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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

CORNELIOUS JOSEPH BOYLE,

Defendant and Appellant.

A117860

(Del Norte County  
Super. Ct. No. CRF049956)

The trial court found that appellant Cornelious Joseph Boyle was a sexually violent predator and ordered him to be committed indefinitely to Atascadero State Hospital. He appeals, raising due process, ex post facto, double jeopardy and equal protection challenges to his commitment pursuant to an amended version of the Sexually Violent Predator Act (SVPA). (See Welf. & Inst. Code,<sup>1</sup> §§ 6600-6609.3.) Boyle also argues that the underlying petition should have been dismissed for material legal error; that his counsel was ineffective at his court trial; and that there was insufficient evidence of qualifying offenses to support his commitment.

In July 2008, we affirmed the commitment order. In August 2008, the California Supreme Court granted Boyle's petition for review but deferred briefing until it issued its decision in *People v. McKee*, a case then pending on the state high court's docket. In January 2010, the court issued its *McKee* decision, which

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

remanded that matter to the trial court for a further hearing on the equal protection issue. (*People v. McKee* (2010) 47 Cal.4th 1172, 1208-1211 [*McKee I*].) In May 2010, the California Supreme Court transferred Boyle’s case back to our court with directions to vacate our July 2008 decision and reconsider the matter in light of *McKee I*. Mindful of the trial court hearing that had not then been held in McKee’s case, the California Supreme Court also ordered us to suspend proceedings in Boyle’s case until the trial court proceedings in the McKee case and any proceedings in which it was consolidated were final, including any appeals and matters before the California Supreme Court. As directed, we suspended proceedings in May 2010 until a final decision in *McKee* would trigger reconsideration of our July 2008 decision.

After the San Diego County Superior Court conducted the required evidentiary hearing, it confirmed McKee’s indeterminate commitment as a sexually violent predator. McKee appealed that trial court order to the Fourth Appellate District, which affirmed the commitment order in July 2012. (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1330-1350 [*McKee II*].) McKee’s petition for review to the California Supreme Court was denied and the Fourth Appellate District issued its remittitur in *McKee II*, which is now final.<sup>2</sup> Accordingly, we have lifted the suspension.

With the benefit of the California Supreme Court decision in *McKee I* on several issues before us and the subsequent decision of the Fourth Appellate District after the trial court’s evidentiary hearing on the equal protection issue in *McKee II*, we now reconsider our earlier decision in the matter before us. After reconsideration, we affirm the order of commitment.

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<sup>2</sup> The California Supreme Court’s May 2010 remand order also directed us to suspend further proceedings in *Boyle* until *McKee* was final “including any proceeding in the Superior Court of San Diego County in which *McKee* may be consolidated with related matters.” San Diego County officials have confirmed that no cases consolidated with *McKee* are now pending.

## I. FACTS

In April 1993, appellant Cornelious Joseph Boyle befriended a seven-year-old boy in Virginia, “talk[ed] dirty” to him, and touched the child’s private parts. He was arrested and charged with aggravated sexual battery. (See Va. Code, § 18.2-67.3.) Boyle pled guilty to this offense and was sentenced to a Virginia penitentiary.

In July 2004, a woman reported to Virginia authorities that Boyle had kissed her 10-year-old daughter and fondled the girl’s breast. Soon after the incident, Boyle disappeared. In October 2004, he was found living in California and was arrested on a Virginia warrant.

Boyle was charged with failure to register as a sex offender and possession of child pornography. (See Pen. Code, §§ 667, subds. (b)-(i), 1170.12; former Pen. Code, §§ 290, subd. (g)(2) [as amended by Stats. 2003, ch. 634, § 1.3], 311.11, subd. (a) [as amended by Stats. 2001, ch. 559, § 1], 667.5, subd. (b) [as amended by Stats. 2002, ch. 606, § 2].) In November 2004, he pled guilty to failing to register and admitted a prior felony conviction for enhancement purposes. He was sentenced to prison for four years. (See former Pen. Code, §§ 290, subd. (g)(2), 667.5, subd. (b).) In 2005, Boyle pled guilty to a Virginia aggravated sexual battery charge stemming from the July 2004 incident. He received a prison sentence for this conviction from the Virginia court.

