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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RAYMOND EVANS MCCONNELL,<br><br>Defendant and Appellant. | D051222<br><br>(Super. Ct. Nos. MH97269, MH99965) |

APPEAL from an order of the Superior Court of San Diego County, Lisa A. Foster and Peter C. Deddeh, Judges. Affirmed.

A jury found defendant Raymond Evans McConnell is a sexually violent predator (SVP) within the meaning of Welfare and Institutions Code[1] section 6600 et seq., and the trial court committed him to an indeterminate term of treatment. On appeal, McConnell contends the trial court should have excused two jurors for cause. We find no abuse of discretion in the trial court's unwillingness to excuse the jurors. We also find the trial

1 All further statutory references are to the Welfare & Institutions Code unless otherwise indicated.

court acted within its discretion in excluding testimony from appellant with respect to his fear of receiving a life sentence in the event he reoffended.

Contrary to appellant's argument, we find no constitutional defect in the statutory scheme under which he has been committed for an indeterminate period with the right to establish, by petition, that he is no longer a threat to public safety. We also reject appellant's argument the trial court had no jurisdiction to hear the petition under which he was committed.

Finally, we reject appellant's contention any failure on the part of the Department of Mental Health (the department) to subject an evaluation handbook it employed to the procedures set out in the Administrative Procedure Act (APA), Government Code section 11340 et seq. requires his release from custody.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Acts*

In 1987 appellant was convicted of committing lewd acts on a six-year-old boy and the boy's seven-year-old brother. Appellant orally copulated the six-year old and attempted to orally copulate the seven-year-old. The brothers were the sons of a friend for whom appellant occasionally worked, and the lewd acts occurred one night after appellant and the boys' father had been out drinking.

Following his conviction for the 1987 acts, appellant served a term in county jail and was placed on probation. While on probation, appellant attempted to commit a lewd act on an 11-year-old boy who was staying at appellant's mother's house. As a result of this incident, appellant's probation was revoked and he was sent to prison.

Appellant was released from prison in 1991. However, appellant violated his parole on a number of occasions and was returned to prison three times. In particular, appellant repeatedly failed to report to his parole officer and at one point absconded for two years, repeatedly failed to register as a sex-offender and repeatedly failed to report to a parole out-patient clinic. In 1995 appellant was convicted of failing to register as a sex offender and was again imprisoned. Appellant has remained in custody since 1995.

2. *SVP Proceedings*

In 2004 a jury found appellant was an SVP and he was committed to treatment at Atascadero State Hospital (Atascadero) for a period of two years. In 2006, following a request from the department, the district attorney filed an amended petition seeking an order committing appellant for an indeterminate period of treatment.

At trial of the district attorney's amended petition, the district attorney presented testimony from a clinical psychologist, Dr. Robert Owen, and a clinical forensic psychologist, Dr. Gary Zinik. Although appellant refused to be interviewed by either Dr. Owen or Dr. Zinik, both psychologists nonetheless performed an evaluation of appellant based on their review of his criminal history, including police and probation reports, medical records from Atascadero and the reports of defense psychologists who were able to evaluate appellant. The prosecution psychologists believed appellant suffered from pedophilia, poly-substance dependence and non-specific personality disorder. Dr. Owen believed appellant was a danger to the health and safety of others and posed a substantial risk of reoffending. Dr. Owen's conclusion was based in part on what Dr. Owen believed was appellant's score on the Static 99, a standardized method of measuring an individual's

risk of sexual reoffending. According to Dr. Owen, appellant's score placed appellant in the high risk category for reoffending. Appellant was in that category because of his selection of three male victims he knew, his general criminality, his failure to participate in the parole out-patient clinic, childhood maladjustment and poor performance on probation and parole. Dr. Owen also noted that at Atascadero appellant was moody, defiant, had angry outbursts, declined to participate in the SVP treatment program and had been spotty in participating in Alcoholics Anonymous groups.

In addition to appellant's Static 99 score, Dr. Owen was concerned about a statement appellant had made to one of the defense psychologists to the effect that he had sexual interest in boys between 14 and 17 years of age. Dr. Owen was also concerned that appellant had no living parents or siblings, no other support system and no job lined up in the event he was released. Dr. Owen was further concerned appellant had not completed sexual offender treatment and thus did not have a strategy to avoid reoffending when he was released.

Dr. Zinik also believed appellant was likely to reoffend. Dr. Zinik relied on the Static 99 and Minnesota Sex Offender Screening Tool Revised (MSOSTR). Appellant's score on both tests indicated he was at high risk to reoffend. Dr. Zinik also thought it was significant that appellant started sex offender treatment but then dropped out. According to Dr. Zinik, the reoffense rate for offenders who drop out of treatment is higher than for those who never enter treatment. Dr. Zinik also found it significant that appellant committed an offense against the 11-year-old in 1988 when he was on probation, that he

was caught with pornography at Atascadero in 2004 and that he admitted he was attracted to teen age boys.

In addition to the psychologists, the district attorney also called appellant as a witness. Appellant admitted to the underlying offenses and explained that at the time he smoked a lot of marijuana and used methamphetamine. Appellant testified that if he were released he would not use drugs or alcohol, although he believed there was nothing wrong with marijuana and that use of the drug should be legal. Appellant stated that he did not attend group therapy sessions at Atascadero because he did not want to talk about sex offenses against children with other ex-convicts, that he did not register as a sex-offender because he did not want the stigma and that he did not believe the treatment program at Atascadero would benefit him. Appellant acknowledged that he had violated every condition of probation and parole that had ever been placed on him. Appellant also conceded that he only had a "vague" relapse prevention plan.

