IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Ct.
	) No. S162823
	)
Plaintiff and Respondent,	) Court of Appeal
	) No. D050554
v.	)
	) Superior Court
RICHARD MCKEE,	) No. MH97752
	)
Defendant and Appellant.	)
	)

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO

Honorable Peter L. Gallagher, Judge

APPELLANT'S OPENING BRIEF

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By appointment of the Supreme Court
with the assistance of Appellate
Defenders, Inc.

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ISSUES PRESENTED

(California Rules of Court, rule 8.516 (a)(1)

The Sexually Violent Predators Act (SVPA) was amended by the passage of Proposition 83, in November 2006. The issues presented are that the amended SVPA is unconstitutional as it violates appellant's constitutional rights to due process of law, is an illegal ex post facto law, and violates equal protection.

STATEMENT OF APPEALABILITY

This appeal is from a judgment that finally disposes of all issues between the parties and is authorized by Penal Code section 1237 and Code of Civil Procedure section 904.1.

STATEMENT OF THE CASE

A petition filed on November 8, 2004, alleged appellant was a sexually violent predator (SVP) within the meaning of Welfare and Institutions Code[1] section 6600 et seq., and sought appellant's commitment for a two year period. (I. C.T. pp. 1-3.)

On March 28, 2006, a *Marsden* motion to relieve counsel was filed. The motion was heard and denied on September 25, 2006. On February 16, 2007 a demurrer was filed, alleging the newly amended SVPA was unconstitutional. On March 5, 2007, the demurrer was heard and denied. Also on March 5, 2007, an amended petition was filed incorporating the post proposition 83 changes to the Sexually Violent Predator Act (SVPA), and asking that appellant be committed for an indeterminate period. (I. C.T. pp. 106-107, 127-134, 234, 151-153, 231.)

On March 5, 2007 trial commenced. On March 12, 2007, a jury found appellant was an SVP with a diagnosed mental disorder who was a

[1] All future references are to the Welfare and Institutions Code, unless otherwise stated.

danger to others and likely to engage in sexually violent predatory criminal behavior. (I. C.T. pp. 234-245.)

On March 13, 2007, the court ordered appellant committed for an indeterminate term pursuant to the provision of sections 6600-6604. On March 14, 2007, appellant timely filed a notice of appeal. (I. C.T. pp. 204-206.)

STATEMENT OF FACTS

Richard Romanoff, a clinical psychologist since 1986, began evaluating SVP's on a contract basis in 1997. (V. R.T. pp. 218, 223.) He was on the panel with about 50 to 60 other evaluators. (V. R.T. p. 224.) He had conducted approximately 240 SVP evaluations. (V. R.T. p. 227.) In about sixty five to seventy percent of the evaluations, he concluded the subjects were not SVP's. In about thirty to thirty five percent of the evaluations, he concluded the subjects were SVP's. (V. R.T. p. 227.) In order to be found an SVP, a person must have committed sexual crimes against qualifying victims, a certain kind of mental disorder that predisposes the person to committing sexual offenses, and be likely to re-offend if returned to the community. (V. R.T. p. 225.)

Romanoff evaluated appellant two times, finding him to be a SVP on both occasions. (V. R.T. pp. 230-231, 234.) Romanoff first evaluated appellant in August, 2004. (V. R.T. p. 230.) In January, 2007, appellant refused to participate in the evaluation. (V. R.T. pp. 233-234.)

Based on the 2004 evaluation, appellant's two qualifying prior offenses[2] were from 1991 in New York, and 1998 in San Diego County. The 1991 offense involved an eleven year old girl who was babysitting for appellant and his family. Appellant was stationed in Fort Drum, New York, in the army, as a sergeant. The girl indicated that she and appellant engaged in consensual vaginal and anal intercourse on five occasions over a period on one month. Appellant acknowledged the sexual contact, but said it occurred on three occasions. Appellant further indicated he thought the girl was eighteen years old. Appellant admitted the offense, was reduced in rank to private, and given a dishonorable discharge. (V. R.T. pp. 240-243.)

Appellant's second prior qualifying offense occurred in 1998 in San Diego County and involved appellant's eight year old niece. (V. R.T. p. 247.) The sexual contact occurred on about forty different occasions, spanning a period of eighteen to nineteen months, until the victim was ten years old. (V. R.T. pp. 247, 248.) Appellant attempted to insert his penis into the victim's anus, succeeding on several occasions. He also attempted to unsuccessfully insert his penis into the victim's vagina on several occasions. On occasion he would lick her breast, vaginal, and anal area, as well as fondling her breasts and vaginal area. On one occasion he inserted his finger into her vagina. (V. R.T. pp. 249-250.)

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[2] The SVPA was amended in November, 2006, to require only one qualifying offense.

Romanoff indicated that appellant told him that he spoke to his niece in a "religious" way, saying that she had qualities "making her fit to be a righteous wife for someone." He told his niece that she was a "virtuous" woman, and she felt that she would go on to become appellant's wife someday. His niece clearly cared for appellant, and did not report the sexual contact because she did not want him to get in trouble. (V. R.T. pp. 250-251.) Appellant acknowledged the improper sexual contact with his niece. (V. R.T. p. 254.)

Romanoff diagnosed appellant as suffering from two different mental disorders, pedophilia and schizoaffective disorder. (V. R.T. p. 260.) Pedophilia is a recognized mental disorder involving recurrent sexual fantasies over a six month period involving prepubescent children. (V. R.T. p. 286.) Schizoaffective disorder combines elements of schizophrenia and bipolar disorder. It is characterized as a breakdown in cognitive functions that interacts with a breakdown in the ability to control and regulate affects. (V. R.T. pp. 294-295.)

Romanoff noted that appellant grew up in an unstable and chaotic situation. His mother and father separated when he was about five years old and his mother suffered from a "pretty serious psychiatric illness." The family was homeless for periods of time. (V. R.T. pp. 263-264.) Appellant was in and out of school, and at the age of nineteen, enlisted in the army. He spent ten years in the army and did well. (V. R.T. p. 264.)

Appellant began to experience psychiatric difficulties during the period after his discharge from the army, described as depression and being actively suicidal. Appellant did go back to college and authored a book. (V. R.T. pp. 265-266.)

Following his arrest in 1998, appellant began experiencing much more overt psychiatric symptoms, such as auditory hallucinations. He received continuous mental health treatment from the time he arrived in the prison system until 2004, including specific sex offender treatment, in which he was an "active participant." (V. R.T. pp. 268-269, 272.) He received antipsychotic medications, antidepressant medications, and mood stabilizing medications. (V. R.T. pp. 271-272.)

Appellant indicated a very unusual sexual history to Romanoff. He stated that he had sexual intercourse at age five with both similarly aged girls and slightly older girls. This continued until he was about age thirteen. He then remained celibate until he married at age nineteen or twenty. Following his divorce he again became celibate until the contact with his niece began. Romanoff stated that appellant had a distorted view of normal sexuality. (V. R.T. pp. 275-277.)

Romanoff also stated that appellant's behavior changed over the last three years, a period of time that coincided with appellant ceasing to take any medication. In 2004 he was viewed as "seriously mentally ill but generally cooperative, actively engaged in treatment, at times showing

some absence of insight into his illness, but much more of reasonable and approachable and somebody you could reason with." (V. R.T. pp. 279-280.) In 2007, appellant was viewed as "more irritable, argumentative, sometimes verbally hostile towards people." He completely denied having a mental illness and said he had made all of that up to affect his placement within the prison system. (V. R.T. pp. 279-280.) He also denied that there was any inappropriate sexual contact between him and his niece. (V. R.T. pp. 290-291.)

Romanoff concluded that both the pedophilia and schizoaffective disorders were qualifying mental disorders for purposes of the SVP evaluation, and that the two disorders interacted in a way that made it difficult for appellant to control his urges. (V. R.T. pp. 301-302.)

Romanoff then addressed the final criteria in the evaluation, that of the likelihood of re-offending. He uses an objective instrument called the STATIC-99, that uses an actuarial method, providing roughly a seventy percent accuracy plus or minus ten percent within a ninety five percent confidence interval. The STATIC-99 considers ten factors. Appellant was scored as a three, which was in the moderate to low risk range to re-offend. (V. R.T. pp. 303-306, 309-312.) Romanoff did acknowledge that he may have mis-read the conviction papers in New York and appellant's actual score would be a two. (V. R.T. pp. 349-351.) Appellant's score of three meant there was a twelve percent risk of recidivism over five years, a

fourteen percent chance of recidivism over ten years, and a nineteen percent risk of recidivism over fifteen years. (V. R.T. pp. 313, 357-358.) Romanoff felt, however, that appellant fell into the thirty percent of people that the STATIC-99 doesn't diagnose properly, as his level of sexual deviancy is higher then the norm. (V. R.T. pp. 314-315.) Romanoff concluded that appellant was a SVP. (V. R.T. p. 322.)

