03-56712

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

JAMES ALLEN HYDRICK, et al. Plaintiffs-Appellees, v. GRAY DAVIS, et al., Defendants, MELVIN E. HUNTER; et al., Defendants-Appellants.	Case No. 03-56712 (D.C. Case No.: CV 98-7167 TJH (RNB) Central California (Los Angeles))

APPELLANTS' REPLY TO APPELLEES' ANSWERING BRIEF

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APPELLANTS' REPLY
TO APPELLEES' ANSWERING BRIEF

INTRODUCTION

The law governing the commitment and confinement of Sexually Violent Predators (SVP) is evolving. In 2000 the California Sexually Violent Predator Act (SVPA) had been in force only four years. Other states' similar statutes had been in place only 10 years. That is a very brief period in federal jurisprudential development.

Since 2000 the Supreme Court, Circuit Courts and California Courts, have issued numerous opinions defining standards for the conditions of SVP confinement and delineating the constitutional analytical framework for SVP claims.

Appellees claim that the "law of the case" doctrine defeats all of Appellants' assertions in the Motion to Dismiss Appellees' Second Amended Complaint (Motion). However, law of the case is not created by a motion's summary denial. even if law of the case were applicable Appellants fall within two exceptions to the rule-manifest injustice and changes in the law.

In framing the issues in their Answer Appellees seem to ignore a basic premise underlying Appellants' appeal of the District Court order of August 26, 2003 summarily denying Appellants' Motion - that Appellants are entitled to qualified immunity on causes of action based on law that does not apply to the civilly

committed. Simply put, Appellants posit that state officials cannot be held liable in their individual capacities for alleged violations of constitutional clauses not applicable to persons over whom they have custodial responsibility.

For the causes of action that may apply to the civilly committed, Appellees' ignore the specific nature of the sexually violent predator commitment statutes and status. For example, Appellees state unequivocally that committed persons have a constitutional right to be free from involuntary medication. Answer p. 48. That is incorrect as a matter of law. Rather, as discussed in Appellants' Opening Brief and below, committed persons can be constitutionally involuntarily medicated in circumstances applicable to the SVP.[1]

Many of Appellees other claims are improperly pled consisting only of conclusory allegations with no factual support. The SAC contains no specific allegations tied to one individual's acts.

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[1] The involuntary medication of SVPs is a particularly unsettled issue in California. The California Supreme Court has remanded a case addressing that issue back to the California Court of Appeal on three occasions. (*In re Calhoun*, 112 Cal.App.4th 1262 [6 Cal Rptr.3d 34][B159949 (S094596)] (2003) (vacated and remanded subsequent to filing of Appellants' Opening Brief by 85 P.3d 2 (Cal. 2004).) The Court of Appeal, in a published decision held that the involuntary medication of SVPs was permitted under the commitment statute. *See* footnote 2. However, that decision was vacated and the case remanded for reconsideration in light of *In re Qawi*, 32 Cal.4th 1 (2004). The matter's legal issues are currently being briefed in the California Court of Appeal, Second Appellate District, Division Six.

A. Clarification of Points and Issues.

Appellees state that Appellants filed the Motion on February 25, 2003 and the District Court summarily denied the Motion on August 26, 2003 making it appear as though the Court reviewed Appellants' Motion for 6 months. Appellees fail to mention that their Opposition to the Motion was filed on July 25, 2003 and the order allowing the brief exceeding page limits was entered on July 31, 2003.

Appellees assert that Appellants' Motion to Dismiss the Second Amended Complaint (SAC) reasserts the "exact same arguments that were advanced and rejected by the district court in the First Motion to Dismiss." (Answer p. 11.) That assertion is factually inaccurate. Appellants grounds for dismissal are similar in some, but not all instances. Furthermore, as a review of the Motion makes clear, many of Appellants' arguments are based on decisions handed down by the Supreme Court and other courts since Defendants/Appellants answered the First Amended Complaint (FAC).[2]

