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 REPLY BRIEF

Stephen M. Hinkle, Attorney at Law
SBN 124407
3529 Cannon Road, Ste 2B-311
Oceanside, CA 92056
(760) 295-1541
Attorney for Appellant

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

Table of Authorities

Cases

Statutes

Other Authorities

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 REPLY BRIEF

INTRODUCTION

Appellant RICHARD MCKEE will respond to portions of the Attorney General's brief where additional comment appears likely to be helpful to the court in deciding this case. To the extent consistent and possible with that objective, repetition of appellant's earlier briefing will be avoided. Both sides have thoroughly briefed the issues presented, and appellant continues to rely primarily on that briefing. The absence of additional comment on all aspects of the Attorney General's brief in this reply should not be taken as a concession of any nature. The effort to keep

the briefing as short as possible should not be seen as a lack of confidence in the merits of the matters not addressed. The case and facts are fully and accurately stated in the appellant's opening brief.

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. Introduction

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 Sexually Violent Predator Act (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 the 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.

Respondent argues that the current SVPA passes constitutional muster. (Respondent's Brief at p. 5.) Respondent's arguments are not persuasive.

Respondent begins by noting that the review and release procedures set forth under Welfare and Institutions Code[1] sections 6605 and 6608 are no different than what existed under the previous version of the SVPA previously approved by this court in *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1167-1179 (*Hubbart*). (Respondent's Brief at pp. 9-10.) Appellant would not disagree. The fundamental difference here is that the review and release procedures set forth under sections 6605 and 6608 are now the sole mechanism for review and release. 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).) That right no longer

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

exists so the review and release procedures set forth under sections 6605 and 6608 must be examined in light of the revised law.

Respondent states that appellant claims that indeterminate civil commitments are unconstitutional. (Respondent's Brief at p. 12.) Respondent does not note where in his opening brief appellant makes such a claim. Appellant's claim is that *his* indeterminate civil commitment *under the revised SVPA* is unconstitutional.

Respondent discusses the case of *Jones v. United States* (1983) 463 U.S. 354 [103 S.Ct. 3043, 77 L.Ed.2d 694] (*Jones*), as standing for the proposition that appellant's civil commitment is constitutional. (Respondent's Brief at pp. 12-14.) As discussed in appellant's opening brief, the constitutionality of the amendments to the SVPA by Proposition 83 cannot be upheld on the basis of *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 v. Texas* (1979) 441 U.S. 418 [99 S.Ct. 1804, 60 L.Ed.2d 323] (*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.

Respondent next argues that the amendments made to the SVPA only bring California's law in line with the law in Kansas and other states, arguing that the law in Kansas was upheld in *Kansas v. Hendricks* (1997) 521 U.S. 346 [117 S.Ct. 2072, 138 L.Ed.2d 501]. (Respondent's Brief at p. 13.) Respondent is mistaken.

The Court in *Hendricks* 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." (*Kansas v. Hendricks, supra,* 521 U.S. 346, 364.) While the previous version of the SVPA was in line with the Kansas statute reviewed by the United States Supreme Court in *Hendricks,* the revised SVPA eliminates the requirement that the court hold an semi-annual review of appellant's commitment wherein the prosecution bears the burden of proving beyond a reasonable doubt that appellant meets the criteria for commitment. (§6604.)

Respondent cites *Hubbart* in support of its argument that this court upheld the constitutionality of the pre Proposition 83 SVPA against claims that it violated due process of law, the equal protection clause, and the ex-post facto clause. Respondent claims that appellant is basing his entire case on a single line in *Hubbart,* that of "…the maximum length of each

commitment is relatively brief – two years." (*Hubbart v. Superior Court, supra,* 19 Cal.4th 1138, 1166-1167.) (Respondent's Brief at p. 13-14.) Appellant's argument covers some forty five pages of his opening brief and is based on far more then the above quoted line. Appellant will point out that the quoted line in *Hubbart* is quite significant, as anyone comparing a two year term to a potential life term will attest to. As Justice Kennedy stated in *Hendricks*:

> 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."

