreme Court issued Manuel v. City of Joliet, which held that a defendant seized without probable cause could challenge his pretrial detention under the Fourth Amendment. —— U.S. ——, 137 S.Ct. 911, 917, 197 L.Ed.2d 312 (2017). Manuel does not address the availability of due process challenges after a legal seizure, and it cannot be read to mean, as Defendants contend, that only the Fourth Amendment is available to pre-trial detainees. For example, even when the detention is legal, a pre-trial detainee subjected to excessive force properly invokes the

[6] In Cole, the plaintiff was arrested and charged with crimes based upon fabricated evidence—the same evidence which gave rise to the grand jury determination that probable cause existed for the charges. Cole asserted a Fourth Amendment claim for the unlawful arrest and a Fourteenth Amendment claim for the filing of "false charges"—meaning, charges filed upon fabricated evidence.

> Fourteenth Amendment. See, e.g., Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). So, too, may a legally seized pre-trial detainee held for an extended period without further process. This Court has already addressed the interplay between the Fourth and Fourteenth Amendment, and Manuel fits with these prior cases.

Id. at 429.

Unlike in Jauch, Petitioner does not concede there was probable cause to support the SVP detention; to the contrary, he claims, as the plaintiff did in Manuel, that there was no probable cause to support his SVP detention and that the probable cause determination was due to a fraud perpetrated on the court. In so doing, he asserts that he was not an SVP as of 2006, his detention is unlawful and prays this Court release him and terminate the SVP proceedings. (Doc. 124 at 15) Accordingly, legal posture of Manuel is akin to the current situation and counter to that in Jauch. Relying upon the wisdom of the United States Supreme Court, the Court finds that Petitioner's challenge to his seizure without probable cause must be brought under the Fourth Amendment rather than the due process clause (See Manuel, 137 S. Ct. at 918 (a pretrial detainee's claim that he was unlawfully detained without probable cause was properly brought under the Fourth Amendment). Thus, the Court recommends that Respondent's motion to dismiss based on Petitioner's challenge on federal due process grounds be granted.

2. Abstention

Respondent continues to argue that abstention applies because Petitioner seeks dismissal of the pending recommitment proceedings. (Doc. 139 at 8-9; Doc. 142 at 4.) Specifically, Respondent contends that Petitioner cannot enjoin the ongoing state commitment proceedings, he can only seek release from custody pending trial. (Doc. 139 at 8; Doc. 142 at 4.)

Absent extraordinary circumstances, "interests of comity and federalism instruct [federal courts] to abstain from exercising our jurisdiction in certain circumstances when . . . asked to enjoin ongoing state enforcement proceedings." Nationwide Biweekly Admin., Inc. v. Owen, 873 F.3d 716, 727 (9th Cir. 2017). "Younger abstention is appropriate when: (1) there is an ongoing state judicial proceeding; (2) the proceeding implicates important state interests; (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges; and (4) the requested relief seeks to enjoin or has the practical effect of enjoining the ongoing state judicial

proceeding." Arevalo v. Hennessy, 882 F.3d 763, 765 (9th Cir. 2018) (alterations and internal quotation marks omitted). But "even if Younger abstention is appropriate, federal courts do not invoke it if there is a 'showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate.'" Id. at 765-66 (quoting Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 435, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982)).

Regarding the abstention issue, the Ninth Circuit concluded that Petitioner's claim fits squarely within the "irreparable harm" exception to Younger abstention set forth in Arevalo v. Hennessy, 882 F.3d 763 (9th Cir. 2018), because (1) regardless of the outcome at trial, a post-trial adjudication will not fully vindicate his right to a current and proper pretrial probable cause determination, and (2) his claim, which could not be raised in defense of the criminal prosecution, could not prejudice the conduct of the trial on the merits. Page v. King, 932 F.3d 898 at 904. Though the Court finds some merit to Respondent's argument, considering the Ninth Circuit's prior conclusion, the Court recommends that Respondent's motion to dismiss based on abstention be **DENIED**.

**RECOMMENDATION**

Accordingly, the Court **RECOMMENDS** as follows:

1) Petitioner's motion for leave to file second amended petition (Doc. 125) be **DENIED**;

2) Petitioner's motion to declare state court exhaustion of Fourth Amendment claim to be unnecessary or excused, or alternatively, to stay and abey the instant proceedings pending exhaustion (Doc. 127) be **DENIED AS MOOT**;

3) Respondent's motion to dismiss the first amended petition (Doc. 139) be **GRANTED**.

