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

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM LANGHORNE,

Defendant and Appellant.

H037208

(Santa Clara County

Super. Ct. No. 192118)

Defendant William Langhorne appeals from an order involuntarily committing him for an indeterminate term to the custody of the State Department of Mental Health (now State Department of State Hospitals; hereafter the Department) 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

On appeal, Langhorne contends: (1) the trial court erred by failing to remove a juror for cause; (2) he was entitled to more than six peremptory challenges; (3) the trial court erred by denying his pretrial motion for new evaluators, evaluations, and a new probable cause hearing; (4) there was insufficient evidence he had tried to control his

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

behavior but failed; (5) an indeterminate term of commitment violates due process, equal protection, ex post facto and double jeopardy provisions of the state and federal Constitutions. We will affirm the judgment.

BACKGROUND

A. Brief Overview of the SVPA

The SVPA provides for the involuntary civil commitment, for treatment and confinement, of an individual who is found by a unanimous jury verdict (§ 6603, subds. (e) & (f)), and beyond a reasonable doubt (§ 6604), to be a “sexually violent predator” (*ibid.*). The definition of an SVP is set forth in section 6600, subdivision (a)(1) as follows: “ ‘Sexually violent predator’ means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.”

The SVPA was amended twice in 2006. Prior to those amendments, an individual determined to be an SVP was committed to the custody of the Department for a two-year term. The individual’s term of commitment could be extended for additional two-year periods. (Former § 6604, as amended by Stats. 2000, ch. 420, § 3; former § 6604.1, as amended by Stats. 2000, ch. 420, § 4.)

On September 20, 2006, the Governor signed into law Senate Bill 1128, which amended the SVPA effective immediately. (Stats. 2006, ch. 337, § 62.) Among other changes, the amended SVPA provided for an indeterminate term of commitment, and the references to two-year commitment terms and extended commitments in sections 6604 and 6604.1 were eliminated. (Stats. 2006, ch. 337, §§ 55, 56.)

Less than two months later, voters approved Proposition 83, which amended the SVPA effective November 8, 2006. (See Cal. Const., art. II, § 10, subd. (a).) Like Senate Bill 1128, Proposition 83 amended the SVPA to provide that an SVP’S

commitment term is “indeterminate.” (§ 6604; see § 6604.1.) Proposition 83 also eliminated all references to a two-year term of commitment and most references to an extended commitment in sections 6604 and 6604.1. Thus, a person found to be an SVP under the SVPA is now subject to an indeterminate term of involuntary civil commitment. (*People v. Whaley* (2008) 160 Cal.App.4th 779, 785-787 (*Whaley*).

B. Procedural Background

We summarized some of the procedural background of Langhorne’s case in *Langhorne v. Superior Court* (2009) 179 Cal.App.4th 225 (*Langhorne*). In *Langhorne*, this court explained that “[o]ur summary of the pertinent procedural background” included information from the prior opinion in *People v. Langhorne* (Aug. 14, 2008, H031887) [nonpub. opn.], of which this court took judicial notice. (*Langhorne, supra*, at p. 229.) The prior summary provided as follows:

“In 1986, Langhorne was convicted of 10 counts of lewd and lascivious conduct upon a child under 14 years of age (Pen. Code, § 288, subd. (a)), four counts of oral copulation with another person under 16 years of age (Pen. Code, § 288a, subd. (b)(2)), and two counts of oral copulation with another person under 18 years of age (Pen. Code, § 288a, subd. (b)(1)). (*People v. Langhorne, supra*, H031887.)

“Langhorne was initially committed as a sexually violent predator in 1997. He was thereafter recommitted for additional two-year terms, with the most recent two-year term extending to November 14, 2007.

“On June 8, 2007, before the expiration of the most recent two-year commitment period, the People filed a ‘motion to retroactively apply an indeterminate term to respondent’ under the 2006 amendments to the SVPA. (§§ 6604, 6604.1, subd. (a).) The trial court granted the motion on July 27, 2007, and ordered Langhorne to be committed to the custody of the [Department] for an indeterminate term as a sexually violent predator. Langhorne appealed. . . . (*People v. Langhorne, supra*, H031887.)” (*Langhorne, supra*, 179 Cal.App.4th at pp. 229-230.)

While Langhorne's appeal in *People v. Langhorne, supra*, H031887, was pending, this court filed *Whaley, supra*, 160 Cal.App.4th 779, in which this court held that "an indeterminate term of commitment imposed pursuant to section 6604.1 may not be imposed retroactively." (*Id.* at p. 784.) This court explained that before an indeterminate term of commitment may be imposed, "a person already committed as a sexually violent predator before the amendments to sections 6604 and 6604.1 in 2006 is entitled to an extension proceeding at which there would be a new determination of the person's status as a sexually violent predator." (*Id.* at p. 803.)

"On March 5, 2008, two days after *Whaley, supra*, 160 Cal.App.4th 779, was filed, the People requested updated evaluations from the [Department]." (*Langhorne, supra*, 179 Cal.App.4th at p. 232.) Evaluations were performed by Robert M. Owen, Ph.D. and Jack Vogensen, Ph.D. Both evaluators concluded that Langhorne met the criteria for commitment as an SVP.

On June 6, 2008, while Langhorne's appeal in *People v. Langhorne, supra*, H031887, was still pending, the People filed a petition to extend Langhorne's commitment from the date his prior two-year term expired to " 'the term prescribed by law.' " (*Langhorne, supra*, 179 Cal.App.4th at p. 232.) On August 14, 2008, this court issued an unpublished opinion in *People v. Langhorne, supra*, H031887, reversing the order imposing a retroactive indeterminate term of commitment.

On October 10, 2008, Langhorne filed a motion to dismiss the pending petition to extend his commitment. He argued that this court had reversed the order committing him to an indeterminate term and that the pending petition to extend his commitment had been filed after his " 'last lawful' " two-year commitment term had expired, leaving the trial court without jurisdiction to proceed on the petition to extend his commitment. (*Langhorne, supra*, 179 Cal.App.4th at p. 232.)

After the trial court denied Langhorne's motion to dismiss, he filed a petition for writ of mandate and/or prohibition in this court. (*Langhorne, supra*, 179 Cal.App.4th at

p. 234.) This court denied the petition in a published opinion issued on November 16, 2009, concluding that “substantial evidence supports the trial court’s finding that the People made a good faith mistake of law when they brought the motions to automatically convert [Langhorne’s] most recent two-year commitment term[] to [an] indeterminate term[], which resulted in [Langhorne’s] unlawful custody.” (*Id.* at p. 239.)

Meanwhile, on November 4, 2009, the trial court held a probable cause hearing, at which both evaluators testified. The prosecution submitted the 2008 evaluations as well as updated evaluations that had been prepared in September of 2009. At the end of the hearing, the trial court found probable cause to believe that appellant had been convicted of a qualifying sexually violent offense against at least one victim, he had a diagnosable mental disorder, and the disorder made it likely that he will engage in predatory sexually violent conduct if released.

On August 27, 2010, Langhorne filed a motion requesting new evaluations, conducted by new and impartial evaluators, and a new probable cause hearing. (See *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*).)² By order filed January 26, 2011, the trial court denied Langhorne’s motion.³

On July 15, 2011, Langhorne filed a written objection to the indeterminate term provision of the SVPA. He alleged that imposition of an indeterminate term would violate the constitutional guarantees of due process and equal protection, and that it would violate the constitutional prohibitions against ex post facto laws and double

² As we will discuss, *Ronje* had ordered similar pretrial relief where the section 6601 evaluations had been conducted under a standardized assessment protocol that was later determined to be an invalid underground regulation not adopted in compliance with the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.). (*Ronje, supra*, 179 Cal.App.4th at p. 521.)

³ Defendant subsequently filed a petition for writ of mandate and/or prohibition, challenging the denial of his *Ronje* motion. (*Langhorne v. Superior Court* (H036658) [nonpub. order].) This court denied the petition by order dated April 20, 2011.

jeopardy. The trial court found the motion premature and indicated that the issue would be addressed if the SVP petition was found true.

After a jury trial, Langhorne was found to be an SVP. On July 29, 2011, the trial court committed him to the Department for an indeterminate term, and it denied his objections to the indeterminate term of commitment.⁴

C. Evidence at Trial

At trial, the disputed issues included whether Langhorne suffered from a “currently diagnosed mental disorder” and whether it was “likely” that he would “engage in sexually violent criminal behavior” if released. (§ 6600, subd. (a)(3).) The defense took the position that Langhorne had never suffered from pedophilia, because there was no evidence that his victims were prepubescent. Alternatively, the defense attempted to show that any such disorder was in remission. The defense further argued that while in prison and in the custody of the Department, Langhorne had not exhibited any behaviors indicating he posed a current threat to reoffend.

