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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KENDYL WELCH,

Defendant and Appellant.

H035567

(Santa Clara County

Super. Ct. No. 211349)

Appellant Kendyl Welch appeals from an order committing him for an indeterminate term to the custody of the Department of Mental Health (DMH) after a jury found him to be a “sexually violent predator” (SVP) within the meaning of the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.).¹ He contends the trial court prejudicially erred in (1) admitting “detailed, inadmissible hearsay” about his prior conduct, (2) “denying [his] *Brady*[²] motion in contravention of his rights to due process and a fair trial,” (3) allowing “inadmissible evidence” of prior incompetency and not guilty by reason of insanity findings “and denying [his] motion for a mistrial,” (4) allowing expert testimony about treatment phases at the state hospital, and (5) “failing to

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

² *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

order new evaluations and [a] new probable cause hearing” pursuant to a valid protocol. (Capitalization & boldface omitted.) Welch also challenges the constitutionality of the SVPA on due process, ex post facto, double jeopardy, equal protection, and First Amendment grounds. The California Supreme Court considered many of these constitutional claims in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*). In accordance with *McKee*, we reverse the commitment order and remand the case for reconsideration of Welch’s equal protection claim. We find no merit in his remaining contentions.

I. Background

Welch was serving a four-year sentence for possession of a controlled substance when the petition to commit him as an SVP was filed in 2008.

At trial, the People presented evidence about the predicate offense for which Welch had suffered a qualifying conviction. Welch met Betty S. in a Seattle bar in 1985. He followed her outside, threw her to the ground in front of a firehouse, and told her, “I’m going to have you and if you don’t go along I’ll kill you.” Betty got up, but Welch grabbed her by the throat and threw her back to the ground. She tried to get up again, and Welch took her by the throat again, pushed her to the ground, and raped her. When firemen came to Betty’s aid, Welch punched one of them and attempted to flee. Arresting officers described him as “speaking in a rambling manner and not making much sense.” He was found incompetent to stand trial and committed to the state hospital. His condition improved with antipsychotic medications, and he was returned to competency. In 1986, he pleaded guilty to second degree rape.

Dr. Michael Musacco and Dr. Robert Owen testified as experts for the prosecution. Welch had refused to be interviewed, but that did not preclude either psychologist from forming his opinion since, as Dr. Musacco explained, they had access to a “good quantity” of documents, “perhaps 1,500 pages” of court, prison, and state

hospital records that allowed them to assess Welch's "mental and emotional functioning." The records included information about Welch's predicate offense, various non-predicate offenses, including assaults on Blanche M., Reenie F.,³ and Sonya B., and numerous parole violations. Both doctors relied on the totality of these materials in forming their opinions. Both also had an opportunity to observe Welch when the district attorney interrupted her direct examination of Dr. Musacco to call Welch as a witness. Welch provided his birth date and identified his photograph on booking documents from King County, Washington and Santa Clara County, California, but soon lapsed into repetitive "no comment" responses to the district attorney's questions.

Dr. Musacco testified that he diagnosed Welch with schizophrenia, paranoid type and substance abuse disorder. He also offered "rule-out diagnoses" of paraphilia not otherwise specified (NOS) and antisocial personality disorder, explaining that "rule-out means I think that probably applies . . . , but I don't have enough information to be positive."

In forming his diagnoses, Dr. Musacco relied on the Diagnostic and Statistical Manual IV, the reference work "most commonly used" by mental health care professionals in the United States to diagnose individuals suffering from mental illness. He explained that the diagnostic criteria for schizophrenia "include disorganized thoughts and speech, . . . not being able to think or talk in a way that is organized and has flow. [¶] The other important symptoms of schizophrenia include either the presence of auditory hallucinations, . . . or delusional beliefs" Paranoid type schizophrenia is characterized chiefly by paranoid thoughts. Individuals suffering from this type of schizophrenia believe that "people are out to get them. They would be hostile, angry, and aggressive. Very often or typically there is a presence of a delusional belief system to go with that paranoia" In order for a diagnosis of schizophrenia to apply, "the person

³ The record variously refers to the victim as "Reenie" and as "Renee."

needs to be impaired in their functioning in some way because of those symptoms.” Although schizophrenia can go into remission with medication, social support, and the like, it is “a chronic mental disorder that doesn’t go away.”

A paraphilia is “the presence of sexual thoughts, urges, or behaviors carried out against an unsuspecting person or a victim lasting over a time frame of six months or longer.” A diagnosis of paraphilia is established by a “pattern of behaviors.” Dr. Musacco “considered the diagnosis of paraphilia nonconsent, . . . with sexual sadism, as well,” because Welch had “a long history . . . over the course of numerous years of engaging in forcible sexual acts that could be the product of arousal to either the nonconsent . . . or . . . to the pain or suffering or humiliation of the victim.” He offered the diagnosis on a rule-out basis because “to meet [the] criteria, you have to have evidence that the person is aroused to the nonconsent part or the sadistic part, the suffering of the victim.” Without an interview, there was “just not enough” evidence of that “to be absolutely positive” the diagnosis applied.

Antisocial personality disorder is “a pattern of interacting with a world, other people, . . . characterized typically by illegal behaviors . . . including burglaries, assaults, things of that nature. [¶] . . . [T]o meet the criteria for the . . . disorder you have to have evidence of the symptoms occurring before the age of 15.” The records contained “some reference to juvenile delinquent behavior,” but Dr. Musacco could not confirm that Welch met all of the criteria before age 15.

Dr. Musacco testified that schizophrenia was the “most prominent” condition and the chief contributor to Welch’s history of sexually assaultive behavior toward women. He opined that schizophrenia made Welch likely to reoffend in a sexually violent manner. The “primary reasons” for this opinion “ha[d] to do with the specific circumstances of the sexual crimes, the behaviors themselves, [and] the comments that he made to the victims and to the witnesses, [and others] who interviewed him and had contact with him in the context of these crimes.”

Before eliciting testimony about Welch's nonpredicate sexual offenses, the district attorney asked for a limiting instruction. The court instructed the jury that the information Dr. Musacco was about to provide was "not going to be offered for the truth of the matter asserted, but simply for the basis of his opinion." Dr. Musacco then summarized what the records said about some of Welch's nonpredicate offenses. In 1996, Welch attacked Blanche in a San Francisco motel room that she and her common-law husband had allowed him to share because "he seemed like a shy, lonely, quiet guy who . . . [had] just come in from Seattle, and [she] felt bad for him." Welch unexpectedly hit Blanche on the head, grabbed her by the throat, and told her that he did not want to kill her but he had to. Blanche reported that his voice and demeanor changed, becoming more and more menacing as he reached down her throat and attempted to pull out her windpipe while "coax[ing]" her to stop breathing. She managed to fight him off, and she escaped. Welch told police he had not planned to kill Blanche, but only to assault her until she passed out and then rape her. Initially found incompetent to stand trial, he was restored to competency and pleaded guilty to making terrorist threats.

In 2000, a homeless woman named Reenie ran into a San Francisco street naked and was almost hit by a car. She told police that she and Welch had been smoking cocaine in the nude at a homeless camp when he hit her in the face. Welch, who was on parole at the time, gave police a false name and told them he "didn't do anything to that bitch." His parole was revoked.

In 2001, Welch attacked Sonya at a San Francisco transient hotel. Sonya, who had mental health issues herself, initially reported that as she walked past the door to Welch's room, he unexpectedly punched her in the eye, grabbed her and pulled her into his room, ordered her to take off her clothes, began choking her, and attempted to sexually assault her. Later that same day, Sonya gave police a different account, telling them that she and Welch were in his room drinking alcohol when he closed and locked the door, punched her in the eye, and said he was going to rape her. When she tried to leave, Welch

grabbed her with both hands by the throat. Sonya escaped when someone knocked on the door, and she notified the police. Welch assaulted the officers who arrested him. He pleaded guilty to false imprisonment.

Summarizing how Welch's prior offenses supported his diagnosis, Dr. Musacco noted several "unusual" components of the attack on Betty in Seattle. Ordinarily, rapists try not to get caught, but this rape occurred in a highly public location in front of a firehouse, which evidenced the disorganized thought patterns that are symptomatic of schizophrenia. Arresting officers described Welch's speech as rambling and not making sense, another symptom of the illness.

Dr. Musacco found the attack on Blanche significant for several reasons. Welch's statement to police that he would not have killed her if he did not "have to" reflected his disorganized thinking. That statement was "odd. . . . It's aggressive. And tied with the comment about rape, it wraps up the whole issue of his sexuality being connected with his aggressiveness." That Welch became more menacing in his demeanor as the assault escalated and then "smile[d]" at Blanche as he choked her and coaxed her to stop breathing demonstrated "really impaired, unusual . . . psychotic behavior that seems to be fueling his activities. We can't explain it by . . . even ordinary criminal kinds of motivation." In Dr. Musacco's opinion, it "pointed toward either a mental illness fueling it . . . or a paraphilia" in that "[t]here could be . . . some sexual drive or arousal to the nonconsensual component of that behavior." Choking, he noted, is "one of the features of sexual sadism," and Welch's attacks on Betty, Blanche, and Sonya all involved the "commonality" where "he's grabbing a woman by the neck in the context of an assault."

