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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

JACKIE ROBINSON,

Petitioner,

vs.

STEPHEN MAYBERG,

Respondent.

CASE NO. 09cv346-IEG(POR)

**Order Denying Petition for Writ of  
Habeas Corpus; Granting in Part  
Certificate of Appealability**

Petitioner Jackie Robinson, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his December 14, 2006 involuntary commitment to the custody of the California Department of Mental Health (“DMH”) for an indeterminate term. The trial court, in San Diego County Superior Court Case No. SDC153907, ordered Petitioner be committed under California’s Sexually Violent Predator Act (“SVPA”), Cal. Welf. & Inst. Code §§ 6600 *et seq.*, after a jury unanimously found beyond a reasonable doubt that Petitioner was a sexually violent predator (“SVP”) as defined in that statute<sup>1</sup>. Respondent has filed an answer to the petition and lodged the state court record. Petitioner has filed a traverse.<sup>2</sup>

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<sup>1</sup>A “sexually violent predator” is one “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.” Cal. Welf. & Inst. Code § 6600(a)(1).

<sup>2</sup>In the interests of justice, on March 11, 2020 the Court withdrew the reference of this case to Magistrate Judge Louisa Porter for issuance of a Report and Recommendation pursuant to Local Civil Rule HC.2.

**Procedural History**

1  
2           The San Diego County District Attorney filed a petition pursuant to the SVPA on April 8,  
3 2003, alleging Petitioner was a SVP based upon his January 24, 1992 conviction on four counts of  
4 committing lewd and lascivious acts upon a child under the age of 14, and his January 24, 2001  
5 conviction for failing to register as a sex offender. [Lodgment No. 1, Clerk’s Transcript (“CT”), 1-  
6 67.] According to the law in effect at that time, the District Attorney sought to have Petitioner  
7 committed to the DMH for two years. [CT 1.] Following a hearing on June 4, 2003, the court  
8 found probable cause to proceed with the petition. However, the court released Petitioner to the  
9 custody of the San Bernardino County Sheriffs Department to face charges based upon his  
10 January 3, 2003 arrest in that County for annoying or molesting a minor under the age of 18 in  
11 violation of the terms of his parole. [CT 293; Unpublished Opinion of California Court of Appeal  
12 (“Cal. Ct. App. Op.”), filed August 8, 2008, Lodgment No. 7, p. 11.] Petitioner waived time for  
13 trial with regard to the San Diego County Superior Court SVPA petition in order to resolve the  
14 San Bernardino County charges. Petitioner entered a plea of *nolo contendere* to the San  
15 Bernardino County charge in late July 2004. [Cal. Ct. App. Op., p. 14.] On March 4, 2005, the  
16 San Bernardino County Superior Court sentenced Petitioner to a negotiated mitigated prison term  
17 of 32 months. [Id., p. 17.]

18           Petitioner agreed to a series of continuances of the San Diego County SVPA petition  
19 proceedings through September 15, 2006. [CT, 293-318.] On September 15, 2006, Petitioner filed  
20 a written motion to enforce an agreement he claimed the parties entered into at the June 4, 2003  
21 probable cause hearing. [Id., p. 18; CT 318-319.] Petitioner argued that the San Diego County  
22 District Attorney at the June 4, 2003 probable cause hearing agreed to dismiss the SVPA petition  
23 if the San Bernardino County court imposed any prison time on the annoying or molesting a minor  
24 charges. Following an evidentiary hearing, the court denied Petitioner’s motion on September 18,  
25 2006. [CT 320-321.]

26           A jury trial commenced on the SVPA petition in San Diego County Superior Court on  
27 September 20, 2006. [CT 325.] The trial ended on September 28, 2006, when the jury reported  
28 they were hopelessly deadlocked. The court declared a mistrial. [CT 339-340.]

1           On October 3, 2006, anticipating a change in the law with regard to commitment of SVPs,  
2 the San Diego County District Attorney filed an amended petition alleging Petitioner was a SVP  
3 and requesting that the court commit Petitioner to the DMH for an indeterminate term. [CT 198-  
4 203.] Trial once again commenced on December 4, 2006. [CT 346-347.] On December 13, 2006,  
5 the jury unanimously found Petitioner to be a SVP. [CT 358-361.] Based upon the provisions of  
6 Proposition 83, passed by California voters in November of 2006, the court ordered Petitioner be  
7 committed to the DMH for an indeterminate term. [CT 288-289.]

8           Petitioner filed a direct appeal, and also filed a petition for a writ of habeas corpus in the  
9 California Court of Appeal. [Lodgment Nos. 2 and 3.] The Court of Appeal consolidated the  
10 matters, and affirmed the trial court's judgment and commitment by unpublished opinion filed  
11 August 8, 2008. [Lodgment No. 7.] Petitioner filed a petition for review in the California  
12 Supreme Court. [Lodgment No. 8.] The California Supreme Court denied the petition, without  
13 comment, on November 12, 2008. [Lodgment No. 9.]

14           Petitioner timely filed this current petition on February 20, 2009. Petitioner asserts the  
15 following grounds for relief: (1) Petitioner's indeterminate commitment to the custody of the  
16 Department of Mental Health violated his constitutional right to due process of law; (2) the  
17 judgment should be reversed because Petitioner's indeterminate commitment to the custody of the  
18 Department of Mental Health renders the SVPA punitive in nature in violation of the ex post facto  
19 clause; (3) the judgment should be reversed because Petitioner's indeterminate commitment to the  
20 custody of the Department of Mental Health renders the SVPA punitive in nature and violates the  
21 prohibition against cruel and unusual punishment; (4) the judgment must be reversed because  
22 Proposition 83 violated the single subject rule applicable to ballot initiatives; (5) Petitioner's  
23 indeterminate commitment with limited judicial review of his custodial status violates the equal  
24 protection clause of the Fourteenth Amendment; (6) Petitioner's Fifth and Fourteenth Amendment  
25 due process rights were violated when the trial court refused to enforce his plea bargain; (7) the  
26 trial court violated Petitioner's Fifth, Sixth, and Fourteenth Amendment rights when it failed to  
27 grant a mistrial when Petitioner's key witness failed to testify; (8) the trial court violated  
28 Petitioner's constitutional rights to due process and fair trial by refusing to exclude inflammatory

1 evidence; and (9) cumulative error requires reversal.

2 **Factual Background**

3 Petitioner was 18 years old in 1992 when he pled guilty to four counts of committing lewd  
4 and lascivious acts against four boys under the age of 14. [Cal. Ct. App. Op., p. 5.] The first  
5 victim, Jason, was a 9-year-old boy who lived next door to Petitioner and who played video games  
6 at Petitioner’s house. Petitioner sodomized Jason on about 20 occasions, and digitally penetrated  
7 Jason’s anus on 3 other occasions. [Id.] The second victim, Jimmy, was an 11-year-old boy with  
8 whom Petitioner maintained a close friendship over the course of three years prior to May of 1991.  
9 Jimmy would earn “points” by engaging in sexual activity with Petitioner<sup>3</sup>, and could exchange the  
10 points for video games and other items. [Id., pp. 5-6.]

