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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ADALBERTO LIZAOLA FAUSTO,

Defendant and Appellant.

H038047

(Santa Clara County

Super. Ct. No. 200501)

I. STATEMENT OF THE CASE

Defendant Adalberto Lizaola Fausto appeals from an order extending his commitment to Napa State Hospital (NSH) as a mentally disordered offender (MDO). (Pen. Code, §§ 2970, 2972.)¹ He claims the court erred in failing to advise him of his right to a jury trial, accepting counsel's jury waiver, and conducting a bench trial.

We affirm the extension order.

II. BACKGROUND AND PROCEDURAL HISTORY

In 1997, defendant stabbed a man in a restaurant who refused his demand for money. Defendant was later convicted of assault with a deadly weapon and sentenced to prison for two years. (§ 245, subd. (a)(1).) On April 14, 2003, defendant was committed to NSH under section 2970 as a mentally disordered offender (MDO). His commitment

¹ All unspecified statutory references are to the Penal Code.

was later extended a number of times, and the last extension was scheduled to expire on April 17, 2012. However, in July 2011, the Santa Clara County District Attorney filed a petition to re-extend the commitment. At a pretrial hearing on October 14, 2011, the court stated, “And it’s my understanding [defendant] wants a trial in this matter. He’s willing to waive jury; is that correct?” Counsel responded, “That’s correct your honor. I’ve spoken to him and that is our wish.” Counsel then waived a jury trial. On February 23, 2012, after a bench trial, the court sustained the petition and extended defendant’s commitment to April 17, 2013.

III. THE EXTENSION HEARING

Dr. Gerado Manansala, M.D., a staff psychiatrist at NSH, testified as an expert in the diagnosis and treatment of mental disorders and risk assessment. He had treated defendant since May 2010. He testified that defendant suffered from schizo-affective disorder (bipolar type), alcohol dependence, and antisocial personality disorder. He explained that defendant’s history of psychoses began when he was 17 years old, and he had been hospitalized numerous times. Defendant’s diagnosis of antisocial personality disorder was based on reports that at an early age he was involved in fights. He had an extensive misdemeanor and felony criminal record involving violent behavior. He also had a history of persistent assaultive behavior with inmates and staff while committed for treatment. Defendant’s last assault was in 2005. Dr. Manansala reported that defendant showed no remorse toward the stabbing victim of his commitment offense and recently said that he wished the victim had died because he deserved it.

Dr. Manansala recommended that defendant’s commitment be extended because defendant currently posed a substantial risk of physical harm to others if released. He acknowledged that in the secure and supervised environment of the hospital, defendant had taken the medication that kept his disorders in remission. However, Dr. Manansala testified that defendant had denied having a mental disorder, did not like to take medication, and did not believe he needed any medication. Only in 2011 did defendant

say that he would continue taking his medication. However, he would not do so because he had a mental disorder but because he was addicted. Given defendant's background and attitude toward his mental disorders and medication, Dr. Manansala opined that defendant was likely to stop taking his medication if released from a secured environment. He further noted that when defendant was not properly medicated, he became paranoid and delusional, he refused to eat, and he became violent and assaultive.

Dr. Manansala acknowledged that defendant had performed his work as a gardener and attended conferences, medical appointments, and Alcoholics Anonymous (A.A.). He noted, however, that defendant only sporadically participated in a symptoms-management group. As a result, defendant had not developed a relapse prevention plan, did not know what triggered his mental illness, and had not developed any insight concerning the precursors or warning signs of decompensation and mental illness, such as delusions, paranoia, hallucinations, and bizarre behavior. Dr. Manansala also noted that defendant was not willing to work toward outpatient status under a conditional release program in the community because he did not think he suffered from mental illness. Rather, defendant sought to be released unconditionally because he did not think he would pose a threat to anyone.

Defendant testified that he did have a mental disorder. He said he was diagnosed only because he assaulted four boys who had beaten him. He denied that mental illness contributed to his violent behavior. He said he only took medication because he was ordered to do so, and he continued to take it because he was addicted. He admitted that he had no relapse prevention plan but said he did not need one because "I don't relapse. I'm normal." Defendant insisted that the man he stabbed owed him money but said he now regretted stabbing him. He denied telling Dr. Manansala that he wished the victim had died.

IV. THE MDO COMMITMENT SCHEME AND EXTENSION PROCEDURE

The Mentally Disordered Offender Act (the Act) (§ 2960 et seq.) permits the state to involuntarily commit persons who have been convicted of a violent crime related to their mental disorders to a mental hospital for treatment until their disorders can be kept in remission. (*In re Qawi* (2004) 32 Cal.4th 1, 9 (*Qawi*); see *Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061 (*Lopez*) [the MDO Act has the dual purpose of protecting the public while treating severely mentally ill offenders].)

