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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY JUDGE,

Defendant and Appellant.

D054342

(Super. Ct. No. MH102101)

APPEAL from a judgment of the Superior Court of San Diego County, Peter L. Gallagher, Judge. Affirmed.

Anthony Judge appeals a judgment committing him for an indeterminate term to the custody of the State of California Department of Mental Health (Department) under the Sexually Violent Predators Act (Welf. & Inst. Code, § 6600 et seq. (the SVPA)).¹ He

¹ All further section references are to the Welfare and Institutions Code.

contends the judgment must be reversed because his indeterminate commitment under the SVPA violates his constitutional rights to due process and equal protection. Judge also asserts the court prejudicially erred when it refused to give the jury an amplifying instruction regarding the standard for finding a likelihood of committing future predatory acts under the SVPA.

Judge's constitutional claims were recently addressed in part by the California Supreme Court in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*). In our original opinion, we followed *McKee I* by rejecting Judge's due process claim and remanding for further proceedings on his equal protection claim. The Supreme Court granted Judge's petition for review; vacated our decision; and, in order to prevent an unnecessary multiplicity of proceedings on the equal protection claim, ordered us to suspend further proceedings in Judge's appeal pending finality of the proceedings on remand in *McKee I*. The trial court rejected McKee's equal protection claim on remand, this court affirmed that decision in *People v. McKee* (2012) 207 Cal.App.4th 1325 (*McKee II*), and the Supreme Court denied review. The decision in *McKee II* having become final, we reject Judge's constitutional challenges to the SVPA on the authority of *McKee I* and *McKee II*. We also reject his claim of instructional error. Thus, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2008, the People filed a petition to commit Judge as a sexually violent predator (SVP). The parties stipulated to Judge's previous convictions: In 1977, he was convicted of assault with intent to commit rape and assault with a deadly weapon, and

was sentenced to Patton State Hospital as a mentally disordered sex offender. In 1982, Judge was convicted of forcible rape, and in 1993 forcible oral copulation. While incarcerated, Judge exposed himself to female prison guards and employees, with the last such incident occurring in 1995.

At a jury trial, two prosecution² experts testified that Judge suffered from paraphilia and antisocial personality disorder. Both experts also testified that they believed Judge is likely to commit sexually violent predatory offenses in the future. Employing various predictive tests, including the STATIC-99 test, the prosecution experts estimated the probability of Judge committing a sexually violent offense over the 10 years after trial was between 30.8 percent and 100 percent.

Judge presented an expert psychologist and licensed clinical social worker, Brian Abbott, who testified that the recidivism rates projected by the standard predictive tests used by the prosecution experts were skewed by irrelevant and outdated data. Applying more recent California data to adjust Judge's STATIC-99 test score, Abbott testified Judge's likelihood of reoffense was approximately 15 percent over the next 10 years. Abbott offered no opinion on whether Judge met the criteria for commitment as an SVP.

The jury found Judge was an SVP, and the trial court committed him for an indeterminate term pursuant to the SVPA.

² Although a proceeding under the SVPA is civil in nature (*People v. Allen* (2008) 44 Cal.4th 843, 860 (*Allen*)), we follow the common practice of characterizing the parties to the action as the "prosecution" and "defense" (see, e.g., *id.* at p. 866; see also *People v. Hurtado* (2002) 28 Cal.4th 1179, 1192 (*Hurtado*) ["Although the SVPA is a civil proceeding, its procedures have many of the trappings of a criminal proceeding."]).

DISCUSSION

We discuss Judge's various appellate challenges below, after providing a general overview of the SVPA.

I

OVERVIEW OF THE SVPA

The SVPA provides for the involuntary and indefinite civil commitment of persons who have been convicted of a sexually violent offense and are found to be SVP's following the completion of their prison terms. (§ 6604.) As originally enacted, the SVPA provided for a two-year period of confinement. The SVPA was amended in 2006 to provide for an indeterminate term of confinement for persons who are found beyond a reasonable doubt to be SVP's. (*Ibid.*; see *People v. Shields* (2007) 155 Cal.App.4th 559, 562-563.)

The SVPA defines an SVP 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).) The requirement that an SVP be found "likely [to] engage in sexually violent criminal behavior" (*ibid.*) means "the person presents a substantial danger, that is, a serious and well-founded risk, that he or she will commit such crimes if free in the community." (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 922 (*Ghilotti*), italics omitted.)

