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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR A. ACOSTA,

Defendant and Appellant.

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In re VICTOR ARTHUR ACOSTA on  
Habeas Corpus.

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D059553

(Super. Ct. No. MH104971)

D062392

(Super. Ct. No. MH104971))

APPEAL from a judgment of the Superior Court of San Diego County and a petition for writ of habeas corpus, John S. Einhorn, Judge. Judgment affirmed; petition denied.

A jury found Victor A. Acosta qualified as a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code,<sup>1</sup> § 6600 et seq.). The trial court in April 2011 ordered Acosta civilly committed for an indeterminate term.

Acosta does not challenge the sufficiency of the evidence to support the jury's findings. Instead, Acosta contends (1) his civil commitment violated the right to equal protection under the law; (2) the 45-day extension hold under section 6601.3 was placed on his scheduled release date without good cause in violation of his due process rights; (3) the trial court erred (i) in limiting him to six peremptory challenges and, as such, he was denied due process under the law, (ii) in failing to dismiss jurors or make adequate inquiry following alleged misconduct by the jurors and (iii) in instructing the jury regarding the various elements to establish he qualified as a SVP, which he contends effectively lowered the people's burden of proof; and (4) conversely, to the extent defense counsel failed to make proper and timely objections during trial, he received ineffective assistance of counsel.

As we explain, we reject each of these contentions and affirm Acosta's judgment of commitment as an SVP.

Acosta has also filed a petition for writ of habeas corpus, D062392, which by separate order we have consolidated with his appeal for purposes of disposition. Acosta's petition alleges several of the same contentions Acosta raised in his appeal, does not

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<sup>1</sup> Unless noted otherwise, all statutory references herein are to the Welfare and Institutions Code.

include any contentions that were not the subject of his appeal and does not rely on any evidence outside the appellate record. Accordingly, we deny the petition.

## BACKGROUND

Acosta forcibly raped at knifepoint a 16-year-old girl in July 1986, violated parole in 1993 by sexually assaulting a 24-year-old woman with Down's syndrome and threatening to kill her if she did not comply with his demands and attempted in 2005 to assault sexually a woman he befriended who suffered from schizophrenia. Three prosecution experts testified Acosta met SVP commitment criteria because of his predicate qualifying conviction and a qualifying mental disorder that volitionally impaired his judgment and predisposed him to a moderate to high risk of sexually violent criminal predatory behavior.

## DISCUSSION

### *A. Equal Protection*

Acosta contends the more onerous provisions of the SVPA than those imposed by other commitment statutes deny him equal protection of the laws. We disagree.

Our high court in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*) stated the People must show "that, notwithstanding the similarities between SVP's and [other civilly committed individuals, such as mentally disordered offenders (MDO's) (Pen. Code, § 2960 et seq.)], 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 p. 1208.) Our high court suggested a variety of ways the People might carry this burden, including the presentation of evidence

that there is a greater risk of recidivism by SVP's because of the "inherent nature of the SVP's mental disorder" or that the "SVP's pose a greater risk to a particularly vulnerable class of victims." (*Ibid.*)

Following *McKee I*, on 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 persons found not guilty by reason of insanity (NGI's) (Pen. Code, § 1026 et seq.) (See *People v. McKee* (2012) 207 Cal.App.4th 1325, 1347 (*McKee II*)). Such 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) and 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.*)

The People in *McKee II* also 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. (*McKee II, supra*, 207 Cal.App.4th at p. 1347.)

This court independently reviewed the evidence in *McKee II* and agreed that the People had established " '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 . . . 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 conclude here, as we did in *McKee II*, that the disparate treatment of SVP's under the SVPA "is reasonable and factually based" and thus, that the SVPA does not violate Acosta's constitutional right to equal protection of the law. (See *McKee II, supra*, 207 Cal.App.4th at p. 1348.)

*B. 45-Day Extension Hold*

Acosta next contends his due process rights were violated because the issuance of a 45-day hold pursuant to section 6601.3 was made without the statutorily required "good cause."