In his defense, appellant presented testimony from two psychologists, Dr. Christopher North and Dr. Amy Phenix. Dr. North believed that appellant was not likely to reoffend because of his minimal contact with children, his maturity, his involvement in some treatment activities and his knowledge that if, upon release, he committed a sex crime he would be incarcerated for the rest of his life. Dr. North also relied on another psychological test, the Abel Sexual Interest Inventory, which showed that appellant was not pre-occupied with sex with boys. Dr. North noted that appellant did not have fantasies about boys and did not watch TV shows about boys or read books about boys.

On cross-examination, Dr. North conceded appellant was found in possession of a magazine with pictures of young male models and that the models looked like teenage boys. Dr. North also acknowledged appellant's score on the Static 99 and the MSOSTR placed him in the high risk category for reoffending. However, Dr. North believed a close examination of appellant's history and behavior showed appellant barely met the various criteria which put him in the high risk category.

Dr. North conceded appellant has stated that he likes children and is comfortable around them and that if, upon release, appellant began using drugs or alcohol, there was an increased risk he would reoffend. Dr. North also acknowledged that appellant did not have a viable relapse plan in that he had not arranged for a place to live or found a job.

Dr. Phenix testified she did not think appellant was at a high risk to reoffend. She based her opinion on the fact the offenses which gave rise to the petition occurred on two days in appellant's life and on the fact there was no evidence appellant had been preoccupied with sexual activity with children, collected child pornography or had any contact with children or engaged in sexually deviant behavior while he was on parole following his 1991 release from prison. Dr. Phenix also found appellant's impulsivity had decreased through the years. Dr. Phenix did acknowledge appellant's failure to complete a sex offender treatment program put appellant at a slightly higher risk of reoffending.

Appellant also presented testimony from two psychiatric technicians at Atascadero. The technicians testified they did not have problems with appellant, that searches of his room did not uncover any child pornography, that he acted appropriately

with staff and that he did not act out sexually or in a predatory manner toward other patients.

The jury found appellant was an SVP, and the trial court recommitted appellant to Atascadero for an indeterminate period of treatment.

I

As we indicated at the outset, appellant first argues the trial court abused its discretion in denying his challenge for cause to two jurors, Juror Nos. 5 and 7. We find no abuse of discretion.

A. *Legal Principles*

"A party may challenge a prospective juror for actual bias, defined as a state of mind that would prevent that person from acting impartially and without prejudice to the substantial rights of any party. [Citation.] On review of a trial court's ruling, if the prospective juror's statements are equivocal or conflicting, that court's determination of the person's state of mind is binding. If there is no inconsistency, the reviewing court will uphold the court's ruling if substantial evidence supports it. [Citation.] Here, the juror's statements were equivocal and somewhat conflicting. Accordingly, we must defer to the trial court's determination of his state of mind." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488.)

B. *Juror No. 5*

Juror No. 5 stated she worked in the personnel office of the sheriff's department where she is responsible for hiring civilian employees. When asked if she could be fair and impartial, Juror No. 5 stated: "I have some concerns about that. I don't hire citizens

of the county that want to get employed based on past history, drug usage, excessive alcohol usage, et cetera. And I just hope I don't have to come to the point where I have to use a different set of rules. Because I don't think I can do that." In response to this comment, the trial court explained to Juror No. 5 that the jury would receive a set of instructions that would describe what a sexually violent predator is and that her task would be to determine whether there was proof beyond a reasonable doubt that appellant met that description. Although Juror No. 5 had some additional difficulty on voir dire by defense counsel, she eventually assured the court: "I think after listening to the mental professional testimony, I can probably be fair and make a decision based on that." Finally, when asked on voir dire by defense counsel whether she could follow the law, she stated that she could.

In rejecting a claim of juror bias in very similar circumstances, the court in *People v. Hillhouse* stated: "On this record, the trial court could reasonably conclude the juror was trying to be honest in admitting to his preconceptions but was also sincerely willing and able to listen to the evidence and instructions and render an impartial verdict based on that evidence and those instructions. Indeed, a juror like this one, who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so. A reviewing court must allow the trial court to make this sort of determination. The trial court is present and able to observe the juror itself. It can judge the person's sincerity and actual state of mind far more reliably than an

appellate court reviewing only a cold transcript. We see no basis on which to overturn the trial court's determination that this juror could be impartial." (27 Cal.4th at p. 488.)

On this record, as in *People v Hillhouse*, the trial court could reasonably conclude that, notwithstanding her initial misunderstanding of her role as a juror and frankness with respect to her confusion, Juror No. 5 could act with impartiality. (27 Cal.4th at p. 488; see also *People v. Horning* (2004) 34 Cal.4th 871, 896.) Thus, the trial court did not abuse its discretion in declining to excuse Juror No. 5 for cause.

C. *Juror No. 7*

Juror No. 7 was a pediatrician who had extensive training and experience in the treatment of juvenile rape victims. In addition to his medical training, Juror No. 7 also had a degree in psychology. He testified that as part of his training he learned about the efficacy rates of rehabilitation of child molesters. He also testified that he had some familiarity with the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM-IV), a manual published by the American Psychiatric Association that includes all currently recognized mental health disorders. Notwithstanding his familiarity with the subject matter of the proceeding, during the course of voir dire Juror No. 7 repeatedly stated that he was a fair and objective person and that he would listen to the evidence and put his prior knowledge aside. He described himself as "very objective" and "data driven."

In considering appellant's challenge of Juror No. 7 for cause, the trial court stated: "He said he's familiar with the DSM-IV. He has a degree in psychology. So when he says he has background with the issues of this case, I don't think he has a background in

determining whether or not somebody is a sexually violent predator. He has a background in psychology and he's familiar with the DSM-IV, which covers many things besides sexually violent predators." The trial court then ruled: "I think he can be fair and impartial. I think he can set aside the knowledge that he has about this issue and decide it based upon what he hears in court . . . . [H]e's a very objective person and can objectively look at this situation and decide based on evidence."

Given Juror No. 7's testimony as to his objectivity and fairness, the trial court could reasonably conclude he would be fair and impartial. Hence, as with Juror No. 5, the trial court did not abuse its discretion in denying appellant's challenge for cause. (See *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 488.)

