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

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS EDWARD TOWNE,

Defendant and Appellant.

H039085

(Santa Clara County

Super. Ct. No. 211205)

In October 2008, a jury found defendant Dennis Edward Towne to be a Sexually Violent Predator (SVP) pursuant to Welfare and Institutions Code section 6600 et seq., the Sexually Violent Predators Act (SVPA or Act).¹ In a prior unpublished opinion filed on March 4, 2011, this court reversed the commitment order and remanded the case for further consideration by the trial court below in light of *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*) and the resolution of further proceedings in that case, including any proceedings in the Superior Court of San Diego County. (*People v. Towne* (Mar. 4, 2011, H033465 [nonpub. opn.] (*Towne I*)).) The proceedings in *McKee* became final in October 2012. (*People v. McKee* (2012) 207 Cal.App.4th 1325, rev. denied Oct. 10,

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

2012 (*McKee II*). Thereafter, the trial court ordered defendant committed for an indeterminate term.

On appeal, defendant contends that the indeterminate term of commitment prescribed by the SVPA, as amended in 2006, violates his constitutional right to equal protection under the law. He acknowledges that the court in *McKee II* rejected such a challenge, but urges that we are not bound by that decision and that, in any event, it was wrongly decided. We conclude that defendant's equal protection claim lacks merit for the reasons stated in *McKee II*. We will therefore affirm the order of commitment.

FACTS²

Defendant, born in 1960, first fondled a child when he was 13. There were various instances between 1973 and 1990 of defendant's engaging in sexual contact with children. In 1991, he pleaded guilty to one count of committing a lewd act on a child (Pen. Code, § 288, subd. (a)); he received a six-year prison sentence, and was ultimately paroled in May 1994.

In 1997 he exposed himself to children under 13 and was later convicted of a number of counts of indecent exposure and annoying and molesting two 13-year-olds. During his subsequent imprisonment, he received a disciplinary write-up in 2002 for exposing himself to a female staff person.

In 2007, the District Attorney filed a petition under the SVPA. At trial, three psychologist-experts testified for the prosecution. They each had diagnosed defendant with pedophilia and exhibitionism. Each of them opined that defendant posed a serious and well-founded risk of reoffending in a criminally, sexually violent, and predatory way. Defendant scored (in two separate tests) 9 on a 0-12 scale on the Static-99, an actuarial

² A detailed recitation of the underlying facts is found in *Towne I, supra*, H033465, pp. 2-8 [nonpub. opn.]. As the facts are not germane to the claims on appeal, we present an abbreviated discussion of them here.

instrument for predicting sexual recidivism. This score placed defendant in a high-risk category with a 52-percent chance of reoffense at 15 years. One expert, Dr. Dawn Starr, identified additional risk factors for reoffense by defendant that included numerous probation or parole violations; intimacy deficits; hostility toward women; absence of long-term friendships; and a lack of sexual self-regulation, including a high level of sex drive or sexual preoccupation, a high level of sexual deviance, and a history of using sex as a means of dealing with negative feelings such as anger or social rejection. Defendant had a depressive disorder for which he was being treated at the hospital with antidepressants; this condition placed him indirectly at-risk for reoffense because he indicated “he would like to go off his psych meds when he is out in the community.” Dr. Starr opined—as did the two other psychologist-experts—that defendant was not amenable to voluntary outpatient treatment, and that he should be in “[s]ome kind of locked facility.”

PROCEDURAL BACKGROUND

The Santa Clara County District Attorney filed a petition in 2007 to commit defendant as an SVP under the Act. In October 2008, a jury found the allegations of the petition true, and the court committed defendant to the Department of Mental Health for an indeterminate term. In his first appeal, defendant asserted a number of challenges, including the claim that the SVPA violated the equal protection clauses of the state and federal constitutions. On March 4, 2011, we found no merit to any of the issues raised by defendant other than his equal protection claims. Because defendant’s equal protection claims potentially had merit, we reversed the commitment order based upon the Supreme Court’s decision in *McKee I, supra*, 47 Cal.4th 1172. We directed “the trial court to suspend further proceedings pending finality of the proceedings on remand in *McKee*, including any proceedings in the superior court of San Diego County in which *McKee* may be consolidated with related matters. ‘Finality of the proceedings’ shall include the finality of any subsequent appeal and any proceedings in the California Supreme Court.”