The SVPA requires the Department to review the mental condition of a committed SVP at least annually, and allows the court to appoint, or the committed person to retain, a qualified expert or professional person to examine him or her. (§ 6605, subd. (a).) If the Department concludes the committed individual no longer meets the requirements of the SVPA, or that conditional release is appropriate, it must authorize the filing of a petition for release by the committed individual. (§ 6605, subd. (b).)³ If, after a probable cause hearing, the court determines the petition has merit, the committed person is entitled to a trial, with all the constitutional protections that were afforded at the initial commitment hearing. (§ 6605, subds. (c), (d).) At the trial, if the state opposes the petition, it must prove beyond a reasonable doubt that the committed individual remains an SVP. (§ 6605, subd. (d).) If the trier of fact finds in the committed person's favor, the person must be unconditionally released and discharged. (§ 6605, subd. (e).)

If the Department does not authorize the filing of a petition for release, the committed person may file a petition for conditional release or unconditional discharge under section 6608, subdivision (a). Unless the court finds the petition is frivolous or includes no evidence of changed circumstances, it must set a hearing on the petition. (§ 6608, subds. (a), (d).) In such a hearing, which may not be held until at least one year from the date of the order of commitment, the committed person must prove by a

³ A parallel provision requires the Department to seek judicial review of a commitment through habeas corpus proceedings if at any time it has reason to believe the committed person is no longer an SVP. "If the superior court determines that the person is no longer a sexually violent predator, he or she shall be unconditionally released and unconditionally discharged." (§§ 6605, subd. (f), 7250; see generally *Allen, supra*, 44 Cal.4th at p. 859.)

preponderance of the evidence that he or she is entitled to be unconditionally discharged or placed in a state-operated forensic conditional release program for one year. (§ 6608, subds. (c), (d), (i).) If the court denies the petition, the committed person may not file another petition until one year from the date of denial. (§ 6608, subd. (h).) If the court places a person in a state-operated forensic conditional release program for one year, at the end of the year it must hold another hearing to determine if the person should be unconditionally discharged on the ground that he or she no longer meets the requirements of the SVPA. (§ 6608, subd. (d).) If the court determines the person is not ready for unconditional discharge, it may place the person on outpatient status. (§ 6608, subd. (g).)

II

DUE PROCESS

Judge contends the SVPA violates his federal constitutional right not to be deprived of liberty "without due process of law" (U.S. Const., 14th Amend., § 1) because, after the initial commitment order, it shifts the burden of proof to the committed person to prove that he or she is no longer an SVP. The California Supreme Court considered and rejected this claim in *McKee I, supra*, 47 Cal.4th at pages 1188-1193. After issuance of the Supreme Court's opinion in *McKee I*, we requested supplemental briefing from the parties on the impact of that decision on this appeal. In that briefing, Judge conceded *McKee I* disposes of his due process claim. We, of course, are bound by the decision in *McKee I* and reject Judge's due process claim on that basis. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III

EQUAL PROTECTION

Judge asserts his involuntary commitment under the SVPA violates his equal protection rights because (1) SVP's are subject to indeterminate terms of commitment while persons subject to other civil commitment schemes are subject to only one- or two-year terms, and (2) the SVPA treats SVP's whom the Department authorizes to file a petition for release or discharge more favorably than those SVP's who are not authorized to file such a petition. We address these claims in turn after setting forth the generally applicable legal principles.

A. Applicable Legal Standards for Equal Protection Claims

The federal and California Constitutions both forbid a state to deny to any person within its jurisdiction the "equal protection of the laws." (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7, subd. (a).) The basic guarantee of equal protection is that those who are similarly situated relative to the purpose of a law will receive like treatment. (*City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 439; *In re Lemmanuel C.* (2007) 41 Cal.4th 33, 47.) "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." (*Baxtrom v. Herold* (1966) 383 U.S. 107, 111.) Thus, a state "may adopt more than one procedure for isolating, treating, and restraining dangerous persons" based on reasonably perceived differences in the degree of danger posed by different classes of persons. (*Conservatorship of Hofferber* (1980) 28

Cal.3d 161, 172 (*Hofferber*); accord, *People v. Hubbard* (2001) 88 Cal.App.4th 1202, 1217 (*Hubbart*).

"Strict scrutiny is the appropriate standard against which to measure claims of disparate treatment in civil commitment." (*People v. Green* (2000) 79 Cal.App.4th 921, 924; accord, *Hofferber, supra*, 28 Cal.3d at p. 171, fn. 8.) Under this standard, disparate treatment "is upheld only if it is necessary to further a compelling state interest." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1156 (*Buffington*)). The state bears the burden of showing the distinctions drawn by the law are necessary to further the compelling interest underlying the law. (*Hubbart, supra*, 88 Cal.App.4th at p. 1217.)

B. *Judge's Claim That the Differences in the Initial Term of Commitment Applicable to SVP's and Other Groups of Civilly Committed Persons Violates His Equal Protection Rights Has No Merit*

Judge argues that subjecting him to an indeterminate term of commitment violates his right to the equal protection of the laws because other dangerous felons subject to civil commitment are confined for only relatively short determinate terms. We disagree. As we shall explain, this argument was rejected by the decisions in *McKee I, supra*, 47 Cal.4th 1172, and *McKee II, supra*, 207 Cal.App.4th 1325.