The Act provides treatment at three stages of commitment: as a condition of parole, in conjunction with the extension of parole, and following release from parole. (*Lopez, supra*, 50 Cal.4th at p. 1061.) “Sections 2970 and 2972 govern the third and final commitment phase, once parole is terminated. If continued treatment is sought, the district attorney must file a petition in the superior court alleging that the individual suffers from a severe mental disorder that is not in remission, and that he or she poses a substantial risk of harm. (§ 2970.)” (*Lopez, supra*, 50 Cal.4th at p. 1063.)

V. FAILURE TO ADVISE

Defendant contends that the court erred in failing to advise him of the right to a jury.

Section 2972, subdivision (a), provides that the court “shall advise the person . . . of the right to a jury trial.”² This language imposes a mandatory duty on the

² Section 2972, subdivision (a) provides, “(a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. [¶] The standard of proof under this section shall be proof beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.”

court.³ (*Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 542 [“ ‘shall’ ” typically construed as mandatory; e.g., *People v. Tindall* (2000) 24 Cal.4th 767, 772.]

The record does not reflect that the court advised defendant before the bench trial. This is understandable because the record reveals that counsel waived defendant’s presence at all pretrial hearings, and the court did not order defendant transported to court until the day of trial. Nevertheless, the court’s failure to directly advise defendant does not compel reversal.

Before any judgment can be reversed for error under state law, it must appear that the error complained of “has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801.) This means that reversal is justified “when the court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

It is clear that counsel was aware that defendant had the right to a jury trial. Where, as here, counsel waives an MDO’s presence at pretrial hearings, effectively precluding a direct judicial advisement before trial, the court may reasonably expect counsel to discuss with the client all pertinent matters that will arise or that have arisen in pretrial hearings, including the right to a jury trial and whether to have one. Indeed, “[l]ike all lawyers, the court-appointed attorney is obligated to keep her client fully informed about the proceedings at hand, *to advise the client of his rights*, and to vigorously advocate on his behalf. [Citations.] The attorney must also refrain from any act or representation that misleads the court. (Bus. & Prof.Code, § 6068, subd. (d); Rules

³ We mean “mandatory” in its obligatory, rather than jurisdictional, sense as in a required, rather than discretionary, action. (See *Morris v. County of Marin* (1977) 18 Cal.3d 901, 908 [discussing distinction].)

Prof. Conduct, rule 5–200(B).)” (*In re Conservatorship of Person of John L.* (2010) 48 Cal.4th 131, 151-152 (*John L.*), italics added.) Moreover, absent a showing to the contrary, “[a] reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; *Conservatorship of Ivey* (1986) 186 Cal.App.3d 1559, 1566; e.g., *Conservatorship of Mary K.* (1991) 234 Cal.App.3d 265, 272 [where no evidence to the contrary, court may presume counsel discussed jury waiver with client before waiving on client’s behalf].)

Here, when the court expressed its understanding that defendant wanted to waive a jury trial, counsel agreed, indicating that he had spoken to defendant about it, and they wished to do so. Thus, despite the lack of a judicial advisement, the record establishes that defendant not only knew about his right to a jury trial but also wanted to waive it.

Furthermore, a single opinion by a psychiatric expert that the defendant is currently dangerous due to a mental disorder can constitute substantial evidence to support the extension of a commitment. (*People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1165; *People v. Bowers* (2006) 145 Cal.App.4th 870, 879.)

Dr. Gerado Manansala’s opinion constitutes overwhelming evidence to support the order extending defendant’s commitment. Defendant had a long history of mental illness and violent behavior. He suffered from schizoaffective disorder (bipolar type), alcohol dependence, and antisocial personality disorder. Although defendant took his medication in the secure and supervised environment, Dr. Manansala found it likely that defendant would not continue to do so if released. Defendant denied that he had a mental disorder and did not believe medication was necessary. Moreover, defendant did not know what triggered his illness and what its warning signs were, and he lacked insight into the relationship between his delusional thinking and violent and assaultive behavior in the restaurant. Finally, he noted that defendant had not developed a relapse prevention plan.

Defendant did not present an expert to contradict Dr. Manansala's analysis and conclusions. Nor did defendant's own testimony have much tendency to undermine Dr. Manansala's opinion. Rather, he simply said that he did not suffer from mental illness or pose a threat to anyone and thus should be unconditionally released.