(*Towne I, supra*, (H033465, p. 2 [nonpub. opn.].) On November 9, 2012, after the Supreme Court denied review in *McKee II, supra*, 207 Cal.App.4th 1325, the trial court committed defendant to an indeterminate term under the SVPA. Defendant filed a timely notice of appeal.

DISCUSSION

I. *Equal Protection Challenge to SVP Act*

A. *McKee I and McKee II*

“Proposition 83, passed by the voters in November of 2006, modified the terms by which [SVP’s] can be released from civil commitment under the [Act]. In essence, it changes the commitment from a two-year term, renewable only if the People prove to a jury beyond a reasonable doubt that the individual still meets the definition of an SVP, to an indefinite commitment from which the individual can be released if he proves by a preponderance of the evidence that he no longer is an SVP.” (*McKee I, supra*, 47 Cal.4th at pp. 1183-1184.) Defendant contends that the SVPA violates his equal protection rights in that it treats SVP’s differently than persons committed as Mentally Disordered Sex Offenders (MDO’s) or persons found not guilty of charged crimes by reason of insanity (NGI’s).

We note at the outset that the first prerequisite for a successful equal protection argument is “ ‘a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ [Citations.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 (*Hofsheier*), quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530.) The appropriate inquiry by the court “is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’ [Citation.]” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) The second requirement of a successful equal protection challenge—where the law involves a

suspect classification or touches upon fundamental interests—is to establish that the law is not necessary to achieve a compelling governmental interest. (*Hofsheier*, at p. 1200.)³

In addressing, inter alia, the defendant’s contention in *McKee I* that the SVPA violated his equal protection rights, our high court held that SVP’s were similarly situated to MDO’s and NGI’s. (*McKee I, supra*, 47 Cal.4th at pp. 1204, 1207.) But it also recognized that persons civilly committed as MDO’s or persons committed as NGI’s are subject to short, definite terms of commitment, whereas persons found to be SVP’s under the 2006 amendment to the SVPA are committed to an indeterminate term of commitment. (*Id.* at pp. 1202, 1207.) The court found “no question that, after the initial commitment, an SVP is afforded different and less favorable procedural protections than an MDO.” (*Id.* at p. 1202.) Thus, it found meritorious the contention that NGI’s and SVP’s are similarly situated for purposes of an equal protection challenge. (*Id.* at p. 1207.) Furthermore, it declared that, where groups are similarly situated and “the state makes the terms of commitment or recommitment substantially less favorable for one group than the other, . . . it is required to give some justification for this differential treatment.” (*Id.* at p. 1203.) Our high court continued: “When a constitutional right, such as the right to liberty from involuntary confinement, is at stake, the usual judicial deference to legislative findings gives way to an exercise of independent judgment of the facts to ascertain whether *the legislative body* ‘*has drawn reasonable inferences based on substantial evidence.*’ ” [Citations.] . . . Therefore, the legislative findings recited in

³ “[M]ost legislation is tested only to determine if the challenged legislation bears a rational relationship to a legitimate state purpose. [Citations.]” (*Hofsheier, supra*, 37 Cal.4th at p. 1200.) But *McKee*’s personal liberty was at stake; therefore, the court in *McKee II, supra*, 207 Cal.App.4th at p. 1347, applied the strict scrutiny (compelling state interest) test. (See *In re Moye* (1978) 22 Cal.3d 457, 465 [strict scrutiny standard applied in evaluating equal protection challenge to NGI law because “petitioner’s personal liberty is at stake”].)

the ballot initiative do not by themselves justify the differential treatment of SVP's.” (*Id.* at pp. 1206-1207, italics added.)

The high court in *McKee I* concluded that “neither the People nor the courts below properly understood” the People’s burden of justifying the differential treatment of SVP’s, and the People should be afforded the opportunity to meet that burden. (*McKee I, supra*, 47 Cal.4th at pp. 1207-1208.) It remanded the case for the trial court’s determination of “whether the People, applying the equal protection principles articulated in [*In re Moye, supra*, 22 Cal.3d 457] and related cases discussed in [its] opinion, 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.”⁴ (*Id.* at pp. 1208-1209, fn. omitted.) The court stated: “On remand, the government will have an opportunity to justify Proposition 83’s indefinite commitment provisions, at least as applied to McKee, 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.” (*Id.* at p. 1210, fn. omitted.) The trial court was directed to “determine not whether the statute is wise, but whether it is constitutional.” (*Id.* at p. 1211, fn. omitted.)

