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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VINH NGUYEN, Defendant and Appellant.	E048880 (Super.Ct.No. RIC329441) OPINION

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge. Affirmed.

Chris Truax, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton, and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Vinh Nguyen, was found to be a sexually violent predator (SVP), and committed to the Department of Mental Health (DMH) for an indeterminate term

following a petition for recommitment under the Sexually Violent Predators Act (SVPA). (Welf. & Inst. Code,[1] § 6600 et seq.) He appeals the judgment and civil commitment on the grounds that (1) the trial court erred in allowing defendant's counsel to waive defendant's presence at trial, and (2) the indeterminate term for SVP's violates state and federal guarantees of equal protection. We affirm.

BACKGROUND

On or about November 18, 2005, the People filed a petition to recommit defendant as a SVP.[2] Due to delays, a subsequent petition for recommitment was filed on January 17, 2008, prior to trial on the 2005 petition. On July 13, 2009, following a bench trial on the 2005 petition for recommitment, the trial court made a true finding that defendant remained a SVP. Defendant was not present at the trial; his counsel informed the court that his presence was waived. Defendant was committed to the DMH for an indeterminate term, and the 2008 petition was dismissed as moot. Defendant timely appealed.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Minute orders and an order following the probable cause hearing pertaining to this petition are in the clerk's transcript, but the petition itself is not included in the record on appeal. The January 17, 2008, petition is in the clerk's transcript. The trial proceedings related to the November 2005 petition, resulting in a true finding on that petition, and a dismissal of the January 2008 petition on the grounds it was moot.

DISCUSSION

1. Defendant's Absence at the Trial Was Harmless Beyond a Reasonable Doubt.

Defendant claims his due process rights were violated when the trial on his recommitment petition was conducted in his absence, without a personal waiver of the right to be present from the defendant, after his attorney informed the court that defendant waived his right to be present. Some background is helpful to our analysis.

2. Procedural Backdrop.

Of the approximate 37 hearings conducted between March 2006 and the date of the trial, defendant was transported to court once, inadvertently, on March 10, 2009, for the hearing on his motion to dismiss the recommitment petition. At that hearing, defendant's counsel explained that because of the inadvertent transportation of defendant to the hearing, he risked losing his bed at Coalinga State Hospital. After the court denied the motion to dismiss the recommitment petition, the court set a new hearing date for the trial and the prosecutor inquired if defendant wanted to be present. Defendant responded, through his attorney, that he wanted to be present. The court ordered that defendant be transported back to court for the trial, which was set for May 4, 2009.

Because the minutes of the May 4, 2009, hearing are ambiguous as to defendant's presence, we augmented the record on our own motion to obtain the reporter's transcript of that hearing. The supplemental reporter's transcript reveals that defendant was not transported for the hearing, and his attorney represented that defendant waived his presence. In addition, counsel informed the court that defendant's presence at his trial

was waived, but that in light of a new opinion, defendant might want to have a jury trial. A new date was selected for a trial readiness conference, June 18, 2009, and the court directed that "Defendant is to remain housed in Coalinga State Hospital."

On June 4, 2009, defendant filed a motion to continue the trial on the ground that defense counsel was in trial on another case. In the motion, defense counsel indicated defendant "has waived his presence at trial and waived a jury." On June 8, 2009, the court heard the motion to continue. The minutes are unclear as to whether defendant appeared, but we infer he did not because the record does not include a transportation order for that date and the minutes reflect that defendant was to remain housed at Coalinga State Hospital.

The matter was called for court trial on June 13, 2009, in defendant's absence. Defendant claims he is entitled to a reversal because his due process rights were violated by proceeding in his absence without a personal waiver of his presence. We disagree.

a. General Legal Principles

The SVPA provides for the involuntary civil commitment of certain offenders, following the completion of their prison terms, who are found to be SVP's. A "SVP" is 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).) Certain enumerated sex crimes constitute a sexually violent offense within the meaning of the SVPA, including a violation of Penal Code

section 288, subdivision (a), when committed by force, violence, duress, menace, or fear of immediate unlawful bodily injury of the victim or another person. (§ 6600, subd. (b).)

