IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD MCKEE, Defendant and Appellant.	S162823

Fourth Appellate District, Division One, No. D050554
San Diego County Superior Court No. MH97752
The Honorable Peter L. Gallagher, Judge

ANSWER BRIEF ON THE MERITS

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

STEVE OETTING
Supervising Deputy Attorney General

BRADLEY A. WEINREB
Deputy Attorney General
State Bar No. 157316

110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2290
Fax: (619) 645-2271
Email: Bradley.Weinreb@doj.ca.gov

Attorneys for Plaintiff and Respondent

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INTRODUCTION

In *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 (*Hubbart*), this Court found civil commitment under the Sexually Violent Predator Act (SVPA) did not on its face violate due process, ex post facto or equal protection principles. Although the SVPA initially afforded limited two-year commitment terms subject to re-commitment proceedings, following the November 2006 passage of Jessica's Law (Proposition 83), persons found to be a Sexually Violent Predator (SVP) are now subject to indeterminate civil commitment terms.

Appellant McKee was found to be an SVP and then committed for an indeterminate term. McKee argues the indeterminate term and placing the burden on the SVP to thereafter obtain conditional release denies due process, violates ex post facto, and constitutes an equal protection violation. These meritless constitutional challenges should be rejected: neither the indeterminate term itself, nor the burden on the committed SVP to prove he is entitled to conditional release when he files an unauthorized petition, denies due process because there exist adequate procedural safeguards to ensure commitment is only for a current mental condition; the indeterminate commitment is not punishment and does not violate ex post facto principles; the indeterminate

commitment does not constitute an equal protection violation because the SVP is not similarly situated to persons committed under other civil commitments that provide a specified commitment term.

STATEMENT OF THE CASE

On March 12, 2007, a San Diego Superior Court jury found appellant Richard McKee to be a sexually violent predator, within the meaning of Welfare and Institutions Code, section 6600 et seq. (1 CT 234-245.)[1/] The trial court thereafter imposed an indeterminate civil commitment term.

McKee appealed, challenging *inter alia*, the constitutionality of his indeterminate commitment. (1 CT 204-206.) The Court of Appeal upheld the commitment on March 20, 2008.

McKee filed a Petition for Review on April 17, 2008. On July 9, 2008, this Court granted review and thereafter ordered the issues limited to: "Does the amended Scxually Violent Predator Act violate appellants's constitutional rights to due process of law, is it an illegal ex post facto law, and does it violate equal protection?".

STATEMENT OF FACTS

McKee had been previously convicted of two prior sexually violent

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

Respondent also observes that an initial commitment petition was filed against McKee on November 8, 2004. (1 CT 1-3.) Following procedural delays not at issue on appeal, the People filed an amended petition on March 5, 2007, incorporating changes to the SVPA pursuant to Jessica's Law (Proposition 83). This included notice to McKee that he was subject to an indeterminate civil commitment term. (1 CT 106-107, 127-134, 151-153, 231, 234.)

offenses involving both multiple sexually related incidents (vaginal and anal intercourse) with an eleven-year-old babysitter in 1991 (5 RT 240-243) and multiple sexually related incidents (anal intercourse, attempted vaginal intercourse, digital penetration) with his eight-year-old niece in 1998 (5 RT 249-250).

Clinical psychologist Dr. Richard Romanoff, evaluated McKee on two separate occasions. Both times he determined McKee was an SVP. (5 RT 230-231-234.) According to Romanoff, McKee was a pedophile (recurrent sexual attraction to prepubescent children) and had a schizoaffective disorder. (5 RT 260, 286, 294-295.) Although McKee received mental health treatment and medication while in prison through 2004 (5 RT 268-269, 272), he stopped taking his medication around 2004. After that, McKee became hostile, denied having any mental illness, and denied having any inappropriate prior sexual contact with children (5 RT 279-280, 290-291).

Based on his evaluation, a review of McKee's prior history, and consideration of standard risk-assessment testing methods, Romanoff believed that McKee's mental disorders made it difficult to control his sexual behavior (5 RT 301-302), and, that McKee was likely to engage in sexually criminal behavior in the future (See e.g., 5 RT 303-306, 309-315, 322, 357-358.)

Clinical psychologist Jack Vognsen also believed McKee had the same mental disorders (7 RT 552) and that McKee's mental condition deteriorated after he stopped taking his medication in 2004 (7 RT 571-572, 585). Like Romanoff, Vognsen believed McKee had difficulty controlling his behavior and met SVP criteria. (See e.g., 7 RT 583-584, 580, 588-589, 594.)

McKee testified that he faked having a mental illness while in prison, and although he denied having prior inappropriate sexual contact with his niece, admitted that he had sexual contact with the babysitter. (6 RT 485, 487, 505-506, 517.) In addition, clinical psychologist Nancy Ruescenberg testified that

while McKee had the same qualifying sex offenses and mental disorders (6 RT 401-402), she believed that McKee had a low risk of re-offending (see, 6 RT 406-407, 421-422).

ARGUMENT

I.

THE TRIAL COURT PROPERLY IMPOSED AN INDETERMINATE CIVIL COMMITMENT TERM AFTER THE JURY FOUND McKEE TO BE A SEXUALLY VIOLENT PREDATOR

McKee claims his indeterminate civil commitment term under the revised SVPA violated federal due process, ex post facto and equal protection principles. (BOM 18.) The claims lack merit. Neither the indeterminate term itself, nor the burden on the committed SVP to prove he is entitled to conditional release when he files an unauthorized petition, denies due process because there exist adequate procedural safeguards to ensure commitment is only for a current mental condition; the indeterminate commitment is not punishment and does not violate ex post facto principles; the indeterminate commitment does not constitute an equal protection violation because the SVP is not similarly situated to persons committed under other civil commitments that provide a specified commitment term.

A. Statutory Background

This Court is familiar with the statutory and procedural framework of the SVPA. (See, e.g., *Hubbart v. Superior Court, supra*, 19 Cal.4th at pp. 1143-1149.) As originally enacted effective January 1, 1996 (Stats.1995, ch. 763, § 3), the SVPA provided for the involuntary civil commitment for a two-year term of confinement and treatment of persons who, in a unanimous jury verdict after trial (former §§ 6603, subd. (d), 6604), are found beyond a reasonable doubt to be SVP's (former § 6604). (*People v. Williams* (2003) 31 Cal.4th 757, 764.) A person's commitment could not be extended beyond that two-year term unless a new petition was filed seeking a successive two-year commitment. (Former § 6604; *People v. Shields* (2007) 155 Cal.App.4th 559, 562.)