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[2] A partial listing includes: *Seling v. Young*, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001)("as applied" criminal law claims disallowed for civil statute; criminal law constitutional claims not applicable to SVPs' treatment requirements); *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)(qualified immunity); *McKune v. Lile*, 536 U.S. 24, (2002)(no right to privileges if not participating in treatment); *Kulas v. Valdez*, 159 F.3d 453 (9th Cir. 1998), *cert. denied*, 120 S. Ct. 1187 (2000)(SVP treatment); *Thielman v. Leean*, 282 F.3d 478 (7th Cir. 2002)(due process and equal protection, conditions of confinement); *In re Matthews*, 345 S.C. 638, 550 S.E.2d 311 (2001)(statute tracks Kansas' statute and therefore no Double Jeopardy - conditions of confinement not punitive); *Page v. Torrey*, 201 F.3d 1136 (9th Cir. 2000)(person detained as SVP

In fact, Appellees' retreat from their assertion that Appellants' arguments are exactly the same by using the terms "most of the arguments" and on page 12 of the Answer stating "[w]ith respect to Defendants' claims that were not previously raised and adjudicated . . .". Thus, Appellees admit that not all of Appellants' arguments were previously raised.

Appellees assert that the qualified immunity defense is not properly raised at this stage of the proceedings. That is inaccurate. Appellants are required to raise the defense of qualified immunity as early as possible in the proceedings so that the Court's and parties' time is not wasted. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.

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not subject to PLRA); *Munoz v. Kolender*, 208 F. Supp. 2d 1125 (S.D.CA 2002)(SVP confinement in jail while awaiting hearing not a constitutional violation): *Kansas v. Crane*, 534 U.S. 407 (2002)(serious difficulty controlling behavior required for SVP commitment); *Woodard v. Mayberg*, 242 F. Supp. 2d 695 (N.D.CA 2003)(California's SVP commitment scheme tracks Kansas and Washington's SVP commitment schemes and is civil, not punitive in nature - "as applied" challenge to statute inappropriate under *Seling*); *Hubbart v. Superior Court*, 19 Cal.4th 1138 [81 Cal.Rptr.2d 492] (1999)(SVPA tracks Kansas' statute as proper civil commitment scheme and does not violate *es post facto*, double jeopardy, due process, equal protection); *People v. Hurtado*, 124 Cal.Rptr.2d 186 [28 Cal.4th 1179] (2002)(SVPA not punitive); *(People v. Superior Court (Ghilotti)*, 27 Cal.4th 888 [119 Cal.Rptr.2d 1] (2002)(SVPA narrowly tailored to achieve compelling purpose of confining and treating extremely dangerous persons unable to control mental disorders);*Cooley v. Superior Court*, 29 Cal. 4th 228, 253 [57 P.3d 654](SVPs and LPS patients not similarly situated for equal protection purposes); *In re Calhoun*, 112 Cal.App.4th 1262 [6 Cal Rptr.3d 34] (2003)(vacated and remanded subsequent to filing of Appellants' Opening Brief by 85 P.3d 2 (Cal. 2004)(SVPs are committed for and may not refuse treatment); *Hubbart v. Knapp*, 2003 U.S. Dist. LEXIS 15534 (N.D.CA. 2003)(*Ex Post facto* clause applies only to criminal statutes and Double Jeopardy applies only to criminal proceedings).

Ct. 2151, 150 L. Ed. 2d 272 (2001); *Hunter v. Bryant*, 502 U.S. 224, 227, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991) *(per curiam)*.

Appellees' assert that the qualified immunity defense goes only to the reasonableness of Appellants' actions. Rather, Appellants first assert the defense of qualified immunity based on the Appellees pleading of law not applicable to Appellants. Under decisions handed down in the last four years, several of Appellees' causes of action are based on law not applicable to Appellees.

Secondly, Appellants base the threshold qualified immunity defense on the lack of clearly established law governing Appellees' causes of action against Appellants in their individual capacities.

I.

APPELLEES' LAW OF THE CASE ASSERTION IS MISPLACED

Appellees' primary argument in urging the Court of Appeals to affirm the District Court's summary denial of Appellants' Motion to Dismiss the SAC is that the District Court also summarily denied Appellants' Motion to Dismiss the FAC. Appellees' incorrectly assert that the two Motions are identical except that a new party was added. Answer p. 5. Appellees fail to note that the new party was added in his individual capacity. Under Appellees reasoning the new party, who had no chance to argue the prior summary denial, is precluded from seeking dismissal from

the litigation now that he has been added in his individual capacity. No authority stands for that proposition.