In the fall of 2006, Boyle was scheduled to be released from state prison in California. During the summer and early fall, four clinical psychologists evaluated him to determine whether he met the statutory definition of a sexually violent predator—a sexually violent offender with a serious mental disorder. (See § 6600, subd. (a)(1).) One concluded that he did not, but the other three found that he did. The state Department of Mental Health (DMH) recommended that Boyle be committed as a sexually violent predator. Accordingly, in October 2006, a petition was filed seeking Boyle’s civil commitment pursuant to the SVPA. (See §§ 6250, 6600-6609.3.) The petition alleged that he had been convicted of aggravated sexual batteries in Virginia stemming from the 1993 and 2004 incidents. In February 2007,

the trial court found that there was probable cause to believe that Boyle was a sexually violent predator. (See § 6602.) After he waived his right to a jury trial on the petition, the court found in April 2007 that he was a sexually violent predator and ordered him committed indefinitely to Atascadero State Hospital.

## II. CONSTITUTIONAL CHALLENGES

### A. *Statutory Background*

On appeal, Boyle raises several constitutional challenges to an amended version of the SVPA. He contends that the amended SVPA runs afoul of his federal and state constitutional rights to due process and equal protection of the laws, as well as violating constitutional bans on double jeopardy and ex post facto laws.<sup>3</sup> He seeks immediate release, reasoning that because the statutory authority underlying the commitment order does not meet constitutional muster, his commitment was invalid. In order to understand Boyle's claims of error on appeal, we set out an overview of the SVPA as originally enacted and as amended in November 2006.

The original version of the SVPA took effect in 1996. (See Stats. 1995, ch. 763, § 3, p. 5922.) At that time, the SVPA provided for a two-year civil commitment of any person who was tried and found beyond a reasonable doubt to be a sexually violent predator. (*McKee I, supra*, 47 Cal.4th at p. 1185; *People v. Williams* (2003) 31 Cal.4th 757, 764; *Hubbart I, supra*, 19 Cal.4th at pp. 1143, 1147; see former §§ 6603, subd. (d), 6604 [Stats. 1995, ch. 763, § 3, pp. 5925-5926].) When the two-year term of commitment expired, it could be extended if a new jury trial was conducted at which the People again proved beyond a reasonable doubt that the committed person remained a sexually violent predator. (Former §§ 6604, 6604.1, 6605, subds. (d), (e); *McKee I, supra*, 47 Cal.4th at p. 1185; *Cooley v.*

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<sup>3</sup> As appears to be the practice in such cases, Boyle argues that the amended SVPA violates both the federal and state Constitutions, but makes no separate argument pertaining to any state constitutional issues. We presume that the standards applicable to his federal constitutional challenges apply equally to resolve those challenges based on the state Constitution. (See *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1152 fn. 19 (*Hubbart I*).

*Superior Court* (2002) 29 Cal.4th 228, 243, fn. 5.) In practice, the extension procedures of the original SVPA often resulted in a new determination of sexually violent predator status every two years. (See *People v. Whaley* (2008) 160 Cal.App.4th 779, 785-786; *People v. Munoz* (2005) 129 Cal.App.4th 421, 429-430.)

The original SVPA was designed to ensure that a committed person did not remain confined any longer than he or she suffers from a mental abnormality rendering him or her unable to control his or her dangerousness. (*McKee I, supra*, 47 Cal.4th at p. 1186; *Hubbart I, supra*, 19 Cal.4th at p. 1177.) The committed person was entitled to petition for conditional release to a community treatment program and the state was required to conduct an annual review of a committed person's mental status that could lead to unconditional release. (*McKee I, supra*, 47 Cal.4th at p. 1186; see former §§ 6605, 6608.) In 1999, the California Supreme Court upheld the original SVPA against various constitutional challenges, relying on the reasoning of a United States Supreme Court decision upholding a similar Kansas law against federal constitutional attack. (*Hubbart I, supra*, 19 Cal.4th at pp. 1151-1179; see *Kansas v. Hendricks* (1997) 521 U.S. 346, 350, 356-371 (*Hendricks*).)

