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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. KHANH NGUYEN, Defendant and Appellant.	B223531 (Los Angeles County Super. Ct. No. ZM013158)

APPEAL from an order of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed in part and reversed in part with directions.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Victoria B. Wilson and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Khanh Nguyen appeals from an order of commitment as a sexually violent predator. We affirm the order of commitment but reverse and remand with respect to defendant's equal protection argument.

PROCEDURAL AND FACTUAL BACKGROUND

In 1994, defendant pleaded no contest to two counts of committing a lewd act on a child (Pen. Code, § 288, subd. (a)) and admitted he occupied a position of special trust with respect to the children (*id*., § 1203.066, subd. (a)(9)). (*People v. Nguyen* (Super. Ct. L.A. County, 1994, No. NA017272).) The case arose out of defendant's molestation of two preteen boys while he was a camp counselor. Defendant was sentenced to state prison for five years.

In 1996, the Department of Corrections referred defendant to the Department of Mental Health (DMH) for evaluation under the Sexually Violent Predators Act (SVPA, Welf. & Inst. Code, § 6600 et seq.). The DMH did not recommend commitment as a sexually violent predator (SVP), and defendant was released on parole. (*People v. Nguyen* (Sept. 26, 2002, B149315) [nonpub. opn.] [2002 WL 31122803 at p. 5].)

One of the conditions of defendant's parole was that he not possess child pornography. In an October 1997 parole search, photographs of naked boys were found on defendant's computer. He also had subscribed to an internet service for pedophiles. He was arrested and returned to prison. (*People v. Nguyen*, *supra* [2002 WL 31122803 at p. 5].)

In 1998, the Department of Corrections again referred defendant to the DMH for evaluation under the SVPA. At the DMH's request, the County of Los Angeles (County) filed a petition for commitment. Following a court trial, defendant was adjudged a SVP and committed to the DMH for two years, ending on April 24, 2002. Defendant appealed

the commitment order. It was upheld on appeal. (*People v. Nguyen, supra* [2002 WL 31122803 at pp. 5-6, 10].)

On March 21, 2002, the County filed a petition to keep defendant committed as a SVP. (*People v. Nguyen* (Super. Ct. L.A. County, No. ZM005292).) Following a hearing, the court found probable cause to believe he would engage in sexually violent behavior if released from prison and ordered him to remain in custody.

On March 23, 2004, the County filed a recommitment petition under the SVPA. (*People v. Nguyen* (Super. Ct. L.A. County, Nos. ZM007375, NA017272).) On June 22, 2005, No. ZM005292 was consolidated into No. ZM007375, and the court found probable cause and ordered defendant to remain in custody.

On April 4, 2006, the County again filed a recommitment petition under the SVPA. (*People v. Nguyen* (Super. Ct. L.A. County, Nos. ZM010052, NA017272).) On October 31, 2006, the parties filed a stipulation to a continued commitment period of two years. This was in response to uncertainty over the retroactive effect of new legislation and a pending ballot initiative which would extend the commitment period for a SVP from two years to an indeterminate term.

The probable cause hearing was held on August 8, 2007. The court found probable cause and ordered defendant to remain in custody pending a trial.

A jury trial began on April 1, 2008. However, the jury was unable to reach a verdict and the County's request for a retrial was granted.

Prior to retrial, the County filed the instant petition on April 22, 2008. (*People v. Nguyen* (Super. Ct. L.A. County, Nos. ZM013158, NA017272).) Defendant waived his right to a probable cause hearing and submitted on the doctors' reports in the case file. The court found probable cause and ordered that defendant remain in custody pending trial.

The trial court ordered No. ZM010052 consolidated into No. ZM013158, and a jury trial began on November 12, 2009. The prosecution presented testimony by one of defendant's victims and by the police officer who conducted the 1997 parole search, and testimony by a police officer and investigator who discovered a 2006 letter from

defendant to a convicted sex offender containing lewd comments regarding boys. The prosecution also presented testimony by two clinical psychologists who evaluated defendant. Defendant testified on his own behalf and presented testimony by two psychologists. He also presented testimony by a friend who was a minister who pledged to support defendant upon his release.