Nancy Ruescheneberg was the second clinical psychologist to testify. She had conducted approximately 225 SVP evaluations. (VI. R.T. p. 398.) In about seventy two percent of the evaluations, she concluded the subjects were not SVP's. In about twenty eight percent of the evaluations, she concluded the subjects were SVP's. (VI. R.T. p. 398.)

Ruescheneberg also evaluated appellant in August, 2004. (VI. R.T. p. 399.) She noted that appellant had suffered the same two qualifying offenses as had Romanoff, and described them in substantially the same fashion. (VI. R.T. pp. 401-402.) She also diagnosed appellant with the same mental disorders, pedophilia and schizoaffective disorder. (VI. R.T. p. 402.) She noted that appellant had nonexclusive pedophilia and also enjoyed sex with adult females. (VI. R.T. p. 402.)

As to the third criteria, that of the likelihood of re-offending, Ruescheneberg also used the STATIC-99. Appellant was scored as a two, which was in the moderate to low risk range to re-offend. (VI. R.T. pp. 406-407.) Appellant's score of two meant there was a nine percent risk of

recidivism over five years, a ten percent chance of recidivism over ten years, and a sixteen percent risk of recidivism over fifteen years. (VI. R.T. pp. 408-409.) Ruescheneberg also considered what she referred to as static risk factors, in order to get a complete picture of appellant's likelihood of re-offending. Those static risk factors are sexual deviance, dropping out of treatment, and general criminality lifestyle and stability. (VI. R.T. pp. 408-409.)

For sexual deviance, the criteria was prior sex offenses with two or more unrelated children under the age of twelve. Appellant was related to the second child, his niece, so that factor did not add to his risk of re-offending. (VI. R.T. pp. 409-410.)

Appellant had not dropped out of his sex offender treatment program, so that factor also did not add to his risk of re-offending. (VI. R.T. p. 411.)

For general criminality lifestyle and stability, Ruescheneberg felt that appellant had no childhood maladjustment or conduct disorder, and he did not suffer from psychopathy. He did not have any general criminality factors, but appeared to have a period of unemployment. On balance, Ruescheneberg felt that appellant's static risk factors were low, complementing his STATIC-99 score. (VI. R.T. pp. 409-415.)

Ruescheneberg also looked at dynamic risk factors, defined as intimacy deficits, sexual self-regulation, general self-regulation,

cooperation with supervision, whether or not the person has an antisocial personality disorder, and if that person has attitudes that are supportive of sexual assault. (VI. R.T. p. 416.)

For intimacy deficit, Ruescheneberg looked to see if appellant had sustained an intimate relationship with someone. As he had been married for ten years, he had the capacity for intimacy. (VI. R.T. p. 416.) Ruescheneberg looked for emotional identification with children, a factor that appellant appeared to have, and concern for others, which appellant also had. (VI. R.T. p. 417.)

For sexual self-regulation, Ruescheneberg looked for signs of sexual preoccupation. She did not find that appellant was sexually preoccupied. (VI. R.T. pp. 417-418.) Ruescheneberg also found that appellant did not have attitudes tolerant of sexual assault, and that he had no problems with supervision. (VI. R.T. pp. 418, 419.)

For general self-regulation, Ruescheneberg looked for signs of impulsiveness or negative emotionality. She did not find appellant to suffer in this area. (VI. R.T. pp. 419-420.) She also did not find appellant to have an anti-social personality disorder. (VI. R.T. p. 420.)

Ruescheneberg concluded that none of the additional factors she concluded would cause her to adjust appellant's STATIC-99 score, and that his risk to re-offend was medium low. As a result, she felt that appellant

was not likely to re-offend, and that he did not meet the criteria for classification as a SVP. (VI. R.T. pp. 421-422.)

Appellant was the next witness in the trial. He indicated that he was faking his mental illness in order to survive the prison system. (VI. R.T. p. 485.) He denied having sexual contact with his niece, but acknowledged the sexual contact with his eleven year old babysitter in New York. (VI. R.T. p. 487.)

Appellant stated that he wanted to be initiated as a free mason but his wife withheld her consent. When that happened he began sleeping around with other women, including his babysitter. He stated that his wife brought the babysitter into the house "as a weapon" against him, and that the babysitter was sexually mature and the aggressor in the relationship. He was unaware of her age. (VI. R.T. pp. 487-493.)

Appellant stated the "sexual contact" with his niece was a story fabricated by his wife. (VI. R.T. p. 494.) He pled guilty to the charges after being "coerced" by his attorney. He also indicated he was drugged at the time. (VI. R.T. pp. 505-506.)

After he was dismissed by the army, appellant said that he reconciled with his wife and they moved to San Diego, where another child was born. (VI. R.T. p. 497.) Appellant also stated that he had made up the story of his sexual history, and that he was a virgin at marriage. (VI. R.T. p. 517.)

Jack Vognsen was the third clinical psychologist to testify. He began evaluating SVP's on a contract basis in 1997. (VII. R.T. p. 544.).) He had conducted approximately 500 SVP evaluations. (VII. R.T. p. 547.) In about forty eight percent of the evaluations, he concluded the subjects were not SVP's. In about fifty two percent of the evaluations, he concluded the subjects were SVP's. (VII. R.T. p. 547.)

Vognsen evaluated appellant in October, 2004. (VII. R.T. p. 548.) He also attempted to evaluate appellant in 2006 and 2007, but appellant refused to talk to him. (VII. R.T. pp. 567, 569.) At the 2004 evaluation, Vognsen acknowledged finding the same two qualifying offenses as the other two psychologists. (VII. R.T. p. 550.) He also acknowledged finding the same two mental disorders as the other two psychologists. (VII. R.T. p. 552.) He stated that appellant had acknowledged to him having schizoaffective disorder and pedophilia. (VII. R.T. pp. 562-563.) He noted that appellant had discontinued his medication, with an adverse effect on his mental condition by 2007. (VII. R.T. pp. 571-572.)

With respect to the likelihood of re-offense, Vognsen also evaluated appellant with the STATIC-99 test. He also scored appellant as a three, which was in the moderate to low risk range to re-offend. (VII. R.T. pp. 573-574.) Appellant's score of three meant there was a nineteen percent risk of recidivism over fifteen years. (VII. R.T. p. 574.)

Vognsen also evaluated appellant with an older version of the STATIC-99, called the RRASOR. He felt this instrument was better at predicting recidivism for people whose main cause was sexual deviance. (VII. R.T. pp. 574-575.) Vognsen felt that appellant's sexual deviance was high, based on the number and type of offenses committed against appellant's eight year old niece. (VII. R.T. pp. 576-577.) Vognsen scored appellant with a three on the RRASOR. Appellant's score of three meant there was a twenty five percent risk of recidivism over five years, and a thirty seven percent risk of recidivism over ten years. (VII. R.T. p. 580.)

Vognsen considered other risk factors as well, although he stated pedophiles tend to not show risk factors other then those indicated by sexual deviancy. (VII. R.T. p. 581.) While appellant was not generally a criminal type of person, he did exhibit some intimacy deficit as well as poor sexual self-control. (VII. R.T. pp. 583-584.) He also showed a deterioration in general self-control from 2004 to 2007. (VII. R.T. p. 585.) Vognsen opined that appellant was likely to re-offend in the future, and thus met the criteria for a SVP. (VII. R.T. pp. 588-589, 594.)

Vognsen acknowledged that "there's a lot to learn about why sex offenders may commit crimes again," and "a lot that we still don't know." (VII. R.T. p. 594.

ARGUMENT

I.

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT'S ORDER FOR APPELLANT'S INDEFINITE COMMITMENT TO THE CUSTODY OF THE DEPARTMENT OF MENTAL HEALTH VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, TO BE FREE OF EX POST FACTO LAWS, AND TO EQUAL PROTECTION

A. Summary of Argument

Following a jury trial, appellant was found to be a sexually violent predator. The trial court committed appellant to the custody of the Department of Mental Health for an indefinite period. Proposition 83 modified the SVPA to provide for indefinite commitment of sexually violent predators. The SVPA was also modified to place the burden on the SVP defendant to prove that he was not fit for commitment pursuant to thc SVPA. The modifications to the SVPA made by Proposition 83 violated appellant's federal constitutional rights to due process of law, to be free of ex post facto laws, and to equal protection. Hence, the judgment must be reversed.