Dr. Musacco mentioned other instances that were "part and parcel" of Welch's pattern of "out of proportion, aggressive, threatening behaviors" caused by his mental illness. He referred to "an arrest report" from December 1989 when Welch threatened to kill someone, "and he's uncooperative with the officers when they arrive" and in front of them, "threatened to kill the victim again and then threatened to kill the officers as well."

He noted a parole officer's comment that supervising Welch was "like a roller coaster ride." There were times when Welch was "very pleasant, and mild-mannered, and then he becomes hostile, a very violent human being" The sudden hostility that Blanche described was another example of what Dr. Musacco called "that switch flipping kind of thing." He had seen the same behavior when he tried to interview Welch. The officer who escorted Welch to the interview room reported no unusual behavior; he said Welch spoke with him "just like normal." As soon as Welch entered the room and saw Dr. Musacco, however, it was "like a light switch that got turned on" Refusing to sit down, Welch told Dr. Musacco "through clenched teeth" that he did not want to be interviewed without an attorney. Dr. Musacco had "had a lot of people refuse to interview," but he had never in his career had anybody "shaking" with anger. Although it was "unusual" to see such hostility "going off and on like a switch," and it was "not one of the specific criteria for schizophrenia," Dr. Musacco believed it was "related" to Welch's schizophrenia, "part of his inability to modulate his mood."

Dr. Musacco used the Static-99-R and the MnSOST-R actuarial risk assessment tools to evaluate the risk that Welch's diagnosed mental disorders made it likely he would engage in sexually violent conduct in the future. Welch's Static-99-R score of five correlated with a 19.6 to 27 percent risk of reoffending within five years and a 28 to 35 percent risk of reoffending within 10 years. His "total score of nine" on the MnSOST-R test put him in the "high risk category" for recidivism. This was not a close case, Dr. Musacco told the jury. He opined without "any hesitation" that Welch was currently suffering from a diagnosed mental disorder, namely, schizophrenia, that made him likely to engage in sexually violent predatory criminal behavior in the future.

Dr. Owen testified that he diagnosed Welch with paraphilia NOS, psychotic disorder NOS, and polysubstance dependence disorder. He explained that "[p]araphilia basically means sexual deviance," and "psychosis" is an umbrella term to describe individuals who are "grossly disturbed in their thinking." Schizophrenia is a type of

psychotic disorder. Welch's diagnosis "very well could be refined to schizophrenia, but without an interview, it's difficult to do that," so Dr. Owen elected to use the "more general term of psychotic disorder NOS." Paraphilia and psychotic disorder are two "distinct conditions" that in Dr. Owen's opinion interacted in Welch's case. "So basically the psychosis tends to exacerbate . . . his paraphilia."

Welch's behavior on the stand demonstrated that he was currently suffering from a psychotic disorder, in Dr. Owen's opinion. "What I saw was an individual who isn't thinking clearly, . . . whose thinking tends to be tangential, jumping from topic to topic. . . . [He] wasn't responding very well to the questions at hand but instead seemed to be wrapped up in his own internal processes. All of these are signs of psychosis." Dr. Owen found additional signs of psychosis in Welch's hospital records. A 1986 report described Welch as "very negative, uncooperative, withdrawn, confrontational, easily agitated, . . . hostile and threatening." Welch reportedly assaulted another patient on the ward. "His thinking was irrational, associations loose." Significantly, many of those symptoms improved with medication, and "[h]e acknowledged having both auditory and visual hallucinations." He also acknowledged paranoia and grandiose thinking. "Obviously," Dr. Owen said, "those are very serious psychotic symptoms."

Before Dr. Owen explained how Welch's nonpredicate sexual offenses supported his diagnoses, the district attorney sought a "reminder" limiting instruction. The court instructed the jury that "[s]imilar to a section of Dr. Musacco's testimony, . . . what's going to be offered is not for the truth of the matter asserted but simply for the basis of his opinion."

Dr. Owen used the Static-99-R, Static-2002-R, and MnSOST-R tools to assess whether Welch was likely to engage in sexually violent criminal behavior as a result of his diagnosed mental disorders. Welch's Static-99-R and MnSOST-R scores placed him in the "high risk" category for sexual reoffending, and his score on the Static-2002-R placed him in the "moderate, high risk category." Dr. Owen concluded that "based upon

his mental disorders, [Welch] ha[d] a substantial level of risk for committing new sexual crimes, much like the old ones.” In his opinion, Welch’s diagnosed mental disorder made it likely that he would engage in sexually violent criminal behavior in the future.

Other prosecution witnesses included Henry Templeman and John Alvarez. Templeman, a fingerprint expert from the San Jose Police Department, testified that the prints identified as Welch’s on various arrest records matched a known fingerprint example on file. Alvarez, a parole agent with the California Department of Corrections and Rehabilitation (CDCR) who was assigned to supervise Welch after Welch threatened to kill two other parole agents, testified about Welch’s conduct on parole between 1998 and 2005.

Psychologist Dr. Brian Abbott testified as an expert for the defense. Dr. Abbott, who did not attempt to interview Welch, reviewed the same records that Drs. Musacco and Owen reviewed and was also present when Welch testified. Dr. Abbott told the jury that without interviewing Welch, he was “not able to render any definitive opinions about his current mental state or current actual diagnosis” He was “fairly comfortable” diagnosing schizophrenia based on his record review and opined that Welch was “more likely than not” currently suffering from it, but there was “insufficient information” to allow him to say whether Welch met “the full threshold” or was in “partial remission or even possible full remission.” According to Dr. Abbott, there was “grossly insufficient information in the records” to substantiate a diagnosis of paraphilia and insufficient information to substantiate that Welch suffered from antisocial personality disorder.

Dr. Abbott criticized the Static-99-R, Static-2002-R, and MnSOST-R actuarial risk assessment tools as substantially overpredicting the recidivism rate for offenders who, like Welch, have scores over five. He saw no need to perform a risk assessment because in his opinion, Welch did not “meet the mental disorder criteria” and, therefore, did not qualify as an SVP.

Other defense witnesses included Miguel Arrellano and Chariti Messer, whose tai chi and literature appreciation classes Welch attended at the state hospital. Neither had ever seen him behave inappropriately.

The jury found the petition true, and the court ordered Welch committed to the custody of the DMH for an indeterminate term. Welch filed a timely notice of appeal.

II. Discussion

A. Evidence Admitted as the Basis of Expert Opinion

1. Background

Welch moved in limine to exclude “*all* hearsay evidence in the form of police reports, probation reports, psychological evaluations, prison records, parole revocation reports, and state hospital records” providing details unrelated to his predicate offense. “Even if the court allows such hearsay evidence for a limited purpose,” his motion continued, “the defense would ask the court to exclude” (1) psychological evaluations from nontestifying doctors, (2) evidence of Welch’s 1979 arrest in Miami for commercial burglary and possession of marijuana, (3) evidence of his January 1996 conviction for making criminal threats and assaulting Blanche, (4) evidence of his February 2000 conviction for falsely imprisoning Sonya, (5) evidence of his involvement in a September 2000 incident involving Reenie, (6) CDCR records and parole revocation reports, and (7) state hospital records from Patton, Atascadero, and Coalinga state hospitals in California, Western State Hospital in Washington, and Miami-Dade State Hospital in Florida. Welch’s motion papers asserted that these categories of evidence were hearsay (Evid. Code, § 1200) not subject to the hearsay exception in section 6600, subdivision (a)(3), irrelevant (Evid. Code, § 350), and more prejudicial than probative (Evid. Code § 352). At the hearing, Welch’s trial counsel declined the court’s invitation to “address each [category] . . . and put on the record if you want to supplement your moving papers as to why you think they should be excluded.”

The trial court denied the motion with one qualification: the People’s experts would not be permitted to discuss the diagnoses or opinions of nontestifying treating physicians or evaluators. They would, however, be permitted to refer to descriptions in the documents of Welch’s conduct, statements, or behavior, “[s]o long as . . . they are material or significant to the basis for the expert’s opinion.” The court observed that “it appears from what I see in the moving papers that each [category] is significant, and each is material to the basis for the opinion of the evaluator’s [*sic*] assuming that then they would come in and Evidence Code Section 352 would not keep them out in light of the ruling. They may be admitted as the basis for the expert’s opinion as long as [a proper foundation] is laid”

2. Analysis

Welch claims the trial court improperly permitted the People’s experts to disclose the contents of the challenged records “under the guise of” reasons to support their opinions. He argues that information about conduct unrelated to his predicate offense should have been excluded, because it was hearsay to which no exception applied, because it was more prejudicial than probative, and because its admission violated his due process right to confront and cross-examine witnesses. We disagree.

a. Hearsay

“When expert opinion is offered, much must be left to the trial court’s discretion. [Citation.]” (*People v. Carpenter* (1997) 15 Cal.4th 312, 403, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.) Expert testimony may 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.]” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 (*Gardeley*)). “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.]” (*Ibid.*) “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. [Citations.]” (*Ibid.*)

Welch does not expressly argue that the People failed to satisfy the “threshold requirement of reliability” (*Gardeley, supra*, 14 Cal.4th at p. 618.) To the extent he might be suggesting that the materials Drs. Musacco and Owen considered were not “of a type that is reasonably relied upon by experts” in their field, that suggestion is untenable. (*Id.* at p. 618.) Probation and police reports, prison records, hospital records, and psychological evaluations are commonly relied upon by expert witnesses in forming their opinions in SVP cases. (See, e.g., *People v. Dean* (2009) 174 Cal.App.4th 186, 196 (*Dean*) [experts “could reasonably rely on and base their opinions on the [state hospital] and other institutional records”]; *People v. Martinez* (2001) 88 Cal.App.4th 465, 470-472 [experts relied on “cumulative prison file, reports concerning sexual and nonsexual offenses other than the two predicate offenses, and evaluations . . . by treating and nontreating staff” at the state hospital]; *People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, 145 [experts relied on the defendant’s “criminal record, including the probation reports”].) These are the types of records on which Drs. Musacco and Owen based their opinions. Both explained in detail why each general category of records was relevant and useful to the development of their opinions. Dr. Musacco explained, for example, that information documented in recent state hospital reports “provides us with some understanding of how [Welch] is functioning today . . . , how he is behaving, his mood, his demeanor or things that he is saying, . . . whether he is participating in treatment, or taking medication. So it gives us . . . a series of pictures of how he is behaving and functioning in the hospital.” Dr. Owen testified that older records from other state hospitals were also important, because they “gave me a sense of his

functioning at an earlier point in his life. I'm looking for trends, consistency and symptoms and such.”

