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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BRIAN ROBERT SCHULER, Defendant and Appellant.	H033090 (Santa Clara County Super. Ct. No. 211121)

I. INTRODUCTION

Appellant Brian Robert Schuler was convicted of forcibly raping a fellow resident of a locked residential psychiatric facility and sentenced to a term of eight years in state prison. Before Schuler was released on parole, the People filed a petition to commit him as a sexually violent predator under the Sexually Violent Predators Act (SVPA). (Welf. & Inst. Code, § 6600, et seq.)[1] A jury found the allegation that Schuler was a sexually violent predator to be true. By order filed on June 18, 2008, the trial court committed Schuler to the State Department of Mental Health for an indeterminate term.

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

On appeal, Schuler challenges the order of commitment. He contends that the finding that he is a sexually violent predator should be reversed for several reasons: the trial court abused its discretion in allowing the People's experts to testify regarding the details of prior misconduct other than the qualifying offense; the trial court abused its discretion when it admitted into evidence the district attorney's summaries of Schuler's criminal and institutional history; the admission of multiple hearsay, through the experts' testimony and the district attorney's summaries, violated due process; the trial court failed to sua sponte instruct the jury that the hearsay relied upon by the experts in forming their opinions was admitted for the limited purpose of showing the basis for the experts' opinions and not for the truth; trial counsel was ineffective in failing to request that limiting instruction; the jury was told that the consequence of finding Schuler to be a sexually violent predator was that he would be committed to a state hospital; and the SVPA violates the due process, ex post facto, double jeopardy, and equal protection clauses of the state and federal constitutions.

Pursuant to the recent decision of the California Supreme Court, *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*), ruling that the equal protection challenge to the SVPA has potential merit, we will reverse the order committing Schuler to the custody of the State Department of Mental Health for an indeterminate term and remand the matter to the trial court for the limited purpose of, as stated in *McKee*, allowing the People to 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.) We find no merit in the remaining issues raised by defendant, for the reasons stated below. [2]

[2] As we will discuss, in his supplemental briefing Schuler has conceded that his constitutional challenges, other than the equal protection claim, lack merit in light of *People v. McKee*, *supra*, 47 Cal.4th 1172.)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Commitment Petition*

In 1998, Schuler was a resident of Crestwood Manor (Crestwood), a locked residential psychiatric facility. L. was also a resident of Crestwood. One day, Schuler asked L. to listen to music with him in his room. When they went to his room, Schuler pushed L. onto his bed, held her down and raped her. Schuler was convicted of forcible rape (Pen. Code, § 261, subd. (a)(2)) of L. in 2000 and sentenced to a term of eight years in state prison.[3]

Before Schuler's scheduled parole release date of March 13, 2007, the People filed, on March 2, 2007, a petition to commit him as a sexually violent predator under the SVPA. The petition stated that the State Department of Mental Health had requested that Schuler be civilly committed as a sexually violent predator based upon the evaluations of two psychologists whose reports were attached to the petition.[4]

After a probable cause hearing was held, the trial court issued its May 24, 2007 order finding that there was probable cause to believe that (1) Schuler had been convicted of a qualifying sexually violent offense against at least one victim; and (2) he has a diagnosable mental disorder that makes it likely that he will engage in sexually violent predatory criminal conduct if released. The trial court also ordered the matter to be set for trial.

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[3] This court upheld the 2000 conviction. (*People v. Schuler* (Oct. 16, 2002, H022585) [nonpub. opn.].)

[4] The psychologists' evaluations attached to the commitment petition were not included in the record on appeal.

B. *The Jury Trial*

1. In Limine Orders

The jury trial began on June 2, 2008, with a hearing on the parties' motions in limine.[5] The trial court made several in limine rulings pertinent to this appeal.

Schuler's motion in limine No. 6 sought to exclude hearsay evidence of his prior nonqualifying misconduct obtained from police reports, probation reports, psychological evaluations, prison records and state hospital records. During oral argument on the motion, defense counsel contended that the specific facts of an incident of November 9, 1996, in which Schuler was alleged to have had sexual intercourse with J., a fellow resident of the Dominican Mental Health Facility, should be excluded due to unreliability. The court denied the motion, finding that J. had testified in an Evidence Code section 402 hearing and at a trial and therefore the evidence of the 1996 incident was sufficiently reliable for the experts to rely upon it. The court also denied the motion to exclude other evidence of Schuler's prior nonqualifying misconduct, finding that the evidence was relevant and, under Evidence Code section 352, the probative value was not "substantially outweighed" by a "substantial danger of undue prejudice or misleading the jury."

The trial court granted Schuler's motion in limine No. 9 to exclude any mention of the consequences of a true finding, such as any suggestion that he would go to a hospital for treatment if he was found to be a sexually violent predator.

The People's motion in limine No. 2 was granted over Schuler's objection. The trial court ruled that the expert witnesses would be allowed to testify regarding the evidence they had relied upon in forming their opinions, including Schuler's statements

[5] The record reflects that a hearing on some of the parties' motions in limine and other pretrial matters was held on November 14, 2007.

and their review of records pertaining to him. Defense counsel objected to the experts testifying about any of Schuler's prior nonqualifying misconduct.

The trial court denied the People's motion in limine No. 3 for an order allowing the admission of evidence of Schuler's nonqualifying prior sexual assaults and other criminal history. The court reasoned that "[n]aturally that information comes in as the basis of the expert's opinion, but it doesn't come in for the truth of the matter asserted."

Finally, the trial court granted the People's motion in limine No. 4 for an order allowing the People to question Schuler as if he was under cross-examination. Defense counsel objected on the ground that it would be unfair to allow the People to lead a person who is mentally ill during questioning. The court indicated that it would intervene if the examination became unfair to Schuler.

2. The People's Evidence

The People's evidence was presented through three expert witnesses and the testimony of Schuler. Because several of Schuler's contentions on appeal concern the experts' testimony, we will summarize each expert's testimony separately.

Testimony of Dr. Dale Arnold

Dale Arnold has a Ph.D. in psychology. His employment history includes working as a psychologist at Atascadero State Hospital where he was primarily assigned to the sexually violent predator program. Under his contract with the State Department of Mental Health, Dr. Arnold evaluated Schuler for the purposes of rendering a psychological diagnosis and assessing the risk that he would reoffend in a sexually violent predatory manner.

Dr. Arnold's evaluation included interviewing Schuler and reviewing Schuler's records from 25 different sources, including courts, prisons, and hospitals. According to Dr. Arnold, records such as police reports, court documents, probation reports, prison records, and hospital records are routinely used in performing sexually violent predator

evaluations and are reliable sources of information. Dr. Arnold found that the information regarding Schuler's crimes was consistent in the different sources.

Regarding the qualifying offense involving the rape of L., Dr. Arnold stated that the records, including a transcript of L.'s trial testimony, indicated that when L. and Schuler were at Crestwood, Schuler asked L. if she would like to listen to some music in his room. She agreed, but when they got to his room, "he pushed her down onto his bed and held her with his knee and then proceeded to rape her by putting his penis into her vagina." L. was acquainted with Schuler but they were not in a dating relationship. She had no intention of having sexual contact with Schuler and very clearly said no. Although the rape occurred in May 1998, L. did not report the crime until March 1999. The delay in reporting was due to her fear of Schuler. However, when L. encountered Schuler at another facility in March 1999, she reported the rape to staff because she was fearful of something like that happening again. Schuler told Dr. Arnold during his interview that his sexual contact with L. was consensual, which conflicted with his report to police that he never had any sexual contact with L.

To determine whether Schuler has "a diagnosable mental disorder that predisposes him to committing criminal sexual acts," Dr. Arnold looked at Schuler's psychosocial history, relationship history, sexual history, and criminal history. The records indicated that Schuler has been hospitalized between 20 and 30 times, with six hospitalizations before 1989. His criminal history included another rape in 1996, which led to a charge of sexual battery of J. at Dominican Mental Health Center. Dr. Arnold described the 1996 incident as follows: "[J.] was in the day room of the facility . . . . And Mr. Schuler had come up to her and came on to her sexually and at that time essentially started to fondle her and then stuck his finger into her vagina and then forced, coerced her to go into a room, a private room, where he then raped her." Dr. Arnold found that while there was some inconsistency in J.'s reports of the 1996 incident, she had consistently said that there were unwanted sexual acts with digital and penile penetration of her vagina.

The 1996 incident involving J. was significant, in Dr. Arnold's view, because it predated the 1998 rape of L. and showed that the social and legal consequences that Schuler had suffered as a result of the 1996 incident did not stop him from later raping L. Dr. Arnold acknowledged that the criminal case concerning the 1996 rape of J. was dismissed and Schuler was not convicted of any crime relating to that incident.

Dr. Arnold also reviewed a one-page chart provided by the district attorney entitled "Criminal History of Brian Schuler," which Dr. Arnold believed to accurately summarize Schuler's criminal history. The chart indicated the following incidents: (1) February 4, 1992, committing battery with a rock; (2) November 9, 1996, rape and digital penetration of J.; (3) January 20, 1998, battery conviction for biting a staff member on the cheek; (4) May 1998, rape of L.; (5) 1998, sexually harassing C., another patient, in the day room of a facility; (6) 1998, forcibly kissing a staff member; (7) 1998, exposing himself to a house cleaner; (8) 1998, exposing himself on several occasions to another staff member, rubbing his penis against her buttocks, and brushing up against her breasts; and (9) June 1999, grabbing and squeezing A.'s rear end. Some of the information pertaining to the incidents came from trial transcripts that Dr. Arnold had reviewed.

