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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SPENCER ALAN THOMPSON,

Defendant and Appellant.

A131788

(Sonoma County  
Super. Ct. No. SCR27031)

**I. INTRODUCTION**

This is an appeal from an order committing Spencer Thompson to the custody of the Department of Mental Health (DMH) for an indeterminate term pursuant to a jury determination that Thompson is a sexually violent predator (SVP) under the Sexually Violent Predator Act, Welfare and Institutions Code section 6600 et seq. (the SVPA).<sup>1</sup>

Thompson contends the commitment order must be reversed because (1) he was denied the effective assistance of counsel; (2) the trial court refused to give a pinpoint jury instruction addressing the requirement of volitional impairment; and (3) the current version of the SVPA violates the equal protection clause of the state and federal constitutions. We reject Thompson's first two contentions. However, we will remand this case to the trial court for consideration of Thompson's equal protection claim.

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<sup>1</sup> Unlabeled statutory references are to the Welfare and Institutions Code.

## II. THE SVPA

“The SVPA ‘allows for the involuntary commitment of certain convicted sex offenders, whose diagnosed mental disorders make them likely to reoffend if released at the end of their prison terms.’ [Citation.]” (*People v. Medina* (2009) 171 Cal.App.4th 805, 811-812 (*Medina*)). A SVP is defined as “a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” (§ 6600, subd. (a).)

The SVPA establishes a screening process pursuant to which the Department of Corrections and Rehabilitation and the Board of Parole Hearings identify potential SVP’s and refer them to the DMH for a full evaluation conducted “in accordance with a standardized assessment protocol, developed and updated by” the DMH. (§ 6601, subds. (b), (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.” (§ 6601, subd. (c).) If, as a result of the full evaluation under section 6601, subdivision (c), two mental health professionals conclude that the person qualifies as an SVP, the Department must request the responsible county to file a commitment petition. (§ 6601, subds. (d), (h); see generally *Medina, supra*, 171 Cal.App.4th at p. 812.)

“The objective of the evaluation process is to screen out individuals who plainly do not meet the SVP criteria. [Citation.] The actual legal determination that a particular person is an SVP, however, is made during the subsequent judicial proceedings, not during the screening process. [Citation.]” (*Davenport v. Superior Court* (2012) 202 Cal.App.4th 665, 669 (*Davenport*)). In other words, the evaluations prepared prior to the filing of a SVPA petition do not affect disposition of the merits of the petition, but instead serve only as a procedural safeguard to prevent meritless petitions from reaching trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063.)

“Once filed, the petition must be reviewed by a judge of the superior court to determine if it contains sufficient facts to constitute probable cause to believe that the

prisoner is likely to engage in sexually violent predatory criminal behavior upon release. (§ 6601.5.) [¶] If the court so determines, a full, adversarial preliminary hearing is held. The petition is dismissed unless the court determines there is probable cause to believe that the prisoner is likely to engage in sexually violent predatory criminal behavior upon release. (§ 6602, subd. (a).) If the court so determines, the matter is set for trial. Either party may demand a jury trial, the prisoner is entitled to counsel, to retain experts, and have access to all relevant medical and psychological reports and records. The prisoner must be found to be an SVP beyond a reasonable doubt by a unanimous jury. (§§ 6603, subds. (a), (b), (e), (f), 6604.)” (*People v. Munoz* (2005) 129 Cal.App.4th 421, 429.)