This Findings and Recommendation is submitted to the United States District Court Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty days after being served with a copy, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within ten court days after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified

time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: **June 9, 2020**

**/s/ Jennifer L. Thurston**
UNITED STATES MAGISTRATE JUDGE

**APPENDIX D**

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

| | |
|---|---|
| SAMMY L. PAGE,<br>*Petitioner-Appellant*,<br><br>v.<br><br>AUDREY KING,<br>*Respondent-Appellee.* | No. 17-16364<br><br>D.C. No.<br>1:16-cv-00522-AWI-JLT<br><br>OPINION |

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted February 8, 2019
San Francisco, California

Filed August 2, 2019

Before: Richard A. Paez and Marsha S. Berzon, Circuit Judges, and Gary Feinerman,* District Judge

Opinion by Judge Feinerman

* The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

## SUMMARY[**]

### Habeas Corpus / *Younger* Abstention

The panel vacated the district court's judgment dismissing based on *Younger* abstention a habeas corpus petition in which Sammy Page, who has been detained for thirteen years awaiting trial for recommitment under the California Sexually Violent Predator Act (SVPA), alleges that the State of California is violating his due process rights by continuing to detain him pretrial based on an outdated and scientifically invalid probable cause finding.

The panel rejected as irreconcilable with this court's precedents Page's contention that his SVPA case has been stalled for so long that it is no longer "ongoing" for purposes of *Younger v. Harris*, 401 U.S. 37 (1971). The panel explained that the state court proceeding is "plainly ongoing" for *Younger* purposes where, as here, no final judgment has been entered.

The panel held that the delay in bringing Page's SVPA case to trial is not an extraordinary circumstance under *Younger*, as the delay is primarily attributable to defense counsel's litigation efforts, not the state court's ineffectiveness.

The panel held that Page's claim fits squarely within the "irreparable harm" exception to *Younger* abstention set forth in *Arevalo v. Hennessy*, 882 F.3d 763 (9th Cir. 2018),

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

because (1) regardless of the outcome at trial, a post-trial adjudication will not fully vindicate his right to a current and proper pretrial probable cause determination, and (2) his claim, which could not be raised in defense of the criminal prosecution, could not prejudice the conduct of the trial on the merits.

The panel wrote that the merits of Page's due process claim are reserved for the district court on remand, and that the district court should consider anew Page's request for appointment of counsel.

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## COUNSEL

Andrea Renee St. Julian (argued), San Diego, California, for Petitioner-Appellant.

Max Feinstat (argued), Deputy Attorney General; Tami M. Krenzin, Supervising Deputy Attorney General; Michael P. Farrell, Senior Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, Sacramento, California; for Respondent-Appellee.

## OPINION

FEINERMAN, District Judge:

Sammy Page, who has been detained for the last thirteen years awaiting trial for recommitment under the California Sexually Violent Predator Act ("SVPA"), Cal. Welf. & Inst. Code § 6600 *et seq.*, filed a petition for habeas corpus, alleging that the state is violating his Fourteenth Amendment due process rights by continuing to detain him pretrial based on an outdated and scientifically invalid probable cause finding. The district court dismissed the petition under *Younger v. Harris*, 401 U.S. 37 (1971). We vacate and remand for further proceedings. (Page raised three uncertified issues, which we decline to address. Ninth Cir. R. 22-1(e). If relevant on remand, Page may raise them in the district court.)

### Factual and Procedural History

#### A. Page's State SVPA Proceedings

From 1971 to 1987, Page committed three brutal rapes during home invasion robberies. *See People v. Page*, 2005 WL 1492388, at *3–5 (Cal. Ct. App. June 24, 2005). In 2004, he was adjudicated a Sexually Violent Predator ("SVP") under the SVPA and civilly committed for two years. *Id.* at *1–3.

In February 2006, the state filed a petition to recommit Page as an SVP. The state supported its petition with two psychiatric evaluations diagnosing Page with Paraphilia Not Otherwise Specified ("NOS") based on his affinity for nonconsensual sex and concluding that he qualified as an SVP. In May 2006, the state court found probable cause to detain Page pretrial. Page has been detained awaiting trial

ever since. The state court minute orders and the July 21, 2015 declaration of David C. Cook, an SVPA prosecutor, set forth the relevant timeline. (Page argues that we should disregard the declaration because Cook cannot act as both witness and attorney in the same case. *See* Cal. Rules of Professional Conduct 3.7 (2018). This argument fails because Cook does not represent the state in this federal case.)

On March 16, 2006, a public defender was appointed to represent Page. The case was continued until December 15, 2006 to permit the parties to prepare for trial. On December 15, the state filed a motion based on a recent amendment to the SVPA. The court granted the motion and continued the case to March 2, 2007.

The case was repeatedly delayed over the next two years. Defense counsel requested one continuance, but no explanation for the other continuances appears in the record. The case then was continued throughout 2009 to permit the parties to litigate defense motions, including Page's motion for substitute counsel. On March 12, 2010, Cook "informed the court and Page's counsel that [the state] was ready for the case to be set for trial." The case nonetheless was continued to May 2012 so that two additional defense motions could be briefed and decided.

One of the defense motions sought a new probable cause hearing, new mental health evaluations, and new mental health evaluators. In a supporting declaration, Dr. Allen Francis opined that "Paraphilia NOS, nonconsent" is an "incompetent" and "psychiatrically unjustified" diagnosis upon which the psychiatric community had recently cast doubt, most notably by rejecting proposals to include it in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, or

"DSM-V." The court granted the motion for new evaluations and a new probable cause hearing, and continued the case to November 2012 to allow the new evaluations to take place.

