Filed 3/24/10 P. v. Judge CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY JUDGE, Defendant and Appellant.	D054342 (Super. Ct. No. MH102101)

APPEAL from a judgment of the Superior Court of San Diego County, Peter L. Gallagher, Judge. Affirmed in part; remanded in part with instructions.

Anthony Judge appeals a judgment committing him for an indeterminate term to the custody of the State of California Department of Mental Health (Department) under the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 et seq. (the SVPA)).[1] Judge contends that the judgment must be reversed because his indeterminate

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

commitment under the SVPA violates his constitutional rights to due process and equal protection. Alternatively, he asserts the court prejudicially erred when it refused to give an amplifying jury instruction regarding the standard for finding a likelihood of committing future predatory acts under the SVPA.

Judge's constitutional claims were recently addressed, in part, by the California Supreme Court in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*). In accordance with *McKee*, we remand for a hearing on one of Judge's equal protection claims. We affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2008 the San Diego County District Attorney filed a petition seeking to commit Judge as a sexually violent predator (SVP). The parties stipulated to Judge's previous convictions: In 1977 Judge was convicted of assault with intent to commit rape and assault with a deadly weapon, and was sentenced to Patton State Hospital as a mentally disordered sex offender. In 1982 Judge was convicted of forcible rape, and in 1993 forcible oral copulation. While incarcerated, Judge exposed himself to female prison guards and employees, with the last such incident occurring in 1995.

At a jury trial, two prosecution[2] experts testified that Judge suffers from paraphilia and an antisocial personality disorder. Both experts additionally testified that they

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2 While an SVP proceeding is civil in nature (see *People v. Allen* (2008) 44 Cal.4th 843, 860 (*Allen*)), we follow the common practice of characterizing the parties to the action as the "prosecution" and "defense." (See, e.g., *id.* at p. 866; *People v. Hurtado*

believe Judge is likely to commit future sexually violent predatory offenses. Employing various predictive tests, including the STATIC-99 test, the prosecution experts estimated that the probability of Judge committing a sexually violent offense over the next 10 years was between 30.8 percent and 100 percent.

The defense presented an expert psychologist and licensed clinical social worker, Brian Abbott, who testified that the recidivism rates projected by the standard predictive tests utilized by the prosecution experts were skewed by irrelevant and outdated data. Applying more recent California data to adjust Judge's STATIC-99 test score, Abbott testified Judge's likelihood of reoffense was approximately 15 percent over the next 10 years. Abbott did not offer an opinion as to whether Judge met the SVP criteria.

The jury found that Judge was an SVP and the trial court committed him for an indeterminate term pursuant to the SVPA.

DISCUSSION

We discuss Judge's various appellate challenges below, after providing a general overview of the SVPA.

I

OVERVIEW OF THE SVPA

The SVPA provides for the involuntary and indefinite civil commitment of persons who have been convicted of a sexually violent offense and are found to be SVP's

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(2002) 28 Cal.4th 1179, 1192 (*Hurtado*) ["Although the SVPA is a civil proceeding, its procedures have many of the trappings of a criminal proceeding."].)

following the completion of their prison terms. (§ 6604.) As originally enacted, the SVPA provided for a two-year commitment term. The SVPA was amended in 2006 and, as amended, provides for an indeterminate term of confinement for persons who, in a unanimous jury verdict after trial, are found beyond a reasonable doubt to be SVP's. (*People v. Shields* (2007) 155 Cal.App.4th 559, 562-563 (*Shields*); §§ 6604, 6604.1.)

The SVPA defines an SVP 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).) The requirement that an SVP be found "likely [to] engage in sexually violent criminal behavior" (*ibid*.) means that the person "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 (*Ghilotti*), italics omitted.)

