No. 18-7220

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

PASHTOON FAROOQI — PETITIONER
(Your Name)

VS.

STATE OF CALIFORNIA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

California Court of Appeal, Fourth Appellate District, Division Three
(NAME OF COURT THAT LAST RULED ON THE MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

PASHTOON FAROOQI CO-002159-2
(Your Name)

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(City, State, ZIP Code)

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QUESTIONS(S) PRESENTED

1. Does the California version of its Sexually Violent Predators Act (SVPA) violate the precedents of this Court, and is it therefore unconstitutional?

2. Has the State of California, through its Department of State Hospitals, departed from professional standards to such a degree that SVPA civil commitment is legislatively-approved unconstitutional punishment? (*Seling v. Young,* 531 U.S. 250, 265 (2001); *Foucha v. Louisiana,* 504 U.S. 71, 82-83 (1992).)

3. Is the California version of its SVPA void for vagueness because it invites "more unpredictability and arbitrariness"? (*Sessions v. Demaya,* 584 U.S. ___, 138 S.Ct. 1204, 1223-1234 (2018).)

4. Is the California SVPA an unconstitutional Bill of Attainder? (*Patchat v. Zinke,* — U.S. —, 138 S.Ct. 897 (2018); *Nixon v. Administrator of General Services,* 433 U.S. 425, 475-476 (1977).)

5. Under California law, the prosecution's expert witness cannot relate case-specific facts asserted in hearsay statements. (*People v. Sanchez* (2016) 63 Cal.4th 665.) The admission of this evidence in petitioner's

civil commitment trial also violated *Crawford v. Washington,* 541 U.S. 36, 53-56 (2004), which prejudiced this petitioner. Do these violations require reversal of petitioner's indefinite involuntary civil commitment on Constitutional grounds?

6. a. Does the State of California's departure from professional standards require reversal and dismissal in this case by this Court because of insufficient evidence to find petitioner was a sexually violent predator who suffered from an actual "diagnosed mental disorder"?

b. Did the State of California's denial of a jury instruction (a unanimous jury finding where multiple acts are argued in the alternative to constitute a single crime)—requiring the finding of the "mental disorder that predisposed [petitioner] to commit sexually violent behavior"—deny petitioner his rights to Due Process of Law and a jury trial? (*Richardson v. United States,* 526 U.S. 813, 816-817 (1999); *Schad v. Arizona,* 501 U.S. 624, 634, fn 5 (1991).)

c. In the circumstances of this case, should petitioner's civil commitment be reversed because of an impermissibly vague jury instruction (i.e., CALCRIM No. 3454)?

LIST OF PARTIES

☑ All parties appear in the caption of the case on the cover page. The parties' addresses are as follows.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows.

Petitioner:

In propria persona

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Respondents:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

☐ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to
the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☑ For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix __A__ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☑ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)

☑ For cases from **state courts**:

The date on which the highest state court decided my case was July 2, 2018. A copy of that decision appears at Appendix A .

☑ A timely petition for review by the California Supreme Court was thereafter denied on the following date: September 12, 2018, and a copy of the order denying review appears at Appendix B .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

California Constitution

California Code of Regulations

STATEMENT OF THE CASE

A jury found petitioner Pashtoon Farooqi to be a sexually violent predator (SVP) under the California Sexually Violent Predators Act (SVPA). (Cal. Welfare & Institutions Code, § 6600 et seq.). He was ordered indefinitely committed the State of California Department of State Hospitals (DSH).

Petitioner argued, to the courts below, that the trial court infringed upon his State and Federal right to witness confrontation and due process by allowing the respondent's expert witnesses to testify about case-specific facts, which prejudiced petitioner ((*People v. Sanchez* (2016) 63 Cal.4th 665; *Crawford v. Washington,* 541 U.S. 36, 53-56 (2004)); the evidence is insufficient to support the SVP finding, and the trial court committed instructional error. In a supplemental brief, petitioner also argued that California Welfare & Institutions Code § 6600, subdivision (a)(3) violated his Constitutional right to due process.

Respondent herein conceded the trial court erred by allowing one of the government's experts to recite case-specific facts (hearsay) about a single incident, but also argued the case-specific facts were properly admitted under other "exceptions" to the California hearsay rules, and that there was in any event no prejudice to petitioner.

The appellate court agreed with respondent that any evidentiary error was harmless in light of the volume of evidence properly admitted. The appellate court also rejected petitioner's challenge to the sufficiency of the evidence, the asserted instructional error, and his Constitutional challenges.

The Supreme Court of California denied review. Petitioner now petitions this Court for certiorari.

The California SVPA is an Unconstitutional Bill of Attainder

The California SVPA was enacted in 1996, and is now substantially different than the original version which was changed in November 2006 by California Proposition 83, entitled the Sex Offender Punishment and Control Act of 2006. This initiative statute changed the SVPA from a legislative scheme of therapy to one of punishment.