1. Prosecution Case

The prosecution presented three witnesses: the two evaluators (Drs. Owen and Vognsen) and Langhorne himself.

a. Robert Owen, Ph.D.

Dr. Owen, a licensed clinical psychologist, testified about Langhorne’s predicate offenses. The predicate offenses included molestation of 17 victims over a ten-year

⁴ The trial court specified that the indeterminate commitment was “subject to the ultimate decision” in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*). As will be discussed below, in *McKee I*, the California Supreme Court considered an equal protection challenge to the indeterminate commitment scheme under the amended SVPA, but remanded the matter for further proceedings on the issue. In *People v. McKee* (2012) 207 Cal.App.4th 1325 (*McKee II*), the Court of Appeal rejected the equal protection challenge to the amended SVPA.

period, ending upon his arrest in 1986. Langhorne was age 55 at the time of trial, but between the ages of 20 and 30 at the time of the predicate offenses.

Langhorne had met most of the boys through his positions as an assistant scout master with the Boy Scouts and a soccer coach. Most of the boys were age 12 when the molestations began, although at least one was age 11. Langhorne's acts of molestation included touching or fondling the boys' genitalia, orally copulating them, requiring them to orally copulate him, encouraging them to look at pornography, and encouraging them to masturbate.

Dr. Owen diagnosed Langhorne with pedophilia. He testified that the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) contains two criteria for a diagnosis of pedophilia: (1) evidence that the person has had a period of at least six months with recurring fantasies, urges or behaviors directed towards a prepubescent child; and (2) evidence that the person has acted on those sexual urges. The DSM-IV defines a prepubescent child as "generally age 13 years or younger."

Dr. Owen explained that Langhorne exhibited "hebephilic tendencies" and defined hebephilia as an attraction to boys aged 13 to 16. However, he did not diagnose Langhorne with hebephilia, since it was not a disorder listed in the DSM-IV.

Langhorne had been molested as a child. He had no long-term adult relationships. He had a one-year relationship with a woman during the time he was committing some of the molestations, and he had a one-year relationship with a cellmate while in prison. Langhorne claimed to have a current sexual interest in adults (both male and female), but Dr. Owen believed Langhorne was being deceptive.

Dr. Owen acknowledged that, through treatment, a pedophile can learn to manage his impulses so that he will not reoffend. Langhorne had engaged in some treatment while in Department custody, but he had dropped out by the time of Dr. Owen's March 2011 interview.

Dr. Owen did not believe that Langhorne's pedophilia was in remission. Rather, due to his custodial status, "It's just the opportunity isn't there." The mere fact that 25 years had passed since Langhorne's offenses did not make the pedophilia go away. Within the last six years, in fact, Langhorne had reported that he needed to walk away when he saw children on television.

Dr. Owen assessed Langhorne's risk of reoffense on various actuarial instruments. On the Static 99-R, Langhorne scored a two, putting him at a "low-moderate" risk of reoffense. On the SRA-FV, Langhorne scored in the "moderate-high" category. On the MNSOST, Langhorne scored in the "high risk" category.

Overall, Dr. Owen believed Langhorne presented a "substantial and well-founded risk" of reoffense. This opinion was based on the fact that his sexual deviance lasted for a decade, the fact that he had multiple victims and repeated acts, and the extent to which his life was focused on the sexually deviant activities.

b. Jack Vognsen, Ph.D.

Dr. Vognsen, a psychologist, gave Langhorne a primary diagnosis of pedophilia, but also felt Langhorne had hebephilia. Dr. Vognsen found it hard to believe that Langhorne's attraction to boys had stopped. Although while in prison Langhorne had a relationship with an adult male, this did not mean that he no longer had pedophilic interests.

According to Dr. Vognsen, Langhorne's lack of volitional control was shown by the fact that he had continued to molest boys for a long time, while knowing the acts were illegal and that the boys objected. Although there was no current evidence regarding Langhorne's lack of self-control, "It would be hard to get that type of evidence," due to Langhorne's custodial status.

Dr. Vognsen testified that treatment programs like the one offered at Coalinga State Hospital had cut reoffense by up to 30 percent. The other classes Langhorne had taken were not as effective.

c. Langhorne

Langhorne admitted that he had molested at least 17 boys from 1979 until his arrest in 1986. In addition to molesting them, he would show them pornography. He knew that his acts were illegal and wrong, but he did not believe he was harming the boys. He felt that he was helping and teaching them.

Langhorne denied that any of the boys were prepubescent, except possibly one, who he had merely groped over his clothing. According to Langhorne, younger boys did not interest him because their genitals were not developed. In addition, they were not available to go places with him, such as to see movies.

Langhorne claimed he stopped participating in treatment because he did not think some of the social workers were “very competent.” He also did not like being critiqued for his answers. He had recently begun taking classes, including a sexual compulsivity class and a class called Breaking Barriers, which taught him how to make good decisions. He knew that “[r]ecovery is a lifelong work.”

Langhorne claimed he was no longer attracted to boys. He sometimes saw them in visiting rooms but felt no attraction. He was able to look away when provocative images of boys were displayed on television. He acknowledged that eliminating his risk of reoffense would take work and that loneliness was one of his triggers. If released, Langhorne planned to move to Georgia to live with his father and step-mother. He would continue participating in group treatment.

2. Defense Case

a. Brian Abbott, Ph.D.

Dr. Abbott, a licensed clinical social worker and forensic psychologist, did not believe Langhorne suffered from pedophilia at the time of trial. He also believed it was unlikely that Langhorne had suffered from pedophilia in the past, since the evidence was not clear as to whether the boys were prepubescent. If Langhorne did suffer from pedophilia in the past, it was in remission by the time of trial.

Dr. Abbott believed that Langhorne had only adult homosexual interests and that Langhorne had shown an ability to maintain adult relationships by the time of trial. Thus, even if hebephilia or paraphilia NOS (not otherwise specified) were valid diagnoses, Langhorne also did not currently have either of those conditions.

Dr. Abbott believed the molestations occurred not out of a “paraphilic motivation” but because Langhorne had a “maladaptive way of dealing with psychological problems and social problems.”

Addressing the question whether Langhorne’s volitional control was impaired, Dr. Abbott pointed out that Langhorne had not tried but failed to control his urges. He did note that Langhorne had declined child pornography when it was offered to him. Dr. Abbott did not believe there was a substantial risk that Langhorne would reoffend.

b. James Park, Ph.D.

Dr. Park, a licensed psychologist, likewise did not believe that Langhorne fit the SVP criteria.

Dr. Park explained that although the DSM-IV defines pedophilia by using the age of 13 as a cut-off, it should really say “prepubescent,” since the age of onset for puberty has been in decline. Children aged 11 and 12 can be in puberty. If the boys Langhorne molested were pubescent, pedophilia would have been an incorrect diagnosis. Dr. Park himself diagnosed Langhorne with pedophilia in full remission.

Dr. Park did not believe there was evidence that Langhorne lacked volitional control at the time of the offenses or at the time of trial. Instead, Langhorne had merely been compulsive.

Dr. Park found it significant that Langhorne had never been found in possession of any child pornography while in custody and that on one occasion, Langhorne had refused to take child pornography that had been offered to him.

Dr. Park did not believe that Langhorne needed to complete all of the phases of treatment offered through the Department. Dr. Park believed that, at the time of trial,

Langhorne understood the wrongfulness of his prior acts. He also had exhibited significant life changes, including the ability to develop an intimate, continued relationship with an adult.

c. Lay Witnesses

David Savoy, a senior psychiatric technician at Coalinga State Hospital, had worked on Langhorne's unit for three years. At the time of trial, Langhorne was participating in several groups, although he had not been participating in phase two of SVP treatment. He found it "amazing" that Langhorne had never been found with any contraband, including child pornography, during the random searches conducted by Department staff.

Langhorne's father testified that he would allow Langhorne to live with him if Langhorne was released.

DISCUSSION

A. Denial of "For Cause" Challenge to Juror No. 1

Prospective Juror No. 18 was seated as Juror No. 1 for Langhorne's trial. Langhorne contends the trial court erred by failing to remove Juror No. 1 for cause, thereby violating his constitutional rights to due process and a fair trial. Langhorne contends that Juror No. 1 should have been removed after he revealed, on voir dire, that he had been molested as a child and stated that appellant reminded him of that part of his past.

1. Proceedings Below

In his questionnaire, Juror No. 1 reported that he was 60 years old, single, and had no children. He was employed as a project manager. In response to the written questions, Juror No. 1 reported that his stepfather had molested him, that no arrest had been made, that no criminal proceedings had been instituted, and that he had not seen any mental health professional for treatment in conjunction with the molestation.