At the conclusion of the trial, the jury found defendant to be a sexually violent predator. The trial court ordered an indeterminate term of commitment pursuant to Welfare and Institutions Code section 6604.

DISCUSSION

A. *Voir Dire*

After the 12 jurors had been selected and the parties were examining the prospective alternate jurors, the prosecutor exercised a peremptory challenge to excuse Prospective Alternate Juror No. 3. At that point, defense counsel made an objection under *People v. Wheeler* (1978) 22 Cal.3d 258, "that was the third, three Asians." Defense counsel requested a mistrial.

The trial court responded, "I'm not going to find a prima facie case. However, I am going to request that the [prosecutor] indicate her reasons on the record. They are pretty obvious."

The prosecutor explained, "I believe her answers to my questions, especially when I was asking her about the doctors and whether or not she was going to be able to listen to both sides, I felt like she wasn't either understanding what I was saying, she paused and I believe the way she answered the question, I thought she just answered it because she had to not because she felt a certain way. [¶] I do feel that she has a difficulty understanding English. And she has no prior jury experience." Following this explanation, the trial court denied defendant's *Wheeler* motion.

Defendant contends the trial court erred in failing to find a prima facie case of group bias. We disagree.

A party's use of peremptory challenges is presumed to be valid. (*People v. Williams* (1997) 16 Cal.4th 153, 187; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 278.) Inasmuch as a peremptory challenge need not be exercised solely for a clearly identifiable bias, as opposed to a suspicion of potential bias, the presumption of validity is essential. Counsel may develop a distrust for a potential juror's objectivity "'on no more than the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another" [citation].'" (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215-1216; accord, *People v. Turner* (1994) 8 Cal.4th 137, 171, disapproved on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Counsel may excuse potential jurors based on hunches or for arbitrary reasons, so long as they are unrelated to impermissible group bias. (*People v. Box* (2000) 23 Cal.4th 1153, 1186, fn. 6, disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10; *Turner*, *supra*, at p. 165.) Thus, the burden is on the complaining party to make a prima facie showing that the peremptory challenges have been exercised in violation of the Constitution. (*Johnson*, *supra*, at p. 1216; see *People v. Crittenden* (1994) 9 Cal.4th 83, 115.)

Once a prima facie showing is made, the burden shifts to the party exercising the peremptory challenges to present a neutral explanation for the challenges related to the case. (*People v. Silva* (2001) 25 Cal.4th 345, 384; *People v. Williams*, *supra*, 16 Cal.4th at p. 187.) The trial court must then determine whether the opposing party has proved purposeful discrimination. (*Silva*, *supra*, at p. 384.)

If the court finds a prima facie case has not been made but nonetheless invites the prosecution to justify its peremptory challenges, the question before us is whether a prima facie case has been made. (*People v. Box*, *supra*, 23 Cal.4th at p. 1188; *People v. Welch* (1999) 20 Cal.4th 701,746.) If it has not been made, no review of the prosecution's explanations is necessary. (*Box*, *supra*, at p. 1188; *People v. Davenport* (1995) 11 Cal.4th 1171, 1201.)

In order to make a prima facie showing, the party making the motion must show from all the circumstances of the case that there is a strong likelihood the persons are

excluded because of their group association. (*People v. Box*, *supra*, 23 Cal.4th at pp. 1187-1188; *People v. Williams*, *supra*, 16 Cal.4th at p. 187.) It is true that unconstitutional exclusion may be shown in part by establishing a pattern of challenges eliminating most or all members of the cognizable group. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 115; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) However, merely referring to the number of persons of a particular group excused by peremptory challenge is insufficient in itself to establish a prima facie case. (*People v. Dement* (2011) 53 Cal.4th 1, 19; *People v. Garcia* (2011) 52 Cal.4th 706, 747; *Crittenden*, *supra*, at p. 119.) "[M]erely alluding to the fact a party has used its peremptory challenges to exclude members of a particular group" is insufficient to meet the burden of establishing a prima facie case. (*People v. Trevino* (1997) 55 Cal.App.4th 396, 406.)