1. *The McKee I Decision*

In *McKee I*, the defendant challenged as a violation of his equal protection rights an order committing him for an indeterminate term under the SVPA. (*McKee I, supra*, 47 Cal.4th at p. 1185.) Our Supreme Court held SVP's are similarly situated to other civilly committed persons, including persons found to be mentally disordered offenders (MDO's) and those found not guilty by reason of insanity (NGI's). (*Id.* at pp. 1203,

1207.) Therefore, absent a showing by the state of a justification for treating SVP's significantly less favorably than MDO's and NGI's, the Supreme Court concluded the SVPA may violate an SVP's constitutional right to the equal protection of the laws. (*McKee I*, at pp. 1203, 1207.) The Supreme Court remanded the case to the trial court to determine whether the state could establish that, relative to MDO's and NGI's, SVP's "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 p. 1208.) The Supreme Court noted that the state could satisfy this burden by demonstrating "that the inherent nature of the SVP's mental disorder makes recidivism as a class significantly more likely"; "that SVP's pose a greater risk to a particularly vulnerable class of class of victims, such as children"; or "some other justification." (*Ibid.*)

2. *The McKee II Decision*

On remand, after a lengthy evidentiary hearing the trial court concluded the People had presented substantial evidence to support a reasonable perception that SVP's pose a different or greater danger to society than that posed by MDO's or NGI's. (*McKee II*, *supra*, 207 Cal.App.4th at p. 1332.) This evidence included statistical data, psychological test scores and testimony from experts that due to the nature of their mental disorders, SVP's as a class pose a significantly higher risk of recidivism than do MDO's or NGI's. (*Id.* at pp. 1340-1342.) In particular, the evidence supported "a reasonable inference or perception that SVP's pose a higher *risk* of sexual reoffending than do MDO's or NGI's." (*Id.* at p. 1342.) The People also presented evidence that victims of sexual offenses suffer

more severe physical, mental and emotional harm than do victims of nonsex offenses because of the intrusiveness and long-lasting consequences of sex offenses. (*Id.* at pp. 1342-1344.) In particular, "that evidence and the evidence discussed above regarding recidivism rates support a reasonable inference that SVP's, as sexually violent offenders with serious mental disorders making them dangerous, generally pose an increased risk of harm to the vulnerable class of children." (*Id.* at p. 1344.) Finally, the People presented evidence that SVP's have diagnoses that are significantly different from those of MDO's and NGI's. Whereas MDO's and NGI's are much more likely to suffer from psychotic disorders than from pedophilia or another paraphilia, the converse is true of SVP's. (*Ibid.*) Treatment plans and success rates likewise differ among these groups: Patients with psychotic disorders are likely to respond to medication and to participate in treatment, but patients with paraphilias are much less likely to respond to medication or to participate in treatment. (*Id.* at pp. 1344-1346.) Thus, commitment for an indeterminate term, rather than a relatively short, fixed term (e.g., two years), facilitates SVP's compliance with their treatment plans. (*Id.* at pp. 1345-1347.)

On appeal, this court independently reviewed the evidence discussed above to "determine whether the People presented substantial evidence to support a reasonable inference or perception that the [SVPA's] disparate treatment of SVP's is necessary to further compelling state interests." (*McKee II, supra*, 207 Cal.App.4th at p. 1339.) This court concluded the People had "shown 'that the inherent nature of the SVP's mental disorder makes recidivism as a class significantly more likely[;] . . . that SVP's pose a greater risk [and unique dangers] to a particularly vulnerable class of victims, such as

children'; and that SVP's have diagnostic and treatment differences from MDO's and NGI's, thereby supporting a reasonable perception by the electorate . . . that 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." (*Id.* at p. 1347, quoting *McKee I, supra*, 47 Cal.4th at p. 1208.) This court therefore held the disparate treatment of SVP's "is reasonable and factually based," and the SVPA does not violate their constitutional right to the equal protection of the laws. (*McKee II*, at p. 1348.)

3. *Application of the McKee II Decision to This Case*

After awaiting the final resolution of the equal protection claim in *McKee II, supra*, 207 Cal.App.4th 1325, as instructed by our Supreme Court, we requested supplemental briefing on the impact of that decision on this appeal. The People responded with a short supplemental brief urging us to follow *McKee II*. Judge initially declined the opportunity to address the issue, but later substituted counsel, obtained permission to file a supplemental brief, and submitted a brief advancing several arguments why we should not follow *McKee II*. None is persuasive.