B. Overview of the Sexually Violent Predator Act.

The Sexually Violent Predator Act took effect on January 1, 1996. (Stats. 1995, ch. 763, §3.) In *Kansas v. Hendricks* (1997) 521 U.S. 346, 360-369, [117 S.Ct. 2072, 138 L.Ed.2d 501] (*Hendricks*), the United States Supreme Court upheld by a 5-4 vote the constitutionality of the sexually

violent predator statute that had been enacted in Kansas. The Kansas statute was substantially similar to the California SVPA. In *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1167-1179, the California Supreme Court upheld the constitutionality of the SVPA against claims that it violated due process of law, the equal protection clause, and the ex-post facto clause. Prior to the enactment of Proposition 83, section 6604 required that the defendant's commitment to the Department of Mental Health be limited to two years. The district attorney had to file a petition at the end of the two-year term in order to extend defendant's commitment. In proceedings under the SVPA, the district attorney had the burden of proving beyond a reasonable doubt that the defendant was a sexually violent predator. The defendant was entitled to a jury trial which required a unanimous verdict and the assistance of counsel and experts. (§6603, subd. (a), (e), and (f).) Section 6604.1, subdivision (b), provided in part, "The rights, requirements, and procedures set forth in Section 6603 shall apply to extended commitment proceedings."

Proposition 83 changed a number of provisions of the SVPA. Section 6604 was amended to read, "If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health." The indeterminate terms commences on

the date of the issuance of the commitment order. (§6604.1, subd. (a).) The State Department of Mental Health is required to examine the mental condition of a sexually violent predator at least once every year and file a report with the court. (§6605, subd. (a).) The sexual violent predator may petition the court for conditional release or discharge if the Department of Mental Health determines the person no longer meets the definition of a sexually violent predator or can be conditionally release. (§6605, subd. (b).) The trial court must set an order to show cause hearing. (*Ibid.*) The trial court must determine whether probable cause exists to believe the petitioner's diagnosed mental disorder has so changed "that he or she is not a danger to the health and safety of others and is not likely to engaging in sexually violent criminal behavior, if discharged. . . ." (§6605, subd. (c).) If the trial court makes that finding, then it must order a hearing on the petition. (*Ibid.*)

At the hearing, the petitioner is entitled to a jury trial and the assistance of counsel and experts. (§6605, subd. (d). The State has the burden of proving beyond a reasonable doubt that the petitioner is a sexually violent predator. (*Ibid.*) If the court or the jury rules against the petitioner, he or she is committed to the State Department of Mental Health for an indeterminate period. (§6605, subd. (e).) The petitioner must be unconditionally discharged if the judge or jury rules in favor of the petitioner. The State Department of Mental Health must file a petition for

judicial review of a sexually violent predator's commitment if it has reason to believe the person no longer meets the definition of a sexually violent predator. (§6605, subd. (f).)

Section 6608 governs petitions filed for release without the concurrence of the Director of Mental Health. Under subdivision (a), a committed individual may file with the superior court, and without the concurrence of the Director of Mental Health, a petition for conditional release or unconditional discharge. "Upon receipt of a first or subsequent petition from a committed person without the concurrence of the director, the court shall endeavor whenever possible to review the petition and determine if it based upon frivolous grounds and, if so, shall deny the petition without a hearing. The person petitioning for conditional release and unconditional discharge under this subdivision shall be entitled to assistance of counsel." (§6608, subd. (a).) If the trial court determines after a hearing that the petitioner would not be a danger to the health and safety of others, it shall order the petitioner committed to a conditional release program for one year. (§6608, subd. (d).) Following the one year conditional release, the trial court must hold another hearing to determine if the person should be unconditionally discharged. (*Ibid.*) "If the court denies the petition to place the person in an appropriate forensic conditional release program or if the petition for unconditional discharge is denied, the person may not file a new application until one year has elapsed from the

date of denial." (§6608, subd. (h).) At any hearing held pursuant to section 6608, "the petitioner shall have the burden of proof by a preponderance of the evidence." (§6608, subd. (i).)

C. Appellant's Indeterminate Commitment to the Custody of the Department of Mental Health Violated His Right to Federal Due Process of Law

As described above, Proposition 83 modified the SVPA by providing for an indeterminate commitment and shifting the burden of proof in commitment proceedings to the committed individual to prove by a preponderance of the evidence that he was not a sexually violent predator unless the petition was filed with the concurrence of the Director of the Department of Mental Health. Appellant was committed to the State Department of Mental Health for an indeterminate term pursuant to these modifications to the SVPA. The judgment must be reversed because the modifications made to the SVPA by Proposition 83 violated appellant's right to federal due process of law.

Kansas v. Hendricks, supra, 521 U.S. 346, is the seminal case dealing with the constitutionality of the sexually violent predator law. The defendant in that case challenged Kansas's sexually violent predator law on the grounds of substantive due process, double jeopardy, and ex post facto. The Court noted that the Kansas SVP statutes required the state to prove beyond a reasonable doubt the defendant was a sexually violent predator. The committed individual could be released in one of three ways; the

committing court was required to hold an annual review to determine if continued detention was required; the confining authority could release the individual if it concluded continued detention was not required; or the committed person could petition for release.

The Court began its analysis by noting, "Although freedom from physical restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action," (*Foucha v. Louisiana* (1992) 504 U.S. 71, 80 [112 S.Ct. 1780, 1785, 118 L.Ed.2d 437] that liberty interest is not absolute." (*Kansas v. Hendricks, supra*, 521 U.S. at p. 356.) "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." (*Id.*, at p. 357.) A finding of dangerousness was not sufficient, by itself, to justify indefinite involuntary commitment. (*Id.*, at p. 358.) A valid civil commitment statute required a finding of dangerousness coupled with proof of an additional factor such as a "mental illness, or "mental abnormality." (*Ibid.*) The Kansas statute was a valid civil commitment statute because it required "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." (*Id.*) The defendant in *Hendricks* argued the statute violated the ex-post facto clause. The Court rejected this argument because, "[F]ar from

any punitive objective, the confinement's duration is instead linked to the stated purpose of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others." (*Id.*, at p. 363.) The Court finally noted, "commitment under the Act is only potentially indefinite. The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. (§59-29a08.) If Kansas seeks to continue the detention beyond that year, a court must again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement." (*Id.*, at p. 364.)

Although the SVP statute in *Hendricks* was upheld, Justice Kennedy, the swing vote, cautioned that an SVP Act could easily cross the line and become unconstitutional:

> My brief, further comment is to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application.
>
> On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were to be shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it. (*Kansas v. Hendricks, supra*, 521 U.S. at p. 372-373.)

Likewise in *Hubbart v. Superior Court, supra,* 19 Cal.4th 1138, 1179, Justice Werdegar cautioned that "the act must not be stretched beyond its constitutional limits."

Hendricks did not expressly decide that indefinite involuntary commitment under the sexually violent predator act violated due process of law because that issue was not presented to it. The Court did note, however, the limited duration of the commitment, and the provision for periodic judicial review which applied the beyond a reasonable doubt standard, in upholding the statute. The rationale followed by *Hendricks* in upholding the sexually violent predator statute suggests that an indeterminate commitment violates due process of law. *Hendricks* required a finding of dangerousness coupled with an existing "mental illness," or "mental abnormality," in order to civilly commit the SVP defendant. *Kansas v. Crane* (2002) 534 U.S. 407, 412-413 [122 S.Ct. 867, 151 L.Ed.2d 856], later clarified this standard by requiring "a special and serious lack of ability to control behavior," in order to commit a SVP defendant. (See also *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 916 [holding the phrase "likely to engage in acts of sexual violence" requires "a determination that, as the result of a current mental disorder which predisposes the person to commit violent sex offenses, he or she presents a substantial danger–that is, a serious and well founded risk of reoffending in this way if free"].)

An indefinite commitment is inconsistent with the notion that a valid civil commitment can occur only when the defendant has an existing "mental illness" or "mental abnormality." Once a certain period of time has passed, a defendant's current mental state, including whether he suffers

from a current "mental illness" or "mental abnormality" which makes him dangerous to the community, cannot rationally be determined from the fact that the defendant at one time suffered from that condition. Because of the complexity and varying nature of mental illnesses, an arbitrary time cannot be fixed by which a past diagnosis cannot no longer be deemed evidence, by itself, of a current "mental illness or "mental abnormality." However, perpetuity is not the period of time in which a past diagnosis can be deemed evidence of a current "mental illness" or "mental abnormality"

The amendments to the SVPA by Proposition 83 do provide two mechanisms for judicial review of the defendant's confinement. These mechanisms for judicial review are constitutionally inadequate.

Under section 6605, subdivision (b), The State Department of Mental Health can file a petition for the detainee's discharge or conditional release if it determines the person no longer meets the definition of a sexually violent predator or can be released to a conditional release program. The filing of such a petition is in the absolute discretion of the Department of Mental Health because it determines whether the detainee can be conditionally released or is no longer is a sexually violent predator, without any judicial review. The burden is on the state to prove beyond a reasonable doubt that the defendant meets the definition of a sexually violent predator. The state, however, only has the burden of proof beyond a reasonable doubt when the Department of Mental Health has filed the

petition for release. The burden of proof is not placed on the state to prove that his condition has not changed or that he still qualifies as an SVP but on the individual to prove that his condition has changed. This is distinctly different from the burden of proof at the initial probable cause hearing under section 6602, subdivision (a), which requires the judge to determine "whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release."