Prior to 2006, the SVPA provided that a person who was determined to be a SVP could not be kept in actual custody for longer than two years unless a petition to extend the commitment was filed. (Former § 6604; *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 802, fn. 6.) However, in November 2006, California voters passed Proposition 83 which led to a modification of the terms governing when a SVP may be released from civil commitment under the SVPA. (*People v. McKee* (2010) 47 Cal.4th 1172, 1183-1184 (*McKee*)). This modification changed “the commitment from a two-year term, renewable only if the People prove to a jury beyond a reasonable doubt that the individual still meets the definition of an SVP, to an indefinite commitment from which the individual can be released if he proves by a preponderance of the evidence that he no longer is an SVP.” (*Ibid.*)

### **III. STATEMENT OF FACTS**

#### **A. *Background: Thompson’s Prior Acts and Convictions***

In 1984, Thompson sexually molested the seven-year-old daughter of a friend on at least two occasions. Both times the abuse occurred at night while the child was in her bed and Thompson was intoxicated. On the second occasion, the girl’s father walked in during the incident, became angry and kicked Thompson out of his house. A few weeks later, Thompson was intoxicated again when he showed up at the home of a child who took piano lessons from him. The boy’s mother allowed Thompson to spend the night on

the couch because he was so drunk, but kicked him out after finding him on the floor next to her son's bed.

On at least two occasions in 1987, Thompson was in his car when he attempted to engage young people in illegal conduct. Thompson was parked in front of a supermarket when he invited a group of young girls to party and do drugs with him. On another occasion, Thompson picked up a 15-year-old boy from the side of a highway, talked to him about sex, gave him pornography and touched his crotch. After the boy insisted on getting out of the car, Thompson tried to convince him to get back in until the boy started throwing rocks.

In May 1988, Thompson was convicted of oral copulation of a victim incapable of giving legal consent because of a mental disorder or a developmental or physical disability (Pen. Code, § 288a, subd. (g)), and was sentenced to a three-year prison term. The victim was a 19-year-old developmentally disabled man who was riding his bicycle in a park when Thompson accosted him and pulled him down an embankment. When police arrived at the scene, Thompson was passed out drunk.

In January 1999, Thompson was convicted of oral copulation of a victim under the age of 14 (Pen. Code, § 288a, subd. (c)), and was sentenced to an eight-year prison term. The incident, which occurred in the trailer park where Thompson was living at the time, involved a six-year-old boy. After initially denying the molestation charge, Thompson subsequently admitted the sexual conduct but claimed that the boy initiated it.

On May 5, 2003, a jury found that Thompson was a SVP and he was subsequently committed to the DMH for a two-year term. On May 5, 2005, Thompson's commitment was extended for two years pursuant to a stipulation of the parties.

#### **B. *The Present Case***

On December 21, 2006, the People filed a petition to extend Thompson's commitment as a SVP for an indeterminate term. After a lengthy delay, a jury trial commenced on March 8, 2011, before the Honorable Peter Ottenweller. The parties stipulated to the truth of information about Thompson's prior acts and crimes which we have summarized above.

The People presented expert testimony by two psychologists who examined and evaluated Thompson, Dr. Marianne Davis and Dr. Jack Vognsen. Both doctors diagnosed Thompson with pedophilia and alcohol dependence. These doctors also testified that Thompson's mental disorders impair his volitional and emotional control, that he is likely to engage in sexually predatory violent criminal acts as a result of his disorders and that he meets the criteria as a SVP as described in the SVPA.

Thompson elicited expert testimony from Dr. Jesus Padilla. Padilla first evaluated Thompson in August 2009 and, like the other doctors who testified at trial, diagnosed Thompson with pedophilia and alcohol dependence. At that time, Padilla found that Thompson met the SVP criteria. However, Padilla changed his opinion and concluded that Thompson did not meet the criteria of a SVP when he reevaluated Thompson in December 2009 because he concluded that Thompson no longer posed a substantial risk of reoffense.

During his trial testimony, Padilla explained to the jury that he changed his opinion and concluded that Thompson did not meet the criteria of a SVP because the risk assessment procedure that he used in 2009 had been changed to account for the age of the alleged SVP when calculating the likelihood of reoffense. Nevertheless, Padilla expressly confirmed at trial that Thompson does presently suffer from pedophilia and alcohol dependence and that he has a diagnosed mental disorder as defined by the SVPA.

On April 1, 2011, the jury returned its verdict finding that Thompson qualifies as an SVP. That same day, the court filed an order committing Thompson to Coalinga State Hospital for an indeterminate term.

