Filed 12/14/09 P. v. Aguon CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY SALAS AGUON, Defendant and Appellant.	D053875 (Super. Ct. No. MH 101627)

APPEAL from a judgment of the Superior Court of San Diego County, William H. Kronberger, Judge. Affirmed.

A jury found Anthony Salas Aguon to be a sexually violent predator (SVP). He was recommitted to an indeterminate civil commitment term under the Sexually Violent Predator Act (SVPA). (Welf. & Inst. Code, §§ 6600-6604.)[1]

Aguon contends insufficient recent and objective evidence supports the jury's findings. He further contends the trial court erroneously: (1) instructed the jury to

1 All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

determine whether it was necessary to keep him in a secure facility to ensure the health and safety of others, which improperly directed the jury to consider the consequences of its verdict and thereby diminished the prosecutor's burden of proof and denied him due process; (2) instructed regarding his likelihood of reoffense; (3) admitted evidence regarding his prior 1972 uncharged rape; (4) failed to instruct the jury, without request, that it was required to find he had serious difficulty in controlling his sexual behavior. Moreover, (5) the prosecutor's "use of the term 'sexually violent predator' was governmental misconduct;" (6) the evaluations supporting the petition to recommit him are invalid because the statutorily required protocol was an "underground regulation," which was promulgated in violation of the Administrative Procedure Act (APA); therefore, the trial court lacked jurisdiction to proceed with the SVP petition; (7) the SVPA violates the due process, equal protection, ex post facto and double jeopardy clauses of the federal or state Constitutions.[2]

FACTUAL AND PROCEDURAL BACKGROUND

The parties stipulated that Aguon was convicted of a sexually violent offense against more than one victim; specifically, in 1975, he was convicted of rape by threats of

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2 A number of issues with respect to the constitutionality of the SVPA are presently pending before the California Supreme Court. (See *People v. McKee* (2008) 160 Cal.App.4th, review granted July 9, 2008, S162823 [lead case includes due process, equal protection, and ex post facto issues]; *People v. Johnson* (2008) 162 Cal.App.4th, review granted Aug. 13, 2008, S164388; *People v. Riffey* (2008) 163 Cal.App.4th 474, review granted Aug. 20, 2008, S164711; *People v. Boyle* (2008) 164 Cal.App.4th 1266, review granted Oct. 1, 2008, S166167; *People v. Garcia* (2008) 165 Cal.App.4th, review granted October 16, 2008, S166682; *People v. Force* (2009) 170 Cal.App.4th, review granted April 15, 2009, S170831.)

great and immediate bodily harm (Penal Code, § 261.3) and sentenced to three years to life in prison. In 1984, he was convicted of forcible rape and forcible oral copulation against two different victims (Pen. Code, § 261 (2); 288a, subdivision (c)) and sentenced to 37 years in prison.

Prosecution Evidence

Drs. Bruce Yanofsky and Mark Patterson, both psychologists, testified similarly for the People that they interviewed Aguon in 2007 and in 2008, and reviewed police and parole officers' reports, psychiatric and psychological evaluations, and prison records regarding Aguon's case. The psychologists evaluated Aguon using Static-99, Minnesota Sex Offender Screening Tool (MnSOST), the Sex Offender Risk Appraisal Guide (SORAG) and the Hare Psychopathy Checklist-Revised (PCL-R). On the latter actuarial tool, Aguon was in the highest risk category for reoffending in a sexually violent way, indicating a 100 percent likelihood of reoffending in seven to ten years. Both psychologists diagnosed Aguon with chronic paraphilia NOS (not otherwise specified), which manifests itself in deviant sexual arousal. The diagnosis was based on Aguon's criminal history, including extremely violent sexual offenses, which demonstrated his inability to inhibit such behavior despite arrests, incarcerations and hospitalizations. They also diagnosed him with alcohol dependency and antisocial personality disorder.

Dr. Yanofsky opined, "So, for instance, if someone knows that by drinking or drugging they commit crimes, well, they should not drink or go to drugs, and their personality may allow them to realize that and stop. But if you have a personality disorder to go along with it and you think you can go beyond the law or you can break

the rules or you don't have the remorse, you don't have the guilt, you're not going to stop that behavior either. [¶] So you have a mix of three conditions that interact that, I think, lead to the type of behavior we've seen. Because in looking at the records I've described, rape is not . . . his only offense. He's also been violent in other ways. So we can't say that his personality disorder only acts in ways that affects [*sic*] his paraphilia. He's [*sic*] also stolen and assaulted and done other things that are very antisocial. But the whole mix is what really makes him . . . dangerous."

Dr. Yanofsky testified that in 1972, Aguon was criminally charged for his involvement in a gang rape incident, whose details were "a little sketchy." Consequently, Aguon was determined to have an unidentified mental condition requiring treatment and he was sent to Atascadero State Hospital, where he was seen and treated. This incident showed that Aguon, who was born in 1950, started his deviant sexual behavior at an early age.

Dr. Yanofsky testified that according to the official report of Aguon's 1975 conviction, he and another person responded to an advertisement for a garage sale and spoke to the woman hosting the sale. Aguon returned to her house alone and, in front of her four-year old child, demanded to have sex with her. He grabbed a pair of scissors and threatened to kill her, and subsequently raped her repeatedly outside of her child's presence.

In 1984, according to the official reports, Aguon approached a neighbor at her house, claiming he needed to collect money for work he had done. He grabbed her from behind, tried to choke her, threatened her, and forced her to have sex. The next day,

Aguon forced himself into a different woman's car, told her he had a gun, was affiliated with law enforcement and had killed before. He threatened her and forced her to drive. At one point, the car was stopped and he forcibly had vaginal intercourse and oral and anal copulation with her.

Aguon told Dr. Yanofsky regarding the rapes, "I know at the time that the victim was saying, 'No, No, No,' in my mind I am seeing it differently." Aguon was unable to stop himself from proceeding with the rapes.

Dr. Yanofsky testified that there is no record that Aguon committed any sexual offense between 1975 and 1984 because his convictions for parole violations and various crimes unrelated to sexual assaults resulted in "long periods of incarceration or hospitalization of one form [or] the other, so opportunity was really not there. Aside from that there [were] periods of supervision."

Dr. Yanofsky pointed to reported incidents of Aguon's misconduct at the hospital: that he was "corralling, at some point, staff . . . inappropriately, or approaching them or touching them. And these are places where these rules are very tight and very explicit." Although the Coalinga State Hospital offers different programs to help Aguon gain insight into his psychological condition and facilitate an eventual release from the hospital and into the community, he elected not to participate in any program except Alcoholics Anonymous. Dr. Yanofsky opined Aguon "definitely needs the restrictive treatment" in the hospital setting otherwise Aguon is likely to reoffend.

