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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY SALAS AGUON,

Defendant and Appellant.

D053875

(Super. Ct. No. MH 101627)

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

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

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

This case is before us for the third time. In the first appeal, we affirmed the judgment; however, Aguon appealed and the California Supreme Court directed us to vacate our decision and reconsider the cause in light of its decision in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*). In the second appeal, as required by *McKee I*, we reversed the judgment (order of civil Commitment) and remanded the case for proceedings solely on the issue of equal protection, but otherwise affirmed the judgment. This court subsequently decided *People v. McKee* (2012) 207 Cal.App.4th 1325, 1347, review denied Oct. 10, 2012 (*McKee II*). On this third appeal, the parties submitted supplemental briefing regarding the effect of *McKee I* and *McKee II* on Aguon's equal protection claim. We affirm the judgment.

Aguon contends insufficient recent and objective evidence supports the jury's findings. He further contends the trial court erroneously: (1) instructed the jury to determine whether it was necessary to keep him in a secure facility to ensure the health and safety of others, which improperly directed the jury to consider the consequences of its verdict and thereby diminished the prosecutor's burden of proof and denied him due process; (2) instructed regarding his likelihood of reoffense; (3) admitted evidence regarding his prior 1972 uncharged rape; (4) failed to instruct the jury, without request, that it was required to find he had serious difficulty in controlling his sexual behavior. Moreover, (5) the prosecutor's "use of the term 'sexually violent predator' was governmental misconduct;" (6) the evaluations supporting the petition to recommit him are invalid because the statutorily required protocol was an "underground regulation," which was promulgated in violation of the Administrative Procedure Act (APA);

therefore, the trial court lacked jurisdiction to proceed with the SVP petition; (7) the SVPA violates the due process, ex post facto, double jeopardy and equal protection clauses of the federal or state Constitutions; and (8) his trial counsel rendered ineffective assistance of counsel.

FACTUAL AND PROCEDURAL BACKGROUND

The parties stipulated that Aguon was convicted of a sexually violent offense against more than one victim; specifically, in 1975, he was convicted of rape by threats of great and immediate bodily harm (Penal Code, § 261.3) and sentenced to three years to life in prison. In 1984, he was convicted of forcible rape and forcible oral copulation against two different victims (Pen.Code, § 261 (2); 288a, subdivision (c)) and sentenced to 37 years in prison.

Prosecution Evidence

Drs. Bruce Yanofsky and Mark Patterson, both psychologists, testified in similar terms that they interviewed Aguon in 2007 and in 2008, and reviewed police and parole officers' reports, psychiatric and psychological evaluations, and prison records regarding Aguon's case. The psychologists evaluated Aguon using Static-99, Minnesota Sex Offender Screening Tool (MnSOST), the Sex Offender Risk Appraisal Guide (SORAG) and the Hare Psychopathy Checklist-Revised (PCL-R). On the SORAG actuarial measurement tool, Aguon scored in the highest risk level, indicating a 100 percent likelihood of reoffending—including in a sexually violent way—in seven to ten years. Both psychologists diagnosed Aguon with chronic paraphilia NOS (not otherwise specified), which manifests itself in deviant sexual arousal. The diagnosis was based on

Aguon's criminal history, including extremely violent sexual offenses, which demonstrated his inability to inhibit such behavior despite arrests, incarcerations and hospitalizations. They also diagnosed him with alcohol dependency and antisocial personality disorder.

Dr. Yanofsky opined, "So, for instance, if someone knows that by drinking or drugging they commit crimes, well, they should not drink or go to drugs, and their personality may allow them to realize that and stop. But if you have a personality disorder to go along with it and you think you can go beyond the law or you can break the rules or you don't have the remorse, you don't have the guilt, you're not going to stop that behavior either. [¶] So you have a mix of three conditions that interact that, I think, lead to the type of behavior we've seen. Because in looking at the records I've described, rape is not . . . his only offense. He's also been violent in other ways. So we can't say that his personality disorder only acts in ways that affects [*sic*] his paraphilia. He's [*sic*] also stolen and assaulted and done other things that are very antisocial. But the whole mix is what really makes him . . . dangerous."