II

Next, we turn to appellant's contention the trial court erred in limiting his testimony. We find no error.

At trial the prosecutor sought a ruling from the trial court preventing appellant from testifying he would not reoffend because he faced a life term if he was convicted of a third offense. The trial court granted the prosecution's request and ordered that appellant not testify about his fear of a life term. Appellant testified consistent with the trial court's ruling. Appellant's testimony ended on the evening of June 25, 2007. When trial resumed the following afternoon, the prosecutor advised the trial court that on reflection he wanted to withdraw his objection to testimony from appellant with respect to his fear of a life term. Appellant's counsel declined to have his client resume the stand. Counsel stated he did not want to subject appellant to cross-examination on the subject.

However, thereafter in presenting appellant's case, appellant 's counsel elicited testimony from one of his experts, Dr. North, to the effect he believed appellant was not likely to reoffend because appellant knew he would be incarcerated for the rest of his life if he committed a new crime.

Contrary to appellant's argument on appeal, the trial court acted properly in disposing of the prosecution's request to limit his testimony. First, we note the trial court's ruling did not prevent appellant from testifying about his fear of a life sentence. As the record makes clear, when presented with an opportunity to testify about his fear of a life sentence, appellant in fact declined. Thus, he may not complain on appeal about the trial court's initial ruling excluding testimony about his fear. (*People v. Morley* (1928) 89 Cal.App. 451, 458.)

Secondly, the trial court acted well within its discretion in excluding testimony about the potential consequences of future criminal acts. As the trial court noted in initially excluding appellant's fear of a life sentence, such evidence was only a "backhanded way" of bringing before the jury the issue of the consequences of their own determination that appellant was an SVP. Such consideration by a jury in an SVP case is clearly improper. (*People v. Rains* (1999) 75 Cal.App.4th 1165, 1169.) Thus, the trial court could have reasonably determined the risk of bringing such improper considerations before the jury outweighed the probative value of the testimony. (Evid. Code, § 352.)

Finally, we note the trial court's order did not materially prejudice appellant. In declining to resume the stand and testify about his fears, appellant's conduct at trial not only estopped him from raising the issue on appeal but offered fairly persuasive evidence

his testimony on this issue was not in any sense important to his case. Our conclusion as to the minimal role evidence of appellant's fears played in the trial is buttressed by the fact his expert did testify about appellant's knowledge that he could be imprisoned for life if he reoffended and the jury nonetheless determined that he was an SVP. In sum, it is not probable appellant would have obtained a more favorable result had the trial court initially permitted him to testify about his fears. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III

Next, appellant contends that his indefinite commitment under the SVP statute is unconstitutional in two respects. He argues that the statute offends due process because following his commitment he will bear the burden of demonstrating that he is no longer a danger to society. He further argues that the statute violates the principle of equal protection because other civil commitment statutes provide specific commitment terms. We find no constitutional defect in the statutory scheme.

A. *The Amended Statutory Scheme*

The Sexually Violent Predators Act (the Act), as originally enacted as of January 1, 1996 (Stats.1995, ch. 763, § 3), provided for the involuntary civil commitment for a two-year term of confinement and treatment of persons who, by a unanimous jury verdict after trial (former §§ 6603, subd. (d), 6604), are found beyond a reasonable doubt to be an SVP (former § 6604). (*People v. Williams* (2003) 31 Cal.4th 757, 764; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1143, 1147 (*Hubbart*).) A person's commitment could not be extended beyond that two-year term unless a new petition was

filed requesting a successive two-year commitment.[2] (Former §§ 6604, 6604.1; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 243, fn. 5 (*Cooley*); *People v. Shields* (2007) 155 Cal.App.4th 559, 562 (*Shields*).) On filing of a recommitment petition, a new jury trial would be conducted at which the People again had the burden to prove beyond a reasonable doubt that the person was currently an SVP. (Former §§ 6604, 6605, subds. (d), (e); *People v. Munoz* (2005) 129 Cal.App.4th 421, 429 ["[A]n SVP extension hearing is not a review hearing . . . . An SVP extension hearing is a new and independent proceeding at which . . . the [People] must prove the [committed person] meets the [SVP] criteria, including that he or she has a currently diagnosed mental disorder that renders the person dangerous"]; *Cooley*, *supra*, 29 Cal.4th at p. 243, fn. 5; *Shields*, *supra*, 155 Cal.App.4th at p. 565; *People v. Roberge* (2003) 29 Cal.4th 979, 984.)

As originally enacted, an SVP was defined as "a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Former § 6600, subd. (a).) A "sexually violent offense" included a Penal Code section 288 lewd act on a child under age 14. (Former § 6600, subd. (b); *Hubbart, supra*, 19 Cal.4th at p. 1145.) Under the Act, a person is "likely" to engage in sexually violent criminal behavior (i.e., reoffend) if he or she

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2 Former 6604 provided in pertinent part: "[T]he person shall not be kept in actual custody longer than two years unless a subsequent extended commitment is obtained from the court incident to the filing of a new petition for commitment under this article or unless the term of commitment changes pursuant to subdivision (e) of Section 6605."

"presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community." (*People v. Superior Court (Ghilotti*) (2002) 27 Cal.4th 888, 922; see also *People v. Roberge*, *supra*, 29 Cal.4th at pp. 988-989.) The Act does not require proof the person "*is more likely than not* to reoffend." (*Ghilotti*, *supra*, 27 Cal.4th at p. 923.)

The Act is "designed to ensure that the committed person does not 'remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.' [Citation.]" (*Hubbart, supra*, 19 Cal.4th at p. 1177.) The Act "therefore provides two ways a defendant can obtain review of his or her current mental condition to determine if civil confinement is still necessary. [First,] [s]ection 6608 permits a defendant to petition for *conditional* release to a community treatment program. . . . [Second,] [s]ection 6605 [requires] an annual review of a defendant's mental status that may lead to *unconditional* release." (*People v. Cheek* (2001) 25 Cal.4th 894, 898, fn. omitted.)