Dr. Yanofsky evaluated Aguon's risk of reoffending using Static-99, an actuarial instrument that ranks a criminal's probability of reoffense based on variables such as his

age, relationships, number of prior convictions, whether those convictions were for violence and sexual offense; and if he knew his previous victims. Aguon showed a 39 percent chance of reconviction within five years after his release from an institutional setting and a 100 percent likelihood of reoffending in seven to ten years. Dr. Yanofsky separately analyzed different dynamic factors to determine Aguon's risk of reoffense, taking into account factors such as Aguon's juvenile offenses, failure to accept treatment while institutionalized, and criminal history. Dr. Yanofsky stated Aguon scored high on the PCL-R, which focused on psychopathy, or Aguon's detachedness from others and difficulty experiencing empathy, love and sincerity. These characteristics of a criminal mindset are based on his criminal history, including his rapes, assault, his failure to complete cognitive and behavioral sex offender treatment, violations of parole, and frequent unemployment. Dr. Yanofsky testified Aguon's future offenses are likely to be predatory because of his criminal history, his sexual assaults of women, and the unavailability of an intensive outpatient treatment program.

Dr. Patterson diagnosed Aguon with two substance abuse disorders, one for alcohol and another for cocaine. He testified Aguon had a "serial repetitive, recurrent, chronic inability to suppress those kinds of hostile sexual behaviors." Aguon also violated the personal space of women personnel at the hospital, touched them inappropriately, "creating an atmosphere of stalking," intimidated them and generally had an "inappropriate kind of sexualized approach to them." In their most recent interview, Aguon said "he had to learn to try to control [his fantasies related to coercive sexual behavior or rape] because if he didn't control it, it would be bad." Dr. Patterson

concluded Aguon's conduct was predatory because he committed sexual offenses with women who were either casual acquaintances or strangers. Dr. Patterson also opined Aguon could not be safely released into the community because "for someone with his background, it would be difficult for him to put something together, a treatment plan of his own, because he would not be on parole . . . so he'd have to show even more self-initiative or self-starting kinds of behaviors to get involved in treatment. In fact, he told me he doesn't need treatment. So we would estimate that there's a very low likelihood he would seek it out on his own."

Defense Evidence

Edward Moon, a registered nurse at Coalinga State Hospital testified he meets with Aguon regularly and likes him because he keeps the hospital clean and does not cause trouble.

Four police officers employed at Coalinga State Hospital testified they had interacted with Aguon over at least two years and he was always well-behaved, respectful and never acted out. However, none of the defense witnesses had access to Aguon's patient records, and therefore they did not know if those records contained complaints made by the women on staff.

DISCUSSION

I.

Overview of SVPA

Prior to 2006, a person who was found to be an SVP was subject to a two-year involuntary civil commitment term under the SVPA. At the end of that term, the People

were required to file another petition seeking a determination that the person remained an SVP. If the People did not file a recommitment petition, the person would have to be released. (Former § 6604, as amended by Stats. 2000, ch. 420, § 3.) On filing of a recommitment petition, a new jury trial was conducted at which the People again had the burden to prove beyond a reasonable doubt that the person was currently an SVP. (Former §§ 6604, 6605, subds. (d), (e); *People v. Munoz* (2005) 129 Cal.App.4th 421, 429 ["[A]n SVP extension hearing is not a review hearing. . . . An SVP extension hearing is a new and independent proceeding at which . . . the [People] must prove the [committed person] meets the [SVP] criteria, including that he or she has a currently diagnosed mental disorder that renders the person dangerous"].)

In 2006, the SVPA was amended first by the Legislature and then by the electorate, with the passage of Proposition 83. An SVP is defined as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600 subd. (a)(1).) A " '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 a menace to the health and safety of others." (*Id.*, subd. (c).)

The screening is conducted in accord with an assessment protocol developed by the Department of Mental Health (Department). (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 (*Hurtado*).) " 'If that screening leads to a determination that the defendant is

likely to be [an SVP], the defendant is referred to the [Department] for an evaluation by two psychiatrists or psychologists. (§ 6601, subds. (b) & (c).) If both find that the defendant "has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody" (§ 6601, subd. (d)), the [D]epartment forwards a petition for commitment to the county of the defendant's last conviction (*ibid.*). If the county's designated counsel concurs with the recommendation, he or she files a petition for commitment in the superior court. (§ 6601, subd. (i).)' " (*Hurtado*, *supra*, at pp. 1182-1183.)

The trial court holds a hearing on the petition to determine whether "there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." (§ 6602, subd. (a).) The probable cause hearing is an adversarial hearing and the person named in the petition has the right to counsel. (*Ibid.*) If the court finds probable cause, it orders a trial to determine whether the person is an SVP. (§ 6602, subd. (a).) The person named in the petition must remain in a secure facility between the time probable cause is found and the time trial is completed. (*Ibid.*)

The person named in the petition is entitled to a trial by jury, and the jury's verdict must be unanimous. (§ 6603, subds. (a) & (f).) The person named in the petition also is entitled to retain experts or professional persons to perform an examination on his or her behalf. (§ 6603, subd. (a).) At trial, the trier of fact determines whether, beyond a reasonable doubt, the person named in the petition is an SVP. (§ 6604.)

The SVPA grants the person named in the petition the right to be present at the commitment proceeding and "the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding." (§ 6605, subd. (d).) If the trier of fact determines the person named in the petition is an SVP, the person is committed for an indefinite term to the Department's custody for appropriate treatment and confinement in a secure facility. (§ 6604.)

Once committed, the individual must have "a current examination of his or her mental condition made at least once every year." (§ 6605, subd. (a).) After the examination, the Department must file a report in the form of a declaration that addresses (1) "whether the committed person currently meets the definition of [an SVP]," and (2) "whether conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and conditions can be imposed that would adequately protect the community." (*Ibid*.) The Department is to file this report with the trial court that committed the person, and must serve the report on the prosecuting agency and the committed individual. The committed individual may retain, or the court may appoint, a qualified expert to examine him or her. (*Ibid*.)

If the Department concludes in the report that the committed individual no longer meets the requirements of the SVPA, or that conditional release is appropriate, the Department must authorize the committed individual to petition the trial court for release. (§ 6605, subd. (b).) Upon receipt of the petition for conditional release or unconditional discharge, the trial court is to set a probable cause hearing at which the court "can consider the petition and any accompanying documentation provided by the medical

director, the prosecuting attorney or the committed person." (*Ibid*.) If the trial court determines that probable cause exists to believe the petition has merit, it must set a hearing on the issue, at which time the committed individual is "entitled to the benefit of all constitutional protections that were afforded him or her at the initial commitment proceeding." (*Id*., subds. (c), (d).) If the fact finder determines that the state has not met its burden, the committed person must be released. (*Id*., subd. (e).)