Additionally, Dr. Arnold determined that Schuler had a history of substance abuse involving cocaine, marijuana, methamphetamine, PCP, inmate-manufactured alcohol, and "Vic's inhalers." Schuler's prison records indicated that he had been disciplined for incidents of "mutual combat" in 2002 and 2003. Schuler also violated his parole in 2006 by failing to attend an outpatient mental health clinic and, as a result, his parole was revoked after two months.

Dr. Arnold further stated that Schuler's psychiatric history showed that he has received treatment for major mental disorders, including schizophrenia and schizoaffective disorder, since his early twenties. Dr. Arnold diagnosed Schuler as currently suffering from schizoaffective disorder, bipolar type; a personality disorder; paraphilia, not otherwise specified; and polysubstance abuse. The diagnosis of

paraphilia, not otherwise specified, means that Schuler has "recurrent fantasies, urges or behaviors to engage [in]. . . non-consenting sexual activity." Paraphilia is a "chronic and lifelong condition" that Schuler had recently demonstrated in his interactions with female staff, in particular by becoming fixated on one female and persistently trying to make contact with her.

Dr. Arnold also gave his opinion that Schuler was likely to commit another sexually violent offense if he were to be released into the community. His opinion was based in part on using a risk assessment actuarial instrument known as the Static 99. Schuler scored an eight, which placed him on the high risk category according to the Static 99. Schuler also scored a 30.5 on the Hare Psychopathy Checklist, which "placed him the severe range of psychopathy" and indicated that he is likely to reoffend much more quickly than the average sex offender. The third risk assessment tool that Dr. Arnold used was the Minnesota Sexual Offender Screening Tool, on which Schuler's score of 11 placed him the high risk category.

Dr. Arnold explained that his conclusion that Schuler was likely to reoffend in a sexually violent predatory manner was also based on Schuler's mental disorders, which included a deviant sexual interest and caused him to be unstable, impulsive, and manipulative, and also caused him to act under false beliefs.

Testimony of Dr. Mark Scherrer

Mark Scherrer received a Ph.D. in psychology and specializes in clinical and forensic psychology. His employment history includes serving as a unit psychologist at Atascadero State Hospital where he worked with mentally disordered offenders. He was later promoted to a position in the forensic services department that involved providing evaluations throughout the hospital, including sex offender evaluations. He is currently in private practice and evaluated Schuler under his contract with the State Department of Mental Health.

Dr. Scherrer's evaluation of Schuler included two interviews and reviewing Schuler's prison records and state hospital medical records, as well as records of his criminal history and psychological and psychiatric evaluations. He also reviewed police and probation reports regarding the rape of L. as well as L.'s trial testimony. From his review, Dr. Scherrer determined that when Schuler was a resident of a locked facility, he asked L. to listen to some music in his room and then got L. on his bed, after which he held her down with his knee, arm, and hands on her shoulders, removed her pants, and forcefully raped her over her objections.

Schuler's criminal history involved another rape, according to Dr. Scherrer. In 1996, Schuler sexually assaulted J., a 21-year-old female patient, in a locked psychiatric wing of a hospital where they were both patients. J. was severely mentally ill. Schuler accosted J. in a day room where he digitally penetrated her, then got her into a room where he digitally penetrated her again and raped her against her will. Dr. Scherrer was aware that the criminal case involving J. was ultimately dismissed.

Dr. Scherrer was also aware of additional criminal acts by Schuler, which were sufficiently summarized on a chart provided by the district attorney and marked as People's exhibit No. 1. The additional criminal acts included a battery conviction in 1992, and a "set of incidents" in 1998 involving either patients or employees of the facility where Schuler was a resident. Dr. Schuler found that the 1998 incidents had a common sexual element, consisting of Schuler accosting women who were not willing, including unsolicited kissing, exposing himself, rubbing his genitals on their buttocks, and grabbing their buttocks.

In Dr. Scherrer's opinion, Schuler suffers from mental disorders that predispose him to committing criminal sexual acts. Dr. Scherrer's opinion was based upon the information he had received from his records review and his interviews with Schuler. Dr. Scherrer diagnosed Schuler as suffering from two primary mental disorders, paraphilia not otherwise specified (sex with non-consenting persons) and schizoaffective disorder,

bipolar type. Additionally, Dr. Scherrer determined that Schuler has a borderline personality disorder, not otherwise specified, with antisocial and narcissistic traits.

Dr. Scherrer further determined that what made Schuler most sexually dangerous was the paraphilic disorder, since he has an urge for coercive sexual activity that is exacerbated by the schizoaffective disorder that impairs his judgment and impulse control, as well as the personality disorder that causes him not to care about the rights of others.

As to his risk assessment, Dr. Scherrer concluded that Schuler is likely to engage in sexually violent predatory criminal behavior. His risk assessment included his diagnosis of Schuler's mental disorders and data from risk assessment tools. Using the Static 99 risk assessment tool, Dr. Scherrer gave Schuler a score of eight. Dr. Scherrer originally gave Schuler a score of seven, but after later learning that rape victim J. was a stranger to Schuler, Dr. Scherrer increased his score to eight. Both scores placed Schuler in the high risk category.

Testimony of Dr. Andrea Shelley

Andrea Shelley is a forensic psychologist who performed an evaluation of Schuler to determine whether he met the statutory criteria for a sexually violent predator. She has a Ph.D. in clinical psychology. Her employment history includes treatment of sex offenders at Patton State Hospital as well as risk assessment of released sex offenders. She currently works under contract with the State Department of Mental Health to evaluate individuals who are alleged to be sexually violent predators.

As part of her evaluation, Dr. Shelley interviewed Schuler and reviewed about 20 different sources of information about him, including his criminal history as accurately summarized on the chart marked People's Exhibit No. 1. She had also previously performed a mentally disordered offender evaluation of Schuler. When Dr. Shelley first evaluated Schuler to determine if he was a sexually violent predator, she determined that he did not have a diagnosis as defined in the SVPA and he was not likely

to reoffend in a sexually violent criminal predatory manner. She changed her opinion after reviewing the testimony of other patients and staff regarding their experiences with Schuler, as well as reports about Schuler's non-consensual sexual intercourse with victim J. This information indicated to Dr. Shelley that Schuler has a "chronic pattern" of "being sexual with women against their will." Dr. Shelley further stated, "[I]t was the details of those events that changed my mind." A two-page chart entitled "Institutional History of Brian Schuler," marked as People's exhibit No. 9, accurately summarized some of Schuler's institutional behavior from June 2007 to March 2008, according to Dr. Shelley.

Dr. Shelley's current opinion is that Schuler has two mental disorders, including schizoaffective disorder, bipolar type, and personality disorder not otherwise specified involving antisocial, borderline and narcissistic features. She did not initially diagnose him as suffering from paraphilia, but added that diagnosis after further records review indicated that between the years of 1994 and 1999 Schuler had touched or had intercourse with eight women without their consent.

Dr. Shelley also believes that Schuler has a high risk of committing sexually violent predatory offenses due to the combination of his mental disorders, which make it extremely difficult for him to control his desire to have sex with non-consenting persons or to care about the other person. Additionally, her review of his records showed that he had a pattern of "becoming manic and hypersexual."

The inconsistencies in the reports by rape victim L. did not change her opinions because L. had consistently said that Schuler had forcible sexual intercourse with her against her will. L.'s one-year delay in reporting the rape was not significant, according to Dr. Shelley, because residents of a board and care facility may be afraid of the consequences of reporting or fear that they will not be believed. However, Dr. Shelley acknowledged that she had some doubt as to whether the claim of rape by J. was valid due to the inconsistencies about that incident.

Dr. Shelly's opinion was also based upon Schuler's score of eight on the Static 99 risk assessment tool, which placed him in the high risk category. Schuler also received a high risk score on the Minnesota Sexual Offender Screening Tool.

Testimony of Brian Schuler

During his testimony, Schuler denied that he suffered from schizoaffective disorder and described himself as "a real ladies' man." He acknowledged that he had intercourse with L. twice, but told the investigating police officer that he did not have intercourse with her because his attorney was not present. He knew J. "from the mental health system" and wanted to be with her, but he did not rape her.

3. Defense Evidence

Schuler presented one expert witness, Dr. Brian Abbott. Dr. Abbott has a Ph.D. in clinical psychology and is in private practice as a clinical social worker and a clinical psychologist. His work experience includes the position of executive director of the Giarretto Institute, which provides therapeutic services and counseling to sexually abused children, their families, and the perpetrators. More recently, he has been in private practice as a psychologist. He performs forensic evaluations, including sexually violent predator evaluations. The trial court found that Dr. Abbott was qualified as an expert "in psychology and statistical methods as it relates to sexual recidivisim."

Dr. Abbott testified regarding his statistical analysis of the Static 99 risk assessment tool. He believes that the Static 99 tends to overpredict the sexual recidivism rate for persons who, like Schuler, are over the age of 40. Dr. Abbott also believes that the Static 99 has never been validated for use on sexually violent predators. Additionally, there is a danger of obtaining a false positive (determining a person is a likely recidivist) on the Static 99. Dr. Abbott further explained that because Schuler is nearly 49 years of age, he falls into an age group where the rate of recidivism declines and is one-third less than what the Static 99 would predict. Consequently, Dr. Abbott considers that "it would

be dangerous to try and quantify someone's risk level based on their categorical [Static 99] score of zero to six plus."