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

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

In 1984, according to the official reports, Aguon approached a neighbor at her house, claiming he needed to collect money for work he had done. He grabbed her from behind, tried to choke her, threatened her, and forced her to have sex. The next day, Aguon forced himself into a different woman's car, told her he had a gun, was affiliated with law enforcement, and had killed before. He threatened her and forced her to drive. At one point, the car was stopped and he forcibly had vaginal intercourse and oral and anal copulation with her.

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

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

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

Dr. Yanofsky evaluated Aguon's risk of reoffending using Static-99, an actuarial instrument that ranks a criminal's probability of reoffense based on variables such as his age, relationships, number of prior convictions, whether those convictions were for violence and sexual offense; and if he knew his previous victims. Aguon ranked in the high risk category for reoffense, and 39 percent of individuals in that group were reconvicted within five years after release from an institutional setting and 45 percent were reconvicted within ten years. Dr. Yanofsky separately analyzed different dynamic factors to determine Aguon's risk of reoffense, taking into account factors such as Aguon's juvenile offenses, failure to accept treatment while institutionalized, and criminal history. Dr. Yanofsky stated Aguon scored high on the PCL-R, which focused on psychopathy, or Aguon's detachedness from others and difficulty experiencing empathy, love and sincerity. These characteristics of a criminal mindset are based on his criminal history, including his rapes, assault, his failure to complete cognitive and behavioral sex offender treatment, violations of parole, and frequent unemployment. Dr.

Yanofsky testified Aguon's future offenses are likely to be predatory because of his criminal history, his sexual assaults of women, and the unavailability of an intensive outpatient treatment program.

Dr. Patterson diagnosed Aguon with two substance abuse disorders, one for alcohol and another for cocaine. He testified Aguon had a "serial repetitive, recurrent, chronic inability to suppress those kinds of hostile sexual behaviors." Aguon also violated the personal space of women personnel at the hospital, touched them inappropriately, "creating an atmosphere of stalking," intimidated them and generally had an "inappropriate kind of sexualized approach to them." In their most recent interview, Aguon said "he had to learn to try to control [his fantasies related to coercive sexual behavior or rape] because if he didn't control it, it would be bad." Dr. Patterson concluded Aguon's conduct was predatory because he committed sexual offenses with women who were either casual acquaintances or strangers. Dr. Patterson also opined Aguon could not be safely released into the community because "for someone with his background, it would be difficult for him to put something together, a treatment plan of his own, because he would not be on parole . . . so he'd have to show even more self-initiative or self-starting kinds of behaviors to get involved in treatment. In fact, he told me he doesn't need treatment. So we would estimate that there's a very low likelihood he would seek it out on his own."

Defense Evidence

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

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

DISCUSSION

I.

Overview of SVPA

Prior to 2006, a person who was found to be an SVP was subject to a two-year involuntary civil commitment term under the SVPA. At the end of that term, the People were required to file another petition seeking a determination that the person remained an SVP. If the People did not file a recommitment petition, the person would have to be released. (Former § 6604, as amended by Stats. 2000, ch. 420, § 3.) On filing of a recommitment petition, a new jury trial was conducted at which the People again had the burden to prove beyond a reasonable doubt that the person was currently an SVP. (Former §§ 6604, 6605, subds. (d) & (e); *People v. Munoz* (2005) 129 Cal.App.4th 421, 429 ["[A]n SVP extension hearing is not a review hearing. . . . An SVP extension hearing is a new and independent proceeding at which . . . the [People] must prove the

[committed person] meets the [SVP] criteria, including that he or she has a currently diagnosed mental disorder that renders the person dangerous"].)