Sufficiency of the Evidence[3]

Aguon contends insufficient recent and objective evidence supports these findings: he has a current mental disorder of a kind to support civil commitment as opposed to being a dangerous person more properly dealt with exclusively through criminal proceedings; is likely to reoffend, and the future offenses likely will be predatory and

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3 Aguon does not contest that the stipulation regarding his convictions established the first prong of the test set forth in the Court's instruction with CALCRIM No. 3454: "To prove this allegation, the People must prove beyond a reasonable doubt that: 1. He has been convicted of committing a sexually violent offense against one or more victims; and 2. He has a diagnosed mental disorder; and 3. As a result of that diagnosed mental disorder, he is a danger to the health and safety of others because it is likely that he will engage in sexually violent predatory criminal behavior; and 4. It is necessary to keep him in custody in a secure facility or a state-operated forensic conditional release program to ensure the health and safety of others. [¶] . . . [¶] A person is likely to engage in sexually violent predatory criminal behavior if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released into the community. The likelihood that the person will engage in such conduct does not have to be greater than 50 percent. [¶] Sexually violent criminal behavior is predatory if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the primary purpose of victimization."

sexually violent, in particular because the experts relied on Static-99 and an erroneous standard for evaluating the probability of reoffense, based on his entire life expectancy.

When a defendant challenges the sufficiency of the evidence to support a finding that he is an SVP, "this court must review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.] To be substantial, the evidence must be ' "of ponderable legal significance . . . reasonable in nature, credible and of solid value." ' " (*People v. Mercer* (1999) 70 Cal.App.4th 463.) "In reviewing the record to determine the sufficiency of the evidence this court may not redetermine the credibility of witnesses, nor reweigh any of the evidence, and must draw all reasonable inferences, and resolve all conflicts, in favor of the judgment." (*People v. Poe* (1999) 74 Cal.App.4th 826, 830.)

Before addressing Aguon's specific claims of insufficiency of evidence, we address his principal underlying claim that, except for the stipulation regarding his 1975 and 1984 rape convictions, the only evidence supporting the finding he is an SVP came from the experts' opinions, which were not admitted for their truth.

California law permits a person with "special knowledge, skill, experience, training, or education" in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion. (*Id*., § 801.) Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*Id*., subd. (a).)

Evidence Code section 801 limits expert opinion testimony to an opinion that is "[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates . . . " (*Id.*, subd. (b).) A trial court has discretion " 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' " (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*).)

"Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citations.] . . . [¶] So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*Gardeley*, *supra*, at pp. 618-619.)

Drs. Yanofsky and Patterson both based their opinions on police and parole officers' reports, prison records, psychiatric and psychologists' reports and evaluations, and their own interviews with Aguon and professional evaluations. These are the types

of materials mental health professionals and experts reasonably rely on in forming their opinions in SVP cases. We conclude that the testimonies of Drs. Yanofsky and Patterson provided sufficient basis from which the jury could reasonably find Aguon is an SVP.

Evidence Regarding Aguon's Current Mental Disorder

Contrary to Aguon's contention, both expert psychologists recently (within the previous year) and objectively (relying on different empirically supported actuarial risk assessment tools widely accepted in the field) diagnosed him with paraphilia NOS, an incurable mental disorder, which is characterized by the obsessive, repetitive and driven nature of his criminal sexual violence. He continued to exhibit a lack of control over his sexual behavior, as evidenced by his repeatedly invading the private space of the women on staff at the hospital, and interacting with them in inappropriate ways.

The experts also testified Aguon's inability to control his behavior is further impaired by another mental disorder, antisocial personality disorder, and his abuse of alcohol. Dr. Patterson testified Aguon admitted he had to learn to try to control his fantasies related to coercive sexual behavior or rape. Based on the above, there was sufficient evidence Aguon was a dangerous sexual offender of the kind subject to civil commitment as distinguished from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings. (*People v. Williams* (2003) 31 Cal.4th 757, 778 (*Williams*).)

We reject Aguon's claim that there was insufficient evidence that he would be a danger to others if released, and his future offense likely would be predatory or a sexually violent offense.

Section 6600 subdivision (e) defines "predatory" as "an act [that] is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization."

The United States Supreme Court, in evaluating a Kansas statute for civil commitment of SVPs stated: "Insistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities." (*Kansas v. Crane* (2002) 534 U.S. 407, 412.) The Supreme Court added, "And we recognize that in cases where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." (*Id.* at p. 413.) The California Supreme Court noted the "Kansas and California schemes use nearly identical wording to define an SVP as someone who suffers from a diagnosed mental disorder which 'predisposes' the person to committing sexually violent acts, and which makes the person a 'menace' to the health and safety of others and 'likely' to reoffend." (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1158, fn. 24 (*Hubbart I*).)

Dr. Yanofsky testified that he based his diagnosis of paraphilia NOS on the persistence of Aguon's engaging in rapes over a long period of time. Moreover, "upon further examination of the clinical interview, the clinical data I have available, Mr. Aguon's direct response to some questions made it fairly clear or very clear, in my eyes, that he has been sexually stimulated by forceful sexual activity. He has had a hard time controlling those impulses as he acted on them and later felt bad about it. And then punished or sanctioned, but nonetheless he wasn't able to really stop the behavior and then he went ahead and did it again." Dr. Patterson reached the same diagnosis on the same bases. Their testimony sufficed to show Aguon suffers from a condition that makes him a danger to the health and safety of others within the meaning of section 6600, subdivision (a). The experts, in forming their opinions, properly relied on police reports recounting Aguon's rapes of total strangers. That testimony plus other testimony regarding Aguon's difficulty controlling his sexual behavior and failure to obtain treatment was sufficient to support the jury's findings.

Aguon challenges the predictive accuracy of the Static-99, arguing its "predictive accuracy is 20 to 30 percent better than flipping a coin." He also contends the Static-99 was developed based on a sample that was primarily pedophiles, who are more likely to reoffend; therefore, because he has no record of child molestation, the Static-99 does not sufficiently support the finding he is likely to reoffend at the rate indicated by the results of the Static-99. Finally, he contends the experts applied an erroneous standard of "likely" by assessing his risk of reoffense over the whole rest of his life. According to him, "If a person is to be civilly committed, it must be based on his dangerousness at the

time of his commitment or within the reasonably-foreseeable future. A prediction of dangerousness over the whole remaining course of an individual's life exceeds that." We need not address these concerns because, as discussed above, the Static-99 was but one of the tools that demonstrated his likelihood to reoffend. Therefore, even if the results of the static-99 were discarded, other actuarial tools demonstrated his likelihood of reoffense.

More importantly, the California Supreme Court addressed the likelihood of reoffense and stated that there is no need "to pinpoint the time at which future injury is likely to occur if the person is not confined. Nor is there any authority for [the] suggestion that a person is not dangerous and cannot be involuntarily confined on mental health grounds unless the state proves he would otherwise inflict harm immediately upon release." (*Hubbart I*, *supra*, 19 Cal.4th at p. 1163.) It reiterated it interpreted the "likely to reoffend" prong of California's SVPA to require only " 'a substantial danger, that is, a serious and well-founded risk ' " — but not necessarily a greater than even chance — that the person's diagnosed mental disorder will lead to new criminal sexual violence unless the person is confined and treated. (*People v. Roberge* (2003) 29 Cal.4th 979, 988 (*Roberge*); *People v. Ghilotti* (2002) 27 Cal.4th 888, 922 (*Ghilotti*).)