Dr. Abbot also criticized the People's expert witnesses' diagnosis of paraphilia not otherwise specified, or being aroused by coercive sexual behavior, as "essentially an invented diagnosis." However, he did not provide any other specific opinions regarding Schuler's mental condition or his risk of reoffending.

4. Jury Verdict and Commitment Order

On June 18, 2008, the jury rendered its verdict finding the petition alleging that Schuler was a sexually violent predator within the meaning of section 6600 to be true.

On the same day, June 18, 2008, the trial court issued its order committing Schuler to the custody of the State Department of Mental Health for an indeterminate term for appropriate treatment and confinement in a secure facility, pursuant to section 6604. Thereafter, Schuler filed a timely notice of appeal.

III. DISCUSSION

On appeal, Schuler argued that the finding that he is a sexually violent predator should be reversed for several reasons: the trial court abused its discretion in allowing the People's experts to testify regarding the details of prior misconduct other than the qualifying offense; the trial court abused its discretion when it admitted into evidence the district attorney's summaries of Schuler's criminal and institutional history; the admission of multiple hearsay, through the experts' testimony and the district attorney's summaries, violated due process; the trial court failed to sua sponte instruct the jury that the hearsay relied upon by the experts in forming their opinions was admitted for the limited purpose of showing the basis for the experts' opinions and not for the truth; trial counsel was ineffective in failing to request that limiting instruction; the jury was told that the consequence of finding Schuler to be a sexually violent predator was that he would be committed to a state hospital; and the SVPA violates the due process, equal protection, ex post facto and double jeopardy provisions of the state and federal

constitutions. We will begin with a brief overview of the SVPA, followed by our analysis of the issues arising from the expert witness testimony.

A. *Brief Overview of the SVPA*

The SVPA provides for the involuntary civil commitment, for treatment and confinement, of an individual who is found, by a unanimous jury verdict (§ 6603, subds. (e) & (f)), and beyond a reasonable doubt (§ 6604), to be a "sexually violent predator" (*ibid*). The criteria for a finding that a person is a sexually violent predator are set forth in section 6600, subdivision (a)(1) as follows: " '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."

The SVPA was amended twice in 2006 -- in September, by Senate Bill 1128 (Stats. 2006, ch. 337, § 62), and in November, by Proposition 83 (see Cal. Const., art. II, § 10, subd. (a)). Prior to the amendments in 2006, an individual determined to be a sexually violent predator was committed to the custody of the Department of Mental Health for a two-year term. The individual's term of commitment could be extended for additional two-year periods. (Former § 6604, as amended by Stats. 2000, ch. 420, § 3; former § 6604.1, as amended by Stats. 2000, ch. 420, § 4.)

On September 20, 2006, the Governor signed into law Senate Bill 1128, which amended the SVPA effective immediately. (Stats. 2006, ch. 337, § 62.) Among other changes, the amended SVPA provided for an indeterminate term of commitment. (Stats. 2006, ch. 337, § 55.) The references to two-year commitment terms and extended commitments in sections 6604 and 6604.1 were eliminated. (Stats. 2006, ch. 337, §§ 55, 56.)

Less than two months after Senate Bill 1128 amended the SVPA, voters approved Proposition 83, which amended the SVPA effective November 8, 2006. (See Cal. Const.,

art. II, § 10, subd. (a).) Like Senate Bill 1128, Proposition 83 amended the SVPA to provide that a sexually violent predator's commitment term is "indeterminate." (§ 6604; see § 6604.1.) Proposition 83 also eliminated all references to a two-year term of commitment and most references to an extended commitment in sections 6604 and 6604.1. Thus, a person found to be a sexually violent predator under the SVPA is subject to an indeterminate term of involuntary civil commitment. (*People v. Whaley* (2008) 160 Cal.App.4th 779, 785-787.)

B. *Expert Witness Testimony*

Schuler contends, for several reasons, that the trial court abused its discretion when the court allowed the People's expert witnesses to testify in detail about his alleged nonqualifying "offenses or behaviors" in violation of Evidence Code section 352. Our analysis begins with the applicable standard of review.

1. Standard of Review

The standard that generally applies to review of a claim of erroneous admission of evidence is abuse of discretion. " 'As a general matter, a trial court is vested with broad discretion in ruling on the admissibility of evidence. The court's ruling will be upset only if there is a clear showing of an abuse of discretion, i.e., that the court exceeded the bounds of reason.' [Citation.]" (*People v. Dean* (2009) 174 Cal.App.4th 186, 193.) Also, " '[i]t is . . . well settled that the erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice. [Citation.] "A 'miscarriage of justice' should be declared only when the court 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." [Citations.]' [Citations.]" (*People v. Fields* (2009) 175 Cal.App.4th 1001, 1018.)

Keeping in mind the general standard of review, we next consider the limitations on expert witness testimony.

2. Limits on Expert Witness Testimony

In the present case, the claim of erroneous admission of evidence arises from expert witness testimony. "Evidence Code section 801[6] limits expert opinion testimony to an opinion that is '[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates . . . .' [Citation.]" (*People v. Gardeley* (1997) 14 Cal.4th 605, 617 (*Gardeley*).)

Thus, expert testimony may be based "on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.]" (*Gardeley*, *supra*, 14 Cal.4th at p. 618.) "Of course, any material that forms the basis of an expert's opinion must be reliable. [Citation.]" (*Ibid*.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for the expert's opinion testimony. [Citations.]" "And because Evidence Code section 802[7]

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[6] Evidence Code section 801 provides, "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on a matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

[7] Evidence Code section 802 provides that "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]" (*Ibid.*)

A trial court, however, " 'has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.' [Citation.]" (*Gardeley, supra*, 14 Cal.4th at p. 619.) "A trial court also has the discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation.]" (*Ibid; People v. Bell* (2007) 40 Cal.4th 582, 608.)

Further, "[b]ecause an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment. [Citations.] Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his [or her] opinion and should not be considered for their truth. [Citation.]" (*People v. Montiel* (1993) 5 Cal.4th 877, 919 (*Montiel*); *People v. Catlin* (2001) 26 Cal.4th 81, 137.) "Sometimes a limiting instruction may not be enough. In such cases, Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citations.]" (*People v. Bell, supra*, 40 Cal.4th at p. 608.)

3. Analysis

According to Schuler, the trial court erred in allowing the People's expert witnesses to testify about the details of his nonqualifying "offenses or behaviors" because the hearsay evidence relied upon by the expert witnesses was unreliable and a proper limiting instruction was not given. He also argues that the error is reversible because he

would have obtained a more favorable outcome if the jurors had not heard a substantial amount of inadmissible hearsay evidence pertaining to his alleged nonqualifying "offenses or behaviors" and had not assumed the evidence to be true.

The People disagree, contending that the trial court properly allowed the expert witnesses to testify as to the bases of their opinions because the records of Schuler's prior acts, including probation reports, police reports, psychological reports, prison records, and hospital files, are of the type commonly relied upon by expert witnesses in sexually violent predator cases. The People also argue that Schuler had the opportunity at the time of trial to show that the expert witnesses' reliance on such records was unreasonable and assert that Schuler has not, on appeal, demonstrated that the records of his prior acts were so unreliable that they should have been excluded. Additionally, the People maintain that the recent decision in *Dean*, *supra*, 174 Cal.App.4th 186, suggesting that expert witnesses in sexually violent predator trials should not testify regarding the details of nonqualifying criminal behavior, was wrongly decided. They argue that the expert witnesses must discuss the nature and details of a defendant's prior acts in order to explain why he or she suffers from a mental disorder and poses a substantial risk of reoffending.

At the outset, we observe that it is undisputed that a limiting instruction was not given in this case that would have informed the jurors "that matters admitted through an expert go only to the basis of his [or her] opinion and should not be considered for their truth," as set forth in *Montiel, supra*, 5 Cal.4th at page 919. Therefore, to the extent that any hearsay problems arose from the testimony of the People's expert witnesses, they were not cured by the giving of the limiting instruction approved in *Montiel*.

However, we agree with the People that the evidence regarding Schuler's prior nonqualifying misconduct that was presented through the expert witnesses' testimony was properly before the jury for the nonhearsay purpose of showing the bases for the experts' opinions. (*People v. Martinez* (2001) 88 Cal.App.4th 465, 486.) As this court has previously determined, the SVPA "contemplates and expressly provides for the

disclosure of all relevant records, including medical and psychological records, and their consideration in [sexually violent predator] commitment proceedings." (*Id*. at p. 475-476; § 6601, subd. (b) [screening by State Department of Corrections and Rehabilitation for likely sexually violent predators must be based on review of the person's social, criminal and institutional history]; § 6601, subd. (c) [evaluation by State Department of Mental Health to determine whether a person is a sexually violent predator must assess risk factors including criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder]; § 6603, subd. (a) [person subject to SVPA is entitled to access to all relevant medical and psychological records and reports].)

In short, "the SVPA contemplates that the psychological evaluators will have access to and consider these records in rendering their opinions and writing their reports." (*People v. Martinez*, s*upra*, 88 Cal.App.4th at p. 476.) The same is true when the psychological evaluators testify at trial, because the prosecutor may properly examine a psychological evaluator regarding the relevant information contained in the records that the evaluator relied upon in forming the opinion that a person is a sexually violent predator. (*Id*. at p. 482.) Moreover, Schuler has not challenged, either on appeal or in the trial court, the testimony of Dr. Arnold that the records that he reviewed in forming his expert opinions about Schuler, including police reports, court documents, probation reports, prison records, and hospital records, are routinely used in performing sexually violent predator evaluations. Thus, Schuler cannot show that the out-of-court statements in the records relied upon by the People's experts were not of the type reasonably relied upon by psychological evaluators in performing sexually violent predator evaluations. (Evid. Code, § 801; *Gardeley*, *supra*, 14 Cal.4th at p. 618.)