SVPA proceedings have a nonpunitive purpose. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1144.) The act provides treatment for mental disorders from which SVP's currently suffer to reduce the threat of harm otherwise posed to the public. (*Id.* at pp. 1143-1144; *People v. Otto* (2001) 26 Cal.4th 200, 205.) However, because a civil commitment involves a significant deprivation of liberty, a defendant in an SVP proceeding is entitled to due process protections. (*Otto,* at p. 209; *Foucha v. Louisiana* (1992) 504 U.S. 71, 80 [112 S.Ct. 1780, 118 L.Ed.2d 437]; see also *People v. Carlin* (2007) 150 Cal.App.4th 322, 340.)

To this end, section 6603 provides certain procedural rights, entitling the person to a trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports. (§ 6603, subd. (a).)

b. Analysis

In arguing that defendant has a statutory right to be present at the SVP recommitment proceeding, defendant relies on section 6605. However, that section applies to proceedings related to a petition for conditional release. (§ 6605, subd. (b).) When the DMH determines that the person's condition has so changed that the person no longer qualifies as an SVP, or where it determines that conditional release to a less restrictive alternative is in the best interest of the person, the director may authorize the person to file a petition for conditional release. Upon receipt of that petition, the court

shall order a show-cause hearing at which the court can consider the petition and any documentation provided by the medical director, the prosecutor, or the committed person. (§ 6605, subd. (b).) At that show-cause hearing, the committed person "shall have the right to be present and shall be entitled to the benefit of all the constitutional protections that were afforded to him or her at the initial commitment proceeding." (§ 6605, subd. (d).) Because the instant proceeding was not related to a petition for conditional release, the provisions of section 6605 are inapplicable. The right to be present at a recommitment hearing is not a statutorily guaranteed right under the SVPA.

Defendant asserts he has a constitutional due process right to be present at the hearing, relying on *In re Watson* (1979) 91 Cal.App.3d 455 and *People v. Fisher* (2009) 172 Cal.App.4th 1006. The court in *Fisher* noted that an MDO proceeding is civil, rather than criminal, and did not implicate all of the constitutional and procedural safeguards afforded to criminal defendants. (*Fisher,* at p. 1013.) However, relying on *Watson, supra,* the court determined that in civil commitment proceedings, due process guarantees the right to be present during the presentation of evidence absence personal waiver or demonstrated inability to attend. (*Fisher,* at p. 1013, citing *Watson,* at pp. 461-462.)

The People argue that a party to a civil case does not have an absolute right to be personally present. (Citing *Yarbrough v. Superior Court* (1985) 39 Cal.3d 197, 203-204; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 913; and *Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App.4th 332, 338.) These cases involved incarcerated persons who were sued for civil damages and sought access to the courts to defend those actions. We agree that parties in civil actions do not have an absolute right to be personally

present. However, an SVP proceeding is a special proceeding of a civil nature and not a civil action. (See *People v. Yartz* (2005) 37 Cal.4th 529, 536-537.) Given the significant deprivation of liberty resulting from an indeterminate commitment following an SVP determination, notwithstanding the lack of an express statutory right to be present at SVP proceedings, we agree with *Fisher* and *Watson* that the defendant had a due process right to be present at the trial.

The next question is whether defendant's counsel had authority to waive his presence. Defendant argues that counsel lacked the authority to waive his right to be personally present, relying on *In re Watson, supra,* 91 Cal.App.3d at pages 461-462 and *People v. Fisher, supra,* 172 Cal.App.4th at page 1014. The People argue that counsel may waive the committee's right to be present and to make other procedural decisions over the committee's objection. (*People v. Masterson* (1994) 8 Cal.4th 965, 969, 971 [holding that counsel may waive jury trial over the client's objection].) However, the conclusion in *Masterson* was driven, in part, by the recognition that in proceedings to determine competency to stand trial in a criminal case (ref. Pen. Code, § 1368 et seq.), it is presumed that the person whose competence is in question cannot be entrusted to make basic decisions regarding the conduct of that proceeding. (*Masterson,* at p. 974.) Civil commitments under the SVPA do not necessarily involve individuals whose competence is in question, so we cannot extend the holding of *Masterson* to the situation before us.

At oral argument, the People urged us to find that appointed counsel has authority to waive the defendant's presence based on the holding of *Conservatorship of John L.* (2010) 48 Cal.4th 131, 148. In that case, the defendant informed his appointed attorney

that he did not want to contest the conservatorship or to be present in court, and his appointed attorney relayed that information to the trial court. (*Id.* at p. 149.) The Supreme Court held that "in the absence of any contrary indication, the superior court may assume that an attorney is competent and fully communicates with the proposed conservatee about the entire proceeding," and that counsel was authorized to waived the conservatee's presence. (*Id.* at p. 156.)