Juror No. 1 was called into the jury box on July 19, 2011, just after Langhorne had exhausted his six peremptory challenges. The trial court asked whether Juror No. 1 could think of any reason why he could not be a fair and impartial juror in this matter. Juror No. 1 replied, “I cannot.” He indicated there was nothing specific he wanted to discuss.

The trial court noted that Juror No. 1 had not filled out the questionnaire completely – he had not answered the last three questions and had not signed it.⁵ Juror No. 1 apologized and offered to “do it here.” The trial court gave Juror No. 1 time to complete the questionnaire, then resumed questioning him.

The trial court noted that Juror No. 1 had reported that he or someone he knew had been the victim of a sexual assault or molestation, and it asked if “that is in any way going to influence your decision-making in this case.” Juror No. 1 replied, “I don’t believe it will.” The trial court asked, “You can push that to the side?” Juror No. 1 answered, “Yes.” The trial court asked, “It’s not going to resurrect its ugly head in terms of what you are told or your experiences that’s not part of this?” Juror No. 1 stated, “I believe I would have it under control.” Juror No. 1 confirmed he would be objective. In answering further questions from the trial court, Juror No. 1 confirmed he had “[n]o spillovers,” “[n]o axes to grind,” “[n]o hidden agendas,” and “[n]o vendettas.” Juror No. 1 also confirmed he understood the burden of proof was beyond a reasonable doubt, that the SVPA petition was presumed to be not true, and that the people had to “prove the case beyond a reasonable doubt about all three elements.”

Trial counsel then asked Juror No. 1 a series of questions. Juror No. 1 explained that he had been molested between the ages of eight and 17 and that the molestation had

⁵ The last three questions on the questionnaire asked whether Juror No. 1 had ever served on a jury before, whether he had ever been a witness or testified at a hearing, and whether there was any matter addressed in the questionnaire that he would prefer not to discuss openly.

gone on for “a long period of time.” Trial counsel noted that the jury was “going to hear evidence about prior offenses” and asked how that would impact Juror No. 1’s “ability to resolve this issue.” Juror No. 1 replied, “I think it’s going to, obviously, enter my mind.” He continued, “However, I keep hearing the judge, and I feel in my heart that I can push aside the issues that were brought up in my childhood. It’s been long ago enough that it is not an issue with me now. I will be honest and tell you that – and this is probably a deal breaker – but just looking at him brings back memories for me. Okay. And so it’s starting to resurrect certain things that happened so many years ago. So I think I have trouble pushing that off to one side.”

Trial counsel asked for clarification. Juror No. 1 explained, “What I am saying is, the feelings that I had when I was a child somehow he reminds me of those feelings.” He further explained, “His presence reminds me of the events that took place.” Trial counsel asked, “And is that going to impact on your ability to be fair and impartial?” Juror No. 1 responded, “I would like to think not.” He continued, “I would like to think I could push those aside and I believe I can.” He later added, “The feelings may get resurrected. I don’t know if they will or not. I’d like to think I could keep them under control.”

Trial counsel concluded his voir dire by asking, “Do you think you can be fair and impartial to both sides at this time given those events and the appearance of [Langhorne]?” Juror No. 1 replied, “I think I can.”

The prosecution declined to question Juror No. 1, and the jury was sworn.

The following day, July 20, 2011, trial counsel requested to put some “matters from the jury selection process . . . on the record.” He then explained that the previous day, he had “approached at the sidebar” and requested additional peremptory challenges. The trial court confirmed that it had denied that request. Trial counsel reiterated his request for additional peremptory challenges, and the trial court again denied it.

Trial counsel then stated that he “also had wanted to preserve one challenge regarding cause,” regarding Juror No. 1. He specified, “We questioned [Juror No. 1] for

cause yesterday, and it is our request to have him removed as a juror . . . for cause. The reason is that [Juror No. 1] indicated that he has been a victim of child molest himself that lasted, I think, approximately nine years from about age 8 to age 17 by his stepfather. While [Juror No. 1] indicated that he can put that aside and try to be fair, he also indicated that while he was looking at my client[,], my client's physical appearance was causing some of his previous memories or emotions to surface because of the way he looked. And given that information, your honor, it appears to be clear that he is not going to be impartial and fair in this process, notwithstanding his comments on that issue, and I would ask that he be removed for cause.”

The prosecution submitted the matter without argument. The trial court ruled as follows: “Okay. Well, in any event, bottom line is I believe him. I watched both his verbal responses as well as his non-verbal responses. I’m quite confident that he would be a fair and impartial juror. [¶] What you say is true, but he also indicated that he would . . . in essence, set aside his personal emotions and be objective in evaluating the case. And, frankly, I believe him. [¶] So that request is rejected.”

2. Analysis

“Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.]” (*People v. Weaver* (2001) 26 Cal.4th 876, 910 (*Weaver*)). “In according deference on appeal to trial court rulings on motions to exclude for cause, appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person’s responses (noting, among other things, the person’s tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record. [Citation.]” (*People v. Stewart* (2004) 33 Cal.4th 425, 451.) “ [T]he manner of the juror while testifying is oftentimes more indicative of the real character of his [or her] opinion than his [or her] words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below

upon such a question of fact, except in a clear case.’ ” (*Wainwright v. Witt* (1985) 469 U.S. 412, 428, fn. 9 (*Wainwright*).

“A trial court should sustain a challenge for cause when a juror’s views would ‘prevent or substantially impair’ the performance of the juror’s duties in accordance with the court’s instructions and the juror’s oath. [Citations.]” (*People v. McDermott* (2002) 28 Cal.4th 946, 981-982 (*McDermott*)). “On appeal, we will uphold a trial court’s ruling on a challenge for cause by either party ‘if it is fairly supported by the record, accepting as binding the trial court’s determination as to the prospective juror’s true state of mind when the prospective juror has made statements that are conflicting or ambiguous.’ [Citations.]” (*Id.* at p. 982.)

Langhorne’s primary argument is that Juror No. 1 should have been removed from the jury due to the implied bias stemming from his past experience as a victim of child molestation. (See Code of Civ. Proc., § 225, subd. (b)(1) [jurors may be challenged for cause based on general disqualification, implied bias, or actual bias].)

“Implied bias” is “a presumption of bias that could not be overcome by a finding that [the juror] could be fair and impartial. Under California law, a juror may be excused for ‘implied bias’ only for one of the reasons listed in Code of Civil Procedure section 229, ‘and for no other.’ (Code Civ. Proc. § 229.)” (*People v. Ledesma* (2006) 39 Cal.4th 641, 669-670 (*Ledesma*)). The fact that a juror has been the victim of a crime similar to the one charged is not listed in Code of Civil Procedure section 229 as a ground for implied bias.⁶ The statute does specify that a juror may be excused for implied bias if

⁶ The statutorily enumerated reasons for implied bias are: “(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar. [¶] (b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, guardian and ward, conservator and conservatee, master and servant, employer and clerk, landlord and tenant, principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; (continued)

he or she has “a state of mind . . . evincing enmity against, or bias towards, either party” (Code of Civ. Proc., § 229, subd. (f)), although that has traditionally been the definition of *actual* bias. (See former Pen. Code, § 1073 [defining “actual bias” as “the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party”].)

Langhorne argues that bias should have been implied in this case because Juror No. 1 had been molested as a child and Langhorne was alleged to be an SVP based, in part, upon his commission of child molestation crimes. However, Langhorne fails to cite any cases holding that a juror must always be excused for implied bias if the juror was the victim of a crime similar to the one charged. As we will explain, case law is clear that each case must be considered on its facts.

or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. . . . [¶] (c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant. [¶] (d) Interest on the part of the juror in the event of the action, or in the main question involved in the action [¶] (e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them. [¶] (f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party. [¶] (g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member. [¶] (h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.” (Code Civ. Proc., § 229.)

The California Supreme Court has noted that under federal case law, “bias may be implied or presumed from the ‘potential for substantial emotional involvement’ inherent in certain relationships. [Citations.]” (*Ledesma, supra*, 39 Cal.4th at p. 670 [no implied bias attributed to juror who worked in the jail system where the defendant was housed].) Under federal case law, a juror’s bias is implied only in “rare” and “extreme situations.” (*Fields v. Brown* (9th Cir. 2007) 503 F.3d 755, 768, 770 (*Fields*); see also *Gonzales v. Thomas* (10th Cir. 1996) 99 F.3d 978, 987 (*Gonzales*).)