Welch next suggests that by providing a “specific hearsay exception relating to details of the requisite prior conviction . . . ,” section 6600, subdivision (a)(3) somehow precludes the introduction of hearsay unrelated to his predicate offense. The suggestion lacks merit.

At trial in an SVP commitment proceeding, “the plaintiff bears the burden of proving beyond a reasonable doubt that the defendant is an SVP. [Citations.]” (*Dean, supra*, 174 Cal.App.4th at p. 191, fn. omitted.) Among other things, the People must show that the defendant “has been convicted of a sexually violent offense against one or more victims” (§ 6600, subd. (a)(1).) Multiple-level hearsay is admissible for that purpose. (§ 6600, subd. (a)(3); *People v. Otto* (2001) 26 Cal.4th 200, 208 (*Otto*).) Such hearsay is offered to prove the truth of the matters asserted. The “hearsay” evidence that Welch challenges here, by contrast, was not hearsay, because it was not offered for the truth of the matters asserted but instead for the *nonhearsay* purpose of explaining the bases for the experts’ opinions. Section 6600, subdivision (a)(3) does not control the admission of the evidence that Welch challenges here.

b. Evidence Code Section 352

Welch argues that the challenged evidence should have been excluded under Evidence Code section 352 because it was “particularly inflammatory” and excessively detailed, which increased the risk that the jury would improperly consider it as substantive evidence against him.

“California law gives the trial court discretion to weigh the probative value of inadmissible evidence relied upon by an expert witness as a partial basis for his opinion against the risk that the jury might improperly consider it as independent proof of the facts recited therein. [Citation.]” (*People v. Coleman* (1985) 38 Cal.3d 69, 91 (*Coleman*).) “Because an expert’s need to consider extrajudicial matters, and a jury’s

need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment. [Citations.] Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. [Citation.]” (*People v. Montiel* (1993) 5 Cal.4th 877, 919 (*Montiel*)). “[I]n aggravated situations,” however, “where hearsay evidence is recited in detail,” a limiting instruction may not remedy the problem. (*Coleman*, at p. 92.) Welch asserts that this is such a case, but we are not persuaded.

The defendant in *Coleman* was tried for the murders of his wife, son, and niece. He asserted diminished capacity and insanity defenses, and both sides presented extensive psychiatric and psychological testimony. (*Coleman*, *supra*, 38 Cal.3d at pp. 74-75, 78.) Three “highly emotional and inflammatory letters” written by the defendant’s wife “long before the murders” were admitted for the limited purposes of impeaching the defendant’s credibility and explaining and challenging the bases for the various doctors’ expert opinions. (*Id.* at pp. 74, 81.) In addition to describing the defendant’s paranoia and “the generally tragic development of the family’s complex problems,” the wife stated in her letters that the defendant had “‘twice before’ tried ‘to hurt’ her, that he had ‘many times’ threatened to kill the family, that he did not want his children going through life as he had, and that his wife feared that he would ‘do this to us and then find out’ [that she was not involved in what he believed was a conspiracy against him].” (*Id.* at p. 82.)

“[V]ia a series of largely unsuccessful attempts to fashion proper questions” during his cross-examination of the defendant, the prosecutor was able to bring the most prejudicial portions of the letters before the jury. (*Coleman*, *supra*, 38 Cal.3d at p. 86.) One expert was later permitted to read the entirety of two of the letters into the record. (*Id.* at p. 88.) In holding that the trial court abused its discretion in allowing these

“[a]ccusatory statements ‘from the grave’” to come into evidence over the defendant’s Evidence Code section 352 objection, the court noted that the prosecutor could have impeached the defendant “without revealing to the jury those details of the letters which did *not* impeach the veracity of [his] testimony” (*Coleman*, at pp. 87, 88, 93) Emphasizing that “the letters were only a small portion of the material on which the psychiatrists based their opinions and were not cited by them as items of major significance in their evaluation of the defendant’s mental capacity,” the court also observed that “those portions of the letters which the prosecutor legitimately offered to challenge the psychiatric opinions could have been selected and presented in a fashion that would have lessened their emotional impact and would have avoided the improper inference that the victim’s accusations were true.” (*Id.* at p. 93.)

This case is not like *Coleman*. No “[a]ccusatory statements ‘from the grave’” came into evidence. (*Coleman*, *supra*, 38 Cal.3d at p. 87.) No irrelevant yet highly prejudicial evidence was presented through bungled cross-examination or otherwise. (*Id.* at p. 86.) We think the level of detail here was appropriate. The experts provided only as much detail as required to justify their opinions, and they were careful to explain how each individual piece of evidence fit into the larger picture they were describing. The situation here was not an “aggravated” one that could not be cured by a limiting instruction.

Welch concedes that the court gave a limiting instruction, but he claims it was an “ineffective, ad-lib” one that “encouraged the jury to give the hearsay even more credence” We disagree.

We note at the outset that the court gave not one but repeated limiting instructions, reminding the jury immediately before hearsay information was elicited from Drs. Musacco, Owen, and Abbott that it was “not going to be offered for the truth of the matter asserted, but simply for the basis of [the particular doctor’s] opinion.” In this way, the instruction was helpfully “tied to particular evidence, and the jury’s attention was . . .

drawn to specific hearsay information disclosed by expert witnesses which should only be considered as a basis for evaluating their opinions.” (*Montiel, supra*, 5 Cal.4th at p. 919.) The court also instructed the jury before they began deliberating that “[d]uring the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.” (CALCRIM No. 303.)

Welch argues that the mechanic example the court gave the jury made the limiting instruction misleading. “Let’s say . . . that I call my mechanic,” the court told the jury after giving the limiting instruction during Dr. Musacco’s testimony, “and I tell him I am having trouble putting, I put the clutch in, and it goes in, but I can’t get the car into gear, I can’t get it in reverse, I can’t get it into first, I can put it into third or fourth or something of that sort. I give the mechanic my observations, my symptoms of what the car is doing, and my mechanic tells me in his or her opinion this is what is wrong with the car. It doesn’t necessarily mean that is what is happening to the car, just that what I have described to him and that he is basing his opinion simply on what he was told. [¶] So that doesn’t necessarily mean that is what the car is doing, that’s just what I am telling him, and he is giving me that opinion based on that” The court used an abbreviated version of the example after giving a reminder limiting instruction during Dr. Owen’s testimony: “I had talked in terms of me telling my mechanic, giving my mechanic some symptoms and him telling me in response to those symptoms what he thinks is wrong with the car. It’s not that’s what’s happening to the car, it’s just his opinion based on what he hears.”

Welch argues that the mechanic example is misleading because in the example, the mechanic is getting personal observations from the judge, while in SVP cases, the expert is getting “second and third hand observations” We think this is a distinction without a difference. The focus of the instruction, like the focus of the mechanic example, is not where the information comes from but that the expert (or the mechanic) is

giving his opinion “bas[ed] . . . simply on what he was told,” which may or may not be true.

c. Due Process Right to Confront Witnesses

Welch contends that allowing the People’s experts to describe his nonpredicate prior offenses and conduct violated his right to confront and cross-examine witnesses. We disagree.

SVP proceedings are civil in nature. (See *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1172 (*Hubbart*)). “There is no right to confrontation under the state and federal confrontation clause in civil proceedings, but such a right does exist under the due process clause. [Citation.]” (*Otto, supra*, 26 Cal.4th at p. 214.) “In civil proceedings, including SVPA proceedings, “[d]ue process requires only that the procedure adopted comport with fundamental principles of fairness and decency.”” (*Dean, supra*, 174 Cal.App.4th at p. 204.) “[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]” (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Fundamental principles of fairness and decency were not compromised here. We reject Welch’s suggestion that a “wholesale abandonment of prohibitions against hearsay and the right of a defendant to confront and cross-examine individuals who have made damaging out-of-court statements against [him]” occurred. Here, unlike in *Otto*, the challenged evidence was not admitted to prove that the reported incidents occurred. As previously discussed, it was properly admitted for a *nonhearsay* purpose: to allow the People’s experts to explain and support their opinions. ““As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s [constitutional] right to present a defense.”” (*People v. Gurule* (2002) 28 Cal.4th 557, 620 [rejecting argument that alleged restrictions on the defendant’s cross-examination of a witness “violated his rights to confrontation, due process, [and] a fair trial.”].)