Aguon counters that the California Supreme court's "interpretation gives the California SVP statute a broad sweep that confines more people who would not actually reoffend than it does people who would. Because it is not narrowly tailored to a compelling state interest, it denies due process of law" under the federal Constitution. He also contends the trial court erred in instructing the jury with the portion of CALCRIM

3454 stating the People are required to prove: "As a result of that diagnosed mental disorder, he is a danger to the health and safety of others because *it is likely* that he will engage in sexually violent predatory criminal behavior." (Emphasis added.) We are bound by California Supreme Court authority as stated in *Roberge*, *supra*, 29 Cal.4th 979. (*Auto Equity v. Superior Court* (1962) 57 Cal.2d 450, 455.)

II.

Aguon contends that the trial court erred in instructing the jury with the portion of CALCRIM No. 3454 stating the People must prove beyond a reasonable doubt that "[i]t is necessary to keep [him] in custody in a secure facility to ensure the health and safety of others" because it invited the jury to consider the consequences of its verdict.

The California Supreme Court has stated that evidence of the person's amenability to voluntary treatment, if any is presented, is relevant to the ultimate determination whether the person is likely to engage in sexually violent predatory crimes if released from custody. (*Roberge*, *supra*, 29 Cal.4th, at p. 988, fn. 2; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256 (*Cooley*) ; *Ghilotti*, *supra*, 27 Cal.4th at p. 927.) Following the Supreme Court's guidance, the court in *People v. Grassini* (2003) 113 Cal.App.4th 765 held, "The trial court is required to instruct on the general principles of law that are necessary to the jury's understanding of the case. [Citations.] The Supreme Court's statements in *Ghilotti* and in *Cooley* . . . , together with its observation in *Roberge* that evidence of amenability to voluntary treatment, if such evidence is presented, is 'relevant to the ultimate determination whether the person is likely to engage in sexually violent predatory crimes if released from custody' [citation] indicate that this is not a matter

constituting a theory of defense but is essential to the determination to be made by the trier of fact, and thus constitutes a general principle of law necessary to the jury's understanding of the case." (*Grassini*, *supra*, at p. 778.)

Here, in light of relevant evidence that Aguon has not sought or obtained treatment for his paraphilia NOS, the trial court did not err in instructing in the language set forth above because it was relevant to a determination of whether he was likely to engage in sexually violent crimes if released. At any rate, it is not reasonably probable the jury interpreted the instruction as a direction to consider the consequences of their verdict because the trial court separately instructed the jury to do just the opposite: "You must reach your verdict without any consideration of the consequences." (CALCRIM No. 3550.)

III.

Evidence Regarding 1972 Guam Incident

Aguon moved in limine to exclude from evidence reference to a 1972 incident in Guam, arguing that not much was known about the incident. As stated in Dr. Yanofsky's report, Aguon's "involvement had to do . . . basically his cousins calling him up and saying: We have a girl with us, come and pick us up, something to that effect." Subsequently, Aguon was sent to Atascadero State Hospital, but it is unclear what, if anything he was convicted of, or his participation in any crime. Aguon argued that under Evidence Code section 352, such testimony was prejudicial because, "The jury is going to believe that he committed some kind of rape." Moreover, Aguon argued, "These allegations are unsubstantiated and unproven, and extend beyond the facts that formed

the bases of [his] convictions. As such, they lack the necessary indicia of reliability to guarantee [his] due process rights."

The trial court denied the motion, ruling such testimony would not be prejudicial because, "It's admitted [the psychologists] don't know much about the underlying facts. They're just simply saying it's one of the things that we've considered that went forward. So it's an effort to exclude a basis for an expert opinion, as well as a[n Evidence Code section] 352 issue."

At trial, Dr. Yanofsky testified the information he had obtained regarding the incident was "a little sketchy to a certain extent, but we know enough, I think. Back when Mr. Aguon was living in Guam he was charged, along with other individuals, in the participation of a rape. As far as we can tell, at the time he was deemed to have some sort of mental condition that needed treatment and he was sent, actually, here to the U.S. to Atascadero State Hospital, where he was seen for a while."

Aguon contends, "The [psychologists] did not have the benefit of a report prepared by a court officer. There were no preliminary hearing transcripts. There is no information regarding the circumstances of the original statement. There is no evidence of corroboration. And, most importantly, there is no adjudication of guilt." He also contends, "Without the Guam incident, the diagnosis of paraphilia and of a serious difficulty in refraining from sexually violent criminal behavior would have to be based on only two data points, 1975 and 1984. Two data points can hardly said [*sic*] to be a 'pattern,' yet it is the alleged the pattern [*sic*] that defines the diagnosis."

The trial court did not err in admitting evidence regarding the 1972 incident. The California Supreme Court has pointed out that under section 6600, subdivision (a)(3), "By permitting the use of presentence reports at the SVP proceeding to show the details of the crime, the Legislature necessarily endorsed the use of multiple-level-hearsay statements that do not otherwise fall within a hearsay exception." (*People v. Otto* (2001) 26 Cal.4th 200, 208.)

The 1972 incident was significant because it established an age of early onset of Aguon's condition, which intensified over the years. The incident also showed that although Aguon was previously arrested and charged for a sexual offense, it did not deter him from committing other rapes. For that purpose, there was sufficient indicia of reliability regarding the 1972 incident. Even Aguon's counsel did not dispute Aguon was charged with a crime of sexual misconduct and subsequently hospitalized and treated for a mental condition related to sexual misconduct. Defense counsel stated at the hearing on the motion in limine: "We don't know what participation he had, other than that his car was involved in an alleged crime;" and, "We know thereafter at some point Mr. Aguon is sent to Atascadero State Hospital."

IV.

Use of Term "Sexually Violent Predator" During Trial

Aguon contends "the incessant use of the term 'sexually violent predator' before the jury was a denial of due process." He complains, "Because the Legislature has written the term into the law, it is one that is embedded in the instructions, embedded in the testimony of the witnesses, and intoned repeatedly as a bell that rings incessantly

from the first moment of trial to the last. It is uttered repeatedly from the start of voir dire to the concluding recitation of the law. It is the subject of the opening statements and closing arguments of counsel. And yet it is unnecessary." He adds, "While the trial necessarily involves facts of sex and of violence, there is no justification for linking these concepts in a slogan, an epithet, 'sexually violent predator.' " Finally, he appears to claim the prosecutor committed "governmental misconduct" by using the phrase, but points out, "Ordinarily, when it occurs, misconduct of this kind springs from the mouth of an overzealous prosecutor. In the instant case, it is the hand of politicians sitting in the Legislature that has injected this misconduct to the trial. But the effect on the fairness of the proceeding, the damage to the due process rights of the person against whom the forces of the state have been deployed in trial is not less, but more when the source of the misconduct is the drafters of laws."