Briefly, Acosta's scheduled release date from prison was set for April 11, 2010, following his guilty plea to sexual battery by restraint. On April 8, 2010, the Board of Parole Hearings (BPH) signed a 45-day hold to "facilitate full SVP evaluations to be concluded by the [Department of Mental Health]." The 45-day hold became effective on April 11, 2010.

In April 2010 when the 45-day extension hold was placed on Acosta, section 6601.3 did not define the term "good cause." Subdivision (b) was added to section 6601.3 effective January 1, 2011, and reads as follows: "For purposes of this section, good cause means circumstances where there is a recalculation of credits or a restoration of denied or lost credits, a resentencing by a court, the receipt of the prisoner into

custody, or equivalent exigent circumstances which result in there being less than 45 days prior to the person's scheduled release date for the full evaluation described in subdivisions (c) to (i), inclusive, of Section 6601." (Stats. 2010, ch. 710, § 5.)

However, California Code of Regulations, title 15, section 2600.1, subdivision (d), in April 2010 defined "good cause" as "[s]ome evidence" that a person has a qualifying conviction and is "likely to engage in sexually violent predatory criminal behavior." (Cal. Code Regs., tit. 15, § 2600.1, subd. (d)(2).) Our Supreme Court in *In re Lucas* (2012) 53 Cal.4th 839, 849-850, concluded that because this regulation defined good cause in terms of an inmate's potential to satisfy the SVP criteria and not on a showing for the need for an extension beyond an inmate's scheduled release date, the regulation was invalid.

Significant to the case at hand, the court in *In re Lucas* concluded that the BPH could not be faulted for not anticipating the decision in *In re Lucas* invalidating regulation 2600.1. (*In re Lucas, supra*, 53 Cal.4th at p. 853.) Relying in part on section 6601, subdivision (a)(2), which provides that an SVP petition "shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law" (§ 6601, subd. (a)(2)), the court in *In re Lucas* found the BPH's reliance on regulation 2600.1's definition of "good cause" was excusable as a good faith mistake of law. (*In re Lucas, supra*, 53 Cal.4th at pp. 852 & 858.)

Here, the record shows the BPH placed a 45-day hold on Acosta *before In re Lucas* invalidated regulation 2600.1 and its definition of "good cause" and *before*

subdivision (b) defining "good cause" was added to section 6601.3. As such, we conclude the BPH's reliance on regulation 2600.1 excusable as a good faith mistake of law within the meaning of section 6601, subdivision (a)(2). We thus reject Acosta's contention that the 45-day extension hold violated his due process rights. (See *In re Lucas, supra*, 53 Cal.4th at p. 858.)<sup>2</sup>

### C. Number of Peremptory Challenges

Acosta next contends his due process and equal protection rights were violated because he was entitled to 20 peremptory challenges (as in a criminal case involving a life sentence (Code Civ. Proc., § 231, subd. (a)), rather than the six peremptory challenges allotted to litigants in a civil case. (See *id.*, subd. (c).)

Our high court in *People v. Stanley* (1995) 10 Cal.4th 764, 807–808, held that defendants in special proceedings of a civil nature are only entitled to the number of peremptory challenges ordinarily allotted to civil litigants, even when the special proceeding (in that case a competency hearing) is ancillary to criminal proceedings. Subsequently, the Court of Appeal in *People v. Calhoun* (2004) 118 Cal.App.4th 519 noted that SVP proceedings were consistently characterized as special proceedings of a civil nature (*id.* at pp. 524–526) and as such, held that SVP defendants were only entitled to six peremptory challenges. (*Id.* at p. 527.) The court in *People v. Calhoun* reasoned that principles of federal due process did not mandate additional challenges because the

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<sup>2</sup> Because of our decision, we conclude it is unnecessary to decide the People's alternative contention that Acosta forfeited this issue on appeal because he did not challenge the 45-day extension hold at the trial court level.

Constitution did not require the provision of any peremptory challenges. (*Id.* at pp. 527–529.)