Here, Welch had the opportunity to cross-examine Drs. Musacco and Owen about their opinions and the materials on which they were based. Through his own expert, he had the opportunity to challenge any expert conclusions that he believed were unsupported or based on unreliable evidence. He also had the opportunity to confront and cross-examine the People's nonexpert witnesses and to call his own witnesses to present his version of events. His due process right to confront and cross-examine witnesses was not violated. (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 55-56.)

B. *Brady* Motion

1. Background

Welch sought and obtained extensive informal discovery before trial, and his counsel was told he was “welcome” to review the district attorney’s case file. The district attorney drew the line at running criminal histories on Welch’s victims, however, explaining that “I can not [*sic*], by law, run criminal histories on anyone I choose. The person must be a listed witness in a pending case that is likely to be called to testify. . . . These women are not parties or witnesses”

Welch filed a formal motion “for a court order compelling the prosecution to turn over *Brady* material.” (Capitalization & boldface omitted.) His motion sought “***all*** favorable evidence required under *Brady v. Maryland*,” including but not limited to criminal histories of Betty, Blanche, Sonya, and Reenie, disclosure of any pending charges against them, their probation status, evidence of “acts of . . . dishonesty and . . . prior false reports of sex offenses,” and “[e]vidence that a victim may have been under the influence of a controlled substance, affecting her memory, perception, and ability to recall events.” The district attorney’s response noted, among other things, that Welch had foregone the opportunity to challenge Betty’s, Blanche’s, and Sonya’s statements by pleading guilty or no contest to the charges and stipulating that there was a factual basis for his pleas. While no charges had been brought in the assault involving Reenie, Welch

had similarly foregone the opportunity to challenge her statements to police when he “signed a waiver of his parole [revocation] hearing and was returned to custody for seven months.” The district attorney represented that she had long ago “provided copies of all documents in [her] possession” to Welch’s counsel in response to his informal requests for discovery and had also “repeatedly” offered him the opportunity to review her file, but “that offer has not been acted upon.” When she repeated those representations at the hearing, Welch’s trial counsel replied, “I . . . basically I trust her that I do have everything.”

The court denied the motion, explaining that “[b]ased on all the facts the Court has heard, I do not believe the People are required to turn over that kind of information to the defense. The experts relied on these police records in forming their opinions, and those police reports . . . on their face appear to be reliable, and it would seem reasonable for them to rely on those reports in order to form their opinion[s]. And it is not my opinion that the People are required under the law . . . [to] provide that information. So the request is denied.”

2. Analysis

Welch contends the trial court prejudicially “erred . . . in contravention of his rights to due process and [a] fair trial” when it denied his *Brady* motion. (Capitalization & boldface omitted.) He claims he was entitled to “back ground [*sic*] information on the out-of-court declarants” because “the ability to test the credibility of statements introduced through the testimony of the state evaluators was at the crux of [his] defense,” and evidence showing bias or a lack of credibility on his victims’ part would be evidence “favorable to the defendant within the meaning of *Brady*.” Denial of access to this information, he argues, “put the whole case in such a different light as to undermine confidence in the verdict.” (*Kyles v. Whitley* (1995) 514 U.S. 419, 435.)

Welch begins with the assertion that *Brady* should apply in SVPA proceedings. He asserts that *Brady* “was based on the Due Process clause which applies to civil as well as

criminal proceedings.” “[C]ivil commitment entails a “massive curtailment of liberty” in the constitutional sense’ [citation] and ‘[t]he destruction of an individual’s personal freedoms effected by civil commitment is scarcely less total than that effected by confinement in a penitentiary.’ [Citation.]” This is the entirety of Welch’s argument. The two cases he quotes are not on point.⁴

We need not decide whether *Brady* applies in SVPA proceedings, which are civil rather than criminal or quasi-criminal in nature (see *Hubbart, supra*, 19 Cal.4th at p. 172), because even if we assume that *Brady* applies,⁵ Welch has not established *Brady* error here.

⁴ In *Humphrey v. Cady* (1972) 405 U.S. 504, an inmate committed in lieu of sentence to the “sex deviate facility” of the state prison petitioned for a writ of habeas corpus, challenging the constitutionality of the Wisconsin Sex Crimes Act. (*Id.* at p. 506.) The court held that his equal protection claims were “at least substantial enough to warrant an evidentiary hearing” and remanded the case. (*Id.* at p. 508.) In *People v. Burnick* (1975) 14 Cal.3d 306, the California Supreme Court held that due process required application of the beyond-a-reasonable-doubt standard in mentally disordered sex offender (MDSO) commitment proceedings. (*Id.* at pp. 323, 332.)

⁵ We acknowledge that a federal district court in North Carolina recently held as a matter of first impression nationally that “extreme circumstances” (vastly different from those presented here) warranted application of the *Brady* doctrine in a civil commitment proceeding under the federal Adam Walsh Child Protection and Safety Act of 2006 (18 U.S.C. § 4248) (the Act). (*United States v. Edwards* (E.D.N.C. 2011) 777 F.Supp.2d 985, 996 (*Edwards*)). We are, of course, not obliged to follow *Edwards*, and we do not find it persuasive in the circumstances presented here. The Act permits the government to detain those certified as “sexually dangerous,” but provides no procedural safeguards (e.g., notice, hearing, burden of proof) or judicial review until the district court holds a hearing to determine whether the detainee is in fact sexually dangerous. (*Id.* at pp. 986-987, 993.) There is no time frame within which the hearing must be held, and *Edwards* was detained almost three years past his release date before a bench trial was calendared. (*Id.* at pp. 991, 993.) Shortly before trial, the government filed two expert reports supporting the commitment; one concluded that *Edwards* met the criteria for a sexually dangerous person, but the other, by a Dr. Denby, evaluated *Edwards*’s risk of recidivism and expressly did “not render an opinion about his eligibility as a Sexually Dangerous Person.” (*Id.* at p. 988.) Four days before trial, the government inexplicably stipulated to dismiss the case, although it was uncontested that *Edwards* had not successfully completed therapy, and no improvement in his condition was evident. (*Id.* at pp. 989,

The prosecution has a duty under *Brady* to disclose evidence that is both favorable to the accused and “material either to guilt or to punishment.” (*Brady, supra*, 373 U.S. at p. 87; *In re Sassounian* (1995) 9 Cal.4th 535, 543 (*Sassounian*).) “[N]ot every nondisclosure of favorable evidence denies due process.” (*In re Brown* (1998) 17 Cal.4th 873, 884.) To violate due process, the nondisclosure must be “so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” (*Strickler v. Greene* (1999) 527 U.S. 263, 281 (*Strickler*).)

A defendant claiming a *Brady* violation has the burden on appeal to establish that the evidence was withheld and that it was material under *Brady*. (*Strickler, supra*, 527 U.S. at p. 289.) “There are three components of a true *Brady* violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.” (*Strickler*, at pp. 281-282.) In most circumstances, “[a] showing . . . of the favorableness and materiality of any evidence not disclosed by the prosecution necessarily establishes at one stroke . . . ‘error’ and ‘prejudice.’” (*Sassounian, supra*, 9 Cal.4th at p. 545, fn.7.) We review the elements of a *Brady* claim de novo. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

993.) The government later explained that it had “only recently” discovered that Dr. Denby had submitted a later report opining that Edwards did *not* meet the statutory criteria. (*Id.* at p. 989.) The government argued that it acted in good faith. (*Ibid.*) It also maintained that “it had unfettered discretion to sift through multiple [expert reports] until it found an opinion supporting its case,” and “that it had no obligation to disclose medical opinions . . . favorable to the detainee.” (*Id.* at p. 994.) “This cannot be allowed,” the district court wrote. (*Ibid.*) Ruling on “what the Fifth Amendment requires in terms of evidentiary disclosure,” the court held that “the normal rules and customs governing civil procedure in the federal courts are inadequate to protect the fundamental liberty interests at stake. The Fifth Amendment Due Process Clause instead requires the application of the *Brady* Doctrine in any case involving a detainee under § 4248.” (*Edwards*, at pp. 991-992.)

Welch cannot establish any element of a *Brady* claim here. He does not assert a typical *Brady* violation, “involve[ing] the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.” (*United States v. Agurs* (1976) 427 U.S. 97, 103 (*Agurs*), disapproved on another ground in *United States v. Bagley* (1985) 473 U.S. 667, 676-683 (*Bagley*).) Nor does he claim that true impeachment evidence, that is, evidence tending to cast doubt on the credibility of a *testifying* witness, was withheld. Here, the district attorney gave Welch carte blanche to review her entire file. As the California Supreme Court has noted, “the prosecutor’s *Brady* obligation may, under proper circumstances, be satisfied by an ‘open file’ policy, under which defense counsel are free to examine all materials regarding the case that are in the prosecutor’s possession. [Citations.]” (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1134, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) On this record, Welch cannot plausibly claim that anything at all was withheld—unless, that is, *Brady* requires prosecutors to run rap sheets on nontestifying individuals whose statements are not being offered for their truth. Welch cites no authority to support stretching *Brady* that far, and we are not aware of any.