Aguon correctly identified the Legislature as the drafter of the law, which specifically defines the term "sexually violent predator." And he correctly points out that the trial necessarily raised the subject of his acts of sex and violence. We conclude there was no error for the parties to use the term "sexually violent predator" and variations thereof to describe him or his conduct. We note that Aguon's counsel also used the same term or its abbreviation, "SVP," several times during closing argument. We conclude Aguon has not alleged that he suffered the kind of prejudice that warrants reversal, or that this court is authorized to remedy. The legislature appears better suited to address his arguments.

V.

Aguon contends the trial court prejudicially erred by failing to instruct, without request, that the evidence must show he had serious difficulty in controlling sexual behavior, but he concedes the California Supreme Court "in *People v. Williams*, *supra*, 31 Cal.4th at [pp.] 776-778 . . . held that the standard SVP instructions, couched in the language of the statute, which were given here adequately convey the idea of 'serious difficulty'." We agree with the concession, and are bound by *Williams*. (*Auto Equity*, *supra*, 57 Cal.2d at p. 455.)

VI.

Underground Regulations

Aguon contends the evaluations supporting the petition are invalid because the statutorily-required protocol was promulgated in violation of the APA, and therefore the trial court lacked jurisdiction to proceed with the SVP petition. He challenges the legality of his commitment because it derived from the Department's reliance on a mental health evaluation protocol, parts of which the Office of Administrative Law (OAL) has since determined constitute "underground" regulations.[4] Aguon contends that the

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[4] State agencies must formally adopt regulations in compliance with the procedural requirements of the APA. Certain guidelines that have not been adopted pursuant to the APA are considered to be illegal "underground regulations." (See Cal.Code Regs., tit. 1, § 250, subd. (a) [" 'Underground regulation' means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA."].)

illegality of the Department's protocol means that the petition to find him an SVP should be dismissed.

We reject Aguon's claim because even if we presume that the OAL determination is correct and the Department's protocol does constitute an underground regulation, the Department's use of the protocol does not undermine the legitimacy of Aguon's commitment. Other appellate courts have reached the same conclusion when faced with this claim. (See *People v. Medina* (2009) 171 Cal.App.4th 805 (*Medina*); *In re Glenn* (2009) 178 Cal.App.4th 778 (*Glenn*); *People v. Rotroff* (2009) 178 Cal.App.4th 619 (*Rotroff*).)

1. *Additional background*

The process for committing an individual under the SVPA begins when prison officials screen an inmate's records to determine whether it is likely that he or she is an SVP. (§ 6601, subds.(a), (b).) If prison officials make such a determination, the inmate is referred to the Department for a full evaluation as to whether he or she meets the SVP criteria. (*Id*., subd. (b).) Two mental health professionals designated by the Department are to "evaluate the person in accordance with a standardized assessment protocol, developed and updated by the [Department], to determine whether the person is [an SVP]." (*Id*., subds. (c), (d).) "The standardized assessment protocol [to be used by the evaluators] shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (*Id*., subd. (c).)

Consistent with the obligations set forth in section 6601, subdivision (c), the Department published the "Clinical Evaluator Handbook Standardized Assessment Protocol (2007)" (Handbook), to assist evaluators who conduct SVP evaluations on prisoners and evaluations of SVPs who are subject to recommitment. In August 2008, the OAL determined that 10 sections of the Handbook constitute "regulations" that the Department should have adopted in conformance with the procedures set forth in the APA. According to the OAL, the portions of the Handbook that were not promulgated pursuant to the APA constitute illegal "underground regulations." (2008 OAL Determination No.19.)

2. *Analysis*

Aguon offers no authority to support his assertion that the use of an "underground regulation" during the pre-petition administrative proceedings renders the subsequent commitment proceedings void, and thus subject to per se reversal for lack of jurisdiction. In suggesting that the Department's use of the challenged protocol deprives the trial court of fundamental jurisdiction to order commitment following a jury trial, Aguon fails to acknowledge the limited role that the Handbook plays in the preliminary phase of the SVP proceedings.

The Department is statutorily required to use the protocol for the purpose of administrative actions that lead up to the filing of an SVP petition. (§ 6601, subds.(c), (d).) " '[T]he requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so.'

[Citation.] 'After the petition is filed, rather than demonstrating the existence of the two evaluations, the People are required to show the more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior.' " (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063.)

"[O]nce the petition is filed a new round of proceedings is triggered." (*People v. Superior Court* (*Preciado*) (2001) 87 Cal.App.4th 1122, 1130.) Specifically, after a petition is filed, the court holds a probable cause hearing, at which the court's focus shifts away from assessing formal conformance with procedural requirements to evaluating the probative value of the evaluations on the substantive SVP criteria. The probable cause hearing under the SVPA is analogous to a preliminary hearing in a criminal case as both are designed to protect the accused from having to face trial on groundless or otherwise unsupported charges. (*Medina*, *supra*, 171 Cal.App.4th at pp. 818-819; *Glenn*, *supra*, 178 Cal.App.4th at pp. 813, fn. 10.)

In analogous circumstances in the context of a criminal prosecution, the California Supreme Court has concluded that defects in the preliminary hearing phase of a criminal proceeding do not automatically invalidate a subsequent conviction; rather, a defendant must show that he or she was prejudiced by the challenged defect. (See *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-530 (*Pompa-Ortiz*).) "[I]rregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if [the] defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. The right to

relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects." (*Id.* at p. 529.) "The presence of a jurisdictional defect which would entitle a defendant to a writ of prohibition prior to trial does not necessarily deprive a trial court of the legal power to try the case if prohibition is not sought." (*Ibid.*)

The *Pompa-Ortiz* rule "applies to SVP proceedings." (*People v. Hayes* (2006) 137 Cal.App.4th 34, 51.) Furthermore, the rule applies equally to the "denial of substantial rights as well as to technical irregularities," including claims of the denial of counsel and ineffective assistance of counsel at a preliminary hearing. (*Id.*, at pp. 50-51.) This court has held that the failure to obtain the evaluations of two mental health professionals, as required under section 6601, subdivision (d), did not deprive the court of fundamental jurisdiction to act on an SVP petition. (*Preciado*, *supra*, 87 Cal.App.4th at pp. 1128-1130.) The defect "was not one going to the substantive validity of the complaint, but rather was merely in the nature of a plea in abatement, by which a defendant may argue that for collateral reasons a complaint should not proceed." (*Id.* at p. 1128.)