Patients at DSH-Coalinga are not prisoners, having been committed under civil pretenses. DSH-Coalinga is supposed to be a therapeutic psychiatric hospital, not a "boot camp." Nevertheless, DSH and DSH-Coalinga have taken this institution—which was built for the sole reason and purpose to hold and treat SVPs—and moved in Mentally Disordered Offenders and state prisoners of the California Department of Corrections & Rehabilitation along with the SVPs, who mingle together.

On January 29, 2018 (a Saturday), the California Department of State Hospitals (DSH) and DSH-Coalinga declared there was an out-of-control "child pornography epidemic" and the institutional police department seized control of the institution from administrative officials. No evidence of such epidemic was produced and no warrants were sought. The declaration basically informed the patients and public of two points: (1) that *ALL* patients were involved and all patients' private electronic properties were to be seized—even those who had no record, history, or crimes in these areas; and (2) that DSH and DSH-Coalinga cannot manage its security protocols regarding the contraband of a very few (about 20), and, instead, enacting punitive and retaliatory measures on the vast majority of patients in compliance.[1/]

Then the DSH-Coalinga internal police force enacted a procedure which was just a ruse for the unconstitutional search and violent seizure—without warrant—to seize and destroy patient personal property that had positively *nothing* to do with any alleged child pornography, i.e., foods, clothing, hygienic products, etc. DSH-Coalinga patients <u>do</u> have the State constitutional and regulatory right to privacy. (Cal. Const., art. I, § 1; Tit.

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[1] When patients complained (a few by rampage), respondent merely claimed that the patients wanted their pornography and were having temper tantrums. Such claims were subterfuge and clearly untrue.

9, Cal. Code Regs., § 883(b)(1).)

DSH and DSH-Coalinga have prevented compliance with this Court's decision in *Packingham v. North Carolina,* 582 U.S. —, 137 S.Ct. 1730 (2017) (through the enactment of Tit. 9, Cal. Code Regs., § 4350), and which is used to overrule this Court's *Packingham* decision [But the assertion of a valid governmental interest "cannot, in every context, be insulated from constitutional protections. (Citation.)" and "It is well established that, as a general rule, the Government 'may not suppress lawful speech as the means to suppress unlawful speech.' (Citation.)"]

Congress has ordered that all State mental health programs should provide treatment in the least restrictive environment. (Mental Health Systems Act, 42 U.S.C . § 9501(1)(A), (F), (G), (J).) This is still good law, but it is ignored by DSH and DSH-Coalinga.

The worst offense was that this unconstitutional *"cleansing"* included putting an end to and abandoning the California Sex Offender Treatment Program (SOTP)—which is in direct violation of *Kansas v. Hendricks,* 521 U.S. 346 (1997), and the SVPA itself, which mandates that the sole purpose and reason DSH-Coalinga houses civil detainees is for treatment. The internal police department called in the police departments of other California State hospitals for back-up, and then further denied therapists

at DSH-Coalinga to even visit their patients' units or check on any patients who have been in SOTP for decades, although they forced these staff (and others) to take part in the unlawful and unconstitutional seizure of patient properties. Once DSH and DSH-Coalinga set aside the SOTP (more on this below), every action afterward, by definition, is an act of punishment—which is conflict with and counter to every decision of this High Court, from *Kansas v. Hendricks* forward. "Civil detainees have a protected interest in their personal property. [Citation.] Where the state authorizes the deprivation by a policy or procedure, it is actionable under the Due Process Clause. (*Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433, (1982); *Hudson v. Palmer,* 468 U.S. 517, 532, (1984).)" In *United States v. Brown,* 381 U.S. 437 (1965), this Court "emphatically rejected the argument that the Bill of Attainder Clause outlawed only a certain class of legislatively imposed penalties...." (*Id.,* 381 U.S. at 447-448, quoting *Cummings v. Missouri,* 4 Wall 277, 320 (1868).)

Bill of Attainder is a generic term embracing both bills of attainder and bills of pains and penalties. (*Drehman v. Stifle,* 75 U.S. (8 Wall) 595 (1870).)

Observe the following (*Patchat v. Zinke,* — U.S. —, 138 S.Ct. 897 (2018); *Nixon v. Administrator of General Services,* 433 U.S. 425, 475-476

(1977), but petitioner gives notice that—due to page limitations of the Rules of this Court—these instances are just the "tip of the iceberg":

Psychology / Psychology

DSH and DSH-Coalinga depart from accepted professional standards (see *Youngblood v. Romeo,* 457 U.S. 307 (1982)) by causing patients significant risk of harm and actual harm (no clinical justification). It fails to meet its burden to as a mental health facility to provide patients with reasonable therapeutic opportunities that have proven exit strategies, that are rational, and that do not keep patients until they die.[2] Actual specifics can and will be provided when and if this Court grants certiorari.