On September 20, 2006, the Legislature passed Senate Bill No. 1128, amending the SVPA to increase the length of the commitment term from two years to an indeterminate term. The bill was passed as an urgency measure, to go into effect immediately. (Stats. 2006, ch. 337, § 55.) Shortly thereafter, on November 7, 2006, the voters enacted Proposition 83, also known as "The Sexual Predator and Punishment Control Act: Jessica's Law," which made several changes to the SVPA.[2/] (Ballot Pamp., Primary Elec. (Nov. 7, 2006) text of Prop. 83, pp. 135-138; *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1280-1281.) Jessica's Law went into effect the next day. (Cal. Const. Art. II, § 10.) Like Senate Bill No. 1128, it provides for an indeterminate SVP commitment term. (§ 6604.) Regardless, any statutory amendments set forth in Senate Bill No. 1128 which were not also set forth in Jessica's Law no longer apply, and, those sections as amended pursuant to Jessica's Law now control. (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310 (later enactments supercede earlier).)

Under the revised SVPA, when a court or jury determines that a person is an SVP,

> the person shall be committed for an indeterminate term to the custody of the State Department of Mental Health ["DMH"] for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health.

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2. Proposition 83 altered the SVPA in other respects not subject to the appeal: only one predicate conviction (rather than two) is required to initiate SVP proceedings (§ 6600(a)(1)); it expanded definitions of what qualifies as a predicate conviction and what constitutes a sexually violent offense (§ 6600(b)(1) and (g), § 6600.1); and any remaining parole is tolled until the person is no longer found to be an SVP (§ 6601(k)).

Proposition 83 also increased criminal punishment for sex offenses by increasing the term provided and increasing the type of sex offenses that would trigger enhancements and longer sentences. It also provided for increased monitoring of registered sex offenders and restrictions on where they could reside.

(§ 6604.)

Because the revised SVPA provides for an indeterminate commitment term, a committed person now, in effect, "remains in custody until he successfully bears the burden of proving he is no longer an SVP or the [DMH] determines he no longer meets the definition of an SVP. [Citations.]" (*Bourquez v. Superior Court*, *supra*, 156 Cal.App.4th at p. 1287.)

Proposition 83, however, did not alter the provisions governing commitment review and release mechanisms that existed under the original SVPA's two-year commitment term that had been approved by this Court in *Hubbart*. To that end, the revised SVPA still ensures that any commitment ordered under section 6604 will not continue in the event the SVP's condition materially improves.

For example, an SVP shall have a current examination of his or her mental condition made at least once every year and that person's annual report,

> shall include consideration of whether the committed person currently meets the definition of a sexually violent predator and 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.

(§ 6605, subd. (a).)

Additionally, under section 6605, the SVPA grants DMH authority to petition the court for release if it,

> determines either: (1) the person's condition has so changed that the person no longer meets the definition of a sexually violent predator, or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the director shall authorize the person to petition the court for conditional release to a less restrictive alternative or for an unconditional discharge.

(§ 6605, subd. (b).)

Upon receipt of an authorized petition for conditional or unconditional release, the court orders a show cause hearing and,

> If the court at the show cause hearing determines that probable cause exists to believe that the committed person's diagnosed mental disorder has so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior if discharged, then the court shall set a hearing on the issue.

(§ 6605, subd. (c).)

And, both sides have the right to experts and a jury at the hearing, and the committed person is entitled to all the constitutional protections afforded to him at the initial commitment proceeding. (§ 6605, subd. (d).)

> The burden of proof at the hearing shall be on the state to prove beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent criminal behavior if discharged.

(§ 6605, subd. (d).)

Although an SVP must obtain authorization from DMH to file a petition for conditional or unconditional release under section 6605, section 6608 affords the person a right to petition for either type of release without DMH concurrence. The court may deny a section 6608 petition without a hearing, if it determines the petition is frivolous. (§ 6608, subd. (a).) Otherwise, it shall hold a hearing. At that time, the court will determine,

> whether the person committed would be 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 due to his or her diagnosed mental disorder if under supervision and treatment in the community. If the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community, the court shall order the committed person placed with an appropriate forensic conditional release program operated by the state for one year. . . . At the end of one year, the court shall hold a hearing to determine if the person should be unconditionally released from commitment on the basis that, by reason of a diagnosed mental disorder, he or she is not a danger to the health

and safety of others in that it is not likely that he or she will engage in sexually violent criminal behavior.

(§ 6608, subd. (d).)

No section 6608 petition hearing shall be held until the person has been under commitment for at least one year (§ 6608, subd. (c)), and once a petition is denied, the person may not file a new petition until one year has elapsed from the date of the denial (§ 6608, subd. (h)). And once a section 6608 petition has been denied, either as frivolous or after a hearing, the court shall deny any subsequent section 6608 petition "unless it contains facts upon which a court could find that the condition of the committed person had so changed that a hearing was warranted." (§ 6608, subd. (a).) Because the petition is filed without concurrence from DMH, under a section 6608 the petitioner has the burden of proof by a preponderance of the evidence. (§ 6608, subd. (i).)

Finally, aside from the annual review, if the Director of the DMH determines at any time "that the person's diagnosed mental disorder has so changed that he is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community, the director shall forward a report and recommendation for conditional release in accordance with Section 6608" to the court and parties, and the court shall set a hearing in accordance with the procedures set forth in section 6608.[3/] (§ 6607.)

It bears repeating that the review and release procedures set forth under section 6605 and 6608 are no different than what existed under the SVPA

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3. Of course, this presumes that the SVP has successfully undergone treatment. Once civilly committed, SVP's undergo a five-phase "Sex Offender Commitment Program" for treatment. (*Hydrick v. Hunter* (9th Cir. 2006) 449 F.3d 978, 986.) Phase One comprises group sessions that educate the SVP about California's SVPA. Phases Two through Five of the treatment plan involve cognitive treatment. (*Id.* at pp. 986-987.) Upon successful completion of Phase Five, the SVP is conditionally released under the supervision of the DMH. (*Id.* at p. 987; §§ 6607, 6608.)

reviewed by this Court in *Hubbart*. Specifically, the burden on the petitioner to prove by a preponderance of the evidence that he is entitled to conditional release when he files a petition without DMH concurrence under section 6608, is no different than what was required under the prior version of the SVPA. (*Hubbart v. Superior Court, supra*, 19 Cal.4th at p. 1148 ("In an apparent attempt to deter multiple unsubstantiated requests and to reduce the administrative burden that might otherwise occur, the court is permitted, 'whenever possible,' to review and deny the SVP's unilateral petition for conditional release 'without a hearing' if it is 'based upon frivolous grounds.' (§ 6608, subd. (a).) Also, '[i]n any hearing authorized by [section 6608], the petitioner shall have the burden of proof by a preponderance of the evidence.' (*Id.*, subd. (i).)".)