In any event the law of the case doctrine does not apply when the prior pleading was summarily denied. This follows from the fact that no findings of fact and conclusions of law, to establish law of the case, have been made by the court. *See e.g., United States v. Cote,* 51 F.3d 178, 181 (9th Cir. 1995) (law of the case does not apply because the summary denial of the petition does not indicate the court considered and decided the issue presented by the government . . ."); *see also Moore v. Anderson*, 222 F.3d 280 (7th Cir. 2000) (law of the case is inapplicable because a summary denial of a petition for rehearing does not explain the bases for the denial, it is insufficient to confer any implication or inference regarding a court's opinion relative to the merits).

As was the case in *Moore*, the district court's summary denial of Appellants' Motion does not explain the basis for the denial. It is therefore insufficient to confer any implication or inference regarding a court's opinion relative to the merits of Appellants arguments. *Moore* at 284; *See also Wilmer v. Board of County Comm'rs*, 69 F.3d 406 (10th Cir. 1995)(issues must actually be decided before law of the case can be invoked).[3]

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[3] It is worthy to note that the California Supreme Court has come to the same conclusion. *Kowis v. Howard*, 3 Cal. 4th 888 (1992) (A summary denial does not decide a "cause" . . . and should therefore not be given law of the case

The United States Supreme Court long ago explained why law of the case doctrine does not extend to interlocutory orders. In *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186,70 S. Ct. 537, 94 L. Ed. 750 (1950) the Court determined that law of the case doctrine is inapplicable to interlocutory orders because they do not constitute a final judgment in the matter. In *United States Smelting* the Court noted that the party had the opportunity to appeal the first interlocutory order, but was not bound to. The choice not to appeal the first interlocutory order did not mean that on appeal of the second interlocutory order law of the case doctrine applied. Quite the opposite, *United States Smelting* held that the law of the case did not apply because no final judgement had been entered and the appellate court did not have to decide the issue as the district court had done in the first instance. *United States Smelting* at 199.

This case is very similar. Appellants herein chose not to appeal the district Court's denial of their Motion to Dismiss the FAC. They were not bound to appeal that interlocutory order. Appellees' filed the SAC, and after it was summarily denied Appellants chose to appeal the summary denial based in large part on Supreme Court decisions handed down since the FAC was summarily denied. Under the cases cited above Appellants arguments are not subject to law of the case doctrine because both orders were summarily denied, were interlocutory, and were not a final judgment of

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effect (citations omitted).

the merits of the issue. As the Court in *United States Smelting* said; "The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of *res judicata*." *Id.* at 199. *See also Union Mut. Life Ins. Co. v. Chrysler Corp.*, 793 F.2d 1, 16 (1st Cir. 1986)(Until entry of judgment, [interlocutory orders] remain subject to change at any time. The doctrine of law of the case does not limit the power of the court in this respect); *Gregg v. U.S. Industries, Inc.*, 715 F.2d 1522, 1530 (11th Cir. 1983), *cert. denied*, 466 U.S. 960, 80 L. Ed. 2d 556, 104 S. Ct. 2173 (1984)(law of the case applies only where there has been a final judgment and not to interlocutory rulings); *Vintilla v. United States*, 931 F.2d 1444, 1447 (11th Cir. 1991) (law of the case at district court level becomes binding only when there has been final judgment).

Clearly on point is *United States v. Turner*, No. 99-10098, 2003 U.S. Dist. LEXIS 15238 (D.Mass. September 4, 2003) wherein the Court held that "[i]nterlocutory orders, including denials of motions to dismiss, remain open to trial court reconsideration, and do not constitute the law of the case." *Id.* at 2 (emphasis added).

A. Changes in the Law Exception to Law of the Case Applies.

Although the law of the case doctrine is not applicable to a summary denial constituting an interlocutory order the instant appeal falls within at least two

exceptions to the doctrine's application in any event.

The law of the case doctrine is discretionary. *See Furlong v. Shalala*, 238 F.3d 227, 237 n. 5 (2d Cir. 2001), and this Court need not apply the doctrine if the circumstances warrant. *See, e.g., Blue Cross and Blue Shield United of Wis. v. Marshfield Clinic*, 152 F.3d 588, 591 (7th Cir. 1998) Appellants' appeal falls within two exceptions to the law of the case doctrine's applicability.

> A court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result.

United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997).

B. Manifest Injustice Will Result If the Defendant Added in His Individual Capacity Is Bound by a Summary Denial Three Years Prior to His Involvement in the Case.