#### **IV. DISCUSSION**

##### **A. *The Right to Effective Assistance of Counsel***

###### **1. *Issue Presented and Standard of Review***

Thompson contends that he was deprived of his constitutional right to the effective assistance of counsel because his trial attorney failed to request that the trial court order a new set of SVP evaluations for him pursuant to *In re Ronje* (2009) 179 Cal.App.4th 509

(*Ronje*), a case that was decided shortly before the probable cause hearing was held in this case.

In *Ronje, supra*, 179 Cal.App.4th 509, an individual whose trial on a SVP petition was pending sought habeas relief on the ground that his SVP evaluations had been conducted pursuant to a DMH standardized assessment protocol that was subsequently determined to be an invalid “underground” regulation by the Office of Administrative Law (OAL) because it was not adopted in accordance with the Administrative Procedure Act, Government Code section 11340 et seq. The *Ronje* court deferred to the OAL and held that the standardized assessment protocol used by the DMH in 2007 to determine whether an individual was a SVP (the 2007 protocol) constitutes an invalid underground regulation. (*Ronje* at pp. 516-517.) Furthermore, the court concluded that the *Ronje* petitioner was entitled to a remedy without having to make a showing of prejudice since his trial had not yet commenced. Therefore, the *Ronje* court directed the trial court to order new SVP evaluations using a valid assessment protocol and to conduct another probable cause hearing. (*Id.* at p. 521.)

As noted above, Thompson contends that his trial attorney rendered ineffective assistance because she failed to request a new set of SVP evaluations pursuant to *Ronje, supra*, 179 Cal.App.4th 509. To prove this claim of constitutional error, Thompson carries the burden of establishing (1) deficient performance by trial counsel and (2) prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*); *People v. Garrison* (1989) 47 Cal.3d 746, 788.)

To be deficient, counsel’s performance must have fallen “ ‘below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citations.]” (*Ledesma, supra*, 43 Cal.3d at p. 216.) In applying this prong of the test, courts must exercise deferential scrutiny so as to avoid the dangers of “second-guessing.” (*Ibid.*) “Reviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates that there could be no rational tactical purpose for counsel’s omissions.” (*People v. Lucas* (1995) 12 Cal.4th 415, 442.)

Further, to establish prejudice Thompson “ ‘must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ ” (*Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

## **2. Background**

### **a. Thompson’s SVP Evaluations**

When the December 2006 petition was filed in this case, it was supported by the evaluations and conclusions of two psychologists, Dr. Goldberg and Dr. Vognsen, both of whom concluded that Thompson met the statutory definition of an SVP. Dr. Goldberg completed his evaluation of Thompson on October 23, 2006. Dr. Vognsen completed his evaluation on October 20, 2006.

Goldberg updated his evaluation on April 4, 2008, and again on May 22, 2009. Both times, Goldberg confirmed his prior conclusion that Thompson was a SVP. Dr. Vognsen updated his evaluation on April 11, 2008, and concluded that Thompson met the requirements of a SVP. However, in a second updated evaluation dated May 6, 2009, Vognsen concluded that Thompson did not meet the requirements of a SVP.

The trial court was notified of the split decision among the evaluators at a hearing on June 16, 2009. With the concurrence of both parties, the court issued an order directing the DMH to appoint two additional evaluators pursuant to section 6601, subdivision (e). Accordingly, the DMH appointed Dr. Davis and Dr. Padilla to evaluate Thompson.

On June 30, 2009, Dr. Davis completed her clinical evaluation of Thompson pursuant to which she concluded that Thompson met the criteria of a SVP under section 6600. On July 30, 2009, Dr. Padilla completed his clinical evaluation of Thompson pursuant to which he concluded that Thompson met the criteria of a SVP.

In anticipation of the December 2009 probable cause hearing, the People requested that each of the four evaluators involved in this case prepare an addendum report. Dr. Goldberg generated an addendum report on December 2, 2009, in which he confirmed his prior conclusion that Thompson was a SVP. Dr. Vognsen generated an addendum report

on January 24, 2010, in which he changed his most recent opinion and concluded that Thompson did in fact meet the criteria of a SVP.