The trial court clearly did not err in finding defendant failed to make a prima facie showing of impermissible exclusion. The fact that the prosecutor had excluded three Asians from the jury was not sufficient to establish a prima facie case. (*People v. Dement*, *supra*, 53 Cal.4th at p. 19; *People v. Garcia*, *supra*, 52 Cal.4th at p. 747; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 119.)

B. *Indeterminate Commitment*

Defendant contends that, pursuant to the October 31, 2006 stipulation, he could be committed only for an additional two-year period, not an indeterminate term. We disagree.

The stipulation states that "[o]n September 20, 2006 Senate Bill 1128, urgency legislation, was signed into law by the Governor. Additionally a ballot initiative commonly known as 'Jessica's Law' is on the ballot in November of 2006. The legislation and the initiative include language which would lengthen the term of commitment for a SVP from two years to an indeterminate term. Due to uncertainty in the retroactive application of this change," the County was entering into the stipulation.

"For SVPs who have been committed and currently have a pending re-commitment petition for an extended commitment, the District Attorney's Office will file

additional petitions for extended commitments as they become timely pursuant to Welfare and Institutions Code § 6604.1. The District Attorney's office will use the filing criteria and commitment period in effect at the time of filing the re-commitment petitions. If a pending 2 year re-commitment petition filed prior to the effective date of the bill and/or initiative has not been tried prior to the expiration of the two-year commitment period and a new petition is timely filed after the effective date, the District Attorney's Office will pursue an indeterminate term."

Here, the recommitment petition filed on April 4, 2006 in Case No. ZM010052 was pending on October 31, 2006, when the stipulation was filed. The new legislation then became effective. The case went to trial on April 1, 2008, but the jury was unable to reach a verdict and a retrial was granted. A new recommitment petition was filed on April 22, 2008 in Case No. ZM013158. Case No. ZM010052 was consolidated into No. ZM013158 and went to trial on November 12, 2009.

At the conclusion of the original trial, defense counsel moved to dismiss the case, and the People requested a retrial. The court denied the defense motion and granted the retrial.

In discussing the further proceedings to be held, the prosecutor stated that she "would like to have [defendant] sent back [to court] next Tuesday so that the new petition can be filed. And then once that case is filed, a probable cause hearing is held. It can be determined by his attorney whether or not he wants to consolidate."

Defense counsel then pointed out: "Now, this trial was expedited, as the court is aware, based on a stipulation and that stipulation being germane to the issue of whether or not Mr. Nguyen would be contesting a two-year or indeterminant [*sic*] commitment. The date certain as represented to me is April 24th would be the deadline for completing this trial. Mr. Nguyen will clearly suffer prejudice if not granted a trial date in time, at least make a reasonable attempt at the 24th.

"If the court won't grant a trial date in advance of the 24th such that Mr. Nguyen might have an opportunity to contest this within the constructs of the stipulation that we've agreed to for the purpose of the jurisdiction of this trial, request a stay on any

additional petitions until we're able to resolve this and I think that's an appellate issue that needs to be resolved, specifically the prejudice suffered by Mr. Nguyen. Because the idea was to complete the trial by a certain date and nobody made any provisions for a mistrial. . . ."

The trial court noted that mistrials "happen in all sorts of cases" and continued the matter to April 22 . It denied the request to stay the filing of any additional petitions.

On April 22, the parties set August 6 as the date for the next hearing, at which they would either set a probable cause hearing or defendant would submit on the documentary evidence. On August 14, the court asked defense counsel why the case had not remained in Long Beach, where it originally had been tried. Defense counsel explained: "There is some discussion—I pressed having a new trial within two weeks afterwards. My understanding was because of—just the practical matter we wouldn't realistically be able to go to trial immediately, and because the People submitted a concurrent petition. [¶] So the next trial would actually be for a trial under two petitions rather than just the original. So there had to be an arraignment for the new petition. I think that's what brought it back here."

When the case finally went to trial, defense counsel objected to consolidation of the petitions, but the trial court overruled his objection.

Defendant first complains that the trial court failed to follow *Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156 (*Litmon I*). In *Litmon I*, the petitioners were committed as SVPs. While recommitment petitions were pending, the People filed second recommitment petitions. Over the petitioners' objections, the first and second recommitment petitions were consolidated for trial. (*Id*. at pp. 1162-1164.)