On November 7, 2006, California voters passed Proposition 83 (also known as Jessica's Law), amending the Act effective November 8. (*Shields*, *supra*, 155 Cal.App.4th at pp. 562-563.) Pursuant to Proposition 83, "former section 6604 was amended to eliminate the two-year term provision and to provide for an indeterminate term of confinement (subject to the SVP's right to petition for release). [Citations.]" (*Id.*

at p. 562.)[3] Section 6604 of the Act now provides in relevant part: "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 [DMH] for appropriate treatment and confinement . . . ." (Italics added.) Proposition 83 did not change section 6604's requirement that a person's commitment as an SVP be proved at trial beyond a reasonable doubt.[4] (§ 6604.) Under Proposition 83, section 6605 continues to require current examinations of a committed SVP at least once every year. (§ 6605, subd. (a).) However, Proposition 83 added new provisions to section 6605 regarding the DMH's obligations:

"(a) . . . The annual report [following a current examination] shall include consideration of whether the committed person currently meets the definition of a

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[3] "Proposition 83 states that the change from a two-year term to an indeterminate term is designed to eliminate automatic SVP trials every two years when there is nothing to suggest a change in the person's SVP condition to warrant release: ' "The People find and declare each of the following: [¶] . . . [¶] (k) California is the only state, of the number of states that have enacted laws allowing involuntary civil commitments for persons identified as sexually violent predators, which does not provide for indeterminate commitments. California automatically allows for a jury trial every two years irrespective of whether there is any evidence to suggest or prove that the committed person is no longer a sexually violent predator. As such, *this act allows California to* protect the civil rights of those persons committed as a sexually violent predator while at the same time *protect society and the system from unnecessary or frivolous jury trial actions where there is no competent evidence to suggest a change in the committed person.*" ' [Citations.]" (*People v. Shields, supra*, 155 Cal.App.4th at p. 564.)

[4] Proposition 83 changed the definition of an SVP by lowering the number of victims in the qualifying sexually violent offense(s) from two to one under section 6600, subdivision (a)(1), which now provides: " 'Sexually violent predator' means a person who has been convicted of a sexually violent offense against *one* or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Italics added.)

sexually violent predator and whether conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and conditions can be imposed that would adequately protect the community. The [DMH] shall file this periodic report with the court that committed the person under this article. The report shall be in the form of a declaration and shall be prepared by a professionally qualified person. A copy of the report shall be served on the prosecuting agency involved in the initial commitment and upon the committed person. *The person may retain, or if he or she is indigent and so requests, the court may appoint, a qualified expert or professional person to examine him or her, and the expert or professional person shall have access to all records concerning the person.*

"(b) If the [DMH] determines that either: (1) the person's condition has so changed that the person no longer meets the definition of a sexually violent predator, or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the director shall authorize the person to petition the court for conditional release to a less restrictive alternative or for an unconditional discharge. The petition shall be filed with the court and served upon the prosecuting agency responsible for the initial commitment. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall order a show cause hearing at which the court can consider the petition and any accompanying documentation provided by the medical director, the prosecuting attorney or the committed person." (Italics added to indicate language retained from original Act.)

Therefore, in the event the DMH determines a person is no longer an SVP, the DMH is required to authorize that person to file a petition for unconditional release or discharge. (§ 6605, subd. (b).) Proposition 83 did not amend the provisions regarding the court's consideration of a DMH-authorized petition for release. If, at a show cause hearing on that petition, the trial court determines there is probable cause to believe the person's 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 engage in sexually violent criminal behavior if discharged, the court must set an evidentiary hearing (i.e., a trial) on the issue. (§ 6605, subd. (c).) Furthermore, section 6605, subdivision (d), continues to provide (without amendment by Proposition 83):

"At the [evidentiary] hearing, the committed person shall have the right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding. . . . The committed person also shall have the right to demand a jury trial and to have experts evaluate him or her on his or her behalf. The court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be on the state to prove beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent criminal behavior if discharged."

If the court or jury finds in the committed person's favor, the person shall be unconditionally released and discharged. (§ 6605, subd. (e).)

In the event the DMH does not authorize the committed person to file a petition for release pursuant to section 6605, the person nevertheless may file a petition for conditional release for one year and subsequent unconditional discharge pursuant to section 6608 without the DMH's authorization in the same manner as before passage of Proposition 83. [5] (§ 6608, subd. (a) ["Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release or an unconditional discharge without the recommendation or concurrence of the [DMH]"]; *People v. Cheek, supra*, 25 Cal.4th at p. 902 ["Section 6608, which provides for conditional release to a community treatment program, does not mention section 6605, and permits a defendant to be unconditionally released only after

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[5] Section 6608, subdivision (d), provides: "The court shall hold a hearing to determine whether the person committed would be a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior due to his or her diagnosed mental disorder if under supervision and treatment in the community. If the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community, the court shall order the committed person placed with an appropriate forensic conditional release program operated by the state for one year. A substantial portion of the state-operated forensic conditional release program shall include outpatient supervision and treatment. The court shall retain jurisdiction of the person throughout the course of the program. At the end of one year, the court shall hold a hearing to determine if the person should be unconditionally released from commitment on the basis that, by reason of a diagnosed mental disorder, he or she is not a danger to the health and safety of others in that it is not likely that he or she will engage in sexually violent criminal behavior. The court shall not make this determination until the person has completed at least one year in the state-operated forensic conditional release program. The court shall notify the [DMH] of the hearing date."

the defendant has spent a year in a conditional release program"].)[6] Section 6608, subdivision (i), was not amended by Proposition 83 and continues to provide with regard to hearings on a committed person's section 6608 petition for conditional release: "In any hearing authorized by this section, *the petitioner shall have the burden of proof by a preponderance of the evidence*." (Italics added.) After a trial court denies a section 6608 petition, "the person may not file a new application until one year has elapsed from the date of the denial." (§ 6608, subd. (h).)