Since then, the SVPA has been amended several times, most significantly in November 2006. Shortly after Boyle's civil commitment petition was filed, California voters amended the SVPA when they approved Proposition 83. (*McKee I, supra*, 47 Cal.4th at p. 1186; see Cal. Const., art. II, § 10, subd. (a).) This amended version of the SVPA specifies an indeterminate term of civil commitment, rather than the two-year term set out in the original law. (See §§ 6604, 6604.1; *McKee I, supra*, 47 Cal.4th at pp. 1186-1187.) Proposition 83 did not change the requirement that sexually violent predator status at an initial commitment proceeding had to be proven by the state beyond a reasonable doubt. (§ 6604.) However, the amended SVPA provides that a committed person will remain in custody until he or she successfully meets the burden of proving by a preponderance of evidence that he or she is no longer a sexually violent predator or until the DMH determines he or she no

longer meets the definition of a sexually violent predator. (§§ 6604, 6608; *McKee I, supra*, 47 Cal.4th at p. 1187.)

The amended SVPA continues to require annual evaluations of whether or not a committed person remains a sexually violent predator. (§ 6605, subd. (a); *McKee I, supra*, 47 Cal.4th at p. 1187.) This annual examination may trigger a DMH authorization for the committed person to petition for conditional release or unconditional discharge. (See § 6605, subds. (a), (b); *McKee I, supra*, 47 Cal.4th at p. 1187.) At trial pursuant to a DMH-authorized petition, if the state opposes the petition, it must carry the burden of proving 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).)

Even if the DMH does not authorize a petition, the committed person may file an unauthorized petition for conditional release or unconditional discharge with the court, but different procedures apply. In these circumstances, the trial court summarily denies the petition if it is frivolous or fails to allege sufficient facts to warrant a full hearing on it. (§ 6608, subd. (a); *McKee I, supra*, 47 Cal.4th at p. 1187.) At all hearings on the petition, the committed person has the burden of proof to show that he or she is no longer a sexually violent predator based on a preponderance of evidence. (§ 6608, subd. (i).) If the trial court denies an unauthorized petition, the committed person is barred from filing a new petition for one year. (§ 6608, subd. (h); *McKee I, supra*, 47 Cal.4th at p. 1187.)

The amended SVPA<sup>4</sup> was in effect in April 2007, when Boyle was committed as a sexually violent predator. Thus, he was ordered to be committed for an indefinite term of treatment and confinement with the DMH according to the terms of the amended law. (See §§ 6604, 6604.1.) This was proper. The date of

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<sup>4</sup> Some provisions of the SVPA have been amended since November 2006. As the issues on appeal relate only to the SVPA as amended in November 2006, our references to the amended SVPA are to the law as it was after Proposition 83 passed.

adjudication of sexually violent predator status—not the filing date of the underlying petition—is the event determining whether any retroactive application of the law has been made. (*People v. Carroll* (2007) 158 Cal.App.4th 503, 514; see *People v. Shields* (2007) 155 Cal.App.4th 559, 563 [interim SVPA].) Amendments to the SVPA apply prospectively to all proceedings pending at the time that those amendments became effective. (See, e.g., *People v. Whaley*, *supra*, 160 Cal.App.4th at pp. 792-796; *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1288-1289.) As the trial court’s April 2007 finding of sexually violent predator status was the critical event in Boyle’s case, the current version of the SVPA—including those amendments that became effective in November 2006 with the passage of Proposition 83—applies to this matter.