Likewise, a requirement that the Department utilize a protocol that has been adopted pursuant to the APA is collateral to the merits of Aguon's SVP petition. We reject Aguon's assertion that a defect in the Department's evaluative process deprived the trial court of fundamental jurisdiction to act on his petition. Rather, Aguon must demonstrate that he was prejudiced by the Department's use of the Handbook. He has not attempted to make such a showing. Aguon fails to explain how use of the evaluation

protocol resulted in actual prejudice to him, either by depriving him of a fundamental right or a fair trial; therefore, we reject his challenge to the Department's use of an "underground regulation" in evaluating him under the SVPA.

VII.

Ex Post Facto and Double Jeopardy

Aguon contends the 2006 amended SVPA, which provides for commitment to an indeterminate term, is punitive, and violates the ex post facto and double jeopardy clauses of the federal Constitution. (§ 6604) Aguon argues that amendments to the SVPA have made the statute punitive in nature, despite the fact that the Act has a stated civil purpose. He bases his contention on (1) the indeterminate term; (2) an alleged shifting of burden to the defendant; (3) "[i]t is only after the [Department] decides the defendant meets the new burden [set forth in section 6605, subdivision. (b)], and authorizes him to petition for his conditional release, and defendant makes it through a probable cause hearing, that the State is finally required to prove he still meets the criteria at trial[; (4)] failure to treat is now considered evidence that the defendant's condition has not changed, and completion of treatment is a prerequisite to release." We reject Aguon's contentions because the constitutional principles prohibiting double jeopardy and ex post facto laws apply only to criminal proceedings. These contentions also have been rejected in *Rotroff*, *supra*, 178

Cal.App.4th 619; *Glenn*, *supra*, 178 Cal.App.4th 778; and *People v. Taylor* (2009) 174 Cal.App.4th 920, 938-939.[5]

Article I, section 10, of the United States Constitution prohibits the states from passing any law that retroactively alters the definition of a crime or increases the punishment for a criminal act. (*Collins v. Youngblood* (1990) 497 U.S. 37, 43.) Only penal statutes may implicate federal ex post facto protection. (*Kansas v. Hendricks* (1997) 521 U.S. 346, 370 (*Hendricks*); see also *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 504-505.) Further, if the SVPA applies only prospectively, permitting confinement only on a finding of current mental disorder and the likelihood of posing a future danger to the public, it does not violate the prohibition against ex post facto laws. (See *Hendricks*, at p. 371; see also *People v. Whaley* (2008) 160 Cal.App.4th 779, 792-796; *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1288-1289.)

The United States Supreme Court rejected a similar ex post facto challenge to a Kansas sexually violent predator statute. (*Hendricks*, *supra*, 521 U.S. at pp. 362-368, 370-371.) Based on the United States Supreme Court's analysis in *Hendricks*, the California Supreme Court upheld the previous version of the SVPA against challenges that it was a punitive statute that implicated federal ex post facto concerns. (*Hubbart I*,

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5 Aguon does not distinguish between the federal and state Constitutions. We therefore address the thrust of his argument, which involves only the federal Constitution. In any event, the "federal and state ex post facto clauses are interpreted identically." (*Hubbart I*, *supra*, 19 Cal.4th at p. 1171.)

supra, 19 Cal.4th at pp. 1170-1179; see *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1226 (*Hubbart II*); *Hubbart v. California* (2002) 534 U.S. 1143.)

In determining whether the amended SVPA is punitive for purposes of federal constitutional law, we apply the same analysis that the California Supreme Court used when it considered a similar challenge to the former SVPA in *Hubbart I*, *supra*, 19 Cal.4th at pp. 1170-1179. Whether a particular proceeding should be considered to be civil or criminal is initially a question of statutory construction. We first attempt to determine whether the body enacting the law intended to establish civil, rather than criminal, proceedings. (*Hendricks*, *supra*, 521 U.S. at p. 361.) Courts ordinarily defer to the enacting body's stated intent, and "will reject the [L]egislature's[6] manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " (*Ibid.*)

It is evident from the original SVPA that the Legislature intended to create a civil commitment procedure designed to protect the public from harm. (See *Hendricks*, *supra*, 521 U.S. at p. 361; *Hubbart I*, *supra*, 19 Cal.4th at p. 1171.) The amended SVPA retains the basic structure of civil commitment procedures to treat mentally ill persons who have committed acts of sexual violence, and the same statutory placement in the Welfare and

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6 Although statutory interpretation often involves questions regarding a legislative body's intent in enacting a statute or ordinance, we must ascertain the intent of the voters as the enacting body because Proposition 83 was enacted by the voters of the State of California in this situation. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901.)

Institutions Code, as the original SVPA. These factors support the conclusion that the amended SVPA is civil in nature.

We next consider whether the effects of the amended SVPA are so punitive that the Act should be considered a criminal statute. When analyzing the effects of a statutory scheme, we consider a non-exhaustive, non-dispositive list of seven factors that provide "a useful framework" for considering whether a statute is punitive in purpose or effect. (*Smith v. Doe* (2003) 538 U.S. 84, 97.) These factors include whether the statutory scheme: (1) "has been regarded in our history and traditions as a punishment," (2) "imposes an affirmative disability or restraint," (3) "promotes the traditional aims of punishment," (4) "has a rational connection to a nonpunitive purpose," (5) "is excessive with respect to this purpose," (6) "whether the regulation comes into play only on a finding of scienter," and (7) "whether the behavior to which it applies is already a crime." (*Id*. at pp. 97, 105.)

Commitment of the dangerously mentally ill is a legitimate governmental objective that has historically been viewed as nonpenal. (*Hendricks*, *supra*, 521 U.S. at pp. 362-363; see *Hubbart I*, *supra*, 19 Cal.4th at pp. 1172-1173.) Commitment of SVPs under the original SVPA did not implicate the two primary objectives of criminal punishment-retribution and deterrence. The original SVPA was not retributive because it did not assign culpability for prior criminal conduct, but, rather, used the existence and nature of the prior conduct as evidence of the existence of a mental disorder and/or future dangerousness. (See *Hendricks*, at pp. 361-363; *Hubbart I*, at p. 1175.)

The amendments to the SVPA did not change this. Similarly, there is no basis for concluding that the amendments to the SVPA create an increased deterrent effect over the original SVPA. Persons committed pursuant to sexually violent predator laws suffer from mental disorders that prevent them from exercising sufficient control over their conduct. Such individuals are unlikely to be deterred by the threat of civil confinement. (*Hendricks*, *supra*, 521 U.S. at pp. 362-363.) Under the amended SVPA, it must still be determined that SVPs suffer from mental disorders that prevent them from exercising sufficient control over their conduct; therefore, the amendments to the SVPA do not make it any more likely that a sexually violent predator will be deterred by its provisions than he or she would be under the provisions of the original SVPA.