11 The third victim, Thomas, was a 10-year-old boy who Petitioner sodomized on more than  
12 one occasion. Petitioner would give Thomas money, food, or treats each time he sodomized him.  
13 [Id., p.6.] The fourth victim, Mark, was a 9-year-old boy who Petitioner fondled on the buttocks.  
14 On one occasion, Petitioner pulled Mark’s underpants down while Mark was pinned against the  
15 bed, and smelled and touched Mark’s buttocks. [Id.]

16 After Petitioner was released from prison on parole in August 1993, he remained out of  
17 custody until 1995, when he committed a non-sexual offense. Petitioner returned to prison until  
18 August 1999, when he was again released. After his release in August 1999, Petitioner failed to  
19 report to his parole officer and failed to register as a sex offender. He, instead, lived in a homeless  
20 shelter under an alias and false Social Security number. Petitioner was re-arrested for these  
21 offenses in December 1999. [Id. p. 7.]

22 Petitioner was again released from custody in June 2002. In January 2003, Petitioner was  
23 arrested in San Bernardino County and charged with annoying or molesting a minor with a prior  
24 sexual offense. In violation of the conditions of his parole, Petitioner had been corresponding in  
25 an online chat room with Marcus, who was 16-years-old, for purposes of having sex. Petitioner  
26 traveled to San Bernardino County in January 2003, without permission from his parole agent, to

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27  
28 <sup>3</sup>For example, Jimmy would earn 10 points by allowing Petitioner to grind on him, 50  
points by allowing Petitioner to digitally penetrate his anus, 100 points by allowing Petitioner to  
take off his pants, and 1,000 points by allowing Petitioner to do anything he wanted. [Id.]

1 meet Marcus. After buying Marcus a video game, Petitioner and Marcus drove to a secluded area  
2 where they began kissing and fondling one another. They drove to a more secluded area, but  
3 Petitioner's car became stuck in the sand. When a deputy sheriff stopped to assist them, Petitioner  
4 and Marcus initially lied about their relationship, telling the deputy they were cousins. Upon  
5 further investigation, the deputy learned the two were not related and had been kissing and  
6 touching each other's genitals. According to the deputy, Marcus looked young, between the ages  
7 of 14 and 16. Petitioner asserted he believed Marcus was 19-years-old. [*Id.*, p. 7.]

8         Psychologists Clark Clipson and Harry Goldberg both testified at the December 2006 trial.  
9 Drs. Clipson and Goldberg first evaluated Petitioner in January 1999, to determine whether he  
10 should be committed to the DMH under the SVPA. [Reporter's Transcript ("RT"), Lodgment No.  
11 10, at 96, 722.] At that time, both Dr. Clipson and Dr. Goldberg determined that Petitioner did not  
12 meet the criteria of a sexually violent predator. [RT 99, 722-723.] Drs. Clipson and Goldberg  
13 evaluated Petitioner again following his 2003 arrest in San Bernardino County, at which time they  
14 both determined Petitioner met the SVP criteria. Both doctors concluded Petitioner had the  
15 diagnosed mental disorders of pedophilia and antisocial personality disorder. [Cal. Ct. App. Op.,  
16 p. 8; RT 115-122, 132-138, 730-752.] Both doctors also concluded Petitioner had a high risk of  
17 re-offending and that the sexual offenses were predatory in nature. [Cal. Ct. App. Op., p. 9; RT  
18 161-169, 752-778.]

19         Psychologist Dr. Ted Donaldson testified on behalf of Petitioner at trial. Dr. Donaldson  
20 opined Petitioner never had a sexual preference for children and was not a pedophile. [Cal. Ct.  
21 App. Op., p. 9; RT 854-856.] Dr. Donaldson challenged the reliability of the methods used by  
22 Drs. Clipson and Goldberg to evaluate Petitioner's risk of re-offending, and opined that any  
23 assessment of risk was moot because Petitioner did not have a diagnosable mental disorder. [Cal.  
24 Ct. App. Op., p. 9.]

25         Petitioner also testified at trial. Petitioner denied sodomizing any of the four young  
26 victims. [Cal. Ct. App. Op., p. 9; RT 947-950.] After his release from prison in August 1993,  
27 Petitioner became a manager at KFC and took home study courses to earn his bachelor's degree in  
28 business administration. [Cal. Ct. App. Op., p. 9; RT 960-61.] Petitioner did not believe he was

1 required to register as a sex offender when he was released from prison in August 1999 because he  
2 was living in a homeless shelter and thought he had completed his sentence. [Cal. Ct. App. Op.,  
3 pp. 9-10; RT 982-985.] Petitioner met Marcus online, in a Gay 20s chat room, and believed  
4 Marcus was 19. [Cal. Ct. App. Op., 10; RT 994-997.] Petitioner testified his parole agent gave  
5 him verbal permission to travel to San Bernardino to contest a traffic ticket that a friend got while  
6 driving Petitioner's car. He arranged to meet Marcus while he was in San Bernardino taking care  
7 of the ticket. [RT 998-1000.] Petitioner met Marcus at a liquor store, and then drove to a store to  
8 buy Marcus a video game as a Christmas gift. [RT 999-1001.] The two then drove to a desolate  
9 area where they touched and fondled each other. Because they kept getting interrupted by passing  
10 all-terrain vehicles, they moved to a more isolated area, but Petitioner's car got stuck in the sand.  
11 [RT 1002-1006.] When Petitioner and Marcus were walking toward the police station to try to get  
12 help, Marcus first told Petitioner he was only 16-years-old. [RT 1006-1007.] Because Petitioner  
13 knew he would be in trouble for being with a 16-year-old, the two decided to tell the police they  
14 were cousins. [RT 1007.]

### 15 Legal Standard

16 Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal  
17 habeas corpus claims:

18 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall  
19 entertain an application for a writ of habeas corpus in behalf of a person in custody  
20 pursuant to the judgment of a State court only on the ground that he is in custody in  
21 violation of the Constitution or laws or treaties of the United States.

22 28 U.S.C. § 2254(a) (West 2006) (emphasis added). A federal habeas corpus petition must allege  
23 a deprivation of one or more federal rights to present a cognizable claim pursuant to § 2254. A  
24 state's interpretation of its laws or rules provides no basis for federal habeas corpus relief when no  
25 federal constitutional question arises. Estelle v. McGuire, 502 U.S. 62, 68 (1991) (federal habeas  
26 corpus relief does not lie for errors of state law, and federal courts may not reexamine state court  
27 determinations on state law issues).

28 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "worked  
substantial changes to the law of habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.  
1997). As amended by AEDPA, 28 U.S.C. § 2254(d) now reads:

1 (d) An application for a writ of habeas corpus on behalf of a person in custody  
2 pursuant to the judgment of a State court shall not be granted with respect to any  
3 claim that was adjudicated on the merits in State court proceedings unless the  
4 adjudication of the claim—

5 (1) resulted in a decision that was contrary to, or involved an  
6 unreasonable application of, clearly established Federal law, as determined  
7 by the Supreme Court of the United States; or

8 (2) resulted in a decision that was based on an unreasonable  
9 determination of the facts in light of the evidence presented in the  
10 State court proceeding.

11 28 U.S.C.A. § 2254(d) (West 2006) (emphasis added).