1. The administrative abandonment of all SOTP clearly defines and indicates the punitive nature of DSH and DSH-Coalinga. The ongoing administrative reprisal interventions most specifically set aside any therapeutic ideologies in favor of prison-like conditions, invoking retribution and deterrence. Pains and penalties.

2. The evolving corruption is underscored by the blatant dismissal of

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[2] By comparison, the California Department of Corrections and Rehabilitation has its own sex offender treatment program which allows treatment for two years and then releases the prisoner to parole. These are the same inmates as are referred to the SVPA, which keeps patients indefinitely for no discernable reason other than to lengthen confinement time. This directly affects petitioner's liberty interests. (See California Penal Code § 3072.)

ethical responsibilities for a *"hospital"* supposedly built on therapeutic foundations. The bad psychology practiced at DSH-Coalinga for patients long past due release from unending cycles of abusive treatment is continued demonstration of unethical principles and extreme abandonment of legislative intent. (Examples: Men on their deathbeds and no longer a danger to *anyone* are kept in custody and confinement until after they die; other dying men are not permitted visitors from family friends or family clergy; no Skype-type visits are permitted to the dying.) There can be no justification for these policies and practices. Pains and penalties.

3. Due to an increasingly growing and large number of revolving staff, especially in the psychology department, treatments teams are usually understaffed, against licensing standards, or they do not have enough staff to even hold treatment teams on some units. Treatment team meetings with patients are required by the SVPA to be monthly, but they are now held only quarterly or *annually*. Pains and penalties.

4. An accepted standard of hours for most SOTP is approximately 20-to-22 hours of therapy per week. DSH-Coalinga holds SOTP groups offering about five hours or less per week—which significantly lengthens SOTP by years, violating petitioner's liberty interests. Pains and penalties.

5. Unnecessarily extending incarceration in a highly restrictive

environment, while subjecting patients to excessive and unnecessary groups, fosters despair, hopelessness, and in many cases, a quality of life that is *not* safe or safe-seeming. Pains and penalties.

6. Long lists for assessment "testing" take months and/or years to initiate and even longer to complete. Pains and penalties.

7. Inappropriate diagnoses (i.e., ambiguous "*not otherwise specified*" and personality disorders not meeting Diagnostic and Statistical Manual criteria). Pains and penalties.

8. Years of positive actions, behaviors, and monthly reports can be, and frequently are, ignored or discounted with each new evaluator, facilitator, or psychologist's opinion. Pains and penalties.

9. Psychological rehabilitation is prevented given current DSH policies and practices which act as deterrents for patient options to discharge in any given standard time frame within professional guidelines, which are seemingly designed only to ensure job security for department staff rather than to provide treatment. Pains and penalties.

10. The SVPA mandates monthly treatment team assessments (Cal. Welf. & Inst. Code, § 6606, subd. (e)). However, DSH and DSH-Coalinga have mandated quarterly treatment team assessments, thereon artificially lengthening incarceration times. Pains and penalties.

11. DSH-Coalinga behavior management is virtually non-existent—punishing all for administrative failures to address individual problems. Further, DSH maintains that patients at DSH-Coalinga are "violent" and the "worst of the worst," while ignoring that *none of female hospital staff* (which comprise more than 50% of the work force) *have ever been sexually assaulted.* DSH and DSH-Coalinga take former prisoners with "minimum" or "medium custody" levels and make all "maximum security" prisoners, merely because the patient was formerly convicted of a sex offense. Pains and penalties.

12. *Psychiatric*—DSH-C fails and refuses to proficiently use or utilize its psychiatric staff, and it hinders those on treatment units from the full authority of their licenses. Pains and penalties.

Patients' Rights

1. DSH-Coalinga residents have called for the disbanding of the current Patients' Rights scheme as incompetent advisors and advocates of the administration rather than the patients. Pains and penalties.

2. Part of the many errors caused by DSH-Coalinga is pretending that it is a hospital for treatment but running it like a high-security prison, and that many of the stable factors that California prisons have in place discussed a proper appeal system for patients imprisoned here—the appeal

process used in California prisons is far superior and advantageous for prisoners with complaints. DSH frequently ignores patients' complaints or lets 60 or 90 days elapse before universally denying patients' complaints. There is no enforcement mechanism. This is a classic Fourteenth Amendment equal protection violation.

3. In more than 90% of submitted complaints on violation of residents' rights, DSH has found grounds for denial or that any rights have been violated. Pains and penalties; due process violations.