Further, under both the original and amended versions of the SVPA, a jury need not make a finding of scienter or criminal intent to find that a person is an SVP. (*Hendricks*, *supra*, 521 U.S. at p. 362; compare with Pen.Code, § 20 [criminal act requires both act and intent].) The absence of an intent requirement constitutes further evidence that neither the original SVPA nor the amended SVPA were intended to be retributive. (*Hendricks*, at p. 362.)

The amended SVPA's provision for an indeterminate commitment term, rather than a determinate two-year term, does not alter the civil nature of the statutory scheme. Commitment under the amended SVPA is distinct from an indefinite prison term in that treatment of the committed person is a goal of the amended SVPA. (*See Hendricks*, *supra*, 521 U.S. at pp. 365-368; *Hubbart I*, *supra*, 19 Cal.4th at p. 1174.) Both the original and the amended SVPA provide for treatment, in addition to confinement, of

SVPs. (See § 6604.) Further, the United States Supreme Court has held that the duration of commitment is not evidence in and of itself of a punitive intent where it is linked to the purpose of that commitment, i.e., to hold the individual until his or her mental disorder no longer poses a threat to others. (*Hendricks*, at pp. 363-364; *Hubbart I*, pp. 1173, 1176.) The California Supreme Court has held that the original SVPA was designed to ensure that the committed person did not remain confined past a point at which he or she ceased to suffer from a mental abnormality rendering him or her unable to control his or her dangerousness. (*Hubbart I*, at p. 1177.) Under the amended SVPA, it is no different; once a committed individual is adjudged to no longer meet the definition of an SVP, he or she is entitled to release. Thus, the change from a determinate to an indeterminate commitment term does not support the conclusion that the amended SVPA is more punitive than the original SVPA.

As we have previously noted, Aguon had a right to a jury trial at the initial commitment hearing and at any hearing on a petition authorized by Department. (See §§ 6603, subd. (a), 6604, 6605, subd. (d).) One purpose of the amendments to the SVPA under Proposition 83 was to eliminate "unnecessary or frivolous jury trial actions where there is no competent evidence to suggest a change in the committed person." (Ballot Pamp., Gen. Elec. (Nov. 7, 2006), text of Prop. 83, p. 127.) It is clear that the change from a statutory scheme involving a determinate term and the right to a jury trial for recommitment proceedings under the original SVPA, to a statutory scheme involving an indeterminate term with no jury trial right for unauthorized petitions for release, did not have a punitive purpose. We conclude that the fact that the amended SVPA does not

provide for the right to a jury trial on a petition filed by an SVP who has not received Department authorization does not render the amended SVPA a punitive statute.

The underlying purpose and intent of the SVPA has not changed. The amended SVPA still requires a judicial finding that the detainee is an SVP, meaning not only that the person has committed a qualifying offense, but that the person suffers from "a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) The original and amended versions of the SVPA are thus similar with respect to whether the SVPA is punitive, for purposes of ex post facto concerns. We conclude that the amended version of the SVPA, like the original SVPA, is not punitive in either purpose or effect, for purposes of determining whether the Act violates the federal constitutional prohibition against ex post facto laws. (See *Hendricks*, *supra*, 521 U.S. at pp. 360-369.)

We similarly reject Aguon's contention that his commitment under the amended SVPA constitutes double jeopardy. The double jeopardy clause of the federal Constitution prohibits punishing an individual twice for the same offense. (*Hendricks*, *supra*, 521 U .S. at p. 369.) As we have already concluded, commitment under the amended SVPA is civil in nature, not punitive. A commitment under the amended SVPA thus does not constitute a second prosecution or second punishment for the same offense for which Aguon was previously convicted and incarcerated. (See *Hendricks*, at p. 369; see also *Hubbart II*, *supra*, 88 Cal.App.4th at p. 1226.)

VIII.

Equal Protection

Aguon contends the amended SVPA's provision for commitment to an indeterminate term violates his right to equal protection under the state and federal Constitutions because it treats differently SVPs, and individuals committed under different statutory schemes as the Mentally Disordered Offender Act (Pen.Code, § 2960 et seq.) (MDOs) and persons found not guilty by reason of insanity (NGIs) (Pen.Code, § 1026 et seq.), despite the fact they are all deprived their fundamental right to liberty. Aguon challenges on equal protection grounds the differences between how he will be treated in the recommitment process [under the SVPA] when compared to persons committed under California's other civil commitment schemes. We disagree.

a. *Applicable standards for equal protection claims*

"The right to equal protection of the laws is guaranteed by the Fourteenth Amendment to the federal Constitution and article I, section 7 of the California Constitution. The 'first prerequisite' to an equal protection claim is ' "a showing that 'the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' " ' " (*Hubbart II*, *supra*, 88 Cal.App.4th at p. 1216.) Because individuals who are not similarly situated need not be treated equally (*People v. Green* (2000) 79 Cal.App.4th 921, 924, (*Green*)), the first step in an equal protection analysis is to determine whether the two identified groups are in fact similarly situated for purposes of the law being challenged. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199.)

" 'Equal protection applies to ensure that persons similarly situated with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment. [Citation.]' [Citation.] The state 'may adopt more than one procedure for isolating, treating, and restraining dangerous persons; and differences will be upheld if justified. [Citations.] Variation of the length and conditions of confinement, depending on degrees of danger reasonably perceived as to special classes of persons, is a valid exercise of power.' " (*Hubbart II*, *supra*, 88 Cal.App.4th at p. 1217.) "Strict scrutiny is the appropriate standard against which to measure claims of disparate treatment in civil commitment." (*Green*, *supra*, 79 Cal.App.4th at p. 924.) In applying this standard, the state has the burden of establishing that it has a compelling interest that justifies the law and that the distinctions made by that law are necessary to further its purpose. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 641.)

b. *A comparison of the SVPA to other civil commitment schemes does not establish that the SVPA's indeterminate commitment scheme violates Aguon's right to equal protection*

Aguon claims that he was denied equal protection of the laws, under both the federal and state Constitutions, because he was committed for an indeterminate term and will bear the burden in subsequent proceedings to establish that he no longer qualifies as an SVP, without the benefit of a jury trial. In contrast, Aguon notes that individuals who are committed under other civil commitment statutes are committed for fixed terms and receive the benefit of jury trials at which the state bears the burden to prove that their commitments must be extended. We reject Aguon's contention.

(i) *SVPs and persons who are civilly committed under other legislative schemes are not similarly situated for purposes of recommitment procedures*

Aguon argues that persons who are committed under the amended SVPA, persons committed as MDOs and NGIs are all similarly situated for the purpose of evidentiary burdens and jury rights in recommitment proceedings. We disagree.

The premise that SVPs are similarly situated to MDOs and NGIs overlooks significant differences in the relevant commitment schemes and their purposes with respect to the degree and type of danger that persons committed under the different schemes pose, as well as the severity of the mental illness, prognosis, and amenability to treatment of persons in the different groups. Although SVPs, MDOs, and NGIs all suffer from mental disorders, the dangers that those in each group pose are different. The SVPA narrowly targets " 'a small but extremely dangerous group of sexually violent predators' " (*Cooley*, *supra*, 29 Cal.4th at p. 253), but the other classifications involve a broad range of mental illness and associated conduct.

