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

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL CRANE,

Defendant and Appellant.

H039627

(Santa Clara County
Super. Ct. No. 211939)

I. INTRODUCTION

Defendant Michael Crane appeals from an order involuntarily committing him for an indeterminate term to the California Department of Mental Health (now, State Department of State Hospitals; hereafter the Department) after the trial court determined 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 Defendant argues that the indeterminate term of commitment violates the equal protection clauses of the federal and state Constitutions. We will affirm the judgment.

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

II. FACTUAL AND PROCEDURAL BACKGROUND²

On November 16, 2011, the People filed a petition to commit defendant under the SVPA. The petition alleged three qualifying offenses.

The first offense was a 1969 conviction for violating Penal Code section 288, subdivision (a). According to defendant, “his penis was accidentally exposed through the leg of his shorts while he was jogging around an elementary school. . . . [A] little girl was staring at his exposed penis, and he approached her When she touched his penis, . . . he immediately left the area.”

The second offense was a 1984 conviction for violating Penal Code section 288, subdivision (a). Defendant began molesting his step-daughter when she was eight years old and continued molesting her until she was 11 years old. Defendant performed oral sex on the victim and had her perform oral sex on him. When the victim was 10 years old, her mother found defendant sitting on the victim’s bed with his pants down. The victim told her mother about the molestations, and thereafter, defendant never had oral sex with her again. However, he continued to ask the victim to engage in oral sex. Additionally, on one or two occasions, defendant fondled the victim through her clothing.

The third offense was a 1993 conviction for violating Penal Code section 288, subdivision (a)³. Defendant molested the 13-year-old daughter of his girlfriend multiple times between September 1987 and May 1989. The victim reported that defendant first molested her when she was in third grade. Defendant told the victim that he was going to teach her how to say “no” to somebody trying to molest her. He pulled out his penis in front of her, masturbated, and ejaculated on the floor. Defendant followed the victim to

² The summary of defendant’s offenses is taken from the Department’s Evaluation Report.

³ Defendant was also convicted of five other violations of Penal Code section 288, subdivision (a) and one violation of Penal Code section 288, subdivision (b) related to the same victim.

another room, pulled up her shirt, rubbed his penis on her, and ejaculated on her chest. Defendant then pulled down the victim's pants, told her to lay across his lap because he was going to spank her, and touched her buttocks, chest, and vagina. The victim reported that defendant touched her every day.

After a hearing, the trial court found that there was probable cause to believe that defendant was an SVP. Defendant waived his right to a jury trial and agreed to submit to the court the determination of whether he was an SVP. Defendant stipulated that two of his prior offenses were sexually violent offenses under sections 6600 and 6600.1. He also acknowledged that after submitting the matter to the court, he would be found an SVP under section 6600 et seq. and that the court would commit him to an indeterminate term of treatment.

On May 3, 2013, the trial court found that defendant was an SVP within the meaning of section 6600. The court filed an order committing defendant to the Department for appropriate treatment and confinement for an indeterminate term pursuant to section 6604.

III. DISCUSSION

Defendant contends that a commitment for an indeterminate term under the SVPA violates the equal protection clauses of the federal and state Constitutions and that the order committing him for an indeterminate term should be reversed. In *People v. McKee* (2010) 47 Cal.4th 1172, 1207-1208 (*McKee I*), the California Supreme Court held that the People had not yet carried their burden of demonstrating why SVP's under the SVPA, but not persons found to be mentally disordered offenders (MDO's; Pen. Code, § 2960 et seq.) or persons not guilty of a felony by reason of insanity (NGI's; Pen. Code, § 1026.5) are subject to indeterminate terms. On remand in *McKee I*, the trial court conducted an evidentiary hearing and determined that the People met their burden to justify the disparate treatment of SVP's. (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1330 (*McKee II*)). The appellate court affirmed the trial court's decision in *McKee II*

(*id.* at pp. 1330-1331), and the California Supreme Court subsequently denied review. On appeal, defendant argues that *McKee II* “contains three significant flaws,” and thus, this court should not follow that case.

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 No. 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 No. 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.)