4. Patients' Rights is a DSH advocate and not a patient advocate—it preserves DSH policies to violate and discard patients' rights in most cases. In fact, in one of its most famous policies, DSH claims to have the authority to give patients only those rights it deems to fit the situation at the time. "rights" include: safety, adequate health care (see below), habilitation, freedom from restraint, preventing regression, and facilitate liberty interests. Patients' Rights staff routinely separate "patient rights" from "civil rights," and do not and will not enforce a patient's *civil* rights. Pains and penalties.

5. "Adequate Treatment." DSH has standards below those generally accepted by professional judgments and practice—accepted by professional judgments and practice. (*Youngberg v. Romeo,* 457 U.S. 307 (1982).)

Recently, as noted above, DSH-Coalinga Department of Police Services seized control of DSH-Coalinga and simply *stopped* <u>*all*</u> SOTP—just cancelled it—thereby breaking the laws and the precedents of this Court and the reason why this institution allegedly exists: to provide a Sex Offender Treatment Program. Pains and penalties.

6. No Out and Non-Ending Treatment Groups. (See *Oregon Advocacy Center v. Mink* (9th Cir. 2003) 322 F.3d 1101, 1121, citing *Sharp v. Weston* (9th Cir. 2000) 233 F,3d 1166, 1172.) Pains and penalties.

7. DSH provides no vocational opportunities, outright denying many suggested and viable programs used by the prison system (e.g., handicapped animal training [pets for the blind, as an example], computer programming). DSH has no re-entry programs at all. Pains and penalties.

<u>Medical:</u>

General medical services, infection control, physical/ occupational therapy, dental/dietary care, nursing care, medication management.

1. The death rate at DSH-Coalinga is far beyond normal in any given population outside of cancer wards, There are a number of extremely feeble, aging, and dying patients who no longer need to be incarcerated, but are kept here—not for protection of the public, but for job security of the staff only. Pains and penalties.

2. More than 125 patients have died at DSH-Coalinga since 2005. The patients' cancer rate is suspiciously high, and way above "normal." Pains and penalties.

3. Forced medication still occurs, many times for the flimsiest of reasons, many times for merely disagreeing with psychiatric staff. Pains and penalties.

4. To attend any outside medical appointment, all custody and transport is handed over to prison guards; patients are shackled hand-and-foot and driven in cramped, closely confined "bins/cages" in small vans—or in cattle cars reminiscent of the Nazi era. Pains and penalties. For this reason many patients simply try to live with health needs due to abusive treatment, by prison guards, of civil detainees who are not prisoners, and for that reason, many choose not to go out for medical treatments.

5. Medical regimens, medications, and treatments are often prescribed or cancelled without appropriate or current diagnostic evaluation, and almost never with the legally required informed consent of the patient. In many cases, antibiotics are prescribed in a haphazard manner to treat viral infections, clearly in violation of the guidelines from the Centers for Disease Control and Prevention. There are often no

collaborative consults between pharmacy and psychiatrists.

Nursing

6. Nursing decisions are often and frequently overruled by the decisions of psychiatric technicians. Pains and penalties.

7. Monitoring patients under immediate medical care is inadequate, insufficient, and often non-existent. Pains and penalties.

Many medical issues are a means for punitive measures and punitive disciplines enforced under false medical opinions. Pains and penalties.

Placement in the Most Integrated Setting

1. DSH runs a prison and *not* a hospital. DSH policies are prison-mandated and punitive. Pains and penalties.

2. Liberty CONREP (Conditional Release) is a "final stage" (Module 4) of the SOTP. However, DSH has overridden the purpose by forcing patients to remain incarcerated for years while Liberty CONREP "finds" housing. The entire construct is overly punitive and restrictive when compared with the California Department of Corrections which releases sex offenders daily from prison to parole—prisoners with far worse crimes without the limitations Liberty CONREP uses abusively. Pains and penalties.

3. Upon release, for those very few fortunate to be released, the

monetary allowance given is just $50 and patients are forced onto the nearest bus away from Coalinga. DSH and DSH-Coalinga show no interest in what then happens even for men with nowhere to go or live, without any outside support resources to help. This fact prompts many men to stay under the ~~abdominal~~ abominable conditions of DSH rather than attempt to survive without aid in the world. Pains and penalties; cruelty.

4. Professional standards mandated by Federal laws require the pursuit of a timely discharge to the most integrated, appropriate environment that is consistent with the needs of the patients. DSH and DSH-Coalinga ignore positive discharge planning procedures with overly restrictive and unrealistic goals and purposes. Pains and penalties.

5. DSH and DSH-Coalinga prohibits and denies access to any current resources for patients preparing their discharge plans; and will not provide any avenues in which to make contact with reentry programs, housing opportunities, clinical programs, etc. Pains and penalties.

6. DSH and DSH-Coalinga engages in and *encourages* extended institutionalization, poor transition methodology, which *adds high risk* for reoffense once released without any supportive substructures in place as patients attempt to reintegrate back into their communities. Insanity.

