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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES LEON GARCIA, Defendant and Appellant.	E046835 (Super.Ct.No. RIC465429) O P I N I O N

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed.

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

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

Defendant James Leon Garcia asserts three arguments challenging the constitutionality of the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6601 et seq.):[1] (1) the SVPA violates equal protection guarantees because it treats individuals committed as sexually violent predators (SVP's) differently from individuals who have been civilly committed as mentally disordered offenders (MDO's) (Pen. Code, § 2960 et seq.) and persons found not guilty of a crime by reason of insanity (NGI's) (Pen. Code, § 1026 et seq.); (2) the SVPA violates due process by requiring a person committed as an SVP who has not been authorized to petition for release to prove that he or she is not an SVP; and (3) the SVPA violates equal protection guarantees by treating committed individuals who have not been authorized to petition for release differently from those who have been so authorized. We reject these arguments and affirm the judgment.[2]

I. FACTUAL BACKGROUND

In February 2007, the Riverside County District Attorney petitioned the superior court pursuant to the SVPA to commit defendant to a secure facility designated by the State Department of Mental Health (Department). At a trial on the petition, evidence was

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

[2] Similar arguments are pending before the California Supreme Court. (See, e.g., *People v. McKee* (2008) 160 Cal.App.4th 1517 (review granted July 9, 2008, S162823); *People v. Johnson* (2008) 162 Cal.App.4th 1263 (review granted Aug. 13, 2008, S164388); *People v. Boyle* (2008) 164 Cal.App.4th 1266 (review granted Oct. 1, 2008, S166167); *People v. Force* (2009) 170 Cal.App.4th 797 (review granted Apr. 15, 2009, S170831.)

introduced that defendant was convicted of: assault with intent to commit rape in 1987 (Pen. Code, § 220), annoying or molesting a child in 1993 (*id.*, § 647.6), and annoying or molesting a child in 1998 (*ibid.*). The prosecution introduced the testimony of two experts who testified that defendant suffered from "paraphilia, not otherwise specified." They also stated that defendant suffered from alcohol dependence. One of the experts opined that defendant presented a high risk to the community of committing sexually violent predatory criminal behavior. The second testified that he believed that defendant is likely to commit sexually violent offenses if released into the community. A defense expert diagnosed defendant as having alcohol dependency, but testified that defendant did not have a mental condition that impaired his volitional abilities.

A jury found that defendant is an SVP. The court ordered that he be committed for an indeterminate term to the Department for treatment in a secure facility.

II. ANALYSIS

A. *Overview of SVPA*

Under the SVPA, the Secretary of the Department of Corrections and Rehabilitation may refer a prison inmate to the Department for evaluation as an SVP. (§ 6601, subds. (a), (b).) An SVP is defined as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) If the Department determines that the person is an SVP, a request for a petition

for commitment under the SVPA is sent to the county where the person was convicted. (§ 6601, subds. (h), (i).) The district attorney for the county or county counsel may file such a petition in the superior court. (*Ibid.*)

If a petition for commitment is filed, the trial court must determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon release from prison. (§ 6602, subd. (a).) The individual is entitled to counsel at the probable cause hearing. (*Ibid.*) If the court finds there is probable cause, a trial is set to determine whether the person is an SVP. (*Ibid.*)

The individual named in the petition is entitled to a trial by jury, to the assistance of counsel, to retain experts, and to have access to all relevant medical and psychological records and reports. (§ 6603, subd. (a).) If trial is by a jury, a unanimous verdict is required. (*Id.*, subd. (f).) The People have the burden of proving that the individual is an SVP beyond a reasonable doubt. (§ 6604.)

Prior to 2006, a person found to be an SVP was committed to the custody of the Department for treatment and confinement in a secure facility for a two-year term. (Former § 6604.) At the end of that term, the person was required to be released unless the People petitioned for and obtained a determination that the person remained an SVP. (Former §§ 6604, 6605, subd. (e).) If an extended commitment was sought, the People had the burden of proving the individual met the SVP criteria beyond a reasonable doubt. (Former §§ 6601, subd. (i), 6604, 6604.1; *People v. Munoz* (2005) 129 Cal.App.4th 421,

429.) If the People satisfied this burden, the individual was committed for another two-year period. (Former § 6605, subd. (e).)