B. McKee I

In *McKee I*, the defendant argued that his indeterminate commitment under the SVPA violated his equal protection rights because the SVPA treats SVP's significantly less favorably than similarly situated individuals who are civilly committed under other statutes. (*McKee I, supra*, 47 Cal.4th at p. 1196.)

The California Supreme Court first determined that SVP's and MDO's 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 NGI's 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 [their] 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 with the following instructions: “We therefore remand this case to the trial court to determine whether the People, applying the equal protection principles articulated in [*In re Moye* (1978) 22 Cal.3d 457 (*Moye*)] and related cases discussed in the present 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. The trial court may, if appropriate, permit expert testimony. [¶] . . . 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. The trial court is to determine not whether the statute is wise, but whether it is constitutional.” (*McKee I, supra*, 47 Cal.4th at pp. 1208-1211, fns. omitted.)

C. McKee II

On remand from *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 (*McKee II, supra*, 207 Cal.App.4th at p. 1330), 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." (*Id.* at p. 1342.)

The Static-99 evidence included in the Department's data showed that the average Static-99 score for all SVP's civilly committed since 2006 was 6.19, which placed them in the " 'high' risk category for sexual reoffense." (*McKee II, supra*, 207 Cal.App.4th at p. 1341.) In contrast, the average Static-99 score for MDO's at Patton State Hospital subject to sex offender registration under Penal Code section 290 in 2010 was 3.6, "placing them in the 'moderate-low' risk category for sexual reoffense." (*Ibid.*) The average Static-99 score for all patients discharged from Atascadero State Hospital since January 1, 2010, and subject to sex offender registration, including MDO's and NGI's, was 4.6, which placed them in the " 'moderate-high' risk category for sexual reoffense." (*Id.* at pp. 1341-1342.)

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,^[4] and that their respective treatment plans, compliance, and success rates are likewise significantly different. That evidence and the evidence on

⁴ Dr. David Fennell, a psychiatrist and the chief of forensics at Atascadero State Hospital, testified that "MDO's and NGI's with a sexual predicate offense were not more likely to commit a new sexual offense (versus another dangerous offense) on release because their mental disorders made them disorganized and unpredictable. In comparison, SVP's are more likely to commit a new sexual offense because of their diagnoses with pedophilia or other paraphilias." (*McKee II, supra*, 207 Cal.App.4th at p. 1345.)

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.) Accordingly, the trial court’s order rejecting the defendant’s equal protection claim and affirming his indeterminate commitment under the SVPA was upheld. (*Id.* at p. 1350.) The California Supreme Court denied review of *McKee II* on October 10, 2012, and therefore the proceedings on remand from *McKee I* are now final.

D. Analysis

Defendant urges this court not to follow *McKee II* because the opinion “contains three significant flaws”: (1) the *McKee II* court failed to properly conduct a de novo review, (2) it misapplied the strict scrutiny test, and (3) when the strict scrutiny test is properly applied, the evidence presented by the People was not sufficient to show that the disparate treatment of SVP’s was justified.

First, defendant claims that the *McKee II* court applied a deferential standard of review rather than an independent standard of review. Defendant 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.) He asserts that the court ignored McKee’s evidence and accepted the People’s evidence as accurate.

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*. After the *McKee I* court remanded the case, the *McKee II* court independently reviewed *all* of the evidence and concluded that “the disparate treatment of SVP’s under the Act is reasonable and factually based and was adequately justified by the People at the evidentiary hearing on remand.” (*McKee II, supra*, 207 Cal.App.4th at p. 1348.) We discern no error. Additionally, we note that other courts have rejected a similar challenge to *McKee II*. (See *People v. McKnight* (2012) 212 Cal.App.4th 860, 864 (*McKnight*) [finding that the “claim that the appellate court failed to independently review the trial court’s determination is frivolous”]; *People v. Landau* (2013) 214 Cal.App.4th 1, 47-48; *People v. McDonald* (2013) 214 Cal.App.4th 1367, 1378, 1381.)