In addition, the court in *People v. Calhoun* court rejected the argument that limiting an SVP defendant to six peremptory challenges violates a defendant's equal protection rights because an SVP defendant is committed for purposes of management and treatment whereas a criminal defendant is imprisoned for purposes of deterrence and punishment, and thus the SVP defendant was not similarly situated to a criminal defendant. (*People v. Calhoun, supra*, 118 Cal.App.4th at pp. 529–530.)

We agree with the holding and reasoning of *People v. Calhoun* and thus reject Acosta's contention his due process and equal protection rights were violated when the trial court properly limited him to six peremptory challenges. (See also *McKee I, supra*, 47 Cal.4th at pp. 1193–1195 [concluding the SVP law is not punitive in a manner similar to criminal proceedings because the duration of confinement of an SVP defendant is linked to the stated purposes of commitment, to wit: " 'to hold the person until his [or her] mental abnormality no longer causes him [or her] to be a threat to others. [Citation.]' ")<sup>3</sup>

#### D. *Juror Misconduct*

Acosta contends the trial court erred by failing to question adequately, and ultimately to dismiss, three jurors who he contends were separately involved in discussions about the case in violation of the court's admonition.

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<sup>3</sup> In light of our decision on this issue, we deem it unnecessary to decide the People's alternative contention that Acosta forfeited his challenge to the ruling of the trial court allotting him six peremptory challenges because the record allegedly is not clear whether Acosta used all six challenges.

## 1. *Brief Background*

On a Monday morning in late March 2011, the prosecutor informed the trial court that one of the People's expert witnesses, Dr. Bruce Yanofsky, had come into brief contact with juror No. 1. Specifically, after Dr. Yanofsky had completed his testimony the previous week, juror No. 1 approached Dr. Yanofsky in the hall and said, "This is an interesting case. It's been very informational. This is my first jury trial. Thank you." Dr. Yanofsky also noted that juror No. 1 had asked a question of him unrelated to the case involving juror No. 1's daughter, who was interested in working in Mexico as a veterinarian. Dr. Yanofsky told juror No. 1 he did not know the answer to this question.

Defense counsel noted that juror No. 1 was probably just being polite and making conversation with Dr. Yanofsky, which counsel noted people tend to do, and that no issues involving the case were discussed. However, defense counsel expressed concern that this brief one-on-one interaction may have bolstered the witness's credibility. Ultimately, defense counsel said he would defer to the trial court for handling. In response, the trial court indicated it would question juror No. 1 outside the presence of the remaining jurors.

The record shows that when asked by the trial court to explain his "contact" with Dr. Yanofsky in the hall, juror No. 1 told the court: "My question to the doctor was—he mentioned that he studied—his studies were done in Mexico. So I asked him if—my daughter is interested in studying veterinarian, and I asked him if—how was the transition from Mexico into the United States in regards to the validation of the studies. And his response was, well—first he said, [']Well, I don't know if I'm going to respond

because I don't know what your question is,['] when I asked him if I could ask him a question. And then once he found out what . . . the question [was] about, then he [said], [']Well, it's not hard. It's just that you have to stick to it."

"THE COURT: All right. Any other discussions or comments to Dr. Yanofsky about the nature of this particular case?

"Juror No. 1: No. No, sir. Not that I recall. It was in the presence of a couple of the other jurors and—no, sir. It was just that, and then he left.

"THE COURT: Was your contact with Dr. Yanofsky such that you are affected by his testimony because of the out-of-court contact? Would that give his testimony any greater weight to you?

"Juror No. 1: Oh, no. No, sir, because we didn't discuss anything in regards to the case. It was just—no, sir.

"THE COURT: All right. You're not supposed to have any contact with any of the parties or witnesses at all just to avoid the appearance of impropriety. Nothing occurred during the time that you and he discussed whatever you discussed that would make you favor the side that he testified for just because you talked to him?

"Juror No. 1: No, sir. No, sir.

"THE COURT: All right. Please in the future while you're with us don't have any contact with the lawyers, with the witnesses and—thank you.

"Juror No. 1: Yes, sir."