7. Patients are denied any up-to-date, modern, current training for

the electronic, computerized world today for men having been incarcerated for 30 or more years. When and if patients do get released, the patients are so completely unprepared to face technology that is everyday life "out there." There are patients at DSH-Coalinga who have never used a cell phone or done texting/emails or seen the "Internet" and who lack competitive computer skills in today's job market or to even look for employment. Pains and penalties.

8. Official DSH and DSH-Coalinga policy is to instill paranoia in the public regarding sex offenders. The overall message in this toxic setting is, *"You are unworthy, unredeemable, and society is against you!"* Pains and penalties.

Punitive Policies

DSH and DSH-Coalinga depart from professional standards by causing patients significant risk of harm and actual harm.

1. There is no valid reason why California will not model its SOTP after the Washington State model where sex offender civil rights include single apartments, their own property, their own clothes, internet access on their own computers, etc. Even the Kansas model (examined by this Court in *Kansas v. Hendricks, supra*) is much less restrictive a program than DSH and/or DSH-Coalinga. Pains and penalties.

2. California and DSH changed institutional intentions by adopting Title 9 of California Code of Regulations (prison policies) and not even trying to use Title 22 policy (for civil and hospital environs) in place. "Titles" are institutional guidelines by which rules, policies, and living standards are mandated. Pains and penalties.

3. The larger question is that every man sent to DSH-Coalinga under the SVPA is a civil detainee, prison sentences have been served and completed (exception: see page 5, above). Why any prison-formatted policy exists and why punitive measures are the daily regimen for patients at DSH-Coalinga needs to be questioned at a fundamental basis in operation. Pains and penalties.

4. DSH/DSH-Coalinga receives special permissions to go around many licensing issues and statutory requirements, accepting "flex waivers" forgiving violations and sub-standards. Pains and penalties.

5. Personnel from executive to middle management have demonstrated a marked lack of qualifications and abilities to operate effective treatment programs, assessment of patients, or to maintain appropriate staffing levels. The past few executive directors of DSH-Coalinga have been promoted from the position of psychiatric technician, without qualification as medical doctors or psychiatrists. These

are our "leaders." Pains and penalties.

6. Shortage of staff created a number of subpar sub-standard practices across the board in all DSH-Coalinga issues. Abusive staff get moved from unit to unit with no legal ramifications to modify dangerous behaviors. Staff who actually attempt to *help* patients are transferred or fired. Pains and penalties.

7. "Domestic partners," married under California law, are allowed to live together and "conjugate," whereas all other residents are not permitted conjugal or family visits. Condoms are available to LGBTQ[3] patients on demand. Pains and penalties for heterosexual patients, and outrageous by any standard.

8. "Skype"-type internet access is permitted only for court appearances or psychiatric evaluations, while video visits with out-of-state relatives are denied, as well as for men too ill or dying not allowed to have video visits. Pains and penalties.

9. Recently DSH-Coalinga invented a hospital-wide search and seizure (mentioned above), claiming to be after illegal electronics and child porn. This ruse quickly revealed itself when searchers seized personal

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[3] LGBTQ is an acronym for Lesbian, Gay, Bisexual, Transgender, and Questioning.

items that have nothing to do with electronics or kiddy porn: toothbrushes, toothbrushes, store-bought personal foods, clothing, etc. Pains and penalties.

10. Administrative staff held a "congratulatory" meeting soon after the illegal seizure and removal of patients' personal properties. This meeting's minutes (available by subpoena only) indicate a complete and utter lack of concern, not only for the residents here, but for the constitution and laws of the California and the United States. The minutes demonstrate how staff felt —"positive," "well-done," "We-Did-Good," "This ought to be done more often," "...stimulating experience...." Slavery.

11. DSH-Coalinga has repeatedly permitted patients to have certain personal property, which was purchased by or given to the patients, then "changed their mind" and policy, and then seizing even *more* than the granted property allowed. This is a torture technique utilized by many prisons and on prisoners of war throughout the history of imprisonment. Pains and penalties.

12. In the California prison system, men with gang tattoos are admitted to a program to get the tattoos removed to help facilitate a new life once released; whereas DSH and DSH-Coalinga deny and refuse such a rehabilitative program. This act alone may belie their intentions: Pains

and penalties.

13. DSH and DSH-Coalinga foster an environment of corruption and a Code of Silence where staff are afraid to report what they know, fearing retaliation of firing, even with statutory "whistleblower" protection. Pains and penalties.