In 2006, the SVPA was amended by the Legislature and the electorate. (Stats. 1995, ch. 763, Prop. 83, The Sexual Predator Punishment and Control Act: Jessica's Law; see *People v. Allen* (2008) 44 Cal.4th 843, 849, fn. 4.) Among other changes, the amendment replaced the two-year commitment term with an indeterminate term and created new procedures for obtaining release from custody. Under the amended SVPA, after an individual has been committed for an indeterminate term, the Department must examine the individual's mental condition at least once each year. (§ 6605, subd. (a).) The committed individual may retain, or the court may appoint, a qualified expert to examine him or her. (*Ibid.*) The expert shall have access to all records concerning the person. (*Ibid.*) The report of the examination must be in the form of a declaration prepared by a "professionally qualified person" and include consideration of: (1) whether the committed individual currently meets the definition of an SVP; (2) whether conditional release to a less restrictive alternative or unconditional release is in the best interest of the person; and (3) if release is appropriate, whether conditions can be imposed that would adequately protect the community. (*Ibid.*) This report must be filed with the court and served on the prosecuting agency and the committed individual. (*Ibid.*)

If the Department's report concludes the committed individual no longer meets the definition of an SVP or that conditional release to a less restrictive alternative is

appropriate, the Director of Mental Health (the Director) must authorize the committed individual to petition the trial court for release. (§ 6605, subd. (b).)[3] The petition must be served on the prosecuting agency. (§ 6605, subd. (b).) Upon receipt, the trial court shall set a probable cause hearing to consider the petition. (*Ibid.*) If the court determines that probable cause exists to believe the petition has merit, it must set a hearing on the issue, at which time the committed individual is entitled to all of the constitutional protections provided at the initial commitment hearing. (*Id.*, subds. (c), (d).) Either side may demand a trial by jury and retain experts to examine the committed individual. (*Id.*, subd. (d).) The People have the burden of proof to establish beyond a reasonable doubt that the committed individual remains an SVP. (*Ibid.*) If the court or jury finds in favor of the individual, he must be unconditionally released and discharged. (*Id.*, subd. (e).) If the finding is against the individual, he or she is recommitted for an indeterminate period. (*Ibid.*)

If the Director does not authorize the committed person to file a petition for release, the person may nevertheless petition the trial court for conditional release or unconditional discharge.[4] (§ 6608, subds. (a), (c).) If such a petition is filed, the trial

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[3] In addition, if the Department "has reason to believe" a committed individual is no longer an SVP, "it shall seek judicial review of the person's commitment pursuant to the procedures set forth in Section 7250," which provides for a writ of habeas corpus for committed persons. (§§ 6605, subd. (f), 7250; *People v. Allen, supra,* 44 Cal.4th at p. 859.)

[4] In addition to hearings initiated by a petition filed by the committed individual, a hearing pursuant to section 6608 must be held if the Department submits a report and recommendation for conditional release. (§ 6607, subd. (b).) This report and

[footnote continued on next page]

court "shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." (*Id.*, subd. (a).) If the court allows a hearing, the committed person is entitled to counsel. (*Ibid.*) However, in contrast to the initial commitment proceeding and subsequent proceedings that are authorized by the Director, the individual has the burden of proving by a preponderance of the evidence that the petition should be granted. (*Id.*, subd. (i).)

If the trial court determines the committed individual would not be a danger to others while under supervision and treatment in the community, the trial court shall order the individual placed in a state-operated forensic conditional release program for one year. (§ 6608, subd. (d).) After that year, "the court shall hold a hearing to determine if the person should be unconditionally released from commitment" because he or she is no longer an SVP. (*Ibid.*)

If the court denies the petition, the committed individual may not petition the trial court again for at least one year. (§ 6608, subd. (h).) Any subsequent petition filed without the recommendation or concurrence of the Director shall be denied by the trial court "unless it contains facts upon which a court could find that the condition of the committed person had so changed that a hearing was warranted." (*Id.*, subd. (a).)

[footnote continued from previous page]
recommendation is made when the Department determines the committed individual's "diagnosed mental disorder has so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community . . . ." (*Id.*, subd. (a).)