The SVPA requires the Department to review the mental condition of a committed SVP at least annually, and allows the court to appoint, or the committed person to retain, an expert. (§ 6605, subd. (a).) If the Department concludes the committed individual no longer meets the requirements of the SVPA, or that conditional release is appropriate, it must authorize the filing of a petition for release by the committed individual. (§ 6605,

subd. (b).)[3] If, after a probable cause hearing, the court determines that the petition has merit, the committed person is entitled to a trial, with all constitutional protections as are provided at the initial commitment hearing. At the trial, if the state opposes the petition, it must prove beyond a reasonable doubt that the committed individual remains an SVP. (§ 6605, subds. (c), (d).) If the trier of fact finds in the committed person's favor, the person must be unconditionally released and discharged. (§ 6605, subd. (e).)

If the Department does not authorize the filing of a petition for release, the committed person may nevertheless file a petition for release under section 6608, subdivision (a). Unless the court finds the petition is frivolous or includes no evidence of changed circumstances, it must set a hearing on the petition. (§ 6608, subd. (a).) In such a hearing, the committed person must prove by a preponderance of the evidence that he is entitled to be released to a state-operated forensic conditional release program for one year. (§ 6608, subd. (d), (i).) At the end of one year, the court must hold another hearing to determine if the person should be unconditionally released from commitment on the basis that the he or she no longer meets the requirements of the SVPA. (§ 6608, subd. (d).) If the court determines the person is not ready for unconditional release, it may place the person on outpatient status. (§ 6608, subd. (g).)

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[3] Additionally, a parallel provision requires the Department to seek judicial review of a commitment through habeas corpus proceedings if at any time it determines that the committed person is no longer an SVP. If in such proceedings "the superior court determines that the person is no longer a sexually violent predator, he or she shall be unconditionally released and unconditionally discharged." (§§ 6605, subd. (f), 7250; see generally *Allen*, *supra*, 44 Cal.4th at p. 859.)

II

DUE PROCESS

On appeal, Judge contends that the SVPA violates his federal constitutional right to due process because after the initial commitment order, it shifts the burden of proof to the committed person to prove that he or she is no longer an SVP. This contention was recently addressed by the California Supreme Court in *McKee*, which rejected the claim. (*McKee, supra*, 47 Cal.4th at p. 1193 [the SVPA does not violate the due process clause].)[4] We are bound to follow the decision of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we reject Judge's due process claim.

III

EQUAL PROTECTION

Judge asserts that his involuntary commitment as an SVP under the SVPA violates his right to equal protection because (1) SVP's are treated differently from other civilly-committed groups under California law, and (2) the SVPA treats committed persons whom the Department authorizes to file a petition for release more favorably than those SVP's who are not authorized to file a petition for release. We address each of these claims in turn after discussing the applicable legal principles.

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4 After issuance of *McKee, supra*, 47 Cal.4th 1172, we requested supplemental briefing on the impact of that decision on this appeal. In that briefing, Judge concedes that *McKee* is dispositive of his due process claim.

A. *Applicable Standards for Equal Protection Claims*

"The initial inquiry in any equal protection analysis is whether persons are 'similarly situated for purposes of the law challenged.'" (*In re Lemanuel C.* (2007) 41 Cal.4th 33, 47, italics omitted; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) The question is whether the state has adopted a classification that affects similarly situated groups in an unequal manner. (*Cooley*, at p. 253.) "A statute does not violate equal protection when it recognizes real distinctions that are pertinent to the law's legitimate aims." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 873; *Baxtrom v. Herold* (1966) 383 U.S. 107, 111 ["Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made."].) It is a valid exercise of state power to "'adopt more than one procedure for isolating, treating, and restraining dangerous persons'" depending upon "'degrees of danger reasonably perceived as to special classes of persons.'" (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1217, quoting *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 172 (*Hofferber*).) "[T]he Legislature may make reasonable distinctions between its civil commitment statutes based on a showing that the persons are not similarly situated, meaning that those who are reasonably determined to represent a greater danger may be treated differently from the general population." (*In re Smith* (2008) 42 Cal.4th 1251, 1266; *McKee*, *supra*, 47 Cal.4th at pp. 1199-1200.)