Second, we reject defendant’s claim that the *McKee II* court in effect applied a rational basis test rather than a strict scrutiny test in reviewing the evidence presented at the hearing. Defendant claims that “it was not enough to simply show that the legislature or the voters could reasonably believe that SVP[’]s were more dangerous as a class. The prosecution had to show that SVP[’]s actually were more dangerous as a class.” He criticizes *McKee II* for analyzing only whether there was “a reasonable inference or perception” that SVP’s are more dangerous than MDO’s or NGI’s, rather than whether SVP’s are actually more dangerous than those groups. (*McKee II, supra*, 207 Cal.App.4th at p. 1342.)

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*.

Furthermore, defendant argues that the People failed to show that the “disparate treatment between SVP[’]s, MDO[’]s and NGI[’]s was necessary to protect society.” Relying on *Bernal v. Fainter* (1984) 467 U.S. 216 (*Bernal*) and *Dunn v. Blumstein* (1972) 405 U.S. 330, defendant argues that “[t]he element of necessity under the strict scrutiny standard required that the prosecution show that the disparate treatment of SVP[’]s constituted the least restrictive means possible.” Defendant contends that the *McKee II* court misapplied the strict scrutiny test by improperly “reject[ing] the need for the prosecution” to “show that the disparate treatment of SVP[’]s constituted the least restrictive means possible.”

McKee made a similar argument relying on *Bernal*, and the *McKee II* court rejected it. (*McKee II, supra*, 207 Cal.App.4th at p. 1349.) In *Bernal*, the United States Supreme Court stated that “[i]n order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.” (*Bernal, supra*, 467 U.S. at p. 219.) The *McKee II* court described the quoted sentence from *Bernal* as “probable dictum,” distinguishing *Bernal* because it involved a suspect class, alienage.

(*McKee II, supra*, 207 Cal.App.4th at p. 1349.) “We are unaware of any case applying the ‘least restrictive means available’ requirement to all cases involving disparate treatment of similarly situated classes,” the *McKee II* court wrote. (*Ibid.*) “On the contrary, our review of equal protection case law shows the two-part test, as discussed in *Moye*[, *supra*, 22 Cal.3d 457] 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.” (*McKee II, supra*, 207 Cal.App.4th at p. 1349.)

We agree with the *McKee II* court’s analysis of this issue. We note that *Moye*, like *McKee II* and like this case, involved an equal protection challenge to a civil commitment statute. In remanding the case in *McKee I*, the California Supreme Court instructed the trial court to “apply[] the equal protection principles articulated in *Moye* and related cases discussed in the [*McKee I*] opinion” (*McKee I, supra*, 47 Cal.4th at p. 1208), and to determine whether, after a trial, the People had shown that imposing on SVP’s greater burdens to obtain release from commitment is necessary to promote the state’s compelling interests in public safety and humane treatment of the mentally ill (*id.* at pp. 1207-1211). 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 (*McKee II, supra*, 207 Cal.App.4th 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.

Third, we disagree with defendant's contention that the evidence in the *McKee II* trial did not support the appellate court's ruling that SVP's were more dangerous than MDO's and NGI's and thus harsher treatment was necessary. Defendant makes several contentions in this regard.

Defendant claims that *McKee II* erroneously concluded that "[t]he People presented evidence showing the inherent nature of the SVP's mental disorder makes recidivism significantly more likely for SVP's as a class than for MDO's and NGI's." (*McKee II, supra*, 207 Cal.App.4th at p. 1340.) Specifically, he contends the appellate court did not examine any evidence comparing the sexual recidivism rate of SVP's with the sexual recidivism rate of MDO's and NGI's; rather, the court compared the SVP's rate of reoffending with rates of other types of crimes, which was "neither useful, nor relevant."

In *McKee II*, the People presented the testimony of three expert witnesses, studies, and the Static-99 data comparing recidivism rates. The *McKee II* court acknowledged that the evidence presented only showed 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." (*McKee II, supra*, 207 Cal.App.4th. at p. 1342.) Nonetheless, the court found that the recidivism rate evidence was " 'significant, given that the goal of the SVP[A] is specifically to protect society from particularly serious sexual offenses.' " (*Ibid.*) In reaching this inference, *McKee II* relied, in part, on evidence that the scores on the Static-99 test, which assesses the *risk* that a sex offender will commit new sex offenses, was higher for SVP's than for non-SVP sex offenders. (*Id.* at p. 1342.) The court noted that "[r]egardless 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." (*Ibid.*) In so concluding, *McKee II* thus followed *McKee I*, where the California Supreme Court suggested that evidence concerning a greater *risk* of recidivism by SVP's was one type of evidence that the People might present 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." (*McKee I, supra*, 47 Cal.4th at p. 1208.)