In addition to the procedures for obtaining release set forth in section 6608, a person committed as an SVP has the right to challenge the commitment by a petition for writ of habeas corpus pursuant to section 7250.[5] Although this statute does not mention the burden of proof, a habeas corpus petitioner generally has the burden of establishing a basis for relief by a preponderance of the evidence. (See *In re Visciotti* (1996) 14 Cal.4th 325, 351; see also Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."].)

B. *Standard of Review*

Defendant's arguments present challenges to the constitutional validity of the SVPA; that is, the contentions are based upon the text of the statute itself, not its application to the defendant's particular circumstances. (See, e.g., *Dillon v. Municipal Court* (1971) 4 Cal.3d 860, 865.) As such, defendant must demonstrate that the SVPA's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084; *Pacific Legal*

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[5] Section 7250 provides: "Any person who has been committed is entitled to a writ of habeas corpus, upon a proper application made by the State Department of Mental Health . . . , by that person, or by a relative or friend in his or her behalf to the judge of the superior court of the county in which the hospital is located, . . . judicial review shall be in the superior court for the county that determined the question of the mental competence of the person. All documents requested by the court in the county of confinement shall be forwarded from the county of commitment to the court. Upon the return of the writ, the truth of the allegations under which he or she was committed shall be inquired into and determined. The medical history of the person as it appears in the clinical records shall be given in evidence, and the superintendent in charge of the state hospital wherein the person is held in custody and any other person who has knowledge of the facts shall be sworn and shall testify relative to the mental condition of the person."

Foundation v. Brown (1981) 29 Cal.3d 168, 180.) The defendant has the burden of establishing a statute's unconstitutionality. (*People v. Otto* (2001) 26 Cal.4th 200, 209-210; *Brown v. Superior Court* (1971) 5 Cal.3d 509, 520.)

C. *Equal Protection: SVP's, MDO's, and NGI's*

Defendant contends the indeterminate commitment provision violates equal protection because other civil commitment detainees in California are not subject to this requirement. Specifically, defendant compares the commitment scheme for SVP's with the commitment scheme for MDO's and NGI's. The MDO commitment scheme, he points out, provides for an annual recommitment proceeding at which the state must prove beyond a reasonable doubt that a detainee continues to meet the MDO commitment criteria. (See Pen. Code, § 2972, subd. (a).) The civil commitment of an individual held under the NGI commitment scheme is, after the initial commitment term, entitled to a recommitment proceeding every two years and "to the rights guaranteed under the federal and State Constitutions for criminal proceedings." (Pen. Code, § 1026.5, subd. (b).) In contrast to these schemes, the SVPA provides for an indeterminate commitment term and, when an individual seeks release from an SVPA commitment who has not been given permission by the Director to do so, the individual has the burden of proving that he is not an SVP by a preponderance of the evidence.

As defendant acknowledges, his equal protection claim requires that he first establish that the state has adopted a classification scheme under which two similarly situated groups are treated unequally. (See *In re Eric J.* (1979) 25 Cal.3d 522, 530;

People v. Taylor (2009) 174 Cal.App.4th 920, 935 [Fourth Dist., Div. Two] (*Taylor*).) Our inquiry is not whether the two groups are similarly situated for all purposes, but whether they are similarly situated for the purpose of the law that is being challenged. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199-1200.) We conclude that defendant has failed to establish this threshold requirement.

Our state Supreme Court has held that, under the equal protection clause, the state may not place "arbitrary and discriminatory confinement standards for criminal incompetents in the civil commitment statutes." (*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 171.) It may, however, "adopt more than one procedure for isolating, treating, and restraining dangerous persons; and differences will be upheld if justified. [Citations.]" (*Id.* at p. 172; see also *In re Smith* (2008) 42 Cal.4th 1251, 1266.)

Although both SVP's and MDO's have, by definition, a mental disorder, the nature of the respective mental disorders are not the same. A person subject to commitment under the MDO law must have a "severe mental disorder that is not in remission or cannot be kept in remission without treatment." (Pen. Code, § 2962, subd. (a).) The "term 'severe mental disorder' means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely." (*Ibid.*) An SVP, by contrast, must have 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." (Welf. & Inst. Code, § 6600, subd. (a)(1).) The SVPA is thus concerned not with only persons who committed sexually violent crimes, but with persons whose mental disorder makes them likely to do so again.