⁴ In *In re Moye, supra*, 22 Cal.3d 457, the California Supreme Court, evaluating an equal protection claim, compared the class of persons confined as mentally disordered sex offenders (MDSO’s) with NGI’s (i.e., persons confined after being acquitted of a criminal offense by reason of insanity). (*Id.* at pp. 463-465.) Both groups were confined for treatment “in lieu of criminal punishment” (*id.* at p. 463), but the duration of their commitments differed. (*Id.* at pp. 464-465.) The court held: “Because petitioner’s personal liberty is at stake, . . . the applicable standard for measuring the validity of the statutory scheme now before us requires application of the strict scrutiny standard of equal protection analysis. Accordingly, the state must establish both that it has a ‘compelling interest’ which justifies the challenged procedure and that the distinctions drawn by the procedure are necessary to further that interest. [Citation.]” (*Id.* at p. 465.)

On remand, the trial court, after a 21-day evidentiary hearing, concluded that the People had “met their burden to justify the disparate treatment of SVP’s under the standards set forth in *McKee [I]*.” (*McKee II, supra*, 207 Cal.App.4th at p. 1330.) But McKee once again appealed the trial court’s order. In his second appeal, he contended that “the trial court erred by finding the People met that burden.” (*Ibid.*) The Fourth District, Division One, rejected the challenge, holding that “the trial court correctly found the People presented substantial evidence to support a reasonable perception by the electorate that SVP’s present a substantially greater danger to society than do MDO’s or NGI’s, and therefore the disparate treatment of SVP’s under the Act is necessary to further the People’s compelling interests of public safety and humane treatment of the mentally disordered.” (*Id.* at pp. 1330-1331.)

B. *Defendant’s Equal Protection Challenge Lacks Merit*

Notwithstanding the holding of *McKee II, supra*, 207 Cal.App.4th 1325, defendant contends that the 2006 amendment to the SVPA violates equal protection because it unjustifiably treats persons committed as SVP’s different from persons committed as MDO’s or NGI’s. He makes essentially three arguments: (1) the holding of *McKee II* is not binding on this court; (2) the reasoning of the court in *McKee II* was flawed because it failed to perform a de novo review of the trial court’s decision; and (3) the court in *McKee II* failed to properly apply the strict scrutiny test, which, if properly applied, would have resulted in finding the evidence insufficient to support the trial court’s finding that the SVPA did not violate his equal protection rights.

We address these contentions below.

1. *Binding Effect of McKee II*

Defendant contends that *McKee II* is not binding on this court. He argues that the Supreme Court’s denial of review of *McKee II* should not be construed as the high court’s approval of that decision. He speculates that review may have been denied

simply “because . . . there was no conflict among the lower courts at that time.” He urges that we “not . . . accept the conclusions of *McKee II*.”

It is of course true that the opinion of one Court of Appeal is not ordinarily binding on another Court of Appeal. (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4.) And while the Supreme Court’s denial of a petition for review is not to be construed as the high court’s having approved of the propositions set forth in the Court of Appeal’s decision, “ ‘it does not follow that such a denial is without significance as to [the high court’s] views [citations].’ [Citation.]” (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 449, fn. 13, quoting *DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 178.)

In this instance, the Supreme Court clearly implied that the decision in *McKee II*, if not binding, should at least be given considerable weight by other courts. In *People v. McKnight* (2012) 212 Cal.App.4th 860 (*McKnight*), it was argued that the Supreme Court intended that the decision in *McKee* on remand would resolve the equal protection challenge to the SVPA only as to the individual defendant in that case. The First District Court of Appeal, Division 3, rejected that contention: “*McKee I* recognized that the People could attempt to justify the Act’s disparate impact in a variety of ways, and that these included showing that SVP’s as a class are significantly more likely to reoffend than MDO’s or NGI’s, showing they pose a greater risk to children (in which case the equal protection analysis would apply only to child predators), or by other, unspecified means. [Citation.] In light of that recognition, the Court transferred the multiple ‘grant and hold’ cases under *McKee I*, including this one, to the Courts of Appeal with directions to vacate their prior opinions and suspend further proceedings until the *McKee I* remand proceedings were final, ‘in order to avoid an unnecessary multiplicity of proceedings.’ [Citations.] On remand, *McKee [II]* concluded that differences between SVP’s as a class and other offenders justify their different treatment under the Act. It is plain that *McKee II* is not to be restricted to Mr. McKee alone or only to those SVP’s

convicted of crimes against children, like his, but rather its holding applies to the class of SVP's as a whole.” (*Id.* at pp. 863-864.)