The present case stands on different footing because there is conflicting evidence in the record: on March 10, 2009, defendant, who was personally present, requested to be present at the hearing; on May 4, 2009, defendant was absent and his counsel informed the court he did not wish to be present. Aside from these distinguishing facts, the holding of *Conservatorship of John L.* must be considered in light of the fact that conservatorships are of limited duration (Pen. Code, § 1370, subd. (c)(1) [no more than three years]; § 5361 [one year]), while SVP commitments are indeterminate in duration. We cannot extend the holding of that case to this.

There are no cases on point. However, an attorney for a person who is the subject of a civil commitment petition for being mentally retarded and dangerous to self or others (§ 6500) has been held to lack the authority to waive the prospective committee's right to be present at the hearing, over the committee's objection. (*People v. Wilkinson* (2010) 185 Cal.App.4th 543.) The reviewing court in the *Wilkinson* case observed, citing *Masterson,* that counsel may waive his or her client's right to a jury trial, even over the objections of the client, but held that "it does not necessarily follow that an attorney may waive all of a client's rights." (*Wilkinson,* at p. 551.) *Wilkinson* was decided four months

after the Supreme Court issued the opinion in *Conservatorship of John L.*, but made no mention of the case, perhaps because *Wilkinson* involved a client who expressed a desire to attend the hearing.

Based on the weight of authority (*Wilkinson*, *Watson*, and *Fisher*), we agree that counsel does not have authority to waive his or her client's right to attend the hearing that may result in an indeterminate commitment over the client's objection. The next question is whether the error requires reversal. In a civil commitment proceeding, we use the *Chapman* test (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]) to review federal constitutional error. (*People v. Fisher*, *supra*, 172 Cal.App.4th at p. 1014.) Reversal is required unless the error is harmless beyond a reasonable doubt. (*Chapman*, at p. 24; *Fisher*, at p. 1014.)

The error here was harmless beyond a reasonable doubt. For the vast majority of the case, the defendant was unwilling to participate in the proceedings, going so far as to personally request a continuance in writing so that he could maintain his position in a vocational training program. At every hearing except for the single hearing in March 2009, at which he personally, and for the first time, indicated his desire to attend his trial, defendant's presence had been waived by counsel, and defendant never objected, as the committee in *Wilkinson* did. To the contrary, there are strong indications that defendant did not want to participate in the trial. This was again reflected on the ultimate day of trial, when counsel informed the court that he had met with defendant in March 2009 and had communicated with defendant since that date, and that defendant waived both his presence at trial and his right to be tried by a jury.

Thus, while the evidence is not undisputed, there is no indication that defendant objected to his attorney's waiver of his presence, or that he desired to be present on July 13, 2009, for his trial. The record reflects there was communication between defendant and his counsel *after* he requested to be present, in which he withdrew that request. If, as counsel represented, defendant had no desire to be present, then any error would be harmless beyond a reasonable doubt.

Additionally, at trial, defense counsel thoroughly cross-examined the prosecution experts and presented a defense expert who disagreed with the pedophilia diagnosis of the other experts who had evaluated defendant. (See *People v. Fisher*, *supra*, 172 Cal.App.4th at p. 1014.) Further, there was undisputed evidence that defendant refused to participate in treatment despite the many years he has been committed.[3] He has not, therefore, shown that his presence at trial would change his prognosis.

At oral argument defendant's appellate counsel argued that the "unknown unknowns" of what input defendant could have provided to his trial attorney if he had been present require reversal. He argued that where the record is silent as to how the defendant's presence would have affected the case, reversal is required. However, appellate counsel acknowledged that defendant could only clarify historical facts about his personal background and would not likely have affected the expert opinions presented

[3] Defendant was evaluated for an SVP commitment in 1999, and for recommitment in 2002, 2003, and 2005.

at trial to his advantage.[4] We disagree that any unknowns compel reversal. Details of defendant's personal background have been reported numerous times through several SVP proceedings, without any objection or challenge. Unless his past history has changed, there are no "unknown unknowns" defendant's presence could have elucidated.