B. The Court of Appeal Decision

The Court of Appeal acknowledged federal due process requires constitutional safeguards to be present for purpose of involuntary commitment under *Addington v. Texas* (1979) 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (*Addington*), but rejected McKee's argument that *Addington* mandated reversal of the indefinite commitment because McKee and not the State bore a burden to establish he is no longer an SVP for purpose of the release provisions set forth in section 6608. The Court of Appeal explained the circumstances in *Addington* involved only an *initial* civil commitment proceeding and therefore *Addington* did not address whether findings at proceedings subsequent to an initial civil commitment (e.g., a subsequent review or release hearing) require the state to submit proof by clear and convincing evidence. Furthermore, the Court of Appeal explained that *Addington* involved only an "ordinary" civil commitment statute and did not address the standard of proof required in special civil commitment proceedings (e.g., an SVP civil commitment proceeding under the Act). (Opn. at p. 18.)

Instead, the Court of Appeal relied on the post-*Addington* decision in *Jones v. United States* (1983) 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694, which held application of a standard of proof by a preponderance of the evidence did not violate federal due process at an initial hearing regarding the civil commitment of a person previously found not guilty of committing a criminal offense by reason of insanity. In that context, the defendant establishes his insanity; the Supreme Court observed,

> when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." (*Id.* at p. 370, 103 S.Ct. 3043.).

(Opn. at pp. 22-23.)

Therefore, the Court of Appeal concluded that federal due process was not violated when McKee's dangerousness and mental illness were proved beyond a reasonable doubt at his initial commitment trial (which applied a higher standard of proof than permitted in *Jones*); and that McKee's being subject to subsequent annual examinations and potential annual petitions for release pursuant to sections 6005 and 6608 were adequate to protect his federal constitutional right to due process of law, even if he were required to prove his right to release by a preponderance of the evidence at a section 6608 hearing conducted without DMH authorization . (Opn. at pp. 23 and 27-28.)

In addressing McKee's ex post facto argument, the Court of Appeal explained the Supreme Court rejected an ex post facto challenge to the Kansas SVPA in *Kansas v. Hendricks* (1997) 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501, and, that this Court did the same with respect to the pre-Proposition 83 SVPA in *Hubbart, supra*. (Opn. at pp. 31-32.) The Court of Appeal concluded imposition of an indefinite commitment term under the revised SVPA did not exact a punitive purpose because the duration of the term

is not linked to punishment but instead is designed to hold the person until the mental abnormality no longer causes him to be a threat to others. (Opn. at pp. 34-36.)

Finally, the Court of Appeal rejected McKee's equal protection argument. It applied strict scrutiny to measure McKee's claim that disparate treatment exists in comparing the SVPA to other civil commitment schemes because of the burden-shifting provisions for purpose of conditional release under section 6608. The Court of Appeal determined SVP's and other civil committees are not similarly situated but even if they were, their disparate treatment is necessary to further a compelling state interest. (Opn. at pp. 38-44.)

C. The Constitution Does Not Prohibit An Indeterminate Civil Commitment

McKee's contention that indeterminate civil commitments are unconstitutional is undermined by *Jones v. United States, supra,* 463 U.S. at page 354. There, the United States Supreme Court upheld a District of Columbia statutc that provided for the indefinite commitment of a defendant acquitted by reason of insanity, and required him to prove that he was no longer insane or dangerous by a preponderance of the evidence in order to be released. The court found that "a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society" because the criminal act indicates dangerousness and the insanity acquittal supports an inference of continuing mental illness. (*Id.* at pp. 365-366.) Accordingly, the court held that the Constitution permits the government to confine a person found not guilty by reason to insanity to a mental institution "until such time as he has regained his sanity or is no longer a danger to himself or society." (*Id.* at p. 370.) The Court rejected the notion that the person could not be hospitalized for a period longer than he could have been incarcerated if convicted because the purpose of the

commitment was not to punish the individual, but to treat him and protect the public. (*Jones v. United States, supra,* 463 U.S. at p. 368.)

> And because it is impossible to predict how long it will take for any given individual to recover—or indeed whether he ever will recover—Congress has chosen, as it has with respect to civil commitment, to leave the length of commitment indeterminate, subject to periodic review for the patient's suitability for release.

(*Jones v. United States, supra,* 463 U.S. at p. 368.)

Similarly, in *Kansas v. Hendricks, supra,* 521 U.S. at page 346, the Supreme Court upheld the constitutionality of Kansas's SVPA, which provides for the commitment of an SVP "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." (Kan. Stat. Ann. § 59-29a07(a).)

Indeed, part of California's motivation for amending the SVP Act was to bring it in line with Kansas and other states SVP laws, which uniformly provide for indeterminate terms. The voters declared:

> California is the only state, of the number of states that have enacted laws allowing involuntary civil commitments for persons identified as sexually violent predators, which does not provide for indeterminate commitments. California automatically allows for a jury trial every two years irrespective of whether there is any evidence to suggest or prove that the committed person is no longer a sexually violent predator. As such, this act allows California to protect the civil rights of those persons committed as a sexually violent predator while at the same time protect society and the system from unnecessary or frivolous jury trial actions where there is no competent evidence to suggest a change in the committed person.

(Ballot Pamp., Primary Elec. (Nov. 7, 2006) text of Prop. 83, § 2(k), p. 127.)

In light of *Jones* and *Hendricks*, it cannot reasonably be contended that it violates due process to hold an SVP for an indeterminate period until he no longer meets the definition of an SVP or can be safely placed on conditional release. McKee's argument to the contrary is based on a single line in *Hubbart v. Superior Court, supra,* in which this Court cited the "relatively brief" length

of an SVP commitment as one reason for rejecting a defense claim that the treatment provisions of our Act were a sham:

> Moreover, the Act is accompanied by a declaration of the Legislature's intent to establish a nonpunitive, civil commitment scheme covering persons who are to be viewed, "not as criminals, but as sick persons." (§ 6250; see Stats. 1995, ch. 763, § 1.) Commitment and treatment are proper under the Act only for so long as the person is both mentally disordered and dangerous. To this end, *the maximum length of each commitment term is relatively brief—two years.* (§ 6604.) A new mental evaluation and judicial review of the commitment are required each year, providing the SVP with an opportunity to receive unconditional release and discharge in the event his condition has materially improved. (§ 6605, subds. (a)-(e); see *id.*, subd. (f).) The Act also provides opportunities for conditional supervised release into the community before the two-year commitment term expires. (§§ 6607, 6608.)