We conclude that the appellate court's decision in *McKee II*, while perhaps not strictly binding on this court, is to be given considerable weight. Absent a showing that the court erred in *McKee II*, we will consider it dispositive here. With this view in mind, we will address defendant's specific attacks upon *McKee II*.

2. *De Novo Review Was Performed in McKee II*

The Fourth District, Division One, clearly stated in its opinion that it was performing a de novo review of the trial court's decision. “McKee asserts, and we agree, that we review de novo the trial court's determination whether the Act, as amended by Proposition 83, violates his equal protection rights. We 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 Act. Although the trial court heard the testimony of many witnesses and received in evidence many exhibits, the instant constitutional question involved mixed questions of law and fact that are predominantly legal, if not purely legal questions, which are subject to de novo review. [Citations.] Furthermore, because in this case the trial court presumably did not decide any disputed historical facts, but determined only whether the People presented sufficient evidence to support a reasonable perception that SVP's pose a greater danger to society, we are in as good a position as the trial court to make that determination. Therefore, we apply an independent standard in reviewing the trial court's order rejecting McKee's equal protection claim.” (*McKee II, supra*, 207 Cal.App.4th at p. 1338.)

Defendant contends that, notwithstanding its recitation of the applicability of the de novo review standard, the court in *McKee II* failed to apply it. He asserts that the appellate court erred by applying what he characterizes as a “deferential substantial evidence test” in which the appellate court resolved “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.) Defendant also claims that although “[e]arly in the opinion, the *McKee II* Court noted” that evidence was presented by both sides, its actual analysis “detailed two studies and the testimony presented by the prosecution without mentioning a single witness or study presented by McKee.”

We find that the review of the trial court’s decision described by the appellate court in *McKee II* is entirely consistent with an independent, de novo review of the evidence, and is in accord with the Supreme Court’s opinion and directions in *McKee I*. (See *McKee I*, *supra*, 47 Cal.4th at pp. 1206-1211.) Our careful review of *McKee II* does not demonstrate that the appellate court failed to independently consider all the evidence presented by the parties, including McKee’s evidence. As the Supreme Court in *McKee I* emphasized, “mere disagreement among experts will not suffice to overturn the Proposition 83 amendments.” (*Id.* at p. 1210.)

Our conclusion that the appellate court in *McKee II* did not abdicate its responsibility of conducting a de novo review of the trial court’s decision is consistent with that of two other intermediate appellate courts in this state. (See *People v. McDonald* (2013) 214 Cal.App.4th 1367, 1378-1379 [Fourth Dist. Div. 3] (*McDonald*); *People v. Landau* (2013) 214 Cal.App.4th 1, 47 [Fourth Dist. Div. 3] (*Landau*); *McKnight*, *supra*, 212 Cal.App.4th at p. 864 [First Dist. Div. 3].)

3. *Strict Scrutiny Was Properly Applied in McKee II*

Defendant also contends that *McKee II* misapplied the strict scrutiny test. He argues that the appellate court in *McKee II* “applied a deferential rational basis test” because it “examin[ed] only whether there was any reasonable evidence which supported the electorate’s determination, . . . resolv[ed] conflicts in support of the determination, and . . . indulg[ed] in reasonable inferences to uphold the electorate’s decision.” He

asserts that had strict scrutiny been properly applied, the SVPA would have been found to violate equal protection. We disagree.

In *McKee II*, the appellate court examined evidence in three areas: recidivism, greater trauma experienced by victims of sexual offenses, and diagnostic and treatment differences. (*McKee II, supra*, 207 Cal.App.4th at pp. 1340-1347.) With respect to recidivism, the appellate court concluded that the Static-99 evidence supported “by itself, a reasonable inference or perception that SVP’s pose a higher *risk* of sexual reoffending than do MDO’s or NGI’s.” (*Id.* at p. 1342.) Included among that evidence was data from the Department of Mental Health indicating marked differences in the Static-99 scores of SVP’s as compared with the scores of MDO’s and NGI’s. (*Id.* at p. 1341.) “The average Static-99 score for all SVP’s civilly committed since the passage of the amended Act in 2006 [was] 6.19,” which “place[d] SVP’s in the ‘high’ risk category for sexual reoffense.” (*Ibid.*) In contrast, the average Static-99 score for MDO’s at Patton State Hospital subject to sex offender registration requirements in 2010 was only 3.6, which placed them “in the ‘moderate-low’ risk category for sexual reoffense.” (*Ibid.*) And the average Static-99 score for all patients discharged from Atascadero State Hospital since January 1, 2010, and subject to sex offender registration requirements, a group including MDO’s and NGI’s, was 4.6, a score which placed them “in the ‘moderate-high’ risk category for sexual reoffense.” (*Id.* at pp. 1341-1342.)