Additionally, despite defendant's absence, his trial attorney capably presented expert evidence on the core issue to be determined in the proceedings: whether defendant was a pedophile who is a danger to others in that he is likely to engage in sexually violent criminal offenses. Moreover, counsel represented to the court that defendant did not wish to be present for the trial, which compels the conclusion that reversal for a new hearing, with no guarantee he will choose to attend (given the overwhelming number of hearings for which he waived his presence) is unnecessary. Further, in the years since defendant was first committed as an SVP, defendant has refused to participate in therapy or treatment to address his diagnosis. He had little to offer the court in his defense on the issue of his likelihood of committing future sexually violent criminal offenses, had he appeared.

Most importantly, contrary to the defense expert's opinion that defendant was not a pedophile, there was evidence beyond a reasonable doubt that he did meet the criteria for pedophilia. The result would not have been different with defendant's presence because the matter to be determined at trial depended on expert opinion based on professional assessments, which would not be affected by defendant's presence.

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[4] There are serious risks inherent in having defendant testify and exposing him to cross-examination.

The evidence supporting defendant's diagnosis was convincing under any standard. Dr. Marianne Davis (Dr. Davis) conducted more than one evaluation of defendant and found that defendant met the criteria for a diagnosis of pedophilia. She also testified that defendant was evaluated by four different doctors in 1999 and all four agreed on the diagnosis of pedophilia. Since that time, defendant has been reevaluated on a continuous basis and the diagnosis of pedophilia has been consistently given. Dr. Davis further testified that defendant had been offered sex offender treatment but had not completed Phase I. Based on assessments (Static-99, Static-2002, and MnSOST-R), Dr. Davis determined defendant posed a serious and well-founded risk of engaging in sexually violent predatory behavior.

A defense expert, Dr. Raymond Anderson (Dr. Anderson), testified that there was insufficient evidence to support a conclusion defendant was a pedophile because there was no evidence that defendant had an internal drive or fixation, or strong and persistent urges to commit sex offenses against children. The defense expert also testified on his behalf that defendant's age affected his level of risk, insofar as a 45 year old would repeat an offense less frequently than a 35 year old.

There is no possibility that defendant's presence at the hearing would have made a difference. Despite the opinion of Dr. Anderson that defendant was not a pedophile, the court was familiar with the numerous evaluations of defendant since his initial SVP commitment, and the fact that all experts concurred in the diagnosis of pedophilia. Further, evidence contained in the expert evaluations considered by the prosecution's expert and contained in the court's file supported an inference that defendant *did* respond

to an internal drive or urge to commit sex offenses against children, contrary to Dr. Anderson's conclusion. In 1989 he violated parole two times by having prohibited contact with children, near a school, despite being expressly prohibited from doing so. The fact he continued to follow a young boy to school after being warned off by his parole officer supports an inference that he suffers from a strong and persistent urge to commit sex offenses against children.

Notwithstanding the defense expert's opinion that defendant did not meet the diagnostic criteria for pedophilia, this was not the type of dispute that affected the reliability of the proceeding to the degree that defendant's presence would have made a difference. (See *People v. Wilkinson, supra,* 185 Cal.App.4th at pp. 551-552.) Thus, even though defendant did not personally waive his right to be present, any error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

3. Given the Different Standards Applicable to MDO's and SVP's, and the Low Rate of Success in the Treatment of Sexually Violent Predators, Different Treatment for This Class of Offenders Is Rational.

Defendant argues that the indeterminate commitment provisions of the SVPA violated federal guarantees of equal protection. To the extent that the decision in *People v. McKee* (2010) 47 Cal.4th 1172 found that SVP's and MDO's are similarly situated, both parties have requested that we suspend this appeal pending the finality of the proceedings in *McKee*, which was remanded to allow the prosecution to present justification for disparate treatment. We decline to suspend this appeal because the record in this case supports disparity of treatment where there are statutory differences

between SVP's and MDO's, and statistical reasons to treat the two classes of offenders differently.

The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. This initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Neither the Fourteenth Amendment of the Constitution of the United States nor the California Constitution precludes classification by the Legislature or requires uniform operation of the law with respect to persons who are different. (*People v. Guzman* (2005) 35 Cal.4th 577, 591.) A strict scrutiny standard is used to measure claims of disparate treatment in civil commitments. (*People v. Green* (2000) 79 Cal.App.4th 921, 924.)