Dr Davis generated an addendum report on November 30, 2009, confirming her prior conclusion that Thompson was a SVP. Dr. Padilla generated an addendum report on December 4, 2009, in which he changed his prior opinion and concluded that Thompson did not meet the criteria of a SVP. In a second addendum report dated February 3, 2010, Padilla again concluded that Thompson did not meet the criteria of a SVP.

**b. *Ronje***

For reasons not evident on this record, the probable cause hearing was delayed several times and was finally held on December 10, 2009, and February 11, 2010.<sup>2</sup> The month before that hearing commenced, on November 19, 2009, the *Ronje* court filed its decision holding that the 2007 protocol was an invalid underground regulation. (*Ronje, supra*, 179 Cal.App.4th 509.)

On November 25, 2009, Thompson's trial counsel filed a motion to continue the probable cause hearing in order to determine whether Thompson's SVP evaluations were invalid under *Ronje*.

The People opposed the continuance motion and produced evidence establishing the following facts: (1) In February 2009, the DMH adopted a new standardized assessment protocol which satisfied the requirements of the Administrative Procedure Act (the 2009 protocol); (2) the original set of evaluators in this case (Dr. Goldberg and Dr. Vognsen) updated their evaluations of Thompson using the 2009 protocol which resulted in a split decision as to whether Thompson met the SVP criteria; (3) two additional evaluators were appointed (Dr. Davis and Dr. Padilla), both of whom

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<sup>2</sup> As reflected in our factual summary, the SVPA petition was filed in December 2006. Yet the probable cause hearing was not held until three years later and the trial was finally held in March 2011. Apparently a variety of factors contributed to this delay and, unfortunately, appellate counsel on both sides of this case fail to assist us in navigating the convoluted procedural history of this case.

employed the 2009 protocol and both of whom concluded that Thompson met the SVP criteria.

On December 2, 2009, a hearing on the motion for a continuance was conducted before the Honorable Arthur Wick. Thompson's counsel argued that she needed additional time to confirm that the newer SVP evaluations complied with the 2009 protocol. The trial court disagreed and noted that there had already been several continuances in the case. Ultimately, the court ruled that "good cause has not been stated for the continuance of the hearing of this matter."

On December 9, 2009, the day before the probable cause hearing commenced, Thompson's trial counsel filed a motion to dismiss the SVPA petition on the ground that it was not supported by two valid SVP evaluations. The following day, she filed a second more detailed motion to dismiss. The court took the matter under submission and proceeded with the preliminary hearing. On February 26, 2010, Thompson's trial counsel filed a third motion to dismiss the SVPA petition. All three of the motions to dismiss were based on *Ronje* and on the theory that the SVPA was not supported by two valid concurring evaluations. On March 24, 2010, the court filed a detailed order denying all three motions.

On October 13, 2010, Thompson filed a pro per petition for writ of habeas corpus. The petition stated, among other things, that the original SVP evaluations in this case were "voided" in accordance with *Ronje* and that "the evaluators prepared new evaluations of petitioner pursuant to a validly promulgated Standardized Assessment Protocol." Nevertheless, Thompson maintained the court was required to dismiss the SVPA petition because, as of that time, there was a split decision among both sets of evaluators that had been appointed in the case.

On February 4, 2011, the superior court denied Thompson's writ petition, explaining its ruling in a four-page order filed four days later. The court found, among other things, that (1) the statutory requirements of the SVPA were satisfied because there were two concurring evaluations at the time the December 2006 petition was filed; (2) the fact that the original evaluators changed their mind did not deprive the court of

jurisdiction over the petition; and (3) because the opinions of the doctors that were being presented at the probable cause hearing “were based on the current, valid ‘protocol,’ there is no error to be cured by ordering new evaluations or conducting [a new] probable cause hearing.”