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

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.

Respondent argues that such a burden is minimal. (Respondent's Brief at p. 16.) On the contrary, such a burden is substantial.

Respondent argues that once the Department of Mental Health (DMH) determines that appellant no longer meets the criteria to be classified as an SVP, a committed person "will almost always be able to make the minimal showing required for a probable cause hearing." (Respondent's Brief at p. 16.)

Under section 6605, subdivision (b), the DMH 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 DMH because it determines whether the detainee can be conditionally released or is no longer is a sexually violent predator, without any judicial review. While 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 only has that burden of proof when the DMH has filed the petition for 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 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 DMH. The allocation of the burden of proof to the state in proceedings under section 6605, furthermore, has little practical meaning. The DMH 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 DMH has concluded the SVP detainee should be released, there is little likelihood the hearing held pursuant to section 6605 will be adversarial.

Respondent acknowledges that the burden on appellant for filing a petition for discharge pursuant to section 6608 is greater. (Respondent's Brief at p. 16.) However, again citing *Jones*, respondent argues that the United States Supreme Court has approved a law in which the detainee must prove that he is no longer dangerous. (Respondent's Brief at p. 17.)

The difference between the law at issue in *Jones* and the revised SVPA is that the law in *Jones* provided for a very limited commitment. "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. Such is not the case here.

Respondent further argues that placing the burden on the detainee to prove that he is no longer an SVP is justified because the initial commitment proceeding provided for in the SVPA "support an inference of continuing dangerousness and mental illness." Respondent further argues that a "diagnosed mental disorder" is "typically slow to change." (Respondent's Brief at p. 18.)

Respondent cites no authority for its assertion that a "diagnosed mental disorder" is "typically slow to change." The initial commitment proceeding provided for in the SVPA only supports an inference that appellant at the time of the proceeding has a mental illness and presents a danger. The Due Process Clause forbids holding an insanity acquittee beyond the period of time that he is no longer mentally ill. (*O'Conner v. Donaldson* (1975) 422 U.S. 563, 575, [95 S.Ct. 2486, 45 L.Ed.2d 396]; *Foucha v. Louisiana* (1992) 504 U.S. 71, 77 [112 S.Ct. 1780, 118 L.Ed.2d 437].) 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.

Respondent concludes that that since a prior determination had been made that an SVP is, beyond a reasonable doubt, mentally ill and likely to commit sexually violent predatory offenses if released, the public has a special interest in the person's continued confinement. (Respondent's Brief at p. 18.) However as noted above, an SVP detainee's civil commitment is lawful only if he suffers from a *current* mental condition.

C. The Judgement 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

Respondent argues that the United States Supreme Court in *Hendricks,* and the California Supreme Court in *Hubbart*, both rejected claims that the Kansas SVPA and the California SVPA, which largely followed the Kansas law, violated the Ex Post Facto clause of the United States Constitution. (Respondent's Brief at pp. 19-21.) Appellant acknowledges that both courts found the respective SVPA laws, *as constituted*, did not have a punitive purpose.

However, as noted in appellant's opening brief, 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[2] 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.

Appellant further argued in his opening brief that under the seven factor framework in *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144 [83 S.Ct. 554, 9 L.Ed.2d 644], the revised SVPA is punitive in nature. Respondent does not address this argument, but instead argues that since the *Hubbart and Hendricks'* courts were more concerned with whether there were adequate procedural safeguards in the law, and the revised SVPA contains adequate procedural safeguards, the law passes constitutional muster. (Respondent's Brief at p. 23.) As previously noted in appellant's opening brief, and in paragraph B to this argument, 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.

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

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

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.) As argued in appellant's opening brief, the similarly situated groups include: those who meet the definition of sexually violent predator under the SVP Act, those committed under Penal Code section 2960, et. seq., the Mentally Disordered Offender (MDO) Act, and individuals committed to the custody of the DMH because they were found not guilty of a crime by reason of insanity.