Four mental health professionals were retained to perform the new evaluations. The first two evaluators disagreed as to whether Page met SVP criteria, necessitating two additional evaluators, who also disagreed. In the end, two evaluators, including one that had recommended recommitment in 2006, concluded that Page no longer met SVP criteria. They based their determinations in part on Page's lengthy pretrial detention, reasoning that he had aged and had not committed any further sexual or violent acts. The two other evaluators came to the opposite conclusion, finding that Page continued to meet SVP criteria. One of those evaluators diagnosed Page with Paraphilia NOS.

The case was continued from November 2012 to May 2013 so that defense motions related to the new evaluations could be filed, briefed, and decided. On July 26, 2013, the state requested a continuance to file a motion based on *Reilly v. Superior Court*, 304 P.3d 1071 (Cal. 2013), which called into question Page's entitlement to a new probable cause hearing. Defense counsel then sought several continuances to respond to the state's *Reilly* motion. The court granted the *Reilly* motion on April 18, 2014 and rescinded its prior order calling for a new probable cause determination.

The case was repeatedly continued until June 2, 2017 to allow defense counsel to litigate additional motions. The minute orders from July 28, 2017 through November 3, 2017 reference a "motion" but provide no further detail. The case was continued on January 5, 2018 "[b]y agreement of counsel" and again on May 4, 2018 for unknown reasons.

Cook averred in his declaration that he "remain[s] ready to set this matter for trial" and that, to his knowledge, "neither Page nor his trial counsel has ever requested that Page's case be set for trial." Cook further averred that he requested only one continuance after calling ready for trial on March 12, 2010.

**B. Page's Federal Habeas Proceedings**

Page filed the present federal habeas petition in the Northern District of California on July 16, 2012. He alleged that his due process rights were violated by the state court when it based its pretrial detention probable cause finding on pseudoscience; by the prosecution when it introduced pseudoscientific evidence at the probable cause hearing; and by the state when it continued to detain him based on the 2006 probable cause finding even though the 2012 evaluations suggested that the 2006 evaluations had become outdated. The district court abstained under *Younger v. Harris*, 401 U.S. 37 (1971). *See Page v. King*, 2015 WL 5569434 (N.D. Cal. Sept. 21, 2015). We vacated and remanded, instructing the district court to consider whether it had jurisdiction to decide the petition.

On remand, the district court transferred the case to the Eastern District of California, which again abstained under *Younger*, dismissed Page's petition, and declined to issue a certificate of appealability. *See Page v. King*, 2017 WL 11373232 (E.D. Cal. Feb. 24, 2017). Page appealed. We granted a certificate of appealability on the issue whether the district court properly abstained under *Younger*.

**Discussion**

Absent extraordinary circumstances, "interests of comity and federalism instruct [federal courts] to abstain from

exercising our jurisdiction in certain circumstances when . . . asked to enjoin ongoing state enforcement proceedings." *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 727 (9th Cir. 2017). "*Younger* abstention is appropriate when: (1) there is an ongoing state judicial proceeding; (2) the proceeding implicates important state interests; (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges; and (4) the requested relief seeks to enjoin or has the practical effect of enjoining the ongoing state judicial proceeding." *Arevalo v. Hennessy*, 882 F.3d 763, 765 (9th Cir. 2018) (alterations and internal quotation marks omitted). But "even if *Younger* abstention is appropriate, federal courts do not invoke it if there is a 'showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate.'" *Id*. at 765–66 (quoting *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982)).

Page does not dispute that *Younger* abstention can apply to ongoing SVPA proceedings, but he offers two grounds for why the district court nevertheless erred in abstaining under *Younger* given the facts and circumstances of this case. We consider those grounds in turn.

## I. Whether Page's State SVPA Proceedings Are Ongoing

Page first contends that his SVPA case has been stalled for so long that it is no longer "ongoing" for purposes of *Younger*. This contention cannot be reconciled with our precedents, which establish that "[t]here is no principled distinction between finality of judgments for purposes of appellate review and finality of state-initiated proceedings for purposes of *Younger* abstention." *San Jose Silicon Valley Chamber of Commerce Political Action Committee v.*

*City of San Jose*, 546 F.3d 1087, 1093 (9th Cir. 2008). Where, as here, "no final judgment has been entered" in state court, the state court proceeding is "plainly ongoing" for purposes of *Younger*. *Id.* While recognizing the possibility that a state court could intentionally delay proceedings to stave off federal habeas review or for other improper purposes, we have determined that *Younger*'s exceptions for bad faith, harassment, or other extraordinary circumstances provide sufficient protection from such state court abuse. *Id.* We therefore turn to the question whether Page can establish one of those exceptions.

## II. Whether Extraordinary Circumstances Make *Younger* Abstention Inappropriate

Federal courts will not abstain under *Younger* in "extraordinary circumstances where irreparable injury can be shown." *Brown v. Ahern*, 676 F.3d 899, 903 (9th Cir. 2012). Page argues that this exception applies here, either because of the state court's extraordinary delay in bringing him to trial or because he will be irreparably harmed if he is unable to seek federal review prior to trial.