First, Judge contends we are not bound by the decision in *McKee II* because (1) the Supreme Court's order granting review and directing us to hold the case pending finality of the decision in *McKee II* does not require us to follow that decision; (2) the Supreme Court's "failure to grant review in *McKee II* does not elevate the decision to controlling precedent"; (3) "[o]ne Court of Appeal does not bind another Court of Appeal"; and (4) the People previously acknowledged the trial court's decision on remand

would not bind other courts. We agree *McKee II* does not constitute precedent "binding upon us"; but that does not mean we should not follow it if "we find its rationale quite persuasive," as we do. (*Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority* (1974) 40 Cal.App.3d 98, 101.)

Second, Judge argues he "is in a significantly different position than McKee and thus should not be bound by the evidence introduced by McKee at his trial" because he "is a convicted rapist, not a pedophile." This argument was recently rejected in *People v. McKnight* (Dec. 12, 2012, A123119) ___ Cal.App.4th ___ [2012 Cal.App. LEXIS 1325] (*McKnight*). McKnight argued *McKee II* did not resolve his equal protection claim because, unlike McKee, McKnight "was not convicted of crimes against children." (*McKnight*, at p. *4.) Our colleagues in the First District disagreed, as do we, because "the analysis and holding in *McKee II* do not turn on concerns specific to child predators." (*Ibid.*) The *McKee II* court noted that compared to MDO's and NGI's, SVP's (1) pose a greater risk of reoffense; (2) cause greater harm to their victims, whether child or adult, because sex offenses have longer lasting and more intrusive consequences than nonsex offenses; and (3) require longer commitments due to different diagnoses and treatment plans. (*McKee II, supra*, 207 Cal.App.4th at pp. 1340-1347.) The court held these differences between SVP's *as a class* and other types of offenders justify their different treatment under the SVPA. (*McKee II*, at p. 1347.) This holding "is not to be restricted to Mr. McKee alone or . . . to those SVP's convicted of crimes against children"; it "applies to the class of SVP's as a whole," including Judge. (*McKnight*, at p. *5.)

Third, Judge criticizes the *McKee II* court for not conducting the required de novo review of the evidence, but instead conducting "a mixture of sufficiency of the evidence review and the rational basis test," which was insufficiently critical of the evidence introduced at trial. We reject this criticism.

The *McKee II* court stated the equal protection claim "involved mixed questions of law and fact that are predominantly legal, if not purely legal, *which are subject to de novo review.*" (*McKee II, supra*, 207 Cal.App.4th at p. 1338, italics added.) The court went on to state: "*In independently reviewing the evidence admitted at the remand hearing, we must determine whether the People presented substantial evidence to support a reasonable inference or perception that the [SVPA's] disparate treatment of SVP's is necessary to further compelling interests.*" (*Id.* at p. 1339, italics added.) This is consistent with the applicable standard of review articulated by the Supreme Court: "When a constitutional right, such as the right to liberty from involuntary confinement, is at stake, the usual judicial deference to legislative findings gives way to an exercise of *independent judgment* of the facts to ascertain whether the legislative body "'has drawn reasonable inferences based on substantial evidence.'" (*McKee I, supra*, 47 Cal.4th at p. 1206, italics added.) The *McKee II* court then spent several pages reviewing in detail the evidence presented at the remand trial, noting various disagreements in the expert testimony, and concluding substantial evidence supported a reasonable inference or perception that disparate treatment of SVP's was necessary to further the state's compelling interests in public safety and humane treatment of the mentally ill. (*McKee II*, at pp. 1339-1348.) We therefore agree with the First District that the "claim

that the appellate court failed to independently review the trial court's determination is frivolous." (*McKnight, supra*, ___ Cal.App.4th at p. ___ [2012 Cal.App. LEXIS at p. *4].)

Fourth, and finally, Judge complains the *McKee II* court did not subject the SVPA to strict scrutiny because it did not determine whether the indeterminate term of commitment prescribed for all SVP's was "the least restrictive means available, necessary to fulfill a compelling governmental interest, and narrowly tailored to meet that compelling governmental interest." We disagree. As we shall explain, although the *McKee II* court did not articulate the strict scrutiny test in the terms Judge prefers, it did apply the required level of scrutiny.

The United States Supreme Court has articulated the strict scrutiny test in various ways. For example, it stated the test in this simple way: "To survive strict scrutiny, . . . a State must do more than assert *a compelling state interest*—it must demonstrate that its law is *necessary to serve the asserted interest*." (*Burson v. Freeman* (1992) 504 U.S. 191, 199, italics added.) The Supreme Court also stated the test in somewhat more detail: "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by *sufficiently important state interests* and is *closely tailored to effectuate only those interests*." (*Zablocki v. Redhail* (1978) 434 U.S. 374, 388, italics added.) With even more elaboration, the Supreme Court explained:

"[Laws] measured by a strict equal protection test . . . are unconstitutional unless the State can demonstrate that such laws are '*necessary to promote a compelling governmental interest*.' [Citations.] . . . [¶] It is not sufficient

for the State to show that [classifications affecting fundamental rights] further *a very substantial state interest*. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be *drawn with 'precision,'* [citations] and must be *'tailored' to serve their legitimate objectives*. [Citation.] And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose *'less drastic means.'*" (*Dunn v. Blumstein* (1972) 405 U.S. 330, 342-343 (*Dunn*), italics added.)