The SAC makes no distinctions among Defendants. All are grouped together as one for all alleged claims in both their individual and official capacities. No individual separate acts are alleged. No individual proximate causation is alleged. It would be manifestly unfair for one Defendant who has been grouped with all other Defendants to not have an opportunity to argue his claims for dismissal at the threshold stage of the litigation. It would be similarly unfair for the other Defendants

to remain in a lawsuit alleging the same violations when the newly added Defendant is dismissed from the lawsuit based on changes in the law since the summary denial of a Motion to Dismiss issued three years prior.

Manifest injustice would clearly occur if the new defendant, Melvin Hunter, is bound in his individual capacity by a decision with which he was not involved.[4] On the other side of that coin, manifest injustice would also result when Mr. Hunter is dismissed in either his individual capacity yet other Defendants are not despite all Defendants being grouped together as one in the SAC.

C. Changes in the Law Applicable to SVPs.

In the opening brief Appellants discuss several Supreme Court and Circuit Court decisions that have been issued since the summary denial of Appellees' First Amended Complaint in February, 2000. Opening Brief pp. 22-23; *See* footnote 2.. Numerous decisions have effectively altered the legal landscape governing SVP commitment and confinement. Among these decisions is *Seling v. Young*, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 734 wherein the Supreme Court held that a civil statute cannot be divested of its civil nature by the implementation of that statute. *Seling* at 267. it is Appellants' implementation of the statute that Appellees attack.

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[4] Appellants note that Appellees fail to mention that they filed a successful motion to add Mr. Hunter as a Defendant in his individual capacity despite his being at the hospital prior to appointment as Executive Director for only six months. Appellants automatically substituted Mr. Hunter in as a Defendant in his official capacity when he assumed his post.

In the SAC Appellees make alleged claims based solely on constitutional provisions applicable only to the criminally confined. *Ex post facto*, double jeopardy, Sixth Amendment, and Eighth Amendment claims are simply not applicable to the civilly committed.

Appellees argue that these constitutional provisions should be applicable to Appellants because they are alleging that it was the Appellants' acts which gave rise to the claims and thus the allegations are not an "as applied" challenge. Appellants fail to see the distinction.

1. *Seling v. Young* Bars Appellees Criminal Jurisprudential Claims.

Appellees claim that *Seling* is not applicable to Appellants herein because Appellees seek injunctive relief, claiming that *Seling* specifically allowed such a claim. Answer p. 17. Appellees grossly misrepresent the holding in *Seling* with this argument. Nowhere in the *Seling* decision does the Court imply that a civilly committed section 1983 claimant may use constitutional criminal jurisprudence to state a claim for injunctive relief. In fact, in referring the *Kansas v. Hendricks*, 521 U.S. 346, 369, Ct. 2072, 138 L.Ed.2d 501 (1997) the *Seling* Court stated "Our conclusion that the Kansas Act was "nonpunitive thus removed an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims."

Appellants posit that the terms "Defendants' implementation" of the SVPA and the SVPA "as applied" to Plaintiffs" mean virtually the same thing. In either case the

statute is a civil commitment statute as already determined by the California Supreme Court. *Hubbart v. Superior Court* (1999) 19 Cal. 4th 1138 [81 Cal.Rptr.2d 492].

Similarly, Appellees approach in the instant case is similar to petitioners in *Seling* where the court admonished that "Permitting respondent's as-applied challenge would invite an end run around the Washington Supreme Court's decision that the [Washington Sexually Violent Predator] Act is civil in circumstances where a direct attack on that decision is not before this Court." *Seling* at 263. Here Appellees ask the Court to apply criminal law jurisprudence not applicable to the civilly committed to defeat Appellants claim of qualified immunity thereby attempting an end run around the California Supreme Court's decision in *Hubbart* wherein the SVPA was found to be a constitutional civil commitment scheme and not violative of *ex post facto* and double jeopardy.

As was the case in *Seling*, this court must evaluate Appellees' allegations as presented in a double jeopardy and *ex post facto* challenge under the assumption that the SVPA is civil, as determined by the *Hubbart* court. *Seling* at 263.