"Strict scrutiny is the appropriate standard against which to measure claims of disparate treatment in civil commitment." (*People v. Green* (2000) 79 Cal.App.4th 921, 924; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1153, fn. 20; *Hofferber, supra*, 28 Cal.3d at p. 171, fn. 8.) In applying this standard, the state has the burden of establishing that it has a compelling interest that justifies the law and that the distinctions made by the law are necessary to further its purpose. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 641.)

B. *Judge's Equal Protection Claim as to Differential Treatment Between SVP's and Other Types of Civilly Committed Persons Requires Remand*

In *McKee,* our Supreme Court held that SVP's are similarly situated to other civilly committed persons, including persons deemed mentally disordered offenders (MDO's) and those found not guilty by reason of insanity (NGI's). Therefore, absent a showing of a compelling state interest in treating SVP's significantly less favorably than MDO's and NGI's, California's SVPA may violate the equal protection clause of the United States Constitution. (*McKee, supra*, 47 Cal.4th at pp. 1203, 1207.) The *McKee* court remanded the case to the trial court to determine whether the state could establish a compelling interest justifying its disparate treatment of SVP's, and whether such treatment is necessary to further its interest. (*Id*. at pp. 1207, 1210.)[5] The court explained that the

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5 *McKee, supra,* 47 Cal.4th 1172, observes that fundamental distinctions between classes of individuals subject to civil commitment are subject to strict scrutiny, but also that the government may make reasonable distinctions "'depending on degrees of danger reasonably perceived as to special classes of persons.'" (*Id*. at p. 1210, quoting *Hofferber, supra,* 28 Cal.3d at pp. 171-172.)

"government has not yet shown that the special treatment of SVP's is validly based on the degree of danger reasonably perceived as to that group, nor whether it arises from any medical or scientific evidence. On remand, the government will have an opportunity to justify Proposition 83's indefinite commitment provisions, at least as applied to McKee, and demonstrate that they are based on a reasonable perception of the unique dangers that SVP's pose rather than a special stigma that SVP's may bear in the eyes of California's electorate." (*McKee*, *supra*, 47 Cal.4th at p. 1210.)

McKee is binding upon this court and we must follow our high court's determination that an indefinite commitment under the SVPA potentially violates an SVP's right to equal protection. (*McKee*, *supra*, 47 Cal.4th at pp. 1207, 1210.) As in *McKee*, the record in this case is inadequate to determine whether the state has a compelling interest justifying its disparate treatment of SVP's, including Judge. (*Id*. at p. 1210.) We therefore remand this case to the trial court to conduct a hearing to determine whether the government can "demonstrate the constitutional justification for imposing on SVP's a greater burden than is imposed on MDO's and NGI's in order to obtain release from commitment." (*Id.* at pp. 1208-1209.)[6]

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6 The Attorney General requests that this court appoint a special master to conduct the evidentiary hearing, and retain jurisdiction to review the hearing. We decline to do so. The Attorney General also requests that we instruct the trial court on remand to not permit the defense to introduce evidence, citing language in *McKee*, *supra*, 47 Cal.4th at page 1210, that a "mere disagreement among experts will not suffice to overturn the Proposition 83 amendments." We do not read this excerpt from *McKee* as setting forth a limitation on the evidence to be admitted by the trial court, but rather a recognition that expert testimony would, in due course, be presented by both sides. The Attorney General

C. *Judge's Claim That He Was Deprived of Equal Protection Based on the SVPA's Release Procedures Is Not Ripe*

Alternatively, Judge urges us to reverse the judgment on an equal protection claim not considered in *McKee*. Specifically, Judge contends that the SVPA violates his right to equal protection because its procedures on petitions for release subsequent to an SVP's initial commitment unjustifiably differentiate between those persons committed as SVP's who are authorized by the Department to seek release — and who receive a hearing at which the state bears the burden of proof to prevent their release — and those SVP's who seek release without the Department's approval, who must prove by a preponderance of the evidence that they are no longer SVP's. (§§ 6605, 6608.) However, we do not reach the merits of this claim because it is not ripe for review.[7]

Consistent with the principle that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws," we may render constitutional judgments only where it is necessary to adjudicate the rights of the parties in the particular case before the court. (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 610-611; *Younger v. Superior Court* (1978) 21 Cal.3d 102, 119 (*Younger*).) Therefore, "[o]ne who seeks to raise a constitutional question must show that his rights

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provides no authority for limiting the presentation of evidence, and we are aware of none. We therefore reject the Attorney General's request.