The Supreme Court recognized, however, that using particular language to articulate the test is less important than applying the proper level of scrutiny to review the challenged legislation: "Thus phrased, the constitutional question may sound like a mathematical formula. But legal 'tests' do not have the precision of mathematical formulas. The key words emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes." (*Ibid.*)

California courts likewise have not been uniform in their articulation of the strict scrutiny test. For example, one Court of Appeal wrote:

"Personal liberty is a fundamental right, and a classification infringing on such a right is subject to strict judicial scrutiny. [Citations.] Under this very severe standard, a discriminatory law will not be given effect unless the state establishes the classification bears *a close relation* to the promotion of *a compelling state interest*, the classification is *necessary to achieve the government's goal*, and the classification is *narrowly drawn to achieve the goal by the least restrictive means possible.*" (*People v. Leng* (1999) 71 Cal.App.4th 1, 11; accord, *People v. Cole* (2007) 152 Cal.App.4th 230, 238.)

In a case involving an equal protection challenge to a civil commitment statute, our Supreme Court stated more simply that "the state must establish both that it has *a 'compelling interest'* which justifies the challenged procedure and that the distinctions

drawn by the procedure are *necessary to further that interest.*" (*In re Moye* (1978) 22 Cal.3d 457, 465 (*Moye*), italics added.) And, in a case involving three equal protection challenges to the SVPA, the Court of Appeal used the *Moye* formulation in stating that when a distinction "involves a suspect class or infringes on a fundamental interest, it is strictly scrutinized and is upheld only if it is *necessary to further a compelling state interest.*" (*Buffington, supra*, 74 Cal.App.4th at pp. 1155-1156, italics added.)

Indeed, in remanding the case in *McKee I*, the Supreme Court specifically instructed the trial court to "apply[] the equal protection principles in *Moye* and related cases discussed in [its] opinion" (*McKee I, supra*, 47 Cal.4th at p. 1208), and determine whether, after the trial, the People had shown that imposing on SVP's greater burdens to obtain release from commitment than are imposed on MDO's and NGI's is *necessary to promote the state's compelling interests in public safety and humane treatment of the mentally ill* (*id.* at pp. 1207-1211). At the remand trial, the People met this burden by showing that SVP's as a class pose a higher risk of recidivism than do MDO's or NGI's (*McKee II, supra*, 207 Cal.App.4th at pp. 1340-1342), and that, because of differences in underlying mental disorders and treatment plans, indeterminate terms were more likely to be required and beneficial for SVP's than they would be for MDO's or NGI's (*id.* at pp. 1344-1347). Although contrary evidence was introduced, the People's burden was to show that "the legislative distinctions in classes of persons subject to civil commitment are reasonable and factually based—not [that] they are incontrovertible or uncontroversial." (*McKee I*, at p. 1210; accord, *McKee II*, at p. 1348.) Moreover, by independently reviewing that evidence to determine whether "the legislative body "'has

drawn reasonable inferences based on substantial evidence" (McKee I, at p. 1206; accord, McKee II, at p. 1339), the McKee II court held the People to their "heavy burden of justification" and "closely scrutinized [the SVPA] in light of its asserted purposes" (Dunn, supra, 405 U.S. at p. 343). The strict scrutiny test required no more.

In sum, we agree with the conclusions reached in McKee II, supra, 207 Cal.App.4th 1325. Accordingly, we hold that the trial court's imposition of an indeterminate term of commitment on Judge pursuant to the SVPA did not violate his constitutional right to the "equal protection of the laws." (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7, subd. (a).)

C. *Judge's Claim That He Was Deprived of Equal Protection Based on the SVPA's Postcommitment Release Procedures Is Not Ripe*

Judge also urges us to reverse the judgment based on an equal protection claim not specifically considered in McKee I or McKee II: Whether the SVPA violates equal protection because its procedures on petitions for conditional release or unconditional discharge subsequent to initial commitment unjustifiably differentiate between (1) an SVP who seeks conditional release or unconditional discharge *with the Department's authorization and receives a hearing at which the state must prove beyond a reasonable doubt that the SVP is not entitled to release or discharge*, and (2) an SVP who seeks conditional release or unconditional discharge *without the Department's authorization and receives a hearing at which the SVP must prove by a preponderance of the evidence that the SVP is entitled to release or discharge*. (§§ 6605, 6608.) We had concerns that this claim may not be ripe for review and requested supplemental briefing on the issue.