With the exception of the initial petition, the state, in effect, can prevent any hearing from ever being held in which it has the burden of proving beyond a reasonable doubt that the defendant has a current "mental illness," or "mental abnormality," which makes him a danger to the community by simply not filing a petition.

The next mechanism for judicial review of a detainee's confinement is the filing of a petition for discharge by the detainee pursuant to section 6608. Under subdivision (a), the detainee is entitled to the assistance of counsel. The subdivision does not grant the detainee the right to an expert. The trial court can summarily deny the petition if it believes it is frivolous. The petitioner, i.e., detainee, has the burden of proving by a preponderance of the evidence that he should be conditionally released or is not a sexually violent predator. (§6608, subd. (i).)

Section 6608 is a constitutionally inadequate mechanism for judicial review of a detainee's confinement because the detainee is not entitled to the assistance of an expert and has the burden of proof in a hearing ordered by the trial court. In *Addington v. Texas* (1979) 441 U.S. 418 [99 S.Ct. 1804, 60 L.Ed.2d 323] (*Addington*), the Court discussed the burden of proof applicable to an indefinite civil commitment based on the defendant's mental illness. The Court noted, "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *In re Winship* (1970) 397 U.S. 358, 370 [90 S.Ct. 1068, 1076, 25 L.Ed.2d 368] (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." (*Addington v. Texas, supra*, 441 U.S. at p. 423.) The lowest burden of proof, the preponderance of evidence, applies to civil disputes over money because society has a minimal concern over the outcome of such a proceedings. (*Id.*, at p. 423.) The standard of proof beyond a reasonable doubt applied to criminal proceedings. (*Id.*, at pp. 423-424.) The intermediate standard was "clear," "cogent," "unequivocal," or "convincing." (*Id.*, at p. 424.) In assessing the applicable standard to civil commitment proceedings, the court assessed the individual's interest in not

being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed. (*Id.*, at p. 425.) "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (*Id.*, at p. 425.) Conversely, the state has a legitimate interest in providing care for individuals who cannot care for themselves and pose a danger to the public. (*Id.*, at p. 426.) In balancing these competing interest, the Court stated, "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." (*Id.*, at p. 427.) The Court Due Process Clause therefore required the state to prove, applying the intermediate standard of proof, that a defendant was subject to involuntary civil commitment. (*Id.*, at pp. 431-432.)

Addington dealt with the initial commitment proceeding. The procedure at issue in section 6608 is distinguishable from the issue addressed in *Addington* because section 6608 deals with continued civil commitment of a SVP after a hearing had been held in which the state had to prove beyond a reasonable doubt the defendant was fit for commitment under the SVPA. However, *Addington* governs the procedure the state

should be required to follow at hearings held pursuant to section 6608 because: (1) the SVPA provides for an indeterminate commitment; (2) section 6605 does not grant a SVP a hearing as a matter of right to determine if his commitment should be continued; and (3) the SVP detainee's commitment can only be continued if he suffers from a current mental condition which makes him a danger to the community. Because an indeterminate commitment could continue for decades, but the SVP detainee's civil commitment is lawful only if he suffers from a current mental condition, a hearing held pursuant to section 6608 is more akin to an initial civil commitment proceeding than a hearing to determine if the commitment should be extended. The state, furthermore, should not be able to civilly commit an individual for perpetuity through the fiat of placing the burden on him to prove by a preponderance of the evidence that he is fit for release. The state can, however, achieve this result by simply never filing a petition pursuant to section 6605, and requiring the detainee to prove by a preponderance of the evidence his fitness for release when he files a petition for release.

This Court may be tempted to conclude the allocation of the burden of proof in section 6608, subdivision (i), passes constitutional muster because the burden is placed on the state when it files a petition pursuant to section 6605. This argument fails for several reasons. As argued above, the state has no obligation to ever file such a petition. This Court is well aware

of the hysterics occurring the few times the State Department of Mental Health has ever attempted to release a SVP detainee in something as restrictive as a conditional release program. Media coverage of the release of a SVP defendant is extensive and public fear is whipped into a frenzy. Staff officials as the State Department of Mental Health are obviously aware that the blame game will lead directly to them if a SVP defendant who is released pursuant to a petition filed by the Department commits a crime. Under these circumstances, the requirements of the Due Process Clause are not satisfied by a statutory mechanism which places the burden on the state to prove a SVP detainee's fitness for continued commitment in a proceeding which can only be initiated in the absolute discretion of the State Department of Mental Health. The allocation of the burden of proof to the state in proceedings under section 6605, furthermore, has little practical meaning. The State Department of Mental Health will grant a detainee the permission to file a petition pursuant to section 6605 when the Department has concluded the defendant should be released. If the State Department of Mental Health has concluded the SVP detainee should be released, there is little likelihood the hearing held pursuant to section 6605 will be adversarial. The parties will most likely agree the SVP detainee should be released in a conditional release program. The SVP detainee thus receives little, if any, practical benefit from the allocation of the burden of the proof to the state in proceedings held pursuant to section 6605.

Foucha v. Louisiana, supra, 504 U.S. 71 (*Foucha*), also demonstrates that the modifications made to the SVPA by Proposition 83 render the Act unconstitutional. The defendant in *Foucha* was found not guilty by reason of insanity. The Louisiana statutes required the commitment of the defendant to a psychiatric hospital unless he could prove he was not dangerous. The defendant was committed to the psychiatric hospital whether or not he was then insane. The acquittee or the superintendent could begin release proceedings. If release was recommended by a hospital review panel, the court must hold a hearing. The acquittee had the burden of proving he was not dangerous. If found to be dangerous, the acquittee was returned to the psychiatric hospital. The defendant argued the scheme violated due process and equal protection "because it allows a person acquitted by reason of insanity to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness." (*Foucha v. Louisiana, supra*, 504 U.S. at p. 1782.)

Doctors appointed by the court filed a report which stated the defendant did not suffer from any current mental illness but they could not certify he would not be a danger to others if released. One of the doctors testified the defendant was in a drug induced psychosis when admitted to the hospital but had recovered. The trial court ordered the acquittee returned to the mental hospital. The state appellate courts affirmed the trial

court's ruling because the acquittee had failed to carry his burden of proving he was not dangerous.

The Court noted its decision in *O'Conner v. Donaldson* (1975) 422 U.S. 563, 575, [95 S.Ct. 2486, 45 L.Ed.2d 396] (*O'Conner*), which held it a violation of due process to confine a harmless, mentally ill person. *O'Conner* states that even if the initial commitment was valid, "it could not constitutionally continue after that basis no longer existed." (*O'Conner v. Donaldson, supra*, 422 U.S. at p. 575.) The Court in *Foucha* found the defendant's commitment to the psychiatric hospital unlawful because, "Louisiana does not contend that Foucha was mentally ill at the time of the trial court's hearing. Thus, the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis." (*Foucha v. Louisiana, supra*, 504 U.S. at p. 77.)

O'Conner and *Foucha* hold the Due Process Clause forbids holding an insanity acquittee beyond the period of time that he is no longer mentally ill. Because an individual who has been civilly committed is similarly situated to an insanity acquittee, the above cases apply to the SVPA. The statutory scheme adopted by Proposition 83 creates an unacceptable risk that a SVP detainee who no longer qualifies as a sexually violent predator will have his commitment continued. After the initial commitment, the SVP detainee has no right to a hearing on the merits to

determine if his detention should be continued. If the defendant obtains a hearing on the merits under section 6608, his commitment can be continued if he cannot prove that he no longer is a sexually violent predator. This allocation of the burden of proof can easily result in the situation condemned in *O'Conner* and *Foucha*, in which the commitment of a person who suffers from no mental illness continues.

Foucha also condemned the allocation of the burden of proof to the acquittee: "[T]he State now claims that it may continue to confine Foucha, who is not now considered to be mentally ill, solely because he is deemed dangerous, but without assuming the burden of even proving this ground for confinement by clear and convincing evidence. The Court below gave no convincing why the procedural safeguards against unwarranted confinement which are guaranteed to insane persons and those who have been convicted may be denied to a sane acquittee, and the State has done no better in this Court." (*Foucha v. Louisiana, supra*, 504 U.S. at p. 86.) Similar reasoning applies to the instant case. The state has allocated to the SVP detainee to prove that he or she is not fit for confinement in proceedings under section 6608. The state has improperly shifted the risk of an incorrect decision to SVP detainees.

