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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT MERLIN BAGLEY,

Defendant and Appellant.

A128705

(Lake County
Super. Ct. No. CR916326)

Defendant Scott Merlin Bagley appeals from an order committing him for an indeterminate term of confinement after a jury found him to be a sexually violent predator (SVP) within the meaning of the Sexually Violent Predator Act (SVPA or the Act). (Welf. & Inst. Code,¹ § 6600 et seq.) Bagley contends the Department of Mental Health (Department) relied upon invalid underground regulations in the evaluation process used to initiate his case. He also argues that his indeterminate commitment violates the due process, equal protection, ex post facto, and double jeopardy provisions of the state and federal Constitutions. We affirm the commitment order.

FACTUAL AND PROCEDURAL BACKGROUND

In 1985, Bagley pleaded guilty to two counts of committing a lewd act against a child under 14 years of age. (Pen. Code, § 288, subd. (a).) He was sentenced to serve six years in prison. He was charged in 1993 with 28 counts of committing a lewd act against

¹ Further statutory references are to the Welfare and Institutions Code unless otherwise specified.

a child under 14 years of age. (*Ibid.*) Bagley pleaded guilty to nine of the counts and received a 29-year prison sentence.

In 2008, before the expiration of Bagley's prison term, the Lake County District Attorney filed a petition to commit Bagley as an SVP. The petition was supported by two clinical evaluations, both of which were prepared in 2008. Each of the evaluators concluded that Bagley met the criteria to be considered an SVP as described in the Act. Bagley waived his right to a probable cause hearing.

A jury trial commenced in April 2010. A psychologist who had prepared one of the initial evaluations of Bagley in 2008, Dr. Debra Inman, testified for the People. She first interviewed Bagley in 2008 and had conducted a second interview in 2009. Dr. Inman concluded Bagley is a male-victim pedophile. She also concluded that it is likely Bagley will engage in sexually violent predatory behavior in the future.

Dr. Inman relied in part upon an actuarial instrument known as the Static-99, which predicts the likelihood of recidivism based upon unchanging—i.e., static—factors, such as an offender's past criminal history. Bagley scored a six out of a possible 12 on the Static-99, reflecting a high risk that he will commit a new sex offense. Dr. Inman relied upon the Static-99 both times she evaluated Bagley. She stated the Static-99 has been cross-validated in over 60 studies and that it performs moderately well in predicting recidivism. She acknowledged that one of the criticisms of the test is that it does not take age into account but she also pointed out that a revised version of the Static-99—the Static-99R—accounts for age. Dr. Inman testified that she looked at the Static-99R and concluded a fair estimate of the risk that Bagley would reoffend in five years is around 25 percent, based on newer research concerning the Static-99 and Static-99R.

In addition to the Static-99 and Static-99R, Dr. Inman considered dynamic risk factors, or things that can change over time or with treatment. Dr. Inman also relied on other actuarial instruments to evaluate Bagley, including the Minnesota Sex Offender Screening Tool (MNSOST) and the Static-2002, which is similar to the Static-99 in that it is a type of actuarial instrument for assessing recidivism risk based on unchanging factors. Bagley's score on those instruments revealed a high or moderate-high risk that

he would reoffend. Dr. Inman also looked at a revised version of the Static-2002—the Static-2002R—that takes an offender’s age into account. As a result of his age, Bagley’s score on the Static-2002R was one point lower than his score on the Static-2002, resulting in him being considered a moderate risk to reoffend. Dr. Inman placed Bagley’s risk of reoffense at 20.5 percent over five years and 30 percent over 10 years.

Dr. Andrea Shelley, a forensic psychologist, also testified for the People at trial. Like Dr. Inman, Dr. Shelley concluded that Bagley has pedophilia exclusive to boys. Dr. Shelley opined there is a serious and well-founded risk that Bagley will reoffend. She based her opinion in part on the results of the Static-99, the MNSOST, and the Static-2002. She also considered dynamic risk factors, which are not encompassed within the actuarial instruments. Dr. Shelley explained that some experts do not use the actuarial instruments at all in assessing recidivism risk but that research has shown that using actuarial instruments, such as the Static-99, is better than relying solely on an expert’s clinical opinion.