Defendant also claims that *McKee II* reached its conclusion that victims of sexual abuse suffer greater trauma without any evidence regarding the trauma caused by non-sex offenses. Defendant contends that (1) the testimony of the medical experts was focused on child sexual abuse and that "[i]t is unclear if the testimony is properly extrapolated to adult victims of sexual offenses," and (2) the court cited to no evidence regarding the effects and trauma suffered by victims of other types of crime. We disagree. First, although one of the three medical experts testified specifically about child sexual abuse, the two other experts testified generally about sexual abuse victims. (*McKee II, supra*, 207 Cal.App.4th at pp. 1342-1343.) Second, the evidence relied on by the *McKee II* court included testimony that "[s]exual trauma differs qualitatively from other traumas because of its intrusiveness and long-lasting effects," and that "[d]ysfunction, disassociation and avoidance problems after sexual trauma are unique to sexual abuse and are not seen in victims of physical or other types of abuse." (*Ibid.*)

Defendant further claims that the evidence concerning differences in diagnoses, treatment, compliance, and success rates between SVP's and MDO's or NGI's did not support "the need to eliminate periodic jury trials, the need to shift the burden of proof, or the need to impose indeterminate commitments." Defendant claims that (1) the *McKee II* court, in reviewing the evidence, conducted a substantial evidence review rather than a de novo review, (2) treatment is not actually required before an SVP may be eligible for

release, and (3) the *McKee II* court failed to consider whether indeterminate commitments were the least restrictive means and that a commitment term of five years would have been a less restrictive mean.

We are not persuaded by defendant's argument. As discussed, the *McKee II* court conducted a proper de novo review, which followed the Supreme Court's opinion and direction in *McKee I*. The court determined whether there was substantial evidence that “ ‘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.’ ” (*McKee II, supra*, 207 Cal.App.4th at p. 1347; see also *McKnight, supra*, 212 Cal.App.4th at p. 864.) As to defendant's claim that treatment is not a requirement for an SVP's release and to the extent conflicting evidence was introduced at the trial, the People's burden was to show that “the legislative distinctions in classes of persons subject to civil commitment are reasonable and factually based—not [that] they are incontrovertible or uncontroversial.” (*McKee I, supra*, 47 Cal.4th at pp. 1210-1211; accord, *McKee II, supra*, 207 Cal.App.4th at p. 1348.) Indeed, the People fulfilled this burden by presenting expert testimony and studies, which supported the finding that treatment of SVP's is significantly different from treatment of MDO's and NGI's and that SVP's are less likely to participate in treatment. Defendant also fails to make a persuasive argument that the SVPA's imposition of an indeterminate term of commitment was not the least restrictive means to further the state's compelling interest in protecting the public and providing treatment to SVP's or that a five-year term would equally effectuate those interests. As discussed, the court conducted a proper strict scrutiny analysis in determining that imposing greater burdens on SVP's was necessary to further the state's compelling interests. Furthermore, 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.)

Lastly, defendant asserts that “there were three separate but related elements that were under attack in McKee’s equal protection challenge,” that is, the indeterminate term of commitment, the elimination of the right to a jury trial periodically, and the shifting of the burden of proof. Defendant argues that “[t]he evidence presented in *McKee II* addressed only the issue of indeterminate commitments.” This argument is without merit. Following independent review of the evidence, *McKee II* concluded that “the People on remand met their burden to present substantial evidence, including medical and scientific evidence, justifying the [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),” and that “the disparate treatment of SVP’s under the Act is reasonable and factually based and was adequately justified by the People at the evidentiary hearing on remand.” (*McKee II, supra*, 207 Cal.App.4th at pp. 1347, 1348.)

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 defendant’s equal protection claims are without merit and do not require a remand for a further evidentiary hearing.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MÁRQUEZ, J.

GROVER, J.