In this appeal, Boyle raises various constitutional challenges to the amended version of the SVPA, arguing that it differs so significantly from the original SVPA that the California Supreme Court upheld in 1999 that it now fails to pass constitutional muster. (See *Hubbart I*, *supra*, 19 Cal.4th at pp. 1151-1179.) With the key differences between the original and amended SVPA in mind, we address each constitutional challenge in turn.

#### B. *Due Process*

First, Boyle raises a federal constitutional due process claim, challenging the state’s right to commit him for an indefinite term. He argues that the amended SVPA violates due process because it makes it too difficult for a committed person to obtain release from indefinite commitment. He complains that the amended SVPA improperly shifts the burden of proof from the state to him to prove that he no longer qualifies as a sexually violent predator in cases not involving DMH-authorized petitions. (See U.S. Const., 14th Amend.)

A civil commitment constitutes a significant deprivation of one’s liberty—the fundamental freedom from bodily restraint—requiring due process protection. (*Addington v. Texas* (1979) 441 U.S. 418, 425; see *Jones v. United States* (1983) 463 U.S. 354, 361.) The state must have a constitutionally adequate purpose for civil

confinement—a reason that bears some reasonable relationship to the purpose for which the person is being committed. (*O'Connor v. Donaldson* (1975) 422 U.S. 563, 574; *McKee I, supra*, 47 Cal.4th at p. 1188.) An individual's right to be free of physical restraint may be overridden for the common good when the individual is unable to control his or her behavior and, as a result, poses a danger to public health and safety. (*Hendricks, supra*, 521 U.S. at pp. 356-357; *Hubbart I, supra*, 19 Cal.4th at p. 1151; *McKee I, supra*, 47 Cal.4th at p. 1188.)

In order to make an initial civil commitment of a person to a mental institution, due process requires that the state prove by clear and convincing evidence both that the person is mentally ill and that hospitalization is required for his or her own welfare or for the protection of others.<sup>5</sup> (*Hendricks, supra*, 521 U.S. at p. 358; *Addington v. Texas, supra*, 441 U.S. at pp. 426-427, 432-433; *McKee I, supra*, 47 Cal.4th at p. 1189.) Once the person has been committed, due process permits the person to be held as long as he or she is both mentally ill and dangerous, but no longer. Once the person recovers his or her sanity or is no longer dangerous, due process requires that he or she be released from civil commitment. (*Foucha v. Louisiana* (1992) 504 U.S. 71, 77-78 [state cannot hold dangerous person who is no longer mentally ill]; *McKee I, supra*, 47 Cal.4th at p. 1193.)

On appeal, Boyle argues that the imposition of an indeterminate commitment term unless he proves his right to release by a preponderance of evidence violates his federal due process rights. The California Supreme Court rejects this contention. It concluded that once an initial sexually violent predator commitment is made based on evidence beyond a reasonable doubt, to require an indeterminately committed person to prove that he or she is no longer a sexually violent predator by a preponderance of evidence does not violate due process. (*McKee I, supra*, 47 Cal.4th at p. 1191.) Thus, we reject Boyle's due process claim of error.

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<sup>5</sup> California law goes further, requiring that the state prove the need for an initial civil commitment by proof beyond a reasonable doubt. (§ 6604.)

### C. *Ex Post Facto*

Boyle also reasons that the amended SVPA violates the ban on ex post facto laws contained in the federal and state Constitutions. (See U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) The United States Constitution prohibits any state from passing any ex post facto law. The ex post facto clause prohibits only those laws that retroactively alter the definition of crimes or increase punishment for criminal acts. (*Collins v. Youngblood* (1990) 497 U.S. 37, 43; *McKee I, supra*, 47 Cal.4th at p. 1193.) Thus, to implicate federal ex post facto protection, a statute must be a penal one. (*Hendricks, supra*, 521 U.S. at p. 370; *McKee I, supra*, 47 Cal.4th at pp. 1193-1194.) The California Supreme Court has determined that the SVPA is not a punitive provision. (*McKee I, supra*, at pp. 1193-1195.) Thus, Boyle's ex post facto claim necessarily fails.