However, Schuler emphasizes his contentions that the trial court abused its discretion in denying his motion in limine No. 6 to exclude hearsay evidence of his nonqualifying "offenses or behaviors" obtained from police reports, probation reports,

psychological evaluations, prison records and state hospital records because the evidence was unreliable. Schuler also argues that the experts' testimony regarding his prior nonqualifying misconduct contained a level of detail that was unduly prejudicial, relying on *Dean*, *supra*, 174 Cal.App.4th at pages 487-489. We find no merit in either contention.

Reliability

The contention that the evidence regarding Schuler's prior nonqualifying misconduct, on which the experts based their opinions, was unreliable is not persuasive in light of the record below. Schuler's motion in limine No. 6 argued for a blanket exclusion of all of the evidence concerning his prior nonqualifying offenses and misconduct, without specifying any particular piece of evidence or information as lacking sufficient indicia of reliability to satisfy due process other than the evidence regarding the alleged rape of J. Schuler also failed to object during trial to the experts' testimony regarding any specific act of prior nonqualifying misconduct on the ground that the testimony was based on unreliable evidence. We therefore find that Schuler has forfeited this issue on direct appeal as to any evidence of misconduct other than the rape of J. (Evid. Code, § 353;[8] *People v. Doolin* (2009) 45 Cal.4th 390, 448.)

While Schuler argued that J.'s reports of the rape were unreliable due to her mental illness and because the criminal case involving J. had been dismissed, the People's psychological experts, Dr. Arnold and Dr. Scherrer, testified that they found the

[8] Evidence Code section 353 provides, "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

information concerning that offense to be reliable. The experts explained that despite J.'s severe mental illness and the lack of any criminal prosecution, the rape incident was significant because J. had consistently reported the key facts that Schuler had forced her to have sexual intercourse. Additionally, Schuler had the opportunity to cross-examine these experts as to the information and reasoning underlying their opinions. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155; Evid. Code, § 721, subd. (a).)[9] Our review of the record shows that the issue of whether the evidence concerning the alleged rape of J. was reliable was thoroughly explored during Schuler's cross-examination of the experts.

Moreover, the trial court found that J. had testified in an Evidence Code section 402[10] hearing and at a trial and therefore the evidence of the 1996 incident was sufficiently reliable for the experts to rely upon it. The court also denied the motion to exclude other evidence of Schuler's prior nonqualifying misconduct, finding that the evidence was relevant and, under Evidence Code section 352, the probative value was not "substantially outweighed" by a "substantial danger of undue prejudice or misleading the jury." On this record, we determine that Schuler has failed to show that the trial court abused its discretion in making these findings and denying his motion in limine No. 6 to

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[9] Evidence Code section 721, subdivision (a) provides, "(a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion."

[10] Evidence Code section 402 provides, "(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article. [¶] (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests. [¶] [c] A ruling on the admissibility of the evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute."

exclude evidence of his nonqualifying offenses and misconduct on the ground of unreliability.

Level of Detail

We also find no merit in Schuler's contention that the trial court erroneously allowed the experts to testify to an improper level of detail regarding Schuler's prior nonqualifying misconduct.

The California Supreme Court has stated the general rule that " '[w]hile an expert may state on direct examination the matters on which he [or she] relied in forming his opinion, he [or she] may not testify as to the details of such matters if they are otherwise inadmissible. [Citations.] The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including the matters he [or she] considered in forming them, he [or she] may not under the guise of reasons bring before the jury incompetent hearsay evidence. [Citations.]' [Citation.]" (*People v. Coleman* (1985) 38 Cal.3d 69, 92 (*Coleman*).) In other words, "[t]he court in *Coleman* was attempting to balance the desirability of allowing an expert to explain the basis for an opinion and the need to prevent the jury from considering inadmissible matter for an improper purpose." (*People v. Martin* (2005) 127 Cal.App.4th 970, 977.) Thus, some level of detail may be necessary. "An expert opinion cannot reasonably be based on nonspecific and conclusory hearsay that does not set forth any factual details of an act necessary for the opinion." (*People v. Dodd* (2005) 133 Cal.App.4th 1564, 1570 [parole report lacked sufficient factual detail on which to base an expert opinion that the defendant was a mentally disordered offender].)

In *Dean, supra*, 174 Cal.App.4th 186, which concerned an appeal from an order committing the defendant as a sexually violent predator under the SVPA, the appellate court addressed the issue of whether the trial court had abused its discretion in allowing the People's experts to testify as to the details of the defendant's institutional behavior as noted in the records of Atascadero State Hospital and other institutions. (*Id.* at p. 196.)

The court determined that testimony of one expert should have been limited as follows: "We believe Dr. Goldberg's testimony should have been limited. In bringing before the jury the *matters relied upon* to form his opinion, his testimony should have been circumscribed to more general testimony. He could have permissibly testified that the records demonstrated the extent to which [the defendant] participated in treatment while at [Atascadero State Hospital], the degree to which [the defendant] followed his diabetic regimen, and how he interacted with women staff members and other individuals at [Atascadero State Hospital]. Additionally, he could have properly testified that the records reflected [the defendant's] interaction with the criminal justice system. Limiting Dr. Goldberg's testimony in such a way still affords him the ability to communicate to the jury the matters relied upon in forming his opinion without bringing before it inadmissible hearsay." (*Id.* at p. 200.)

The *Dean* court also determined that the trial court had abused its discretion by allowing another expert, Dr. Starr, to testify regarding "the specifics of the entries" in the records regarding prior nonqualifying misconduct, such as Dean's juvenile offenses, other criminal convictions, and reports of nonconsensual sex while in custody. (*Dean, supra*, 174 Cal.App.4th at p. 200.) The court found that "[t]his testimony is highly inflammatory and, without foundational testimony concerning the records, is of questionable reliability. The value of this testimony to support the bases of Dr. Starr's opinions is simply outweighed by the risk that the jury will impermissibly use the information." (*Id.* at pp. 200-201, fn. omitted.)

In so ruling, the court in *Dean* stated that "[e]xperts can properly and credibly place before the jury the matters they relied upon and the nature of those matters, without testifying as to the specific details of the documentary entries not otherwise admitted into evidence." (*Dean, supra*, 174 Cal.App.4th at p. 201.) The court nevertheless concluded that the trial court had not committed reversible error in allowing the experts to improperly testify as to the details contained the records, because the trial court had given

a limiting instruction, the majority of the information was also testified to by the defendant, and it was not reasonably probable that the defendant would have achieved a more favorable result "in the absence of the jury hearing about these matters on the direct examination of the prosecutor's experts." (*Id*. at p. 202.)

We view the decision in *Dean* as applying the rule articulated in *People v. Coleman, supra*, 38 Cal.3d at page 92--that while an expert may state on direct examination the matters on which he or she relied in forming his opinion, he or she may not testify as to the details of such matters if they are otherwise inadmissible--to the facts of the case before that court. We do not understand *Dean* to prohibit expert testimony in SVPA proceedings regarding any of the details contained in institutional records. In other words, we believe that the trial court's exercise of its discretion regarding the level of detail allowed when an expert testifies as to the material that formed the basis for his or her opinion must be made on a case by case basis. The trial court must balance the need for an expert to adequately explain the basis for an opinion with the need to prevent the jury from considering inadmissible evidence for an improper purpose. (*People v. Martin, supra*, 127 Cal.App.4th at p. 977; *Gardeley, supra*, 14 Cal.4th at p. 619; *People v. Bell, supra*, 40 Cal.4th at p. 608.)

In the present case, as we have noted, the trial court denied Schuler's motion in limine to exclude hearsay evidence of his prior nonqualifying misconduct obtained from police reports, probation reports, psychological evaluations, prison records and state hospital records. During oral argument on the motion, defense counsel only contended that the specific facts of the alleged 1996 rape of J. should be excluded due to unreliability. Then, at the time of trial defense counsel did not object to any of the experts' testimony on the ground that the level of detail given about Schuler's nonqualifying offenses and misconduct was excessive. Therefore, Schuler has forfeited his appellate challenge to the experts' testimony on that ground. (Evid. Code, § 353; *People v. Doolin, supra*, 45 Cal.4th at p. 448.)

Even assuming that Schuler had objected, we would find that the level of detail was appropriate because the details of Schuler's psychosexual history, as indicated in the records reviewed by the experts, were relevant to the experts' diagnoses of Schuler's mental disorders. Most significantly, the details of Schuler's interactions with female patients and staff were relied upon by the experts in forming their opinion that Schuler is likely to reoffend as a sexual predator because his mental disorders cause him to lack impulse control over his urge to have coercive, nonconsensual sex. For example, Dr. Shelley testified that her review of the details of Schuler's interactions with female patients and staff, as noted in his records, indicated to her that Schuler had a "chronic pattern" of "being sexual with women against their will."