(*Hubbart v. Superior Court, supra*, 19 Cal.4th at pp. 1166-1167, italics added.)

Although the commitment term under the revised SVPA can no longer be described as "relatively brief," this Court's underlying point still remains true: "Commitment and treatment are proper under the Act only for so long as the person is both mentally disordered and dangerous." (*Hubbart v. Superior Court, supra*, 19 Cal.4th at p. 1166.) And to ensure persons are not kept in custody longer than necessary, the revised SVPA continues to provide for an annual mental evaluation and regular opportunities for the SVP to petition for conditional or unconditional release with or without the concurrence of DMH. It also permits DMH to recommend conditional release to the court anytime it believes the person's condition has changed, whether or not he is then due for his annual review.

In sum, an SVP commitment term need not be limited to two years or any other finite length of time in order to be constitutional. What is required is adequate (i.e., fundamentally fair) safeguards or procedures to ensure the person is held only "so long as he is both mentally ill and dangerous, but no longer." (*Foucha v. Louisiana* (1992) 504 U.S. 71, 77 [112 S.Ct. 1780, 118 L.Ed.2d

437]; see also *Kansas v. Hendricks*, *supra*, 521 U.S. at p. 358.) We now turn to that issue.

D. It Is Not Unconstitutional To Make The Committed Person Bear The Burden Of Proving He Is Entitled To Release

McKee contends it is unconstitutional to commit SVP's for an indeterminate term rather than for two years and to place the burden on the SVP to show that he is no longer a danger to the health and safety of others in order to obtain conditional or potentially unconditional and outright release into the community, if he files a petition without concurrence of the DMH. (BOM 18.) He cites no persuasive authority to support his claim that such "burden shifting," once the person is duly committed, is unlawful.[4/]

Instead, McKee's argument is directed at section 6605, subdivision (c).

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4. McKee's arguments here do not relate to the indeterminate commitment term imposed, but instead to the subsequent provisions that may come into play if he seeks review of his condition or petition for release. Because McKee is not yet subject to those proceedings, the Court of Appeal first addressed whether those claims were ripe for review. This Court did not request review of that determination.

As the Court of Appeal did, respondent recognizes that even if the contentions are not technically ripe, this Court should exercise discretion and consider the constitutional claims. (See e.g., *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171, quoting *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 149 [87 S.Ct. 1507, 18 L.Ed.2d 681].) Assuming *Pacific Legal* adopted the federal standard for ripeness requirements, McKee's challenge to the indefinite commitment term itself must be viewed in consideration of the SVPA's comprehensive scheme for annual reviews and petitions for release. McKee is in effect making a facial legal challenge to the provisions of section 6608 and the further development of facts would not aid in deciding the issues. And if this court delayed consideration of constitutional challenges until a future section 6608 petition for release was denied, McKee and others would suffer undue hardship in the event such challenges were subsequently determined to be meritorious and it would result in continued uncertainty in law governing an issue of widespread public interest. (*Id.*, at pp. 170-171.)

That section requires that because the SVP is entitled to current examinations of his mental condition at least once a year, he is also entitled to annual notice to petition the court for conditional release. Under section 6605, the court conducts a show-cause hearing to determine whether there is probable cause to believe his diagnosed mental disorder has so changed that he is not a danger to others before he will be entitled to a jury trial.[5/] There is nothing unlawful about this. To begin with, the burden is minimal. The State need only show that a reasonable person could entertain a strong suspicion that release is warranted. (Cf. *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 236, 252.) Moreover, as McKee himself observes, section 6605 requires DMH to authorize the person to file a petition for conditional release or unconditional discharge where the person's condition has so changed that he no longer meets the definition of an SVP, or that conditional release to a less restrictive alternative is in the best interests of the person and conditions can be imposed that adequately protect the community. Armed with such a recommendation, the committed person will almost always be able to make the minimal showing required for a probable cause finding, at which point he maintains the same rights afforded at the initial commitment hearing, and, where the burden shifts to the People to prove beyond a reasonable doubt at the conditional release hearing that the person continues to meet the criteria for commitment. (§ 6605, subd. (d).) In short, any initial burden under section 6605 exists more in name than in reality.

The SVP's burden is greater, however, under section 6608, which sets forth the procedures for release without any DMH concurrence. As noted above, the SVP may still petition for release, conditional or unconditional. The court may deny the petition without a hearing only if it finds the petition

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5. As noted above, the SVP is entitled at this hearing to present expert testimony and cross-examination.

frivolous. (§ 6608, subd. (a).) Otherwise, it must hold a hearing to determine if the person would be a danger to others due to mental disorder if under supervision and treatment in the community. (§ 6608, subd. (d).) At such a hearing, the SVP has the burden of proof by a preponderance of the evidence. (§ 6608, subd. (i).).[6/]

Section 6608's assignment of the burden to the SVP to prove by a preponderance that he is entitled to release, when he does not have the concurrence of DMH, satisfies due process. As noted earlier, the Supreme Court in *Jones v. United States*, *supra*, 463 U.S. at p. 354, upheld a statutory scheme that required an insanity acquittee seeking release to prove by a preponderance that he was no longer insane or dangerous. The court found indefinite commitment upon a finding of not guilty by reason of insanity proper because the criminal act indicates dangerousness and the insanity acquittal supports an inference of continuing mental illness. (*Id.* at pp. 365-366.)

Similarly, a finding under California law that a person is an SVP is a sufficient foundation for indefinite confinement until the SVP proves by a preponderance that he is entitled to release. Although the Constitution only requires proof in a civil commitment case by clear and convincing evidence (*Addington v. Texas, supra,* 441 U.S. at pp. 426-427), California requires the People to prove a person qualifies for commitment as an SVP beyond a reasonable doubt. (§ 6604.) The People's evidence must establish that the person has been convicted of a sexually violent offense in the past, and that he currently suffers from a diagnosed mental disorder that makes him a danger to

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6. As noted above, this is no different than the originally enacted SVPA. In that regard, this Court found a section 6608 conditional release hearing places the burden of proof by a preponderance of the evidence on the petitioner, "[i]n an apparent attempt to deter multiple unsubstantiated requests [for release without concurrence of the DMH] and to reduce the administrative burden that might otherwise occur." (*Hubbart v. Superior Court, supra*, 19 Cal.4th at p. 1148, fn. 14.) The revised SVPA does not alter that conclusion.

the health and safety of others in that it is likely that he will engage in sexually violent predatory criminal behavior. (§ 6600, subd. (a)(1); *People v. Hurtado* (2002) 28 Cal.4th 1179, 1182.) Moreover, SVP cases may only be instituted against persons who are currently in prison. (§ 6601, subd. (a)(1).)