12 A state court’s decision may be found to be “contrary to” clearly established Supreme  
13 Court precedent: (1) “if the state court applies a rule that contradicts the governing law set forth in  
14 [the Court’s] cases” or (2) “if the state court confronts a set of facts that are materially  
15 indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from  
16 [the Court’s] precedent.” Williams v. Taylor, 529 U.S. 362, 405-06 (2000); Lockyer v. Andrade,  
17 538 U.S. 63, 75-76 (2003). A state court decision involves an “unreasonable application” of  
18 clearly established federal law, “if the state court identifies the correct governing legal rule from  
19 this Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case,”  
20 or, “if the state court either unreasonably extends a legal principle from our precedent to a new  
21 context where it should not apply or unreasonably refuses to extend that principle to a new context  
22 where it should apply.” Williams, 539 U.S. at 407; Andrade, 538 U.S. 63, 75-76.

23 “[A] federal habeas court may not issue the writ simply because the court concludes in its  
24 independent judgment that the relevant state-court decision applied clearly established federal law  
25 erroneously or incorrectly. . . . Rather, that application must be objectively unreasonable.”  
26 Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003) (internal quotation marks and citations omitted).  
27 Clearly established federal law “refers to the holdings, as opposed to the dicta, of [the United  
28 States Supreme] Court’s decisions.” Williams, 529 U.S. at 412; Andrade, 538 U.S. 63, 75-76; see  
Smith v. Patrick, 508 F.3d 1256 (9th Cir. 2007) (discussing meaning of “clearly established federal  
law”).

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1 Discussion

2 1. Does Petitioner's indeterminate commitment to the custody of the Department of Mental  
3 Health violate his Constitutional right to due process of law?

4 Petitioner argues that his indeterminate commitment to the DMH violates his right to due  
5 process. Petitioner argues (a) his retrial should have been governed by the prior version of the  
6 SVPA and (b) the SVPA, as amended by Proposition 83, violates due process because it provides  
7 inadequate mechanisms for judicial review.

8 a. Application of amended SVPA to Petitioner's retrial

9 Petitioner's retrial commenced on December 4, 2006, after the amended SVPA took effect.  
10 Under the amended law, Petitioner was committed to the DMH for an indefinite term, rather than  
11 for the two year term for which he would have been eligible under the prior law. Petitioner argues  
12 his right to due process was violated by the trial court's application of the amended SVPA to  
13 justify his indeterminate commitment.

14 The California Court of Appeal rejected Petitioner's claim, noting:

15 In an SVPA proceeding, the statutory law that applies is that which is in effect at  
16 the time of trial. (*People v. Carlin* (2007) 150 Cal. App. 4<sup>th</sup> 322, 328, fn. 2 ["We  
17 apply the statute in effect at the time of appellant's trial".])

[Cal. Ct. App. Op., p. 30.]

18 Petitioner argues the court erred in applying the new indeterminate commitment provision  
19 to his retrial because "[w]hether or not deemed 'punishment,' the result of applying Jessica's Law  
20 to petitioner was increased hardship ...." [Petition, p. 6b.] This is essentially an ex post facto  
21 argument which, as explained below with regard to ground 2, does not entitle Petitioner to relief.

22 b. Adequacy of mechanism for judicial review

23 The prior version of the SVPA provided that SVPs would be committed to the DMH for a  
24 term of two years. If the state wished to keep an individual in custody after the two year term  
25 expired, it bore the burden of again showing beyond a reasonable doubt that the person was a SVP.  
26 Under the amended SVPA, however, a person adjudged to be a SVP "shall be committed for an  
27 indeterminate term" to the custody of the DMH. Cal. Welf. & Inst. Code § 6604. Although the  
28 DMH must examine the individual's mental condition at least once every year, the state need not  
return to court to obtain a new order of commitment. Cal. Welf. & Inst. Code § 6605(a).



1 A person who has been adjudged a SVP, therefore, now has only two avenues for release.  
2 First, the DMH examiner may determine the person's condition has changed so that either he no  
3 longer meets the definition of a SVP, or he could safely be conditionally released to a less  
4 restrictive living arrangement. Cal. Welf. & Inst. Code § 6605(b). The DMH, then, must  
5 authorize the person to petition the court for conditional release or unconditional discharge as  
6 appropriate. If the court finds there is probable cause to believe the person's mental disorder has  
7 so changed that he is not a danger to society, then the court must set a full hearing. The court must  
8 grant relief after such hearing unless the state proves beyond a reasonable doubt that the person  
9 still meets the definition of a SVP. Cal. Welf. & Inst. Code § 6605(c) and (d).

10 Alternatively, a committed person may at any time petition the court for conditional release  
11 or unconditional discharge without the recommendation of the DMH. Cal. Welf. & Inst. Code  
12 § 6608(a). Before the court will order a new full-blown hearing, however, the committed  
13 individual must show, by a preponderance of the evidence, that he "would not be a danger to  
14 others due to his or her diagnosed mental disorder while under supervision and treatment in the  
15 community." § 6608(d). Petitioner argues the statute's indeterminate term of commitment to the  
16 DMH, coupled with the limited opportunity for judicial review, violates due process. The  
17 California Court of Appeal rejected Petitioner's claim, finding neither the indeterminate term of  
18 commitment nor the limited mechanisms for judicial review violates due process. [Cal. Ct. App.  
19 Op., p. 30-32.]

20 It is clear that "commitment for any purpose constitutes a significant deprivation of liberty  
21 that requires due process protection." Addington v. Texas, 441 U.S. 418, 425 (1979). "[The]  
22 State must have 'a constitutionally adequate purpose for the confinement'." Jones v. United  
23 States, 463 U.S. 354, 361 (1983) (quoting O'Connor v. Donaldson, 422 U.S. 563, 574 (1975)).  
24 The Supreme Court has held that "in certain narrow circumstances" states may provide "for the  
25 forcible civil detainment of people who are unable to control their behavior and who thereby pose  
26 a danger to the public health and safety." Kansas v. Hendricks, 521 U.S. 346, 357 (1997). The  
27 Court has "consistently upheld such involuntary commitment statutes provided the confinement  
28 takes place pursuant to proper procedures and evidentiary standards." Therefore, it "cannot be said

1 that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our  
2 understanding of ordered liberty.” Id.

3         However, due process “requires that the nature and duration of commitment bear some  
4 reasonable relation to the purpose for which the individual is committed.” Jackson v. Indiana, 406  
5 U.S. 715, 738 (1972). Although a finding of dangerousness alone is ordinarily insufficient to  
6 justify indefinite commitment, dangerousness coupled with some additional factor such as mental  
7 illness or mental abnormality demonstrates “a likelihood of such conduct in the future if the person  
8 is not incapacitated.” Hendricks, 521 U.S. at 358 (citing Heller v. Doe, 509 U.S. 312, 323 (1993)).