Appellees also appear to claim that *Seling* is inapplicable because the Washington treatment facility was under an injunction to comply with constitutional requirements and a special master had been appointed to oversee compliance with the

injunction.[5] Appellees appear to claim that *Seling* should not apply because Appellees herein are currently seeking an injunction. However, the *Seling* Court did not indicate that the decision on the application of double jeopardy and *ex post facto* turned on the operative injunction.

In any event, Appellees seek much more than an injunction in this case. They seek monetary damages against Appellants in their individual as well as their official capacities. If Appellees were seeking only injunctive relief qualified immunity would not arise.

Appellees also appear to claim that they are not barred from bringing *Ex post Facto*, double jeopardy, Sixth Amendment and Eighth Amendment claims because Appellees claims are brought by the SVP class as a whole and the matter can conclusively resolve the question whether Appellants have implemented the SVPA in a constitutional manner. Appellants claim this is distinct from an "as applied" challenge. However, as *Seling* stated "The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute." *Id.* at 263; *See also Hubbart.*

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[5] Interestingly, the Special Master appointed by the Federal District Court for the Western District of Washington to oversee constitutional compliance with the Washington Sexually Violent Predator treatment program was Dr. Janice Marques of the California Department of Mental Health, one of the designers of the California Sexually Violent Predator treatment program at Atascadero State Hospital.

In their answer Appellees claim that because this case is a class action it will allow the court to conclusively resolve whether Appellants have implemented the SVPA in a constitutional manner. Answer p. 18. Appellees fail to explain how this argument supports the imposition of both a criminal law and civil law constitutional analytical framework in the instant matter or how the class action status allows for an "end-run" around the California Supreme Court's decision in *Hubbart*.

To paraphrase the Ninth Circuit in *Young v. Weston*, 344 F.3d 973, 977 (9th Cir. 2003) the SVPA's civil nature precludes Appellees' claims that the SVPA violates the ex post facto and double jeopardy claims.[6]

In addition, under the class certification order the litigation is divided into Phase I and Phase II. Supplemental Excerpts of Record pp. 0820-0829. Phase II is structured to allow each individual class member to bring any claim which survives Phase I, as an individual. Thus, Appellees arguments that the class action decided the issues once and for all is mistaken in that if Double Jeopardy, *Ex post facto*, Sixth Amendment and Eighth Amendment claims survive the initial Phase of the litigation the individual class members are guaranteed the opportunity to litigate the issues as they apply to each individual in Phase II of the litigation.

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[6] Appellants wonder if Appellees have considered to what effect a finding of *ex post facto* and/or double jeopardy violations would have if not immediate writs by the SVP population seeking immediate release despite Appellees claims that they do not seek release but only an injunction.

The class certification structure flows from the conceptual foundation for the class action vehicle. The class stands for each individual. Therefore, any relief reduces to relief for that individual as a member of the class. In their Answer Appellees claim that they are not attacking the SVPA. They argue that they are attacking the SVPA's implementation by Appellants-i.e., how Appellants have applied the SVPA to affect each class member. Following this approach to its logical conclusion, it is how the SVPA is applied by Appellants to each class member that is truly at issue. As such, *Seling* is controlling and the double Jeopardy, *Ex Post Facto*, Sixth Amendment and Eighth Amendment claims must be dismissed with prejudice.

D. The Law Is Clear That to Defeat a Qualified Immunity Defense Applicable Law Must Be Violated.

To defeat a claim of qualified immunity requires "the existence of clearly established law when "the words of the pertinent federal statute or federal constitutional provision . . . [are] specific enough to establish clearly the law applicable to particular conduct and circumstances . . ." *Durruthy v. Pastor*, 351 F.3d 1080, 1092 (11th Cir. 2003)(emphasis added). "Once a defendant claims that he is entitled to qualified immunity, the court is to determine 'not only the currently applicable law, but whether that **law** was clearly established at the time an action occurred.' *Harlow*, 457 U.S. at 818." *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th

Cir. 2000) (underline emphasis added).

"When a defendant pleads the defense of qualified immunity, the trial judge should determine both what the current applicable law is and whether it was clearly established when the action occurred." *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991) (emphasis added). "[T]he first step in determining if the defendants are entitled to qualified immunity is to examine 'whether, based on the applicable law, a constitutional violation occurred.'" *Flagner v. Wilkinson*, 241 F.3d 475, 480 (6th Cir. 2001) (citations omitted; emphasis added).