Bagley testified in his own defense at trial. The defense also called a psychiatrist, Dr. Lee Stewart Coleman, to testify on behalf of Bagley. Although Dr. Coleman agreed Bagley was a pedophile at the time of the offenses of which he was convicted, Dr. Coleman had no opinion as to whether Bagley is currently a pedophile. He did not see any indications that Bagley is suffering from a major mental disorder. Dr. Coleman testified that the Static-99 and the Static-2002 are not widely accepted in the scientific community. He described the Static-2002 as “basically . . . just an updated version of Static 99.” Among other things, he pointed out that the instruments do not consider dynamic risk factors.

The jury returned a verdict finding that Bagley is an SVP within the meaning of the Act. On May 17, 2010, the court ordered Bagley to be confined for an indeterminate period in a secure facility designated by the director of the Department. Bagley filed a timely appeal.

DISCUSSION

1. Underground Regulations

A. *Overview of the Act and the Department's Evaluation Protocol*

“The Act allows for the involuntary civil commitment of individuals who, as a result of a diagnosed mental disorder, are likely to continue engaging in sexually violent criminal behavior even after serving a prison sentence.” (*In re Wright* (2005) 128 Cal.App.4th 663, 670.) Whenever a person in custody is due to be released from prison and it is determined the person may be an SVP, that person must be referred for a screening by prison officials. (§ 6601, subs. (a)(1), (b).) If it is determined as a result of the screening that the person is likely to be an SVP, the matter is referred for a full evaluation by the Department. (§ 6601, subd. (b).)

The full evaluation is conducted “in accordance with a standardized assessment protocol, developed and updated by” the Department. (§ 6601, subd. (c).) The protocol “shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders.” (*Ibid.*) If, as a result of the full evaluation under section 6601, subdivision (c), two mental health professionals conclude the person qualifies as an SVP, the Department must forward a request for an SVP commitment petition to the county where the person was convicted. (§ 6601, subs. (d), (h).)

The county’s designated counsel must file a commitment petition if counsel concurs with the Department’s recommendation. (§ 6601, subd. (i).) The person named in the petition is entitled to an adversarial hearing to determine whether there is probable cause to believe the person is an SVP. (§ 6602, subd. (a).) The court must set the matter for trial if it finds such probable cause. (*Ibid.*) At trial, if a trier of fact determines beyond a reasonable doubt that the person is an SVP, the court must commit the person for an indeterminate term of confinement in a secure facility for appropriate treatment. (§ 6604.)

Over the years, the Department has “published a clinical evaluator handbook and standardized assessment protocol for its SVP evaluators.” (*In re Ronje* (2009) 179

Cal.App.4th 509, 515 (*Ronje*.) In August 2008, the Office of Administrative Law (OAL) determined that portions of the 2007 version of the protocol met the statutory definition of a regulation and therefore should have been adopted pursuant to the Administrative Procedures Act (Gov. Code, § 11340 et seq.). (*Ibid.*) Consequently, the OAL concluded that the Department’s protocol constituted an invalid “underground regulation.”² (OAL Determination No. 19 (Aug. 15, 2008), p. 1.) “An OAL determination that a particular guideline constitutes an underground regulation is not binding on the courts, but is entitled to deference.” (*People v. Medina* (2009) 171 Cal.App.4th 805, 814.) In *Ronje*, the Court of Appeal agreed with the OAL that the 2007 standardized assessment protocol was invalid as an underground regulation. (*Ronje, supra*, at p. 517.)

The 2008 OAL determination concerned only whether the assessment protocol constituted a regulation under Government Code section 11342.600 and did not assess the substantive merits of the protocol. (OAL Determination No. 19, *supra*, at p. 1.) The OAL stated it “has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.” (*Ibid.*)

After the OAL determined the Department’s 2007 protocol constituted an underground regulation, the Department issued a new protocol for SVP evaluations. According to the People, the new protocol went into effect on an emergency basis in February 2009. The new protocol includes a paragraph specifying that an SVP evaluator must use professionally recognized or accepted tests, instruments, or risk factors in making the SVP assessment. That same paragraph is codified as section 4005 of title 9 of the California Code of Regulations, which became operative as of February 6, 2009.