9         Here, a jury found beyond a reasonable doubt that Petitioner was a SVP within the  
10 meaning of Cal. Welf. & Inst. Code § 6600(a)(1). This required the jury to find that Petitioner  
11 “ha[d] been convicted of a sexually violent offense against one or more victims and ... ha[d] a  
12 diagnosed mental disorder that makes [him] a danger to the health and safety of others in that it is  
13 likely that he ... will engage in sexually violent criminal behavior.” Cal. Welf. & Inst. Code  
14 § 6600(a)(1). Given such finding, the state has “a constitutionally adequate purpose” for  
15 Petitioner’s commitment to the custody of the DMH. Jones, 463 U.S. at 361; see also Hendricks,  
16 521 U.S. at 363 (finding that measures to “restrict the freedom of the dangerously mentally ill”  
17 constitute “a legitimate nonpunitive governmental objective.”).

18         Furthermore, the procedures for judicial review, set forth in Cal. Welf. & Inst. Code  
19 §§ 6605 and 6608, are sufficient to insure that Petitioner’s confinement will not continue beyond  
20 the point when he no longer suffers from a mental disorder or is no longer dangerous. Petitioner  
21 argues the statutory provisions for review are constitutionally inadequate because § 6605 leaves to  
22 the discretion of the DMH whether to recommend conditional release and § 6608 shifts the burden  
23 to the committed individual to demonstrate he is no longer mentally ill.<sup>4</sup> In combination,  
24 Petitioner argues the SVPA now “creates an unacceptable risk that a SVP detainee who no longer  
25 qualifies as a sexually violent predator will have his commitment continued.” [Petition, p. 6f.]

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27         <sup>4</sup>Petitioner also argues § 6608 does not provide an adequate mechanism for judicial review  
28 because, unlike the DMH-initiated procedure set forth in § 6605, § 6608 does not explicitly  
provide a detainee the right to an expert. The California Supreme Court, however, has held that  
when an indigent individual petitions for release on his or her own under § 6608, the court is  
required to appoint an expert. People v. McKee, 47 Cal. 4<sup>th</sup> 1172, 1193 (2010).

1 Petitioner’s argument that California’s SVPA provides inadequate mechanisms for judicial  
2 review is necessarily foreclosed by the Supreme Court’s decision in Jones, 463 U.S. at 361. In  
3 Jones, a criminal defendant found not guilty by reason of insanity was committed to a mental  
4 hospital under a District of Columbia code section for an indefinite period of time, until he  
5 established, by preponderance of the evidence, that he was no longer mentally ill. 463 U.S. at 358.  
6 The Supreme Court rejected the petitioner’s due process challenge to the statute’s indeterminate  
7 period of confinement. The court first noted the verdict of not guilty by reason of insanity  
8 established both dangerousness and mental illness. Id. at 365. The Court did not directly discuss  
9 the statutory provision that placed the burden on the committee to establish he was no longer  
10 mentally ill. However, the Court concluded the procedures for judicial review were sufficient to  
11 insure the confinement lasted only as long as petitioner’s continuing illness and dangerousness.  
12 Id. at 369. In light of Jones, Petitioner cannot demonstrate that the California Court of Appeal’s  
13 decision rejecting his due process claim was contrary to clearly established Federal law.

14 2. Does Petitioner’s indeterminate commitment to the custody of the DMH render the SVPA  
15 punitive in nature in violation of the ex post facto clause?

16 Petitioner argues California’s SVPA, as amended by Proposition 83, is punitive in nature  
17 and thus violates the ex post facto clause. The California Court of Appeal rejected Petitioner’s  
18 argument.<sup>5</sup>

19 The ex post facto clause of the United States Constitution prohibits states from  
20 “retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts.”  
21 Collins v. Youngblood, 497 U.S. 37, 43 (1990). “The categorization of a particular proceeding as  
22 civil or criminal ‘is first of all a question of statutory construction’.” Hendricks, 521 U.S. at 361  
23 (quoting Allen v. Illinois, 478 U.S. 364, 368 (1986)). If the legislature intended to establish  
24 “civil” proceedings, courts ordinarily defer to such intent unless the “party challenging the statute  
25 provides ‘the clearest proof’ that ‘the statutory scheme [is] so punitive either in purpose or effect

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26 <sup>5</sup>The California Court of Appeal’s opinion in People v. Johnson, 162 Cal. App. 4<sup>th</sup> 1263,  
27 1287-89 (2008), upon which the Court of Appeal relied in denying Petitioner’s appeal, was  
28 withdrawn pending the California Supreme Court’s decision of People v. McKee. However, the  
California Supreme Court in McKee recently adopted similar reasoning to find that California’s  
SVPA, as amended by Proposition 83, does not violate the federal constitutional prohibition  
against ex post facto laws. 47 Cal. 4<sup>th</sup> at 1193-1195.

1 as to negate [the State's] intention' to deem it 'civil'." Hendricks, 521 U.S. at 361 (quoting United  
2 States v. Ward, 448 U.S. 242, 248-49 (1980)).

3 In Hendricks, the Supreme Court reviewed a statutory scheme quite similar to California's  
4 pre-Proposition 83 SVPA, and found such act was civil and did not implicate the ex post facto  
5 clause. The Court noted that commitment under the Kansas act "does not implicate either of the  
6 two primary objectives of criminal punishment: retribution or deterrence." 521 U.S. at 362. The  
7 Court also rejected the idea that the statutory scheme was punitive based upon the potential that  
8 the confinement could become indefinite. "Far from any punitive objective, the confinement's  
9 duration is instead linked to the stated purposes of the commitment, namely, to hold the person  
10 until his mental abnormality no longer causes him to be a threat to others." Id. at 363.

11 The Supreme Court in Seling v. Washington, 531 U.S. 250 (2001), also reviewed  
12 Washington's civil commitment for sexual predators. The Washington statute, like California's  
13 current SVPA, provided that after the initial commitment, the person is entitled to an annual  
14 examination of his mental condition. "If that examination indicates that the individual's condition  
15 is so changed that he is not likely to engage in predatory acts of sexual violence, state officials  
16 must authorize the person to petition the court for conditional release or discharge." Id. at 255.  
17 Upon review, the Court found the legislative scheme was not punitive in nature. Id. at 262.

18 Taken as a whole, California's current SVPA is not significantly distinguishable from the  
19 Kansas and Washington statutes which the Supreme Court in Hendricks and Seling found to be  
20 civil in nature. The California Supreme Court has repeatedly stressed the civil nature of a SVPA  
21 commitment. Hubbart v. Superior Court, 19 Cal. 4<sup>th</sup> 1138, 1171 (1999); McKee, 47 Cal. 4<sup>th</sup> at  
22 1194. Although the SVPA now provides for indefinite commitment to the DMH, rather than for a  
23 term of two years, the statutory scheme still provides mechanisms for judicial review to insure  
24 such commitment continues only for as long as a person meets the SVP criteria of mental  
25 abnormality and dangerousness. Proposition 83's amendment of the SVPA, extending committed  
26 individuals' period of confinement indefinitely until such time as they no longer suffer from a  
27 mental abnormality or no longer pose a danger, does not render California's statutory scheme  
28 punitive in nature. Thus, Petitioner is not entitled to relief under the ex post facto clause.

1 3. Does Petitioner's indeterminate commitment to the DMH violate the prohibition against  
2 cruel and unusual punishment?