The delay in bringing Page's SVPA case to trial is not an extraordinary circumstance under *Younger*. True, we have in rare cases declined to abstain where the state court delay was extreme and there was "no end in sight" to the state court proceedings. *See Phillips v. Vasquez*, 56 F.3d 1030, 1035, 1038 (9th Cir. 1995) ("We have consistently recognized that unusual delay in the state courts may justify a decision to protect a prisoner's right to a fair and prompt resolution of his constitutional claims despite the jurisprudential concerns that have led us to decline to review a claim or to require full exhaustion in other cases in which a proceeding related to the federal petition is pending in state court."). But *Younger* abstention is appropriate even in cases of extreme delay

where there is "no indication that the state court has been ineffective," *Edelbacher v. Calderon*, 160 F.3d 582, 586 (9th Cir. 1998), and where the delay is instead "attributable to the petitioner's quite legitimate efforts in state court to escape guilt" through litigation, *id*. at 585.

As the Cook declaration and the state court record show, the delay in bringing Page's SVPA case to trial is primarily attributable to defense counsel's litigation efforts, not the state court's ineffectiveness. Additionally, an end to the state court proceedings is in sight. The state informed the court that it was ready for trial nine years ago and has remained ready at least as of 2015. Thus, it appears that Page could go to trial if he only demanded it.

Page's reliance on speedy trial cases like *Doggett v. United States*, 505 U.S. 647, 652 (1992), which describes an eight-and-a-half-year delay as "extraordinary," is misplaced. Page does not explain how or why speedy trial principles apply to the very different question of what constitutes extraordinary circumstances under *Younger*. Moreover, we have repeatedly rejected the argument that "violation of the Speedy Trial Clause [is] *sui generis* such that it suffice[s] in and of itself as an independent 'extraordinary circumstance' necessitating pre-trial habeas consideration." *Brown*, 676 F.3d at 901 (quoting *Carden v Montana*, 626 F.2d 82, 84 (9th Cir. 1980)). Thus, even if Page could establish that the delay in bringing him to trial would support a speedy trial defense if the state court proceedings were criminal in nature, it does not follow that the delay is an extraordinary circumstance in the meaning of *Younger*.

Page argues in the alternative that abstention is inappropriate for the reasons given in *Arevalo v. Hennessy*, *supra*, which we decided after the district court here issued its ruling. In that case, Erick Arevalo filed a federal habeas

petition alleging that he had been jailed for six months without a constitutionally adequate bail hearing. *Arevalo*, 882 F.3d at 764–65. We held that *Younger* does not "require[ ] a district court to abstain from hearing a petition for a writ of habeas corpus challenging the conditions of pretrial detention in state court" where (1) the procedure challenged in the petition is distinct from the underlying criminal prosecution and the challenge would not interfere with the prosecution, or (2) full vindication of the petitioner's pretrial rights requires intervention before trial. *Id*. at 764, 766–67. We determined that Arevalo's claims satisfied both grounds for overcoming *Younger* abstention.

As to the first, we relied on *Gerstein v. Pugh*, 420 U.S. 103 (1975), which held that a criminal defendant's right to "a judicial determination of probable cause for pretrial restraint of liberty" can be enforced in federal court before state court proceedings conclude. *Id*. at 105, 108 n.9. *Gerstein* reasoned that because claims regarding the right to a probable cause determination are not "directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution," federal court review "could not prejudice the conduct of the trial on the merits." *Id*. at 108 n.9. Applying *Gerstein*, we concluded that Arevalo's bail-related federal habeas claims were "distinct from the underlying criminal prosecution and would not interfere with it." *Arevalo*, 882 F.3d at 766.

As to the second ground for overcoming *Younger* abstention in *Arevalo*, we relied on *Mannes v. Gillespie*, 967 F.2d 1310 (9th Cir. 1992), which declined to abstain from hearing a habeas petitioner's double jeopardy claim on the ground that "[t]he Fifth Amendment's protection against double jeopardy … is not against being twice punished, but

against being twice put in jeopardy," that is, against facing two trials. 967 F.2d at 1312 (internal quotation marks omitted). Given the nature of the double jeopardy right, we reasoned in *Mannes* that a *post*-trial ruling that the state violated the Double Jeopardy Clause would come too late, as the petitioner already would have been irreparably deprived of his rights. *Id.* Likewise, the bail hearing that Arevalo sought was intended to protect him against unconstitutional pretrial detention, a right that could not be vindicated post-trial. *Arevalo*, 882 F.3d at 767. We therefore held that Arevalo had established extraordinary circumstances that threatened irreparable harm and justified proceeding with his habeas petition. *Id.*

Here, Page alleges that the state is violating his due process right not to be detained pretrial based on a stale and scientifically invalid probable cause determination and that his complete loss of liberty for the time of pretrial detention is "irretrievable" regardless of the outcome at trial. If Page is right, then regardless of the outcome at trial, a post-trial adjudication of his claim will not fully vindicate his right to a current and proper pretrial probable cause determination. His claim therefore "fits squarely within the irreparable harm exception" to *Younger* that we applied in *Arevalo*. *Id*. at 766.