² At the request of the People, we take judicial notice of the following: (1) Clinical Evaluator Handbook and Standardized Assessment Protocol (August 2007); (2) 2008 OAL Determination No. 19, dated August 15, 2008; and (3) Standardized Assessment Protocol for Sexually Violent Predator Evaluations. (Evid. Code, § 452, subs. (b), (c).) Although the latter document is undated, the People’s brief indicates the new protocol was adopted on an emergency basis in February 2009 and was ultimately approved on September 14, 2009.

Here, it is undisputed that, in conducting the initial evaluation of Bagley, the Department utilized the 2007 protocol that was later determined to be invalid as an underground regulation. Bagley’s trial took place after the Department had implemented a new protocol that satisfied the requirements of the Administrative Procedures Act.

B. *Fundamental Jurisdiction*

Bagley urges reversal of his SVP commitment, arguing that the trial court lacked fundamental jurisdiction to act because the Department used an invalid protocol in conducting the evaluations required to initiate the filing of a commitment petition. The People contend the OAL and the appellate court in *Ronje* erroneously concluded that the 2007 protocol was an underground regulation. We need not address this argument because we agree with the People’s alternative position that, even assuming the protocol was technically invalid, the trial court was not deprived of fundamental jurisdiction to act and Bagley has failed to demonstrate that he suffered any prejudice as a consequence of the Department’s use of the 2007 protocol.

Fundamental jurisdiction means the “legal power to hear and determine a cause.” (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 (*Pompa-Ortiz*.) Lack of fundamental jurisdiction, therefore, is “ ‘an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.’ ” (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660.) When a court lacks fundamental jurisdiction, the court’s judgment is void and may be directly or collaterally attacked at any time. (*Ibid.*)

In *Pompa-Ortiz*, our Supreme Court declared that irregularities in criminal preliminary hearings “are not jurisdictional in the fundamental sense.” (*Pompa-Ortiz, supra*, 27 Cal.3d at p. 529.) The rule announced in *Pompa-Ortiz* applies to SVP proceedings. (*Ronje, supra*, 179 Cal.App.4th at p. 517; *In re Wright, supra*, 128 Cal.App.4th at p. 673.) The use of evaluations based on an invalid protocol to initiate a proceeding under the Act is considered an irregularity in the preliminary stage of the proceeding. (*Ronje, supra*, at p. 517.) Accordingly, a trial court does not lack

fundamental jurisdiction to hear and decide a commitment petition initiated on the basis of evaluations conducted pursuant to an invalid protocol. (*Id.* at p. 518.)

Bagley's reliance on *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888 and *People v. Allen* (2007) 42 Cal.4th 91 (*Allen*) does not alter our conclusion. In *Ghilotti*, the Department's designated evaluators determined the person referred to them did not qualify as an SVP. (*Ghilotti, supra*, at p. 897.) The Department disagreed with the evaluations because, despite the evaluators' determination, the evaluations suggested the person was, in fact, likely to reoffend if released unconditionally. Consequently, the Department requested and the district attorney filed a petition for that person's recommitment. (*Id.* at pp. 893-894.) Although concerned the evaluators might have misapplied the SVP criteria, the trial court dismissed the petition and ordered the individual's release, finding the district attorney may not file a petition disregarding the determination of the designated evaluators. The appellate court subsequently denied a petition for writ of mandate to vacate the dismissal order. (*Id.* at p. 894.)