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

The screening is conducted in accord with an assessment protocol developed by the Department of Mental Health (Department). (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 (*Hurtado*).) " If that screening leads to a determination that the defendant is likely to be [an SVP], the defendant is referred to the [Department] for an evaluation by two psychiatrists or psychologists. (§ 6601, subs. (b) & (c).) If both find that the defendant "has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody" (§ 6601, subd. (d)), the [D]epartment forwards a petition for commitment to the county of the defendant's last conviction (*ibid.*). If the county's designated counsel concurs with the recommendation, he or she files a petition for commitment in the superior court. (§ 6601, subd. (i).) " (*Hurtado, supra*, at pp. 1182-1183.)

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

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

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

Once committed, the individual must have "a current examination of his or her mental condition made at least once every year." (§ 6605, subd. (a).) After the examination, the Department must file a report in the form of a declaration that addresses

(1) "whether the committed person currently meets the definition of [an SVP]," and (2) "whether conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and conditions can be imposed that would adequately protect the community." (*Ibid.*) The Department is to file this report with the trial court that committed the person, and must serve the report on the prosecuting agency and the committed individual. The committed individual may retain, or the court may appoint, a qualified expert to examine him or her. (*Ibid.*)

If the Department concludes in the report that the committed individual no longer meets the requirements of the SVPA, or that conditional release is appropriate, the Department must authorize the committed individual to petition the trial court for release. (§ 6605, subd. (b).) Upon receipt of the petition for conditional release or unconditional discharge, the trial court is to set a probable cause hearing at which the court "can consider the petition and any accompanying documentation provided by the medical director, the prosecuting attorney, or the committed person." (*Ibid.*) If the trial court determines that probable cause exists to believe the petition has merit, it must set a hearing on the issue, at which time the committed individual is "entitled to the benefit of all constitutional protections that were afforded him or her at the initial commitment proceeding." (*Id.*, subds. (c) & (d).) If the fact finder determines that the state has not met its burden, the committed person must be released. (*Id.*, subd. (e).)

*Sufficiency of the Evidence*²

Aguon contends insufficient recent and objective evidence supports these findings: he has a current mental disorder of a kind to support civil commitment as opposed to being a dangerous person more properly dealt with exclusively through criminal proceedings; is likely to reoffend, and the future offenses likely will be predatory and sexually violent, in particular because the experts relied on Static-99 and an erroneous standard for evaluating the probability of reoffense, based on his entire life expectancy.

When a defendant challenges the sufficiency of the evidence to support a finding that he is an SVP, "this court must review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.] To be substantial, the evidence must be "of ponderable legal

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

significance . . . reasonable in nature, credible and of solid value." ' ' " (*People v. Mercer* (1999) 70 Cal.App.4th 463.) "In reviewing the record to determine the sufficiency of the evidence this court may not redetermine the credibility of witnesses, nor reweigh any of the evidence, and must draw all reasonable inferences, and resolve all conflicts, in favor of the judgment." (*People v. Poe* (1999) 74 Cal.App.4th 826, 830.)

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

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

Evidence Code section 801 limits expert opinion testimony to an opinion that is "[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates . . ." (*Id.*, subd. (b).) A trial court has discretion

" 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' " (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*).)

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

Drs. Yanofsky and Patterson both based their opinions on police and parole officers' reports, prison records, psychiatric and psychologists' reports and evaluations, and their own interviews with Aguon and professional evaluations. These are the types of materials mental health professionals and experts reasonably rely on in forming their opinions in SVP cases. We conclude that the testimony of Drs. Yanofsky and Patterson provided sufficient basis from which the jury could reasonably find Aguon is an SVP.

Evidence Regarding Aguon's Current Mental Disorder

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

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

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

Section 6600 subdivision (e) defines "predatory" as "an act [that] is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship

exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization."