### D. *Double Jeopardy*

Boyle also contends that an amended SVPA commitment constitutes double jeopardy. (See U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) The double jeopardy clause of the federal Constitution prohibits punishing any individual twice for the same offense. (*Hendricks, supra*, 521 U.S. at p. 369; *Witte v. United States* (1995) 515 U.S. 389, 395-396.) As an SVPA commitment is not punitive, it does not constitute a second prosecution within the meaning of the ban on multiple punishment. (*McKee I, supra*, 47 Cal.4th at pp. 1193-1195; see *Hendricks, supra*, 521 U.S. at p. 369; *Hubbart I, supra*, 19 Cal.4th at pp. 1171-1177; *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1209, 1226 (*Hubbart II*)). Thus, Boyle's double jeopardy claim is also meritless. (See *Hendricks, supra*, 521 U.S. at pp. 360-361, 369-370.)

## E. Equal Protection

### 1. Contentions on Appeal

In his final constitutional challenge, Boyle contends that the amended SVPA<sup>6</sup> violates equal protection because of differences between it and other civil commitment schemes. He argues that the commitment of sexually violent predators differs significantly from the commitments of mentally disordered offenders (MDO's) and those found not guilty by reason of insanity (NGI's).<sup>7</sup> He reasons that the distinctions between the SVPA and these other commitment schemes treat similarly situated persons in a markedly different manner, in violation of his state and federal constitutional rights to equal protection of the laws. (See U.S. Const., 14th Amend.; Cal. Const., art. I, § 7; Pen. Code, §§ 1026-1027, 2960-2981; §§ 5000-5550.)

Our Supreme Court has already upheld the original SVPA against an equal protection challenge. (*Hubbart I, supra*, 19 Cal.4th at pp. 1168-1170; see *Hubbart II, supra*, 88 Cal.App.4th at pp. 1209, 1216-1225.) In this appeal, Boyle argues that under the amended SVPA, the various commitment schemes were no longer on an equal footing in California. He notes that the original SVPA and the other commitment schemes all relied on a finite term of commitment after which the

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<sup>6</sup> In fact, he argues that both the September and November 2006 amendments are constitutionally deficient. As the September 2006 amendments were superseded by those enacted in November 2006—the law that applies to Boyle's case—we concern ourselves only with the SVPA as it was amended in November 2006.

<sup>7</sup> Boyle also contends that sexually violent predators and those dangerous mentally ill persons committed pursuant to the more general Lanterman-Petris-Short Act (LPS Act) are similarly situated, such that the disparate treatment violates equal protection. The California Supreme Court has rejected equal protection concerns based on comparisons of the commitment of sexually violent predators with those committed as mentally incompetent under the general civil commitment provisions of the LPS Act. It seems to have concluded that those who are mentally incompetent and those sexually violent predators who have been convicted of a criminal offense are not similarly situated. (*McKee I, supra*, 47 Cal.4th at p. 1209, fn. 11; *In re Smith* (2008) 42 Cal.4th 1251, 1268.) For the same reason, we reject Boyle's LPS Act claim of error.

state was required to prove the continued need for commitment. The amended SVPA violates equal protection, Boyle reasons, because it requires an indefinite term of commitment and sometimes requires the committed person to assume the burden of proving that he or she should be released, without a right to a jury trial on that issue.

During the pendency of this appeal, the California Supreme Court weighed in on these equal protection issues. (See *McKee I, supra*, 47 Cal.4th at pp. 1196-1211.) It ruled that the People should be given an opportunity to show that sexually violent predators constitute a substantially greater risk to society than other similarly situated persons, such that imposing a greater burden on them before release from commitment is needed to protect society. (*McKee I, supra*, 47 Cal.4th at pp. 1207-1208.) Accordingly, an evidentiary hearing was conducted on equal protection concerns in a San Diego County Superior Court proceeding. After the evidentiary hearing, the trial court in *McKee* concluded that the People proved that a justification existed for disparate treatment of sexually violent predators when compared to MDO's and NGI's. The Fourth Appellate District, Division One, affirmed the trial court's commitment order, and the California Supreme Court has denied review. (See *McKee II, supra*, 207 Cal.App.4th at pp. 1330-1332, 1339-1348.) We consider Boyle's equal protection concerns through the lens of these decisions.