### **3. Analysis**

Glossing over the procedural history of this case, Thompson contends that his counsel performed deficiently because (1) she failed to make a proper motion for new *Ronje* evaluations and (2) there could be no sound tactical reason for that omission since Thompson was clearly entitled to a new set of evaluations. We reject both prongs of this argument.

First, the record demonstrates that Thompson’s trial counsel did attempt to secure for her client any benefit that *Ronje* may have conferred. Within days of the publication of that decision, counsel filed a motion to continue the probable cause hearing so that she could attempt to establish Thompson’s right to a new set of SVP evaluations. However, the trial court denied that motion because the People produced evidence which established that Thompson was not entitled to another set of evaluations. Despite this rather clear ruling, Thompson’s trial counsel zealously pursued any avenue that might have been opened by *Ronje* by filing three motions to dismiss the SVPA petition and a petition for writ of habeas corpus.

Second, the record before us also demonstrates that Thompson was not entitled to a new set of evaluations under *Ronje*. As discussed more fully above, *Ronje* disapproved the 2007 protocol used by the DMH to determine whether an individual was a SVP. (*Ronje, supra*, 179 Cal.App.4th at pp. 516-517.) In the present case, although the first set of evaluators may have used the 2007 protocol to perform their original evaluations, they both updated their evaluations using the 2009 protocol before the probable cause hearing commenced. Furthermore, and perhaps more to the point, the second set of evaluators never used the 2007 protocol that was discredited by *Ronje*.

On appeal, Thompson acknowledges that his trial counsel filed several motions to dismiss the SVPA petition in which she relied “in large part on the *Ronje* decision.” But

Thompson complains that those motions were inadequate because his trial counsel did not actually seek to have new evaluations conducted under *Ronje*. In making this argument, Thompson either ignores or overlooks the continuance motion that was filed on his behalf. As discussed above, that motion was, as a practical matter, a request for a determination as to whether Thompson was entitled to new evaluations under *Ronje*. Furthermore, the trial court denied that motion *because* the People established that new evaluations were not required.

Thompson attempts to convince us that he was entitled to a new set of SVP evaluations under *Ronje* by attacking arguments the district attorney made in the lower court to support the People's position that *Ronje* did not apply. By taking this tack, Thompson loses sight of the issue on appeal, i.e., whether *his own attorney* rendered effective assistance. In any event, we will directly address Thompson's substantive theory as to why he was entitled to new *Ronje* evaluations because our rejection of that theory precludes Thompson from establishing prejudice.

Thompson's theory is that the updated evaluations that were performed by the evaluators in this case pursuant to section 6603 were insufficient as a matter of law to cure the *Ronje* error that occurred when the original set of evaluators used the 2007 protocol to evaluate Thompson in 2006. According to Thompson, the only way to cure that error was for "the process to be reset from the beginning" by ordering brand new evaluations under section 6601.

The *Ronje* court did not actually consider whether updated evaluations utilizing a proper protocol would cure the administrative error of using an improper protocol in the initial evaluation. However, the *Ronje* court necessarily rejected Thompson's contention that this type of error requires that the process be "reset from the beginning," as if the original petition had not yet been filed. The *Ronje* court squarely held that dismissal of the SVPA petition is not the proper remedy for an evaluator's use of an invalid assessment protocol. (*Ronje, supra*, 179 Cal.App.4th. at pp. 518-519.) The court reasoned that such a drastic remedy was not appropriate because the flaw in the protocol did not affect the fundamental jurisdiction of the court. As the *Ronje* court explained,

“[u]se of the evaluations based on the invalid assessment protocol, though erroneous, does not deprive the trial court of fundamental jurisdiction over the SVPA commitment petition. The trial court has the power to hear the petition notwithstanding the error in using the invalid assessment protocol. Dismissal therefore is not the appropriate remedy.” (*Id.* at p. 518.)

