EQUAL PROTECTION AND CIVIL COMMITMENT SCHEMES

I. Equal Protection and the 2006 Amendment to the Sexually Violent Predator (SVP) Act

The 2006 amendment to the SVP Act caused an SVP commitment to be for an indeterminate, rather than two-year fixed, term. It 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.)

In the decision of *People v. McKee*, the California Supreme Court rejected due process and ex post facto challenges to the 2006 amendment. (*People v. McKee* (2010) 47 Cal.4th 1172, 1188-1195 [*McKee I*].) But with respect to equal protection[1], the court found that SVP's and Mentally Disordered Offenders (MDO's) are similarly situated, and the People failed to show that differential treatment of the two groups was justified.[2] (*Id*. at pp. 1203, 1207.) The Supreme Court found the strict scrutiny standard of equal protection must apply because such confinement involves a fundamental liberty interest. (*Id*. at p. 1197; See also *People v. Landau* (2013) 214 Cal.App.4th 1, 36.) Under strict scrutiny analysis, the state must establish that: 1) it has a "compelling interest" justifying the challenged procedure, and 2) the distinctions drawn by the procedure are necessary to further that interests. (*McKee I*, *supra*, 47 Cal.4th at p. 1198.)
The Supreme Court remanded the case to the trial court to make findings on whether there were constitutionally sufficient reasons for the differences in treatment of SVP's and MDO's. (*Id*. at pp. 1208-1209.)

On remand, the trial court found the People had succeeded in showing the differential treatment of SVP's was based on a reasonable perception that SVP's represent a substantially greater risk to the public than do MDO's. (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1330 [McKee II][Fourth District].) Defendant appealed and the Court of Appeal affirmed. (*Id*. at pp. 1330, 1347.) Differential treatment of SVP's was justified because the People had shown: 1) Recidivism was much more common among SVP's than among MDO's; 2) the victims of sexual offenses suffered greater trauma in general than did victims of non-sexual offenses; and 3) SVP's have significant diagnostic and treatment differences from MDO's. (*Id*. at pp. 1340-1341,

[1] The right to equal protection of the law is contained in the Fourteenth Amendment to the United States Constitution and article I, section 7, of the California Constitution.
[2] MDO's are not committed for an indeterminate period. They are given a one-year commitment which the People must renew every year by proving beyond a reasonable doubt the person is still an MDO.

1342-1343, 1344-1345.) Specifically, the *McKee II* Court found "SVP's are less likely to participate in treatment, less likely to acknowledge there is anything wrong with them, and more likely to be deceptive and manipulative." (*Id*. at p. 1347.) Thus, although the two groups were similarly situated for equal protection purposes, differential treatment with respect to the determinate versus indeterminate sentencing scheme was justified. (*Id*. at p. 1348.)

Defendant in McKee II petitioned the California Supreme Court for review, but review was denied. (*People v. McCloud* (2013) 213 Cal.App.4th 1076, 1079.)

After the decision in McKee II, California Courts of Appeal repeatedly held the SVP indeterminate commitment scheme did not violate equal protection. (*People v. McCloud*, *supra*, 213 Cal.App.4th 1076, 1086 [First District]; *People v. Landau* (2013) 214 Cal.App.4th 1, 47-48 [Fourth District]; *People v. McKnight* (2012) 212 Cal.App.4th 860, 863 [First District]; *People v. McDonald* (2013) 214 Cal.App.4h 1367, 1371 [Fourth District]; *People v. Kisling* (2014) 223 Cal.App.4th 544, 548 [Third District]; *People v. Gray* (2014) 229 Cal.App.4th 285, 292 [Fifth District].)

In *People v. McDonald*, the Fourth District Court of Appeal concluded that the holdings of *McKee II* applied to SVP's as an entire class. (*People v. McDonald*, *supra*, 214 Cal.App.4th at p. 1378.) The *McDonald* Court rejected appellant's claim of a due process right to present his own individual evidence supporting an equal protection claim. "*McKee I* plainly expressed the Supreme Court's desire to resolve on a classwide basis the equal protection challenge of all SVP's to indeterminate commitments under the Amended SVPA." (*Id*. at pp. 1377-1378.)

In *People v. McDonald* and *People v. Landau*, the Fourth District Court of Appeal rejected appellant's argument that the *McKee II* Court misapplied the de novo standard of review. (*People v. McDonald*, *supra*, 214 Cal.App.4th at p. 1378; *People v. Landau*, *supra*, 214 Cal.App.4th at p. 37.)

In the case of *People v. McKnight*, the First District Court of Appeal agreed with *McDonald* that the Supreme Court intended its *McKee I* decision to apply on a classwide basis. (*People v. McKnight*, *supra*, 212 Cal.App.4th at p. 863.) Similarly, in *People v. Kisling*, the Third District Court of Appeal concluded "that to not follow *McKee II* would be contrary to the California Supreme Court's clear intention in remanding *McKee I* to the trial court for an evidentiary hearing on whether the People could justify the disparate treatment." (*People v. Kisling*, *supra*, 223 Cal.App.4th at p. 548.)