The appellate court concluded that there was “substantial evidence supporting the reasonable perception that the nature of the trauma caused by sex offenses is generally more intense or severe than the trauma caused by nonsex offenses and is sometimes unique to sex offenses.” (*McKee II, supra*, 207 Cal.App.4th at p. 1343.) In doing so, the court reviewed evidence concerning sexual offense victims, as well as other evidence supporting its conclusion. (*Id.* at pp. 1342-1343.)

The *McKee II* court also determined 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.” (*McKee II, supra*, 207 Cal.App.4th at p. 1347.) The distinctions made SVP's more difficult to treat and less likely to participate in treatment. (*Ibid.*) SVP's were “less likely to acknowledge there is anything wrong with them, and more likely to be deceptive and manipulative.” (*Ibid.*) The evidence was that “[o]nly 2 percent of MDO's and NGI's suffer from pedophilia or other paraphilias” as compared with “nearly 90 percent of SVP's [being] diagnosed with pedophilia or other paraphilias.” (*Id.* at p. 1344.) And an expert testified that approximately “90 percent of MDO and NGI patients suffer from a psychotic mental disorder” while “only 1 to 3 percent of SVP's suffer from a psychosis.” (*Ibid.*) There was also evidence that “[p]araphilia typically remains stable or constant throughout a patient's lifetime.” (*Id.* at p. 1345.) “Although there may be an ‘aging out’ effect where patients' behavior or acting out on their fantasies is decreased as they age, that does not mean their urges and fantasies are similarly decreased. Patients with paraphilia generally have a specific intent in selecting victims (e.g., boys age seven to 10 years) and carefully plan and execute their offenses (e.g., by ‘grooming’ their victims before committing the offense). In contrast, patients with severe mental illnesses generally are not that organized and commit impulsive or opportunistic offenses.” (*Ibid.*)

The appellate court in *McKee II* also reviewed evidence showing significant differences in the treatment of severely mentally ill patients and patients with paraphilia. “Patients with severe mental illnesses generally are first treated with psychotropic medications and then with psychosocial support or intervention (e.g., therapy regarding communication skills, social skills, and problem solving). Their amenability to and compliance with treatment usually is very good. Most severely mentally ill patients are compliant with their medications and participate in treatment most of the time. In comparison, the treatment plans for patients with paraphilia generally involve psychosocial intervention-like treatment. Medications may decrease their sexual arousal,

but not their deviant sexual interests. Treatment of paraphilia patients takes longer than for other patients because paraphilia is so pervasive, affecting their thoughts, beliefs, and interactions. . . . Also, a higher percentage of SVP's (i.e., 10 to 15 percent) have antisocial or borderline personality disorders (i.e., involving pathological lying and instability, etc.) than do severely mentally ill patients, making their treatment more difficult. Also, unlike severely mentally ill patients, 'not very many' SVP's are ready to work and participate in treatment." (*McKee II, supra*, 207 Cal.App.4th at p. 1346.) The evidence was that "MDO's . . . are overwhelmingly treated with psychotropic medications, resulting in their stabilization and amenability to psychosocial support treatment. About two-thirds of MDO's and NGI's comply with their treatment programs, typically resulting in their decertification after about three years." (*Id.* at pp. 1344-1345.) In contrast, "SVP's treatment plans are not based on medications, but rather on giving them the tools to limit their risk of sexually reoffending. However, only about 25 percent of SVP's participate in treatment. The shortest time in which an SVP has completed treatment is two and one-half years. Many other SVP's took up to five years to complete treatment." (*Id.* at p. 1345.)

Based upon this evidence the appellate court in *McKee II* concluded: "[T]he People on remand met their burden to present substantial evidence, including medical and scientific evidence, justifying the amended Act'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). (*McKee, supra*, 47 Cal.4th at p. 1207.) The People have shown that, 'notwithstanding the similarities between SVP's and MDO's [and NGI'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 People have shown 'that the inherent nature of the SVP's mental disorder makes recidivism as a class significantly more likely[;] . . . that SVP's pose a greater risk [and unique dangers] to a particularly

vulnerable class of victims, such as children [;]’ and that SVP’s have diagnostic and treatment differences from MDO’s and NGI’s, thereby supporting a reasonable perception by the electorate that passed Proposition 83 that the disparate treatment of SVP’s under the amended Act is necessary to further the state’s compelling interests in public safety and humanely treating the mentally disordered. (47 Cal.4th at p. 1208.)” (*McKee II*, *supra*, 207 Cal.App.4th at p. 1347.)