The *Ronje* court’s conclusion that a later discovered defect in the assessment protocol used to evaluate an alleged SVP does not deprive the court of jurisdiction over a SVPA petition was seconded by a different division of this court in *Davenport, supra*, 202 Cal.App.4th 665. *Davenport* held that, when new evaluations are ordered to cure a *Ronje* error, a split opinion among the evaluators as to whether the individual is a SVP does *not* require that the court dismiss the commitment petition and start the SVP evaluation process from the beginning. (*Id.* at p. 674.)

Even if there is merit to Thompson’s theory that a *Ronje* error cannot be cured by a section 6603 update, that theory is factually irrelevant on this record. On appeal, Thompson literally ignores the fact that, after the DMH abandoned the 2007 protocol, a new set of evaluators was appointed pursuant to section 6601. Those two doctors completed their original evaluations, their updates and their addenda using the 2009 protocol. Thus, even if there was some set of facts under which a *Ronje* error could not be cured by an intervening set of updated evaluations, this would not be that case.

For all of these reasons, we find that Thompson has failed to carry his burden of proving he was denied the effective assistance of counsel.

***B. Pinpoint Jury Instruction***

Thompson posits that, under both federal and state law, a person cannot be subjected to a civil commitment unless he suffers from a mental disorder which makes it seriously difficult for him to control his dangerous behavior. (Citing *Kansas v. Crane* (2002) 534 U.S. 407, 413; *In re Howard N.* (2005) 35 Cal.4th 117 (*Howard N.*)). Therefore, Thompson contends, the trial court committed reversible error by denying his request for a special instruction which elucidated this legal principle.

## 1. *Background*

The parties stipulated to using a modified version of CALCRIM No. 3454 to instruct the jury regarding the People's burden of proving that Thompson is a SVP as alleged in the petition. Pursuant to that model instruction, the jury was told that the People had the burden of proving the following elements beyond a reasonable doubt:

"1. [Thompson] has been convicted of committing sexually violent offenses against one or more victims; [¶] 2. He has a diagnosed mental disorder; [¶] 3. As a result of that diagnosed mental disorder, he is a danger to the health and safety of others because it is likely that he will engage in sexually violent predatory criminal behavior; [¶] AND [¶] 4. It is necessary to keep him in custody in a secure facility to ensure the health and safety of others." This instruction also provided the jury with the following additional guidance regarding these elements:

"The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior, and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

"A person *is likely to engage in sexually violent predatory criminal behavior* if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released into the community."

At a hearing on jury instructions, the trial court also considered 16 special instructions that Thompson proposed, all of which appeared to attempt to explain various aspects of CALCRIM No. 3454. One of those instructions, Thompson's "Special Instruction No. 8," stated:

"In order to find respondent to be a sexually violent predator there must be proof that he has serious difficulty in controlling his behavior. This difficulty in controlling behavior, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist

convicted in an ordinary criminal case.” Thompson argued this special instruction was appropriate under *Kansas v. Crane, supra*, 534 U.S. 407. The trial court disagreed. It found that the conduct discussed in the special instruction was already covered by the parts of CALCRIM No. 3454 which addressed the element requiring proof of a diagnosed mental disorder. Therefore, the court denied Thompson’s request to give this special instruction and two other proposed instructions that were substantively indistinguishable from Thompson’s Special Instruction No. 8.

## **2. Analysis**

Thompson contends that the trial court committed reversible error by refusing to give his proposed special instruction. Our Supreme Court rejected a substantially similar argument in *People v. Williams* (2003) 31 Cal.4th 757, 774-776 (*Williams*).

The *Williams* petitioner challenged his commitment under the SVPA on the ground that the jury in his case did not receive special, specific instruction regarding the need to find serious difficulty in controlling behavior. (31 Cal.4th at pp. 759-760.) The *Williams* court held that specific impairment-of-control instructions are not constitutionally required in California. (*Id.* at pp. 777-778.) The court reasoned that the language of the SVPA “inherently encompasses and conveys to a fact finder the requirement of a mental disorder that causes serious difficulty in controlling one’s criminal sexual behavior.” (*Id.* at p. 759.)