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

Dr. Yanofsky testified that he based his diagnosis of paraphilia NOS on the persistence of Aguon's engaging in rapes over a long period of time. Moreover, "upon further examination of the clinical interview, the clinical data I have available, Mr.

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

Aguon challenges the predictive accuracy of the Static-99, arguing its "predictive accuracy is 20 to 30 percent better than flipping a coin." He also contends the Static-99 was developed based on a sample that was primarily pedophiles, who are more likely to reoffend; therefore, because he has no record of child molestation, the Static-99 does not sufficiently support the finding he is likely to reoffend at the rate indicated by the results of the Static-99. Finally, he contends the experts applied an erroneous standard of "likely" by assessing his risk of reoffense over the whole rest of his life. According to him, "If a person is to be civilly committed, it must be based on his dangerousness at the time of his commitment or within the reasonably-foreseeable future. A prediction of dangerousness over the whole remaining course of an individual's life exceeds that." We need not address these concerns because, as discussed above, the Static-99 was but one of

the tools that demonstrated his likelihood to reoffend. Therefore, even if the results of the static-99 were discarded, other actuarial tools demonstrated his likelihood of reoffense.

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

Aguon counters that the California Supreme court's "interpretation gives the California SVP statute a broad sweep that confines more people who would not actually reoffend than it does people who would. Because it is not narrowly tailored to a compelling state interest, it denies due process of law" under the federal Constitution. He also contends the trial court erred in instructing the jury with the portion of CALCRIM No. 3454 stating the People are required to prove: "As a result of that diagnosed mental disorder, he is a danger to the health and safety of others because *it is likely* that he will engage in sexually violent predatory criminal behavior." (Emphasis added.) We are

bound by California Supreme Court authority as stated in *Roberge, supra*, 29 Cal.4th 979. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*)).)

II.

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

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

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

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

III.

Evidence Regarding 1972 Guam Incident

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

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

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

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

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

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

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

IV.

Use of Term "Sexually Violent Predator" During Trial

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

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

Aguon correctly identified the Legislature as the drafter of the law, which specifically defines the term "sexually violent predator." And he correctly points out that the trial necessarily raised the subject of his acts of sex and violence. We conclude it was not error for the parties to use the term "sexually violent predator" and variations thereof to describe him or his conduct. We note that Aguon's counsel also used the same term or its abbreviation, "SVP," several times during closing argument. We conclude Aguon has not alleged that he suffered the kind of prejudice that warrants reversal, or that this court is authorized to remedy. The legislature appears better suited to address his arguments.

V.

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

VI.

Underground Regulations

Aguon contends the evaluations supporting the petition are invalid because the statutorily-required protocol was promulgated in violation of the APA, and therefore the trial court lacked jurisdiction to proceed with the SVP petition. He challenges the legality of his commitment because it derived from the Department's reliance on a mental health evaluation protocol, parts of which the Office of Administrative Law (OAL) has since determined constitute "underground" regulations.³ Aguon contends that the

³ State agencies must formally adopt regulations in compliance with the procedural requirements of the APA. Certain guidelines that have not been adopted pursuant to the APA are considered to be illegal "underground regulations." (See Cal. Code Regs., tit. 1, § 250, subd. (a) ["'Underground regulation' means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA."].)

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

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

a. Additional Background

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

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

b. *Analysis*

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

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

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

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

In analogous circumstances in the context of a criminal prosecution, the California Supreme Court has concluded that defects in the preliminary hearing phase of a criminal proceeding do not automatically invalidate a subsequent conviction; rather, a defendant must show that he or she was prejudiced by the challenged defect. (See *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-530 (*Pompa-Ortiz*)). "[I]rregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if [the] defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. The right to relief without any showing of prejudice will be limited to pretrial challenges of

irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects." (*Id.* at p. 529.) "The presence of a jurisdictional defect which would entitle a defendant to a writ of prohibition prior to trial does not necessarily deprive a trial court of the legal power to try the case if prohibition is not sought." (*Ibid.*)

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

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

right or a fair trial; therefore, we reject his challenge to the Department's use of an "underground regulation" in evaluating him under the SVPA.⁴

VII.