## 2. *Similarly Situated*

The first requirement of a successful equal protection claim is to show that the state has adopted a classification that affects similarly situated groups in an unequal manner. (*Cooley v. Superior Court, supra*, 29 Cal.4th at p. 253; *Hubbart II, supra*, 88 Cal.App.4th at p. 1216.) If the persons are not similarly situated for purposes of the law, then the equal protection claim necessarily fails. (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.) The California Supreme Court concluded that those committed as sexually violent predators are similarly situated to those committed as MDO's and NGI's. (*McKee I, supra*, 47 Cal.4th at pp. 1203, 1207.) Thus, we consider whether the disparate treatment of these classes of persons violates equal protection.

### 3. *Disparate Treatment Justified*

We need not repeat the evidence presented in San Diego County Superior Court that the Fourth Appellate District set out in great detail in *McKee II*. This evidence satisfied both courts that disparate treatment of sexually violent predators was warranted. (*McKee II, supra*, 207 Cal.App.4th at pp. 1339-1348.) *McKee II* found substantial evidence to support reasonable perception on the part of the electorate enacting the amended SVPA that the recidivism rate of released sexually violent predators is greater than the reoffense rate of other sex offenders; that the harm suffered by victims of sex offenses is greater than that caused by other types of offenses; that sexually violent predators pose an increased risk of harm to children; that sexually violent predators have significantly different diagnoses from those of MDO's and NGI's; and that differences in treatment plans, rates of compliance and success rates are significantly different. (*McKee II, supra*, 207 Cal.App.4th at pp. 1342-1344, 1347.)

That evidence persuaded the *McKee II* court that sexually violent predators as a class pose a substantially greater risk to society than MDO's and NGI's, such that the protection of society warrants the imposition of a greater burden before sexually violent predators can be released from commitment. That court held that the evidence offered at the hearing supported the conclusion that the disparate treatment of sexually violent predators under the amended SVPA was necessary to further the state's compelling interests in public safety and the humane treatment of the mentally disordered. (*McKee II, supra*, 207 Cal.App.4th at p. 1347.) Finding that disparate treatment to be reasonable and factually based, that court concluded that the amended SVPA did not violate the committed person's equal protection rights. (*Id.* at p. 1348.)

Having reviewed the evidence set out in *McKee II*, we reach the same conclusion in Boyle's case—that the evidence offered in the *McKee* trial court proceeding warrants the disparate treatment set out in the amended SVPA. Thus, we also reject Boyle's equal protection challenge.

### III. OTHER ISSUES

#### A. *Material Legal Error*

Boyle also raises several other challenges to the imposition of the law in his case. First, he contends that the trial court should have dismissed the initial commitment petition because the underlying evaluations were tainted by material legal error. He also urges us to find that trial counsel failed to provide him with effective assistance of counsel because of counsel's failure to move for dismissal of the petition based on this material legal error.

The SVPA requires use of a screening procedure to evaluate whether an individual qualifies as a sexually violent predator. (Former § 6601 [as amended by Stats. 2006, ch. 337, §§ 54, 62]; § 6601 [Voter Information Guide, Gen. Elec., *supra*, text of Prop. 83, pp. 136-137].) When the initial commitment petition was filed in October 2006, the definition of a sexually violent predator required that the person have committed a sexually violent offense against two or more victims. (Former § 6600, subd. (a)(1) [as amended by Stats. 2006, ch. 337, § 53].) The petition alleged two sexually violent offenses—the 1993 and 2004 incidents in Virginia that led to Boyle's two convictions of aggravated sexual battery in that state.