7 We requested and received supplemental briefing on the issue of ripeness.

are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation." (*People v. Williams* (1966) 247 Cal.App.2d 169, 170.)

Here, Judge appeals from a decision made under the SVPA's initial commitment procedures (§§ 6601-6604), not from any determination made under the SVPA's postcommitment procedures (§§ 6605, 6608). Judge thus fails to establish he has been aggrieved by the procedures applicable to petitions for release that he claims deprive him of equal protection (§§ 6605, 6608). Therefore, his claim seeks an advisory opinion based on hypothetical facts, which we are not permitted to render. (*Younger*, *supra*, 21 Cal.3d at p. 119; *People v. Williams*, *supra*, 247 Cal.App.2d at p. 170.) Accordingly, we decline to address Judge's claim that the SVPA's postcommitment procedures for petitions seeking release deny him equal protection. (*People v. Carroll* (2007) 158 Cal.App.4th 503, 508, fn. 2 (*Carroll*) [declining to issue advisory opinion as to vagueness of SVPA's release provisions where provisions were not applicable to decision under review].)[8]

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8 Judge urges us to decide this claim because he has been committed for over a year and has not been authorized by the Department to seek release. However, there is no record before us of any petition Judge has filed to seek release. If and when Judge avails himself of the statutory procedures under section 6608, subdivision (a), and is aggrieved by a ruling under that provision, he may appeal. (*People v. Collins* (2003) 110 Cal.App.4th 340, 348 [committed person may appeal the denial of a petition for conditional release].) Until he has done so, the issue is not ripe for appellate review. (*Carroll*, *supra*, 158 Cal.App.4th at p. 508, fn. 2.)

IV

THE TRIAL COURT DID NOT ERR BY FAILING TO GIVE THE AMPLIFYING INSTRUCTION ON THE STANDARD FOR FINDING A LIKELIHOOD TO REOFFEND UNDER THE SVPA

We address Judge's contention that the trial court committed instructional error after setting forth the pertinent procedural history.

A. *Proceedings Relevant to This Claim*

After the trial court indicated it would instruct the jury under CALCRIM No. 3454, defense counsel, apparently relying on language of *Ghilotti*, *supra*, 27 Cal.4th at pages 920-921, requested an amplifying instruction that to find Judge to be an SVP, the jury must first find that he posed a "high risk" of reoffense.[9] The prosecutor responded that the court need not amplify CALCRIM No. 3454 because it was developed after *Ghilotti* was decided and did not include the "high risk" language. The trial court refused to give the defense instruction, but stated counsel could argue in closing that the meaning of "substantial and well-founded" risk was "high risk."

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9 Defense counsel apparently referred to the following statement in *Ghilotti*: "The SVPA thus consistently emphasizes the themes common to valid civil commitment statutes, i.e., a current mental condition or disorder that makes it difficult or impossible to control volitional behavior and predisposes the person to inflict harm on himself or others, thus producing dangerousness measured *by a high risk* or threat of further injurious acts if the person is not confined." (*Ghilotti*, *supra*, 27 Cal.4th at p. 920, original emphasis omitted, italics added.)

During closing arguments, defense counsel argued that a "[c]urrent mental disorder means serious difficulty controlling behavior," and that this was "left off of the [CALCRIM No. 3454 instruction]." Defense counsel continued:

> "[T]he term 'likely' means much more than the mere possibility that a person will engage in such a conduct. It means that he does, in fact, present a high risk that he will engage in such conduct. So if the risk is not high, he's not a sexually violent predator. It is a high risk. And, again, this is one of the things in the law that's not written in the instruction but it is the law. If you have a question about this, ask His Honor for clarification about what 'likely' means because this is the state of the law. It must be a high risk."