The foregoing is sufficient to support an inference of continuing dangerousness and mental illness. Dangerousness is indicated by the person's prior conviction of a sexually violent offense, the fact that he committed an offense meriting a prison sentence,[7] and the beyond-a-reasonable-doubt finding that he is likely to be sexually assaultive if released. Continuing mental illness is indicated by the beyond-a-reasonable-doubt finding that the person suffers from a diagnosed mental disorder and the fact that such disorders are typically slow to change. Finally, both elements are supported by the fact that DMH, the entity charged with treating the SVP, has concluded that release is not warranted.

In sum, the placement of the burden of proof on the SVP to prove entitlement to release by a preponderance in those cases where he contests DMH's determination that release is inappropriate is neither irrational nor unfair. Given the prior determination that the SVP is beyond a reasonable doubt mentally ill and likely to commit sexually violent predatory offenses if released, the public has a special interest in the person's continued confinement. Thus, when the SVP seeks release claiming he is no longer mentally ill or dangerous, and does so without the concurrence of those treating him, requiring him to bear the burden of proof by a preponderance appropriately protects society against the danger posed by an erroneous decision on that issue. Moreover and as this Court has already observed that this procedure "deter[s] multiple unsubstantiated requests [for release without concurrence of the DMH] and to reduce the administrative burden that might otherwise occur." (*Hubbart*

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7. The prison sentence need not be for the sexually violent offense.

v. Superior Court, supra, 19 Cal.4th at p. 1148, fn. 14.)[8/]

Any claim that McKee is either no longer a danger to society or should be released without any need for him to establish such release has merit, ignores his circumstances. McKee had been previously convicted of two prior sexually violent offenses involving both multiple sexually related incidents (vaginal and anal intercourse) with an eleven-year-old babysitter in 1991 (5 RT 240-243) and multiple sexually related incidents (anal intercourse, attempted vaginal intercourse, digital penetration) with his eight-year-old niece in 1998 (5 RT 249-250). McKee was, and is, a pedophile and sexual predator. Before being classified as an SVP he had already received mental health treatment and medication in prison. But, he stopped taking his medication around 2004. After that, McKee became hostile, denied having any mental illness, and denied having any inappropriate prior sexual contact with children (5 RT 279-280, 290-291). And although he later denied having any prior inappropriate sexual contact with his niece, did admit he had sexual contact with the babysitter. (6 RT 485, 487, 505-506, 517.)

E. The Revised SVPA Does Not Violate Ex Post Facto Principles

This Court already determined the originally enacted limited two-year civil commitment term under the SVPA did not violate ex post facto principles because it did not impose any punishment. (*Hubbart v. Superior Court, supra*, 19 Cal.4th at p. 1175.) And although it was not asked to review the revised SVPA under this basis, in *People v. Allen* (2008) 44 Cal.4th 843, this Court recently held a defendant in an SVP proceeding has a due process right to

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8. McKee's suggestion that DMH is a poor "gatekeeper" to the courts without any incentive to facilitate filing of a petition or releasing an SVP (BOM 26-27), is meritless and devoid of factual support. Moreover is it presumed that DMH official duties are properly performed (Evid. Code, § 664); in any event and as previously noted, under section 6608 an SVP may petition the court for conditional or unconditional release without DMH concurrence.

testify over objection of counsel and noted that the purpose of the revised SVPA was *not* to punish individuals found to be sexually violent predators. McKee nevertheless makes the same failed claim against the revised SVPA. (BOM 36.) That the revised SVPA now provides for an indefinite confinement term does not mean it violates principles of ex post facto, because the indeterminate term does not render the commitment punitive in nature under *Hubbart v. Superior Court, supra,* 19 Cal.4th at p. 1138 and *Kansas v. Hendricks, supra,* 521 U.S. at p. 346.

A civil commitment procedure does not constitute a second prosecution for purposes of the double jeopardy clause. (*Kansas v. Hendricks, supra*, 521 U.S. at p. 369.) Similarly, the ex post facto clause applies exclusively to penal statutes, and a commitment statute that does not impose punishment does not raise ex post facto concerns. (*Id.* at pp. 370-71.)

In determining whether a commitment scheme is civil in nature, a reviewing court ordinarily defers to the legislature's stated intent.[9] (*Kansas v. Hendricks, supra*, 521 U.S. at p. 361.) Although a legislature's determination that a proceeding is civil "is not always dispositive," a party challenging the statute must provide "'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.'" (*Kansas v. Hendricks, supra*, 521 U.S. at p. 361.)

In *Kansas v. Hendricks, supra*, 521 U.S. at page 369, the United States Supreme Court reviewed a similar statutory scheme and held that Kansas' SVPA did not establish criminal proceedings, and, that confinement under the Kansas act was not punitive. Thus, the double jeopardy and ex post facto doctrines did not apply to the Kansas act. (*Ibid.*)

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9. In enacting California's SVPA in 1996, the Legislature expressed that no punitive purpose was intended. (See *Hubbart v. Superior Court, supra*, 19 Cal.4th at pp. 1143-44.)

The Kansas act at issue in *Hendricks* provided for the civil commitment of confined persons who were sexually violent predators, with certain procedural safeguards. (*Kansas v. Hendricks, supra*, 521 U.S. at pp. 352-53.) A sexually violent predator was defined as

> any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.

(*Id.* at p. 352.)

Upon a determination that a person met the criteria, the person would be confined, "'until such time as the person's mental abnormality or personality disorder has so changed that the person [was] safe to be at large.'" (*Kansas v. Hendricks, supra*, 521 U.S. at pp. 352-53.) The Kansas act required that a person's commitment "conform to constitutional requirements for care and treatment." (*Id.* at p. 353.)

Like California's original SVPA and the revised SVPA, a person committed under the Kansas statute had several avenues for review of his commitment. (*Kansas v. Hendricks, supra*, 521 U.S. at p. 353.) First, the committing court was required to conduct an annual review to determine whether continued detention was warranted. (*Ibid.*) Second, the Secretary of Social and Rehabilitation Services could at any time decide that a person's condition had so changed as to make release appropriate, and authorize the committed person to petition for release. (*Kansas v. Hendricks, supra*, 521 U.S. at p. 353.) Finally, at any time the confined person could petition for release, even without the Secretary's permission. (*Ibid.*)

In rejecting ex post facto and double jeopardy challenges to the Kansas act, the *Hendricks* court reasoned in part that the absence of a scienter requirement, the unlikelihood that a person who was unable to exercise adequate control over behavior would be deterred by the act, and the conditions

of confinement (essentially the same as those for involuntarily committed patients in the state mental institution) indicated that the Kansas act was not meant to be retributive. (*Kansas v. Hendricks, supra*, 521 U.S. at pp. 362-63.)