In *People v. McKee, supra,* 47 Cal.4th 1172, the California Supreme Court observed that while persons committed as Mentally Disordered Offenders (MDO) (Pen. Code, § 2962) and SVP's do not share identical characteristics, they are similarly situated for the purpose of determining why one group received an indefinite commitment and had the burden of proving they should not be committed, while the other group was subject to short-term commitment renewable only if the People periodically proved that continuing commitment was justified. (*McKee,* at p. 1203.)

However, the Supreme Court did not hold, as a matter of law, that there was no justification for different treatment for SVP's and MDO's. It determined that MDO's and SVP's were "similarly situated for our present purposes," and held that the state was required "to give some justification for this differential treatment." (*People v. McKee, supra,* 47 Cal.4th at p. 1203.) Being similarly situated with others who receive different treatment under the law does not necessarily mean that the challenged statute violates equal protection guarantees. "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 state power." (*Id.* at p. 1200, quoting *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 172, italics added by court.) Instead, a finding that a defendant is similarly situated requires us to determine whether the statutorily authorized difference in treatment withstands the appropriate level of scrutiny. (*People v. Jeha* (2010) 187 Cal.App.4th 1063, 1073.)

SVP's represent a very small number of dangerous people that have committed certain specified crimes and suffer a certain type of mental illness predisposing them to commit sexually violent offenses. As our Supreme Court stated in *Cooley v. Superior Court, supra*, 29 Cal.4th at page 253, the SVP Act "narrowly targets 'a small but extremely dangerous group of [SVP']s . . . .'" SVP's diagnosed as pedophiles pose a greater risk of reoffending. Studies of sex offenders suggest that sexual offending may be different from other types of crime: Although sexual offenders may commit nonsexual crimes, nonsexual criminals rarely recidivate with sexual offenses. (R. Karl Hanson and Monique T. Bussière, *Predicting Relapse: A meta-Analysis of Sexual*

Offender Recidivism Studies, 66 Journal of Consulting & Clin. Psych., pp. 348-362 [No. 2, 1998].) In this respect, MDO's differ from SVP's in that they are less likely to commit a sexually violent offense upon release from custody.

By definition, an SVP is 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), italics added.) A "diagnosed mental disorder" includes a congenital or acquired condition affecting the emotional or volitional capacity that *predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.* (§ 6600, subd. (c), italics added.) Thus, an SVP's mental disorder predisposes him or her to commit a sexual offense.

Further, as Dr. Davis testified, certain classes of persons diagnosed with pedophilia, namely, homosexual nonrelated offenders such as defendant, have the highest rate for repeated offending compared with other sex offenders. She also testified that because SVP's are a special group of sexual offenders, the policy of the law is to corral them, keeping them away from society. This is due in part to the complex and often compulsive nature of the disorder. (Hall, et al., *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 Mayo Clin. Proc. 457, 467, 469 (April, 2007, vol. 4).) Several studies have failed to find any convincing evidence that treatment is effective in reducing recidivism of sexual

offenses. (Grossman, et al., *Are Sex Offenders Treatable? A Research Overview*, 50 Psychiatric Services 349, 356-357 (No. 3, 1999).)

Whereas an SVP's mental disorder must predispose the person to commit criminal sex acts (§ 6600, subd. (c)), no comparable showing is required for an MDO. For MDO's, the prisoner with the "severe mental disorder" (an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment, or which grossly impairs behavior, or that demonstrates evidence of an acute brain syndrome [Pen. Code, § 2962, subd. (a)]) must be found to represent "a substantial danger of physical harm to others." (Pen. Code, § 2962, subd. (d)(1).) No recent overt act must be proven to demonstrate that the prospective MDO constitutes a "substantial danger of physical harm." (Pen. Code, § 2962, subd. (f).)

Further, by statutory implication, an MDO must be found to be amenable to treatment. (Pen. Code, § 2962, subd. (d)(1) [". . . prisoner cannot be kept in remission without treatment, . . ."].) Amenability to treatment is not required for an SVP, nor is it required for treatment of that person. (§ 6606, subd. (b).)

SVP's are thus a subset of prisoners with severe mental disorders, who are predisposed to commit acts of sexual violence by virtue of their mental disorder, having been convicted of a violent sexual offense previously, as opposed to MDO's, who represent a substantial danger of physical harm to others due to a severe mental disorder, without having to prove an overt act. The SVPA thus requires proof of more than a mere predisposition to violence; it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the

person is not incapacitated. (*Kansas v. Hendricks* (1997) 521 U.S. 346, 357 [117 S.Ct. 2072, 138 L.Ed.2d 501].)