The prosecutor argued in rebuttal that defense counsel

> "spent a lot of time talking about, 'high risk.' That's not the state [of the law] in [CALCRIM No. 3454]. Unless you were to say, well, I guess you can interpret high risk meaning the way [CALCRIM No. 3454] defines it because they don't use the word 'high.' The instruction that you're going to follow basically talks about the kind of substantial, well-founded, serious risk. It's all in the law, and that is what guides your determination. There's nothing left out of CALCRIM. That's the law that's going to be guiding your decision."

Defense counsel objected. However, before the trial court could rule on the objection, the prosecutor restated:

> "The way [CALCRIM No. 3454] is phrased is the law you're going to be using in going through the elements in making your determination. If words aren't in there, you have to rely on what it says in the CALCRIM."

The trial court overruled the defense objection, stating: "I disagree. You follow the CALCRIM in applying the facts to the law. That's what it is. Continue."

After the jury retired to commence deliberations, defense counsel again requested an amplifying instruction "that [a] substantial, well-founded, serious risk is high risk" and

an additional instruction that "volitional impairment requires that there's serious difficulty controlling behavior."[10] Defense counsel argued that these instructions were necessary to correct the prosecutor's rebuttal argument implying that counsel was making up the law. The trial court declined to reinstruct the jury in the absence of any jury question. The jury deliberated without making any inquiries of the court and delivered its verdict the same day.

B. *The Trial Court Did Not Err by Failing to Give the Requested Amplifying Instruction*

Judge contends that the trial court prejudicially erred by not instructing the jury with the requested amplifying instructions that the statutory requirement for finding Judge "likely to reoffend" meant the jury must find he posed a "high risk" of reoffense and had "'serious difficulty in controlling [his] behavior.'" We disagree. As we will explain, the trial court properly instructed the jury as to the standard for determining whether Judge was an SVP.

As in any trial, the trial court in an SVP proceeding must instruct on the general principles of law that are necessary to the jury's understanding of the case. (*People v. Roberge* (2003) 29 Cal.4th 979, 988 (*Roberge*).) We review instructional errors under the SVPA under the harmless beyond a reasonable doubt standard. (*Hurtado, supra*, 28 Cal.4th at p. 1194 [failure to instruct on need to find likelihood of future predatory acts

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10 The record does not show Judge's counsel requested the "serious difficulty in controlling behavior" instruction at any time before the instructions were given to the jury and closing arguments were made.

was harmless beyond a reasonable doubt], citing *Chapman v. California* (1967) 386 U.S. 18.)

The United States Constitution requires that an indefinite civil commitment be based on a determination that the individual committed has some illness, abnormality or disorder that causes "serious difficulty in controlling behavior" rendering the individual dangerous. (*Kansas v. Crane* (2002) 534 U.S. 407, 413.) However, our Supreme Court has rejected the claim that a jury must be instructed that to be found an SVP, the person's "'diagnosed mental disorder must render the person *unable to control* his dangerous behavior.'" (*People v. Williams* (2003) 31 Cal.4th 757, 763, 775 (*Williams*).) *Williams* held that the plain language of the SVPA "inherently encompasses and conveys to a fact finder the requirement of a mental disorder that causes serious difficulty in controlling one's criminal sexual behavior." (*Williams*, at p. 759.) The *Williams* court reasoned that a mental disorder meeting the statutory criteria of the SVPA "must additionally produce an actual risk of violent reoffense" that is sufficiently substantial, serious, and well-founded to pass constitutional muster. (*Williams*, at p. 776.) As jurors instructed using the statutory language of the SVPA necessarily understand that to be found to be an SVP the defendant must have a seriously impaired capacity or ability to control violent criminal sexual conduct, no additional instructions are needed. (*Williams*, at pp. 776-777.)