Having considered that supplemental briefing, we decline to reach the merits of this claim.

Consistent with the principle that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws," we may render constitutional judgments only where it is necessary to adjudicate the rights of the parties in the particular case before the court. (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 610-611.) "The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court." (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 119 (*Younger*)). Therefore, "[o]ne who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation." (*People v. Williams* (1966) 247 Cal.App.2d 169, 170.)

Here, Judge appeals a judgment made under the SVPA's initial commitment procedures (§§ 6601-6604), not a judgment or order made under the SVPA's postcommitment procedures for release or discharge (§§ 6605, 6608). Judge has not shown he has been aggrieved by the procedures applicable to petitions for conditional release or unconditional discharge, which he claims violate his equal protection rights. His claim seeks an advisory opinion based on hypothetical facts, which we are not permitted to render. (*Younger, supra*, 21 Cal.3d at p. 119; *People v. Williams, supra*, 247 Cal.App.2d at p. 170.) Accordingly, we decline to address Judge's claim that the SVPA's postcommitment procedures for petitions seeking conditional release or unconditional discharge unconstitutionally deprive him of the equal protection of the laws. (Cf. *People*

v. Carroll (2007) 158 Cal.App.4th 503, 508, fn. 2 (*Carroll*) [declining to issue advisory opinion as to constitutionality of SVPA provisions that did not apply to decision under review].)

Judge nevertheless urges us to decide this claim because he has been committed for longer than a year and has not been authorized by the Department seeking release. There is, however, no record before us of any petition Judge has filed to seek release. If and when Judge avails himself of the statutory procedures under section 6608, subdivision (a), and is aggrieved by a ruling under that provision, he may appeal. (*People v. Collins* (2003) 110 Cal.App.4th 340, 348.) Until he has done so, the issue is not ripe for appellate review. (*Carroll, supra*, 158 Cal.App.4th at p. 508, fn. 2.)

IV

INSTRUCTIONAL ERROR

Judge claims the judgment must be reversed because the trial court committed instructional error regarding the likelihood of reoffense under the SVPA. After setting forth the pertinent procedural history, we shall explain why this claim has no merit.

A. *Proceedings Relevant to This Claim*

After the trial court indicated it would instruct the jury with CALCRIM No. 3454, Judge's trial counsel, apparently relying on language of *Ghilotti, supra*, 27 Cal.4th at pages 920-921, requested an amplifying instruction that to find Judge to be an SVP, the jury must first find that he posed a "high risk" of reoffense.⁴ The prosecutor responded

⁴ Judge's trial counsel apparently relied on the following statement in *Ghilotti*: "The SVPA thus consistently emphasizes the themes common to valid civil commitment

that the court need not amplify CALCRIM No. 3454 because it was developed after *Ghilotti* was decided and did not include the "high risk" language. The trial court refused to give the requested instruction, but stated Judge's counsel could argue in closing that the meaning of "substantial and well-founded" risk was "high risk."

During closing arguments, Judge's trial counsel argued that a "[c]urrent mental disorder means serious difficulty controlling behavior," and that this was "left off" the CALCRIM No. 3454 instruction. Counsel continued:

"[T]he term 'likely' means much more than the mere possibility that a person will engage in such a conduct. It means that he does, in fact, present a high risk that he will engage in such conduct. So if the risk is not high, he's not a sexually violent predator. It is a high risk. And, again, this is one of the things in the law that's not written in the instruction but it is the law. If you have a question about this, ask His Honor for clarification about what 'likely' means because this is the state of the law. It must be a high risk."

The prosecutor argued in rebuttal that Judge's trial counsel

"spent a lot of time talking about, 'high risk.' That's not the state [of the law] in [CALCRIM No. 3454]. Unless you were to say, well, I guess you can interpret high risk meaning the way [CALCRIM No. 3454] defines it because they don't use the word 'high.' The instruction that you're going to follow basically talks about the kind of substantial, well-founded, serious risk. It's all in the law, and that is what guides your determination. There's nothing left out of CALCRIM. That's the law that's going to be guiding your decision."

statutes, i.e., a current mental condition or disorder that makes it difficult or impossible to control volitional behavior and predisposes the person to inflict harm on himself or others, thus producing dangerousness measured *by a high risk* or threat of further injurious acts if the person is not confined." (*Ghilotti, supra*, 27 Cal.4th at p. 920, original emphasis omitted, italics added.)

Judge's trial counsel objected. Before the trial court ruled on the objection, however, the prosecutor stated:

"The way [CALCRIM No. 3454] is phrased is the law you're going to be using in going through the elements in making your determination. If words aren't in there, you have to rely on what it says in the CALCRIM."