The *Williams* court also expressly found that “*Kansas v. Crane, supra*, 534 U.S. 407, does not compel us to hold that further lack-of-control instructions or findings are necessary to support a commitment under the SVPA.” (31 Cal.4th at pp. 774-775.) In reaching this conclusion, the court underscored that “a judicially imposed requirement of special instructions *augmenting* the clear language of the SVPA would contravene the premise of . . . *Kansas v. Crane, supra*, 534 U.S. 407, that, in this nuanced area, the *Legislature* is the primary arbiter of how the necessary mental-disorder component of its civil commitment scheme shall be defined and described.” (*Williams* at p. 774.)

In the present case, Thompson acknowledges the *Williams* decision but argues there was a “problem with Supreme Court’s analysis” in that case. We summarily reject

this argument since this court is bound by *Williams*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Trying a different tack, Thompson contends that the supreme court changed the view that it expressed in *Williams* when it decided *Howard N.*, *supra*, 35 Cal.4th 117. According to Thompson, the *Howard N.* decision shows that the court now recognizes that, in Thompson's words, "the statutory language, merely by its existence, does not necessarily contain within it the necessary information that a jury needs in order to decide whether the defendant has a serious difficulty in controlling his dangerous behavior." We are troubled by this argument which strikes us as a misguided effort to avoid the consequences of binding precedent.

*Howard N.*, *supra*, 35 Cal.4th 117, did not involve a commitment under the SVPA. Rather, in that case the defendant challenged his commitment to the California Youth Authority pursuant to Welfare and Institutions Code section 1800, et seq. (*Id.* at p. 122-123.) The *Howard N.* court held that, although that statute does not expressly require a finding that the person's mental deficiency, abnormality or disorder causes serious difficulty controlling behavior, it should be interpreted to contain such a requirement in order to preserve its constitutionality. (*Id.* at pp. 122, 135-136.) In its *Howard N.* decision, the Supreme Court repeatedly distinguished the statute at issue in that case from the SVPA. (*Howard N.*, *supra*, 35 Cal.4th at pp. 127, 130-131, 136-137.) The court also affirmed its key holdings in *Williams* that (1) a jury instructed in the language of the SVPA " 'must necessarily understand the need for serious difficulty in controlling behavior' " and (2) " 'separate instructions or findings on that issue are not constitutionally required . . . .' " (*Id.* at p. 130.) Thus, contrary to Thompson's questionable argument on appeal, our Supreme Court has not modified the opinions it expressed in *Williams*.

Finally, Thompson attempts to distinguish *Williams* on its facts. The pinpoint instruction that the *Williams* defendant requested stated that " "the diagnosed mental disorder must render the person unable to control his dangerous behavior. " " (*Williams*, *supra*, 31 Cal.4th at p. 782.) As Thompson points out, this proposed instruction did not

accurately reflect the law, which requires only a “serious difficulty in controlling behavior.” (*Kansas v. Crane, supra*, 534 U.S. at p. 413.) Therefore, Thompson would limit application of *Williams* to cases in which the alleged SVP failed to request an accurate pinpoint instruction regarding the volitional requirement implicit in the mental disorder element of the SVPA. With this premise, Thompson concludes that his proposed special instruction was an accurate statement of the law and “nothing in *Williams* suggested that it would be error for the trial court to augment the statutory language with the serious difficulty in controlling dangerous behavior language.”

Preliminarily, we note that *Williams* may in fact suggest just that. The court did not squarely address whether augmenting the statutory language of the SVPA with a special instruction describing the volitional impairment requirement might be error. However, it did emphasize that “in this nuanced area, the *legislature* is the primary arbiter of how the necessary mental-disorder component of its civil commitment scheme shall be defined and described.” (*Williams, supra*, 31 Cal.4th at p. 774.) Thompson points out that Justice Kennard filed a concurring opinion in *Williams* in which she suggested that, in future SVPA cases, it “would be prudent” to explain to jurors “that defendants cannot be found to be sexually violent predators unless they have serious difficulty in controlling their behavior.” (*Id.* at p. 780.) However, Thompson ignores the fact that no other justice joined in that recommendation.