The Supreme Court in *Ghilotti* concluded the district attorney could not file a commitment or recommitment petition unless two mental health professionals concurred the individual " 'has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody.'" (*Ghilotti, supra*, 27 Cal.4th at p. 894.) However, the court also concluded that, upon request, the trial court could review an evaluation, whether for or against commitment, for material legal error. (*Id.* at p. 895.) If the trial court found material legal error on the face of an evaluation, it must order the erring evaluator to prepare a new or corrected evaluation. (*Ibid.*)

If the lack of two valid evaluations deprived the trial court of fundamental jurisdiction, then the trial court would not have the power to conduct the review authorized by the Supreme Court in *Ghilotti*, or to order a new or corrected evaluation. Accordingly, *Ghilotti* supports rather than undermines our conclusion that evaluations conducted pursuant to an invalid protocol do not deprive the trial court of fundamental jurisdiction to act.

In *Allen*, the Supreme Court considered whether the district attorney's untimely filing of a petition for recommitment precluded the trial court from extending a commitment under the Mentally Disordered Offenders Act (Pen. Code, § 2960 et seq.). (*Allen, supra*, 42 Cal.4th at pp. 94-95.) The court concluded the filing deadline is mandatory and that a recommitment premised on an untimely petition is invalid. (*Id.* at p. 104.) A similar rule applies to an untimely SVP petition filed under the Act. (See *People v. Whaley* (2008) 160 Cal.App.4th 779, 804.)

Bagley's reliance on *Allen* and other cases addressing the effect of statutory time limitations is unavailing. As an initial matter, Bagley does not dispute that the district attorney timely filed the commitment petition in this case. Further, the violation of a statutory time limitation is not comparable to other types of procedural irregularities in the preliminary stages of an SVP proceeding. The inquiry in cases involving statutory time limitations turns on whether the limitation is mandatory or directory. (See *Allen, supra*, 42 Cal.4th at p. 101; *In re C.W.* (2007) 153 Cal.App.4th 468, 473; *People v. Williams* (1999) 77 Cal.App.4th 436, 447-448.) If a mandatory procedural requirement is violated, the remedy is to invalidate the ultimate governmental action. (*Allen, supra*, at pp. 101, 104.) In general, a statutory requirement is deemed directory "[u]nless the Legislature clearly expresses a contrary intent." (*Id.* at p. 102.) In *Allen*, the Supreme Court concluded the Legislature intended the deadline to be mandatory. (*Id.* at p. 104.) Here, by contrast, Bagley has made no attempt to demonstrate that the Legislature expressly intended the requirement of evaluations performed pursuant to a properly adopted protocol to be mandatory, rather than directory, in nature. The violation of a mandatory time limitation is simply not analogous to the procedural irregularity of relying on evaluations conducted pursuant to an invalid protocol. We conclude the court here was not divested of fundamental jurisdiction to act.

C. *Lack of Prejudice*

In cases involving pretrial procedural irregularities that do not deprive the court of fundamental jurisdiction to act, the aggrieved party is entitled to relief without a showing of actual prejudice if the irregularity is addressed before trial. (See *Pompa-Ortiz, supra*,

27 Cal.3d at p. 529; *Ronje, supra*, 179 Cal.App.4th at pp. 517-518.) However, if the irregularity is not corrected before trial and is raised as an issue on appeal, reversal is not required unless the aggrieved party was deprived of a fair trial or was otherwise prejudiced in the ability to mount a defense. (*Pompa-Ortiz, supra*, at p. 529; *People v. Medina, supra*, 171 Cal.App.4th at pp. 818-819; *In re Wright, supra*, 128 Cal.App.4th at p. 673.) Here, because Bagley did not raise the issue of the invalid evaluation protocol until after trial, he must demonstrate prejudice to justify reversal of the commitment order.

Bagley has failed to demonstrate that he was prejudiced by the use of an invalid protocol in conducting the initial evaluations. The evaluations simply serve as a procedural safeguard to ensure that meritless petitions do not reach trial. (*In re Wright, supra*, 128 Cal.App.4th at p. 672.) In this case, Bagley waived his right to a probable cause hearing and proceeded to trial, where he was afforded a full and fair opportunity to meet the allegations of the petition. He has not challenged the sufficiency of the evidence at trial. Instead, his claim is that if he were evaluated now by “new and unbiased” evaluators under a properly adopted protocol, there is a reasonable probability the outcome would be more favorable to him. He also asks the court to take judicial notice of various documents related to the Static-99R, such as a workbook and coding form, which he claims demonstrate that he would be considered less likely to reoffend when evaluated under the Static-99R instead of under the Static-99.