Moreover, much of the factual detail regarding the alleged rape of J. was elicited by defense counsel during cross-examination of Dr. Arnold, after defense counsel asked, "Now, the description of the [J.] incident that you gave left out quite a few factors, is that fair to say?" Defense counsel then asked a series of questions regarding the details of the incident, in an effort to demonstrate the inconsistencies in J.'s reporting of the incident. Defense counsel also asked Dr. Arnold a series of questions regarding the details of Schuler's uncharged sexual misconduct in an effort to show that the misconduct was not sexually violent.[11] Thus, our review of the record shows that the level of detail regarding

[11] For example, the following colloquy occurred during defense counsel's examination of Dr. Arnold: "Q. Then we have the situation with Lynn who was working there . . . . [¶] A. Yes. [¶] Q. She indicates that she's preparing for a Halloween party, that Mr. Schuler is very excited by what's going on, and during the preparations and that type of excitement, he grabs her and kisses her? [¶] A. Correct. Actually, it's my understanding that he asked for a hug and she is initially stating no, and then she consents to the hug, and that's when she is grabbed by Mr. Schuler and he kisses her hard. . . . [¶] . . . [¶] Q. So it appears that she doesn't think this is serious enough behavior to call the police right away, and it's something that perhaps she expecting that's going to happen and that she's going to try to take corrective action on her own by counseling Mr. Schuler? [¶] A. Yes. [¶] Q. And so at that point Mr. Schuler really gets obnoxious with

Schuler's nonqualifying misconduct to which the experts testified was relevant and necessary for an explanation of the bases for the experts' opinions, and was also brought out on cross-examination in order to support Schuler's defense theories. Accordingly, we find that the trial court did not abuse its discretion in allowing the expert witnesses to testify regarding the details of Schuler's nonqualifying offenses and misconduct.

Finally, even assuming that some of the details of Schuler's nonqualifying misconduct should have been excluded, we would find the error to be harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) It is not reasonably probable that, had the People's expert witnesses provided less detail regarding the facts of the nonqualifying misconduct on which they based their uncontradicted opinions that Schuler meets the criteria for a sexually violent predator, the outcome would have been different.

Limiting Instruction

Finally, we consider Schuler's contention that a limiting instruction should have been given that told the jurors that the matters on which an expert based his or her opinion were admitted only to show the basis of the opinion and not for the truth of the matter. Although Schuler did not request such an instruction at the time of trial, he argues on appeal that the trial court had a duty to sua sponte give this instruction, trial counsel was ineffective in failing to request the instruction, and the absence of a proper limiting instruction constitutes reversible error.

The instructions given by the trial court regarding expert testimony included the following instructions based on CALCRIM No. 332: "Witnesses were allowed to testify as experts and to given opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the

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her and says she would be missing out on him and he was going to cut off her head? [¶] A. Yes."

instructions about the believability of witnesses generally. In addition, consider the experts[’] knowledge, skill, experience, training and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether the information on which the expert relied was true and accurate. You may disregard any opinion that you find unreliable, unreasonable or unsupported by the evidence. [¶] An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that assumed fact is not true, consider the effect of the expert’s reliance on that fact in evaluating the expert’s opinion. [¶] If the expert witness disagrees with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters on which each witness relied. You may also compare the experts’ qualifications.”

The trial court also instructed the jurors that “[d]uring the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.” However, our review of the record indicates that the trial court did not expressly advise the jurors that any particular evidence was admitted for a limited purpose.

The People maintain that the instructions given regarding expert testimony properly required the jurors to determine whether the evidence relied upon by the experts concerning Schuler’s nonqualifying offenses and misconduct was true and accurate. They explain that “whether the jury ‘was specifically told that [the evidence was admitted] for only the purpose of describing how [the experts] arrived at their opinions’ is a distinction without a difference in SVP cases.” They further explain that “[u]nlike a criminal case, there was no danger of the jury drawing an improper inference based on [Schuler’s] character. The ultimate issue *was* [Schuler’s] character. Therefore, drawing

the inference that the past behavior was true, thus supporting a belief that [he] suffers from a mental disorder that makes him likely to reoffend, would not be improper."

Our evaluation of Schuler's claim of instructional error is guided by the California Supreme Court's rulings on limiting instructions, as follows: " 'When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly. (Evid. Code, § 355, italics added.) Thus, although a court should give a limiting instruction on request, it has no sua sponte duty to give one. [Citation.] [*People v.*] *Collie* [(1981) 30 Cal.3d 43] at page 64, recognizes a possible exception in 'an occasional extraordinary case in which unprotested evidence . . . is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052.) We independently determine whether the trial court had a duty to give a particular jury instruction. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

Applying these rules, we find that the trial court did not have a sua sponte duty to instruct the jurors that the matters on which an expert based his or her opinion were admitted only to show the basis of the opinion and not for the truth of the matter. While the matters on which the People's experts primarily based their opinions--Schuler's criminal offenses and other misconduct as stated in his records--were arguably dominant in the experts' testimony, these matters were highly relevant to the experts' opinions regarding Schuler's mental disorders and the risk that he would reoffend as a sexually violent predator. Therefore, this case is not " 'an extraordinary case' " warranting a sua sponte limiting instruction. (*People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1051-1052.)

The decision in *People v. Housley* (1992) 6 Cal.App.4th 947 (*Housley*), on which Schuler relies, does not convince us that the trial court had a sua sponte duty to give a limiting instruction. In *Housley*, the issue was whether a sua sponte limiting instruction should have been given with respect to a psychological expert's testimony about child

sexual abuse accommodation syndrome (CSAAS). (*Id*. at p. 956.) The appellate court determined that "because of the potential for misuse of CSAAS evidence, and the potential for great prejudice to the defendant in the event such evidence is misused, it is appropriate to impose upon the courts a duty to render a sua sponte instruction limiting the use of such evidence. Accordingly, in all cases in which an expert is called to testify regarding CSAAS we hold the jury must sua sponte be instructed that (1) such evidence is admissible solely for the purpose of showing the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested; and (2) the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true."[12] (*Id.* at pp. 958-959.)

The present case is distinguishable. Unlike *Housley*, the expert testimony regarding Schuler's nonqualifying offenses and misconduct was not "unusually susceptible of being misunderstood and misapplied by a jury . . . ." (*Housley*, *supra*, 6 Cal.App.4th at p. 958.) To the contrary, we find that the expert testimony regarding the record of Schuler's nonqualifying offenses and misconduct was likely to be understood by the jurors to form a substantial part of the basis for the experts' opinions that Schuler had certain mental disorders and was likely to reoffend as a sexually violent predator. The jurors were also instructed to evaluate the reasons for the experts' opinions, as stated in the following portion of the instructions on expert testimony: "In addition, consider . . . the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether the information on

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[12] CALCRIM No. 1193 is based upon *Housley, supra*, 6 Cal.App.4th 947: "You have heard testimony from <*insert name of expert*> regarding child sexual abuse accommodation syndrome. [¶] _____'s <*insert name of expert*> testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her). [¶] You may consider this evidence only in deciding whether or not _____'s <*insert name of alleged victim of abuse*> conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of (his/her) testimony."

which the expert relied was true and accurate. You may disregard any opinion that you find unreliable, unreasonable or unsupported by the evidence." Under these circumstances, we do not believe that a further limiting instruction was necessary to prevent the jurors from misapplying or misusing the evidence regarding Schuler's nonqualifying offenses and misconduct.

Our determination is supported by the decision in *Montiel*, *supra*, 5 Cal.4th at pages 919-920, which involved a first degree murder conviction. In that case, the defendant argued that the prosecution drug expert had improperly disclosed prejudicial hearsay information regarding the defendant's drug use while explaining his conclusions on direct examination. Like the present case, no instruction was given that informed the jurors that "matters admitted through an expert go only to the basis of his [or her] opinion and should not be considered for their truth." (*Id*. at p. 919.) Also, as in the present case, the jurors were instructed that "some evidence has been admitted for a limited purpose and must be considered accordingly. However, this instruction was never tied to particular evidence, and the jury's attention was never drawn to specific hearsay disclosed by expert witnesses which should only be considered as a basis for evaluating their opinions." (*Ibid*.)

Despite the lack of a limiting instruction, the court in *Montiel* rejected the defendant's argument that the prosecutor had used the drug expert to improperly introduce hearsay evidence for the truth of the matter. Finding that the "central theory of both defense and prosecution cases was that defendant was a lifelong abuser of drugs," the court determined that the prosecution drug expert "was entitled to place his conclusions in the context of defendant's overall pattern of drug use." (*Montiel*, *supra*, 5 Cal.4th at p. 920.) Thus, the court concluded that the "admission of evidence about defendant's drug history, even without a limiting instruction, does not undermine confidence in the penalty judgment." (*Ibid*.)

We reach a similar conclusion in the present case. Here, the People's psychological experts were entitled to place their conclusions about Schuler's mental disorders and risk of reoffending as a sexually violent predator in the context of his overall pattern of misbehavior with female staff and patients and other nonqualifying offenses and misconduct. And, as we have discussed, the level of detail regarding Schuler's misconduct to which the experts testified was appropriate in light of the need for the experts to provide an adequate factual basis for their opinions. Accordingly, the admission of this expert testimony without a limiting instruction does not undermine our confidence in the jurors' finding that the allegations of the sexually violent predator petition were true.

For these reasons, we also find that trial counsel was not ineffective in failing to request a limiting instruction. To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) "counsel's performance fell below a standard of reasonable competence" and (2) "prejudice resulted." (*People v. Anderson* (2001) 25 Cal.4th 543, 569; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Moreover, the California Supreme Court has " 'repeatedly emphasized that a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding.' [Citations.] The defendant must show that counsel's action or inaction was not a reasonable tactical choice, and in most cases ' " ' "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. . . ." ' " [Citations.]' " (*People v. Jones* (2003) 30 Cal.4th 1084, 1105.)