This difference in the nature of the mental disorder that must exist in order to qualify as an SVP distinguishes SVP's from MDO's. (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1163.) As the *Buffington* court noted in rejecting an equal protection challenge to the SVPA: "Prisoners who suffer from conditions that may with treatment be kept in remission are the target of the MDO Act, whereas the SVPA covers prisoners whose conditions pose a risk of future sexually violent criminal behavior and who may never be completely treated." (*Ibid.*; see also *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1221-1222.) These two classes of persons are thus not similarly situated for purposes of an equal protection challenge to the indeterminate term and release procedures of the SVPA. (See *Taylor, supra,* 174 Cal.App.4th at pp. 935-936.)

Nor are SVP's similarly situated with those who are committed after a finding of not guilty by reason of insanity. The mental illness of an NGI must exist at the time of *prior* conduct, while the SVPA applies only if the individual has a mental disorder that poses a risk of *future* violent criminal behavior. (Pen. Code, § 1026; Welf. & Inst. Code, § 6600, subd. (a)(1).) There is nothing in the NGI commitment scheme that requires an NGI to have a mental illness that predisposes them to commit violent crimes in the future. Therefore, NGI's and SVP's are not similarly situated for purposes of defendant's equal protection challenge. (See *Taylor, supra,* 174 Cal.App.4th at p. 936.)

Defendant relies heavily on *Baxstrom v. Herold* (1966) 383 U.S. 107 (*Baxstrom*). *Baxstrom* involved involuntary civil commitment laws in New York. Under one statute, a person who is serving a criminal sentence in an institution for the mentally ill and who is nearing the end of his sentence could be civilly committed based upon the opinion of the director of the institution and certification by a state court judge. (*Id.* at p. 110 & fn. 2.) Persons civilly committed under other statutes are entitled to de novo review by a jury of an order certifying him or her as mentally ill; if the jury returns a verdict that the person is sane, the person must be immediately discharged. (*Id.* at p. 111.)

The Supreme Court held that these procedural differences violated equal protection. (*Baxstrom, supra,* 383 U.S. at pp. 111-112.) The court rejected an argument that the statutes reasonably distinguished the civilly insane from those who have dangerous or criminal propensities: "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. [Citation.] Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*. For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." (*Id.* at pp. 111-112.)

Baxstrom is distinguishable. In *Baxstrom*, different people were subject to different procedures for the purpose of determining whether they were "mentally ill *at all*." (*Baxstrom, supra,* 383 U.S. at pp. 110-111.) As explained above, however, the SVPA requires proof of more than just *any* mental illness or disorder; the mental disorder must be such that it "*makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior*." (§ 6600, subd. (a)(1), italics added.) By contrast, one can be classified as an MDO or an NGI without a determination that he or she is likely to engage in sexually violent criminal behavior in the future. The nature of the particular mental illnesses that must exist under the different commitment schemes are not, as in *Baxstrom*, of like kind. *Baxstrom*, therefore, does not control the issue presented in this case. Moreover, *Baxstrom* makes clear that the state may treat people with different mental disorders differently so long as the distinction bears "some relevance to the purpose for which the classification is made." (*Baxstrom, supra,* at p. 111.) Here, the distinction defendant challenges—the imposition of an indeterminate term—is relevant to the purpose for which the SVP classification is made: to protect the public from persons who have been diagnosed with a type of mental disorder that makes it likely such person will engage in sexually violent criminal behavior. Our holding that the imposition of indeterminate terms does not violate the guarantee of equal protection is thus consistent with *Baxstrom*.

D. *Due Process*

As set forth above, the initial commitment as an SVP requires that the People prove that the individual is an SVP beyond a reasonable doubt. (§ 6604.) If the Department subsequently determines that the individual is no longer an SVP, the Department must authorize the committed individual to petition the trial court for release. (§ 6605, subd. (b).) If the People oppose the petition, the People have the burden of proving that the individual is an SVP beyond a reasonable doubt. (*Id.*, subd. (d).) If the Department determines that the individual is still an SVP, the individual can still petition the court for release; however, in this situation, the individual has the burden of proving that he or she would not be a danger to others due to his mental disorder if he or she is under supervision and treatment in the community. (§ 6608, subds. (d), (i).) The burden of proof is a preponderance of the evidence. (*Id.*, subd. (i).) Defendant contends that by placing the burden of proof on the committed individual to show that he or she is not an SVP, the SVPA violates the federal guarantee of due process.