3 Petitioner argues his indeterminate commitment to the DMH violates the Eighth  
4 Amendment's prohibition against cruel and unusual punishment. The California Court of Appeal  
5 rejected Petitioner's argument, once again noting the SVPA is not civil, and not criminal in nature.  
6 As explained above in the discussion of Petitioner's ex post facto clause claim, the Court agrees  
7 that the California SVPA's commitment procedures are civil, rather than criminal, in nature.  
8 Therefore, Petitioner's claim that his indefinite confinement violates Eighth Amendment's cruel  
9 and unusual punishment clause is foreclosed by Seling, 531 U.S. at 262.

10 4. Is Petitioner entitled to relief based upon the single subject rule?

11 Petitioner argues Proposition 83 violated the "single subject rule" of the California  
12 Constitution. Federal habeas corpus relief may be granted only based upon a violation of the  
13 Constitution or laws or treaties of the United States. 28 U.S.C. § 2254; Estelle v. McGuire, 502  
14 U.S. 62, 68 (1991). Petitioner's argument in no way implicates the Constitution, laws, or treaties  
15 of the United States, and thus Petitioner is not entitled to habeas relief on this claim.

16 5. Does Petitioner's indeterminate commitment to the DMH violate equal protection?

17 Petitioner argues that individuals like himself, committed to the DMH under the SVPA, are  
18 treated unequally vis-a-vis similarly situated individuals committed to the DMH as mentally  
19 disordered offenders ("MDO") (under Cal. Penal Code § 2960, *et seq.*) or after they have been  
20 found not guilty by reason of insanity ("NGI"). Under Penal Code § 2972, MDOs are committed  
21 for a period of one year, after which time the State must file a petition for continued treatment  
22 under § 2970, and must again prove beyond a reasonable doubt that the patient has a severe mental  
23 disorder which renders him or her dangerous. There are also significant differences in the  
24 statutory scheme for civil commitment of those found not guilty by reason of insanity. Unlike  
25 SVPs, NGIs may not be confined beyond the maximum term to which they would have been  
26 sentenced for the underlying offense unless the district attorney extends the commitment for two  
27 years by proving that the person continues to present a substantial danger because of mental  
28 illness. Cal. Penal Code § 1026.5(b)(1). Petitioner argues these three groups of individuals  
subject to civil commitment are all similarly situated, such that the State must demonstrate a

1 compelling interest advanced by the disparate treatment of SVPs. The California Court of Appeal  
2 rejected Petitioner’s argument, finding that SVPs are not similarly situated to MDOs and NGIs.  
3 [Cal. Ct. App. Op., p. 34.]

4 The Equal Protection Clause of the Fourteenth Amendment is “essentially a direction that  
5 all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living Ctr.,  
6 473 U.S. 432, 439 (1985).

7 The initial discretion to determine what is “different” and what is “the same”  
8 resides in the legislatures of the States. A legislature must have substantial latitude  
9 to establish classifications that roughly approximate the nature of the problem  
10 perceived, that accommodate competing concerns both public and private, and that  
11 account for limitations on the practical ability of the State to remedy every ill. In  
12 applying the Equal Protection Clause to most forms of state action, we thus seek  
13 only the assurance that the classification at issue bears some fair relationship to a  
14 legitimate public purpose.

15 Plyler v. Doe, 457 U.S. 202, 216 (1982). However, the general rule of deference gives way, and  
16 courts apply a strict scrutiny standard, where a statute classifies by race, alienage or national origin  
17 or where the law impinges on personal rights protected by the Constitution. City of Cleburne, 473  
18 U.S. at 440. Where a state law differentiates based upon other characteristics beyond an  
19 individual’s control, such as gender or illegitimacy, the courts apply an intermediate heightened  
20 standard of review. Id.

21 The Court is aware that the California Supreme Court believes it is proper to apply the  
22 strict scrutiny standard in evaluating disparate treatment among civil commitment statutes. People  
23 v. Green, 79 Cal. App. 4<sup>th</sup> 921, 924 (2000) ; McKee, 47 Cal. 4<sup>th</sup> at 1197 (quoting In re Moye, 22  
24 Cal. 3d 457, 465 (1978))<sup>6</sup>. Clearly established Federal law, however, has consistently evaluated  
25 civil commitment statutes such as the California SVPA under either a rational basis or an  
26 intermediate heightened scrutiny standard. Baxstrom v. Herold, 383 U.S. 107, 114 (1966)  
(evaluating civil commitment statute to determine whether its classifications were “arbitrary”);  
27 Jackson, 406 U.S. at 729 (evaluating whether the state provided “reasonable justification” for

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28 <sup>6</sup>Although the California Supreme Court in McKee purported to apply a strict scrutiny  
standard, it ultimately remanded to the trial court to “determine whether the legislative distinctions  
in classes of persons subject to civil commitment are reasonable and factually based.” 47 Cal. 4<sup>th</sup>  
at 1210. It appears the California courts do not apply an “intermediate” level of “heightened”  
scrutiny in the equal protection context, which likely accounts for the difference in terminology  
applied by the California Supreme Court in McKee.

1 applying a more lenient commitment standard, and a more stringent standard of release, for certain  
2 civil committees); Jones, 463 U.S. at 363, fn. 10 (suggesting in dicta that it was appropriate to  
3 apply a rational basis scrutiny in distinguishing between civil commitment and commitment of  
4 insanity acquittees); United States v. Sahhar, 56 F.3d 1026, 1028 (9<sup>th</sup> Cir. 1995) (noting that  
5 Supreme Court has never established the proper standard of review and applying heightened  
6 scrutiny); Young v. Weston, 192 F.3d 870, 876 (9<sup>th</sup> Cir. 1999), *rev'd on other grounds*, Seling v.  
7 Young, 531 U.S. 250 (2001) (affirming district court's analysis of equal protection challenge to  
8 Washington's sexually violent predator statute under heightened scrutiny standard). Because the  
9 Court finds California's SVPA withstands scrutiny under the heightened equal protection standard,  
10 the Court need not determine exactly which of the two standards is proper under clearly  
11 established Federal law.

12 In determining whether California's SVPA violates equal protection under the heightened  
13 scrutiny standard, this Court must first ask whether SVPs are similarly situated to MDOs and  
14 NGIs. Rosenbaum v. City and County of San Francisco, 484 F.3d 1142, 1153 (9<sup>th</sup> Cir. 2007) (first  
15 step in equal protection analysis requires court to identify the classification of groups which are  
16 similarly situated). If these different categories of committees are similarly situated, the Court  
17 must determine whether the SVPA's differential treatment of SVPs, vis-a-vis similarly situated  
18 civil committees, "is substantially related to a sufficiently important governmental interest." City  
19 of Cleburne, 473 U.S. at 441.

20 The California Court of Appeal in this case held that SVPs are not similarly situated to  
21 MDOs and NGIs for purposes of equal protection analysis. However, the California Supreme  
22 recently reversed course and held that these three types of civil committees are similarly situated  
23 for purposes of equal protection analysis. McKee, 47 Cal. 4<sup>th</sup> at 1203, 1207. This Court need not  
24 decide whether the California Supreme Court's conclusion in McKee, that the different categories  
25 of committees are similarly situated for equal protection analysis, is supported by clearly  
26 established Federal law. Even assuming SVPs, MDOs, and NGIs are similarly situated for  
27 purposes of equal protection analysis, the Court finds the state's differential treatment of SVPs "is  
28 substantially related to a sufficiently important government interest."