Even if we were to assume that something was withheld, moreover, Welch cannot show materiality. All we are presented with here is vague speculation that one or more of Welch’s victims might have had something in her criminal history, assuming she had one, to discredit her account of his crimes. That is not sufficient. “The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.” (*Agurs, supra*, 427 U.S. at pp. 109-110.) The possibility is particularly remote here, where Welch pleaded guilty to the underlying offenses. The plea document reflecting his guilty plea to the second degree rape of Betty includes his written “statement” that “[o]n March 23, 1985, I had sexual intercourse with Betty S. by forcible compulsion by physically restraining her and forcing her to engage in intercourse.” The

presentence report quotes Welch's written version of the offense, including his statement that when Betty left the bar, "I ran after her caught her out in the street had sexual intercourse with her only that not [*sic*] violently.'" These admissions seriously undercut any suggestion that Betty's account was unreliable. (See *People v. Yartz* (2005) 37 Cal.4th 529, 542 (*Yartz*) [SVPA provides sufficient safeguards to ensure that a defendant's conviction from a no contest plea is "reliable as evidence of the defendant's current mental disorder and future violent sexual behavior"].) Blanche's and Sonya's accounts are similarly reliable. In the case involving Blanche, Welch pleaded guilty to assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) and making terrorist threats (Pen. Code, § 422). In the case involving Sonya, he pleaded guilty to false imprisonment (Pen. Code, § 236). It is true that his pleas in these cases made no mention of a sexual component, but they supported other aspects of Blanche's and Sonya's stories, and that lent credibility to the rest of their accounts. With only speculation that some sort of "impeachment" evidence might exist, we cannot say that there was "a reasonable probability that, had [Welch's victims' rap sheets, if any existed] been disclosed to the defense, the result of the proceeding would have been different." (*Bagley, supra*, 473 U.S. at p. 682.)

Nor can we say that the denial of his *Brady* motion denied Welch a fair trial generally. If the credibility of his victims was truly "at the crux of [his] defense," he could have noticed their depositions under the rules for civil discovery to obtain the information he sought.⁶ (Code Civ. Proc., §§ 2019.010, subd. (a), 2025.010, 2026.010, (*Cheek, supra*, 94 Cal.App.4th at p. 996.)

⁶ Since civil discovery rules apply in SVPA proceedings, depositions are authorized. (*People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 988; see also *Leake v. Superior Court* (2001) 87 Cal.App.4th 675, 681-683 [defendant in SVPA proceeding entitled to exchange of expert witness information], disapproved on another ground in *Yartz, supra*, 37 Cal.4th at p. 537; *Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 733-734 [although civil discovery rules apply, requests for admissions may not be propounded "because their use would eviscerate the [SVPA's] requirement that the state

C. Mistrial Motion

1. Background

Describing the materials he relied on in forming his opinions, Dr. Musacco mentioned documents indicating that Welch had been found not guilty by reason of insanity (NGI) in Florida in 1978.

Dr. Musacco also noted that Welch had initially been found incompetent to stand trial for his predicate offense in Washington and committed to the state hospital for evaluation. He observed that Welch's Washington attorney "expresse[d] a concern at the time that . . . Welch suffered from a mental disorder that caused him to be [NGI] at the time that he committed that rape." Dr. Musacco referred to a letter in the Washington court's file that described Welch's symptoms: "confusion, disorganization, guardedness, hostility, anger, refusal to participate or interview, denial of any problems, refusing to accept treatment, aggressive behaviors, and general lack of engaging with the mental health professionals, [and] refusing to answer questions, or to discuss symptoms." He opined that those symptoms were "not uncommon with a paranoid individual, but the extent of it is I would say severe, as documented in the records and as observed by myself." Another letter described Welch's behavior as "[a]gain easily agitated, hostile with minimal confrontation, inappropriate in his anger, refusing to accept medications." A note in the file "report[ed] that he is attacking other patients. He is violent. He is placed in restraints, temporary seclusion. And again they are requesting to provide him with medications to prevent him from hurting other people." Another document described Welch as "being nonsensical, not making any sense, irrational. His thoughts were loosely associated. They were not connected. There was [*sic*] clear signs of a

prove its case beyond a reasonable doubt and, where the case is tried to a jury, obtain a unanimous verdict before the person may be committed. To relieve the state of this burden would deprive a person of liberty interests in violation of the right to due process.".)

mental illness, and he continued to steadfastly refuse treatment. However, once he was provided with medications, his condition improved. He remained guarded, but he was more social, less confrontational, more cooperative, and [doctors were] able to restore him to trial competency.” “It was the treatment team recommendation,” Dr. Musacco noted, that Welch had “a mental disorder,” and the medication was responsible for treating or lessening the symptoms of that mental illness. The defense objected and moved “to strike the treatment team’s conclusions as hearsay and irrelevant.” The objection was overruled.

Dr. Musacco summarized how information gleaned from the documents supported his schizophrenia diagnosis. “Going back to . . . the day of the crime there is a description of him rambling, not making sense, being weird, engaging [in] aggressive sexual behavior. He is referred to his attorney, a public defender who has concern that he is mentally ill and unable to assist in his defense, the court finds him to be incompetent to stand trial, he is sent to the hospital where we have described his behaviors, he has been put on involuntary medications, and improves and discusses some symptoms. Really, I think the only time where he ever discussed the symptoms in the records. He is returned to court. He is restored to competency, the attorney is considering [an NGI] defense, that defense is apparently not pursued, but again speaks to his mental state regarding the crime. He enters a plea. He is sent to the prison up in Washington State. The staff up there, I think this guy seems to be depressed or there’s a mental illness there, and he says, I’m fine[,] nothing[] wrong with me.” Thus, Dr. Musacco explained, there was evidence of each of the diagnostic criteria for schizophrenia, including disorganized thoughts and speech and auditory and delusional beliefs. Impairment must also be shown, he told the jury, and that was “pretty obvious, this sense of criminal activity, as well as his inability to . . . function in the capacity of assisting his attorney. . . . [A]ll of these behaviors are deemed to be and appear to be [symptomatic] of the mental disorder, namely schizophrenia in my opinion.”

Dr. Owen also testified briefly about the NGI and incompetency findings. Noting that “[g]enerally individuals develop Schizophrenia in . . . late adolescence,” he explained that the Florida NGI finding showed “these symptoms manifested years ago.” That Welch was found incompetent to stand trial for raping Betty was significant because “we see that right after this sexual offense psychosis is apparent. Again, we see kind of this combination of paraphilia and psychosis.” Descriptions of Welch’s behavior in the state hospital were significant because “sometimes you can look at treatment kind of diagnostically, does a person improve with this specific treatment. In this case, we see antipsychotics diminish symptoms of psychosis, which I think further supports the idea that this man has a psychotic disorder and is responsive to the appropriate medication.”

Welch moved for a mistrial, specifically referencing the admission of evidence (1) that he had been found NGI in the Florida case, (2) that he had been found incompetent to stand trial and eventually restored to competency in the Washington rape case, and (3) that his attorney in that case had initially pursued an NGI defense. In the alternative, Welch asked “that all testimony related to NGI findings and defenses be stricken from the record, and . . . the jury . . . admonished and instructed to disregard them.” His motion papers asserted that the evidence was “irrelevant and excludable under Evidence Code § 352,” constituted “inadmissible hearsay evidence,” “implicitly refer[red] to the inadmissible hearsay opinions of non-testifying doctors . . . and non-experts . . .,” and posed a significant danger that the jury would give undue weight to previous findings instead of focusing on whether Welch had a currently diagnosed mental disorder.

The court denied the motion, explaining that “[g]iven the limiting instructions the Court gave during this trial, . . . the admission of that particular bit of evidence, even if it was prejudicial, was not so incurably prejudicial that a new trial would be required, and so the Motion for Mistrial is denied.”

2. Analysis

Repeating his claim that the trial court erred in allowing “inadmissible” evidence to come in through the People’s experts, Welch challenges the denial of his mistrial motion. He claims that the admission of “opinion evidence of non-testifying individuals” violated his right to due process and a fair trial.⁷ (Capitalization & boldface omitted.) We reject these contentions.

“‘A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.’ [Citations.]” (*People v. Hines* (1997) 15 Cal.4th 997, 1038.) “A trial court should grant a mistrial only when a party’s chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial.” (*People v. Bolden* (2002) 29 Cal.4th 515, 555.)

We discern no abuse of discretion here. Much of the “hearsay” evidence that Welch complains of (specifically, expert testimony (1) that his Washington attorney was concerned that Welch suffered from a mental disorder that would support an NGI defense, (2) that Welch was initially found incompetent to stand trial for raping Betty, (3) that he had attacked another patient at the Washington State hospital, and (4) that he had been found NGI in a 1978 case in Florida) was, as we have already determined, properly admitted for the *nonhearsay* purpose of supporting and explaining the experts’ opinions.

⁷ Welch also contends that “hearsay descriptions” of his conduct at state hospitals violated his “due process rights to cross-examine witnesses.” This is simply another iteration of his argument that disclosure by the experts of the contents of police reports, probation reports, psychological evaluations, prison records, parole revocation reports, and state hospital records to the jury “under the guise of” reasons to support their opinions violated his right to confront and cross-examine witnesses. We have already rejected that contention.

Properly admitted evidence does not result in the sort of incurable prejudice that a mistrial motion is designed to remedy. Prejudice derives from error, and there was no error here. The evidence that Welch challenges was certainly not supportive of his position that he was not an SVP, but more than that is required to irreparably damage his chances of receiving a fair trial. Even if there was a possibility of prejudice here, it would have been obviated by the court's repeated limiting instructions. (*Montiel, supra*, 5 Cal.4th at p. 919.) We must presume that the jury understood and followed those instructions. (*People v. Panah* (2005) 35 Cal.4th 395, 492.)