A civil commitment constitutes a significant deprivation of the fundamental freedom from physical restraint that is at the core of the liberty protected by the due process clause. (*Foucha v. Louisiana* (1992) 504 U.S. 71, 80 (*Foucha*); *Kansas v. Hendricks* (1997) 521 U.S 346, 356-357; *Addington v. Texas* (1979) 441 U.S. 418, 425.) Nevertheless, an individual's right to be free of physical restraint may be overridden when the individual is unable to control his or her behavior and, as a result, poses a danger to public health and safety. (*Kansas v. Hendricks, supra*, at pp. 356-357; *Foucha,*

supra, at p. 80; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1151.) The Supreme Court has thus upheld civil commitments when the state is required to prove by clear and convincing evidence both that the person is mentally ill and that hospitalization is required for his or her own welfare or for the protection of others. (*Kansas v. Hendricks, supra*, at p. 358; *Foucha, supra*, at pp. 75-76; *Addington v. Texas, supra*, at pp. 432-433.)[6] Once the person has been committed, due process permits the person to be held as long as he or she is both mentally ill and dangerous, but no longer. (*Foucha, supra*, at p. 77; *O'Connor v. Donaldson* (1975) 422 U.S. 563, 575.)

Although not resolving the precise question before us, *Jones v. United States* (1983) 463 U.S. 354 is instructive. In *Jones*, the Supreme Court considered a statute under which a criminal defendant may be acquitted by reason of insanity if his insanity is affirmatively established by a preponderance of the evidence. (*Id.* at p. 356.) An acquittal on this basis indicates a finding that the individual had committed an act that constitutes a criminal offense. (*Id.* at p. 363.) The acquittee can then be committed to a mental institution without a further commitment proceeding. (*Ibid.*) Under the challenged commitment scheme, insanity, if established, is presumed to continue until it can be shown that the defendant has recovered. (*Id.* at p. 364.) After the defendant's initial commitment, he or she is entitled to a judicial hearing to determine his or her eligibility for release; however, the defendant has the burden of proving by a

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[6] California law goes further, requiring that the state prove the need for an initial civil commitment by proof beyond a reasonable doubt. (§ 6604.)

preponderance of the evidence that he or she is no longer mentally ill or dangerous. (*Id.* at p. 357.) In rejecting a due process challenge to the statute, the Supreme Court explained that "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands.'" (*Id.* at pp. 367-368.) As to the initial commitment, the court held that the "preponderance of the evidence standard comports with due process for commitment of insanity acquittees." (*Id.* at p. 368, fn. omitted.)[7]

The SVPA's requirement that the committed individual prove that he or she is not an SVP by a preponderance of the evidence, *under the circumstances that must exist to trigger that requirement*, does not, on its face, violate due process. Placing the burden of proof on the committed individual occurs only if: (1) the state has previously proved beyond a reasonable doubt that the person is an SVP; (2) the individual's mental condition has been thereafter examined at least annually and a professionally qualified person has prepared a report in the form of a declaration that addresses whether the individual is an SVP and whether a conditional or unconditional release is appropriate; (3) the committed individual has been provided with the opportunity to retain (or have a court appoint) an independent expert to examine him or her; and (4) the Director has determined that the individual is still an SVP and release to a less restrictive alternative is not appropriate. (§§ 6601, subd. (a)(1), 6605, subds. (a), (b).) A committed person seeking release under these circumstances is thus someone who has been found beyond a

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[7] The court did not specifically address the requirement that the defendant prove the absence of mental illness in a subsequent proceeding for release. (See *Jones v. United States, supra,* 463 U.S. at p. 363, fn. 11.)