Additionally, as in *Arevalo*, Page's claim is closely analogous to the claim in *Gerstein*: The defendant in *Gerstein* challenged the state's refusal to hold a probable cause hearing, while Page challenges the state's alleged failure to hold a *constitutionally adequate* probable cause hearing. Page's claim likewise is not "directed at the state prosecution[ ] as such, but only at the legality of pretrial detention without a [constitutionally-adequate] judicial hearing, an issue that could not be raised in defense of the criminal prosecution," and thus our review "could not

prejudice the conduct of the trial on the merits." 420 U.S. at 108 n.9. Page's claim therefore satisfies both of the grounds set forth in *Arevalo* for overcoming *Younger* abstention.

The state argues that *Arevalo* is inapposite because Page failed to show that he was unable to raise his due process claim in the state court proceedings. We considered and rejected the same argument in *Arevalo*, and are bound to follow suit here. 882 F.3d at 767 n.3 (noting that the opportunity to present a claim in state court "involve[s] the third *Younger* factor—adequacy of the state proceedings to address the issue," and does not categorically bar the "irreparable harm" exception).

Nor is our treatment of Page's claim inconsistent with our speedy trial jurisprudence. True, we have declined to apply the irreparable harm exception to *Younger* abstention where a federal habeas petitioner seeks to vindicate a speedy trial affirmative defense. *See Carden*, 626 F.2d at 84; *see also Brown*, 676 F.3d at 901 (reaffirming *Carden*). But unlike the protection against double jeopardy or the pretrial rights at issue in *Arevalo* and *Gerstein*, the speedy trial defense primarily protects the integrity of the trial itself. *See United States v. MacDonald*, 435 U.S. 850, 858 (1978) (holding that the "most serious" interest that "the speedy trial right was designed to protect" is "to limit the possibility that the defense will be impaired"); *Carden*, 626 F.2d at 84 (citing *MacDonald* to support its holding that *Younger* abstention was appropriate). Like other rights designed to ensure a fair trial, the speedy trial right asserted as a defense can be vindicated through reversal of the improperly-obtained conviction. *See Carden*, 626 F.2d at 84; *Brown*, 676 F.3d at 901. By contrast, the right asserted by Page implicates the integrity of *pretrial* probable cause

procedures. *Arevalo* shows that such a right is not a trial right and therefore cannot be vindicated post-trial.

Finally, we recognize that in *Drury v. Cox*, 457 F.2d 764 (9th Cir. 1972) (per curiam), we abstained under *Younger* from hearing a challenge to a pretrial probable cause determination. Our two-paragraph, per curiam opinion in *Drury* did not consider or decide whether the petitioner's claim fell within the irreparable harm exception to *Younger*, so it does not govern that issue. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 n.5 (1992) ("It is contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases … where the issue was not presented or even envisioned."). Additionally, we issued *Drury* prior to the Supreme Court's decision in *Gerstein*, which, as noted, expressly held that *Younger* abstention was not appropriate where the petitioner claims that the state has not provided appropriate pretrial probable cause procedures. To the extent that *Drury* stands for the opposite proposition, it has been overruled. *See Miranda v. Selig*, 860 F.3d 1237, 1243 (9th Cir. 2017) ("[W]e are bound by decisions of prior panels[ ] unless [a] … Supreme Court decision … undermines those decisions."); *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) ("[I]ssues decided by the [Supreme] [C]ourt need not be identical in order to be controlling. Rather, the [Court] must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.").

We therefore hold that the district court erred in abstaining under *Younger* from hearing Page's claim that the state is violating his pretrial due process rights. In so holding, we do not speak to the merits of Page's due process claim. Indeed, the Supreme Court's recent opinion in

*Manuel v. City of Joliet*, 137 S. Ct. 911 (2017)—which held that "[i]f the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment," not the Due Process Clause, *id*. at 919—may doom Page's petition unless he is permitted to amend to allege a Fourth Amendment violation. Those merits questions are reserved for the district court on remand.

Before concluding, we note that Page requests that, in the event of a remand, we direct the district court to appoint counsel pursuant to 18 U.S.C. § 3006A(a)(2)(B). The district court denied his requests for appointed counsel because it found that the interests of justice did not require appointment of counsel at the time. On remand, given the complexity of the issues involved in his petition, the district court should consider anew Page's request for appointment of counsel. *See* 18 U.S.C. § 3006A(A)(2)(B).

**VACATED and REMANDED.**

APPENDIX E

COPY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
BEFORE THE HONORABLE JOAN S. CARTWRIGHT, JUDGE
DEPARTMENT NO. 7

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
vs. No. 131518
SAMMIE PAGE,
Respondent.
_____/

RENE C. DAVIDSON COURTHOUSE
1225 Fallon Street
Oakland, California

REPORTER'S TRANSCRIPT OF PROCEEDINGS

May 26, 2006

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APPEARANCES:

For the People: THOMAS J. ORLOFF, District Attorney
BY: SCOTT SWISHER
Deputy District Attorney

For the Defendant: DIANE A. BELLAS, Public Defender
BY: BYRON BROWN
Assistant Public Defender

Reported by: Francina Davis, CSR #4630, RMR, CRR

Exhibit A

PROCEEDINGS

May 26, 2006 A.M. SESSION

(The respondent is present in open court.)