1 The state of California, upon its initial passage of the SVPA in 1995, made the following  
2 legislative findings relating to the particularized danger which SVPs pose to society:

3 The Legislature finds and declares that a small but extremely dangerous  
4 group of sexually violent predators that have diagnosable mental disorders can be  
5 identified while they are incarcerated. These persons are not safe to be at large and  
6 if released represent a danger to the health and safety of others in that they are  
7 likely to engage in acts of sexual violence. The Legislature further finds and  
8 declares that it is in the interest of society to identify these individuals prior to the  
9 expiration of their terms of imprisonment. It is the intent of the Legislature that  
10 once identified, these individuals, if found to be likely to commit acts of sexually  
11 violent criminal behavior beyond a reasonable doubt, be confined and treated until  
12 such time that it can be determined that they no longer present a threat to society.

13 The Legislature further finds and declares that while these individuals have  
14 been duly punished for their criminal acts, they are, if adjudicated sexually violent  
15 predators, a continuing threat to society. The continuing danger posed by these  
16 individuals and the continuing basis for their judicial commitment is a currently  
17 diagnosed mental disorder which predisposes them to engage in sexually violent  
18 criminal behavior. It is the intent of the Legislature that these individuals be  
19 committed and treated for their disorders only as long as the disorders persist and  
20 not for any punitive purposes.

21 [Historical and Statutory Notes, foll. Cal. Welf. & Inst. Code § 6600.] In addition, Proposition 83  
22 provided the following findings and declarations supporting the amendments to the civil  
23 commitment procedures for SVPs:

24 Sex offenders have very high recidivism rates. According to a 1998 report  
25 by the U.S. Department of Justice, sex offenders are the least likely to be cured and  
26 the most likely to reoffend, and they prey on the most innocent members of our  
27 society. More than two-thirds of the victims of rape and sexual assault are under the  
28 age of 18. Sex offenders have a dramatically higher recidivism rate for their crimes  
than any other type of violent felon.

[Voter Information Guide, Gen. Elec., text of Prop. 83.]

Given the elevated risk of recidivism for sex offenders, the lower likelihood that they will  
be cured from their mental disorder which makes it “likely that [t]he[y] ... will engage in sexually  
violent criminal behavior,” Cal. Welf. & Inst. Code § 6600(a)(1), and the particular vulnerability  
of the victims of sex offenses, the state of California has chosen to impose different standards for  
judicial review following initial civil commitment of SVPs. The differential treatment of SVPs,  
vis-a-vis NGIs and MDOs in California, is substantially justified by the state’s legitimate interest  
in protecting the public from violent sexual offenses. Federal courts have consistently found the  
same factors cited by the legislature in enacting the SVPA justify dissimilar treatment of SVPs vis-  
a-vis other types of civil committees. Young, 192 F.3d at 876; Hubbart, 379 F.3d at 781-82.



1 Petitioner has not pointed to any clearly established Federal law, holding that equal protection is  
2 violated under similar circumstances. Therefore, the Court finds Petitioner is not entitled to relief  
3 on his equal protection claim.

4 6. Were Petitioner's Fifth and Fourteenth Amendment due process rights violated when the  
5 trial court refused to enforce his plea bargain?

6 Petitioner argues he and the prosecution entered into an oral plea agreement during the  
7 June 4, 2003 probable cause hearing in the San Diego County Superior Court. Petitioner argues the  
8 parties agreed that the District Attorney would dismiss the San Diego County SVPA petition if  
9 Petitioner received any prison time for the San Bernardino offense. Petitioner argues the trial  
10 court violated his right to due process when it refused to enforce his plea bargain. The California  
11 Court of Appeal reviewed the trial court record, including the record of the evidentiary hearing  
12 with regard to this issue, and concluded the parties did not enter into a plea agreement.

13 “[A] criminal defendant has a due process right to enforce the terms of his plea  
14 agreement.” Buckley v. Terhune, 441 F.3d 688, 694 (9<sup>th</sup> Cir. 2006) (citing Santobello v. New  
15 York, 404 U.S. 257, 261-62 (1971)). “The construction and interpretation of state court plea  
16 agreements ‘and the concomitant obligations flowing therefrom are, within broad bounds of  
17 reasonableness, matters of state law’.” Id. at 695 (quoting Ricketts v. Adamson, 483 U.S. 1, 6 fn.3  
18 (1987)). In determining whether a plea agreement existed in this case, the California Court of  
19 Appeal applied general principles of contract law as set forth by the California Supreme Court in  
20 People v. Shelton, 37 Cal. 4<sup>th</sup> 759, 767 (2006):

21 A negotiated plea agreement is a form of contract, and it is interpreted  
22 according to general contract principles. “The fundamental goal of contractual  
23 interpretation is to give effect to the mutual intention of the parties. If contractual  
24 language is clear and explicit, it governs. On the other hand, ‘[i]f the terms of a  
25 promise are in any respect ambiguous or uncertain, it must be interpreted in the  
26 sense in which the promisor believed, at the time of making it, that the promisee  
understood it.’ “The mutual intention to which the courts give effect is determined  
by objective manifestations of the parties’ intent, including the words used in the  
agreement, as well as extrinsic evidence of such objective matters as the  
surrounding circumstances under which the parties negotiated or entered into the  
contract; the object, nature and subject matter of the contract; and the subsequent  
conduct of the parties.

27 [Cal. Ct. App. Op., p. 11 (internal citations omitted).] The state court’s determination that there  
28 was not a plea agreement is a factual finding entitled to deference in the absence of clear and

1 convincing evidence to the contrary. Brown v. Poole, 337 F.3d 1155, 1160 fn.2 (9<sup>th</sup> Cir. 2003)  
2 (state court’s relevant factual determinations regarding the existence of a plea agreement, which  
3 are reasonable “in light of the evidence presented in the state court proceedings,” are entitled to  
4 deference on habeas review); Mitleider v. Hall, 391 F.3d 1039, 1046 (9<sup>th</sup> Cir. 2004) (state court’s  
5 factual findings are presumed correct in the absence of clear and convincing evidence to the  
6 contrary).

7       Upon review of the state court record, including the transcript of the June 4, 2003 hearing  
8 at which Petitioner claims the parties entered into a plea agreement as well as the transcript of the  
9 September 15 and 18, 2006 evidentiary hearing on Petitioner’s motion to enforce the plea  
10 agreement, the Court concludes Petitioner is not entitled to relief. At the probable cause hearing  
11 on June 4, 2003, defense counsel, Victor Eriksen, acknowledged that the San Bernardino case did  
12 not “necessarily trump” the San Diego County SVPA proceedings. Mr. Erikson asked the court to  
13 sign a transport order, allowing Petitioner to be transferred to San Bernardino County to face the  
14 pending charges there. Mr. Erikson told the court that Petitioner agreed to waive time for trial on  
15 the SVPA petition, and asked the court to set a status conference for December of 2003. Mr.  
16 Erikson thereafter commented that the San Bernardino proceedings could render the San Diego  
17 County SVPA petition proceedings moot: “[T]hat way[,] by December [,] we’ll know hopefully  
18 what the progress is of the San Bernardino criminal prosecution, and at that time we can report to  
19 the court because obviously, if there is a conviction in that case I think this SVP [petition] will be  
20 moot.” [Supplemental Lodgment No. 11, Transcript of June 4, 2003 proceedings, at 1.]