The constitutionality of the amendments to the SVPA by Proposition 83 cannot be upheld on the basis of *Jones v. United States* (1983) 463 U.S. 354 [103 S.Ct. 3043, 77 L.Ed.2d 694] (*Jones*). The

defendant in that case was acquitted by reason of insanity. The defendant requested immediate release from custody. The issue was whether the due process clause permitted the state to confine the individual in a mental hospital, until he had regained his sanity or was no longer a danger to others, on the basis the defendant established at trial by a preponderance of the evidence that he was not guilty by reason of insanity. The defendant argued the due process standard articulated in *Addington* had not been met because the judgment of not guilty by reason of insanity did not constitute a finding of a present mental illness and dangerousness. The first issue was whether the finding of insanity was sufficiently probative of mental illness and dangerousness to justify commitment:

> Nor can we say that it was unreasonable for Congress to determine that the insanity acquittal supports an inference of continuing mental illness. It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment. The precise evidentiary force of the insanity acquittal, of course, may vary from case to case, but the Due Process Clause does not require Congress to make classifications that fit every individual with the same degree of relevance. See Marshall v. United States, 414 U.S. 417, 428, 94 S.Ct. 700, 707, 38 L.Ed.2d 618 (1974). Because a hearing is provided within 50 days of the commitment, there is assurance that every acquittee has prompt opportunity to obtain release if he has recovered. (*Jones v. United States, supra*, 463 U.S. at p. 366.)

Jones allowed an insanity acquittal to support an inference of continuing mental illness only because of the short period of time before judicial review occurred of the defendant's mental status. There was no risk of an unlawful extended confinement under that circumstance. Conversely,

the SVP detainee is not entitled to a hearing as a matter of right at any time following his initial commitment. The SVP detainee could be detained decades without a hearing on the merits to determine if he no longer is a sexually violent predator. Because the SVPA provides for an indeterminate commitment, it is not logical or fair for the initial commitment determination to support an inference of continuing mental illness by the SVP detainee.

The Court in *Jones* next addressed the use of the preponderance of the evidence standard, rather than the clear and convincing standard articulated in *Addington*. The Court distinguished between civil committees who are involuntary committed and insanity acquitees:

> But since automatic commitment under §§ 24-301(d)(1) follows only if the acquittee himself advances insanity as a defense and proves that his criminal act was a product of his mental illness, there is good reason for diminished concern as to the risk of error. More important, the proof that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere ""idiosyncratic behavior,"" *Addington*, 441 U.S., at 427, 99 S.Ct., at 1810. A criminal act by definition is not "within a range of conduct that is generally acceptable." *Id.*, at 426-427, 99 S.Ct., at 1809-1810. (*Jones v. United States, supra*, 463 U.S. at p. 367.)

Appellant did not advance his alleged mental illness in defense of criminal charges. Hence, there can be no justification for shifting the burden of proof to him in any proceedings under the SVPA.

The Court of Appeal, in issuing its ruling in this case, held: "Finally, we conclude *Jones*'s approval of the preponderance-of-the-evidence

standard essentially overruled *Addington*'s holding to the extent *Addington* may have applied to subsequent review or release hearings of an indefinite civil commitment." (Court of Appeal opinion at p. 29.) However the high court's subsequent ruling in *Foucha* clarifies the standard: "[T]he State now claims that it may continue to confine Foucha, who is not now considered to be mentally ill, solely because he is deemed dangerous, but without assuming the burden of even proving this ground for confinement by clear and convincing evidence. The Court below gave no convincing why the procedural safeguards against unwarranted confinement which are guaranteed to insane persons and those who have been convicted may be denied to a sane acquittee, and the State has done no better in this Court." (*Foucha v. Louisiana, supra*, 504 U.S. at p. 86.) The standard of proof should be by clear and convincing evidence.

The current version of the sexually violent predator law is constitutionally flawed because it shifts the burden of proof onto the SVP. *Foucha*, *Addington*, and *Jones* all support appellant's position that the state can only impose a civil commitment on a person based upon a current finding that the individual is mentally ill and dangerous as a result of that mental illness and that the state must prove this by clear and convincing evidence. Appellant is unaware of any authority for the proposition that shifting the burden of proof onto appellant is constitutional. Even *Jones*, the only case in which the burden of proof was shifted, specifically approved

the burden shifting only because of the unique circumstances of a not guilty by reason of insanity commitment, not because such burden shifting is permissible in any other civil commitment cases.

In order for this burden shifting to meet federal due process standards, the procedures must be necessary to further an important governmental interest. Specifically, "[l]egislation which interferes with the enjoyment of a fundamental right is unreasonable under the due process clause and must be set aside or limited unless such legislation serves a compelling public purpose and is necessary to the accomplishment of that purpose. In other words, such legislation would be subject to a strict scrutiny standard of review." (*In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1503, citing *Moore v. East Cleveland* (1977) 431 U.S. 494, 499 [97 S.Ct. 1932, 52 L.Ed.2d 531].) Appellant concedes that the governmental interest is important, but there is no compelling and necessary reason to shift the burden of proof. The California sexually violent predator commitment process was certainly functioning as intended under the previous version of the law where the burden of proof was on the government.

The real difference between the two burdens of proof is in the potential different results. Under the current law, it is possible that a defendant would be unable to prove that he was not a sexually violent predator but that the state would also have been unable to prove, beyond a

reasonable doubt, that he was a sexually violent predator. In such a situation, United States Supreme Court's precedent dictates that the state could not constitutionally continue the person's commitment. California's current law violates that precedent. Unless appellant suddenly dies in custody, he will inevitably become a person that the state cannot constitutionally confine under the United States Supreme Court precedent but one whom the state will be able to continue to confine under the language of the current version of the California SVP Law.

The United States Supreme Court has made it clear that due process requires that the civil commitment of an individual for being mentally ill and dangerous be subject to a strict scrutiny analysis and under that analysis, the burden is on the state to prove, by clear and convincing evidence, that the person is currently mentally ill and currently dangerous. Because California's system does not require the state to meet this burden of proof more than once, it is unconstitutional. Therefore, this court must find the law unconstitutional and either order appellant released or create some other remedy that satisfies the due process requirements of the United States Constitution.

D. The Judgment Should Be Reversed Because Appellant's Indeterminate Commitment to the Custody of the Department of Mental Health Renders the SVPA Punitive in Nature in Violation of the Ex Post Facto Clause

Article I, section 10 of the United States Constitution provides: "No State shall ... pass any ... ex post facto law...." An ex post facto law is one which later punishes an act done before the enactment of the law. The ex post facto law [has] been anathema to the American legal system from its inception." (*People v. Mesce* (1997) 52 Cal.App.4th 618, 622.) The ex post facto clause prohibits three categories of legislative acts: "any provision [1] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed...." (*Collins v. Youngblood* (1990) 497 U.S. 37, 42 [110 S.Ct. 2715, 2719, 111 L.Ed.2d 30], quoting *Beazell v. Ohio* (1925) 269 U.S. 167, 169 [46 S.Ct. 68, 70 L.Ed. 216].)

The Court in *Hendricks* also addressed whether Kansas's sexually violent predator act violated the ex-post facto clause. In making this assessment, the first issue was whether the legislature intended to enact a civil or criminal proceeding. (*Kansas v. Hendricks, supra*, 521 U.S. at p. 361.) Kansas had enacted a civil statute "[B]ecause nothing on the face of

the statute suggests that the legislature sough to create anything other than a civil commitment scheme designed to protect the public from harm." (*Ibid.*)

The Court noted, however, that the civil label was not dispositive and that categorization would be rejected where the party challenging the statute provides "the clearest proof" that the statutory scheme was so punitive in purpose or effect as to negate the state's intent to label it civil. (*Ibid.*) The Court concluded the act did not implicate retribution or deterrence, the two primary objectives of criminal punishment. The act did not implicate retribution because: (1) the defendant's past conduct was used solely to establish a mental abnormality and future dangerousness; (2) the act did not make a criminal conviction a prerequisite for commitment; and (3) a finding of scienter was not required. *(Kansas v. Hendricks, supra,* 521 U.S. at p. 362.) The Court concluded the statute was not intended to act as a deterrent because: (1) individuals with mental disorders were unlikely to be deterred; (2) the conditions of confinement did not suggests a punitive purpose because the SVP defendants are not incarcerated in penal institutions; and (3) the mere fact of physical restraint was not sufficient by itself to establish a punitive purpose. (*Id.*, at pp. 362-363.)

The defendant argued his indefinite confinement rendered his commitment rendered the statute punitive. The Court rejected this argument:

> Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others. Cf. *Jones*, 463 U.S., at 368, 103 S.Ct., at 3051-3052 (noting with approval that ""because it is impossible to predict how long it will take for any given individual to recover [from insanity] or indeed whether he will ever recover-Congress has chosen ... to leave the length of commitment indeterminate, subject to periodic review of the patients' suitability for release""). If, at any time, the confined person is adjudged ""safe to be at large,"" he is statutorily entitled to immediate release. Kan. Stat. Ann. §§ 59-29a07 (1994).
>
> Furthermore, commitment under the Act is only potentially indefinite. The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. §§ 59-29a08. If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement. *Ibid.* This requirement again demonstrates that Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness. (*Kansas v. Hendricks, supra*, 521 U.S. at pp. 363-364.)