In *People v. Gray*, appellant claimed McKee II was wrongly decided because it mistakenly failed to address the equal protection issues arising from the shifting of the burden of proof, and the lack of a jury trial resulting from the SVP amendment. Appellant also claimed the court failed to properly apply strict scrutiny analysis. The Fifth District Court of Appeal rejected appellant's arguments. (*People v. Gray*, *supra*, 229 Cal.App.4th at pp. 291-292.)

II. Equal Protection and the Right to Refuse to Testify

In January 2015, the California Supreme Court decided the case of *Hudec v. Superior Court*, which involved a person who had been judged not guilty by reason of insanity (NGI). (*Hudec v. Superior Court* (2015) 60 Cal.4th 815.) In the trial court, appellant Hudec argued a motion in limine to preclude the People from compelling his testimony at trial against his will. (*Id*. at p. 818.) The trial court denied the motion. (*Ibid*.) Hudec petitioned for writ of mandate, which the Court of Appeal granted. (*Id*. at pp. 818-819.) It directed the trial court not to compel Hudec's testimony. (*Ibid*.) The California Supreme Court granted the People's petition for review. (*Id*. at p. 819.)

At the time, there was a split in authority among the Courts of Appeal as to whether an NGI had a statutory right not to testify.[3] (*People v. Haynie* (2004) 116 Cal.App.4th 1224 [Fifth District][an NGI had a right not to testify]; *People v. Lopez* (2006) 137 Cal.App.4th 1099 [Fourth District][an NGI could be compelled to testify].) The Supreme Court affirmed the Court of Appeal, finding that an NGI had "a statutory right not to testify at his or her NGI commitment extension hearing. On its face, the language of section 1026(b)(7) provides respondents in commitment extension hearings the rights constitutionally enjoyed by criminal defendants. One of those rights is the right to refuse to testify in the prosecution's case-in-chief." (*Id*. at p. 826.) In so holding, the Supreme Court overturned the case of *People v. Lopez*, *supra*, 137 Cal.App.4th 1099. (*Hudec v. Superior Court*, *supra*, 60 Cal.4th at p. 832.)

In the case of *People v. Curlee*, appellant SVP argued that the cases of *McKee I* and *Hudec* compelled a finding that he had a right not to testify at trial, because *McKee I* held NGI's and SVP's were similarly situated, and *Hudec* held an NGI had the right to refuse to testify. (*People v. Curlee* (2015) 237 Cal.App.4th 709, 713 [Fifth District]; *Hudec v. Superior Court*, *supra*, 60 Cal.4th at p. 826.) Curlee claimed his right to equal protection was violated when he was compelled to testify in the People's case-in-chief. (*Curlee*, *supra*, 237 Cal.App.4th at p. 712.) The Court of Appeal agreed, holding SVP's

[3] Hudec did not claim a constitutional right not to testify. (*Hudec*, *supra*, 60 Cal.4th at pp. 819-820.)

were similarly situated to NGI's with respect to the right not to testify, and the People failed to justify its differential treatment of the two groups. (*Id*. at pp. 712, 721.) The Court so held even though *Hudec* found NGI's to be *statutorily* exempt from being compelled to testify, and the SVP statute contained no similar provision. (*Id*. at p. 714; *Hudec*, *supra*, 60 Cal.4th at p. 826.) The Court remanded the matter to the trial court to give the People a chance to justify its differential treatment of NGI's and SVP's. (*Curlee*, *supra*, 237 Cal.App.4th at p. 722.)

People v. Dunley was an MDO case. (*People v. Dunley* (2016) 247 Cal.App.4th 1438 [Fourth District].) When the People compelled Dunley's testimony in the trial court, he admitted he posed a substantial danger to others as a result of his mental disorder. (*Id*. at p. 1445.) Dunley appealed, relying on *Hudec* and *Curlee* to argue MDO's were similarly situated to NGI's and SVP's for purposes of refusing to testify. (*Id*. at pp. 1446-1447.) The Court of Appeal reversed, holding that MDO's, SVP's, and NGI's were all similarly situated with respect to the right not to testify. (*Id*. at pp. 1438, 1450 ["[W]e can see no distinction between MDO's and either SVP's or NGI's for purposes of the testimonial privilege"].)

People v. Field involved an SVP who claimed the right not to testify. (*People v. Field* (2016) 1 Cal.App.5th 174, 192.) In *Field*, the Fourth District followed *People v. Curlee* and found SVP's were similarly situated to NGI's and MDO's. (*Id*. at p. 194.) The Court rejected the Attorney General's argument that the rational basis test, not the strict scrutiny test, should apply. (*Id*. at pp. 194-195.)