As Langhorne points out, cases have recognized that “[t]he probability of bias is substantial when a juror has been victimized by the same type of crime.” (*People v. Diaz* (1984) 152 Cal.App.3d 926, 939 (*Diaz*).) “As a result of such a similar experience, bias may be conscious and the juror may attempt to persuade the other jurors defendant is guilty regardless of the evidence. More likely, however, the prior experience may cause unconscious bias. Only individuals of strong character would not be affected in some way by their previous, identical experience. Subconsciously, the juror may tend to favor the prosecution because of emotional and psychological bonds perceived to exist with the defendant’s victim. Indeed, the juror may sincerely try to be impartial, and yet be unable to do so. [Citation.]” (*Ibid.*)

However, the Ninth Circuit has cautioned against “ ‘formulating categories of relationships which bar jurors from serving in certain types of trial.’ ” (*Fields, supra*, 503 F.3d at p. 772.) In *Fields*, the Ninth Circuit refused to categorically imply bias to a juror whose close relative had been the victim of a crime similar to the charged offense. (*Id.* at p. 774, fn. omitted [“Being the spouse of a rape victim is not, in and of itself, such an ‘extreme’ or ‘extraordinary’ situation that it should automatically disqualify one from serving on a jury in a case that involves rape.”].) The *Fields* court indicated that the determination of implied bias will depend on all of the circumstances of a particular case. It noted that in most cases where it had held that jurors should have been excused for cause because their relatives had been victims of similar crimes, the jurors had concealed

information on voir dire or given equivocal responses to questions about their ability to remain impartial. (See *Fields, supra*, 503 F.3d at pp. 768-769, and cases cited.⁷)

The federal courts have also refused to categorically imply bias to a *juror* who had been the victim of a crime similar to the charged offense. In *Gonzales, supra*, 99 F.3d 978, the Tenth Circuit refused to hold that “juror bias must be presumed in a rape trial if the juror has been a rape victim.” (*Id.* at p. 989.) “To hold that no rape victim could ever be an impartial juror in a rape trial would, we think, insult not only all rape victims but also our entire jury system, which is built upon the assumption that jurors will honestly try ‘to live up to the sanctity of [their] oath.’ [Citation.]” (*Id.* at pp. 989-990.)

As in *Fields*, the *Gonzales* court indicated that the determination of implied bias should be made on a case-by-case basis. A court considering whether to remove a juror for implied bias should focus “on the particular juror’s experience,” by looking at “how the experience affected the juror and what similarities exist between the juror’s experience and the case at trial.” (*Gonzales, supra*, 99 F.3d at p. 990.)

In *Gonzales*, there were “several superficial similarities” between the juror’s experience and the charged offense – in both situations, the victim knew the rapist, had engaged in consensual social activity with him, and had consumed alcohol with him. (*Gonzales, supra*, 99 F.3d at p. 990.) However, there were also some significant differences. First, the victim of the charged offense had been knocked unconscious, whereas the juror had not been subjected to similar violence. Second, the juror had not sought any counseling and indicated that “the rape did not have a detrimental life-

⁷ See *United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513 [in heroin conspiracy case, juror failed to disclose that her sons were in prison for heroin-related crimes]; *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970 [in murder prosecution, juror failed to disclose that her brother had been shot and killed six years earlier and that her husband was in jail]; and *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109 [in drug conspiracy case, juror disclosed that her ex-husband had used and dealt cocaine but responded equivocally each time she was asked whether she could serve impartially].

changing impact on her life.” (*Ibid.*) Third, because the juror had never reported her rape, she “never underwent the experience of being the accuser in a case where the alleged rapist was claiming she consented to sexual intercourse.” (*Id.* at p. 991.) Moreover, the juror’s rape had occurred about 25 years earlier, and the passage of time weighed against a finding of implied bias. (*Ibid.*)

Our Supreme Court has likewise made it clear that a juror need not always be removed for implied bias simply because he or she has been the victim of a crime similar to the one charged. In *People v. Farnam* (2002) 28 Cal.4th 107 (*Farnam*), the defendant faced a robbery special circumstance. Although four jurors had been robbed during the trial, the trial court did not err by failing to remove the jurors, because each of them had “expressed an understanding that the purse snatching had no relation to the crimes allegedly involving defendant, and each indicated that she could be fair.” (*Id.* at p. 142.) Even though one juror had made the “frank statement that ‘still things come into your mind of what happened to you and you can only try to visualize what happened to the other person,’ ” the trial court could find, based on the circumstances and the juror’s demeanor, that she had not “formed emotional and psychological bonds with the victim such that she would be unable to remain objective during defendant’s trial.” (*Ibid.*)

Under the cases reviewed above, it is clear that the trial court was not required to grant Langhorne’s challenge for cause to Juror No. 1 simply because Juror No. 1 had been the victim of child molestation. Further, as we shall explain, Juror No. 1’s particular circumstances did not require the trial court to imply or presume he would be biased. (See *Gonzales, supra*, 99 F.3d at p. 990.)

First, Juror No. 1’s experiences had occurred over 40 years earlier, diminishing the potential for bias. (See *Gonzales, supra*, 99 F.3d at p. 990; compare *Burton v. Johnson* (10th Cir. 1991) 948 F.2d 1150, 1159 [in prosecution for spousal abuse, bias was implied where “the juror, at the time of trial, was living in an abusive situation, fearing her husband’s violent temper even at the time she was testifying in chambers”].)

Second, the circumstances of Juror No. 1's molestation were different from the molestations committed by Langhorne. Juror No. 1 was molested by his stepfather, whereas Langhorne had molested boys he met through the Boy Scouts and youth soccer. Any "superficial similarities" between Juror No. 1's experience and Langhorne's offenses are insufficient to disqualify Juror No. 1 as a matter of law. (*Gonzales, supra*, 99 F.3d at p. 990.)

Third, and significantly, Langhorne was not on trial for the child molestation offenses, but for a determination of whether he had a currently diagnosed mental disorder and was currently dangerous. It was clear Langhorne had already been found guilty and punished for the underlying offenses. None of the victims testified at Langhorne's SVP trial. Thus, there was no danger that Juror No. 1 would "form[] emotional and psychological bonds with the victim such that []he would be unable to remain objective during defendant's trial." (*Farnam, supra*, 28 Cal.4th at p. 142.) Further, like the juror in *Gonzales*, Juror No. 1 had not sought any counseling, and his testimony indicated that the molestations "did not have a detrimental life-changing impact on [his] life." (*Gonzales, supra*, 99 F.3d at p. 990.)

Finally, Juror No. 1 was forthcoming about his past experience, providing an opportunity for "follow-up" about whether he could be impartial. (*Fields, supra*, 503 F.3d at p. 774; compare *Diaz, supra*, 152 Cal.App.3d at p. 938 [juror's concealment of fact that she had been the victim of a similar offense precluded any inquiry about the incident on voir dire].)

As the *Fields* court noted, "[t]he prime safeguard" against actual bias is voir dire, and in most cases, juror bias will be identified through "truthful disclosure of information during voir dire." (*Fields, supra*, 503 F.3d at p. 772.) Here, because Juror No. 1 revealed his past experience during voir dire, the trial court was able to evaluate Juror No. 1's sincerity and credibility regarding his potential bias. Importantly, we confront a cold record, whereas the trial court observed Juror No. 1's tone of voice and demeanor. After

listening to Juror No. 1’s ambiguous and conflicting responses and observing his manner, the trial court determined that Juror No. 8 would be able to “ ‘faithfully and impartially apply the law.’ ” (*Weaver, supra*, 26 Cal.4th at p. 910.) Substantial evidence supports this determination: Juror No. 1 stated that he did not believe that his prior experiences were going to influence his decision-making, that he could “push that to the side,” that he believed he “would have it under control,” and that he would be objective. Although Juror No. 1 also acknowledged that his past experiences would enter his mind and that looking at Langhorne brought back memories, he reaffirmed that he believed he could “push those aside.”

In sum, the transcript of voir dire does not show a “ ‘clear case’ ” of bias. (*Wainwright, supra*, 469 U.S. at p. 428, fn. 9.) Therefore, we defer to the trial court’s determination that Juror No. 1 was not biased. (*McDermott, supra*, 28 Cal.4th at pp. 981-982.) We conclude the trial court did not abuse its discretion in denying Langhorne’s “for cause” challenge to Juror No. 1. (*Weaver, supra*, 26 Cal.4th at p. 910.)

B. Number of Peremptory Challenges

Langhorne asserts that he was denied a fair trial because the trial court denied his request for 20 peremptory challenges and only allowed him six peremptory challenges.