The court rejected the petitioners' claim that they had to be tried on the first recommitment petitions before trial on the second petitions. Since the issue at trial is the person's current mental condition, there was no harm in consolidating the petitions. (*Litmon I, supra*, 123 Cal.App.4th at pp. 1169-1170.) The bigger problem was the delay in trying the case, resulting in a second recommitment petition being filed before the first one was tried. (*Id*. at p. 1170.) The court observed that "[t]he SVPA sets no time period

within which the probable cause hearing preceding a recommitment must be held. And, once probable cause is found, the SVPA sets no time period within which the trial must be held . . . ." (*Ibid*.) "Nevertheless, there must be some limit to the length of time trial on an SVP petition can be delayed." (*Id*. at p. 1171.) However, in the absence of legislative mandates, the court merely urged trial courts to use "every effort consistent with existing statutory law . . . to bring SVP petitions to trial expeditiously and certainly well before the expiration of the very two-year commitment period at issue in the trial." (*Id*. at p. 1172.)

The court acknowledged that trial courts have the inherent power to consolidate SVP petitions where appropriate. (*Litmon I, supra*, 123 Cal.App.4th at p. 1175.) However, it held, "because the SVPA evidences a legislative intent to provide a trial on every filed recommitment petition as close in time to the expiration of the prior commitment as practicable, it is error to order consolidation over objection when a consolidated trial can occur *only* if the earlier petition is further delayed." (*Id*. at p. 1176.)

Citing the holding in *Litmon I*, defendant claims "[i]n essence, that is what happened here." It is not what happened here, however. Once the original trial resulted in a hung jury and a mistrial, defense counsel acknowledged that as a "practical matter [the parties] wouldn't realistically be able to go to trial immediately." The retrial was delayed, but not for the sole purpose of allowing consolidation and trial of the original petition with the newly-filed petition. Thus, there was no failure to follow *Litmon I*.

Defendant also asserts that "the stipulation permitted the district attorney to pursue an indeterminate term for recommitment when both a new petition was timely filed and when the earlier petition had not been tried prior to the expiration date of the earlier two-year commitment." In his case, he claims, "both conditions were not met. A new petition was, indeed, timely filed but [defendant's] case had been brought to trial prior to the expiration date of the prior commitment. [Defendant] cannot be punished because this trial ended in a mistrial."

Defendant appears to be claiming that the pursuant to the stipulation, if a recommitment petition was pending at the time of the stipulation and he was recommitted, he was entitled to the benefit of the stipulation and could only be recommitted for two years. This would be the case even if the trial of the petition took place after the effective date of the new statute permitting indeterminate terms of commitment.

There is nothing in the language of the stipulation that mandates such a conclusion. It provides that "the District Attorney's Office will file additional petitions for extended commitments as they become timely pursuant to Welfare and Institutions Code § 6604.1. The District Attorney's office will use the filing criteria and commitment period in effect at the time of filing the re-commitment petitions. If a pending 2 year re-commitment petition filed prior to the effective date of the bill and/or initiative has not been tried prior to the expiration of the two-year commitment period and a new petition is timely filed after the effective date, the District Attorney's Office will pursue an indeterminate term."

Although the stipulation is not a model of clarity, as it applies to defendant's case, certain things are clear. The April 4, 2006 recommitment petition was to continue defendant's commitment for an additional two years following the end of the prior two-year term of commitment, about April 24, 2006. The stipulation was entered into on October 31, 2006, and the new law was to take effect later that year. At that point, defendant could expect, pursuant to the stipulation, that, assuming he was recommitted following trial, his current term of commitment would be for two years. That is, it would end about April 24, 2008. Any petitions filed after the effective date of the new law could continue his commitment for an indeterminate term beyond April 24, 2008.

Trial on the pending recommitment petition began on April 1, 2008 and ended in a mistrial. Prior to retrial, the instant petition was filed on April 22, 2008. Trial on both petitions did not begin until November 12, 2009, well beyond the time defendant could have expected the stipulation to apply.

In claiming he was entitled to a two-year term of commitment, defendant relies on *People v. Litmon* (2008) 162 Cal.App.4th 383 (*Litmon II*) and *People v. Castillo* (2010) 49 Cal.4th 145. Neither case supports his claim.