Here, the record does not show whether trial counsel had a tactical reason for failing to request a limiting instruction. Therefore, we cannot find ineffective assistance of counsel on the record before us. (*People v. Jones*, *supra*, 30 Cal.4th at p. 1105.) Even if we were to find that reasonably competent counsel would have requested that the court instruct the jury that the matters on which an expert based his or her opinion were admitted only to show the basis of the opinion and not for the truth of the matter, we

would find no prejudice. It is not reasonably probable that Schuler would have achieved a more favorable verdict had the limiting instruction be given. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 569; *Housley*, *supra*, 6 Cal.App.4th at p. 959.)

We therefore find no merit in any of the issues Schuler has raised on appeal with regard to the testimony of the People's expert witnesses.

C. *The District Attorney's Summaries*

Schuler argues that the trial court abused its discretion when it failed to exclude the admission of People's exhibit No. 1, which is a one-page chart summarizing Schuler's "criminal history," and People's exhibit No. 9, which is a two-page chart summarizing Schuler's history of institutional misconduct.[13] According to Schuler, these exhibits should have been excluded under Evidence Code section 352 as more prejudicial than probative, because the exhibits "delineate[d] incidents for the truth of the matter asserted."

The People respond that exhibit Nos. 1 and 9 were merely "brief summaries of the chronology of [Schuler's] behavior prior and after his rape conviction" and were "simply demonstrative evidence" of the facts to which the experts had testified. They contend that the trial court properly overruled Schuler's objection to the admission of exhibit Nos. 1 and 9, based on the court's reasoning that "[w]ith regard to 1 and 9, I do find that they are key facts on which the experts based their opinions, and the list itself helps the jury keep those in mind. I think it's more helpful than prejudicial, and there is no assertion that it's inaccurate. [¶] So based on those reasons, I'm going to admit 1 and 9."

The standard of review for a trial court order under Evidence Code section 352 is abuse of discretion. (*People v. Robinson* (2005) 37 Cal.4th 592, 625.) For several reasons, we determine that the trial court did not abuse its discretion in admitting

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[13] In his reply brief, Schuler acknowledges that his opening brief argument on this issue erroneously references documents that were not exhibit Nos. 1 and 9. He corrected his argument in his reply brief.

exhibit Nos. 1 and 9. First, the California Supreme Court has approved the use of visual aids at trial, stating that "[t]he use of photographs and tape recordings, intended later to be admitted in evidence, as visual or auditory aids is appropriate. [Citations.]" (*People v. Fauber* (1992) 2 Cal.4th 792, 827.)

Second, exhibit Nos. 1 and 9 contain very brief summaries of Schuler's criminal offenses and misconduct that had already been described in more detail during the expert witnesses' testimony. For example, exhibit No. 1, which is captioned "Criminal History of Brian Schuler," lists "2/4/92 Charged with Assault with a Deadly Weapon; Convicted of Battery 2/7/92," followed by "11/9/96 Raped & Digitally Penetrated [J.]" The entirety of the one-page exhibit No. 1 chart lists only nine incidents in the period of 1992 through 2000.

Similarly, exhibit No. 9, which is captioned "Institutional History of Brian Schuler," includes very brief summaries of 16 incidents from 1996 through 2008. For example, exhibit No. 9 lists "7/11/96 Fight," followed by "8/17/96 Behavior Contract" and "11/9/96 [J.]." Schuler does not dispute the expert witnesses' testimony that exhibit Nos. 1 and 9 are accurate summaries according to their review of his criminal and institutional records.

Thus, we find that exhibit Nos. 1 and 9 are visual representations of the expert testimony regarding Schuler's nonqualifying offenses and misconduct that we have already determined, as discussed above, was relevant and necessary for an explanation of the factual basis for the experts' opinions. Accordingly, we agree with the trial court that the probative value of exhibit Nos. 1 and 9 was not outweighed by irrelevance, unreliability, or the potential for prejudice. (*People v. Bell*, *supra*, 40 Cal.4th at p. 608.)

D. *Admission of Multiple Hearsay--Due Process Violation*

In his supplemental opening brief, Schuler argues that the admission of "multiple hearsay," consisting of "detailed expert testimony about multiple alleged nonpredicate offenses and behaviors" and the "government-generated 'summaries' of [his] criminal

history and institutional history" violated his due process rights under the Fourteenth Amendment because the "multiple hearsay" was unreliable. He explains, relying on *People v. Otto* (2001) 26 Cal.4th 200 (*Otto*) and *People v. Carlin* (2007) 150 Cal.App.4th 322 (*Carlin*), that the admission of unreliable multiple hearsay constitutes "prejudicial constitutional error" because "[t]he jury . . . was permitted to hear, and accept as true, every indiscretion noted in [Schuler's] file."

According to the People, the decision in *Carlin, supra,* 150 Cal.App.4th 322, is inapplicable because it was limited to the issue of the admissibility of hearsay evidence in an SVPA proceeding to prove a qualifying offense. The People further argue that any error in allowing expert testimony about Schuler's nonqualifying offenses and misconduct and admitting exhibit Nos. 1 and 9 was harmless error, because there was no reasonable probability of a more favorable outcome. They assert that even if the expert witnesses' testimony had not included the details of Schuler's criminal and institutional history, the jurors would have heard the uncontradicted opinions of three experts that Schuler met the statutory criteria for a sexually violent predator.

We recognize that "[b]ecause civil commitment involves a significant deprivation of liberty, a defendant in an SVP proceeding is entitled to due process protections. [Citation.]" (*Otto, supra,* 26 Cal.4th at p. 209.) Due process was not violated in the present case, however, as a result of the expert testimony or the admission of exhibit Nos. 1 and 9. We reiterate our determination that the evidence regarding Schuler's history of misconduct was properly admitted for the *nonhearsay purpose* of allowing the People's expert witnesses to explain the factual basis for their opinions. We also reiterate our determination that the trial court did not err in admitting that district attorney's summaries that were visual representations of that properly admitted evidence. (*People v. Martinez, supra*, 88 Cal.App.4th at p. 486.) Therefore, we reject at the outset Schuler's contention that the trial court admitted "multiple hearsay" regarding his "multiple alleged nonpredicate offenses and behaviors."

Moreover, as discussed above, Schuler failed to object to any particular piece of evidence or information regarding any specific act of nonqualifying misconduct on the ground that it lacked sufficient indicia of reliability to satisfy due process, and, therefore, he has forfeited that issue on direct appeal with the exception of the evidence concerning the rape of J. to which he did expressly object. (Evid.Code, § 353; *People v. Doolin*, *supra*, 45 Cal.4th at p. 448; *People v. Waidla* (2000) 22 Cal .4th 690, 717.) As to the rape of J., the experts' records review included the transcripts of J.'s testimony in an Evidence Code section 402 hearing and at a trial, and we have concluded that the evidence of the incident was therefore sufficiently reliable for the experts to rely upon it. And, as we have observed, much of the detail regarding the rape of J. was elicited by defense counsel during cross-examination of the People's expert witnesses for the purpose of supporting a defense theory and challenging J.'s credibility.

We also determine that the decisions in *Otto* and *Carlin* do not support Schuler's contention that a due process violation arose from the testimony of the expert witnesses. In *Otto*, the California Supreme Court considered the issue of whether due process was violated in an SVPA proceeding because the victims' hearsay statements in presentence reports were admitted to show the details of the qualifying offenses. (*Otto*, *supra*, 26 Cal.4th at pp. 206-207.) The court concluded there was no due process violation because, among other reasons, the victims' hearsay statements "possessed sufficient indicia of reliability to satisfy due process" since the defendant had been convicted of the offenses and courts routinely rely upon presentence reports to make factual findings in sentencing hearings. (*Id*. at pp. 211-213.) Additionally, the court noted that procedural safeguards further diminished the risk of unreliable hearsay, including the defendant's opportunity to present his own psychological experts and to cross-examine the prosecution witnesses, as well as the trial court's discretion to exclude unreliable hearsay under Evidence Code section 352. (*Id*. at p. 214.) Thus, as the People have pointed out, the decision in *Otto* is distinguishable because it concerned the admission of *hearsay*

evidence to prove a qualifying offense, and not evidence admitted through expert testimony for the nonhearsay purpose of revealing the factual basis for the expert's opinion.

The decision in *Carlin* is similarly unhelpful to Schuler. In that case, this court found a due process violation in an SVPA proceeding arising from the admission of certain hearsay evidence to prove a qualifying offense. (*Carlin*, *supra*, 150 Cal.App.4th at p. 328.) The hearsay evidence in question was an investigator's report that included 2000 and 2001 hearsay victim statements regarding a 1990 child molestation, to which the defendant pleaded guilty in 1991, that were inconsistent with the victim's statement in a 1991 police report. (*Id*. at pp. 336-337.) Because the circumstances surrounding the 2000 and 2001 hearsay victim statements showed that the statements were not spontaneous, were inconsistent, were not made in close proximity to the offense, and were not contained in a presentence report, the statements were found to lack indicia of reliability and their admission to prove a qualifying offense violated due process. (*Id*. at pp. 341-342.) The *Carlin* decision is therefore distinguishable because, again, it addressed the admission of *hearsay evidence* in an SVPA proceeding to prove a qualifying offense, and not evidence admitted through expert testimony for the nonhearsay purpose of revealing the factual basis for the expert's opinion.