The California SVPA is Unconstitutionally Vague

In his brilliant concurring opinion in *Sessions v. Dimaya, supra,* Justice Gorsuch noted that, "...[V]ague laws ... can invite the exercise of arbitrary power ... by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up." (*Id.,* 200 L.Ed.2d 571-572.) "... [I]n my view the weight of the historical evidence shows that the clause sought to ensure that the people's rights are never any less secure against government invasion that they were at common law." (*Id.,* at p. 571.) The California SVPA violates this Constitutional guarantee.

The California SVPA does not require "fair notice." In nearly *all* cases, the statute is sprung on potential committees without any notice whatever. Topping it off is the requirement that a potential committee must have a *current* mental or personality disorder that makes him likely to reoffend; yet, in the trial courts, it is most likely that there is no

currency pleaded by the prosecution, merely a rehashing of the original crime(s), which may be ten, twenty, thirty or more years distant. This is hardly "current."

The California SVPA is too vague to be allowed by this Court to stand. As Justice Gorsuch pointed out in other circumstances, with the changes made by initiative in 2006 (the [California] Sex Offender Punishment and Control Act of 2006), the California "Legislature set up a net large enough to catch all possible offenders, leav[ing] it to the courts to step inside and say who could be rightfully detained, and who should be set at large[,] ... substitut[ing] the judicial for the legislative branch of government. ... Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions. (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972) ["A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis"].)" (*Sessions v. Dimaya, supra,* 200 L.Ed.2d at 574.)

Instead of requiring *real* evidence, indefinite commitment is left to so-called "experts" employed by the prosecution and who merely opine their belief on the dangerousness of the potential committee. This is not *real*

evidence of "signs and symptoms" of a mental disorder. As Justice Gorsuch pointed out, "[I]nstead of requiring real evidence, does the statute mean to just leave it all to a judicial hunch? ... How is a judge to know? How are the people to know?" (*Id.,* 200 L.Ed.2d at 579.) Paraphrasing, the California SVPA does not call for the application of common experience. Choice, pure and raw, is required. Will, not judgment, dictates the result. (*Id.,* at 579.) "[C]oncerns with substantive due process should not lead us to react by withdrawing an ancient procedural protection compelled by the original meaning of the Constitution. ... [N]o one should be surprised that the Constitution looks unkindly on any law so vague that reasonable people cannot understand its terms and judges do not know where to begin in applying it. *A government of laws and not of men can never tolerate that arbitrary power.*" (*Id.,* at pp. 580-581.) This Court should not tolerate it either.

Reversal is Required Because Petitioner's Trial Violated Federal Standards

Violation of Due Process

After the California SVPA was first enacted, the Legislature amended California Welfare & Institutions Code § 6600 to permit the admission of documents containing hearsay for two purposes, to establish: (1) "the existence of any prior convictions"; and (2) "the details underlying the com-

mission of an offense that led to a prior conviction, including the predatory relationship with the victims." (Welf. & Inst. Code, § 6600, subd. (a)(3).) The second purpose violates due process.

Section 6600, subdivision (a)(3) violates due process by permitting the admission of documents containing testimonial hearsay. To the extent section 6600 authorizes introduction of "probation and sentencing reports, and evaluations by the State Department of State Hospitals" it violates due process.. Codifying the admissibility of evidence does not change its nature or the prejudice it may work upon a defendant's right to a fair trial. Admission of evidence — even where statutorily authorized — violates due process where it "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." (*Dowling v. United States,* 493 U.S. 342, 353 (1990).)

Petitioner's commitment violated the holding in *Mathews v. Eldridge,* 424 U.S. 319 (1976) [the court must consider the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal

and administrative burdens that the additional or substitute procedural requirement would entail]. Applying those factors, due process is violated by the introduction of evidence permitted under Section 6600, subdivision (a)(3), requiring reversal by this Court.

Violation of Right to Confrontation

The testimony of prosecution witnesses included case-specific hearsay about the details of petitioner's prior offenses and conduct while in custody, which was improper under California law. (*People v. Sanchez, supra,* 63 Cal.4th 665.) The case-specific testimonial hearsay was admitted without petitioner having any opportunity to cross-examine the persons whose statements were relied upon by the expert.

Sanchez applies to SVPA cases in California generally, and to petitioner's trial specifically. Here, the defense moved in limine to exclude various hearsay evidence and also objected to the introduction of case-specific evidence throughout the trial.

The admission of the evidence in violation of *Sanchez* was also federal Constitutional error. (*People v. Sanchez, supra,* 63 Cal.4th at p. 685; *Crawford v. Washington, supra,*541 U.S. at pp. 53-56). Admission of this evidence prejudiced petitioner Farooqi and requires reversal.