Perhaps most important to the issue before this Court, the *Hendricks* court specifically rejected arguments that a potentially indefinite term of confinement was evidence of Kansas' punitive intent:

> Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.

(*Id.* at p. 363; see also, *Hubbart v. Superior Court, supra*, 19 Cal.4th at p. 1173.)

The court noted that if at any time a person was adjudged safe to be at large, he was entitled to an immediate release. (*Kansas v. Hendricks, supra*, 521 U.S. at p. 364.)

This Court followed *Hendricks* in rejecting ex post facto claims to California's SVPA, stating,

> Viewed as a whole, the SVPA is also designed to ensure that the committed person does not "remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness."

(*Hubbart v. Superior Court, supra,* 19 Cal.4th at p. 1177, quoting *Kansas v. Hendricks, supra*, 521 U.S. at p. 364.)

This Court concluded,

> In light of the foregoing provisions, Hubbart has not established that the SVPA imposes "punishment" by continuing the confinement of persons who are no longer dangerously disturbed.

(*Ibid.*)

Any suggestion that *Hendricks* or *Hubbart* focused on the term of confinement in the respective commitment statutes at issue should be rejected.

The chief concern focused not with whether the confinement was nominally for a fixed period of time or for an indeterminate term. Instead, both courts were mainly concerned with whether there were adequate procedural safeguards to ensure a person who no longer met the conditions for confinement would be released. Such safeguards exist in the current revised SVPA.

First and similar to the Kansas SVPA, an SVP is entitled to an examination of his mental condition at least once a year, which includes consideration of whether the SVP,

> currently meets the definition of a sexually violent predator and 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.

(§ 6605, subd. (a).)

Second, and again similar to the Kansas SVPA, if the DMH determines that a person no longer meets the definition of an SVP, or that a less restrictive alternative is appropriate, "the director shall authorize the person to petition the court for conditional release to a less restrictive alternative or for an unconditional discharge." (§ 6605, subd. (b).) Upon receiving such a petition, the court "shall order a show cause hearing" and, if it determines that probable cause exists to believe that the committed person's diagnosed mental disorder has so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent behavior if discharged, then the court shall set a hearing on the issue. (§ 6605, subds. (b)-(c).) At this hearing, "the committed person shall have the right to be present and shall be entitled to the benefit of all of the constitutional protections that were afforded to him or her at the initial commitment proceeding," including the right to a jury trial and the right to have experts evaluate him or her on his or her behalf. (§ 6605, subd. (d).) At the hearing, the state has the burden of proof

> to prove beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the

health and safety of others and is likely to engage in sexually violent criminal behavior if discharged.

(§ 6605, subd. (d).)

And if the DMH has reason to believe a person is no longer an SVP, it shall seek judicial review of the commitment and,

[i]f the superior court determines that the person is no longer a sexually violent predator, he or she shall be unconditionally released and unconditionally discharged.

(§ 6605, subd. (f).)

Moreover, the Director of Mental Health shall petition the court for conditional release when the director determines,

that the person's diagnosed mental disorder has so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community . . . .

(§ 6607, subd. (a).)

Finally, and again like the Kansas SVPA, even without the concurrence of the Director of the DMH, an SVP may petition the court "for conditional release or an unconditional discharge." (§ 6608, subd. (a).) In that event, "the court shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." (§ 6608, subd. (a).) "In any hearing authorized by this section, the petitioner shall have the burden of proof by a preponderance of the evidence." (§ 6608, subd. (i).)

Thus, the revised SVPA allows a person to be discharged if 1) the Director of Mental Health authorizes the person to petition for his release, 2) the court finds probable cause and sets a hearing, and 3) at the hearing, the state does *not* prove beyond a reasonable doubt that the person is an SVP. (§ 6605.) Mandatory annual examinations of the SVP's current mental condition (§ 6605, subd. (a)) ensure that the Department of Mental Health is apprised of, and informs the court of, any changes in a person's mental condition that might

warrant his or her release. (§§ 6605, subd. (f), 6607, subd. (a).) Even without the consent and authorization of the Director of Mental Health, the SVP can petition the court for a conditional release or an unconditional discharge. (§ 6608, subd. (a).)

The provisions for annual examinations and for release after petitions for conditional or unconditional release, either with or without the consent of the Director of Mental Health, adequately ensure that a person will be discharged if and when his or her condition so changes that he or she no longer meets the criteria of a sexually violent predator. Under the holdings in *Hendricks* and *Hubbart*, nothing more is required to determine that the revised SVPA is civil, not punitive in nature, consonant with the stated purpose of the Legislature. Because the revised SVPA is civil rather than punitive in nature, it does not implicate ex post facto concerns.

F. The Revised SVPA Does Not Violate Equal Protection

This Court previously determined the originally enacted SVPA did not violate equal protection principles even if SVP's were similarly situated to persons subject to other types of civil commitment schemes, such as former Mentally Disordered Sex Offender (MDSO) and Mentally Disordered (MDO) laws and the Lanterman-Petris-Short (LPS) Act. (*Hubbart v. Superior Court, supra*, 19 Cal.4th at p. 1170.)[10/] McKee nevertheless contends the revised SVPA violates the equal protection clause of the federal Constitution because these other civil commitment schemes in California provide a specified and limited duration commitment term. (BOM 48.) This argument also fails.

As noted above, the indeterminate civil commitment order is not

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10. For the Court's information, the Ninth Circuit has held the California SVPA does not violate equal protection. (*Hubbart v. Knapp* (9th Cir.2004) 379 F.3d 773, 782 [no constitutionally significant distinction between MDO and SVP statutes].)

immutable. "Commitment and treatment are proper under the [SVP] Act only for so long as the person is both mentally disordered and dangerous." (*Hubbart v. Superior Court, supra,* 19 Cal.4th at p. 1166.) Ensuring there exists a continued mental disorder and finding of dangerousness still remains a key component under the revised SVPA. In that regard, the indeterminate commitment scheme still requires the committed person be given a mental examination every year to determine whether he or she currently meets the definition of a sexually violent predator (§ 6605), and also permits the person to bring a petition for conditional release or discharge at least annually (§§ 6605, subd. (b), 6608). This statutory framework comports with equal protection when compared to other civil commitment schemes.

> 'The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.' [Citation.] 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.]

(*Cooley v. Superior Court, supra,* 29 Cal.4th at p. 253.)