In any event, even if Thompson’s claim of reversible error is not inconsistent with the court’s analysis in *Williams*, Thompson has failed to establish that he was entitled to a pinpoint instruction under these circumstances. In “ ‘appropriate circumstances,’ ” a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case. (*People v. Bolden* (2002) 29 Cal.4th 515, 558-559.) However, the court is not required to give a pinpoint instruction which is argumentative, duplicative, or not supported by the evidence. (*Ibid.*) In the present case, it does not appear that Thompson took the position at trial that he does have the ability to substantially control his behavior. Nor does he identify for us any evidence to support such a theory. Furthermore, since the

approved CALCRIM instruction adequately instructs the jury on this requirement, a pinpoint instruction addressing the same issue is, by definition, duplicative.

Finally, we hold that any error in refusing to give this pinpoint instruction was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As just noted, Thompson does not identify any evidence in the record which could support a finding that he does not have serious difficulty controlling his dangerous behavior. Instead, his theory of prejudice rests on the following premise: “Notwithstanding the Supreme Court’s decision in *Williams*, the language of the California SVP Law does not adequately convey the due process constitutional requirement explained by the United States Supreme Court in [*Kansas v.*] *Crane*.” As we have already explained above, this assertion is patently erroneous.

As reflected in our factual summary of the trial evidence, all three of the evaluators who testified at trial, including Thompson’s own expert, expressly found that Thompson has a diagnosed mental disorder within the meaning of the SVPA. In order to meet that definition, Thompson must have serious difficulty controlling his dangerous criminal behavior. (*Williams, supra*, 31 Cal.4th at p. 759.) Therefore, on this record, Thompson cannot substantiate his claim of prejudice.

### **C. *Equal Protection***

Thompson contends that the SVPA violates the equal protection clause of the federal and state constitutions because it treats SVP’s differently than other similarly situated mentally disordered offenders (MDO’s) and defendants who have been found not guilty by reason of insanity (NGI’s). Our Supreme Court addressed this issue in *McKee, supra*, 47 Cal.4th 1172, and concluded that the current version of the SVPA, which provides for an indefinite term of commitment, may potentially violate equal protection.<sup>3</sup>

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<sup>3</sup> Thompson also contends that the SVPA violates the due process clause, the ex post facto clause and the double jeopardy clause. However, as Thompson concedes, we must reject these claims because they were all made and rejected in *McKee, supra*, 47 Cal.4th at pp. 1188-1195. (See *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

The *McKee* court determined that SVP's are similarly situated to MDO's and NGI's, but then remanded that case to the trial court with directions to allow the People the opportunity to justify the differential treatment. (*McKee, supra*, 47 Cal.4th at pp. 1207-1211.) As the court explained, "We do not conclude that the People could not meet its burden of showing the differential treatment of SVP's is justified. We merely conclude that it has not done so. Because neither the People nor the courts below properly understood this burden, the People will have an opportunity to make the appropriate showing on remand." (*Id.* at pp. 1207-1208.)

In the present case, the parties agree that *McKee* requires that this case be remanded to the trial court for further proceedings addressing Thompson's equal protection challenge. The People request that we direct the trial court to stay this case pending a final decision in *McKee*, arguing that the Supreme Court has "clearly expressed [its] desire to avoid 'an unnecessary multiplicity of proceedings' on the question whether the amended SVPA violates equal protection . . . ." However, Thompson urges us not to stay proceedings on this issue, contending that he is entitled to the opportunity to litigate his own equal protection claim when this case is remanded. On this record, we do not feel we have sufficient information to resolve this disagreement. Therefore, we will defer to the trial court as to whether this case should be stayed pending finality of the proceedings in the *McKee* case.

## V. DISPOSITION

This case is remanded to the trial court for consideration of Thompson's equal protection claim in light of *McKee, supra*, 47 Cal.4th 1172. The judgment is otherwise affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.