Bagley’s claim of prejudice fails. In essence, he seeks to establish prejudice by surmising that a different set of evaluators might have reached a different decision based on additional evidence that was not presented to the jury that found him to be an SVP. However, on direct appeal we are limited to an assessment of prejudice based upon the record of the proceedings in the trial court. (*People v. Mendoza* (2007) 42 Cal.4th 686, 711.) For this reason we deny the request to take judicial notice of the materials relating to the Static-99R, which were not before the trial court. As a general matter, reviewing courts consider only matters that were part of the record at the time the judgment was entered and refuse to take judicial notice of evidence not presented to the trial court.

(*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Here, in effect, Bagley seeks to challenge the conclusions of the People's witnesses by relying on evidence not before the court. We decline to consider such new evidence in assessing whether Bagley suffered prejudice.

In any event, the jury was aware of the existence of the Static-99R and the fact that it predicted lower recidivism rates than the earlier version of the same instrument, the Static-99. Dr. Inman testified that the Static-99R accounted for age and also claimed to have updated her conclusions based upon the Static-99R and newer research concerning recidivism rates. Nothing prevented Bagley from introducing evidence at trial concerning the Static-99R or challenging Dr. Inman's conclusions based upon the Static-99R. Instead, Bagley's approach at trial was to present an expert who discounted the predictive ability of instruments such as the Static-99 and the Static-2002. In closing argument, Bagley's counsel went so far as to tell the jury that experts who claim that such actuarial instruments can accurately predict recidivism rates are "selling you a bunch of hooey." Bagley cannot now claim prejudice by embracing one such actuarial instrument and arguing that it would have showed he was less likely to reoffend.

Further, the fact the underlying data used by the experts at the time of the initial evaluations may have been subsequently revised is irrelevant to the procedural invalidity of the protocol. The OAL concluded the 2007 protocol was an invalid regulation because it had not been adopted pursuant to the Administrative Procedures Act but made no determination as to the advisability or wisdom of the protocol. (OAL Determination No. 19, *supra*, at p. 1.) Bagley has not indicated how he was prejudiced by the 2007 protocol, other than claiming that a different outcome might have been reached if he had been evaluated using a protocol employing the later-developed Static-99R. However, this "prejudice" has nothing to do with the fact that the 2007 protocol had not been properly adopted. Rather, it is simply a byproduct of constantly evolving psychological data and the fact that advancing age itself might decrease risk of reoffense.

Notably, although the 2007 protocol only required the experts to apply the Static-99, both of the People's experts subsequently evaluated Bagley with the Static-2002 as

well as other instruments and tests, including consideration of dynamic risk factors.³ The 2007 protocol did not limit or otherwise inform the experts' ultimate opinions at trial on the "more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior." (*People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1130.) We also observe that Dr. Shelley first evaluated Bagley in August 2009, after adoption of the revised protocol in February of that year. Likewise, Dr. Inman updated her initial evaluation of Bagley in 2009 and specifically took into account newer research on recidivism as well as the Static-1999R. Thus, despite the passage of time, the advent of the Static-1999R, and the adoption of the revised protocol governing evaluations, both evaluators still concluded Bagley met the criteria to be considered an SVP.

Because we conclude Bagley has failed to establish any prejudice resulting from the use of initial evaluations conducted pursuant to a procedurally invalid protocol, his challenge to the commitment order fails.

D. Due Process

Bagley contends the State of California violated his due process rights by failing to follow its own statutes and procedures. We are not persuaded.