1. Background

As noted above, Langhorne requested additional peremptory challenges during jury selection. Trial counsel explained that the basis for the request was “that [Langhorne] is subject to an indeterminate term of commitment in the state hospital, and like any criminal defendant in perhaps a three-strikes or a homicide case, he essentially has an exposure to life in custody.” Trial counsel argued that the additional peremptory challenges were “appropriate to protect his rights to due process, effective assistance of counsel, and impartial jury, and a right to a fair trial under the 6th and 14th amendments of the U.S. Constitution as well as the California Constitution article I sections 7 and 15.”

2. Analysis

In general, a defendant in a criminal case is entitled to 10 peremptory challenges. (Code Civ. Proc., § 231, subd. (a).) If the charged offense is punishable with death or life in prison, the number of peremptory challenges to which the defendant is entitled is increased to 20. (*Ibid.*) In civil cases, and in criminal cases where the offense is punishable with a maximum term of imprisonment of 90 days or less, each party generally is entitled to six peremptory challenges. (*Id.*, subds. (b) & (c).)

In *People v. Calhoun* (2004) 118 Cal.App.4th 519 (*Calhoun*), the court concluded “that a proceeding under the SVPA is a special proceeding of a civil nature, and therefore pursuant to subdivision (c) of section 231, defendant was entitled to six peremptory challenges.” (*Id.* at p. 527; cf. *People v. Stanley* (1995) 10 Cal.4th 764, 807-808 [proceeding to determine mental competence to stand trial for a capital crime is civil in nature and defendant is entitled to six peremptory challenges].) The *Calhoun* court relied in part on this court’s decision in *People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, where this court concluded that because a commitment under the SVPA is a special proceeding of a civil nature, civil discovery under the Code of Civil Procedure is generally available in SVPA proceedings. (*Id.* at p. 988 [discussing former Code of Civil Procedure section 2016 et seq.]; see *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1166 (*Hubbart*) [SVPA establishes a “civil commitment scheme covering persons who are to be viewed, ‘not as criminals, but as sick persons’ ”].) The *Calhoun* court rejected the defendant’s arguments that additional peremptory challenges were required in SVP cases under principles of due process and equal protection. (*Calhoun, supra*, at pp. 528-530.)

Langhorne argues that “in light of the amendments to the SVP law providing for an indeterminate term of commitment, the conclusion in *Calhoun* is inapt,” particularly with respect to the equal protection analysis. (See *Calhoun, supra*, 118 Cal.App.4th at

p. 529 [“a person facing a commitment proceeding under the SVPA is simply not ‘similarly situated’ to a person facing criminal prosecution”].)

We do not agree. As we shall explain with respect to Langhorne’s ex post facto and double jeopardy claims, the amended SVPA is not punitive in nature; it remains “a nonpenal ‘civil commitment scheme designed to protect the public from harm.’ [Citation.]” (*Hubbart, supra*, 19 Cal.4th at p. 1172, quoting *Kansas v. Hendricks* (1997) 521 U.S. 346, 361 (*Hendricks*)). “After Proposition 83, it is still the case that an individual may not be held in civil commitment when he or she no longer meets the requisites of such commitment. An SVP may be held, as the United States Supreme Court stated under similar circumstances, ‘as long as he is both mentally ill and dangerous, but no longer.’ [Citation.]” (*McKee I, supra*, 47 Cal.4th at p. 1193.) “[E]ven with indefinite commitment and alterations in the burden and standard of proof, the commitment authorized by the [amended SVPA] is not excessive and is designed to last only as long as that person meets the definition of an SVP.” (*Id.* at p. 1195.)

As “the Proposition 83 amendments do not make the [SVPA] punitive” (*McKee I, supra*, 47 Cal.4th at p. 1195), they do not require us to reject the conclusion reached in *Calhoun*. Accordingly, Langhorne’s request for 20 peremptory challenges was properly denied by the trial court.

Langhorne also contends that the trial court should have given him at least one additional peremptory challenge so that he could use it to remove Juror No. 1. “To support a claim that he is constitutionally entitled to more peremptory challenges than are provided by statute, a defendant must establish ‘at the very least that in the absence of such additional challenges he is reasonably likely to receive an unfair trial before a partial jury.’ [Citations.]” (*Ledesma, supra*, 39 Cal.4th at p. 671.) We have already concluded that the trial court did not err by failing to excuse Juror No. 1 on the basis of actual or implied bias. Thus, Langhorne’s claim that he should have been given an additional

peremptory challenge “necessarily fails as well.” (*People v. Lewis* (2008) 43 Cal.4th 415, 495.)

C. Denial of Pretrial Motion for New Evaluators, Evaluations, and Probable Cause Hearing

Langhorne contends the trial court erred by denying his pretrial request for new evaluators, new evaluations, and a new probable cause hearing. He contends the error violated his state and federal rights to due process.

1. Background

On June 6, 2008, the People filed a petition to extend Langhorne’s commitment. (*Langhorne, supra*, 179 Cal.App.4th at p. 232; see former § 6604 [Stats. 2000, ch. 420, § 3, eff. Sept. 13, 2000].) The petition was supported by evaluations of Langhorne performed in March 2008 by Drs. Owen and Vognsen, who concurred that defendant met the criteria for commitment as an SVP. (See § 6601.)

In August 2008, California’s Office of Administrative Law (OAL) determined that certain provisions in the 2007 version of the Clinical Evaluator Handbook and Standardized Assessment Protocol should have been adopted pursuant to the APA and therefore constituted an invalid “underground regulation.” (*Ronje, supra*, 179 Cal.App.4th at p. 515.) The OAL determination did not “address the assessment protocol’s accuracy or reliability in determining whether the person is an SVP as defined in the SVPA.” (*Id.* at p. 520.)

In February 2009, the Department promulgated emergency regulations containing SVP evaluator requirements, in compliance with the APA. (See Cal. Code Regs., tit. 9, § 4005.) In September of 2009, Drs. Owen and Vognsen prepared updated evaluations based on the 2009 protocol; they again concurred that defendant met the criteria for commitment as an SVP. At the November 4, 2009 probable cause hearing, the prosecution submitted the updated evaluations, and Drs. Owen and Vognsen both testified.

On November 19, 2009, the Fourth District filed *Ronje, supra*, 179 Cal.App.4th 509, upholding the OAL's determination that the prior assessment protocol was an invalid underground regulation. (*Id.* at pp. 516-517.) The *Ronje* court held that the error was not “ ‘jurisdictional in the fundamental sense,’ ” and thus that dismissal was not required. (*Id.* at p. 517, quoting *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 (*Pompa-Ortiz*)). Because *Ronje* was “making a pretrial challenge to the evaluations” via a petition for writ of habeas corpus, he was not required to show actual prejudice to obtain relief. (*Ronje, supra*, at p. 518.) Instead, the appropriate remedy was “to remand the matter to the trial court with directions to (1) order new evaluations of *Ronje* using a valid assessment protocol, and (2) conduct another probable cause hearing under section 6602, subdivision (a) based on those evaluations.” (*Id.* at p. 519.)

In August 2010, Langhorne filed a motion for new evaluations, conducted by new evaluators, and a new probable cause hearing, based on *Ronje, supra*, 179 Cal.App.4th 509. The People opposed the request. The People asserted that the probable cause hearing cured any *Ronje* error, that *Ronje* did not require new evaluations in every case, that the updated evaluations satisfied *Ronje*, that there was no evidence of bias affecting the updated evaluations, and that evaluations under section 6601 (initial) and section 6603 (updated) are equivalent.

The trial court conducted a hearing on the motion on December 29, 2010, took the matter under submission, and issued its decision denying the motion on January 26, 2011.⁸ The court found that “any defect related to an invalid assessment protocol has been cured by subsequent judicial proceedings.” The court further found that “[a]ny procedural or substantive challenge to the preliminary administrative determinations based on the assessment protocol is now untimely, for those determinations have been

⁸ At the time, defendant's case was combined with three other cases in which the same motion was filed.

superseded by the court's probable cause findings." The court also concluded that neither *Ronje* nor *Pompa-Ortiz* compelled the court to order new evaluations or a new probable cause hearing.

2. Analysis

Section 6601, subdivision (c), requires the Department to develop and update a "standardized assessment protocol" (protocol). The protocol must "require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders." (*Ibid.*) "Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (*Ibid.*) Involuntary commitment proceedings under the SVPA are initiated only after two professional mental health evaluators, designated by the Director of State Hospitals, agree that an individual potentially subject to the SVPA meets the criteria for being a SVP based upon the protocol. (§ 6601, subs. (c)-(f), (h); see *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 894, 903-904, 909.)

"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*).