Because Proposition 83 amended section 6604 to make an SVP's commitment term indeterminate (rather than a two-year term), a committed person now, in effect, "remains in custody until he successfully bears the burden of proving he is no longer an SVP or the [DMH] determines he no longer meets the definition of an SVP. [Citations.]" (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1287.)

B. *Federal Due Process*

Appellant argues that the Act is unconstitutional because following his commitment he will bear the burden to prove by a preponderance of the evidence that he no longer poses a danger to the health and safety of others within the meaning of the Act. We find the statute fully meets the requirements of the Constitution. Briefly, in light of the requirement that initially the state prove appellant's status as an SVP beyond a

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6 "Section 6605, on the other hand, permits unconditional release without prior placement in a conditional release program." (*People v. Cheek, supra*, 25 Cal.4th at p. 902.)

reasonable doubt, the state may place upon appellant the burden of proving by a preponderance of evidence that he is no longer a danger to the public.

We recognize that in *Addington v. Texas* (1979) 441 U.S. 418 [99 S.Ct. 1804] (*Addington*), the court addressed the question of whether Texas's civil involuntary commitment statute could constitutionally allow an initial indefinite commitment of a person with proof by a preponderance of the evidence, as the Texas Supreme Court held. (*Id*. at pp. 419-422.) The court in *Addington* held: "[T]he 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.) "To meet due process demands, the standard [of proof in a civil commitment proceeding] has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases." (*Id*. at pp. 432-433.)

In imposing a clear and convincing standard of proof, the court stated: "At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance

of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered. [¶] 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." (*Addington, supra,* 441 U.S. at pp. 426-427.)

However, as respondent notes, the United States Supreme Court in *Jones v. United States* (1983) 463 U.S. 354 [103 S.Ct. 3043] (*Jones*) held that application of a standard of proof by a preponderance of the evidence did not violate the federal constitutional right to due process at an initial hearing regarding the civil commitment of a person previously found not guilty of committing a criminal offense by reason of insanity. At the person's criminal trial in the District of Columbia, a statute required that he prove his affirmative defense of insanity by a preponderance of the evidence. (*Id*. at p. 356, fn. 1.) After his acquittal by reason of insanity, a District of Columbia statute provided for his immediate, indefinite commitment to a mental hospital without a hearing. (*Id*. at pp. 356-357, fn. 2, 360-361.) However, that statute required a hearing within 50 days of that commitment to determine whether he was eligible for release, "at which [hearing] he ha[d] the burden of proving by a preponderance of the evidence that he [was] no longer mentally ill or dangerous. [Citation.]" (*Id*. at p. 357.) If he did not meet that burden at the 50-day hearing, he was "entitled [by statute] to a judicial hearing every six months at which he may establish by a preponderance of the evidence that he is entitled to release. [Citation.]" (*Id*. at p. 358.)

In addressing the petitioner's contention that the District of Columbia's NGI civil commitment statutory scheme violated his right to due process, the court in *Jones* noted:

"Congress [as the legislative body of the District of Columbia] has determined that a criminal defendant found not guilty by reason of insanity in the District of Columbia should be committed indefinitely to a mental institution for treatment and the protection of society. [Citations.]" (*Jones, supra*, 463 U.S. at pp. 361-362.) The court then addressed the petitioner's assertion that his NGI civil commitment violated due process because his NGI acquittal of the criminal charge "did not constitute a finding of present mental illness and dangerousness and because it was established only by a preponderance of the evidence." (*Id.* at p. 362, fn. omitted.) The court noted that an NGI verdict "establishe[d] two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness." (*Id*. at p. 363.) The court stated: "Congress has determined that these findings constitute an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person. [Citations.] We cannot say that it was unreasonable and therefore unconstitutional for Congress to make this determination. [¶] The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness. [Citation.] Indeed, this concrete evidence [of commission of a criminal act] generally may be at least as persuasive as any predictions about dangerousness that might be made in a civil-commitment proceeding." (*Id*. at p. 364, fns. omitted.)

The court further stated: "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. . . . 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*, *supra*, 463 U.S. at p. 366.) The court rejected the petitioner's argument that the government did not have a legitimate reason for automatically committing an NGI acquittee because it could present evidence of that acquittal at a subsequent hearing. (*Ibid*.) The court stated: "This argument fails to consider the Government's strong interest in avoiding the need to conduct a *de novo* commitment hearing following every insanity acquittal—a hearing at which a jury trial may be demanded, [citation], and at which the Government bears the burden of proof by clear and convincing evidence. . . . We therefore conclude that a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society." (*Ibid*.)

More importantly for our purposes, in *Jones* the court rejected the petitioner's contention that "his indefinite commitment is unconstitutional because the proof of his insanity was based only on a preponderance of the evidence, as compared to *Addington's* civil-commitment requirement of proof by clear and convincing evidence." ( *Jones, supra*, 463 U.S. at pp. 366-367.) "In equating these situations, petitioner ignores important differences between the class of potential civil-commitment candidates and the class of insanity acquittees that justify differing standards of proof. The *Addington* court expressed particular concern that members of the public could be confined on the basis of 'some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally

acceptable.' [Citations.] . . . But since automatic commitment under [the District of Columbia's NGI commitment statute] 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[.]' [Citation.]" (*Jones*, *supra*, 463 U.S. at p. 367, fns. omitted.)

The court "therefore conclude[d] that concerns critical to our decision in *Addington* are diminished or absent in the case of insanity acquittees. Accordingly, there is no reason for adopting the same standard of proof in both cases. . . . The preponderance of the evidence standard comports with due process for commitment of insanity acquittees." (*Jones, supra*, 463 U.S. at pp. 367-368, fn. omitted.) Accordingly, the court held: "[W]hen a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." (*Id*. at p. 370.)