The trial court overruled Judge's trial counsel's objection, stating: "I disagree.

You follow the CALCRIM in applying the facts to the law. That's what it is. Continue."

After the jury retired for deliberations, Judge's trial counsel again requested an amplifying instruction "that [a] substantial, well-founded, serious risk is high risk" and requested for the first time an additional instruction that "volitional impairment requires that there's serious difficulty controlling behavior." He argued these instructions were needed to correct the implication during the prosecutor's rebuttal argument that he (Judge's trial counsel) was making up the law. The trial court declined to reinstruct the jury in the absence of any question from the jury. The jury deliberated without making any inquiries of the court and delivered its verdict the same day.

B. *The Trial Court Did Not Err by Failing to Give the Requested Amplifying Instruction*

Judge contends the trial court prejudicially erred by not instructing the jury with the requested amplifying instruction that the statutory requirement for finding Judge "likely to reoffend" meant the jury had to find he posed a "high risk" of reoffense and had "'serious difficulty in controlling [his] behavior.'" We disagree. As we shall explain, the trial court properly instructed the jury on the standards for determining whether Judge was an SVP.

As in any trial, the trial court in an SVPA proceeding must instruct on the general principles of law that are necessary to the jury's understanding of the case. (*People v. Roberge* (2003) 29 Cal.4th 979, 988.) We review claims of instructional error in SVPA cases under the harmless beyond a reasonable doubt standard. (*Hurtado, supra*, 28 Cal.4th at p. 1194, citing *Chapman v. California* (1967) 386 U.S. 18.)

The federal Constitution requires that an indefinite civil commitment be based on a determination that the individual committed has some illness, abnormality or disorder that causes "serious difficulty in controlling behavior" that renders the individual dangerous. (*Kansas v. Crane* (2002) 534 U.S. 407, 413.) Our Supreme Court has rejected the claim that this requires the jury to be instructed that to be found an SVP, the person's "diagnosed mental disorder must render the person *unable to control* his dangerous behavior." The court held that the plain 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." (*People v. Williams* (2003) 31 Cal.4th 757, 759, 763, 769.) The court further held a mental disorder meeting the statutory criteria of the SVPA "must additionally produce an actual risk of violent reoffense which, under all the applicable circumstances, is 'substantial,' 'serious,' and 'well-founded.'" Because jurors instructed using the statutory language of the SVPA understand that to be found to be an SVP the defendant must have a seriously impaired ability to control violent criminal sexual conduct, our Supreme Court held that no additional instructions on that point are needed. (*People v. Williams, supra*, at pp. 776-777.)

Here, the trial court instructed the jury with CALCRIM No. 3454, which uses terms contained in the SVPA⁵ and other language defining the phrase "likely to reoffend"⁶ that our Supreme Court has held satisfy constitutional requirements. (*People v. Williams, supra*, 31 Cal.4th at p. 777; *Ghilotti, supra*, 27 Cal.4th at p. 916.) In so doing, the court adequately advised the jury of the legal principles necessary to perform its task. Hence, we reject Judge's contention that the court erred by refusing to give amplifying instructions regarding "high risk" of reoffense and "serious difficulty in controlling behavior." (See *People v. Williams, supra*, at p. 777 [no error in failing to give separate instruction on issue of difficulty of controlling behavior].)

⁵ The jury was instructed that to find Judge was an SVP, it had to find, among other facts, that: (i) he had a diagnosed mental disorder; (ii) as a result of that disorder he was "likely" to engage in sexually violent predatory criminal behavior; and (iii) that it was "necessary to keep [him] in custody in a secure facility to ensure the health and safety of others." (CALCRIM No. 3454.) In addition, the instruction states that 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] a menace to the health and safety of others." (*Ibid.*) These portions of the instruction track the language of the SVPA. (See § 6600, subds. (a)(1), (c).)

⁶ The court's instructional language tracked *Ghilotti, supra*, 27 Cal.4th at page 922, where the court held: "[T]he phrase '*likely* to engage in acts of sexual violence' (italics added), as used in section 6601, subdivision (d), connotes much more than the mere *possibility* that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control. On the other hand, the statute does not require a precise determination that the chance of reoffense is *better than even*. Instead, an evaluator applying this standard must conclude that the person is 'likely' to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community."

C. *The Prosecutor's Rebuttal Argument Did Not Necessitate a Clarifying Instruction*

Judge further argues a clarifying jury instruction was required because the prosecutor's comments during closing argument effectively told the jury that to find Judge to be an SVP, it need not find he had "serious difficulty in controlling behavior" or that he posed a "high risk of re-offense." We disagree.

As we have explained, the California Supreme Court has determined the statutory language sufficiently describes the lack of behavioral control constitutionally required to commit an individual indefinitely, rejecting the argument that a separate instruction on behavioral control is necessary. (*People v. Williams, supra*, 31 Cal.4th at p. 777.)