21       After a break in the proceedings, the trial court addressed the possibility that a new SVPA  
22 petition might be filed against Petitioner: “[I]f he had a new princip[al] commit that was verified  
23 and that would be off calendar because as soon as he’s done his time on that new prison commit  
24 there would be a new –.” [Id. at 2.] Before the court could finish that sentence, however, the  
25 prosecutor interrupted and interjected “– I would dismiss this petition.” [Id.] The court found  
26 probable cause to sustain the petition, and then released Petitioner to the custody of the San  
27 Bernardino County Sheriff to address the charges pending in that county.

28       At the next hearing in the San Diego County Superior Court, on December 2, 2003, Mr.

1 Eriksen discussed the fact the San Bernardino “third strike case” was set for pretrial on  
2 December 12, 2003. The prosecutor noted the parties had talked about continuing the trial on the  
3 SVPA petition until after conclusion of the “three strikes matter” in San Bernardino County,  
4 because that case “would probably resolve this one.” Eriksen agreed, stating “[t]his one will  
5 probably be moot unless [Petitioner] beats that case.” [Cal. Ct. App. Op., at 14.] Petitioner’s  
6 counsel requested a continuance until early March 2004. Petitioner thereafter agreed to a series of  
7 continuances through March 25, 2005.

8 In early March 2005, Petitioner was sentenced to a term of 32 months on the San  
9 Bernardino County matter. At a hearing in San Diego County Superior Court on March 25, 2005,  
10 Petitioner’s new counsel, Richard Gates, stated it was his understanding from the file that the  
11 District Attorney would be dismissing the SVPA petition because Petitioner received prison time  
12 on the San Bernardino matter. [Transcript of March 25, 2005 hearing, at 5-6.] The prosecutor  
13 responded that the SVPA proceedings had been continued because, depending upon the sentence  
14 Petitioner received from the San Bernardino court, the petition could become moot. The  
15 prosecutor noted, however, that because Petitioner had been in custody more than 32-months  
16 before the San Bernardino court imposed its sentence, Petitioner was “basically ... a turnaround.”  
17 [Id. at 6.] Because Petitioner would be released from custody shortly, it was necessary to go  
18 forward with the continued SVPA petition proceedings. The trial court denied Petitioner’s request  
19 to dismiss the SVPA petition, and set trial for April 8, 2005. [Id. at 10.] Petitioner agreed to a  
20 series of continuances thereafter, resulting in a new trial date of September 15, 2006.

21 On September 15, 2006, when trial was set to commence, Petitioner filed a written motion  
22 to enforce a purported agreement entered into at the June 4, 2003 probable cause hearing, to  
23 dismiss the SVPA petition if Petitioner received any time on the San Bernardino County matter.  
24 The court held an evidentiary hearing on the motion on September 15 and 18, 2006. Petitioner  
25 testified, as did his former attorney, Mr. Eriksen, and the original prosecutor, Kathryn Gayle.  
26 Petitioner testified he believed after the June 6, 2003 probable cause hearing that if he received  
27 any prison time on the San Bernardino case, the SVPA petition would be dismissed. [Transcript of  
28 September 15, 2006 hearing, at 45-47.] Petitioner also introduced a copy of a letter he received

1 from Mr. Eriksen following the December 2, 2003 San Diego Superior Court hearing, which stated  
2 “The DA agrees that if you receive ANY prison term in the San Bernardino case, the SVP petition  
3 will be moot and they will move to dismiss it.” Petitioner testified he would not have pleaded no  
4 contest in the San Bernardino matter if he had known the SVPA petition would remain pending in  
5 San Diego. Mr. Eriksen also testified he understood that the District Attorney would dismiss the  
6 SVPA petition if Petitioner received any prison time at all on the San Bernardino County matter.  
7 [Id. at 73-74.]

8 The original prosecutor, Ms. Gayle, testified that she believed the SVPA might be moot  
9 depending on the outcome of the San Bernardino County matter because Petitioner faced a 25-  
10 year-to-life sentence on the charges in that court. [Transcript of September 15, 2006 hearing, at  
11 139-141.] If Petitioner was convicted and sentenced under the three strikes law, it would have  
12 been unnecessary to pursue the SVPA petition. Ms. Gayle testified that she only agreed to dismiss  
13 the SVPA petition in the event there was a new petition filed when Petitioner was to be released  
14 from the San Bernardino County sentence. Ms. Gayle did not intend to guarantee a dismissal of  
15 the San Diego SVPA petition, nor did she enter into any agreement for Petitioner to plead guilty to  
16 the San Bernardino County charges in exchange for dismissal of the SVPA petition. [Id. at 143.]

17 Based upon these facts, the state court’s determination that there was no binding plea  
18 agreement is neither contrary to nor an unreasonable application of clearly established federal law.  
19 As the Court of Appeal noted, one fact critical to understanding the exchange between counsel at  
20 the June 6, 2003 probable cause hearing is that Petitioner was facing a three strikes case in San  
21 Bernardino County which could have resulted in a sentence of 25-years-to-life. The record shows  
22 that the prosecutor never promised Petitioner she would dismiss the SVPA petition if he received  
23 any prison time on the San Bernardino County matter. It was Petitioner’s counsel, not the  
24 prosecutor, who stated that the SVPA petition would be “moot” in the event Petitioner was  
25 convicted in the San Bernardino County matter. The prosecutor stated she would dismiss the  
26 SVPA petition only after the court suggested there would likely be a new petition filed if Petitioner  
27 was convicted of the charges pending in San Bernardino County. The parties’ statements at the  
28 June 6, 2003 hearing did not give rise to an enforceable agreement. As the Court of Appeal noted,

1 “[a]t most, the objective circumstances established that if Robinson’s admitted San Bernardino  
2 offense resulted in the filing of a new SVPA petition or a lengthy prison commitment, the pending  
3 SVPA petition at issue here might be dismissed as moot.” [Cal. Ct. App. Op., at 28.] Neither of  
4 these circumstances arose in this case, and the state court’s determination that there was no  
5 enforceable plea agreement is entitled to deference.

6 7. Did the trial court violate Petitioner’s rights under the Fifth, Sixth, and Fourteenth  
7 Amendments when it failed to grant a mistrial?

8 Petitioner subpoenaed Marcus, the boy with whom he engaged in sexual contact in San  
9 Bernardino County, to appear as a witness on his behalf at the SVPA trial. Marcus initially  
10 appeared in the San Diego Superior Court on December 4, 2006, the date set forth on the  
11 subpoena. The court ordered him to return to court to testify on December 11, 2006. Marcus did  
12 not return to court on that date and the court, despite issuing a bench warrant for his arrest, was  
13 unable to secure his appearance at trial. After Petitioner testified, his attorney moved for a mistrial  
14 on the grounds that Marcus failed to appear to testify. Counsel argued Marcus would have testified  
15 that the sexual contact with Petitioner was consensual. Counsel also argued the jury would have  
16 had the opportunity to see what Marcus looked like and to see that he did not look like a child.  
17 [Transcript of December 12, 2006 proceedings, at 1137-1140.] Petitioner’s counsel did not request  
18 a continuance to allow him to obtain Marcus’s attendance at trial. The trial court denied the  
19 motion for mistrial, finding the jury had heard unequivocal testimony that Petitioner’s contact with  
20 Marcus was consensual. The California Court of Appeal agreed, finding Petitioner could  
21 demonstrate no prejudice. [Cal. Ct. App. Op., at 40-41.]