In *Litmon II*, the defendant filed a motion to dismiss the pending recommitment petition, after trial was continued to a date beyond the expiration of the two-year commitment period, claiming violation of his rights to due process and a speedy trial. The trial court denied the motion on the ground there was no right to a speedy trial under the SVPA. (*People v. Litmon, supra*, 162 Cal.App.4th at pp. 392-393.) Trial was scheduled to begin in March 2007, after the effective date of the new law permitting indeterminate terms of commitment. (*Id.* at p. 394.)

On appeal, the court engaged in an in-depth analysis of the SVPA and the meaning of due process. It concluded that the defendant had the right to due process in the context of proceedings under the SVPA, and the delay violated that right. Accordingly, the trial court should have granted his motion to dismiss. (*People v. Litmon, supra*, 162 Cal.App.4th at p. 406.)

Here, defendant did not move to dismiss the proceedings on the ground of violation of his right to due process. He merely opposed consolidation of the two recommitment petitions for trial. *Litmon II* does not bar the consolidation of two recommitment petitions for trial in every case.

In *People v. Castillo*, *supra*, 49 Cal.4th 145, recommitment petitions were filed in August 2001, October 2003, and September 2005. They were consolidated for trial in January 2006. (*Id*. at p. 148.) In October 2006, the defendant entered into the same stipulation at issue in the instant case. (*Id.* at pp. 150-151.) After trial on the recommitment petitions in 2007, the defendant was found to continue to be a SVP and, pursuant to the stipulation by the District Attorney's Office, the trial court ordered him committed for a two-year term on each petition. (*Id*. at pp. 152-153.) On appeal, the People claimed the two-year recommitment terms were invalid in light of the new law. The appellate court agreed and modified the commitment order to reflect an indeterminate term. (*Id*. at p. 154.) The Supreme Court applied principles of judicial

estoppel to enforce the stipulation and bar the imposition of an indeterminate term in place of the two-year terms imposed by the trial court. (*Id*. at p. 158.)

Unlike the situation in *Castillo,* the instant case involves a recommitment petition filed after the effective date of the new law. The stipulation permitted the district attorney's office to seek an indeterminate term on that petition. Thus, there was no violation of the stipulation justifying the imposition of judicial estoppel.

In sum, we conclude that the trial court did not violate the stipulation by imposing an indeterminate term of commitment as a SVP.

C. *Exclusion of Evidence*

Defendant contends the trial court erroneously prevented him from eliciting highly relevant testimony concerning recidivism rates of persons formerly committed as SVPs, depriving him of a fair trial. We disagree.

At issue is a study by clinical psychologist Jesus Padilla regarding recidivism. The study was excluded at both defendant's original trial and his retrial. The People objected to the admission of evidence of the study on the ground it was incomplete and therefore unreliable.

The evidence was contained in a letter from Dr. Padilla to a public defender in a case in Napa County. The judge in that case had ordered Dr. Padilla to release information concerning "the recidivism rates of the individuals that I had been following that had left Atascadero State Hospital without having had any treatment; they were released by the courts."

However, Dr. Padilla testified in the Evidence Code section 402 hearing that his research project "has not been completed, it has not been written up, it has not been sent to a journal for publication, [and] it has not been peer reviewed." Those steps "would be something that would have to happen before I would rely on it to make decisions for my opinion." The doctor thought "it's important to go through all of the steps to insure the validity of this study so that you can then say this is a valid study and these numbers are valid."

The trial court excluded the evidence under Evidence Code section 352 on the ground it was raw data, without a complete study interpreting the data, and that created a danger of prejudice, confusing the issues or misleading the jury. The court viewed the letter to be "like an incomplete hypothetical; there just isn't enough information there confirming its reliability that I would allow it to go to a jury."