Nothing in *Ronje* supports Langhorne's claim that he is entitled to new evaluators, new evaluations, and a new probable cause hearing. In *Ronje*, new evaluations and a new probable cause hearing were appropriate because *Ronje* had never been evaluated pursuant to a valid protocol. As that court explained, new evaluations and a new

probable cause hearing based on those new evaluations would “cure the underlying error.” (*Ronje, supra*, 179 Cal.App.4th at p. 518.) In the present case, updated evaluations of Langhorne were subsequently prepared by both evaluators using the valid 2009 protocol, and they were submitted at the probable cause hearing.

Further, in *Ronje*, the matter was a pretrial challenge, which affected the remedy and showing necessary for relief. The Fourth District explained that when evaluations are conducted pursuant to an invalid assessment protocol, “ ‘[t]he right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities.’ ” (*Ronje, supra*, 179 Cal.App.4th at p. 517.) Once a defendant proceeds to trial, reversal will be predicated on a showing that “ ‘the error created actual prejudice.’ ” (*Ibid.*; cf. *Medina, supra*, 171 Cal.App.4th at p. 820 [to satisfy prejudice prong of ineffective assistance claim, defendant was required to show that with new evaluations, “he would have been screened out or otherwise would have been found not to be an SVP”].)

In the present case, Langhorne has not shown any actual prejudice stemming from the fact that the initial recommitment evaluations were conducted pursuant to the invalid 2007 protocol. We first note that there was nothing inherently wrong about the 2007 protocol other than the fact it was not properly promulgated, and that the 2009 protocol contains relatively limited requirements for SVP assessments. (See Cal. Code Regs., tit. 9, § 4005.) More importantly, updated evaluations of Langhorne were subsequently prepared by both evaluators using the valid 2009 protocol. Since both evaluators prepared updated evaluations using the 2009 protocol, any errors in the 2008 evaluations were cured. (See *Ronje, supra*, 179 Cal.App.4th at p. 518.)

Further, the trial court found probable cause to believe Langhorne was a SVP after hearing testimony and considering the updated evaluations. Langhorne fails to show how the outcome of the probable cause hearing would have been different if the initial evaluations had been conducted pursuant to a valid protocol. Moreover, the jury found Langhorne was an SVP after a trial, and “[t]here is no indication in this record” that the

initial evaluations, conducted pursuant to the 2007 protocol, “affected [Langhorne’s] trial.” (*Pompa-Ortiz, supra*, 27 Cal.3d at p. 530.) In short, Langhorne is not entitled to any relief based on *Ronje*.⁹

D. Evidence Langhorne “Tried and Failed to Control His Behavior”

Langhorne contends there is insufficient evidence to support his commitment because there was no substantial evidence that he tried and failed to control his behavior. He contends that without such evidence, the commitment violates due process.

The United States Supreme Court held in *Hendricks, supra*, 521 U.S. 346, that the definition of “mental abnormality” in the Kansas Sexually Violent Predator Act satisfied substantive due process requirements. (*Id.* at pp. 356-360.) The court reasoned that the Kansas statutory scheme “requires a finding of future dangerousness, and then links that finding to the existence of a ‘mental abnormality’ or ‘personality disorder’ that makes it difficult, if not impossible, for the person to control his dangerous behavior. [Citation.]” (*Id.* at p. 358.) The court concluded that the requirement in the Kansas statutory scheme “of a ‘mental abnormality’ or ‘personality disorder’ is consistent with the requirements of . . . other statutes that [it has] upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.” (*Id.* at p. 358.)

In *Kansas v. Crane* (2002) 534 U.S. 407 (*Crane*), the United States Supreme Court again considered the Kansas Sexually Violent Predator Act and explained that

⁹ The California Supreme Court is currently considering whether dismissal is the proper remedy when (1) the evaluations originally supporting the filing of the SVP petition were conducted under an assessment protocol that was later found to constitute an invalid regulation and (2) the results of reevaluation under a properly-adopted assessment protocol would have precluded the initial filing of the petition under section 6601. (*Reilly v. Superior Court* (2012) 204 Cal.App.4th 829, review granted June 13, 2012, S202280 (*Reilly*); see also *Macy v. Superior Court* (2012) 206 Cal.App.4th 1393, review granted Sept. 12, 2012, S204255 [briefing deferred pending *Reilly*].) That issue is not presented in this case.

Hendricks, supra, 521 U.S. 346, did *not* set forth a “requirement of *total* or *complete* lack of control.” (*Crane, supra*, at p. 411.) The *Crane* court reasoned: “an absolutist approach is unworkable. [Citations.] Moreover, most severely ill people—even those commonly termed ‘psychopaths’—retain some ability to control their behavior. [Citations.] Insistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities.” (*Id.* at pp. 411-412.)

The *Crane* court emphasized, however, that the federal constitution did not permit commitment under the Kansas statute “without *any* lack-of-control determination” being made. (*Crane, supra*, 534 U.S. at p. 412.) As to the requisite amount of lack of control, the *Crane* court explained that “in cases where lack of control is at issue, ‘inability to control behavior’ will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case. [Citations.]” (*Id.* at p. 413.)

In *People v. Williams* (2003) 31 Cal.4th 757 (*Williams*), the California Supreme Court addressed whether a separate jury instruction regarding the issue of control was constitutionally required after *Crane, supra*, 534 U.S. 407, in order to commit an individual under California’s SVPA. At trial, the defendant had sought, but was refused, an instruction that “ ‘the diagnosed mental disorder must render the person *unable to control* his dangerous behavior.’ ” (*Williams, supra*, at p. 763.) On appeal, the *Williams* defendant asserted that his commitment was invalid because the language of the SVPA did not include “the federal constitutional requirement of proof of a mental disorder that causes ‘serious difficulty in controlling behavior’ [citation], and the jury was not

specifically instructed on the need to find such impairment of control.” (*Id.* at p. 764.) The California Supreme Court disagreed. The court explained that “[b]y its express terms, the SVPA limits persons eligible for commitment to those few who have already been convicted of violent sexual offenses . . . (§ 6600, subd. (a)(1)), and who have ‘diagnosed mental disorder[s]’ (*ibid.*) ‘affecting the emotional or volitional capacity’ (*id.*, subd. (c)) that ‘predispose[] [them] to the commission of criminal sexual acts in a degree constituting [them] menace[s] to the health and safety of others’ (*ibid.*), such that they are ‘likely [to] engage in sexually violent criminal behavior’ (*id.*, subd. (a)(1)). This language inherently encompasses and conveys to a fact finder the requirement of a mental disorder that causes serious difficulty in controlling one’s criminal sexual behavior. The SVPA’s plain words thus suffice ‘to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.’ [Citation.]” (*Williams, supra*, at pp. 759-760.) The court concluded that because “a commitment rendered under the plain language of the SVPA necessarily encompasses a determination of serious difficulty in controlling one’s criminal sexual violence, . . . separate instructions or findings on that issue are not constitutionally required, and no error arose from the [trial] court’s failure to give such instructions in defendant’s trial.” (*Id.* at p. 777, fns. omitted.)

In this case, Langhorne maintains that there was no substantial evidence to support a finding that he “had tried and failed to control his behavior.” Langhorne relies on *People v. Galindo* (2006) 142 Cal.App.4th 531 (*Galindo*), which involved the extended commitment of a defendant found not guilty by reason of insanity pursuant to Penal Code section 1026.5. In *Galindo*, the Court of Appeal accepted the Attorney General’s concession that Penal Code section 1026.5 should be interpreted as requiring proof that the defendant has serious difficulty in controlling dangerous behavior. (*Galindo, supra*, at p. 536.) The *Galindo* court found the concession appropriate in light of *In re*

Howard N. (2005) 35 Cal.4th 117 (*Howard N.*), which held that the extended detention scheme in section 1800 et seq. “should be interpreted to contain a requirement of serious difficulty in controlling dangerous behavior” in order to preserve its constitutionality. (*Howard N.*, *supra*, at p. 132.)

The Court of Appeal in *Galindo* then addressed whether the trial court’s failure to consider the issue of control was prejudicial. The Court of Appeal emphasized that “neither the parties, nor the witnesses, nor the [trial] court had the opportunity to consider the control issue.” (*Galindo*, *supra*, 142 Cal.App.4th at p. 539.) In the absence of expert testimony on the issue, the Court of Appeal examined the record to determine whether there was another form of proof, such as evidence the defendant had “*tried* to control his behavior” but had “encountered *serious difficulty* when trying to do so. . . .” (*Ibid.*) After determining that even the alternate form of proof was insufficient, the Court of Appeal held that the omission of the control issue was not harmless. (*Ibid.*)

We do not interpret *Galindo*, *supra*, 142 Cal.App.4th 531, as requiring proof, in a SVP case, that the defendant made efforts to control his or her dangerous behavior. Nor does *Galindo* suggest that expert testimony by itself would be insufficient to prove the control issue. Moreover, nothing in *Howard N.*, *supra*, 35 Cal.4th 117, upon which the Court of Appeal in *Galindo* relied, abrogates *Williams*, *supra*, 31 Cal.4th 757, which held that commitment under the SVPA does not require the jury to specifically find that the defendant has serious difficulty in controlling his or her behavior.