Defendant, however, takes issue with *McKee II*’s conclusion that the evidence supported “a reasonable perception by the electorate” that disparate treatment of SVP’s was required, arguing that this approach was contrary to strict scrutiny review. But this approach was based upon our high court’s instructions in *McKee I*, where it held: “On remand, the government will have an opportunity to justify Proposition 83’s indefinite commitment provisions, at least as applied to McKee, 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.* [¶] Moreover, we emphasize that mere disagreement among experts will not suffice to overturn the Proposition 83 amendments. The trial court must determine whether the legislative distinctions in classes of persons subject to civil commitment are reasonable and factually based—not whether they are incontrovertible or uncontroversial.” (*McKee I*, *supra*, 47 Cal.4th at pp. 1210-1211, fn. omitted, italics added.)

We also reject defendant’s claim that the *McKee II* court erred because it failed to consider whether there were less restrictive alternatives that the electorate could have employed in addressing societal concerns regarding the dangers posed by SVP’s. The defendant made this argument in *McKee II*, citing *Bernal v. Fainter* (1984) 467 U.S. 216, 219, where the United States Supreme Court stated, “[i]n order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.” The appellate court in *McKee II* indicated that this quoted passage from *Bernal* was “probable dictum and without citation to any supporting cases.” (*McKee II*,

supra, 207 Cal.App.4th at p. 1349.) *McKee II* rejected the defendant’s claim that in reviewing the constitutionality of Proposition 83, it was required to assess whether the indeterminate commitment aspect of the law was the least restrictive available means to advance the state’s compelling interest: “We are unaware of any case applying the ‘least restrictive means available’ requirement to all cases involving disparate treatment of similarly situated classes. On the contrary, our review of equal protection case law shows the two-part test, as discussed in *Moye* and *McKee I*, is the prevailing standard Therefore, in strict scrutiny cases, the government must show both a compelling state interest justifying the disparate treatment and that the disparate treatment is necessary to further that compelling state interest. [Citations.] We are unpersuaded the electorate that passed Proposition 83 in 2006 was required to adopt the least restrictive means available (e.g., a two-year or other determinate term of civil commitment) in disparately treating SVP’s and furthering the compelling state interests of public safety and humane treatment of the mentally disordered.” (*Ibid.*)

We agree that the availability of *equally efficacious* but less burdensome means of accomplishing a compelling state interest is a consideration in strict scrutiny analysis.⁵ The appellate court, however, clearly understood that the strict scrutiny test required the

⁵ See, e.g., *Zablocki v. Redhail* (1978) 434 U.S. 374, 388: “When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. [Citations.]” In *Zablocki*, the court held unconstitutional a statute that precluded a state resident with judicially imposed child support obligations from marrying without court permission, where “the State already ha[d] numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute’s and yet do not impinge upon the right to marry.” (See also *Dunn v. Blumstein* (1972) 405 U.S. 330, 343 [in reviewing constitutionality of durational residence laws for voting, court notes that state must draft statute “with ‘precision,’ . . . ‘tailored’ to serve . . . legitimate objectives. . . . [and] may not choose the way of greater interference. If it acts at all, it must choose ‘less drastic means’ ”].)

government to “show both a compelling state interest justifying the disparate treatment *and* that the disparate treatment is necessary to further that compelling state interest. [Citations.]” (*McKee II, supra*, 207 Cal.App.4th at p. 1349.) Narrow tailoring to serve a compelling state interest does not require exhaustion of every conceivable alternative. (See *Grutter v. Bollinger* (2003) 539 U.S. 306, 339.) The court in *McKee II* properly addressed the “least restrictive means” challenge made by the defendant there. (See *McDonald, supra*, 214 Cal.App.4th at p. 1380 [rejecting contention that *McKee II* erred in failing to address McKee’s claim that Proposition 83’s indeterminate commitment of SVP’s was unconstitutional unless shown to be least restrictive means to advance compelling state interest].)

DISPOSITION

The order of commitment is affirmed.

Márquez, J.

WE CONCUR:

Elia, Acting P.J.

Bamattre-Manoukian, J.