THE COURT: Calling the matter of Sammie Page, please state your appearances for the record.

MR. SWISHER: Scott Swisher on behalf of the state.

MR. BROWN: Byron Brown, assistant public defender, for Mr. Page. He's not present. He's in Coalinga State Hospital.

THE COURT: I have a note we're on for probable cause hearing today; is that correct?

MR. SWISHER: It is.

THE COURT: All right. Then you had waived Mr. Page's appearance?

MR. BROWN: Yes. And I believe the Court, at an earlier date, had essentially indicated a 6601.5 order and granted that.

THE COURT: Yes. The Court had actually reviewed the petition and the attached documents and had issued a 6601.5 order.

Based on that, then, are you all ready to proceed with the probable cause hearing?

MR. SWISHER: Yes.

MR. BROWN: Yes.

THE COURT: All right. Then Mr. Swisher, you may proceed.

MR. SWISHER: Your Honor, the first thing I need to do is I checked, I believe, on Wednesday or Thursday. I think you're already in possession of the certified copies of the most recent evaluations?

THE COURT: Yes.

MR. SWISHER: All right. With that in mind, there appear to

be three predicate priors under the following numbers: Docket No. 50619, docket No. 60557, and docket No. 82230. What I'm going to propose to do is have all of these marked as group exhibits 1, 2, and 3, and then I'll delineate out their respective elements.

THE COURT: Petitioner's 1, 2, and 3 or 1A --

MR. SWISHER: No. 1, 2, and 3, 1 going to 50619.

THE COURT: Petitioner's No. 1 may be docket 50619. Petitioner's No. 2 is docket 60557.

MR. SWISHER: Correct.

THE COURT: And Petitioner's No. 3 will be docket No. 82230.

MR. SWISHER: Thank you.

THE COURT: Those may be so marked.

(Exhibits 1, 2 and 3 were marked for identification.)

MR. SWISHER: All right. Let me list the constituent elements of Petitioner's 1 for Mr. Brown and the Court. Under that docket No. 50619, a statement by the judge and the district attorney under Penal Code section 1203.01. We also see --

THE COURT: Hold on just a second. Go ahead.

MR. SWISHER: -- an Abstract of Judgment under the same docket, a Proceedings on Sentence transcript under the same docket, and verdict of jury forms under the same docket, five pages.

THE COURT: You want all those marked?

MR. SWISHER: I'd like them marked as Petitioner's 1.

THE COURT: That will be the order.

THE CLERK: That's a group exhibit, Your Honor?

THE COURT: Yes. Okay.

THE CLERK: These are all certified?

MR. SWISHER: That's true.

The next group of items is in relationship to 65057, which is out of this county.

THE COURT: I thought you said 60557.

THE CLERK: 60557, that's what I wrote.

MR. SWISHER: It should read 65057.

THE COURT: 65057.

MR. SWISHER: All right. The first is an Information. The second is the Abstract of Judgment. And then there's also a modified Abstract of Judgment. There are several verdict of jury forms and a Proceedings on Sentence transcript, a diagnostic study and recommendation by the California Department of Corrections under the provisions of Penal Code section 1203.03. And then it appears to be a nonautomated CI&I and some form of a social -- let's see -- looks like a probation letter, for lack of a better term, a case summary. All of these are certified as well.

THE COURT: All right. Those will all be part of Petitioner's No. 2.

MR. SWISHER: Finally, Petitioner's No. 3 consists of the following: An Abstract of Judgment in 82230. Looks like a minute order involving a district attorney Joan Cartwright and outlining the verdict of jury.

THE COURT: I don't remember it.

MR. SWISHER: And that's it.

THE COURT: What year was that?

MR. SWISHER: Looks like 11-24-86. Didn't strike a cord, huh? And those are certified.

And again, although Mr. Brown's welcome to check, I have

checked, all of those indicate a particular victim, what the count is, that is, a count that falls within the ambit of 6600, together with the term, whether it be determinate or indeterminate, depending on whether they proceed. I think it's July 1st, 1977.

THE COURT: All right.

MR. BROWN: I'd just ask for clarification what the sentencing was in each, if that's immediately available.

MR. SWISHER: If I can have them. In 82230 it was 23 years, four months. In 65057, it was indeterminate. July 1st, 1977, indeterminate.

MR. BROWN: Okay.

MR. SWISHER: 50619 that also is indeterminate. As they say in the nomenclature of the time, to the term prescribed by law, which was indeterminate.

THE COURT: Okay. Any further evidence from the Petitioners?

MR. SWISHER: No.

THE COURT: All right. Mr. Brown, any objection to Petitioner's 1 being admitted?

MR. BROWN: I'll submit it, Your Honor.

THE COURT: That may be admitted.

(Exhibit 1 was admitted into evidence.)

THE COURT: Any objection to Petitioner's No. 2?