As the record does not need to contain substantial evidence that Langhorne tried but failed to control his behavior, his sufficiency-of-the-evidence challenge to his commitment is without merit.

E. Constitutional Challenges

Langhorne contends that the SVPA, as amended in 2006¹⁰ and as applied to him, violates the due process, equal protection, ex post facto, and double jeopardy clauses of the federal constitution.

1. Due Process

In *McKee I*, the Supreme Court determined that a person committed under the amended SVPA is not deprived of due process because he or she has the burden, after the initial commitment, to show by a preponderance of the evidence that he or she no longer meets the statutory criteria for commitment as an SVP. (*McKee I, supra*, 47 Cal.4th at p. 1191.) The *McKee I* court also found no merit in the contention that the trial court's discretion to deny as frivolous a committed person's petition for conditional release pursuant to section 6608, subdivision (a) violates due process. (*McKee I, supra*, at p. 1192.) Finally, the *McKee I* court construed the amended SVPA to implicitly provide for the appointment of a state-funded mental health expert when a committed person petitions for release under section 6608, subdivision (a), and that so construed, "it does not violate the due process clause." (*McKee I, supra*, at p. 1193.)

Langhorne nevertheless contends that his case is distinguishable from the situations considered in *McKee*, such that the amended SVPA violates due process as applied to him. He asserts that here, "even prosecution testimony supported the conclusion that within two years of the time of commitment, the actuarial prediction of future recidivism . . . would be reduced to zero." It appears Langhorne is referring to Dr. Vognsen's testimony that the Static 99-R adjusts for age and that in five years, when defendant turned 60 years old, his score on that instrument would go from two to zero.

¹⁰ As we have noted, the SVPA was amended twice in 2006, by Senate Bill 1128 (Stats. 2006, ch. 337, § 62), and by Proposition 83 (see Cal. Const., art. II, § 10, subd. (a)).

The expert testimony regarding Langhorne's future actuarial score does not take his case outside the ambit of the *McKee I* due process analysis. A person who scores a zero on one actuarial test does not necessarily fail to meet the criteria for an SVP, as the Static-99 (nor any other actuarial test) is not the sole basis for determining whether a person meets the SVP criteria. In fact, in assessing Langhorne's risk of reoffense, the experts in this case did not rely solely on the Static-99 or other actuarial instruments, but also on dynamic risk factors. (Cf. *People v. Flores* (2006) 144 Cal.App.4th 625, 629-630, 633 [Static-99 did not take into account defendant's castration, a dynamic risk factor that could be considered in assessing his risk of reoffense].) Moreover, we fail to see how Langhorne's future reduced risk changes the analysis of *McKee I*.

Accordingly, based on the decision in *McKee I*, *supra*, 47 Cal. 4th 1172, we conclude that the SVPA, as amended by Senate Bill 1128 and Proposition 83, does not violate the due process clause. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).)

2. Ex Post Facto Law and Double Jeopardy

Langhorne argues that the amended SVPA violates the ex post facto and double jeopardy clauses of the United States Constitution because the 2006 amendments increased the punishment of sex offenders by lengthening the period of civil confinement providing an indeterminate sentence for certain sex offenses.

In *McKee I*, the California Supreme court reiterated its decision in *Hubbart*, *supra*, 19 Cal.4th 1138 that the SVPA was not punitive because it had two nonpunitive objectives, "treatment for the individual committed and protection of the public." (*McKee I*, *supra*, 47 Cal.4th at p. 1194.) After examining the amended SVPA, the *McKee I* court determined that "the Proposition 83 amendments at issue here cannot be regarded to have changed the essentially nonpunitive purpose of the [SVPA]," and therefore that the amended SVPA does not violate the ex post facto clause. (*Ibid.*)

In light of the California Supreme Court's holding in *McKee I* that the amended SVPA is not punitive in nature, Langhorne's double jeopardy claim is likewise without merit. (See *People v. Carlin* (2007) 150 Cal.App.4th 322, 348 [California Supreme Court's determination that SVPA is not punitive " 'removes an essential prerequisite for both . . . double jeopardy and ex post facto claims' "].)

We therefore find that the SVPA does not violate the ex post facto or double jeopardy clauses of the United States Constitution. (*Auto Equity Sales, supra*, 57 Cal.2d at p. 455.)

3. Equal Protection

Langhorne contends that the amended SVPA violates the equal protection clauses of the United States Constitution and the California Constitution. He argues that an individual committed under the amended SVPA is subject to an indeterminate term, whereas "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."

In *McKee I*, our Supreme Court determined that SVP's and mentally disordered offenders (MDO's; see Pen. Code, § 2960 et seq.) are similarly situated for equal protection purposes because they have been involuntarily committed with the objectives of treatment and protection of the public. (*McKee I, supra*, 47 Cal.4th at p. 1203.) The court also determined that SVP's have "different and less favorable procedural protections" than MDO's because "SVP's under the amended [SVPA] are given indeterminate commitments and thereafter have the burden to prove they should be released (unless the [Department] authorizes a petition for release). In contrast, an MDO is committed for a one-year period and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year." (*Id.* at p. 1202.) The court rejected the appellate court's finding that "the

legislative findings recited in the [Proposition 83] ballot initiative” were sufficient to justify the disparate treatment of SVP’s and MDO’s. (*Id.* at p. 1207.)

The California Supreme Court found that SVP’s and individuals found not guilty by reason of insanity (NGI’s; see Pen. Code, § 1026 et seq.) are also similarly situated and “a comparison of the two commitment regimes raises similar equal protection problems” (*McKee I, supra*, 47 Cal.4th at p. 1207.) Consequently, the court agreed with the defendant “that, as with MDO’s, the People have not yet carried their burden of justifying the differences between the SVP and NGI commitment statutes.” (*Ibid.*)

However, in *McKee I*, the California Supreme Court did “not conclude that the People could not meet its burden of showing the differential treatment of SVP’s is justified.” (*McKee I, supra*, 47 Cal.4th at p. 1207.) The court gave the People “an opportunity to make the appropriate showing on remand,” noting that the People would have to show 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 p. 1208.)

The *McKee I* court then remanded the case to the trial court with instructions “to determine whether the People . . . can demonstrate the constitutional justification for imposing on SVP’s a greater burden than is imposed on MDO’s and NGI’s in order to obtain release from commitment.” (*McKee I, supra*, 47 Cal.4th at pp. 1208-1209, fn. omitted.)

On remand in *McKee I*, “the trial court conducted an evidentiary hearing to determine whether the People could justify the [SVPA’s] disparate treatment of SVP’s under the strict scrutiny standard for equal protection claims. At the hearing, the People presented the testimony of eight witnesses and documentary evidence. The trial court also allowed McKee to present evidence; he presented the testimony of 11 witnesses and documentary evidence. The court issued a 35-page statement of decision summarizing

the extensive testimonial and documentary evidence presented at the hearing and finding the People had met their burden to establish, by a preponderance of the evidence, that the disparate treatment of SVP's under the [SVPA] was based on a reasonable perception of the greater and unique dangers they pose compared to MDO's and NGI's." (*McKee II, supra*, 207 Cal.App.4th at p. 1332.)

McKee appealed, and Division One of the Fourth Appellate District affirmed the trial court's order. (*McKee II, supra*, 207 Cal.App.4th at pp. 1330-1331, 1350.) In *McKee II*, the appellate court explained that it would "independently determine whether the People presented substantial, factual evidence to support a reasonable perception that SVP's pose a unique and/or greater danger to society than do MDO's and NGI's, thereby justifying the disparate treatment of SVP's under the [SVPA]." (*Id.* at p. 1338.)

After performing its independent review of the evidence presented in the 21-day evidentiary hearing held in the trial court, the *McKee II* court made several findings. First, with respect to recidivism, the court determined that the expert witness testimony of three psychologists, as well several studies and the Static-99 data comparing recidivism rates, was sufficient to show that "the inherent nature of the SVP's mental disorder makes recidivism as a class significantly more likely than recidivism of sex offenders generally, but does not show SVP's have, in fact, a higher sexual recidivism rate than MDO's and NGI's. . . . Regardless of the shortcomings or inadequacy of the evidence on actual sexual recidivism rates, the Static-99 evidence . . . supports, by itself, a reasonable inference or perception that SVP's pose a higher *risk* of sexual reoffending than do MDO's or NGI's." (*McKee II, supra*, 207 Cal.App.4th at p. 1342.)