The California Supreme Court in *Hubbart v. Superior Court, supra,* 19 Cal.4th 1138, 1171-1175, held the California SVPA did not violate the ex-post facto clause in reliance on the reasoning in *Hendricks*. In *Seling v. Young* (2001) 531 U.S. 250, 260-262 [121 S.Ct. 727, 148 L.Ed.2d 734], the Court concluded a defendant could not raise an "as applied" challenge to the constitutionality of Washington State's sexually violent predator law based on double jeopardy and ex post facto grounds.

In *Smith v. Doe* (2003) 538 U.S. 84 [123 S.Ct. 1140, 155 L.Ed.2d 164] (*Smith*), the Court rejected an ex-post facto challenge to Alaska's sexual offender registration law. The court began its analysis by stating the determination of whether a statutory scheme is civil or criminal is first an issue of statutory construction which requires consideration of the statute's text and structure. (*Smith v. Doe, supra*, 538 U.S. at p. 93.) "A conclusion that the legislature intended to punish would satisfy an ex-post facto challenge without further inquiry into its effect, so considerable deference must be accorded to the intent as the legislature has stated it." (*Id.*, at pp. 92-93.) The Court concluded the legislature intended a civil scheme because: (1) the goal of the law was to notify the public of the presence of high risk sex offenders; (2) the codification of the statute in the criminal code was not determinative because other non-punitive statutes were in that code; (3) aside from the duty to register, the act did not mandate any procedures. (*Smith v. Doe, supra*, 538 U.S. at pp. 95-96.)

The Court in *Smith* also analyzed the effect of the statute under the seven factor framework in *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144 [83 S.Ct. 554, 9 L.Ed.2d 644] (*Kennedy*). Those factors are whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to

which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. (*Kennedy v. Mendoza-Martinez, supra*, 372 U.S. at pp. 168-169.) *Smith* concluded the registration requirement was not punitive in effect because: (1) the dissemination of truthful information in furtherance of a legitimate governmental objective was not punishment; (2) the act imposed no physical restraint and therefore did not resemble punishment; (3) the stigma from the availability of the information flow from the fact of the conviction which was already a matter of public record; (4) the deterrent nature of the act was not sufficient by itself to make the statute punitive because many non-punitive governmental programs have that objective; and (5) the act had a rational connection to a non-punitive purpose. (*Smith v. Doe, supra*, 538 U.S. at p. 101-102.) The Court also cited its decision in *Hendricks* as an example of a non-punitive civil statute. (*Smith v. Doe, supra*, 538 U.S. at p. 104.)

Under *the Kennedy* test, the changes made to the SVPA by Proposition 83 result in it being punitive. An indeterminate incarceration involves an affirmative restraint and historically has been regarded as punishment. Indeed, the SVPA now resembles the Indeterminate Sentencing Law in which offenders were sentenced to life terms subject to parole by the parole board. The SVPA of course will deter and punish sex

offenders. The behavior to which it applies–both past conduct and future conduct–is a crime. Nominally, an alternative purpose than punishment may be assigned to the SVPA. However, with the modifications made to the SVPA by Proposition 83, the Act can no longer be deemed to have a purpose other than punishment and is excessive in relation to its alternative purpose. Proposition 83 reduced the number of victims necessary for commitment as a SVP from two to one, expanded the number of crimes making a defendant eligible for commitment, and provides for lifetime commitment with the burden on the SVP detainee to prove his fitness for release. This expansion of the scope of the SVPA changed it from a law specifically tailored to a small group of troublesome recidivist sex offenders to a general sex crime statute that simply locks sex offenders away for longer periods of time than specified in penal statutes.

Proposition 83 was part of a comprehensive package of reforms presented to the voters. It provided: (1) increased penalties for violent and habitual sex offenders and child molesters; (2) prohibited registered sex offenders from residing within 2,000 feet of any school or park; (3) required lifetime Global Positioning System monitoring of felony registered sex offenders; and (4) expanded the definition of a sexually violent

predator[3]. Taken as a whole, the primary purpose of the law was to increase criminal penalties for sex offenders.

The Legislative Analyst's Office prepared an analysis of Proposition 83. The Analysis was titled, "Sex Offenders. Sexually Violent Predators. Punishment. Residence Restrictions and Monitoring. Initiative Statute." The analysis[4] explains the changes to the SVPA made by Proposition 83 in the context of explaining the other changes made to the law, including the increased punishment for sex offenders.

Proposition 83 evinces a punitive purpose. The Proposition expressly included several changes to the Penal Code which increased the punishment for sexual offenses. The Fiscal Effects portion of the Analysis analyzes the cost to the SVP program by reference to the changes made to the punishment for sex offenders. The Analysis described the impact of Proposition 83 in the "Change SVP Law," portion by stating, "This measure generally makes more sex offenders eligible for an SVP commitment." The voters would understand Proposition 83 as a punitive measure designed to increase the period of time sex offenders are held in custody.

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[3] See http://www.calvoter.or/voter/elections/2006/general/props/prop83.html

[4] The analysis can be found at http://www.lao.ca.gov/ballot/2006/93-11–2006.htm

The Court of Appeal, in ruling on this case, stated "any Penal Code amendments made by Proposition 83 that increased the punishment for various sex offenses have little, if any, relevance to the purpose or effect of Proposition 83's amendments to the Welfare and Institutions Code regarding civil commitments of SVP's (e.g., amendments of §§ 6604 and 6605). Although both provisions were included within the comprehensive Proposition 83 package of reforms, the express punitive purpose of amendments to Penal Code criminal offenses does not show the voters had the same purpose in amending the civil commitment provisions of the Act. We are not persuaded that '[t]he voters would understand Proposition 83 as a punitive measure designed to increase the period of time sex offenders are held in custody," to the extent Proposition 83 amended the Act's civil commitment provisions for SVP's." (Court of Appeal opinion at p. 35.)

The extension of the base term from the two years to an indeterminate term and the other provisions make it more difficult for someone to be released after being found to be a sexually violent predator, indicated that the focus was keeping sexually violent predators locked up, not treating and releasing them. In fact, the primary change in the SVP Law was a dramatic change that makes the law far more punitive. Under the old law, if the experts determined that, after a two year commitment, the defendant no longer qualified as a sexually violent predator, he automatically got released. Under the new law, even if the Department of

Mental Health determines that the defendant no longer qualifies as a sexually violent predator and does not need further treatment, the defendant must still prevail at two hearings before he can be released. If the focus of the law was on treatment, there would be no need for a provision that could require a defendant who no longer needs treatment to remain in custody indefinitely. By implementing a system in section 6605, subdivision (b) that required a hearing even when the Department of Mental Health believes that the individual does not need additional treatment, the voters and the drafters of the initiative clearly demonstrated a desire to lock the sexually violent predator up for as long as possible. This is a punitive objective.

Moreover, whatever intent might be imputed to the drafters of the initiative or the voters, the effect of the law is quite punitive. Under Proposition 83, people who, in the past, would be subject to no further restrictions upon completion of parole other than the requirement to register as a sex offender are now prohibited from living in large portions of the state and required to wear GPS monitors, at their own expense, for the rest of their lives. Under the initiative, people who in the past, would be entitled to release if the State could not prove, beyond a reasonable doubt, that they qualified as a sexually violent predator in a jury trial every two years are now subject to incarceration for the rest of their life unless they can prove that they are no longer sexually violent predators. Again, it is difficult to see how locking someone up for the rest of their life without any

entitlement to a fair hearing on the question of whether they are still mentally ill and dangerous can be viewed as anything but punitive. After all, in the criminal law, once someone is convicted, he must serve his sentence and there is no requirement that he be released if he is no longer dangerous. On the other hand, in a true civil commitment context, an individual cannot be detained once he is no longer mentally ill or dangerous. (*Foucha v. Louisiana, supra*, 504 U.S. at p. 86.)