MR. BROWN: Submitted.

THE COURT: That may be admitted.

(Exhibit 2 was admitted into evidence.)

THE COURT: And Petitioner's No. 3.

MR. BROWN: Submitted.

THE COURT: That may be admitted.

(Exhibit 3 was admitted into evidence.)

THE COURT: Anything further, Mr. Swisher?

MR. SWISHER: No.

THE COURT: All right. Does the respondent wish to present any evidence at this time?

MR. BROWN: Just a couple of points I'd like to make for the Court. The diagnosis relied on by the doctors in the evaluation before the Court is not current for Mr. Page. The Axis II diagnosis in particular is no longer a current part of his working diagnosis. So I just wanted to relay that information to the Court.

THE COURT: But Axis I was?

MR. BROWN: Yes.

THE COURT: Is. Yes.

MR. BROWN: But the antisocial personality disorder is no longer part of the working diagnosis from staff at Coalinga State Hospital.

Mr. Page also asked me to advise the Court that it's his position that, the position, the current protocol that's being used by the Department of Mental Health evaluators, and that would include the two evaluations before the Court now as part of this probable cause determination, essentially haven't been in compliance with the administrative law requirements of the state.

In other words, there is an Office of Administrative Law that is supposed to review various state agency protocols. And it's his position that the current protocols in use have not gone through that review process and so therefore should not be used by the Department for assessment purposes, until that process has been complied with.

THE COURT: You mean the actual form that they use? I mean, the outline that they use?

MR. BROWN: It actually takes the form of a handbook that, I believe, was last revised in '04, or, at least germane to this, was done in '04. And it's his position that it hasn't complied with the administrative regulations that that agency was expected or obligated to comply with pursuant to executive orders issued by the governor for all departments within the executive branch.

THE COURT: Is the Department of Mental Health within the executive branch?

MR. BROWN: Yes.

THE COURT: Do you want to respond to that, Mr. Swisher? Novel approach.

MR. SWISHER: Well, I like it. It has an interesting ring. I wasn't prepared to meet it.

I guess my salvo from the hip will be twofold. The first is if we're in violation, that is, if DMH is in violation of not having the protocol reviewed, I would argue that the remedy is not dismissal.

Failing that, or in addition to that, I'd say if that, and in a similar vein though, if there is a problem in that regard, it's de minimis and again doesn't go to the strength of the commitment.

And that's all I have to say. If they carry the day, well, I can't move DMH, that's for sure. I've tried.

THE COURT: All right. For the purposes of this particular hearing, the Court has reviewed the doctors' evaluations, which are the important thing. And I do note that Mr. Page refused to be re-interviewed by the doctors so all they had to go on was what was in the files. But they did prepare adequate and very thorough reports.

And based on those reports and the evidence presented in this hearing, the Court finds that Sammie Page has been convicted of sexually violent criminal offenses against two or more victims. Sammie Page does have a diagnosed mental disorder that predisposes him to the commission of criminal sexual acts. Sammie Page is likely to engage in sexually violent predatory criminal behavior as a result of the diagnosed mental disorder without appropriate treatment in custody.

And the Court finds that Sammie Page does, in fact, meet the criteria as a sexually violent predator as described in Welfare and Institution Code section 6600, et seq.

Do you have an order there?

MR. SWISHER: I do not see one. And this is Mas's. Can I ask the Court? You don't have one? This is so mystifying to me. I always file the order with everything else. Where they go, it's like my socks.

THE CLERK: Because you can't file an order until it's been signed, so they don't put it in there.

MR. SWISHER: That seems ridiculous to me.

THE CLERK: You need to just hold on to it.

MR. SWISHER: Okay. That explains that now, at least that mystery.

So no, and I don't see that Mr. Morimoto has them in the file, so I'll have to go get it.

THE COURT: I do recall Miss Valle telling you that about 10 times previously, though.

MR. SWISHER: And I'm not disputing that, that it may have gone in one ear and out the other. My wife tells me that on a virtually daily basis.

THE COURT: Based on what I've heard, then, and as I said before, pursuant to Welfare and Institution Code section 6602 and based on the Court's review of the evidence produced at this probable cause hearing, the Court finds that there is probable cause to believe that Sammie Page is a sexually violent predator.

The Court orders that Sammie Page be detained in a secure facility until a trial on this matter is completed.

Now, what date do you want?

MR. SWISHER: I spoke to Mr. Brown briefly, and we agreed that August 11th, with the rest of the cases to be set, would be appropriate.

THE COURT: Is that okay?

MR. BROWN: That's fine, Your Honor.

THE COURT: This matter will be continued until August 11th in this department.

(Whereupon, the matter was concluded.)