A due process challenge similar to Bagley's was rejected by the court in *Ronje*, *supra*, 179 Cal.App.4th 509. In *Ronje*, the court considered three factors identified by the United States Supreme Court in assessing whether a person has received due process: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional procedure would entail." (*Id.* at p. 520.) The court found the first factor weighed in favor of the People and the third factor weighed in favor of the

³ The revised protocol does not require the evaluators to use the Static-99R—or any particular actuarial instrument or formula—but instead merely requires that evaluators "apply tests or instruments along with other static and dynamic risk factors," provided that such "tests, instruments, and risk factors . . . have gained professional recognition or acceptance." (See Cal. Code Regs., tit. 9, § 4005.)

defendant. The second factor was determinative. The court concluded there was “little risk of an erroneous deprivation from use of the invalid assessment protocol.” (*Ibid.*) After noting the OAL did not address the wisdom of the 2007 protocol, the court pointed out that the availability of a probable cause hearing and trial after the filing of a commitment petition provided sufficient procedural safeguards against an erroneous deprivation of liberty. (*Ibid.*) Bagley presents no compelling reason for us to reject the analysis in *Ronje*.

E. *Ineffective Assistance of Counsel*

Bagley next contends that he received ineffective assistance of counsel because his appointed attorney failed to request that the Department prepare new evaluations before trial. He claims that, under *Ronje*, he would have been entitled to receive new evaluations before trial even without a showing of prejudice. While we agree he may have been entitled to new evaluations in light of *Ronje* had his counsel timely raised the issue, we do not agree he received constitutionally ineffective assistance of counsel.

In order to establish a claim of ineffective assistance of counsel, a defendant bears the burden of demonstrating both that counsel’s performance fell below an objective standard of reasonableness (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688) and that there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Id.* at p. 694; *People v. Ledesma* (2006) 39 Cal.4th 641, 746.) “Unless a defendant establishes the contrary, we shall presume that ‘counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.’ [Citation.] If the record ‘sheds no light on why counsel acted or failed to act in the manner challenged,’ an appellate claim of ineffective assistance of counsel must be rejected ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’ ” (*People v. Ledesma, supra*, at p. 746.)

As discussed above, both of the People’s experts completed new or revised evaluations of Bagley after the adoption of the revised protocol. At most, Bagley’s

counsel would have been entitled to new evaluations conducted under a properly adopted protocol. Because Bagley's counsel was presumably aware that more recent evaluations had been performed by the time the matter was set for trial, it was not unreasonable for counsel to decline to challenge the validity of the initial evaluations. Further, there was a conceivable tactical reason for proceeding to trial without requesting new evaluations, particularly if counsel believed the evaluators' conclusions would remain unchanged. In particular, counsel's strategy at trial was to discount the predictive value of actuarial instruments such as the Static-99 and Static-2002. In light of counsel's strategy, it would have been incongruous to rely on a different actuarial instrument—the Static-99R—and demand more updated evaluations that specifically took that instrument into account. Thus, on this record we cannot say counsel's performance fell below an objective standard of reasonableness.

In any event, even if counsel's performance were deficient, Bagley cannot establish prejudice for all of the reasons we have already discussed. He has not demonstrated a reasonable probability that the evaluators selected by the People would have reached a different conclusion under a properly adopted protocol.

2. Equal Protection

Bagley contends California's SVP law violates the equal protection clauses of the United States and California Constitutions because it treats persons committed as SVP's differently from persons committed as mentally disordered offenders (MDO) and persons found not guilty by reason of insanity (NGI). The claim of differential treatment focuses on the fact SVP's are committed for an indeterminate term, with the burden placed on them to show they should be released after being committed, whereas MDO's and NGI's are subject to time-limited commitments in which the burden is on the People to prove that a recommitment is justified beyond a reasonable doubt.

The issues Bagley raises have been decided against him by our Supreme Court in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*) and by this court and other Courts of Appeal. (See *People v. McKee* (2012) 207 Cal.App.4th 1325, 1330-1331 (*McKee II*);

People v. McCloud (2013) 213 Cal.App.4th 1076; *People v. McKnight* (2012) 212 Cal.App.4th 860, 864.)