The record shows that once the other jurors returned to the courtroom, the court promptly reminded them of its admonitions: "Let me remind you [the jury] of two

admonitions that I gave you at the outset of this case. Please don't discuss this case with anybody. Please don't have any contact outside of the courtroom with any of the parties, the lawyers, or the witnesses. Please do not do any research on your own or as a group outside of what you hear during the course of your time with us in the courtroom. Don't Google anything. Don't go look up code sections. Don't do anything extracurricular except listen to the witnesses, [look at] the exhibits that are received into evidence . . . , and [listen to] the instructions on the law that I give you during the time that we are together."

The following day after the evidence was concluded, defense counsel informed the trial court that earlier that day Acosta's brother overheard jurors in the hallway allegedly discussing the case. Defense counsel told the court that Acosta's brother heard juror No. 7 say he already had made up his mind about the case, despite the fact defense counsel was in the middle of closing argument, and that other jurors were laughing.

The record shows the trial court next spoke to Acosta's brother. Acosta's brother told the court that during the morning recess, he heard one juror whom he identified as juror No. 7 saying words to the effect that he already had made up his mind about the case and the "decision was going to be somewhat easy." Acosta's brother said another juror who sits in the back responded to juror No. 7, "Let's give it some—some more time to be thoughtful" and then both jurors chuckled. Acosta's brother also said he heard one of the jurors say his son was a chemical engineer who had been married for about a year. Acosta's brother estimated the conversation between the jurors lasted about a minute.

The court then instructed defense counsel to continue with closing argument and indicated it would question juror No. 7 before the jury started its deliberations.

Later, outside the presence of the other jurors but with counsel and Acosta present, the court questioned juror No. 7 as follows: "THE COURT: Good afternoon, sir. It was reported to me that this morning, 9:15, 9:30, someone overheard you saying something to the effect that you had already made up your mind, that it was an easy call or some such language, and that that statement or those statements were made to Juror No. 5. [¶] Do you remember having any conversation like that this morning?

"Juror No. 7: No, sir. Not—not as to a disposition of I'd already made up my mind.

"THE COURT: Right.

"Juror No. 7: I have not said that.

"THE COURT: Okay. What do you recall stating to a fellow juror this morning in the hallway outside the courtroom to the extent it relates to our case?

"Juror No. 7: I don't remember saying anything about our case on that or a discussion about it.

"THE COURT: Do you recall Juror No. 5 talking to you, again, this morning, again, outside the courtroom, again, between 9:15, 9:20, to the effect that, [']Let's give it some time and be thoughtful about our decision?['] Anything like that?

"Juror No. 7: Something like that, yeah.

"THE COURT: What prompted that, if you know?

"Juror No. 7: I was trying to remember the conversation, who I was talking with. If anything was being said, it was—what I had said was that, [']You know, we can't make up our minds yet. We've still got time to make decisions.[']

"THE COURT: And what prompted that statement—

"Juror No. 7: I don't remember.

"THE COURT: —or statements. [¶] What do you remember another male juror saying in connection with what you said?

"Juror No. 7: I'm not recalling the conversation and I'm having trouble with that. But I do remember stating that we just can't make up our minds.

"THE COURT: And have you made up your mind yet?

"Juror No. 7: No.

"THE COURT: All right. Thank you."

The record shows the court then questioned juror No. 5 about his alleged conversation with juror No. 7:

"THE COURT: Sometime today between, say, 9:15 and 9:20 this morning outside our courtroom, do you recall a dialogue or interaction with Juror No. 7 about one of the two of you having made up your mind about this case or that it will be an easy decision?

"Juror No. 5: Recall nothing like that, your Honor.

"THE COURT: Do you recall having a conversation with Juror No. 7 this morning outside the courtroom?

"Juror No. 5: I've had several discussions with that juror— [¶] . . . [¶]

"THE COURT: To the extent that it related to your role as a juror in this case, what was said?

"Juror No. 5: I think that we have—I think that—may have made a comment wondering how long our deliberations would take, but that's the only comment that I recall making. I don't recall anything about our decisions or opinions on the case.

"THE COURT: Do you recall either you or he saying anything about a decision or having made up your mind?

"Juror No. 5: Not either one of us, your Honor.