Petitioner's Commitment After Admission of Insufficient Evidence was Error

The prosecution experts disagreed over the diagnosis of mental disorder for petitioner Farooqi. One prosecution expert (Jenkins) opined that petitioner suffered from an "other specified paraphilic disorder, non-consent. (3RT 711.) The other prosecution expert (North) testified where was insufficient evidence to support this disorder. (4RT 887.) One defense expert (Abbott) agreed there was insufficient evidence to support Jenkins' diagnosis for petitioner. (5RT 1050.) The other defense expert (Frances), who was a principal author of the DSM-5 (4RT 915), disagreed that North's diagnosis was ever proper.

North testified that petitioner suffered from other specified disruptive impulse control and conduct disorder, with aggressive sexual urges. (4RT 865.) Jenkins did not attribute this diagnosis to petitioner. (See generally 3RT 634-758; 4RT 759-842.) Francis concluded North completely made up the diagnosis by hobbling together different diagnoses. (4RT 943-945.) Abbott likewise disagreed with north, concluding he had considered only past offenses without recent indicia to support the diagnosis. (5RT 1056.)

Federal Constitutional due process requires that a statutory scheme for involuntary commitment must rationally distinguish select classes of dangerous offenders. (*Kansas v. Hendricks, supra,* 521 U.S. at p. 357.) It

cannot constitutionally become a "mechanism for general retribution or deterrence." and it cannot rest upon a mental abnormality which is "too imprecise a category to offer a solid basis for concluding that civil detention is justified." (*Id.,* at p. 373, concurring opinion of KENNEDY, J.)

SVP commitments cannot cease to distinguish meaningfully between on the one hand, offenders whose violent predatory conduct stems in some way from abnormality of thought, perception or affect, and on the other hand, all remaining offenders, who by virtue of their deviant conduct, may properly be described as abnormal, but whose abnormality only traces, in circular fashion, back to their conduct. This Court, in *Foucha v. Louisiana, supra,* 504 U.S. at pp. 82-83, west forth this fundamental concept. *Foucha* forbade involuntary confinement for someone with a "personality" disorder which leads to criminal conduct. It is unconstitutional for California SVPA law to place a psychiatric label on a particular character structure or a generalized propensity to do ill. (See, *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1180-1181 (dis. opn. of WERDEGAR, J.).)

The entire record here failed to provide evidence of solid probative value and failed to inspire confidence that the issue of whether petitioner was an SVP was justly determined. Therefore, the judgment and Farooqi's commitment violate due process and should be reversed. (See *Jackson v.*

Virginia, 443 U.S. 307, 319-320 (1979) [Review for proof beyond a reasonable doubt considers the whole record, and whether a reasonable trier of fact could have rejected all evidence that undermined confidence in the judgment].)

The testimony from the prosecution's experts runs afoul of the requirements in *Kansas v. Hendricks, supra,* 521 U.S. at p. 357, that a proper diagnosis must distinguish the classes of dangerous offenders. Here each prosecution expert focused on petitioner Farooqi's past offenses and behaviors, extrapolated future conduct from them, then struggled to assign a diagnosis.

Based on the foregoing and the requirements of *Hendricks,* the evidence was insufficient as a matter of law to support a verdict that petitioner was a sexually violent predator. Hence, the judgment should be reversed.

Denial of Proper Jury Instructions Prejudiced Petitioner and Denied Him Due Process

The prosecution presented evidence that petitioner suffered from two separate, distinct mental disorders. One prosecution expert (Jenkins) testified Farooqi had other specific paraphilic disorder, non-consent. (3RT 711.) The other prosecution expert (North) testified there was insufficient evidence to support Jenkins' diagnosis (4RT 887), and instead

diagnosed Farooqi with other disruptive impulse control and conduct disorder, with aggressive sexual urges (4RT 865). The prosecutor never elected which diagnosis was the disorder that predisposed Farooqi to reoffend and make him an SVP, or that both did. This denied petitioner due process.

The federal due process entitlement to a unanimous jury applies where *multiple acts* are ~~argued~~ argued in the alternative to constitute a *single crime.* (See *Richardson v. United States, supra,* 526 U.S. 813, 816-817 [RICO prosecution where prosecution was required to prove at least three predicate crimes from among list designated by statute; held: unanimity as to each predicate crime was required and it was insufficient for jurors to agree three crimes were committed without agreeing on the specific crimes]; *Schad v. Arizona,* 501 U.,S. 624, 634, fn. 5.) This is precisely what occurred in the instant case. Accordingly, the judgment should be reversed.

The failure to instruct on unanimity was prejudicial error. Four doctors testified: two for the prosecution and two for the defense. No two doctors agreed on a diagnosis for Farooqi. Not only did the two prosecution experts disagree about a diagnosis, but one fashioned a completely novel diagnosis for Farooqi. When experts could not agree on a diagnosis, it casts

doubt on how jurors could find beyond a reasonable doubt that the diagnosed disorder predisposed Farooqi to commit sexually violent predatory crimes.