It is highly telling that in defendant's lengthy argument regarding the exclusion of the evidence, he fails to cite a single authority to support his contention that the evidence should have been admitted. The question before us is not whether we agree with defendant's characterization of the evidence but whether the trial court abused its discretion in excluding it under Evidence Code section 352. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id*., § 210.) The trial court has the duty to determine the relevance and thus the admissibility of evidence before it can be admitted. (*Id*., §§ 400, 402.) The trial court is vested with wide discretion in performing this duty. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) However, it has no discretion to admit irrelevant evidence. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

The value of an expert's opinion rests upon the material on which the opinion is based and the reasoning leading from this material to a conclusion. (*People v. Coogler* (1969) 71 Cal.2d 153, 166; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) It must be based on the type of material reasonably relied upon by experts. (Evid. Code, § 801, subd. (b); *Pacific Gas & Electric Co.*, *supra*, at p. 1135.) Thus, "the trial court retains discretion to exclude expert testimony . . . that is unreliable or irrelevant, or whose potential for prejudice outweighs its proper probative value. [Citation.]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1061.)

The evidence of Dr. Padilla's study, the "raw data," was relevant only if there was expert opinion testimony tying it to an issue in the case. Dr. Padilla testified that the

study information was not the type of material he would rely upon as an expert. The defense did not proffer any other expert willing to testify that the study information was the type of material reasonably relied upon by experts, and willing to form an opinion based on the information that was relevant to an issue in the case. Since the defense failed to establish the reliability and relevancy of the evidence, the trial court did not abuse its discretion in excluding it. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 717; *People v. Carpenter*, *supra*, 21 Cal.4th at p. 1061.)

D. *Constitutionality of 2006 Amendment of the SVPA*

Defendant contends the 2006 amendment of the SVPA allowing SVPs to be committed for indeterminate terms violates the constitutional rights to equal protection and due process and the proscription against ex post facto laws. The Supreme Court in *People v. McKee* (2010) 47 Cal.4th 1172 addressed these claims. It rejected the due process and ex post facto claims. (*Id*. at pp. 1193, 1195.) Defendant acknowledges we are bound by the court's determinations (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) but raises the claims in order to preserve them for review by the federal courts.

The Supreme Court found, however, that there was merit to the claim that the amended SVPA violated the equal protection clause "because it treats SVP's significantly less favorably than those similarly situated individuals civilly committed under other statutes." (*People v. McKee*, *supra*, 47 Cal.4th at p. 1196.) It did not conclude that the statute violated equal protection but stated: "We do not conclude that the People could not meet [their] burden of showing the differential treatment of SVP's is justified. We merely conclude that [they have] 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." (*Id*. at pp. 1207-1208.)

Defendant requests that we remand the case for further proceedings in the trial court as was done in *McKee*. The People request that we remand the matter to the trial court for reconsideration of the equal protection in light of *McKee*, ordering the trial

court to suspend the proceedings pending the finality of the proceedings on remand in *McKee*, as was done in *People v. Kisling* (2011) 199 Cal.App.4th 687, 695.

We note that the Supreme Court, in cases raising the issue, has granted review and then transferred the cases back to the Courts of Appeal "with directions to vacate [their] decision[s] and, in order to avoid an unnecessary multiplicity of proceedings, to suspend further proceedings pending finality of the proceedings on remand in [*McKee*], including any proceedings in San Diego County Superior Court in which *McKee* may be consolidated with any related matters. 'Finality of the proceedings' shall include the finality of any subsequent appeal and any proceedings in this court." (*People v. Judge* (S182384, review granted and transferred to the Court of Appeal July 28, 2010); *People v. Barbour* (S183450, review granted and transferred to the Court of Appeal July 28, 2010); *People v. McKnight* (S183315, review granted and transferred to the Court of Appeal July 28, 2010).) In keeping with the goal of the Supreme Court "to avoid an unnecessary multiplicity of proceedings," we will take the action advocated by the People and follow the example of *Kisling*.

DISPOSITION

The order is reversed with respect to the question whether defendant's commitment violates the equal protection clause, and the case is remanded to the trial court for reconsideration of this question in light of *People v. McKee*, *supra*, 47 Cal.4th 1172 and the resolution of the proceedings in that case on remand, including any other proceeding in the San Diego Superior Court in which *McKee* may be consolidated with related matters. The trial court shall suspend further proceedings in this case pending the finality of any subsequent appeal and any proceedings in the California Supreme Court in *McKee*. In all other respects, the order is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.