Second, the *McKee II* court considered whether the People had "presented evidence that the victims of sex offenses suffer unique and, in general, greater trauma than victims of nonsex offenses." (*McKee II, supra*, 207 Cal.App.4th at p. 1342.) Based on the expert witness testimony, the court concluded that "there is substantial evidence to support a reasonable perception by the electorate, as a legislative body, that the harm

caused by child sexual abuse and adult sexual assault is, in general, a greater harm than the harm caused by other offenses and is therefore deserving of more protection.” (*Id.* at pp. 1343-1344.)

Third, the *McKee II* court found that there was “substantial evidence to support a reasonable perception by the electorate that SVP’s have significantly different diagnoses from those of MDO’s and NGI’s, and that their respective treatment plans, compliance, and success rates are likewise significantly different. That evidence and the evidence on recidivism . . . , as the trial court found, ‘supports the conclusion that, as a class, SVP’s are clinically distinct from MDO’s and NGI’s and that those distinctions make SVP’s more difficult to treat and more likely to commit additional sexual offenses than are MDO’s and NGI’s.’ In particular, SVP’s are less likely to participate in treatment, less likely to acknowledge there is anything wrong with them, and more likely to be deceptive and manipulative. . . . Furthermore, there is substantial evidence to support a reasonable inference that an indeterminate, rather than a determinate (e.g., two-year), term of civil commitment supports, rather than detracts from, the treatment plans for SVP’s.” (*McKee II, supra*, 207 Cal.App.4th at p. 1347.)

The appellate court therefore concluded in *McKee II* that “the People on remand met their burden to present substantial evidence, including medical and scientific evidence, justifying the amended [SVPA’s] disparate treatment of SVP’s (e.g., by imposing indeterminate terms of civil commitment and placing on them the burden to prove they should be released). [Citation.]” (*McKee II, supra*, 207 Cal.App.4th at p. 1347.) The California Supreme Court denied review of *McKee II* on October 10, 2012, and therefore the proceedings on remand in *McKee I* are now final.

Langhorne urges this court to not follow *McKee II*.¹¹ In the opening brief, he contends that the *McKee II* decision “appears to have a serious flaw in that the court declined to consider the requirement that the disparate treatment (indeterminate commitment) is the least restrictive means necessary to protect any legitimate state interest.” In his reply brief, Langhorne reiterates this argument, claiming that the *McKee II* court erred in refusing to require that the amended SVPA be narrowly tailored to address any distinctions between NGI’s, MDO’s, and SVP’s.

We agree with the *McKee II* court that “the ‘least restrictive means available’ requirement” does not apply “to all cases involving disparate treatment of similarly situated classes.” (*McKee II, supra*, 207 Cal.App.4th at p. 1349.) Further, given the evidence presented in *McKee II* – that the vast majority of SVP’s are diagnosed with pedophilia or other paraphilias, that a paraphilia ordinarily persists throughout a patient’s lifetime, that treatment is not focused on medication, and that most SVP’s do not participate in treatment (*id.* at pp. 1344-1345), we have no basis for concluding that an indeterminate term is not necessary to further the compelling state interest in providing treatment to SVP’s and protecting the public or that there is any less burdensome alternative to effectuate those interests.

In his reply brief, Langhorne adds several additional criticisms of *McKee II*. Appellate courts ordinarily will not consider new issues that are raised for the first time in the appellant’s reply brief as the respondent has no opportunity to counter such contentions. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765.) However, we will briefly address each claim.

¹¹ In his opening brief, Langhorne also criticizes the underlying appellate opinion that preceded *McKee I*. (*People v. McKee* (2008) 160 Cal.App.4th 1517, review granted July 9, 2008, S162823.) As that case was superseded by the California Supreme Court’s grant of review, it is no longer of precedential value. (See Cal. Rules of Court, rule 8.1115(a).) Thus, we do not consider this argument.

First, we disagree with Langhorne’s claim that the *McKee II* court applied a deferential standard of review rather than an independent standard of review. Langhorne acknowledges that the appellate court stated that it was conducting a de novo review (*McKee II, supra*, 207 Cal.App.4th at p. 1338), but he points out that the appellate court also stated that it was determining “whether the People presented substantial evidence to support a reasonable inference or perception that the Act’s disparate treatment of SVP’s is necessary to further compelling state interests. [Citations.]” (*Id.* at p. 1339.) Having reviewed the opinion, we believe the *McKee II* court’s description of its review is consistent with an independent, de novo review of the evidence, as well as with the Supreme Court’s opinion and directions in *McKee I*. We also note that the First District Court of Appeal rejected a similar challenge to *McKee II*, stating that the “claim that the appellate court failed to independently review the trial court’s determination is frivolous.” (*People v. McKnight* (2012) 212 Cal.App.4th 860, 864.)

Second, we reject Langhorne’s claim that the *McKee II* court applied a rational basis test rather than a strict scrutiny test in reviewing the evidence presented at the hearing. He claims that the court failed to discuss whether the distinctions between the SVPA and other involuntary commitment schemes were “necessary” to further a compelling state interest. He criticizes *McKee II* for analyzing whether each factual finding supported “a reasonable inference or perception” that SVP’s are more likely to reoffend, more dangerous, and more difficult to treat than MDO’s or NGI’s (*McKee II, supra*, 207 Cal.App.4th at p. 1342), claiming this language is more akin to the rational basis test.

We disagree that *McKee II* failed to apply strict scrutiny. The *McKee II* court referred to the issue as “whether the People presented substantial evidence to support a reasonable inference or perception that the Act’s disparate treatment of SVP’s is *necessary* to further compelling state interests. [Citations.]” (*McKee II, supra*, 207 Cal.App.4th at p. 1339, italics added.) Moreover, the appellate court’s use of the phrase

“reasonable inference or perception” (*ibid.*) reflects the California Supreme Court’s remand instructions: in *McKee I*, the court stated, “On remand, the government will have an opportunity to justify Proposition 83’s indefinite commitment provisions, . . . and demonstrate that they are based on a reasonable perception of the unique dangers that SVP’s pose rather than a special stigma that SVP’s may bear in the eyes of California’s electorate.” (*McKee I, supra*, 47 Cal.4th at p. 1210, fn. omitted.) Thus, in applying the strict scrutiny test, *McKee II* followed the language set forth in *McKee I*.

Third, Langhorne contends that the *McKee II* court improperly considered irrelevant evidence: what the voters and Legislature might have considered in enacting the 2006 amendments to the SVPA, rather than what they actually considered. He contends that “rather than look to the actual motivation of the voters who enacted Proposition 83 or to the legislative history behind S.B. 1128, the San Diego Superior Court took evidence from a variety of experts and witnesses about the theoretical reasons that could support the use of indeterminate terms for SVP committees.” Once again, we believe that the *McKee II* court’s analysis stemmed from the instructions given to the trial court in *McKee I*, where the California Supreme Court specified that expert testimony could be considered in determining the relevant issues, such as whether “the inherent nature of the SVP’s mental disorder makes recidivism as a class significantly more likely.” (*McKee I, supra*, 47 Cal.4th at p. 1208.)

Finally, Langhorne contends that the *McKee II* court failed to address or distinguish *In re Calhoun* (2004) 121 Cal.App.4th 1315 to the extent it held that differences between MDO’s and SVP’s did not justify different schemes for forcible administration of medication. However, the equal protection issue in *McKee II* turned on the differences in SVP’s and MDO’s recidivism rates, dangerousness, and diagnosis and treatment. (*McKee II, supra*, 207 Cal.App.4th at pp. 1340-1347.) The equal protection issue in *In re Calhoun*, in contrast, turned on whether there were any differences between SVP’s and MDO’s regarding the need for and effectiveness of antipsychotic medication.

The decision in *In re Calhoun* thus has little relevance to the issues presented in *McKee II*. (See *McKee I, supra*, 47 Cal.4th at p. 1220, fn. 4 (conc. & dis. opn. of Chin, J.) [noting that *In re Calhoun* “hardly applies here” because the “exact criteria for medicating mentally disordered offenders is an entirely different matter from the procedures adopted for releasing them into society”].)

In light of the Supreme Court’s clearly expressed intent to avoid an unnecessary multiplicity of proceedings, the Supreme Court’s denial of review in *McKee II*, and our conclusions regarding the asserted flaws in *McKee II*, we find that Langhorne’s equal protection claims are without merit and do not require a remand for a further evidentiary hearing.

DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.