For these reasons, we find no merit in Schuler's due process claim.

E. *Consequence of a True Finding*

Schuler contends that reversible error occurred when the trial court's pretrial order excluding any mention of the consequences of a true finding--that Schuler would go to a hospital for treatment--was violated. He asserts that the order was violated during Dr. Arnold's testimony, when Dr. Arnold mentioned that he was involved in the sexually violent predator program at Atascadero State Hospital and also stated, according to Schuler, that " 'people who reach the end of their prison terms are evaluated for likelihood of committing sexual crimes, and if they are found to meet the criteria they can

be committed to the hospital for treatment to reduce their risk of reoffending in the future.' " Schuler also claims that Dr. Arnold further testified that he was evaluating Schuler for the purpose of commitment to a state hospital due to a sexual disorder.

The People view Dr. Arnold's testimony as speaking to his qualifications as an expert witness and maintain that he did not specifically state that Schuler could be committed to a state hospital. Alternatively, they argue that any error was cured by the jury instruction given that instructed the jurors that it was improper to consider the disposition of Schuler as a result of the verdict. Further, they argue that, assuming there was an error, the error was harmless because there was no possibility of a more favorable verdict since the evidence overwhelmingly demonstrated that Schuler is a sexually violent predator.

It is well established that in a proceeding under the SVPA, the consequence of a finding that a petition to commit a person as a sexually violent predator is true is irrelevant and therefore the jury should not consider what will happen as a result of its verdict. (*People v. Rains* (1999) 75 Cal.App.4th 1165, 1170-1171 (*Rains*); *People v. Calderon* (2004) 124 Cal.App.4th 80, 91.) Where there is expert testimony regarding the consequences of a true finding that the defendant is sexually violent predator, the error requires reversal of the judgment "only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. [Citation.] This is the same standard of review utilized for reviewing the erroneous admission of evidence in a criminal case. [Citations.]" (*Rains, supra*, 75 Cal.App.4th at p. 1170; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

In the present case, the record reflects that the trial court ruled on Schuler's motion in limine No. 9 as follows:

"THE COURT: Okay. Number nine is to exclude any mention of the consequences of a true finding, such as go the hospital for treatment. [¶] Any objection, [Prosecutor]?

"[THE PROSECUTOR]: Well, no, Your Honor. . . .

"THE COURT: We are talking about the consequences of a true finding. The request is granted."

Thereafter, the following exchange occurred during the direct examination of Dr. Arnold:

"[THE PROSECUTOR]: Now, at that point while working at Atascadero [State Hospital] did you start to have any involvement in what is sometimes known as the Sexually Violent Predator Program?

"[DR. ARNOLD]: Yes. Actually, that's the program I was primarily assigned to.

"[THE PROSECUTOR]: And what does that mean?

"[DR. ARNOLD]: It's individuals who once they reach the end of their prison terms can be evaluated to assess their likelihood of committing sexual crimes, and if they're found to meet certain criteria they can be committed to the hospital for treatment to reduce their risk of reoffending in the future."

Then, during Dr. Arnold's testimony regarding his opinions about Schuler, the following exchange occurred:

"[THE PROSECUTOR]: Is that generally, the topic of masturbation, is that generally a topic that you do need to go into when you're evaluating someone for our purposes?

"[DR. ARNOLD]: Yes.

"[THE PROSECUTOR]: Why?

"[DR. ARNOLD]: Well, again, this is a -- I'm evaluating for the purpose of possible commitment to a state hospital because of a sexual disorder, and so one thing that we know about--

"[DEFENSE COUNSEL]: Your Honor, I'm going to object. Can we approach?"

The trial court ruled on the objection as follows in the presence of the jury:

"[THE COURT]: [Prosecutor], I'm going to strike the entire last answer, and you may continue at this point. [¶] . . . [¶] Ladies and gentlemen, when I say 'I'm striking this answer,' you [remember] earlier I told you yesterday that when the Court strikes any testimony, that means you are to treat it as though you never heard of it."

Subsequently, on June 6, 2008, during the course of Dr. Arnold's testimony, Schuler made a motion for mistrial. The motion was based on Dr. Arnold's testimony that he was involved with the sexually violent predator program at Atascadero State Hospital. Schuler argued that this testimony violated the pretrial order that there would be no mention that the consequence of a true finding would be that he would go to a hospital for treatment. The trial court deferred its ruling until the trial testimony concluded on July 17, 2008, when the court denied the motion on the grounds that Dr. Arnold's comment was not "so incurably prejudicial that a new trial is required. I think that any prejudice that came from the comment by the witness has been cured by striking testimony, admonishing the jury, and then together with further admonitions and instructions from the packet of instructions that I'm about to use after argument."

Having reviewed the record in its entirety, for several reasons we are not convinced that reversible error occurred as a result of Dr. Arnold's testimony. First, contrary to Schuler's claim, we do not find that Dr. Arnold expressly testified that he was evaluating Schuler for the purpose of commitment to a state hospital due to a sexual disorder.[14] The issue is whether the jurors would have inferred the consequences of a true finding from Dr. Arnold's testimony, as quoted above. Based on our review of the

[14] The record cite in Schuler's opening brief for his claim that Dr. Arnold testified that he was evaluating Schuler for the purpose of commitment to a state hospital due to a sexual disorder references defense counsel's argument during the motion to dismiss and not Dr. Arnold's actual testimony.

record and all of the evidence, we believe that, even assuming the jurors inferred that the consequence of a true finding would be that Schuler would be committed to a state hospital, there is no reasonable probability of a more favorable verdict.

Most significantly, the People's three expert witnesses, Dr. Arnold, Dr. Scherrer, and Dr. Shelley, all agreed that Schuler had diagnosed mental disorders, including paraphilia, and was likely to reoffend as a sexually violent predator. Schuler's expert witness, Dr. Abbott, did not contradict these opinions because he did not provide any specific opinions about Schuler in his testimony. Therefore, the expert opinion testimony that Schuler is a sexually violent predator was essentially undisputed.

Additionally, the challenged testimony was very brief and a portion of it was stricken by the court. As quoted above, the trial court struck Dr. Arnold's answer that masturbation was a topic that he considered in performing an "evaluation for the purpose of possible commitment to a state hospital because of a sexual disorder." The trial court also admonished the jurors to treat that answer as if they had never heard it, and later instructed the jurors, "You must reach your verdict without any consideration of the consequences." We must presume that the jury followed this instruction and the court's admonishment. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139; *People v. Avila* (2006) 38 Cal.4th 491, 574.)

Under these circumstances, even assuming the complained-of testimony by Dr. Arnold constituted error because the testimony suggested that the consequences of a true finding would be that Schuler would be committed to a state hospital, we are satisfied that the error was harmless because it is not reasonably probable that Schuler would have obtained a more favorable verdict absent the error. (*Rains, supra,* 75 Cal.App.4th at p. 1170.)

F. *Constitutional Challenges*

Lastly, Schuler contends that that the SVPA, as amended in 2006,[15] violates the due process, equal protection, ex post facto and double jeopardy clauses. After briefing was completed in this case, the California Supreme Court issued its decision in *McKee, supra*, 47 Cal.4th 1172, which addressed similar constitutional challenges to the amended SVPA. We requested and received supplemental briefing from the parties regarding the application of the decision in *McKee* to the issues in the present appeal. Having reviewed the supplemental briefing letters, we now turn to Schuler's constitutional claims.

1. Due Process

In his original briefing, Schuler argued that the amended SVPA violates the due process clause of the Fourteenth Amendment to the United States Constitution. In his supplemental briefing, Schuler concedes that the California Supreme Court in *McKee* rejected a similar due process claim to the amended SVPA.

In *McKee*, the Supreme Court determined that a person committed under the amended SVPA is not deprived of due process because he or she has the burden, after the initial commitment, to show by a preponderance of the evidence that he or she no longer meets the statutory criteria for commitment as a sexually violent predator. (*McKee, supra*, 47 Cal.4th at p. 1191.) The court explained that a person committed under the SVPA has been found to have previously committed the requisite qualifying offenses and to have, beyond a reasonable doubt, 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).)" (*Id.* at p. 1191.) Therefore, as in *Jones v. United States* (1983) 463 U.S. 354, 367, the likelihood that the person will be civilly committed on the basis of behavior that is " ' "within a range of

[15] As we have noted, the SVPA was amended twice in 2006, by Senate Bill 1128 (Stats. 2006, ch. 337, § 62), and by Proposition 83 (see Cal. Const., art. II, § 10, subd. (a)).

conduct that is generally acceptable" ' " or merely idiosyncratic is "greatly diminished." (*McKee, supra,* at p. 1191.)

The *McKee* court also found no merit in the contention that the trial court's discretion to deny as frivolous a committed person's petition for conditional release pursuant to section 6608, subdivision (a) violates due process. "The fact that the statute gives the court the authority to deny such petitions does not, of itself, serve as an obstacle to the primary due process goal of ensuring that only those individuals who continue to *meet* SVP criteria will remain involuntarily committed." (*McKee, supra,* 47 Cal.4th at p. 1192, fn. omitted.)

Finally, the *McKee* court construed the amended SVPA to implicitly provide for the appointment of a state-funded mental health expert when a committed person petitions for release under section 6608, subdivision (a). "Given that the denial of access to expert opinion when an indigent individual petitions on his or her own to be released may pose a significant obstacle to ensuring that only those meeting SVP commitment criteria remain committed, we construe section 6608, subdivision (a), read in conjunction with section 6605, subdivision (a), to mandate appointment of an expert for an indigent SVP who petitions the court for release. [¶] Construing the amended [SVPA] in the above manner, we conclude it does not violate the due process clause." (*McKee, supra,* 47 Cal.4th at p. 1193.)