Here, the trial court instructed the jury with CALCRIM No. 3454, which employs the statutory terms used in the SVPA that *Williams* found satisfied the constitutional

requirement. (*Williams, supra*, 31 Cal.4th at p. 776; see § 6600, subd. (a)(1) [defining an SVP and "diagnosed mental disorder"].)[11] CALCRIM No. 3454 also utilizes the standard for "'likely to reoffend'" approved by the California Supreme Court in *Williams, supra*, 31 Cal.4th at page 776, namely, whether there was "a substantial, serious and well-founded risk" that defendant would engage in sexually violent predatory criminal behavior if released into the community. (CALCRIM No. 3454; *Williams, supra*, 31 Cal.4th at p. 776; *Ghilotti, supra*, 27 Cal.4th at p. 916.)[12]

Based on *Williams*'s holding that the language of the SVPA inherently and adequately conveys the crucial elements necessary to find a defendant to be an SVP subject to indefinite commitment, no additional amplifying instruction was necessary.

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11 The jury was instructed that to find Judge was an SVP, it had to determine, inter alia, that: (i) he had a diagnosed mental disorder; (ii) as a result of that disorder he was "likely" to engage in sexually violent predatory criminal behavior; and (iii) that it was "necessary to keep [him] in custody in a secure facility to ensure the health and safety of others." (CALCRIM No. 3454.) In addition, the instruction states that the "term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes [him] a menace to the health and safety of others." (*Ibid*.)

12 The court's instructional language tracks *Ghilotti, supra*, 27 Cal.4th at page 922, in which the court said, "[T]he phrase '*likely* to engage in acts of sexual violence' (italics added), as used in section 6601, subdivision (d), connotes much more than the mere *possibility* that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control. On the other hand, the statute does not require a precise determination that the chance of reoffense is *better than even*. Instead, an evaluator applying this standard must conclude that the person is 'likely' to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, the person 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."

(*Williams, supra,* 31 Cal.4th at pp. 763, 777.) The trial court instructed the jury on the principles necessary to the jury's understanding of its task. Therefore, Judge's contention that CALCRIM No. 3454 required amplifying additional instructions regarding "high risk" and "serious difficulty in controlling behavior" lacks merit. (*Roberge, supra,* 29 Cal.4th at p. 988.)

C. *The Prosecutor's Rebuttal Argument Did Not Necessitate a Clarifying Instruction*

Judge further argues that a clarifying jury instruction was required after the prosecutor's comments made during closing argument effectively told the jury that to find Judge to be an SVP, it need not find he had "serious difficulty in controlling behavior" or that he posed a "high risk of re-offense." We disagree.

As we have explained, the California Supreme Court has determined that the statutory language sufficiently describes the lack of behavioral control constitutionally required to indefinitely commit an individual, rejecting the argument that a separate instruction on behavioral control is necessary. (*Williams, supra,* 31 Cal.4th at p. 777.) Likewise, *Ghilotti* established that the terms "substantial . . . serious and well-founded risk" of reoffense accurately describe the standard for "likely to reoffend" under the SVPA. (*Ghilotti, supra,* 27 Cal.4th at p. 922, italics omitted.) Thus, the trial court here properly instructed the jury on the statutory elements required to find a person meets the

SVP requirements. The prosecutor's argument that the jury instructions given were complete is therefore supported by the law.[13]

Relying on *People v. Cordero* (1989) 216 Cal.App.3d 275, 282, Judge argues that he was entitled to an additional clarifying instruction discussing "serious difficulty in controlling behavior" because it went to the heart of his theory of defense. In *Cordero*, the jury inquired of the court about the meaning of an instruction on deliberate and premeditated killing, and the defense requested a clarifying instruction that would enable the jury to consider the defendant's mens rea theory. (*Id.* at pp. 280-281.) The court refused, which prevented the jury from considering the defense theory. (*Id.* at p. 280.) Here, unlike *Cordero*, there is no indication that the jury was confused or that Judge was prevented from presenting his theory of the case. Judge's attorney amply argued his theory that Judge did not pose a "high risk" of reoffense and therefore the jury should not find Judge to be an SVP under the SVPA. Because the standard instruction covered the point and Judge's "counsel's argument to the jury fully explicated [this] defense theme,"