Although, unlike *Jones*, the instant case does not involve an automatic, indefinite commitment of an insanity acquittee, the court's reasoning in the circumstances of that case supports a conclusion that an SVP's initial indefinite civil commitment pursuant to the amended Act does not violate the federal constitutional right to due process, even though a subsequent section 6608 petition for release requires the committed person to

prove by a preponderance of the evidence that he or she is entitled to release. First, both the District of Columbia statute and the amended Act provide for indefinite civil commitment of persons who are found to be, generally speaking, dangerous to others because of mental illness. Although the District of Columbia statute applies to insanity acquittees and the amended Act applies to sexually violent predators, that distinction is, for purposes of our due process analysis, a distinction without a significant difference.

In *Jones* the court primarily focused on two prerequisite findings in upholding indefinite civil commitment of insanity acquittees without violation of due process: (1) dangerousness (as shown by the jury's finding beyond a reasonable doubt that the acquittee committed a criminal act); and (2) mental illness (as shown by the jury's finding by a preponderance of the evidence that the acquittee was insane at the time of the act). In our case, similar prerequisite findings were made by the jury at appellant's initial civil commitment trial. In finding appellant was a sexually violent predator within the meaning of the amended Act, the jury necessarily found, by proof beyond a reasonable doubt, that appellant: (1) had been convicted of committing a sexually violent offense against one or more victims; (2) had a diagnosed mental disorder; and (3) as a result of that diagnosed mental disorder, is a danger to the health and safety of others because it is likely that he will engage in sexually violent predatory criminal behavior. Therefore, the jury, in effect, found that appellant was both dangerous to others and mentally ill. In fact, unlike in *Jones*, the finding appellant had a diagnosed mental disorder (i.e., was mentally ill) was made by proof beyond a reasonable doubt, a standard of proof greater than that required for the insanity defense in *Jones* (i.e., proof by a preponderance of the evidence).

Furthermore, the higher standard of proof required to show appellant's mental illness provided him with, in effect, more due process protection than provided to the insanity acquittee in *Jones* whose mental illness (i.e., insanity) was proved only by a preponderance of the evidence. Thus, appellant's initial civil commitment for an indefinite term satisfied the general due process requirements set forth in *Jones*.

C. *Equal Protection*

Appellant contends his involuntary commitment as an SVP under the Act, as amended by Proposition 83 in 2006, violated his federal constitutional right to equal protection under the law. Appellant asserts the amended Act violates his federal constitutional right to equal protection of the law because SVP's under the Act are similarly situated to mentally disordered offenders (MDO's), who are civilly committed pursuant to Penal Code section 2960 et seq., and to persons found not guilty by reason of insanity (NGI's), who are civilly committed pursuant to Penal Code section 1026 et seq. He argues SVP's are, however, disparately treated from MDO's and NGI's, and that disparate treatment is not necessary to further any compelling state interest.

1. *Equal Protection Principles*

"The right to equal protection of the laws is guaranteed by the Fourteenth Amendment to the federal Constitution and article I, section 7 of the California Constitution. The 'first prerequisite' to an equal protection claim is ' "a showing that 'the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' " . . . ' [Citation.] [¶] 'Equal protection applies to ensure that persons similarly situated with respect to the legitimate purpose of the law receive like treatment;

equal protection does not require identical treatment. [Citation.]' [Citation.] The state 'may adopt more than one procedure for isolating, treating, and restraining dangerous persons; and differences will be upheld if justified. [Citations.] Variation of the length and conditions of confinement, depending on degrees of danger reasonably perceived as to special classes of persons, is a valid exercise of power.' [Citation.]" (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1216-1217.)

"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* (1999) 74 Cal.App.4th 1149, 1156.)

2. *Compelling Interest Justifies Disparate Treatment*

Appellant argues SVP's and MDO's are similarly situated apparently because both are "committed for treatment because they represent a danger to the public because of a mental disorder." However, we are not persuaded SVP's and MDO's are similarly situated and the Legislature has adopted a classification that affects them in an unequal manner. (*People v. Hubbart*, *supra*, 88 Cal.App.4th at p. 1216.) The classifications of an SVP and an MDO are different. An SVP is defined as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental

disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) In contrast, an MDO is generally defined as a person with a severe mental disorder that cannot be kept in remission without treatment and that was a cause or factor in the commission of a felony offense and, because of that severe mental disorder, represents a substantial danger of physical harm to others. (Pen.Code, § 2962, subds. (a)-(e); *People v. Allen* (2007) 42 Cal.4th 91, 99.) Therefore, the dangers posed by an SVP and an MDO are different. An SVP is civilly committed for treatment and confinement, in part, because of the danger posed that he or she will likely engage in sexually violent criminal behavior in the future. An MDO is civilly committed for treatment and confinement, in part, because of a substantial danger he or she will physically harm others in the future. Although both SVP's and MDO's have mental disorders, the dangers they pose (which provide the bases for their respective civil commitments) are different, and therefore they are not similarly situated.

Assuming arguendo that SVP's and MDO's are similarly situated, we nevertheless conclude their disparate treatment is necessary to further a compelling state interest. Admittedly, SVP's under the amended Act are given indeterminate commitments and thereafter have the burden to prove they should be released (unless the DMH authorizes a petition for release). In contrast, MDO's are committed for one-year periods and thereafter have the right to annual reviews of their confinement at which the People have the burden to prove beyond a reasonable doubt that he or she should be recommitted for

another year. (See Pen. Code, §§ 2970, 2972, subds. (a), (b), (e); *People v. Allen, supra*, 42 Cal.4th at pp. 99-100.)