The California Supreme Court's analysis of the old Sexually Violent Predator Law in *Hubbart* demonstrates just how critical the differences between the current law and the old law were in determining whether the law was punitive in nature. In analyzing the petitioner's ex post facto claim, the court noted that the United States Supreme Court in *Hendricks* did not consider a potentially indefinite commitment to be a problem because the length of confinement was "linked to the stated purpose of the commitment, namely to hold the person until his mental abnormality no longer causes him to be a threat to others." (*Kansas v. Hendricks, supra,* 521 U.S. at 363, quoted in *Hubbart v. Superior Court, supra,* 19 Cal.4th at 1176.) The *Hubbart* court then went on to state:

> This principle was satisfied in *Hendricks* because incapacitation beyond the initial commitment period required a new judicial hearing at which the state was required to prove that the sexual predator remained dangerous and mentally impaired. And, while Kansas did not offer any alternatives to confinement in a secure facility during the term of commitment (such as conditional release), the committed person apparently entitled to unconditional release

> whenever it became clear in proceedings initiated by either the custodial agency or the person that he was safe to be at large.

(*Hubbart v. Superior Court, supra,* 19 Cal.4th at 1176.)

The Supreme Court then went on to explain that the old version of the SVP law was civil and not punitive because:

> In general, each period of commitment is strictly limited and cannot be extended unless the state files a new petition and again proves, beyond a reasonable doubt, that the person is dangerous and mentally impaired. (§ 6604.) Although committed for two years, the SVP is entitled each year to a new mental examination and to judicial review of the commitment to determine whether his condition has changed such that he no longer poses a danger to the health and safety of others. (§ 6605, subds. (a)-(c).) Assuming there is probable cause to support such a determination and a full-blown hearing ensues, the burden rests on the state to prove, beyond a reasonable doubt, that the SVP remains mentally disordered and dangerous. (*Id.* subd. (d).) The SVP is entitled to unconditional release and discharge if he prevails in this proceeding. (*Id.,* subd. (e).) Also, the superior court may order that the SVP be unconditionally released and discharged at any time the Department of Mental Health makes such a request and it is clear the conditions underlying commitment no longer exist. (*Id.*, subd. (f).)

(*Hubbart v. Superior Court, supra,* 19 Cal.4th at 1177.)

Many of these justifications are no longer applicable. The state is no longer obligated to prove, beyond a reasonable doubt, every two years that the defendant is dangerous and mentally impaired. The defendant is only entitled to a full blown jury trial with the burden of proof on the state based upon an annual petition when the annual petition is generated, in effect, by the Department of Mental Health. (§ 6605, subd. (a)-(d).) If the defendant petitions for unconditional release without the support of the Department of

Mental Health, he carries the burden of proof and, even if he convinces the court that he is no longer a sexually violent predator, he must still spend a full year on out-patient treatment before he must prevail at yet another hearing in order to gain his release. Moreover, he has no right to a jury trial. Thus, taken as a whole, the proceedings that now apply to a sexually violent predator after his initial commitment more closely resemble to proceedings that would apply to an individual convicted of a crime and suffering a criminal punishment rather than a mentally ill person being committed to a state hospital for treatment.

The dangers inherent in the current law and the attempt to justify it as a civil, rather than a criminal, statute are exactly those warned of by Justice Kennedy, the fifth vote upholding the Sexually Violent Predator Law, in his concurring opinion in *Hendricks*. Justice Kennedy specifically warned of the risk that a civil commitment may end up resulting in a lifetime confinement. (*Kansas v. Hendricks, supra*, 521 U.S. at 372-373, concurring opinion of Kennedy, J.) Moreover, the more the length of appellant's incarceration depends on the mere existence of the initial finding and the less it depends on the State being required to prove, at regular intervals, that he remains mentally ill and dangerous, the more his confinement resembles a life sentence in a criminal case and the less it resembles a commitment for the specific purpose of providing treatment for a mental illness.

Taken as a whole, the current version of the sexually violent predator law has eliminated many of the protections and procedures that permitted both the United States Supreme Court and the California Supreme Court to determine that sexually violent predator laws are not criminal laws but civil laws. Absent those procedures and protections, the existence of what amounts to a life sentence has turned California's statutes into a criminal law. Since appellant has already been punished for the crimes underlying his commitment as a sexually violent predator, the law now violates the double jeopardy clause of both the state and federal constitution. Moreover, because the current version of the Sexually Violent Predator Law punishes appellant for crimes committed before its enactment, it also violates the ex post facto provisions of both the state and federal constitution. For these reasons, the changes made to the SVPA by Proposition 83 result in it being punitive and appellant's indeterminate commitment to the State Department of Mental Health violates the ex post factor clause.

E. The Judgment Should Be Reversed Because Appellant's Indeterminate Commitment to the Custody of the Department of Mental Health With Limited Judicial Review of His Custodial Status Violates the Equal Protection Clause of the Fourteenth Amendment

The judgment committing appellant to the State Department of Mental Health for an indeterminate term must be reversed because individuals committed under the SVPA, as amended by Proposition 83, are

denied equal treatment to mentally disordered offenders committed under Penal Code section 2960, et. seq., the Mentally Disordered Offender (MDO) Act, and insanity acquittees, committed under the Lanterman-Petris-Short Act. (LPS). Each of these statutory schemes has two common criteria. There must be a finding of a mental disorder coupled with a showing of dangerousness. While the exact language varies, these two criteria are always required in one form or another before a person may be committed or have a commitment extended.

Until the passage of the revised law, the SVPA stood on equal footing with these other involuntary civil commitment schemes. They all contained a common process. The commitment for each was for a discreet period of time, either one or two years. At the end of each commitment, the state bore the burden of re-proving its case in toto and the person had a right to a trial by jury. The current version of the SVPA law stripped from a committed person these crucial protections. It removed the safeguard of a finite term and the assurance of periodic judicial review, with the state shouldering the burden of re-proving its case in front of a jury.

As it stands now, the SVPA is the only involuntary commitment regiment which imposes an indeterminate term. The MDO Act provides for a one-year commitment while allowing the district attorney to file re-commitment petitions every year, should continued involuntary treatment be sought. The person has a right to a jury trial for each re-commitment

period. The burden of proof is placed on the state to prove the justification for recommitment beyond a reasonable doubt every year. (Pen. Code §§ 2970, 2972.) Similarly, the LPS Act provides for an initial 180-day commitment with a scheme allowing for re-commitment procedures for additional 180-day periods should continued involuntary treatment be sought. The person has a right to a jury trial for each re-commitment period with the burden of proof being placed on the state. (Pen. Code §§ 5300-5304.) Regarding the commitments of persons deemed not guilty by reason of insanity, the law provides for a two-year extension. The person has a right to a jury trial for each two-year re-commitment period. Here, too, the burden of proof is placed upon the state to justify the recommitment. (Pen. Code § 1026.5.) It is only the SVPA which no longer provides for periodic re-commitment with the right to a jury trial at each period of review.

Equal protection under the federal and state constitutions requires that persons "similarly situated" receive like treatment under the law. (See e.g., *In re Gary W.* (1971) 5 Cal.3d 296, 303.) "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) Hence:

> "The basic rule of equal protection is that those persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." . . . "The 'equal protection' provisions of the

> federal and state Constitutions protect only those persons similarly situated from invidiously disparate treatment. [Citations.]" . . . Accordingly, "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*People v. Macias* (1982) 137 Cal.App.3d 465, 472; emphasis in original].)

Here, as indicated in the above analysis, the similarly situated groups include: those who meet the definition of sexually violent predator under the SVP Act, those committed under the MDO Act, and individuals committed to the custody of the State Department of Mental Health under the LPS act.

As the three groups of defendants are similarly situated, the fundamental right of liberty is involved. Thus, the strict scrutiny test is applicable. The People have the burden to show that the disparate treatment of two similarly situated groups is necessary to further a compelling state interest and the distinctions created by the statute are necessary to further that interest. (*In re Arthur W.* (1985) 171 Cal.App.3d 179, 184-185; *People v. Olivas* (1976) 17 Cal.3d 236, 243.)

Because of Proposition 83, SVP defendants are subject to indeterminate commitments with the SVP detainee having the burden of proving his fitness for relief unless the state elects to grant the SVP detainee permission to file a petition pursuant to section 6605. The MDO, in contrast, grants the committee the right to periodic judicial review of his confinement in which the state has the burden of proof. Under Penal Code

section 2972, subdivision (a), the prosecution has the burden of proof beyond a reasonable doubt in hearings for continued treatment. That subdivision also grants the defendant the right to a jury trial. Under penal code section 2972, subdivision (c), "the commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970." SVP defendants and MDO defendants are both committed for treatment because they represent a danger to the public because of a mental disorder. There is no compelling state interest that is advanced by granting MDO defendants the right to judicial review every year of their custodial status but making SPV defendants subject to potentially a life term with no meaningful judicial review of their commitment.