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13 Judge's reliance on the *Ghilotti* decision for an instruction on "high risk" is misplaced. In *Ghilotti*, the California Supreme Court interpreted the term "likely to reoffend" used to define an SVP in the SVPA. (*Ghilotti*, *supra*, 27 Cal.4th at pp. 915-916.) The *Ghilotti* court noted that the purpose of the SVPA was to protect the public from persons who were previously convicted of violent sex offenses and who, because of a current mental disorder, presented a "high risk of reoffense." (*Ghilotti*, at p. 921.) Interpreting the statutory language "likely to reoffend" in accordance with this purpose, the *Ghilotti* court concluded it did not require that the chance of reoffense be better than even. Rather, the test was whether the person presented a "*substantial danger — . . . a serious and well-founded risk* — of [reoffense]." (*Ghilotti*, at p. 916.) Thus *Ghilotti* does not stand for the proposition that the jury must determine a defendant poses a "high risk of reoffense" to find SVP status.

the trial court did not err in refusing to give the additional instruction Judge requested. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144, 1145 (*Gutierrez*) [finding no error and no prejudice where instructions given adequately covered valid points in requested pinpoint instruction and defense fully argued the points].)

D. *Any Error in Instructing the Jury Was Harmless*

Finally, even if there was instructional error, we are satisfied it was harmless. The evidence adduced at Judge's trial included a debate among the expert witnesses over the impact and accuracy of the standard tests used to measure Judge's likelihood of reoffense. The experts' estimates of defendant's recidivism rate ranged from Judge's 15 percent to the prosecution's 100 percent. Judge presented no expert testimony that he was no longer suffering a mental disorder causing him difficulty in controlling his behavior. Rather, he argued that the lack of recent incidents showed he had his behavior under control, and that proper analysis of his characteristics showed his risk of reoffense was not high.

Once the jury found Judge met the requirements set forth in the jury instruction — as we must presume it did — it necessarily found he had "serious difficulty in controlling behavior" because the SVPA "inherently embraces and conveys the need for a dangerous mental condition characterized by impairment of behavioral control." (*Williams, supra*, 31 Cal.4th at p. 774, italics omitted.)[14] Accordingly, there is no reasonable possibility

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14 Arguing that the statutory language is not clear, Judge points to the concurring opinion of Justice Kennard in *Williams*, which suggests it "would be prudent for California trial courts also to explain to jurors in future cases that defendants cannot be found to be sexually violent predators unless they have serious difficulty in controlling their behavior." (*Williams, supra,* 31

on this record that the jury would not have found Judge to be an SVP had it been instructed to consider whether he had "serious difficulty in controlling behavior." (See *Gutierrez*, *supra*, 28 Cal.4th at pp. 1144-1145 [no prejudice where instructions and arguments covered defense theory].) Any error based on the failure to instruct on "serious difficulty in controlling behavior" was thus harmless beyond a reasonable doubt. (See *Hurtado*, *supra*, 28 Cal.4th at p. 1194.)

Cal.4th at p. 780 (conc. opn. of Kennard, J.).) However, as the majority in *Williams* emphasizes, the language of the SVPA is clear and adequately instructs the jury on the behavioral control element (*Williams*, *supra*, 31 Cal.4th at pp. 776-777), and Justice Kennard's suggestion is not grounds for finding error where the trial court instructed according to that language. As we have explained here, the instructions given to the jury provided proper guidance for determining whether Judge lacked behavioral control and posed a risk of reoffense.

DISPOSITION

The case is remanded to the trial court to determine whether the Attorney General can demonstrate the constitutional justification for imposing on SVP's a greater burden than is imposed on MDO's and NGI's in order to obtain release from commitment. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.