"Similarly situated" for this purpose means similarly situated for purposes of the law challenged. (*Cooley v. Superior Court, supra,* 29 Cal.4th at p. 253.)

McKee assumes that SVPs are similarly situated to persons committed as the MDO (Pen. Code, § 2960 et seq.), conservatees under the LPS Act (§ 5000 et seq.), and the criminally insane (NGI) (Pen. Code, § 1026 et seq.). (BOM 48.) We disagree.

The fact that "[i]nvoluntary commitment under the MDO Act is directly related to the crime for which the defendant was incarcerated" distinguishes SVP's from MDO's. (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1162.) Moreover, the MDO law targets persons with severe mental disorders that may be kept in remission with treatment (Pen. Code, § 2962, subd. (a)), whereas the

SVPA targets persons with mental disorders that may never be successfully treated (Welf. & Inst. Code, § 6606, subd. (b)). (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1222.) Given these "contrasting backgrounds and expectations related to treatment" (*People v. Buffington*, *supra*, 74 Cal.App.4th at p. 1163), the two groups are not similarly situated for purposes of how long they should be confined and treated.

Nor are LPS patients similarly situated to SVP's.

> The LPS Act is a comprehensive scheme designed to address a variety of circumstances in which a member of the general population may need to be evaluated or treated for different lengths of time. (§ 5150 [short-term emergency evaluation]; §§ 5250 [intensive 14 day treatment]; §§ 5300 [180-day commitment for the imminently dangerous]; §§ 5260 [extended commitment for the suicidal];§§ 5350 [30-day temporary conservatorship or one year conservatorship for the gravely disabled].) In contrast, the SVPA narrowly targets 'a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders [who] can be identified while they are incarcerated.' (Stats.1995, ch. 763, §§ 1, p. 5921.)

(*Cooley v. Superior Court*, *supra*, 29 Cal.4th at p. 253.)

Because the LPS Act applies to a much broader and more diverse category of people than the SVPA, those coming under the two schemes are not similarly situated for equal protection purposes with regard to the length of confinement and treatment. The NGI scheme is distinguishable for this reason as well. It applies not to a narrow group of prisoners who have been convicted of a sexually violent offense and are found likely to engage in sexually violent predatory criminal behavior due to mental disorder, but to people acquitted of a wide variety of crimes, violent and nonviolent, by reason of assorted mental defects with various characteristics, symptoms, treatments, and prospects for recovery.

The voters also recognized that SVP's stand apart from other civil committees in their likelihood of re-offending and resisting treatment. The People thus declared:

> 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, and they prey on the most innocent members of our society. More than two-thirds of the victims of rape and sexual assault are under the age of 18. Sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon.

(Ballot Pamp., Primary Elec. (Nov. 7, 2006) text of Prop. 83, § 2(b), p. 127.)

The revised SVPA does not violate equal protection. SVP's are not similarly situated to persons committed under other civil commitment schemes. But assuming, arguendo, the groups McKee identifies are similarly situated to SVP's for equal protection purposes, the state nevertheless,

> 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.

(*People v. Hubbart, supra,* 88 Cal.App.4th at p. 1217, quoting *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 172.)

In that regard, this Court must determine under what standard it should address the equal protection challenge.

> "'In resolving equal protection issues, the United States Supreme Court has used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. Classifications based on gender are subject to an intermediate level of review. But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose.' (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200, 39 Cal.Rptr.3d 821, 129 P.3d 29.)

(*In re Smith* (2008) 42 Cal.4th 1251, 1262-1263.)

McKee maintains, as the Court of Appeal did, that the proper standard to review his claim of disparate civil commitment treatment is strict scrutiny.[11] (BOM 51.) Respondent disagrees.

"The strict scrutiny standard of review applies only if a legislative classification involves a suspect classification or significantly infringes upon a fundamental right. [Citation.]" *(Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 659.) Strict scrutiny means that the classification will be upheld only if it is necessary to further a compelling state interest. (*People v. Buffington, supra,* 74 Cal.App.4th at pp. 1155-1156.) But if no suspect classification or fundamental right is involved, the reviewing court applies the rational basis test: whether the challenged classifications are """rationally related to a legitimate governmental purpose"""?" (*Adams, supra,* 8 Cal.4th at p. 660; *Romer v. Evans* (1996) 517 U.S. 620, 631 [116 S.Ct. 1620, 1627, 134 L.Ed.2d 855].).

It is questionable whether the statutory distinctions concerning treatment of prospective or adjudicated SVP's and other civil committees impacts any suspect class or burdens any fundamental right, such as liberty. Nevertheless,

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11. McKee merely presumes SVP's are similarly situated to other civil committees and there is a fundamental right of liberty. (BOM 51.) Perhaps this can be traced to the plurality opinion in *Foucha v. Louisiana, supra,* 504 U.S. at pages 85-6, finding strict scrutiny is required where there is a "fundamental right" of "freedom from physical restraint."

The United States Supreme Court has not clearly articulated the standard to be applied in equal protection challenges against involuntary commitment statutes. (*Heller v. Doe* (1993) 509 U.S. 312 [113 S.Ct. 2637, 2642, 125 L.Ed.2d 257].) However, other courts have declined to interpret *Foucha* as requiring heightened review of civil commitment statutes. (See *United States v. Weed* (10th Cir.2004) 389 F.3d 1060, 1071 (concluding a federal statute governing commitment of insanity acquittees implicated neither a fundamental right nor a suspect class and applying rational basis review); *U.S. v. Carta* (D. Mass. 2007) 503 F.Supp.2d 405, 408 (rejecting argument that *Foucha* mandates application of strict scrutiny to any unequal classifications that restrict liberty and applying rational basis review).

this Court has posited that "[u]nder California law, "'[s]trict scrutiny is the appropriate standard against which to measure [equal protection] claims of disparate treatment in civil commitment. [Citations.]'" (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1217, 106 Cal.Rptr.2d 490.)" (*In re Smith, supra,* 42 Cal.4th at p. 1263.) That statement can be traced to *In re Moye* (1978) 22 Cal.3d 457, 465, an MDSO case in which the People conceded, based on *People v. Olivas* (1976) 17 Cal.3d 236, 251, that the strict scrutiny standard was appropriate because the petitioner''s fundamental liberty interest was at stake. (See also *Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 171, fn. 8.) This Court has also explained, however, that *Olivas* should be read narrowly:

> The language in *Olivas* could be interpreted to require application of the strict scrutiny standard whenever one challenges upon equal protection grounds a penal statute or statutes that authorize different sentences for comparable crimes, because such statutes always implicate the right to ""personal liberty"" of the affected individuals. Nevertheless, *Olivas* properly has not been read so broadly. . . . ""[Its] language requires only that the boundaries between the adult and juvenile criminal justice systems be rigorously maintained. We do not read *Olivas* as requiring the courts to subject all criminal classifications to strict scrutiny requiring the showing of a compelling state interest therefor.""