Welch's other complaints are based on misreadings of the record. He claims the People's experts testified about "conclusions of the treatment team from a Washington hospital that [Welch] has a psychotic disorder" Not so. Dr. Musacco testified that the Washington treatment team suggested that Welch might be suffering "from a thought disturbance" or "a mental disorder." Responding to a defense objection that "thought disturbance" was a diagnosis of a nontestifying physician (which the court had ruled inadmissible), Dr. Musacco clarified that "a thought disturbance is not a diagnosis." "[A] diagnosis would be something like schizophrenia, or major depression. A thought disorder generally refers to conditions which may indicate, like the other words I said, they are disorganized thoughts, agitated behaviors. It is not a diagnosis." By the same reasoning, in our view, "mental disorder" is not a diagnosis either. It is simply a generalized summary of the symptoms and behaviors the hospital staff observed. Such descriptions were, as we have already determined, properly admitted for the limited purpose of explaining the experts' opinions.

Welch also complains about the admission of evidence that a Washington psychologist described him as (according to Welch) "*schizophrenic, psychotic, negativistic, oppositional, withdrawn, controlled, autistic, confrontational, easily agitated, irrational, hostile and threatening.*" (Italics added.) The record cites he provides do not support his assertion that hospital staff described him as "schizophrenic" or "psychotic."

We have not found any such references. Dr. Musacco testified that the Washington psychologist described Welch's behavior as "negativistic, oppositional, withdrawn, [and] controlled." "[H]is affect or his display emotionally [was] described as inappropriate and autistic. They indicate he may be suffering from a thought disturbance" Dr. Owen testified, similarly, that the Washington psychologist described "symptoms." "He talks about Mr. Welch being very negative, uncooperative, withdrawn, confrontational, easily agitated, [and says he] is hostile and threatening. . . . His thinking was irrational, associations loose. Socially he was withdrawn."

It was Dr. Musacco, not the Washington hospital staff, who opined that the behaviors Welch exhibited at the hospital and the changes observed in his behavior after he was provided with medication, most notably his descriptions of "auditory and visual hallucinations" and "paranoid and grandiose delusional beliefs," were "the two hallmark symptoms that you see with schizophrenia." Similarly, it was Dr. Owen, not the Washington hospital staff, who opined that "right after this sexual offense [in Washington] psychosis is apparent. Again, we see kind of this combination of paraphilia and psychosis." We reject Welch's assertion that "[d]espite the trial court's in limine order 'granting' [his] motion to exclude the opinions of non-testifying experts [citation], the value of the order was undone by the court's actual admission of numerous instances of out-of court opinions."⁸

⁸ Welch also asserts that "[p]erhaps even more damaging, the opinion of his own prior attorney that he was not guilty of the 1985 offense due to a mental disorder resulting in criminal insanity, and the determinations that [Welch] was incompetent to stand trial following the alleged offense were inadmissible opinions." We disagree. Neither of these "opinions" is a diagnosis of a nontestifying treating physician or evaluator. The evidence was properly admitted for the limited purpose of supporting the experts' opinions. Welch does not explain how prejudice resulted from his Washington attorney's initial opinion or from the initial finding that Welch was incompetent to stand trial. We do not believe any prejudice resulted, but to the extent it did, it was cured by the trial court's repeated limiting instructions. (*Montiel, supra*, 5 Cal.4th at p. 919.)

Welch's reliance on *People v. Campos* (1995) 32 Cal.App.4th 304 (*Campos*) is misplaced. In *Campos*, the sole prosecution expert in a mentally disordered offender (MDO) proceeding was permitted to testify that the reports of nontestifying experts who had evaluated the defendant were consistent with her opinion that he met the MDO criteria. (*Id.* at pp. 307-308.) *Campos* stands for the proposition that while an expert "may state the reasons for his or her opinion, and testify that reports prepared by other experts were a basis for that opinion," he or she "may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts." (*Id.* at p. 308.) *Campos* is inapposite here, where Drs. Musacco and Owen did not disclose "the contents of reports prepared or opinions expressed by nontestifying experts." (*Ibid.*) Instead, they used those experts' descriptions of Welch's behavior to support their own diagnoses and opinions. Even if we were to assume, for the sake of argument, that "a thought disorder" or "a mental disorder" constituted a diagnosis, we would reach the same result the *Campos* court reached, concluding that any such references were not prejudicial since they consumed "only a small portion of [the experts'] lengthy testimony," and the remainder of that testimony "easily support[ed] the jury's determination that the defendant met the MDO [or SVPA] criteria." (*Id.* at pp. 308-309.)

Welch's reliance on *People v. Munoz* (2005) 129 Cal.App.4th 421 (*Munoz*) is also misplaced. In *Munoz*, the court admitted evidence of the defendant's prior SVPA commitments, "but only for the purpose of showing [his] history" at the state hospital. (*Id.* at p. 426.) The prosecutor noted the prior commitments while examining a prosecution expert, asking if she had been assigned to evaluate whether the defendant "'continue[d] to meet the criteria under the SVP law.'" (*Id.* at p. 427.) She responded affirmatively. (*Ibid.*) During closing argument, the prosecutor reminded the jury that the defendant had not contested either of his previous commitments, arguing that there had been no change in him during his previous two years at the state hospital. (*Id.* at p. 428.) The defendant was recommitted as an SVP.

The Court of Appeal reversed, holding that “[t]he manner in which the prosecutor questioned witnesses, the evidence the trial court admitted, and the manner in which [the prosecutor] argued the case suggested that the issue was whether anything had changed since [the defendant’s] prior SVP commitment.” (*Munoz, supra*, 129 Cal.App.4th at p. 432.) “It is tempting,” the court said, to characterize the issue as whether anything has changed since the last determination, but that is a “potentially prejudicial mischaracterization.” (*Id.* at p. 430.) “While it is certainly the case that the fact of a prior SVP commitment has some relevance in determining whether a defendant has a currently diagnosed mental disorder, that relevance is limited, and great care must be taken in admitting evidence concerning the prior commitment.” (*Ibid.*)

Here, unlike in *Munoz*, there was no suggestion that the jury had to decide whether anything had changed since Welch’s prior commitments. Unlike in *Munoz*, the questions posed to the experts here repeatedly reminded the jury that the question was whether Welch *currently* suffered from a mental disorder. “Dr. Owen, we’ve been talking a lot about Mr. Welch’s prior convictions, his parole violations,” the district attorney stated. “Can you tell us what leads you to form the opinion that he has a *current* diagnosis of paraphilia?” (Italics added) “Now, going to your diagnosis of a psychotic disorder, what leads you to believe that it’s a *current* diagnosis?” (Italics added.) “[I]s there any question in your mind that Mr. Welch has a *current* and persistent diagnosed mental disorder?” (Italics added.) Testimony about Welch’s prior commitments was quite limited, moreover, and the jury was instructed that it was offered for a limited purpose—not for its truth but solely to explain the experts’ opinions.

D. Evidence About Treatment Phases at the State Hospital

1. Background

Welch moved in limine to exclude any reference to CONREP (Conditional Release Program), Liberty Health Care, or “conditions required for patients . . . released

pursuant to . . . [sections] 6605 [and] 6608.” He also sought to exclude “any mention” of the requirements for completion or graduation “from the Phases at Coalinga State Hospital,” arguing that such evidence, “including the fact that there are four phases,” would be irrelevant, more prejudicial than probative, and likely to cause undue consumption of time and create substantial danger of confusing the issues. Both motions were denied.

Welch also moved to exclude “any mention” of a true finding on the petition, “in particular, any mention or suggestion that [he] will go to a ‘hospital’ for ‘treatment’” That motion was granted. “The other side of that,” the court told Welch, “is that you are not allowed to tell the jury that this is a life sentence, or that you will spend ten years in the hospital, or anything of that sort.” Addressing Welch, the court asked, “Do you understand?” Welch responded that he did.

At trial, Dr. Musacco opined that Welch had a current diagnosed mental disorder that made him likely to engage in sexually violent predatory criminal behavior in the future. One of the factors he considered in forming that opinion was Welch’s own perception of his risk of reoffending. This factor was important, Dr. Musacco explained, because “[i]f someone has an awareness that [he] is vulnerable to tripping up or making this mistake, [he is] capable of taking steps necessary to stop that from occurring.” He emphasized that such awareness is “highly dependent” on the person’s ability to acknowledge that he or she has an underlying diagnosed mental disorder, because “[w]ithout any self awareness that . . . this condition or this predisposition applies to me . . . it’s less likely that I am going to be able to make change[s] that would be necessary.” Dr. Musacco noted that Welch had never acknowledged that he suffered from schizophrenia or any diagnosed mental disorder. Nor had Welch acknowledged having “an issue with anger, specifically towards women.” Welch had not taken an anger management class at the state hospital, although hospital records indicated he was on “kind of a waiting list” for that class.

Dr. Musacco noted that there was “a specific treatment program for sex offenders” at Coalinga. Asked to “just very briefly” describe each phase of the program, he explained that the first phase informs patients “what the treatment process is, here’s what’s going to be expected of you, here’s what you can expect from us” “The second stage is skills acquisition” and includes a relapse prevention component. “Stage three is skills application.” Stage four, skills transition, includes making connections with a support group, continuing to apply all the skills learned, and “taking the final steps necessary” for release into the community, “which is the fifth stage, which is outpatient placement.” Dr. Musacco testified that Welch was not participating in the program and would “probably not” benefit from it without medication to control his schizophrenia, which Welch continued to refuse. No more was said on the topic, and the questioning moved on to actuarial risk assessment tools.

