

McKee and the SVPA

On January 28, 2010, the California Supreme Court issued *People v. McKee* (2010) 47 Cal.4th 1172, on the constitutionality of the 2006 amendment to the Sexually Violent Predator Act enacted in Proposition 83, which made an SVP commitment indeterminate and placed the burden of proof on the person confined to prove by a preponderance of the evidence that he is no longer an SVP. (Welf. & Inst. Code, § 6600 et seq.) The decision rejected due process and ex post facto challenges to the law. As to an equal protection challenge, however, it found the state had not carried its burden of justifying the differences in treatment between those committed under the SVPA and those committed under other civil commitment schemes, such as the Mentally Disordered Offender Act (Pen. Code, § 2960 et seq.). It remanded the case to the trial court to make findings on whether there are constitutionally sufficient reasons for the differences. Rehearing was denied March 10, 2010.

McKee creates considerable procedural uncertainties. Under the decision a lower court cannot simply apply the SVPA as written, but rather must conduct hearings on whether the law's differential treatment of SVP's is factually justified. Because the Supreme Court did not retain jurisdiction, but instead gave the case back to the trial court, presumably the decision on remand will not be binding on any other court, unless that decision is affirmed on appeal in a published decision. Thus *each* SVP proceeding in the state would theoretically require a hearing on the equal protection issue until some kind of definitive appellate resolution is reached. In practice, at least some appellate courts have been staying SVP proceedings remanded to the trial court pending some kind of further resolution by the Supreme Court. For example, the unpublished decision of *People v. Scroggins* (Feb. 9, 2011, F058996) [2011 WL 438635], stated:

McKee does not explain whether the justification will be a one-time finding, forever applicable to all SVP's committed under the statutory scheme, or whether in every case there must be justification for treating a particular SVP differently than MDO's and NGI's. The opinion appears to contemplate a categorical justification with its citation in footnote 9 to Department of Justice studies and the like. . . . However, it also suggests in footnote 10 that there may be classes of SVP's that pose a greater risk to particularly vulnerable victims, such as children. . . . Until we receive further direction from the state Supreme Court, we remand to the trial court to determine whether sufficient justification has been shown in this case for treating SVP's differently than MDO's and NGI's, but will order that proceedings be suspended until further guidance is provided in *McKee*.

In any given SVP case, both trial and appellate counsel of course must argue for the result they judge most likely to benefit the individual client. Appeals in cases where a

McKee-type hearing was not held, for example, can seek a remand for such a hearing.
We encourage panel attorneys with an SVP appeal to consult with the ADI staff attorney.