Ex Post Facto and Double Jeopardy

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

The court held in *McKee I, supra*, 47 Cal.4th 1172, that the SVPA is nonpunitive, and a person is committed only for as long as he meets the SVP criteria of mental abnormality and dangerousness, and therefore the Act does not fall within the scope of

⁴ One court concluded the 2007 standardized assessment protocol was an invalid underground regulation, but use of the invalid assessment did not affect the court's fundamental jurisdiction over an SVP proceeding. (*In re Ronje* (2009) 179 Cal.App.4th 509, 516-518; accord, *Davenport v. Superior Court* (2012) 202 Cal.App.4th 665, 670.)

the ex post facto clause. (*Id.* at pp. 1194-1195.) Under *McKee I*, Aguon's contention fails.

We similarly reject Aguon's contention that his commitment under the amended SVPA constitutes double jeopardy. The double jeopardy clause of the federal Constitution prohibits punishing an individual twice for the same offense. (*Kansas v. Hendricks*, (1997) 521 U.S. 346, 369.) Considering that the amended SVPA is civil in nature, not punitive, a commitment under the amended SVPA does not constitute a second prosecution or second punishment for the same offense for which Aguon was previously convicted and incarcerated. (See *Hendricks*, at p. 369; see also *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1226 (*Hubbart II*.)

VIII.

Due Process

Aguon contends the amended SVPA's provision for commitment to an indeterminate term violates his right to due process. The *McKee I* court rejected this claim. (*McKee I*, *supra*, 47 Cal.4th at p. 1198.) Relying on *Jones v. United States* (1983) 463 U.S. 354, a case involving commitment proceedings for those adjudged not guilty by reason of insanity, the *McKee I* court concluded that "the requirement that [an individual], after [an] initial commitment, must prove by a preponderance of the evidence that he is no longer an SVP does not violate due process." (*McKee I*, at p. 1191.) We are bound to follow that decision. (*Auto Equity*, *supra*, 57 Cal.2d at p. 455.) Accordingly, we reject Aguon's due process claim.

IX.

Equal Protection

" ' "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." ' ' (Cooley v. Superior Court (2002) 29 Cal.4th 228, 253.)

In *McKee I*, the court held that persons committed under the SVPA are similarly situated to persons committed under the Mentally Disordered Offender Act (Pen. Code, § 2960 et seq.) and persons committed under the Lanterman–Petris–Short Act (Welf. & Inst. Code, § 5000 et seq.) after being found not guilty by reason of insanity (Pen. Code, § 1026 et seq.). (*McKee I*, supra, 47 Cal.4th at pp. 1203, 1207.) Mentally disordered offenders (MDO's) may be committed as a condition of parole for renewable one-year periods. (*McKee I*, at p. 1202; Pen. Code, §§ 2970, 2972, subds. (a) & (c).) Persons found not guilty by reason of insanity may be committed up to the maximum prison sentence for the underlying crime, with possible two-year extensions. (*McKee I*, at p. 1207; Pen. Code, § 1026.5, subds. (a)(1) & (b)(1).)

In *McKee I*, the court held the defendant's claim of disparate treatment would be reviewed under the strict scrutiny standard. (*McKee I*, supra, 47 Cal.4th at pp. 1197–1198.) The court concluded, however, that "[b]ecause neither the People nor the courts below properly understood this burden, the People will have an opportunity to make the appropriate showing on remand. It must be shown that, notwithstanding the similarities between SVP's and MDO'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." (*Id.* at pp. 1207–1208.) The Supreme

Court remanded the matter to the trial court for further proceedings consistent with its opinion. (*Ibid.*)