Likewise, *Ghilotti* established that the terms "substantial danger, that is, a serious and well-founded risk," of reoffense accurately describe the standard for "likely to reoffend" under the SVPA. (*Ghilotti, supra*, 27 Cal.4th at p. 922, italics omitted.) Thus, the trial court here properly instructed the jury on the statutory elements required to find a person meets the SVPA requirements. The prosecutor's argument that the jury instructions given were complete is therefore supported by the law.⁷

⁷ Judge misplaced reliance on *Ghilotti, supra*, 27 Cal.4th 888, for a separate instruction on "high risk." In *Ghilotti*, our Supreme Court interpreted the term "likely to reoffend" used to define an SVP in the SVPA. The Supreme Court noted that the purpose of the SVPA was to protect the public from persons who were previously convicted of violent sex offenses and who, because of a current mental disorder, presented a "high risk of reoffense." Interpreting the statutory language "likely to reoffend" in accordance with this purpose, the Supreme Court concluded the language did not require that the chance of reoffense be better than even. Rather, the test was whether the person presented a "*substantial danger* — that is, a *serious and well-founded risk* — of reoffending." (*Id.* at p. 916.) Thus, *Ghilotti* does not stand for the proposition that the jury must determine a defendant poses a "high risk of reoffense" to find the defendant is an SVP.

Relying on *People v. Cordero* (1989) 216 Cal.App.3d 275, 282, Judge argues he was entitled to a clarifying instruction discussing "serious difficulty in controlling behavior" because it went to the heart of his defense theory. In *Cordero*, the jury inquired of the court about the meaning of an instruction on deliberate and premeditated killing, and the defense requested a clarifying instruction that would enable the jury to consider the defendant's mens rea theory. (*Id.* at pp. 280-281.) The trial court refused to give the requested instruction, which prevented the jury from considering the defense theory. (*Id.* at p. 280.) Unlike *Cordero*, there is no indication in this case that the jury was confused or that Judge was prevented from presenting his theory of the case. Judge's trial counsel amply argued his theory that Judge did not pose a "high risk" of reoffense so that the jury should not find him to be an SVP. Because the standard instruction covered the point and Judge's counsel's argument to the jury fully explicated defense theme, it was not error to refuse to instruct the jury with the clarifying instruction Judge requested.

(*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144-1145 (*Gutierrez*.)

D. *Any Error in Instructing the Jury Was Harmless*

Finally, even if there was instructional error, we are satisfied it was harmless. The evidence adduced at Judge's trial included a debate among the expert witnesses over the impact and accuracy of the standard tests used to measure Judge's likelihood of reoffense. The estimates of the likelihood of Judge's recidivism ranged from Judge's expert's 15 percent to the prosecution's experts' 100 percent. Judge presented no expert testimony that he was no longer suffering a mental disorder causing him difficulty in controlling his behavior. Rather, he argued that the lack of recent incidents showed he had his behavior

under control, and that proper analysis of his characteristics showed his risk of reoffense was not high.

Once the jury found Judge met the requirements set forth in the jury instruction — as we must presume it did — it necessarily found he had "serious difficulty in controlling behavior" because the SVPA "inherently embraces and conveys the need for a dangerous mental condition characterized by impairment of behavioral control." (*People v. Williams, supra*, 31 Cal.4th at p. 774, italics omitted.)⁸ Accordingly, there is no reasonable possibility on this record that the jury would not have found Judge to be an SVP had it been separately instructed to consider whether he had "serious difficulty in controlling behavior." (See *Gutierrez, supra*, 28 Cal.4th at pp. 1144-1145 [no prejudice where instructions and arguments covered defense theory].) Any error based on the failure to instruct on "serious difficulty in controlling behavior" was thus harmless beyond a reasonable doubt. (See *Hurtado, supra*, 28 Cal.4th at p. 1194.)

⁸ Arguing the statutory language is unclear, Judge points to the concurring opinion of Justice Kennard in *People v. Williams, supra*, 31 Cal.4th 757, which suggested it "would be prudent for California trial courts also to explain to jurors in future cases that defendants cannot be found to be sexually violent predators unless they have serious difficulty in controlling their behavior." (*Id.* at p. 780 (conc. opn. of Kennard, J.)) The majority held, however, that the language of the SVPA is clear and adequately instructs the jury on the behavioral control element (*People v. Williams, supra*, at pp. 776-777); Justice Kennard's suggestion is not grounds for reversal where, as here, the trial court instructed with that language. As we have explained, the instructions given to the jury provided proper guidance for determining whether Judge lacked behavioral control and posed a risk of reoffense sufficient to justify an indeterminate term of commitment.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.