2. Analysis

Welch claims the trial court “erred prejudicially” in allowing expert testimony about treatment phases at the state hospital and references to the conditional release program, “because it improperly revealed to the jury the consequences of a true finding on the petition.” (Capitalization & boldface omitted.) Relying on *People v. Allen* (1973) 29 Cal.App.3d 932, 939 (*Allen*) and *People v. Rains* (1999) 75 Cal.App.4th 1165 (*Rains*), he argues that the outcome would have been different but for the error. We disagree.

The jury in an SVPA proceeding must determine, among other things, whether the defendant suffers from “a diagnosed mental disorder” that makes it “likely that he or she will engage in sexually violent criminal behavior.” (§ 6600, subd. (a).) A defendant is “‘likely [to] engage in sexually violent criminal behavior’ if at trial [he] is found to present a *substantial danger*, that is, a *serious and well-founded risk*, of committing such crimes if released from custody.” (*People v. Roberge* (2003) 29 Cal.4th 979, 988 (*Roberge*)). “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. [Citations.]” (*Id.* at p. 988, fn. 2.) However, evidence of the consequences of a “true” finding on an allegation that a defendant is an SVP (that he would be committed to a hospital for treatment) “is not relevant and therefore not admissible.” (*Rains, supra*, 75 Cal.App.4th at p. 1167.)

Allen was a mentally disordered sex offender (MDSO) proceeding. The jury was repeatedly told during voir dire, during the examination of psychiatric experts, and during closing argument that the defendant needed treatment, which he would receive if he were found to be an MDSO. During closing argument, the prosecutor urged the jury to find that Allen was an MDSO, telling them, “he needs help” and “he will benefit from treatment’ [I]f you don’t do anything for him psychiatrically and you just say let him go to jail The worst that can happen to Mr. Allen . . . would be that he would go to jail, spend some time in jail, and when he came out he would be the same person with the same problem He needs help.” (*Allen, supra*, 29 Cal.App.3d at p. 934.) “The judge also entered into the discussion,” telling the jury, that “[i]f in fact you people determine that he is [an MDSO], he’ll receive medical treatment and the proceedings remain suspended’ ” (*Id.* at pp. 934-935.) The judge explained that “[t]his is sort of a hybrid procedure which is quasi civil, but it’s also quasi criminal. As an ordinary rule in a criminal case the jury is not to be concerned with the punishment. In this . . . type of case . . . if the defendant is adjudicated to be [an MDSO], he may be institutionalized for treatment.’” (*Allen*, at p. 935.) Allen was found to be an MDSO.

The Court of Appeal reversed, holding that “the sound principles which prohibit comment or evidence on punishment or penalty to be considered by a jury on the issue of guilt in a criminal case are, by analogy, applicable to [MDSO] proceedings.” (*Allen, supra*, 29 Cal.App.3d at p. 938.) “Permitting the jury to consider the alleged speculative benefits of involuntary treatment is to allow them to believe they are doing the individual a favor by helping him solve his problem rather than punishing him criminally. The statements and remarks heard by the jury suggest that if [Allen] were found to be an

[MDSO] he would receive treatment which would be beneficial and curative, and if he were not so found he would serve a jail sentence and again be turned loose on society. Aside from the evidence being irrelevant, the conclusions are misleading.” (*Ibid.*) Prejudice was increased because the case was “close.” (*Id.* at p. 934.)

Rains was an SVP proceeding. In *Rains*, a juror expressed “concern that a ‘true’ finding would result in sending [Rains] not to a hospital but to prison even though [he had not been] charged with any crime.” (*Rains, supra*, 75 Cal.App.4th at p. 1171.) In response, the court allowed the prosecution’s experts to explain that commitment would be to a psychiatric facility where Rains would receive treatment. (*Ibid.*) Brief testimony about the type of treatment available was also allowed. (*Ibid.*) The Court of Appeal held that the evidence was irrelevant and should not have been admitted. (*Id.* at p. 1170.) It found the error harmless, however, since the testimony was brief, and the jury was instructed not to discuss or consider the subject of penalty or punishment or let it “‘in any way affect’” the verdict. (*Id.* at p. 1171.)

What the jury heard here is quite different from what the juries heard in *Allen* or *Rains*. Dr. Musacco did not disclose the consequences of a true finding here. Instead, his testimony went to the issue of Welch’s amenability (or lack of amenability) to voluntary treatment. He explained that Welch did not acknowledge that he suffered from a mental disorder. Welch continued to refuse medication. Although there was a specific sex offender treatment program at Coalinga, Welch had failed to take advantage of it. Dr. Musacco opined that without medication, Welch would be unlikely in any event to benefit from the program. All of this testimony supported his opinion that Welch was likely to engage in sexually violent predatory crimes if released. We think the testimony, including the very brief description of the different stages of the treatment program, provided context to help the jury assess Dr. Musacco’s opinion. The challenged testimony here, unlike the prosecutor’s and the judge’s comments in *Allen*, was highly relevant. (*Roberge, supra*, 29 Cal.4th at p. 988 & fn.2.)

Even if we were to assume for the sake of argument that Dr. Musacco’s testimony should have been excluded, we would conclude that the failure to exclude it here was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 835-836 (*Watson*)). The challenged testimony was brief, consuming only four pages of the 309-page transcript of Dr. Musacco’s testimony. It was neutral in tone and unlikely, in our view, to evoke an emotional response from the jury. The jury was instructed, moreover, that it was not to “discuss or consider the consequences of your verdict. That is a matter which must not in any way influence your verdict.” Finally, this was not a close case. As Dr. Musacco told the jury, it was an “unusual” case, but he “wouldn’t call it a close case.” He opined without “any hesitation” that Welch was currently suffering from a diagnosed mental disorder, namely, schizophrenia, that made him likely to engage in sexually violent predatory criminal behavior in the future. Dr. Owen was equally confident. Defense expert Dr. Abbott seemingly concurred in the schizophrenia diagnosis, stating that he was “fairly comfortable” with it and believed Welch was “more likely than not” currently suffering from schizophrenia. His opinion did not forcefully contradict the opinions of the People’s experts, moreover, but instead focused on what he described as insufficient information to conclude that Welch met the criteria. It is not reasonably probable that Welch would have obtained a more favorable result had evidence about the treatment program at the state hospital been excluded. (*Watson*, at p. 836.)

E. Denial of *Ronje* Motion⁹

Welch moved before trial for new evaluations and a new probable cause hearing, arguing that his evaluations had been conducted in 2008, under a protocol that was an invalid underground regulation. The court denied the motion. Welch contends the court erred and that the error requires reversal.

⁹ *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*).

Section 6601, subdivision (c) requires the DMH to develop and update a “standardized assessment protocol” for evaluating persons who may be SVP’s. (§ 6601, subd. (c).) The protocol “shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders.” (*Ibid.*) Only after two independent mental health professionals agree, based on the protocol, that a person meets the criteria for an SVP does the DMH request the filing of a petition for involuntary commitment. (§ 6601, subds. (c)-(f), (h).)

“The purpose of this evaluation is not to identify SVP’s but, rather, to screen out those who are not SVP’s. ‘The Legislature has imposed procedural safeguards to prevent meritless petitions from reaching trial. “[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.] The legal determination that a particular person is an SVP is made during the subsequent judicial proceedings, rather than during the screening process. [Citation.]” (*People v. Medina* (2009) 171 Cal.App.4th 805, 814 (*Medina*).)

The DMH published the Clinical Evaluator Handbook and Standardized Assessment Protocol (2007) to evaluate persons who may be SVP’s. (*Medina, supra*, 171 Cal.App. 4th at p. 814.) In 2008, the Office of Administrative Law (OAL) concluded that certain provisions of that handbook met the definition of “regulation” and should have been adopted pursuant to the Administrative Procedure Act (the APA) (Gov. Code, § 11340 et seq.). (2008 OAL Determination No. 19 (Aug. 15, 2008) p. 13.) While OAL determinations are not binding on this court, they are entitled to deference. (*Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431, disapproved on another ground in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577.)

Regulations adopted in violation of the APA are termed “[u]nderground regulation[s]” (Cal. Code Regs., tit. 1, § 250) and may be declared invalid by a court.

(*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333.) In *Ronje*, the court concluded that “[a]s an underground regulation, the 2007 standardized assessment protocol [was] invalid” and its use constituted “an error or irregularity in the SVPA proceedings.” (*Ronje, supra*, 179 Cal.App.4th at p. 517.) The court rejected *Ronje*’s argument that use of the invalid protocol deprived the trial court of fundamental jurisdiction, however, holding that he was not entitled to dismissal of the petition. (*Id.* at p. 518.) “Instead, the proper remedy is to cure the underlying error.” (*Ibid.*) In *Ronje*’s case, the court concluded that the error could be cured by issuance of a writ of habeas corpus and a remand that directed the court to order new evaluations under a valid protocol and conduct a new probable cause hearing based on those evaluations. (*Id.* at p. 520.)

Welch acknowledges that the error he claims occurred here did not deprive the court of fundamental jurisdiction. Relying on *Ronje*, he argues that he too is entitled to new evaluations and a new probable cause hearing. His reliance on *Ronje* is misplaced.