SVP's have a poor prognosis for successful treatment. In the present case, the trial court heard evidence that SVP treatment has a minimal rate of success. Dr. Davis testified that approximately 550 SVP's had been committed for treatment.[5] Of that number, only 15 or 16 persons have completed the treatment program. At trial, defense counsel argued to the court that this statistic rendered the program of treatment a "joke." The probability of successfully completing sex offender treatment is thus 2.9 percent (16 divided by 550[6]).

In other words, the SVPA targets persons with mental disorders that may never be successfully treated. (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1222.) The probability that defendant would reoffend by committing a new sexually violent crime was estimated in the medium-high range. Defendant's scores on the Static-99 instrument[7] place him in the 7.7 to 19.1 percent risk of reoffending within five years, and 8.2 to 27.3 percent risk of reoffending within 10 years. Because defendant has refused to

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[5] According to DMH statistics, as of July 1, 2010, 699 patients have been committed to the SVP treatment program. (Task Force Report of the Sex Offender Commitment Program, http://www.casomb.or/docs/csom%20full%20report.pdf [as of April 18, 2011].)

[6] Although statistics to date show the number of persons who have been committed as SVP's, we were unable to find more current statistics on the successful treatment of SVP's, leading to release. We therefore use the figures provided by Dr. Davis's testimony.

[7] Dr. Davis described the Static-99 is an actuarial instrument used to distinguish between recidivists and nonrecidivists.

participate in his own treatment for the bulk of his past commitments, the probability of his successful completion of sex offender treatment is further reduced.

DMH research shows that between 1986 and 2001, persons committed to the Forensic Conditional Release Program (CONREP) were rearrested 10.6 percent of the time, but the subsequent offenses were significantly less serious than the original offenses. (Cal. Dept. of Mental Health, CONREP, http://www.dmh.ca.gov/Services_and_Programs/Forensic_Services/CONREP/Research_Supporting_Documentation.asp [current as of April 18, 2011].) CONREP participants are persons found to be not guilty by reason of insanity (Pen. Code, § 1026), persons found incompetent to stand trial (Pen. Code, § 1370), or persons committed as MDO's. (Cal. Dept. of Mental Health, http://www.dmh.ca.gov/Services_and_Programs/Forensic_Services/CONREP/default.asp [current as of April 18, 2011.) This is roughly half the number of SVP recidivists, compelling the conclusion that the recidivism risk of SVP's is different from, and greater than, the risk posed by persons committed as MDO's.

At oral argument, defendant directed our attention to the case of *Lankford v. Idaho* (1991) 500 U.S. 110 [111 S.Ct. 1723, 114 L.Ed.2d 173], in urging us to defer ruling on the issue pending the finality of the remand proceedings in *People v. McKee, supra,* 47 Cal.4th at pp. 1209-1210. Defendant argued that because *McKee* had not been decided at the time of the defendant's trial, he was deprived of the opportunity to litigate the equal protection argument.

Lankford involved a defendant charged with murder with special circumstances. The prosecution in that case was not seeking the death penalty but, at the sentencing hearing, the court imposed the death penalty based on the seriousness of the offense, defendant's lack of credibility, and the presence of aggravating circumstances. The United States Supreme Court held that the lack of notice to the parties of the principal issue to be decided at the sentencing hearing violated the defendant's right to due process, saying, "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." (*Lankford v. Idaho*, *supra*, 500 U.S. at p. 126.)

We find *Lankford* inapposite because in this case defense counsel had notice of the issues to be resolved, and he cross-examined the People's expert on the legislative policy relating to indeterminate commitments in SVP proceedings, as well as the rates of recidivism. Additionally, death penalty cases involve a significantly different deprivation of liberty. While there is a significant deprivation of liberty related to an indeterminate commitment, release is nonetheless possible for an SVP who accepts treatment, whereas a person put to death does not have that opportunity once he has been executed.

In our view, the evidence adduced at defendant's trial provides sufficient justification for treating SVP's differently from MDO's. The imposition of an indeterminate commitment did not violate defendant's right to equal protection under the law.

DISPOSITION

The judgment is affirmed.

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s/Ramirez
P.J.

We concur:

s/McKinster
J.

s/Richli
J.