In addition, an SVP is civilly committed in large part because of the likelihood that he or she will engage in sexually violent criminal behavior in the future. (See Ballot Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 127 ["Sex offenders have very high recidivism rates. According to a 1998 report by the U.S. Department of Justice, sex offenders are the least likely to be cured and the most likely to reoffend . . . "].) The SVP group poses a substantial danger to the community, has an extremely high rate of recidivism, requires long-term treatment, and has only a limited likelihood of improvement. On the other hand, the other classification groups may include individuals

who suffer from mental illnesses that are of short duration, are not likely to reoccur, and/or who have the potential to be successfully treated with medication or other therapeutic interventions. (See, e.g., *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1163 [determining that SVPs and MDOs are not similarly situated for purposes of equal protection claim based on differential treatment requirements].)

We conclude that for purposes of an equal protection analysis with regard to determinate versus indeterminate commitment schemes and evidentiary burdens, SVPs and persons who have been committed under different civil commitment statutes are not similarly situated.

(ii) *The government has a compelling interest in treating SVPs differently from persons who are civilly committed for other reasons*

Even assuming, arguendo, that SVPs, MDOs and NGIs are similarly situated for purposes of the procedures that Aguon challenges, we would nevertheless conclude that the disparate treatment of these groups is necessary to further a compelling state interest.

Aguon contends that the state does not have a compelling interest in imposing indeterminate terms on SVPs and requiring them to bear the burden of proof at hearings on petitions not authorized by the Department, while providing determinate terms and the right to recommitment proceedings at which the People have the burden of proof at the conclusion of the determinate terms for MDOs and NGIs.

We conclude that there is a compelling state interest in committing SVPs to indeterminate terms, regardless of the commitment terms that are imposed on those who are committed under other civil commitment statutes. SVPs are given indeterminate,

rather than fixed, terms of civil commitment because they are less likely to be cured and more likely to reoffend than are other civil committees. (See Ballot Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 127.) SVPs are thus deemed more dangerous than persons who are committed under other civil commitment schemes.

As the California Supreme Court has noted, the SVPA, as originally enacted, "narrowly target[ed] 'a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders [who] can be identified while they are incarcerated.' " (*Cooley*, *supra*, 29 Cal.4th at p. 253.) With respect to the prior version of the SVPA, the California Supreme Court stated, "The problem targeted by the Act is acute, and the state interests — protection of the public and mental health treatment — are compelling." (*Hubbart I*, *supra*, 19 Cal.4th at p. 1153, fn. 20.)

In election materials pertaining to Proposition 83, voters were presented with information that sex offenders "prey on the most innocent members of our society" and that such offenders "have very high recidivism rates" and are the "least likely to be cured and the most likely to reoffend." (See Ballot Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 127.) As noted in *People v. Shields* (2007) 155 Cal.App.4th 559, 564, in passing Proposition 83, the voters intended to enhance the confinement of SVPs: "Proposition 83 states that the change from a two-year term to an indeterminate term is designed to eliminate automatic SVP trials every two years when there is nothing to suggest a change in the person's SVP condition to warrant release. . . " The change from the two-year fixed term to an indeterminate term was also intended to reduce the costs of SVP evaluations and court testimony. (*Bourquez*, *supra*, 156 Cal.App.4th at p. 1287.)

Based on the evidence of the voters' intent in passing Proposition 83, we conclude that the changes made by Proposition 83, including the change from a two-year civil commitment to an indeterminate term, were in furtherance of compelling state interests.

The particularized dangerousness of SVPs and the limited success in treating them — characteristics that voters recognized in passing Proposition 83 — justify the state treating SVPs differently from the manner in which it treats individuals who are civilly committed under other statutes. Voters could reasonably have concluded that SVPs should be committed to indeterminate terms, subject to hearings on petitions for release at which the SVP may be required to bear the burden to prove by a preponderance of the evidence that he or she is no longer an SVP. We conclude that the disparities between the procedures that apply in recommitment proceedings for SVPS and those that apply in hearings for MDOs and NGIs do not violate the SVP's constitutional right to equal protection.

IX.

Due Process

Aguon contends the amended SVPA's provision for commitment to an indeterminate term violates his right to due process.

An initial civil commitment for an indefinite term does not violate due process merely because of the potential for a lengthy commitment. (See *Jones v. United States* (1983) 463 U.S. 354, 368 (*Jones*) [statute providing for indefinite commitment of a criminal defendant acquitted by reason of insanity and requiring defendant to prove by preponderance of evidence that he is no longer insane or dangerous in order to be

released does not violate due process]; see also *Hendricks*, *supra*, 521 U.S. 346 [upholding Kansas Sexually Violent Predator Act, which provided for commitment until mental abnormality or personality disorder has so changed that the committed person is no longer dangerous].) An indefinite civil commitment is consistent with due process if the statute provides fair and reasonable procedures to ensure that the person is only held "as long as he is both mentally ill and dangerous, but no longer." (*Foucha v. Louisiana* (1992) 504 U.S. 71, 77.)

The initial commitment hearing provides a significant level of due process protection by requiring the prosecution to prove that the person qualifies for commitment beyond a reasonable doubt. (§ 6604.) This is a higher standard than the clear and convincing standard upheld in *Addington v. Texas* (1979) 441 U.S. 418, 433. The procedures for postcommitment review and release in the SVPA are also constitutionally adequate to ensure that the committed person is released once he or she no longer qualifies as an SVP. The SVPA requires at least annual reviews of an individual's mental health status and forwarding of the reviews to the committing court and the prosecuting attorney. It also requires Department to authorize the individual to file a petition for release if the examination reveals he or she is no longer an SVP. The annual examinations by Department, the right to an independent examination, and the petitioning procedures pursuant to sections 6605 and 6608 minimize the risk of an erroneous determination. The substitution of annual review by the Department and the procedure for authorized and unauthorized petitions, for the requirement in the former version of the SVPA of automatic full judicial review every two years, strikes a reasonable and fair

balance between protection of the rights of committed persons not to be detained any longer than their mental illness and dangerousness requires, and the interest of the state in protecting the public from persons who are mentally ill and dangerous, and in avoiding unnecessary relitigation of issues, in the absence of some evidence of a change in the conditions underlying the initial commitment. (See, e.g., *Hendricks*, *supra*, 521 U.S. at p. 363 [state has legitimate interest in protecting community from the mentally ill and dangerous]; see also *U.S. v. Wattleton* (2002) 296 F.3d 1184, 1200-1201 [state also has an interest in avoiding unnecessary relitigation of issues].)

Because we have addressed the claims on the merits and find no prejudicial error, we do not address Aguon's claims of ineffective assistance of counsel. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.