In *McKee I*, our Supreme Court concluded that the indeterminate term of confinement prescribed by the SVP statute potentially violates equal protection guarantees. (*McKee I, supra*, 47 Cal.4th at pp. 1207-1208.) The court reasoned that SVP's are similarly situated with NGI's and MDO's for equal protection purposes and remanded the matter to the trial court for a hearing to determine whether the People could justify treating SVP's differently from NGI's and MDO's. (*Id.* at pp. 1203, 1208-1209.)

Following an evidentiary hearing upon remand, the trial court found that the People had met their burden to justify the disparate treatment of SVP's. (*McKee II, supra*, 207 Cal.App.4th at pp. 1330-1331.) The decision was affirmed on appeal in *McKee II*, in which the appellate court stated: “[W]e conclude the People on remand met their burden to present substantial evidence, including medical and scientific evidence, justifying the Act’s disparate treatment of SVP’s (e.g., by imposing indeterminate terms of civil commitment and placing on them the burden to prove they should be released). [Citation.] The People have shown that, ‘notwithstanding the similarities between SVP’s and MDO’s [and NGI’s], the former as a class bear a substantially greater risk to society, and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society.’ [Citation.] The People have shown ‘that the inherent nature of the SVP’s mental disorder makes recidivism as a class significantly more likely[;] . . . that SVP’s pose a greater risk [and unique dangers] to a particularly vulnerable class of victims, such as children[;]’ and that SVP’s have diagnostic and treatment differences from MDO’s and NGI’s, thereby supporting a reasonable perception by the electorate that passed Proposition 83 that the disparate treatment of SVP’s under the amended Act is necessary to further the state’s compelling interests in public safety and humanely treating the mentally disordered.” (*Id.* at p. 1347.)

In this appeal, Bagley urges that we grant him the same remedy afforded in *McKee* and remand the matter to the trial court for further proceedings. By contrast, the People argue that we should stay the proceedings pending a final determination in the *McKee*

litigation. The procedural history of *McKee* indicates the Supreme Court's intention that the proceedings in *McKee* would resolve the issue as a matter of law for all SVP's, not merely for the defendant in that case. Specifically, the Supreme Court "transferred the multiple 'grant and hold' cases under *McKee I*, . . . , to the Courts of Appeal with directions to vacate their prior opinions and suspend further proceedings until the *McKee I* remand proceedings were final, 'in order to avoid an unnecessary multiplicity of proceedings.'" (*People v. McKnight, supra*, 212 Cal.App.4th at p. 863.) Thus, it was anticipated that courts should refrain from deciding equal protection issues similar to those raised in *McKee* until there was a final disposition in that litigation. Because the People have the more compelling argument on the issue of the remedy and the need for a stay, we deferred consideration of the appeal pending a final resolution in *McKee*. That finality has now been achieved since the Supreme Court denied review in *McKee II*. (*Ibid.*)

In *People v. McKnight, supra*, 212 Cal.App.4th at p. 864, this court concurred with the analysis and holding in *McKee II*. In light of the Supreme Court's denial of review in *McKee II*, we conclude Bagley's commitment under the Act does not violate his equal protection rights.

3. Due Process, Ex Post Facto, and Double Jeopardy

Bagley contends his indeterminate commitment under the Act violates his due process rights as well as the ex post facto and double jeopardy provisions of the United States and California Constitutions. As Bagley recognizes, because the Supreme Court rejected similar due process and ex post facto arguments in *McKee I, supra*, 47 Cal.4th at pp. 1188-1195, we are likewise required to reject them. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Additionally, because the Supreme Court found that the "Proposition 83 amendments do not make the Act punitive," the Act does not violate the double jeopardy clause or constitute cruel and unusual punishment. (*McKee I, supra*, at p. 1195; *Kansas v. Hendricks* (1997) 521 U.S. 346, 369 [double jeopardy principles do not apply to civil commitment not amounting to punishment].)

DISPOSITION

The commitment order is affirmed.

McGuiness, P.J.

We concur:

Pollak, J.

Jenkins, J.