Contrary to appellant's suggestion, an SVP's indeterminate term of civil commitment is subject to meaningful judicial review. Sections 6605 and 6608 provide an SVP with an opportunity for annual judicial review (provided his or her petition for release is not frivolous and is supported by sufficient factual allegations). More importantly, there is a compelling state interest in committing an SVP to an indeterminate term. SVP's are treated differently (i.e., given an indeterminate term of civil commitment) because they are less likely to be cured, more likely to reoffend, and therefore more dangerous. As the California Supreme Court noted, the Act, on its original enactment, "narrowly target[ed] 'a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders [who] can be identified while they are incarcerated.' " (*Cooley, supra*, 29 Cal.4th at p. 253.)

We note that the voters' information pamphlet for Proposition 83 stated: " 'Sex offenders have very high recidivism rates. According to a 1998 report by the U.S. Department of Justice, sex offenders are the least likely to be cured and the most likely to reoffend, and they prey on the most innocent members of our society. More than two-thirds of the victims of rape and sexual assault are under the age of 18. Sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon.' " (Historical and Statutory Notes, 47A West's Ann. Pen. Code (2008 supp.) foll. § 209, p. 462; see Voter Information Guide, Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 127.)

Also, as we noted in *Shields, supra*, 155 Cal.App.4th 559, the voters in passing Proposition 83 in 2006 intended to enhance the confinement of SVP's. (*Id*. at p. 563.) In *Shields*, we stated: "Proposition 83 states that the change from a two-year term to an indeterminate term is designed to eliminate automatic SVP trials every two years when there is nothing to suggest a change in the person's SVP condition to warrant release." (*Id*. at p. 564.) The change to an indeterminate term also was intended to reduce the costs of SVP evaluations and court testimony. (*Bourquez v. Superior Court, supra*, 156 Cal.App.4th at p. 1287.) Regarding the pre-Proposition 83 version of the Act, the California Supreme Court stated: "The problem targeted by the Act is acute, and the state interests—protection of the public and mental health treatment—*are compelling*." (*Hubbart, supra*, 19 Cal.4th at p. 1153, fn. 20, italics added.) Based on the evidence of the voters' intent in passing Proposition 83, we conclude that the changes made to the Act by Proposition 83, including changing the civil commitment from two years to an indeterminate term, were necessary to further compelling state interests. Therefore, the disparate treatment between SVP's under the amended Act and MDO's does not violate appellant's federal constitutional right to equal protection under the law.[7]

IV

Next, appellant contends that because, after the petition in this case was filed, the Legislature and the voters reenacted the Act with pertinent amendments to provide for an

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[7] By parity of reasoning, appellant's reliance on the rights provided in LPS proceedings and NGI proceedings is also unavailing. Unlike the Act, those proceedings are not focused on a narrow, extremely dangerous and violent class of convicted sex-offenders.

indefinite commitment, the trial court lacked the authority to impose any commitment and that in any event the trial court lacked the power to impose an indefinite commitment. Appellant relies on the failure of the legislation and initiative to expressly apply its provisions to pending cases. Like the courts in *People v. Carroll* (2007) 158 Cal.App.4th 503, 510, and *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1288-1289 (*Bourquez*), we reject these contentions.

With respect to the contention the court had no power to recommit appellant because the new versions of the Act did not expressly provide for recommitment, we agree entirely with the court in *Bourquez*: "By providing for indeterminate terms of commitment, it cannot reasonably be concluded that the voters, by passing Proposition 83, or the Legislature in enacting Senate Bill 1128, intended to release those previously committed as SVP's. Indeed, such a conclusion would 'ascribe to the Legislature [and voters] an intent that the very purpose of the amendment demonstrates could not have existed.' [Citation.] The very nature of Senate Bill 1128 and Proposition 83, to strengthen punishment and control of sexual offenders, compels the conclusion that the Legislature and the voters must have intended that the new law should operate prospectively and that those previously found to be SVP's should remain subject to the provisions for extended commitments under the old law. 'To imply a saving clause in such a situation is simply to give effect to the obvious intent of the Legislature [and voters].' [Citation.]" (*Bourquez*, *supra*, 156 Cal.App.4th at pp. 1287-1288.)

We also agree with the *Bourquez* court's disposition of the contention that neither the Legislature nor the voters intended to make him subject to indefinite committment: "

'It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise. [Citations.]' [Citation.] Proposition 83 is entirely silent on the question of retroactivity, so we presume it is intended to operate only prospectively. The question is whether applying its provisions to pending petitions to extend commitment is a prospective application.

" 'In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was completed before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations.] A law is not retroactive "merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." [Citation.]' [Citation.]

"In determining whether someone is an SVP, the last event necessary is the person's mental state at the time of the commitment. For pending petitions, the person's mental state will be determined after the passage of Proposition 83, at the time of commitment. While past qualifying sex crimes are used as evidence in determining whether the person is an SVP, a person cannot be so adjudged 'unless he "currently" suffers from a diagnosed mental disorder which prevents him from controlling sexually violent behavior, and which "makes" him dangerous and "likely" to reoffend. [Citation.]' [Citation.] '[T]he statute clearly requires the trier of fact to find that an SVP is dangerous *at the time of commitment*.' [Citation.]

"The requirement that a commitment under the SVPA be based on a currently diagnosed mental disorder applies to proceedings to extend a commitment. Such proceedings are not a review hearing or a continuation of an earlier proceeding. [Citation.] Rather, an extension hearing is a new and independent proceeding at which the petitioner must prove the person meets the criteria of an SVP. [Citation.] The petitioner must prove the person is an SVP, not that the person is *still* one. [Citation.] '[E]ach recommitment requires petitioner independently to prove that the defendant has a currently diagnosed mental disorder making him or her a danger. The task is not simply to judge changes in the defendant's mental state.' [Citation.]