"THE COURT: Have you come to a decision or made up your mind yet?

"Juror No. 5: No. Because I think your directions to us are critical, and they're incomplete at this point.

"THE COURT: Thank you."

After this inquiry, the remaining jurors returned to the courtroom and the prosecutor began her closing argument. The record shows that at no time did defense counsel suggest a need for further inquiry by the trial court, object to the trial court's method of inquiry or request that any of the jurors be excused for misconduct.

## *2. Governing Law and Analysis*

Penal Code section 1089 provides in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may

order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box . . . ."

" 'A juror's inability to perform his or her functions . . . must appear in the record as a "demonstrable reality" and bias may not be presumed.' [Citations.] . . . . Moreover, under . . . section 1089, which allows a trial court to remove a juror on a finding of good cause, 'The determination of "good cause" in this context is one calling for the exercise of the court's discretion; and if there is any substantial evidence supporting that decision, it will be upheld on appeal.' [Citation.]" (*People v. Beeler* (1995) 9 Cal.4th 953, 975.)

"Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it is obligated to make reasonable inquiry into the factual explanation for that possibility." (*People v. McNeal* (1979) 90 Cal.App.3d 830, 838.) "[W]hen there is a claim of juror misconduct, the court must conduct 'an inquiry sufficient to determine the facts . . . whenever the court is put on notice that good cause to discharge a juror may exist.' [Citation.]" (*People v. Pinholster* (1992) 1 Cal.4th 865, 928, disapproved on other grounds as stated in *People v. Williams* (2010) 49 Cal.4th 405, 458–459.)

Here, the record shows that once the trial court was alerted to potential juror misconduct, it questioned *each* of the jurors and determined that none of them had engaged in any conduct that suggested any bias or demonstrated an inability to remain open minded and impartial.

Specifically regarding juror No. 1, the record shows juror No. 1 asked Dr. Yanofsky a general question about being a doctor in Mexico because juror No. 1's

daughter was also contemplating working in Mexico. The record shows this brief interaction had nothing to do with the case and based on juror No. 1's responses and demeanor, the court was satisfied that this encounter did not cause juror No. 1 to give Dr. Yanofsky's testimony greater weight or otherwise render juror No. 1 unable to serve as an unbiased juror.

What's more, the record shows that after the trial court spoke to juror No. 1, the court repeated its admonitions to the entire jury, including the admonition to decide the case based on the evidence and the law provided. (See *People v. Mincey* (1992) 2 Cal.4th 408, 467 [noting a trial court's admonition to jurors to decide the case based on the evidence and the law provided, after the court promptly questioned the jurors who read Bible passages after their deliberations were completed for the day, was sufficient to support a finding defendant was not prejudiced]; see also *People v. Osband* (1996) 13 Cal.4th 622, 676 [a reviewing court presumes the jurors followed the trial court's instruction and disregarded any extraneous information].)

On this record, we conclude that the trial court properly exercised its discretion when it questioned juror No. 1, that substantial evidence in the record exists to support the trial court's decision not to dismiss juror No. 1 for good cause and that to the extent there was misconduct by juror No. 1, there was no substantial likelihood that the brief interaction between juror No. 1 and Dr. Yanofsky prejudiced Acosta. (See *People v. Marshall* (1990) 50 Cal.3d 907, 950 [the presumption of prejudice is rebutted when there is no substantial likelihood that the vote of one or more of the jurors was influenced by exposure to improper material].)

We reach the same conclusion regarding the trial court's handling of the conversation between juror Nos. 5 and 7 overheard by Acosta's brother. Again, the record shows at most juror No. 5 wondered how long deliberations would last, but there is no evidence whatsoever in the record suggesting that either juror had made up his mind about the case or otherwise was not fit to serve as an unbiased and impartial juror. In fact, the evidence in the record supports the opposite finding: that each juror understood the importance of keeping an open mind and not deciding the case until directed to do so by the trial court. Thus, even if we assume misconduct involving juror Nos. 5 and 7, we conclude there is no substantial likelihood that such "misconduct" prejudiced Acosta. (See *People v. Marshall*, *supra*, 50 Cal.3d at p. 950.)<sup>4</sup>