On appeal, Boyle contends that two of the evaluators mistakenly concluded that the second of his two offenses—the 2004 aggravated sexual battery in which he kissed the face of a 10-year-old girl and fondled her breast—constituted a qualifying offense. He argues that this second offense did not involve the required level of substantial sexual conduct and as such, the initial commitment petition should have been dismissed. A lewd and lascivious act on a child under age 14 constituted a sexually violent offense if it involved substantial sexual conduct—vaginal or anal intercourse, oral copulation or masturbation. (§§ 6600, subd. (b), 6600.1, subd. (b).) Masturbation requires some touching of the genitals. (See *People v. Chambless* (1999) 74 Cal.App.4th 773, 782-787.)

We need not resolve this issue. By the time that the trial court conducted the February 2007 probable cause hearing on the October 2006 petition, the SVPA had

been amended by the voters in Proposition 83. In November 2006—less than a month after the filing of Boyle’s commitment petition—the amended SVPA modified the definition of a sexually violent predator, requiring that he or she be a person who had committed a sexually violent offense against one or more victims. (§ 6600, subd. (a)(1); see Voter Information Guide, Gen. Elec., *supra*, text of Prop. 83, p. 135.) The law in effect at that time—and when the April 2007 commitment order issued—required only one qualifying offense. Boyle does not contest that the April 1993 touching of the private parts of a seven-year-old child constituted a qualifying offense for purposes of the petition. The petition properly supported the trial court’s order of commitment.<sup>8</sup> As the underlying petition was not defective because of material legal error, we also reject Boyle’s related ineffective assistance of counsel claim.

#### B. *Sufficiency of Evidence*

Next, Boyle argues that the evidence offered at the hearing did not establish that he committed two qualifying offenses and thus did not satisfy the requirements of the SVPA. By the time that the trial court adjudicated Boyle’s sexually violent predator status in April 2007, the law had changed to require only one qualifying offense. (§ 6600, subd. (a)(1); see Voter Information Guide, Gen. Elec., *supra*, text

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<sup>8</sup> Boyle argues in his reply brief that because the petition was defective when it was filed, his continued commitment was illegal from the start. This argument assumes that he was illegally confined beyond his prison release date. Before the petition was filed, Boyle’s release date was thought to have been October 19, 2006. This calculation appears to have been based on his initial November 2004 abstract of judgment, which incorrectly stated that he was sentenced to a three-year term in state prison. About the same time that the October 2006 petition for SVPA commitment had been filed, the abstract of judgment had been corrected to show that, in fact, a four-year term had been imposed in November 2004. The addition of another year to his acknowledged prison term would have extended his prison release date beyond the three weeks that elapsed between the October 2006 petition and the November 2006 effective date of Proposition 83. Thus, Boyle has not demonstrated that an error in the evaluations that led to the October 2006 petition would have extended his period of confinement beyond that already required by his four-year state prison sentence.

of Prop. 83, p. 135.) The critical date is the date of adjudication, not the date of the filing of the underlying petition. (*People v. Carroll, supra*, 158 Cal.App.4th at p. 514; see *People v. Whaley, supra*, 160 Cal.App.4th at pp. 792-796; *Bourquez v. Superior Court, supra*, 156 Cal.App.4th at pp. 1288-1289; *People v. Shields, supra*, 155 Cal.App.4th at p. 563.) Boyle does not contest that the April 1993 offense is a qualifying offense within the meaning of the amended SVPA. Thus, there was sufficient evidence to support the April 2007 commitment.

*C. Ineffective Assistance of Counsel*

Finally, Boyle contends that his trial counsel effectively abandoned him at the hearing and failed to argue the merits of his case, providing him with the ineffective assistance of counsel. As this claim of error also turns on whether counsel made a sufficient argument to challenge a second qualifying offense that was no longer required by the time of the commitment order, counsel committed no error and Boyle suffered no prejudice from any omission of trial counsel in this regard. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-696; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

The commitment order is affirmed.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.