Following remand, the trial court found that the People presented substantial evidence to support a reasonable perception that SVP's pose a unique or greater danger to society than MDO's and those not guilty by reason of insanity (NGI's). (*McKee II, supra*, 207 Cal.App.4th at p. 1347.) This evidence included testimony from experts that SVP's pose a higher risk of reoffending than MDO's or NGI's. (*Id.* at pp. 1340–1342.) The People also presented evidence that victims of sexual offenses go through greater trauma than victims of other traumas because of the intrusiveness and long-lasting effects of sexual assault or abuse. (*Id.* at pp. 1342–1344.) These effects include psychological, physiological, social and neuropsychological consequences on the victim. (*Ibid.*) Additionally, the People presented substantial evidence that SVP's have significantly different diagnoses and treatment plans than MDO's and NGI's and that indeterminate commitment supports SVP's compliance and success rate of those treatment plans. (*Id.* at p. 1347.)

This court independently reviewed the evidence and agreed that the People had established " 'the inherent nature of the SVP's mental disorder makes recidivism as a class significantly more likely[;] . . . that SVP's pose a great 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 . . . that the disparate treatment of SVP's under the amended [SVPA] is necessary to further the state's compelling interests in public safety and humanely treating

the mentally disordered." (*McKee II, supra*, 207 Cal.App.4th at p. 1347.) We concluded that the disparate treatment of SVP's under the act "is reasonable and factually based" (*id.* at p. 1348) and, therefore, that the SVPA does not violate the SVP's constitutional right to equal protection of the law. (*Ibid.*)

In supplemental briefing, Aguon challenges this court's decision in *McKee II*, 207 Cal.App.4th 1325, arguing that as a matter of law, there is no compelling state interest that makes it necessary to impose upon SVP's a burden of proof and a term of commitment different from that which applies to MDO's and NGI's. Specifically, Aguon contends that the analysis of recidivism in *McKee II*, at pp. 1340-1341, does not compare the general dangerousness of SVP's vis-à-vis MDO's and NGI's: He argues, "To determine whether there is a compelling state interest in protecting the public from SVP's that justifies treating SVP's differently from MDO's, there must be a showing as to the comparative [*sic*] danger that MDO's present to the public, a danger that is not limited to the prospect of sex offenses." Aguon argues this Court's analysis of "greater trauma of victims of sexual offenses" in *McKee II*, at pp. 1342-1343 does not apply to persons like him who did not victimize children, but adult women exclusively. He further argues, "To compare the trauma suffered by victims of sex offenses with that suffered by victims of nonsex offenses generally is again to fail to make the comparison that is relevant to the distinction that the Legislature has made in treating SVP's differently from MDO's." Finally, contends this court's analysis of "diagnostic and treatment differences" in *McKee II*, at p. 1342-1344, is deficient because the comparison we make suggests that MDO's and NGI's might be more, not less, dangerous than SVP's: Aguon claims, "When we are

speaking of impulsive or opportunistic crimes of arson, mayhem, attempted murder, robbery, and crimes of violence inflicting severe bodily injury as we are in the case of MDO's, this evidence does not obviously support more severe restrictions upon the SVP's." Aguon prays for this relief: "Because [he] does not present a threat to children and because the evidence considered [in *McKee III*] fails to address the danger actually presented by MDO's and NGI's, [his] case should be remanded for a hearing on the issue of whether, to further a compelling state interest, it is necessary to impose a burden of proof and a term of commitment upon SVP's that is different from that applied to MDO's and NGI's."

McKee II is now final because the California Supreme Court has denied review. We conclude that this case is governed by *McKee II*, and Aguon's arguments suggesting that *McKee II* was wrongly decided are unavailing, therefore, it is unnecessary for us to remand the case for a particularized hearing to explore his claims.

X.

Aguon contends that his attorney rendered ineffective assistance of counsel for failing to challenge the SVPA on constitutional grounds. This claim is moot in light of our rejection of all of Aguon's constitutional arguments.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.