The importance of a unanimity instruction is rooted in the Fourteenth Amendment to the United States Constitution's requirement that all criminal defendants are afforded due process of law. The failure to give a unanimity instruction has the effect of lowering the prosecution's burden of proof. Accordingly, a failure to give the instruction when it is warranted abridges the defendant's right to due process. Without a unanimity instruction, there is a risk of conviction or, as here, a civil commitment, when proof beyond a reasonable doubt is lacking

The prosecution experts attributed two very different and very distinct mental disorders to petitioner Farooqi. In such a situation, a unanimity instruction was needed in order to comprehend the jury's basis for a finding that Farooqi was an SVP and accord him meaningful appellate review. The SVP diagnosed disorder must be both "current" and have some explained nexus to anticipated criminal recidivism involving a predatory sex offense, *not just recidivism in general.* "Diagnosed mental disorder includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of

criminal sexual acts in a degree constituting the person is a menace to the health and safety of others. (Cal. Welf. & Inst. Code, § 6600, subd. (c).)

CALCRIM No. 3454 illustrates the requirement for unanimity. The second element a jury must find beyond a reasonable doubt is that the SVP respondent has "a diagnosed mental disorder." (CALCRIM No. 3454.) At that stage, the mental disorder can be any number of disorders. The second element is inextricably linked to the third element, however, which requires a beyond-a-reasonable-doubt finding that "[a]s a result of ***that*** diagnosed mental disorder, he is a danger...." (CALCRIM No. 3454 [emphasis added].) The statutory requirement is *not* that as a result of *any* disorder he is predisposed to reoffend. Rather, the Code requires the disorder the prosecution proves must affect "emotional or volitional capacity" and "predispos[es] the person" to commitment criminal sexual acts. (Cal. Welf. & Inst. Code, § 6600, subd. (c).)

The jury had to decide whether Farooqi had a mental disorder — either existing at birth or acquired after birth — that affected his ability to control his behavior and that predisposed him to commit criminal sexual acts. Allowing individual jurors to pick either diagnosis, and not to agree, is not what was intended by the statute — or by *Hendricks* or by *Kansas v. Crane,* 534 U.S. 407, 412 (2002).

Based on the contradictory diagnoses offered by each of the two prosecution experts, a reasonable juror could have had doubt as to whether the disorder diagnosis of either expert established Farooqi was an SVP. Thus, respondent cannot show the absence of an election or unanimity instruction was harmless. A rational juror could have had doubt as to whether each alternative diagnosis established the predisposition beyond a reasonable doubt. Accordingly, reversal is required.

REASONS FOR GRANTING THE PETITION

California's version of the Sexually Violent Predator Act has never been scrutinized by this Court. It is unconstitutional for the following reasons:

1. The SVPA clearly violates the precedents of this Court. (*Kansas v. Hendricks,* 521 U.S. 346 (1997).)

2. Because California DSH departed from professional standards, in direct violation of *Youngblood v. Romeo,* 457 U.S. 307 (1982), *Foucha v. Louisiana, supra,* and *Seling v. Young,* 531 U.S. 250 (2001).

3. The SVPA is clearly unconstitutionally void for vagueness. (*Sessions v. Dimaya,* 584 U.S. —, 138 S.Ct. 1204, 1223-1234 (2018).)

4. Testimonial hearsay evidence of expert witnesses violates the Confrontation Clause and prejudices the defendant, including this petitioner, violating the provisions of *Crawford v. Washington,* 541 U.S. 35 53-56.

5. It is too easy to unconstitutionally "find" that a defendant has a personality or mental disorder that requires his indefinite civil commitment to a mental institution. Even though no "bright line" standard is required, there must be some requirement from this Court to ensure that a defendant cannot be committed without *some* current signs and symptoms

of a viable mental disorder. (*Kansas v. Crane,* 534 U.S. 407, 412 (2002).)

6. In *Sessions v. Dimaya,* 584 U.S. —, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), Justice Gorsuch said, "[I]f the legislature could set a net large enough to catch all possible offenders. and leave it to the courts to step inside and say who could be rightfully detained, and who could be set at large[,] this would, to some extent, substitute the judicial for the legislative department of government (citation) ... Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions (citation)." For this very reason, the California SVPA is thereon unconstitutionally vague.

6. Jury instructions in California SVPA cases are too vague to constitutionally permit a lifetime civil commitment, which requires intervention by this Court to set a national standard ;

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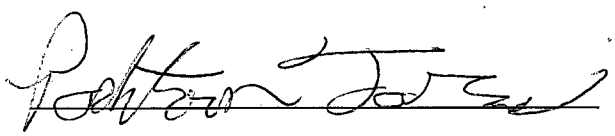
CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



Date: December 27, 2018

APPENDIX A

Opinion of the California Court of Appeal, Fourth Appellate District, Division Three, July 2, 2018, Docket Number G053664