Penal Code section 1026, et. seq., governs commitment of individuals found not guilty by reason of insanity. Under penal code section 1026.2, subdivision (a), a committed individual has the right to submit an application for release. Under Penal Code section 1026.2, subdivision (d), "[n]o hearing upon the application shall be allowed until the person committed has been confined or placed on outpatient status for a period of not less than 180 days from the date of the order of commitment." Penal code section 1026, subdivision (k), provides "the applicant shall have the burden of proof by a preponderance of the evidence" in hearings under that section. When a defendant files a petition for release pursuant to penal

code section 1026.2, the trial court may not summarily deny the petition but must hold a hearing. (*People v. Soiu* (2003) 106 Cal.App.4th 1191, 1197.) Hence, insanity acquittees have the right to a hearing on a petition for release within 180 days following their initial commitment. SVP defendants, by contrast, do not have any right to compel a hearing on the merits regarding their committed status, and that deprivation continues indefinitely. There is no compelling state interest which justified such differential treatment between individuals committed as insanity acquittees and SVP defendants.

While a legislature may distinguish between persons or groups in passing legislation, when dealing with fundamental interests, such differences are upheld only if it is necessary to further a compelling state interest. The United States Supreme Court has consistently held that, in the arena of involuntary civil commitment, a state may not deny a right or protection to one group of committed persons that it confers on other groups of committed persons. Thus, the high court has held that a state prisoner civilly committed at the end of his prison sentence on the finding of a surrogate was denied equal protection when he was deprived of a jury trial that the State made generally available to all other persons civilly committed. (*Baxstrom v. Herold* (1966) 383 U.S. 107, 110 [86 S.Ct. 760, 15 L.Ed.2d 620].) Similarly, a person civilly committed in lieu of a criminal sentence was denied equal protection when, at the end of the criminal

sentence, his commitment was extended without allowing him the jury trial generally allowed to other persons civilly committed. (*Humphrey v. Cady* (1972) 405 U.S. 504, 511 [92 S.Ct. 1048, 31 L.Ed.2d 394].) Likewise, a person civilly committed after a finding that he was incompetent to stand trial where there was little chance of restoration of competency, was entitled to the same protections as other civil commitments. (*Jackson v. Indiana* (1972) 406 U.S. 715, 723-731 [92 S.Ct. 1845, 32 L.Ed.2d 435].)

In *Baxtrom*, the court made clear that protections given to some must be afforded to all. "All persons civilly committed, however, other than those committed at the expiration of a penal term, are expressly granted the right to *de novo* review by jury trial of the question of their sanity under section 74 of the Mental Hygiene Law. Under this procedure any person dissatisfied with an order certifying him as mentally ill may demand full review by a jury of the prior determination as to his competency. If the jury returns a verdict that the person is sane, he must be immediately discharged. It follows that the State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." (*Baxstrom v. Herold, supra*, 383 U.S. at 111.)

The *Baxstrom* court recognized that equal protection does not require that all persons be dealt with identically; however, it noted that it does require that a distinction made have some relevance to the purpose for

which the classification is made. (*Baxstrom v. Herold, supra,* 383 U.S. at 111 citing *Walters v. City of St. Louis* (1954) 347 U.S. 231, 237 [74 S.Ct. 505, 98 L.Ed. 660}.) "Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all. For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." (*Baxstrom v. Herold, supra*, 383 U.S. at 111-112.)

In *Humphrey*, the court held "[c]ommitment for compulsory treatment under the Wisconsin Sex Crimes Act appears to require precisely the same kind of determination [as required to commit someone under the Mental Health Act], involving a mixture of medical and social or legal judgments. If that is so (and that is properly a subject for inquiry on remand), then it is proper to inquire what justification exists for depriving persons committed under the Sex Crimes Act of the jury determination afforded to persons committed under the Mental Health Act." (*Humphrey v. Cady, supra,* 405 U.S. at 510, Fn. Omitted.)

California courts have also required justification for disparate treatment when liberty rights are involved. If a classification scheme is subject to strict scrutiny because it affects a fundamental interest, the presumption of constitutionality that would otherwise pertain falls away, the burden shifts, and the state must both establish a compelling interest that justifies the law and also demonstrate that the distinctions drawn by the law are necessary to further that state interest. (*People v. Saffell* (1979) 25 Cal. 3d 223, 228 citing *People v. Olivas*, *supra,* 17 Cal. 3d 236.)

The amended SVPA now stands as the *sole* instance of a potential lifetime civil confinement, imposed without the additional protection of periodic review and re-commitment hearings where the burden of proof is placed on the state to justify the recommitment in front of a jury. Previously, Penal Code section 1026 stood in this position. Prior to amendment, it allowed for those found guilty by reason of insanity to be committed for an indefinite period of time. The burden was placed on the committee to show he or she was no longer a danger. The California Supreme Court case looked at this scheme and found that it violated the tenet of equal protection:

> In summary, our research reveals that commitments under section 1026 represent the *sole* instance of a potential lifetime confinement, imposed without regard to the nature of the underlying offense or the maximum punishment prescribed for it, and without the additional protection of periodic review and re-commitment hearings. Thus, disparity of treatment seems clearly to exist.

(*In re Moye* (1978) 22 Cal. 3d 457, 465.)

The *Moye* court held that because petitioner's personal liberty was at stake, application of the strict scrutiny standard of equal protection analysis was required. (*In re Moye, supra*, 22 Cal.3d at 465.) "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.)" (*Ibid.*) The court could find no justification for the distinction between those committed under 1026 and other civil commitments. (*Id.*, at p. 466.)

The same analysis with the same results is warranted here. Jessica's Law amended the SVPA such that it is now the only civil commitment scheme which does not provide for periodic extensions and which places the burden on the committed person to prove he or she is no longer a danger without any right to a jury trial. As in *Moye*, there is no justification for treating those committed under the SVPA differently than those committed under other civil commitment regiments. In order for the changes in the law to pass constitutional muster, they must, as noted above, be necessary to further a compelling state interest. The only compelling state interest offered as justification for the Sexually Violent Predator Law is the protection of the public and the treatment of mentally ill sex offenders. Neither interest is furthered in the slightest by changing a periodic commitment into an indefinite one, changing the burden of proof,

or depriving the defendant of his right to a trial by jury. As a realistic and practical matter, the main state interest being served by these changes is one of finance and convenience. By changing the law so they need only get one court trial in their entire life, the state has chosen to sacrifice the fundamental liberty interests of appellant and other similarly situated persons in the name of financial expediency. This hardly constitutes a procedure necessary to serve a compelling state interest.

F. Prejudice

The modifications to the SVPA made by Proposition 83 violated appellant's right to due process of law, equal protection of the law, and the prohibition against ex post facto laws and the guarantee against double jeopardy. The issue is what remedy should be applied because the changes made to the SVPA by Proposition 83 rendered what was formerly a constitutional act now unconstitutional.

The remedial question is answered by legislative intent. (*United States v. Booker* (2005) 543 U.S.220, 246-247 [125 S.Ct. 738, 160 L.Ed.2d 621].) The court seeks to determine what the legislature would have intended in light of the court's constitutional holding. (*Ibid.*) "A court should refrain from invalidating more of the statute than is necessary." (*Alaska Airlines, Inc. v. Brock* (1987) 480 U.S. 678, 684 [107 S.Ct. 1476, 94 L.Ed.2d 661].) "[W]henever an act of Congress contains unobjectionable provisions separable from those found unconstitutional, it

is the duty of this court to do declare, and to maintain the act in so far as it is valid." (*Ibid.*) "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative." (*Ibid.*)

The SVPA act was constitutional prior to its amendment by Proposition 83. The Act was obviously being enforced. Appellant should have the right to a hearing within two years to determine if his commitment should be extended. The prosecution should have the burden of proof beyond a reasonable doubt at the hearing and appellant should have the right to a jury and the assistance of counsel and experts. The trial court's order for appellant's indeterminate commitment should be so modified.

CONCLUSION

The Sexually Violent Predators Act (SVPA) as amended by the passage of Proposition 83 is unconstitutional as it violates appellant's constitutional rights to due process of law, is an illegal ex post facto law, and violates equal protection.

Dated: August 20, 2008

Respectfully submitted,

Stephen M. Hinkle
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

WITH CALIFORNIA RULES OF COURT, RULE 8.360.

Case Name: People v. RICHARD MCKEE

Supreme Court No. S162823

I, Stephen M. Hinkle, certify under penalty of perjury under the laws of the State of California that the attached APPELLANT'S OPENING BRIEF contains 14,370 words as calculated by Microsoft Word 2003.

Dated: August 20, 2008

_____

Stephen M. Hinkle

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Supreme Court No. S162823
SUPERIOR COURT CASE NO. MH97752

People v. RICHARD MCKEE

DECLARATION OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is 3529 Cannon Rd, Suite 2B-311, Oceanside, CA 92056. I served the following document:

APPELLANT'S OPENING BRIEF

of which a true copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee names hereafter, addressed to each addressee respectively as follows:

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Superior Court of San Diego County
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Attn: Hon. Peter L. Gallagher, Judge

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Vista, California, on August 22, 2007.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 22, 2007, at Oceanside, California.

Stephen Hinkle