*D. Instructional Error*

1. *CALCRIM NO. 3454*

Acosta next contends CALCRIM No. 3454<sup>5</sup>—which tracks the language of the SVPA—is insufficient because the instruction required the jury to find only that Acosta

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<sup>4</sup> As was the case *ante* in footnotes 2 and 3, we deem it unnecessary to decide the People's alternative contention that Acosta forfeited his contention of juror misconduct because defense counsel appeared satisfied with the trial court's handling of the issue and did not seek removal of any of the jurors based on such "misconduct."

<sup>5</sup> In accordance with CALCRIM No. 3454, the jury was instructed in pertinent part: "The petition alleges that Victor Arthur Acosta is a sexually violent predator. [¶] To prove this allegation, the People must prove beyond a reasonable doubt that: [¶] 1. He has been convicted of committing sexually violent offenses against one or more victims; [¶] 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. [¶] 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

had a mental condition that affects his ability to control emotions or behavior, when in fact the jury should have been instructed that he had a mental condition that causes him to have serious difficulty controlling his sexual criminal behavior.

A similar contention was considered and rejected by our Supreme Court in *People v. Williams* (2003) 31 Cal.4th 757. There, the "jury was *not* separately and specifically instructed on the need to find serious difficulty in controlling behavior" (*id.* at p. 759, italics added) and as such, the defendant there, like Acosta here, argued a "separate 'control' instruction was constitutionally necessary" pursuant to *Kansas v. Crane* (2002) 534 U.S. 407, 411, 413 [122 S.Ct. 867]. (See *id.* at p. 759.)

Our high court in *People v. Williams* rejected that argument and concluded that 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, supra*, 31 Cal.4th at p. 759.) The court further concluded that jurors instructed with the statutory language "must necessarily understand the need for serious difficulty in controlling behavior" (*id.* at p. 774, fn. omitted), and that no "further lack-of-control instructions or findings are necessary to support a commitment under the SVPA." (*Id.* at pp. 774–775, fn. omitted.)

Because we are bound to follow the holding in *People v. Williams* and because our high court there stated that a "commitment rendered under the plain language of the SVPA necessarily encompasses a determination of serious difficulty in controlling one's

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commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others."

criminal sexual violence" (*People v. Williams, supra*, 31 Cal.4th at p. 777), we reject Acosta's contention that CALCRIM No. 3454 is constitutionally deficient.

## 2. *Unanimity Instruction*

Finally, Acosta contends the trial court erred when it failed to instruct the jury it must unanimously agree on Acosta's diagnosed mental disorder for purposes of the SVPA. We disagree.

The court in *People v. Carlin* (2007) 150 Cal.App.4th 322, 347 rejected this same argument when it ruled that "[a]n SVP proceeding is civil, not criminal, and the unanimity requirement for an SVP proceeding is established by statute. [Citation.] Under the SVPA, the jury must determine whether the requirements for classification as an SVP have been established 'beyond a reasonable doubt' and the jury's *verdict* must be unanimous. [Citations.] There is no statutory requirement regarding unanimity for each subpart of the SVP determination." (See also *People v. Fulcher* (2006) 136 Cal.App.4th 41, 59 [criminal rule requiring unanimity instruction does not apply in civil commitment proceedings under the SVPA].)

We agree with *People v. Carlin* and *People v. Fulcher* and thus reject Acosta's contention that the jury must agree on which of the diagnosed mental disorders he currently has for purposes of the SVPA.<sup>6</sup>

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<sup>6</sup> Given our decision to reach the merits of each of Acosta's contentions on appeal, including jury instruction error, we need not decide his alternative contention that he received ineffective assistance of counsel based on counsel's conduct leading to forfeiture any of those contentions.

DISPOSITION

The judgment of commitment of Acosta as an SVP under the SVPA is affirmed;  
the petition for writ of habeas corpus is denied.

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BENKE, Acting P. J.

WE CONCUR:

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O'ROURKE, J.

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AARON, J.