(*People v. Wilkinson* (2004) 33 Cal.4th 821, 837-838, quoting *People v. Davis* (1979) 92 Cal.App.3d 250, 258.)

Similarly, here there is no reason to subject all civil commitment classifications to strict scrutiny. As in *Wilkinson*, McKee

> ""makes no claim that the classification here at issue involves a suspect class, nor does [his] claim implicate any interest akin to that at issue in *Olivas*, in which an individual faced a longer period of confinement if treated as a juvenile rather than as an adult.""

(*People v. Wilkinson, supra,* 33 Cal.4th 821 at p. 838.)

Moreover, application of the rational basis test would be consistent with the manner in which similar equal protection challenges have been addressed by other States in sexual predator civil commitment cases. (See e.g., *In re*

Detention of Stout (Wash. 2007) 159 Wash.2d 357, 375, 150 P.2d 86; *In re Treatment and Care of Luckabaugh* (S.C. 2002) 351 S.C.122, 148-49, 568 S.E.2d 338; *Westerheide v. State* (Fl. 2002) 831 So.2d 93, 111-12; *In re Williams* (Iowa 2001) 628 N.W.2d 447, 451-53 *In re Samuelson* (Ill. 2000) 189 Ill.23d 548, 727 N.Ed.2d 228, 236-37; *Martin v. Reinstein* (Az. App. 1999) 195 Ariz. 293, 310, 987 P.2d 779; *State v. Post* (Wis. 1995) 197 Wis.2d 279, 320-21, 541 N.W.2d 115 (noting reasons but declining to adopt); see also, *Carty v. Nelson* (2005) 426 F.3d 1064, 1075, fn.5 (applying rational basis test to review California SVPA); but see, *Matter of Lineham* (Minn. 1996) 557 N.W.2d 171, 186 (applying strict scrutiny).)

In addition, any suggestion the indeterminate commitment term under the revised SVPA means that McKee faces a longer commitment term than other civil commitment schemes ignores the very procedural safeguards and framework establish for review of the mental condition and various release mechanisms in the revised SVPA. Accordingly, it is respectfully submitted that the rational basis test applies.

But in any event, the distinctions here meet even the strict scrutiny standard for the reasons discussed above. SVP's are the most dangerous of the dangerous, due to the nature of their crimes and their particularly high rate of recidivism. They are also the least likely to be cured. (Ballot Pamp., Primary Elec. (Nov. 7, 2006) text of Prop. 83, § 2(b), p. 127.) Under the circumstances, confining them indefinitely until they are no longer mentally ill or dangerous, rather than for a set term, is necessary to further the compelling state interests of public protection and mental health treatment. (See *Hubbart v. Superior Court, supra*, 19 Cal.4th at p. 1153, fn. 20.)

Further, there exists a separate compelling interest in requiring an indeterminate term, subject to significant procedural safeguards designed to ensure that an already adjudicated SVP will be committed no longer than

necessary, even when he must bear the burden to establish he is entitled to release if he files a petition not authorized by the DMH. This framework "deter[s] multiple unsubstantiated requests [for release without concurrence of the DMH] and to reduce the administrative burden that might otherwise occur." (*Hubbart v. Superior Court, supra*, 19 Cal.4th at p. 1148, fn. 14.) The limited two-year term and attendant burdens of a revolving courthouse door open to continuing re-commitment procedures or frivolous release petitions - when there has been no change in an SVP's condition or there is no basis for release - simply did not promote an efficient or fair judicial system for the SVP or society.[12/] Imposition of an indeterminate civil commitment term with the safeguards discussed above and as set forth in the revised SVPA, therefore, satisfied a compelling state basis.

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12. "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 People find and declare each of the following: [¶¶] ... [¶¶] (k) California is the only state, of the number of states that have enacted laws allowing involuntary civil commitments for persons identified as sexually violent predators, which does not provide for indeterminate commitments. California automatically allows for a jury trial every two years irrespective of whether there is any evidence to suggest or prove that the committed person is no longer a sexually violent predator. As such, *this act allows California to* protect the civil rights of those persons committed as a sexually violent predator while at the same time *protect society and the system from unnecessary or frivolous jury trial actions where there is no competent evidence to suggest a change in the committed person.*' (Historical and Statutory Notes, 47A West's Ann. Pen.Code, *supra,* foll. §§ 209, p. 430, italics added; Prop. 83, §§ 2, subd. (k).)" (*Shields, supra,* 155 Cal.App.4th at p. 564.)

CONCLUSION

None of McKee's constitutional challenges against the revised SVPA have merit. Consequently, the indeterminate commitment term should be upheld.

Dated: October 16, 2008

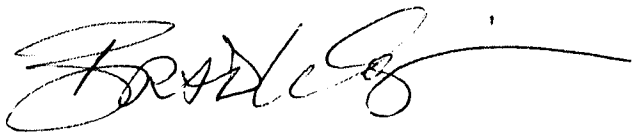
Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

STEVE OETTING
Supervising Deputy Attorney General



BRADLEY A. WEINREB
Deputy Attorney General

Attorneys for Plaintiff and Respondent

BAW:ah
SD2007801158
80292871.wpd

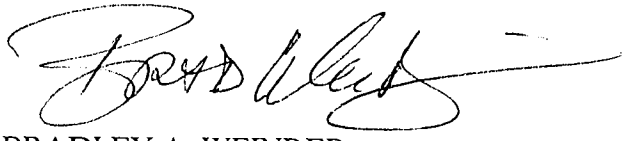
CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWERING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 10081 words.

Dated: October 16, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



BRADLEY A. WEINREB
Deputy Attorney General

Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Richard McKee**
No.: **S162823**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 17, 2008, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Stephen M. Hinkle
Attorney at Law
3529 Cannon Road, Suite 2B-311
Oceanside, CA 92056
Attorney for Appellant (2 copies)

Appellate Defenders, Inc.
555 W. Beech Street, Suite 300
San Diego, CA 92101

California Court of Appeal
Fourth Appellate District, Division One
750 B, Street, Suite 300
San Diego, CA 92101

Clerk of the Court
San Diego County Superior Court
220 West Broadway
San Diego, CA 92101
Delivery to: Hon. Peter L. Gallagher
Judge

The Honorable Bonnie M. Dumanis
District Attorney
San Diego County District Attorney's Office
330 West Broadway, Suite 1320
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 17, 2008, at San Diego, California.

Anna Herrera
Declarant

Signature

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