# Supreme Court of the United States
## Office of the Clerk
## Washington, DC 20543-0001

APPENDIX F

Scott S. Harris
Clerk of the Court
(202) 479-3011

April 18, 2022

Ms. Meredith Fahn
Meredith Fahn, Attorney at Law
1702-L Meridian Ave. #151
San Jose, CA 95125

Re: Sammy L. Page
v. Audrey King, Acting Executive Director, California Department of Mental Health
Application No. 21A614

Dear Ms. Fahn:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on April 18, 2022, extended the time to and including June 23, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

**Scott S. Harris**, Clerk

by

Redmond K. Barnes
Case Analyst

**APPENDIX G**

FILED

JAN 24 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| SAMMY L. PAGE,<br><br>Petitioner-Appellant,<br><br>v.<br><br>AUDREY KING, Acting Exec Dir, CA Dept of Mental Health,<br><br>Respondent-Appellee. | No. 20-17073<br><br>D.C. No.<br>1:16-cv-00522-AWI-JLT<br>Eastern District of California,<br>Fresno<br><br>ORDER |

Before: SILER,* CHRISTEN, and FORREST, Circuit Judges.

The panel judges have voted to deny Appellant's petition for panel rehearing or rehearing en banc. Judges Christen and Forrest have voted to deny the petition, and Judge Siler has so recommended.

The full court has been advised of Appellant's petition, and no judge of the court has requested a vote on it.

Appellant's petition, Docket No. 38, is DENIED.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

**APPENDIX H**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 17 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SAMMY L. PAGE,

Petitioner-Appellant,

v.

AUDREY KING, Acting Exec Dir, CA Dept of Mental Health,

Respondent-Appellee.

No. 20-17073

D.C. No.
1:16-cv-00522-AWI-JLT
Eastern District of California,
Fresno

ORDER

Before: SILER,* CHRISTEN, and FORREST, Circuit Judges.

Appellant's motion to file a late petition for rehearing and/or petition for rehearing en banc (ECF No. 39) is GRANTED. The petition filed on October 22, 2021 is accepted for filing.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

**APPENDIX I**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 26 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

| | |
|---|---|
| SAMMY L. PAGE,<br><br>Petitioner-Appellant,<br><br>v.<br><br>AUDREY KING, Acting Exec Dir, CA Dept of Mental Health,<br><br>Respondent-Appellee. | No. 20-17073<br><br>D.C. No. 1:16-cv-00522-AWI-JLT<br>Eastern District of California,<br>Fresno<br><br>ORDER |

Before: Peter L. Shaw, Appellate Commissioner.

The district court has not issued or declined to issue a certificate of appealability in this appeal, which appears to arise under 28 U.S.C. § 2254. This case is therefore remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

If the district court issues a certificate of appealability, the court should specify which issue or issues meet the required showing. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 116 F.3d at 1270. If the district court declines to issue a certificate, the court should state its reasons why a certificate of appealability

should not be granted, and the Clerk of the district court must forward to this court the record with the order denying the certificate. *See Asrar*, 116 F.3d at 1270.

The Clerk shall send a copy of this order to the district court.

**APPENDIX J**

**MEREDITH FAHN**
ATTORNEY AT LAW
1702-L MERIDIAN AVENUE #151
SAN JOSE, CALIFORNIA 95125
telephone (408)947-1512 email fahn@sbcglobal.net

October 26, 2020

Via Electronic Filing

Molly Dwyer, Clerk of Court
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

**Re:** *Page v. King,* U.S. Court of Appeals no. 20-17073; clarification of nature of proceeding (related to Court's order filed October 26, 2020, ECF No. 4)

Dear Clerk:

Please be advised that this case arises from 28 U.S.C. §2241, not §2254. The order of this Court filed earlier on this date indicates that this case "appears to arise under 28 U.S.C. §2254." ECF No. 4. That is incorrect.

The distinction makes no difference for the limited purpose of needing a certificate of appealability (COA), because a COA is required for §2241 appeals as well as §2254 appeals. Still, in the interests of clarity, as well as the interests underlying appellant Page's pending request to expedite (ECF No. 3), Page wishes to make clear that this is a §2241 case. See also ECF No. 3 (motion to expedite, listing next to caption, 28 U.S.C. §2241).

Very truly yours,

/s/ Meredith Fahn
Counsel for Appellant Sammy Page

**APPENDIX K**

new 530

**PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

Name PAGE, (Last) SAMMY (First) L. (Initial)

Prisoner Number CO-86-9

Institutional Address Coalinga State Hospital, P.O. Box 5003, unit Three, 24511 West Jayne Ave., Coalinga CA 93210

FILED JUL 16 2012 RICHARD W. WIEKING CLERK, U.S. DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

12-3721 WHA

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**

E-filing

SAMMY L. PAGE,
(Enter the full name of plaintiff in this action.)

vs.

Audrey King, Acting Exec. Director, Calif. Dept. OF Mental Health Director

(Enter the full name of respondent(s) or jailor in this action)

(PR) Case No. 12 3721
(To be provided by the clerk of court)

**PETITION FOR A WRIT OF HABEAS CORPUS** 28 U.S.C. 2241(C)(3); Yong V I.N.S. 208 F.3d 1116, 1120 (9th Cir. 2000) (HN 8-9), Ruby V U.S. 341 F.2d 585, 586-87 (9th Cir. 65) (Summary and emergency remedy)

WHA

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b). Verification Proof of Service appendix back of App. DD