Respondent argues that these groups are not similarly situated, citing *People v. Buffington* (1999) 74 Cal.App.4th 1149 (*Buffington*). (Respondent's Brief at pp. 26-27.) However *Buffington* holds just the opposite: "We first resolve the threshold question of whether the SVP's are similarly situated for purposes of the law (i.e., for purposes of the mental disorder definition) to other persons involuntarily committed. We conclude they are. The SVP's and the other persons involuntarily committed are

subject to commitment because they are currently suffering from a mental disorder that renders them dangerous." (*Id.* at p. 1156.)

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.

Respondent next argues that even if SVP's are similarly situated for equal protection purposes, the state is justified in treating SVP's differently, citing *Hubbart, Buffington*, and *Cooley v. Superior Court* (2002) 29 Cal 4th 228. (Respondent's Brief at pp. 26-27.) All three cases cited were decided prior to the passage of Proposition 83 and the subsequent changes to the SVPA.

Respondent argues that assuming, arguendo, that the three identified groups are similarly situated, this court must determine whether the appropriate standard is that of strict scrutiny or rational basis, arguing that this court should adopt the rational basis test. (Respondent's Brief at pp. 28-31.) Appellant disagrees.

"Strict scrutiny is the appropriate standard against which to measure claims of disparate treatment in civil commitment. [Citations.]" (*People v. Green* (2000) 79 Cal.App.4th 921, 924.) Applying the strict scrutiny standard, the state has the burden of establishing it has a compelling interest that justifies the law and the distinctions, or disparate treatment, made by that law are necessary to further its purpose. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 641.) Alternatively stated, applying the strict scrutiny standard, a law "is upheld only if it is necessary to further a compelling state interest. [Citation.]" (*People v. Buffington, supra,* 74 Cal.App.4th 1149, 1156.)

Respondent argues that, even applying the strict scrutiny test, the state is justified in treating SVPs differently from the other similarly situated groups because they are "the most dangerous of the dangerous, due to the nature of their crimes and their particularly high rates of recidivism. They are also the least likely to be cured." (Respondent's Brief at p. 31.)

Respondent's argument does not compare SVPs to MDOs and insanity acquitees and respondent does not provide any authority for the proposition that those three groups should be treated dissimilarly.

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. Appellant noted in his opening brief that, 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 equal protection. (*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. The amended SVPA 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. Respondent argues that the compelling state interest is the protection of the public and the treatment of mentally ill sex offenders. (Respondent's Brief at p. 31.) 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.

Finally, Respondent argues that the state will save both time and convenience. (Respondent's Brief at p. 32.) 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 does not constitute a procedure necessary to serve a compelling state interest.

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: October 24, 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

Court of Appeal No. D050554

I, Stephen M. Hinkle, certify under penalty of perjury under the laws of the State of California that the attached APPELLANT'S REPLY BRIEF contains 3910 words as calculated by Microsoft Word 2003.

Dated: October 24, 2008

Stephen M. Hinkle

Stephen M. Hinkle
Attorney at Law
3529 Cannon Road, Ste 2B-311
Oceanside, CA 92056

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 REPLY 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:

Attorney General
110 West "A" St, Suite 1100
P.O. Box 85266
San Diego, CA 92101

Appellate Defenders, Inc.
Attn: Neil Auwarter
555 W. Beech St., Suite 300
San Diego, CA 92101

Office of the District Attorney
Attn: Gretchen Means
330 West Broadway, Suite 1240
San Diego, CA 92101

Fourth District Court of Appeal
Division One
750 B St., Ste 300
San Diego, CA 92101

Clerk of the Court
Superior Court of San Diego County
220 W. Broadway
San Diego, CA 92101
Attn: Hon. Peter L. Gallagher, Judge

Richard McKee #K91888
San Luis Obispo County Jail
PO Box 15409
San Luis Obispo, CA 93406

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Vista, California, on October 29, 2008.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 29, 2008, at Oceanside, California.

Stephen Hinkle