22 The erroneous exclusion of critical, corroborative defense evidence may violate both the  
23 Sixth Amendment right to present a defense, and the right to due process. See DePetris v.  
24 Kuykendall, 239 F.3d 1057, 1062 (9th Cir.2001) (citing Chambers v. Mississippi, 410 U.S. 284,  
25 294 (1973) and Washington v. Texas, 388 U.S. 14, 18-19 (1967)). However, a defendant does not  
26 have an unfettered right to offer evidence that is incompetent, privileged or otherwise inadmissible  
27 under standard rules of evidence. Id. (quoting Taylor v. Illinois, 484 U.S. 400, 410 (1988)). The  
28 exclusion of evidence does not violate the Due Process Clause unless “it offends some principle of  
justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

1 Montana v. Egelhoff, 518 U.S. 37, 43 (1996) (quoting Patterson v. New York, 432 U.S. 197,  
2 201-02 (1977)) (internal quotations omitted). The exclusion of evidence also does not violate the  
3 Sixth Amendment unless the excluded testimony is both material and favorable to the defense. See  
4 United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

5 The California Court of Appeal's decision rejecting Petitioner's claim was not contrary to  
6 or an unreasonable application of clearly established federal law. As an initial matter, because  
7 Petitioner's counsel never requested a continuance of the trial, Petitioner is now barred from  
8 asserting that the trial court violated his rights by failing to grant a continuance. Cal. Ct. App. Op.,  
9 p. 40 (concluding Petitioner's claim that he should have been granted a continuance was forfeited  
10 because he did not request a continuance); Davis v. Woodford, 384 F.3d 628, 654 (9<sup>th</sup> Cir. 2004)  
11 (when a state relies on adequate and independent ground to deny a federal claim, prisoner is barred  
12 from raising such claim on habeas review).

13 Furthermore, Petitioner was not entitled to a mistrial. At trial, Dr. Clipson testified that  
14 Petitioner told him he thought Marcus was a 19-year-old adult. On the other hand, Deputy Cesar  
15 Chacon of the San Bernardino Sheriff's Department testified Petitioner told him he knew Marcus  
16 was only 16 years of age. [Transcript of December 6, 2006 trial, at 442.] Marcus's testimony  
17 regarding how old he told Petitioner he was would have been cumulative, and Petitioner has not  
18 established the testimony would have been favorable to his defense.<sup>7</sup> Furthermore, with regard to  
19 the issue of consent, Deputy Chacon testified that Marcus told him he was not afraid of Petitioner  
20 and that what happened between them was consensual. [Id. at 447-48.] Thus, Marcus's failure to  
21 testify as to the issue of consent was also not prejudicial. Finally, to the extent Petitioner sought to  
22 establish that Marcus did not look young, the trial was held almost four years after the contact  
23 leading to the San Bernardino County charges. There is nothing to suggest Petitioner requested  
24 that Marcus bring to trial photos showing what he looked like in January of 2003. Under such  
25 circumstances, the trial court's failure to grant a mistrial did not violate Petitioner's rights.

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28 <sup>7</sup>The prosecution also wanted Marcus to appear as a witness at trial, because from all of the  
pretrial statements they expected Marcus would testify Petitioner knew before they met in San  
Bernardino County in January of 2003 that Marcus was only 16 years old.

1 8. Did the trial court violate Petitioner's right to due process by refusing to exclude  
2 inflammatory evidence?

3 Petitioner argues the trial court should have excluded inflammatory evidence regarding  
4 (a) the nature of his sexual acts with Jason and Jimmy, (b) expert testimony on the ultimate issue  
5 of the case, (c) the probation report in the original 1992 case that details the multiple counts for  
6 which Petitioner was charged, (d) Petitioner's prior burglaries, (e) Petitioner's failure to register as  
7 a sex offender in July 2000, and (f) Petitioner's parole violation. The California Court of Appeal  
8 rejected Petitioner's claim, finding that the trial court did not err in admitting the evidence and that  
9 any error was not prejudicial. [Cal. Ct. App. Op., at 42-43.]

10 In order to establish that the erroneous admission of evidence at trial violated his right to  
11 due process, Petitioner here must show the error rendered the trial "arbitrary and fundamentally  
12 unfair." Alberni v. McDaniel, 458 F.3d 860, 865 (9<sup>th</sup> Cir. 2006) (citing Estelle v. McGuire, 502  
13 U.S. 62, 70 (1991)). Contrary to Petitioner's arguments, the evidence to which Petitioner objects  
14 was both relevant and not unduly prejudicial. The prosecution had the burden of proving that  
15 Petitioner was a SVP, which required it to show he had previously been convicted of a sexually  
16 violent offense against one or more victims, that he had a diagnosed mental disorder which made  
17 him dangerous, and that it was likely he would engage in sexually violent behavior again in the  
18 future. Cal. Penal Code § 6600(a)(1). Each of the items of evidence to which Petitioner objects  
19 was relevant to the prosecution's proof of its case. In addition, reviewing the trial testimony as a  
20 whole, it cannot be said that the items of evidence to which Petitioner objects were any more  
21 inflammatory than much of the evidence that was admitted through the testimony of the examining  
22 mental health experts. Petitioner is not entitled to relief on his due process claim relating to the  
23 admission of evidence.

24 9. Cumulative error

25 Finally, Petitioner argues he is entitled to relief based upon the cumulative effect of errors  
26 committed during his trial. "The combined effect of multiple trial errors may give rise to a due  
27 process violation if it renders a trial fundamentally unfair, even where such error considered  
28 individually would not require reversal." Parle v. Runnels, 505 F.3d 922, 928 (9<sup>th</sup> Cir. 2007)  
(citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). Here, there was no violation of


1 Petitioner’s federal constitutional rights. Thus, Petitioner is not entitled to relief on his cumulative  
2 error claim.

3 **Conclusion**

4 For the reasons set forth herein, the Court DENIES the petition for a writ of habeas corpus.  
5 Upon review, the Court concludes that “reasonable jurists” would find debatable the issues raised  
6 by Petitioner’s due process and equal protection claims related to California’s indeterminate  
7 commitment process for SVPs (Petitioner’s claims 1 and 5). Slack v. McDaniel, 529 U.S. 473,  
8 484 (2000). Thus, the Court GRANTS Petitioner a certificate of appealability on those two  
9 claims. 28 U.S.C. § 2253(c) (certificate of appealability appropriate where petitioner has made “a  
10 substantial showing of the denial of a constitutional right”). The Court DENIES a certificate of  
11 appealability with regard to Petitioner’s remaining claims.

12 **IT IS SO ORDERED.**

13 **DATED: May 27, 2010**

14   
15 **IRMA E. GONZALEZ, Chief Judge**  
16 **United States District Court**

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