"Because a proceeding to extend commitment under the SVPA focuses on the person's current mental state, applying the indeterminate term of commitment of Proposition 83 does not attach new legal consequences to conduct that was completed before the effective date of the law. [Citation.] Applying Proposition 83 to pending petitions to extend commitment under the SVPA to make any future extended commitment for an indeterminate term is not a retroactive application." (*Bourquez, supra*, 156 Cal.App.4th at pp. 1288-1289.)

V

By way of a supplemental brief, appellant argues the order of commitment should be reversed because the handbook which the department uses in evaluating prospective SVP's was not adopted as a regulation under the provisions of the APA. We asked for a supplemental response from the respondent. We find no defect in the order of commitment.

Under section 6601, subdivision (a), the Director of the Department of Corrections may ask the department to evaluate whether a prisoner is an SVP. Section 6601, subdivision (c), requires the department evaluate any such prisoner "in accordance with a standardized assessment protocol, developed and updated by the [department], to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder."[8]

Consistent with its obligations under section 6601, subdivision (c), the department published a handbook for use by SVP evaluators in evaluating prisoners and SVP's subject to recommitment. In a recent decision, the Office of Administrative Law (OAL) determined that in material parts the department's handbook was a regulation which the department should have adopted in conformance with the procedures set out in the APA, Government Code section 11340. (2008 OAL Determination No. 19, p. 13.) The OAL found the handbook is a regulation because it applies generally to prisoners being

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8 Section 6601, subdivision (d), in turn provides in pertinent part: "Pursuant to subdivision (c), the person shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and practicing psychologist, designated by the Director of Mental Health. If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of Mental Health shall forward a request for commitment under Section 6602 to the county designated in subdivision (i)."

evaluated, rather than to a specific case and that it was intended to implement the requirements of section 6601, subdivisions (c), (d). (See 2008 OAL Determination No. 19, pp. 7-13, relying on *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.)

As appellant points out, the OAL's determination portions of the handbook are a regulation within the meaning of the APA is entitled to some deference. (See *Grier v. Kizer* (1990) 219 Cal.App.4th 422, 434-435, disapproved on other grounds *Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal.4th at p. 577.) However, even assuming the department was obligated to meet the requirements of the APA before using the handbook, its failure to comply with the APA would not undermine the trial court judgment entered against appellant.

As respondent points out, in analogous circumstances in criminal law, the Supreme Court has found that defects in the preliminary hearing stage of a criminal proceeding do not invalidate a subsequent conviction unless the defendant can show he or she was prejudiced by the defect. (See *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-530 (*Pompa-Ortiz*).) In particular, in rejecting an earlier rule under which such defects were held to deprive a court of the power to act in a criminal proceeding, the court stated: "The presence of a jurisdictional defect which would entitle a defendant to a writ of prohibition prior to trial does not necessarily deprive a trial court of the legal power to try the case if prohibition is not sought." (*Id.* at p. 529.) More directly, we have held the failure to obtain the evaluation of two mental health professionals, which is required by the closely related provisions of section 6601, subdivision (d), did not

deprive a court of fundamental jurisdiction to nonetheless act on an SVP petition. (See *People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1128-1130 (*Preciado*).) We found this defect "was not one going to the substantive validity of the complaint, but rather was merely in the nature of a plea in abatement, by which a defendant may argue that for collateral reasons a complaint should not proceed. [Citation.]" (*Id*. at p. 1128.)

For the same reasons we rejected the contention asserted in *Preciado*, that a defect in the department's evaluative process deprived the court of fundamental jurisdiction over an SVP petition, we reject appellant's indistinguishable contention that a defect in adoption of the department's evaluation handbook somehow prevented the court from acting on respondent's petition. Like the requirement that two evaluators examine a prospective SVP we considered in *Preciado*, the requirement that the handbook meet the requirements of the APA is entirely collateral to the merits of the respondent's petition. In this regard we note the purpose of "[t]he APA is intended to advance 'meaningful public participation in the adoption of administrative regulations by state agencies' and create 'an administrative record assuring effective judicial review.' [Citation.] . . . The APA was born out of the Legislature's perception there existed too many regulations imposing greater than necessary burdens on the state and particularly upon small businesses." (*Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 908-909.) In contrast, the purposes of the SVP statute "are to protect the public from a select group of offenders who are extremely dangerous and to provide treatment for them." (*Preciado, supra,* 87 Cal.App.4th at pp. 1130-1131; see also *Hubbart, supra* 19 Cal.4th at p. 1144; Stats. 1995,

ch. 763, § 1.) As we have noted, those purposes represent compelling interests. (*Hubbart v. Superior Court, supra*, 19 Cal.4th at p. 1153, fn. 20.) Given this context, we do not believe the Legislature intended that either an SVP petition or a jury's determination a particular offender is a dangerous SVP should be invalidated because the broader public participation interests embodied in the APA have not been fully vindicated. (See *Preciado, supra*, 87 Cal.App.4th at p. 1131; see also *In re Lamonica H.* (1990) 220 Cal.App.3d 634, 642.)

Appellant has not attempted to show he was in any way prejudiced by the department's use of an underground regulation. Rather, he has emphasized that his claim is based on his contention that the department's failure to meet the requirements of the APA deprived the trial court of jurisdiction to hear respondent's petition. Since we have determined that any defect under the APA would not deprive the court of the power to act on respondent's petition and because appellant has failed to show any prejudice, we must therefore reject his APA claim. (See *Pompa-Ortiz, supra*, 27 Cal.3d at pp. 529-530.)

We also reject appellant's contention his counsel rendered ineffective assistance of counsel by failing to raise the requirements of the APA in the trial court. Had appellant's counsel asserted the arguable defect the department's evaluative process, under *Preciado* the trial court would have been compelled to determine that notwithstanding the defect it had jurisdiction to hear respondent's petition. Thus in the trial court, as here, appellant's inability to show that he was prejudiced by the department's use of an underground regulation would have defeated his APA claim.

## DISPOSITION

The order is affirmed.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.