To defeat a claim of qualified immunity Appellees must show that the law Appellants are accused of violating is applicable to Appellees. If the law is not applicable to Appellees qualified immunity must attach and defeat the claim at the motion to dismiss stage. No factual inquiry can make inapplicable law somehow applicable to a plaintiff. Thus, under *Seling*, which forbids an "as applied" criminal law challenge to a civil statute, and the "applicable law" requirement necessary to defeat a claim of qualified immunity, Appellees claims under the *Ex post Facto* and Double Jeopardy clauses of the Constitution as well as their Sixth Amendment and Eighth Amendment claims must be dismissed. The dismissal should be with prejudice and should be in both Appellants' individual and official capacities on qualified immunity grounds and for failure to state a claim for Appellants in their official capacities.

E. Involuntary Medication.

Appellees claim that involuntarily committed persons have an absolute right to be free of involuntary treatment. The Supreme Court as recently as June 16, 2003 determined that involuntary medication of confined persons was acceptable under certain circumstances. As Appellees' point out, involuntary medication is permitted when a medically informed record supports the need for medication and procedural safeguards are in place. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). In the case of the SVP such procedural safeguards are in place during the commitment process and a medically informed record is part of the commitment process.

Appellants note to the court that the SVPA requires the treatment of SVPs. Welf. & Inst. Code section 6603. The involuntary medication of SVPs is a constitutional function of the treatment requirement and the SVP commitment criteria. In addition, the question of required treatment absent involuntary medication is not clearly established as a constitutional violation

Appellees correctly point out that one case cited by Appellants in their Opening Brief has since been vacated by the California Supreme Court. However, Appellees fail to point out that the case was remanded to the California Court of Appeal for reconsideration by that same order vacating the Court of Appeal decision. Issues are being briefed with the most recent request for briefing of specific issues due June 25,

2004. That case *In re Calhoun* 112 Cal.App.4th 1262 [6 Cal Rptr.3d 34] (2003) (vacated and remanded subsequent to filing of Appellants' Opening Brief by 85 P.3d 2 (Cal. 2004), highlights Appellants position regarding the fact that the law governing involuntarily medicating SVPs is not clearly established. The original *Calhoun* decision held that the SVPA was written to allow the involuntary treatment, including medication, of SVPs. In vacating and remanding the California Supreme court did not give an opinion that the original decision was in error. Rather, it remanded for reconsideration in light of another case involving a mentally disordered offender who had been involuntarily medicated. Thus, the issue remains unsettled in California.

In support of their contention that involuntary medication of SVPs is a constitutional violation Appellees cite several cases handed down since the Motion to Dismiss the FAC was summarily denied. Answer p. 27-28. This proves Appellants' point regarding recent changes in the law. However, the cases Appellees note also prove Appellants' entitlement to qualified immunity on this issue, at the very least. The very fact that several recent decisions have addressed the involuntary medication question from various angles and with various outcomes shows the law governing involuntary medication of the SVP is not now, and was not in 1998, clearly established.

Appellants ask the Court to take judicial notice of the SVPA and its

requirement that SVPs be treated during confinement. The SVPs are provided all due process during the commitment process itself. The order of commitment, as a function of the commitment criteria, fulfills all constitutional requirements of due process prior to involuntary medication for treatment purposes.

The SVPA presents a comprehensive statutory scheme designed to address the problem of a "small group of criminal offenders who are extremely dangerous as the result of mental impairment, and who are likely to continue acts of sexual violence even after they have been punished for such crimes." *Hubbart supra at* 1143.

The process for determining whether a convicted sex offender meets the requirements of the SVPA takes place in several stages, both administrative and judicial. At all stages of the proceedings, there are protections built into the process to ensure that the rights of the individual are protected. (See Welf. & Inst Code §§ 6601, 6601.3, 6601.5, 6602, 6602.5, 6603, 6604, 6604.1, 6605, and 6606) If a case does in fact proceed to court on the petition to commit, the individual is afforded a jury trial with counsel, where the state bears the burden of proving beyond a reasonable doubt, that the individual meets the criteria for being declared an SVP.

Once the State meets its burden of proof, the SVPA mandates that the SVP receive "appropriate treatment." Appellees are afforded the full panoply of rights during the commitment process including a jury trial.