Because *Ronje*’s challenge to the protocol was a pretrial one, he was entitled to habeas corpus relief without a showing of prejudice. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 (*Pompa-Ortiz*)). In *Pompa-Ortiz*, the California Supreme Court addressed a claimed error in preliminary examination procedures. (*Id.* at p. 523.) The court held that “[t]he 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.) Where a defendant fails to seek extraordinary relief, however, “irregularities 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” (*Ibid.*) “[A] defendant who feels he has suffered error at his preliminary hearing can seek to

correct that error by filing a pretrial writ petition. If he does not, and elects to go to trial, the error at the preliminary hearing can only lead to reversal . . . if the error created actual prejudice.’ [Citation.]” (*Ronje, supra*, 179 Cal.App.4th at p. 517.) “The *Pompa-Ortiz* rule applies to denial of substantive rights and technical irregularities in proceedings and to SVPA proceedings. [Citations.]” (*Ibid.*)

Welch did not seek writ relief, and he has made no showing of prejudice here. Nor can he. As the *Medina* court noted, the purpose of the evaluations is “to screen out those who are not SVP’s.” (*Medina, supra*, 171 Cal.App.4th at p. 814.) “The legal determination that a particular person is an SVP is made during the subsequent judicial proceedings.” (*Ibid.*) Those proceedings include a probable cause hearing (§ 6602) and a trial (§§ 6603, 6604). At the probable cause hearing, 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. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1130.) The matter then proceeds to trial, where the People have the burden of proving beyond a reasonable doubt that the person meets the criteria of the SVPA. (§§ 6603, 6604.)

Here, the trial court found there was probable cause to believe that Welch met the criteria of the SVPA. After a trial, the jury found him to be an SVP. Welch has not challenged the sufficiency of the evidence at the probable cause hearing or at trial. Nor has he shown that dismissal of the petition because the protocol was invalid would have resulted in an abandonment of the commitment proceedings. He has not shown that, had he been evaluated under a valid protocol, it was reasonably probable that he would have been found not to be an SVP. Welch has not carried his burden to show prejudice. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105.) His challenge to the evaluations supporting the petition does not justify reversal of his commitment.

F. Constitutional Challenges

1. Due Process

Welch contends that indeterminate commitment under the SVPA violates due process by making his commitment indefinite, placing the burden on him to show by a preponderance of the evidence that he is no longer an SVP, giving the court discretion to deny a committed person's frivolous petition without a hearing, and making "no provision for the appointment of a mental health expert." The California Supreme Court addressed and rejected these arguments in *McKee*, and we decline Welch's invitation to "revisit" them. (*McKee, supra*, 47 Cal.4th at pp. 1188-1193; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456 (*Auto Equity Sales*)).

2. Ex Post Facto and Double Jeopardy

Welch contends that indeterminate commitment renders the SVPA punitive in nature and violates the ex post facto clause. The California Supreme Court concluded otherwise in *McKee*, holding that "the Proposition 83 amendments at issue here cannot be regarded to have changed the essentially nonpunitive purpose of the [SVPA]." Accordingly, the court held, "the SVPA does not violate the ex post facto clause." (*McKee, supra*, 47 Cal.4th at pp. 1194, 1195.) We are bound by the high court's holding. (*Auto Equity Sales, supra*, 57 Cal.2d at pp. 455-456.)

Welch next contends that indeterminate commitment violates the double jeopardy clause because "notwithstanding a 'civil' label," it constitutes additional criminal punishment for offenses he has already been punished for. Given the *McKee* court's conclusion that the SVPA is not punitive in nature, Welch's claim fails. (*McKee, supra*, 47 Cal.4th at p. 1194; *Auto Equity Sales, supra*, 57 Cal.2d at pp. 455-456.) It is well established that a civil commitment procedure does not constitute a second prosecution for purposes of the double jeopardy clause. (*Kansas v. Hendricks* (1997) 521 U.S. 346, 369.)

3. Equal Protection

Welch contends that indeterminate commitment violates the equal protection clauses of the federal and state Constitutions “because all other civilly committed people in California are entitled to limited confinement and periodic jury trials where the government has the burden of justifying extended commitment.” (Capitalization & boldface omitted.)

In *McKee*, the California Supreme Court concluded that SVP’s are similarly situated to persons who have been found NGI (Pen. Code, § 1026 et seq.) or committed as MDO’s (Pen. Code, § 2960 et seq.). (*McKee, supra*, 47 Cal.4th at pp. 1203, 1207.) The court also stated that McKee’s claim of disparate treatment would be reviewed under the strict scrutiny standard. (*Id.* at pp. 1197-1198.) However, the court concluded that “[b]ecause neither the People nor the court 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.)

Welch contends that “the prosecution had the opportunity in the instant case to demonstrate constitutional justification for the disparate treatment of SVP’s, but failed to do so.” Conceding that “[a]s in *McKee*, the record in the present case is inadequate to determine whether the state has a compelling interest in treating SVP’s in a disparate manner,” he argues that “the proper remedy is reversal, or at the very minimum, remand to the trial court for an evidentiary hearing.” (*McKee, supra*, 47 Cal.4th at pp. 1207-1211.) The Attorney General, on the other hand, urges us to stay the proceedings (presumably in this court) “pending finality of the proceedings in *McKee*.” We conclude that the proper remedy is remand to the trial court for an evidentiary hearing. (*McKee*, at pp. 1207-1211.) Given the high court’s express desire to avoid “an unnecessary

multiplicity of proceedings” on the issue, however, we will direct the trial court to suspend further proceedings pending finality of the proceedings on remand in *McKee*.¹⁰

4. First Amendment

Welch contends the SVPA violates the First Amendment by denying detainees “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.” We disagree.

The First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides the right “to petition the Government for a redress of grievances.” (U.S. Const., 1st Amend.) Prisoners have a constitutional right of access to the courts. (*Ex parte Hull* (1941) 312 U.S. 546, 549.)

Welch claims he was deprived of this right because under section 6605, subdivision (b), a committed person “may file a petition for release only with the concurrence of the director of the [DMH].” He acknowledges that section 6608, subdivision (a) allows him to file a petition *without* the director’s concurrence, but argues that he nevertheless lacks meaningful access, since “there is no provision allowing for the appointment of the medical expert who will be necessary to prove [his] case.”

Welch is mistaken. It is true that section 6608 does not refer to appointment of a medical expert, but section 6605, subdivision (a) does, providing that a committed person has the right to retain (or, if indigent, to request appointment of) an expert to examine

¹⁰ We do so consistent with the California Supreme Court’s directive to the Courts of Appeal in a number of cases, like *McKee*, in which the constitutionality of the SVPA was challenged on equal protection grounds. The high court granted review on a “grant and hold” basis in those cases and, after deciding *McKee*, transferred them back to the Courts of Appeal for reconsideration in light of the decision. “In order to avoid an unnecessary multiplicity of proceedings,” the high court additionally directed the Courts of Appeal “to suspend further proceedings pending finality of the proceedings on remand in *McKee*,” explaining that “[f]inality of the proceedings’ shall include the finality of any subsequent appeal and any proceedings in [the California Supreme Court].” (See, e.g., *People v. Rotroff*, review granted Jan. 13, 2010, S178455, transferred with directions May 20, 2010.)

him or her. (§ 6605, subd. (a).) As the California Supreme Court explained in *McKee*, “[a]lthough section 6605, subdivision (a) does not explicitly provide for the appointment of the expert in conjunction with a section 6608 petition, such appointment may be reasonably inferred.” (*McKee, supra*, 47 Cal.4th at p. 1192.) “Given that the denial of access to expert opinion when an indigent individual petitions on his or her own to be released may pose a significant obstacle to ensuring that only those meeting SVP commitment criteria remain committed, we construe section 6608, subdivision (a), read in conjunction with section 6605, subdivision (a), to mandate appointment of an expert for an indigent SVP who petitions the court for release.” (*McKee*, at p. 1193.)

Welch next argues that section 6608, subdivision (a) denies him meaningful access, because it permits the court to summarily deny a petition without a hearing if it concludes the petition is frivolous, and it places the burden of proof on the committed person under a preponderance of the evidence standard. (§ 6608, subds. (a), (i).) There is no merit to this argument. First, a judicial officer makes the determination whether the petition is frivolous, and the committed person is entitled to the assistance of counsel to make his or her showing. (§§ 6608, subd. (a), 6605, subd. (a).) Second, there is no authority for the proposition that the First Amendment guarantees an individual a particular type of proceeding when he or she is before the court. Habeas corpus proceedings illustrate this point. A court may summarily deny a petition for a writ of habeas corpus when the petitioner fails to prove, by a preponderance of evidence, facts that establish a basis for relief. (See *In re Visciotti* (1996) 14 Cal.4th 325, 351-357; *People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) Analogously here, the First Amendment does not entitle a committed person to an evidentiary hearing on a petition that has been deemed frivolous.

III. Disposition

The order committing Welch to the custody of the DMH for an indeterminate term is reversed, and the case is remanded to the trial court for the limited purpose of reconsidering Welch's equal protection claim in light of *McKee*. The trial court is directed to suspend further proceedings pending finality of the proceedings on remand in *McKee*. "Finality of the proceedings" shall include the finality of any subsequent appeal and any proceedings in the California Supreme Court.

Mihara, Acting P. J.

WE CONCUR:

Duffy, J.*

Walsh, J.**

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

** Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.