Accordingly, based on the decision in *McKee, supra,* 47Cal.4th 1172, we find defendant's concession that the SVPA does not violate the due process clause to be appropriate. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

2. Ex Post Facto Law and Double Jeopardy

Schuler argues in his supplemental briefing that the amended SVPA violates the ex post facto and double jeopardy clauses of the United States Constitution because Proposition 83 increased the punishment of sex offenders by lengthening the period of civil confinement and amending the Penal Code to provide an indeterminate sentence for

certain sex offenses. According to Schuler, "the voters made it clear that the purpose of the initiative was simply to lock up sex offenders (whether in prison or in the Department of Mental Health) for as long as possible." However, Schuler concedes that the California Supreme Court in *McKee* rejected the claim that the amended SVPA violates the ex post facto clause of the United States Constitution.[16]

In *McKee*, the court noted that the ex post facto clause "prohibits only those laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.' [Citation]." (*McKee, supra,* 47 Cal.4th at p. 1193.) The court reiterated its decision in *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 that the SVPA was not punitive because it had two nonpunitive objectives, "treatment for the individual committed and protection of the public." (*McKee, supra,* at p. 1194) After examining the amended SVPA, the *McKee* court determined that "the Proposition 83 amendments at issue here cannot be regarded to have changed the essentially nonpunitive purpose of the [SVPA]," and therefore the court concluded that the amended SVPA does not violate the ex post facto clause. (*Ibid*.)

We therefore find defendant's concession that the SVPA does not violate the ex post facto clause of the United States Constitution to be appropriate. (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455.)

3. Equal Protection

Schuler also contends in his supplemental briefing that the amended SVPA violates the equal protection clauses of the United States Constitution and the California Constitution. He argues that an individual committed under the amended SVPA is

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[16] We construe defendant's silence in his supplemental briefing regarding his double jeopardy challenge to constitute a concession that the claim has no merit under *McKee, supra,* 47 Cal.4th 1172. In any event, we conclude that the amended SVPA also does not violate the double jeopardy clause because a civil commitment procedure does not constitute a second prosecution for purposes of the double jeopardy clause. (*Kansas v. Hendricks* (1997) 521 U.S. 346, 369.)

subject to an indeterminate term, while the commitment of a mentally disordered offender (MDO; § Pen. Code, § 2960 et seq.), the commitment of an individual found not guilty by reason of insanity (NGI; Pen. Code, § 1026 et seq.), the commitment of a mentally disordered sex offender (MDSO; former § 6316.2, subd. (f)), the commitment of juvenile offenders (§ 1802) or the conservatorship of a gravely disabled person under the Lanterman-Petris-Short Act (§§ 5350, 5361), is subject to extensions of one year or two years.

According to Schuler, the California Supreme Court in *McKee* agreed with his contention that MDOs and NGIs are similarly situated to persons committed under the SVPA (SVPs) and found merit in the claim that the amended SVPA violates the equal protection clause of the federal constitution due to the differences in the commitment periods for SVPs, MDOs, and NGIs.

The *McKee* court determined that SVPs and MDOs are similarly situated for equal protection purposes because they have been involuntarily committed with the objectives of treatment and protection of the public. (*McKee, supra*, 47 Cal.4th at p.1202.) The court also determined that SVPs have "different and less favorable procedural protections" than MDOs because "SVP's under the amended [SVPA] are given indeterminate commitments and thereafter have the burden to prove they should be released (unless the [Department of Mental Health] authorizes a petition for release). In contrast, an MDO is committed for one-year periods and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year." (*Ibid*.) The court rejected the appellate court's finding that the "legislative findings recited in the [Proposition 83] ballot initiative" were sufficient to justify the disparate treatment of SVPs and MDOs. (*Id*. at p. 1207.)

The *McKee* court further found that SVPs and NGIs are also similarly situated and a "comparison of the two commitment regimes raises similar equal protection problems. . . ." (*McKee, supra*, 47 Cal.4th at p.1207.) Consequently, the court agreed

with the defendant "that, as with MDO's, the People have not yet carried their burden of justifying the differences between the SVP and NGI commitment statutes." (*Ibid.*)

However, the *McKee* court did not rule that the defendant had succeeded in establishing that the amended SVPA violates the equal protection clause. The court explained that it "did not conclude that the People could not meet its burden of showing the differential treatment of SVP's is justified. We merely conclude that it has not yet done so. Because neither the People nor the courts below properly understood this burden, the People will have an opportunity to make the appropriate showing on remand. It must be shown that, notwithstanding the similarities between SVP's and MDO's, the former as a class bear a substantially greater risk to society, and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society." (*McKee, supra*, 47 Cal.4th at p. 1208.)

The *McKee* court accordingly remanded the case with the following instructions: "We therefore remand this case to the trial court to determine whether the People, applying the equal protection principles articulated in [*In re Moye* (1978) 22 Cal.3d 457] and related cases discussed in the present opinion, 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. The trial court may, if appropriate, permit expert testimony. [¶] 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 the California electorate. [¶] Moreover, we emphasize that mere disagreement among experts will not suffice to overturn the Proposition 83 amendments. The trial court must determine whether the legislative distinctions in classes of persons subject to civil commitment are reasonable and factually based--not whether they are incontrovertible or uncontroversial.

The trial court is to determine not whether the statute is wise, but whether it is constitutional." (*McKee*, *supra*, 47 Cal.4th at p. 1208-1211, fns. omitted.)

In the present case, Schuler contended in his first supplemental briefing letter that the People had the opportunity to demonstrate constitutional justification for the disparate treatment of SVPs, as required by the decision in *McKee*, but failed to do so. He therefore argued that the appropriate remedy for the equal protection violation is reversal of his indeterminate sentence. Alternatively, Schuler requested that the matter be remanded to the trial court for an evidentiary hearing similar to that ordered in *McKee*.

The People, in their first supplemental briefing letter, acknowledged that the *McKee* court ruled that the amended SVPA potentially violates the equal protection clause and asserted that the proper remedy under *McKee* is remand to the trial court for an evidentiary hearing. They invited this court to "appropriately guide the trial court by stating that the narrow issue in a *McKee* hearing is whether the People have provided 'reasonable and factually based' evidence demonstrating that SVP's pose a greater danger to society than do MDO's and NGI defendants. [Citation.]"

The People further maintained in their first supplemental briefing letter that the evidentiary hearing should be limited. In their view, Schuler should not be permitted to offer "affirmative evidence," "the hearing should not become a battle of experts," and the prosecutor should be allowed to make a "reasonable and factually-based" showing that imposing an indeterminate term of commitment on SVPs furthers the state's compelling interest in public safety.

The case was not submitted at the time of oral argument on February 18, 2010, pending the finality of the California Supreme Court's decision in *McKee*. The court denied rehearing in *McKee* and issued the remittitur on March 10, 2010. The People subsequently submitted a second supplemental briefing letter, dated March 11, 2010. In their second supplemental briefing letter, the People now request that this court appoint a special master to conduct an evidentiary hearing pursuant to California Rules of Court,

rule 8.252(c), rather than remand the matter to the trial court for an evidentiary hearing. According to the People, "[r]etaining jurisdiction to directly review the hearing would hasten the eventual resolution of the equal protection issue by the California Supreme Court and would significantly reduce the period during which lower courts and litigants operate in uncertainty as to the constitutionality of the SVPA."

In his second supplemental briefing letter, Schuler reiterates his contention that the appropriate remedy is reversal of his indeterminate commitment. Alternatively, Schuler concurs with the People's request for appointment of a special master.

We decline the People's request for an appointment of a special master to conduct an evidentiary hearing pursuant to Code of Civil Procedure section 909[17] and California Rules of Court, rule 8.252.(c).[18] "It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' [Citation.] This rule reflects an 'essential distinction between the trial and the appellate court . . . that it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law . . . .' [Citation.] The rule promotes the orderly settling of factual questions and disputes in the trial court, provides a meaningful record for review, and serves to avoid prolonged delays on appeal. 'Although appellate courts are authorized to make findings of fact on appeal by Code of Civil Procedure section 909 and [former] rule 23 of the California Rules of Court, the authority should be exercised

[17] Code of Civil Procedure section 909 provides in part, "In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court."

[18] California Rules of Court, rule 8.252(c)(1) states, "A party may move that the reviewing court take evidence."

sparingly. [Citation.] *Absent exceptional circumstances, no such findings should be made*. [Citations.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

In accordance with the California Supreme Court's decision in *McKee*, we will reverse the order committing Schuler to the Department of Mental Health for an indeterminate period and remand the matter to the trial court for the limited purpose of, as stated in *McKee*, allowing the People to 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." (*McKee*, *supra*, 47 Cal.4th at p. 1208.) We decline the People's invitation to limit the scope of the remand hearing, since the decision in *McKee* includes the California Supreme Court's direction as to the proper scope of the hearing.

IV. DISPOSITION

The order of June 18, 2008 committing appellant Brian Schuler to the custody of the State Department of Mental Health for an indeterminate term for appropriate treatment and confinement in a secure facility is reversed and remanded for the limited purpose, as stated in *People v. McKee* (2010) 47 Cal.4th 1172, 1208, of allowing the People to 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."

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MCADAMS, J.

_____
DUFFY, J.