Thus, the question of treatment for the SVP has been decided through Court

proceedings. In fact, the Legislature was very clear: "Treatment does not mean that the person must recognize his or her problem and willingly participate in the treatment program." Welf. & Inst Code § 6606 (a). The Legislature has mandated that the Department of Mental Health "shall afford the [SVP] with treatment" even if the SVP does not consent to the treatment. Welf. & Inst Code § 6606 (a) and (b).[7]

The Legislature has not given the SVP "veto power" over treatment, but instead left it to the sound professional judgment of the mental health professionals employed at ASH.[8]

As the SVPA requires, a medically informed record is required for commitment for treatment. Thus, Appellants' contention that involuntary medication was and is

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[7] In fact, Welfare and Institutions Code section 6600 mandates that the Department of Mental Health provide a Program of Treatment. "A person who is committed under this article shall be provided with programming . . ." (§ 6606(a) And "[t]he programming provided ... shall be consistent with current institutional standards for the treatment of sex offenders, and shall be based on a structured treatment protocol . . ." (§ 6606(c)).

[8] As one Court opined twenty years ago, "[W]e believe it is patently unwise to give person committed to treatment what is in essence a veto power. If a patient can render himself unamenable to treatment by simply refusing to cooperate in therapy programs set up for his benefit, the state's fundamental interest in treating and hopefully, curing those persons with dangerous mental disorders would be frustrated. We are inclined to agree with the trial judge who stated, "the People of this State have an entitlement, in view of that which has occurred in Mr. Lakey's life and in the life of his victim, to insist that he, so long as there are programs available for his treatment at Atascadero, cooperate in – those programs . . . ." *(People v. Lakey*, 102 Cal.App.3d 962, 973 (1980)(interpreting requirements of Mentally Disordered Sex Offender statute)

permissible is supported by the commitment statute itself.

II.

STATE LAW CLAIMS

In their answer Appellees claim that they are not making any state law claims. However, in the SAC Appellees include alleged claims which they assert violate the California Constitution and State law. (ER pp. 0480-0485.) Appellants are puzzled by this doublespeak-either they are not asserting state law claims and they should not be included in the SAC, or they are asserting them and that is why they are included in the SAC. It cannot be both. Based on Appellees assertions in their Answer to Appellants' Opening Brief alone, all state law claims should be dismissed with prejudice.

This approach to stating claims and then denying such claims are stated also reflects Appellees approach to their claims for damages against state official Appellants in their official capacities. Appellees claim that, even though such claims are included in the SAC, they should be ignored. If they should be ignored why are the claims in the SAC?

III.
APPLICABLE LAW MAY FLOW FROM CASES NOT IN THE SAME PROCEDURAL POSTURE

Appellees argue in their answer that many of Appellants' cited authority are inapplicable to the case at bar because those cases were not in the same procedural

posture as the instant case. However, Appellees are mistaken.

The law does not flow in a narrow stream between banks formed by decisions in the same procedural posture as the case before a court. That a rule of law contained in a Supreme Court habeas petition review is applicable to an Motion to Dismiss appeal in a Federal Circuit Court of Appeals is basic.

No authority is cited by Appellees for their claimed rule of law that only decisions dealing with the appeal of the summary denial of a Motion to Dismiss a complaint are applicable in the instant matter. Neither have Appellants found such authority. Appellants are convinced such authority does not exist.

IV.

ELEVENTH AMENDMENT

A. Claims for Damages Against State Officials in Their Official Capacity are Barred Under the Eleventh Amendment.

Appellees argue that they are not seeking claims for damages against state officials in their official capacities. However, in arguing that they are not seeking such damages Appellees' answer states that the "course of the proceedings" establish that they are not seeking such damages. Answer p. 8. Thus, Plaintiffs are seeking to offer evidence outside of the SAC itself to counter the plain language of the SAC.

In deciding whether the SAC seeks unconstitutional damages against state officials in their official capacity the court must look to the SAC, and not additional

evidence offered as fact to bolster Appellees' contention.

If the SAC does not actually seek damages against Appellants in their official capacities why was the language not altered to so state when the SAC was submitted when Appellees were aware of the issue prior to filing the SAC. No reasonable answer to that question is proffered by Appellees to explain the inclusion. Appellees should be required to submit a Complaint that reflects what they are actually seeking. Appellants should not have to guess by looking to the "course of the proceedings" to determine Appellees' requested relief. This Court should order damages claims against state officials in their official capacity dismissed with prejudice under the Eleventh Amendment.