reasonable doubt to have a mental disorder that predisposes the person to sexually violent criminal behavior, is subject to periodic reviews of his mental health, and who has, even with the assistance of an expert hired for him or her, failed to persuade the Director that he or she is no longer an SVP. If such a person does petition for release, he is provided with the right to counsel. (§ 6608, subd. (a).) Under these circumstances, requiring a committed individual who seeks release to prove by a preponderance of the evidence that he or she is no longer an SVP is not, on its face, a constitutionally impermissible burden. (See *Taylor, supra,* 174 Cal.App.4th at p. 931.)[8]

Defendant relies primarily upon *Foucha, supra,* 504 U.S. 71. In that case, the court considered a Louisiana commitment scheme for criminal defendants who are found not guilty by reason of insanity. (*Id.* at p. 73.) Under that scheme, an acquitted person could be denied release from confinement even if the person no longer suffers from any mental illness. (*Ibid.*) Indeed, the petitioner in the case, Foucha, had recovered from his drug induced psychosis and was not suffering from a mental illness or disease when he sought release. (*Id.* at pp. 74-75, 79.) Nevertheless, the state court ordered Foucha recommitted to the mental institution because he was dangerous to himself and others.

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[8] We emphasize that the current challenge is a facial challenge to the constitutionality of the SVPA. We do not foreclose the possibility that a person committed under the SVPA could establish that, as applied, the implementation of the statutory scheme on an individual or collective basis may be violative of due process. (See *Tobe v. City of Santa Ana, supra,* 9 Cal.4th at p. 1084 ["When a criminal defendant claims that a facially valid statute or ordinance has been applied in a constitutionally impermissible manner to the defendant, the court evaluates the propriety of the application on a case-by-case basis to determine whether to relieve the defendant of the sanction."].)

(*Id.* at p. 75.) The court held this was unconstitutional. The court explained that because the State of Louisiana does not contend that Foucha was mentally ill at the time of the trial court's hearing, "the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis." (*Id.* at p. 78.)

Foucha is distinguishable. Unlike the Louisiana statute, the SVPA does not permit a committed individual to continue to be held once it is determined that the person no longer has the kind of mental disorder required to be confined. If, following an annual review, the Director determines that the person is not an SVP, the Director must authorize the individual to file a petition for release (§ 6605, subd. (b)); if the Director does not authorize such a petition, the individual can file one without the Director's permission (§ 6608, subd. (a)). In either situation, the court or a jury must determine whether the person still has the requisite diagnosed mental disorder. (§§ 6605, subd. (d), 6608, subd. (d).) If, as in *Foucha*, the state concedes that the person does not have the requisite mental disorder, then, unlike *Foucha*, the person must be released. (§ 6608, subd. (d).) *Foucha*, therefore, does not aid defendant.

E. *Equal Protection: SVP's Authorized to Petition for Release and SVP's Not Authorized to Petition for Release*

Defendant contends the SVPA violates equal protection because it treats SVP's who have been authorized by the Director to petition for release differently from SVP's who have not been so authorized. In particular, as set forth above, the SVPA provides

different procedures and burdens of proof for seeking and obtaining release from commitment based upon whether the Director authorizes the committed individual to petition for release. Defendant argues that such different treatment violates equal protection because, he asserts, all SVP detainees have been found to share the same basic characteristics, viz., that they are an SVP.

The argument ignores the reason why the Director authorizes some to petition for release and does not authorize others. The persons the Director authorizes to petition for release pursuant to section 6605 are, according to the Department, no longer SVP's. By contrast, the individuals who must petition for release pursuant to section 6608 have been found, based upon expert examination, to still be SVP's. Although the final determination as to whether an individual is or is not an SVP will be made by a jury or a court, the initial determination by the Department is made to give individuals whom the Department has determined are no longer SVP's an easier path out of confinement than those who are still found by the Department to be SVP's (or, alternatively, to give individuals whom the Department has determined are still SVP's a more difficult path). This distinction, reasonable on its face, has "some relevance to the purpose for which the classification is made." (See *Baxstrom, supra,* 383 U.S. at p. 111.) Thus, the individuals who are in the first group are not similarly situated to the individuals in the second group. Defendant's equal protection argument on this ground therefore fails.

III. DISPOSITION

The judgment is affirmed.

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/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Gaut
J.