V.

THE EIGHTH AMENDMENT IS NOT APPLICABLE TO THE CIVILLY COMMITTED

Appellees answer cites no authority indicating that the Eighth Amendment is applicable to the civilly committed. Appellants refer the court to *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998) wherein the Court stated that [claims by pretrial detainees are analyzed under the Fourteenth Amendment Due Process Clause, rather than under the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979)."

VI.

APPELLEES FAIL TO SPECIFY CONSTITUTIONAL VIOLATIONS WITH PARTICULARITY AND RELY ON RESPONDEAT SUPERIOR THEORIES TO IMPOSE LIABILITY ON SUPERVISORY PERSONNEL

To premise a supervisor's alleged liability on a policy promulgated by the supervisor the plaintiff must identify a specific policy and the alleged constitutional deprivation. *See e.g., City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed. 2d 412 (1989); *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992). The SAC does not identify any specific policies except one Administrative Directive that they do not allege has been violated.

VII.

APPELLEES OTHER CLAIMS CONSTITUTE CONCLUSORY ALLEGATIONS AND MISAPPLICATION OF THE LAW APPLICABLE TO SVPS

Appellees other alleged claims and causes of action rely on conclusory allegations with no factual support. No specific factual information is supplied in the SAC. Appellees are mistaken in their belief that conclusory allegations are sufficient in a Second Amended Complaint. For state officials to undergo the burdens of litigation actual factual allegations are required.

Appellees cite California Code of Regulations (CCR) Title 22 sections 71001 *et seq*. to support their contention that SVPs have a state-created liberty interest in

certain privileges at ASH. Answer p. 48. Unfortunately, the CCR sections cited by Appellees are not applicable to SVPs. Those CCR sections govern "Acute Psychiatric Hospitals." Nowhere in the SAC do Appellees allege that SVPs are held in an "Acute Psychiatric Hospital" and in fact the SVP units are not licensed as such. The quoted CCR sections are simply not applicable to Appellees. Thus, no state-created liberty interest has been created and Appellants are entitled to qualified immunity.

VIII.

FOURTH AMENDMENT SEARCHES

Appellees misrepresent Appellants Fourth Amendment position. Answer pp. 37-39. Appellants do not argue that SVPs are prisoners. Appellants do argue that SVPs are confined in a secure mental institution because of their continuing dangerousness and mental disorders. The safety and security needs of the institution justify limits on patients' rights under the Fourth Amendment.

IX.

McKUNE v. LILE

Appellants do not argue, again, that SVPs are prisoners for applicability of *McKune v. Lile*, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). Rather, *McKune* stands for the proposition that reduction in privileges is a valid response to behaviourial difficulties arising in a confined situation.

Appellees arguments throughout their answer run with the conviction that the SVPs are model citizens entitled to be treated as such within the confines of a secure mental institution. Appellees are mentally disordered individuals committed due to ongoing dangerousness. Although that does not mean all their rights are forfeit at the hospital door, it does mean reasonable restrictions are appropriate and necessary. Such restrictions are not a constitutional violation and Appellants are entitled to qualified immunity for most if not all of Appellees allegations.

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CONCLUSION

For all of the above reasons Appellants' Motion to Dismiss the SAC should be granted with prejudice as to the claim for damages against state officials in their official capacities and Appellees' alleged claims under the Sixth Amendment, Eighth Amendment, *Ex Post Facto* and *Double Jeopardy* clauses of the United States Constitution. All claims against Appellants in their individual capacities should be dismissed on Qualified Immunity grounds. All State law claims should be dismissed.

DATED: June 17, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C)

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Answering Brief is

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2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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DATED: June 17, 2004

RANDALL R. MURPHY
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DECLARATION OF SERVICE

Case Name: **JAMES HYDRICK, et al. v. GREY DAVIS, et al.**

Case Nos.: **03-56712**

I am employed in the County of Los Angeles, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 300 S. Spring Street, Los Angeles, California 90013.

On June 18, 2004, I served the following documents described as: **APPELLANTS' REPLY TO APPELLEES' ANSWERING BRIEF** on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

METHOD OF SERVICE:

[x] (**BY MAIL**) I caused such envelope(s) fully prepaid to be placed in the United States Mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence of mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Executed this 18th day of June, 2004, at Los Angeles, California.

Melanie K. Foster

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