Under the circumstances, we do not find it reasonably possible, let alone reasonably probable, that defendant would have obtained a more favorable result had the court ordered his presence at a pretrial hearing and expressly advised him about the right to a jury trial. (*People v. Watson, supra*, 46 Cal.2d at p. 836; cf. *People v. McClellan* (1993) 6 Cal.4th 367, 377, 378 [failure to advise about sex registration requirement harmless].)⁴

VI. PERSONAL WAIVER

Defendant contends that counsel's waiver was invalid. He asserts that the Act assumes that MDOs are competent to decide between a bench and jury trial, and therefore, the Act requires a jury trial unless it is personally and expressly waived by the MDO.

Section 2972, subdivision (a) requires not only that the court advise "the person" of the right to a jury trial but also that the court conduct a jury trial "unless waived by both the person and the district attorney."

Defendant argues that because "the person" in the advisement provision refers to the MDO, the phrase "unless waived by the person" means unless *personally* waived by the MDO. In other words, only the MDO can waive a jury trial, and in the absence of an

⁴ We do not intend to suggest that it was improper or inappropriate for counsel to waive defendant's presence or that the court had a duty to order defendant's presence in order to directly advise him. However, a direct advisement is not the only way for the court to ensure that an MDO is made aware of the right to a jury trial. In our view, the practical difficulty in advising an MDO committed to a state hospital could easily be solved with an advisement and waiver form for the MDO read and sign. (See *People v. Ramirez* (1999) 71 Cal.App.4th 519, 521-522 [waiver form proper substitute for judicial advisement].)

express and personal waiver, a waiver by counsel is not valid even if, as here, counsel waives in accordance with the MDO's wishes.

When engaging in statutory construction, “[w]e begin with the statutory language because it is generally the most reliable indication of legislative intent. [Citation.] If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. [Citation.]” (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 211.) If the language is susceptible of multiple interpretations, we may look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.)

With these basic principles in mind, we turn to the statutory language. We agree with defendant that under the Act, a competent MDO can control the decision of whether to waive his or her right to a jury trial. The mandatory advisement reflects a legislative intent to judicially ensure that “the person”—i.e., the MDO—knows that he or she has the right, among other things, to a jury trial. “We must presume that the Legislature intended ‘every word, phrase and provision . . . in a statute . . . to have meaning and to perform a useful function.’ ” (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476, quoting *Clements v. T.R. Bechtel Co.* (1954) 43 Cal.2d 227, 233.) When the advisement and waiver provisions are read together, the purpose and function of the advisement become clear. In requiring a jury trial unless waived by “the person,” the Legislature designed and intended the advisement to inform the MDO of the right to a jury trial so that he or she can decide whether to waive it. (See *People v. Barrett* (2012) 54 Cal.4th 1081, 1109 (*Barrett*) [a jury advisement enables person to comprehend and control decision to request a jury trial]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1071 [purpose of standardized *Faretta* advisements is “to ensure a clear record of a knowing and voluntary

waiver of counsel”]; § 1016.5, subd. (d) [required advisement of potential immigration consequences intended to inform decision of whether to waive rights and enter plea].)

However, although the Act contemplates that an MDO can control the decision to waive a jury, it does not follow that the waiver provision requires an MDO’s personal and express waiver or precludes waivers by counsel. Indeed, in *People v. Otis* (1999) 70 Cal.App.4th 1174 (*Otis*) and *People v. Montoya* (2001) 86 Cal.App.4th 825, 829 (*Montoya*), the courts rejected such a claim and held that the Act does not require a personal waiver.⁵

In *Otis*, counsel waived a jury trial. The defendant objected and requested a jury trial, but at the time, he was delusional and said he was being sexually assaulted by invisible police. The court denied the request. On appeal the defendant claimed the language requiring a jury trial “unless waived by both the person and the district attorney,” meant that only the MDO could waive the jury trial. (*Otis, supra*, 70 Cal.App.4th at pp. 1175-1176.)

In a brief opinion, the court disagreed. It found “nothing in the requirement that the waiver must be by ‘the person’ precludes the person’s attorney from acting on his behalf” and noted that “[t]he Legislature did not say the waiver had to be made ‘personally.’” (*Otis, supra*, 70 Cal.App.4th at p. 1176.) The court opined that if the Legislature had intended to require a personal waiver, it would have made its intent clear and unambiguous. (*Ibid.*)

As the court further explained, “Section 2966 concerns persons who have been found by the Board of Prison Terms to be mentally disordered. The Legislature must have contemplated that many persons, *such as Otis*, might not be sufficiently competent

⁵ *Otis* dealt with section 2966, subdivision (b) and *Montoya* dealt with section 2972, subdivision (a), but both sections require the court to advise the MDO of the right to a jury trial and conduct a jury trial “unless waived by the person and the district attorney.”

to determine their own best interests. There is no reason to believe the Legislature intended to leave the decision on whether trial should be before the court or a jury in the hands of *such a person.*” (*Otis, supra*, 70 Cal.App.4th at p. 1177, italics added; cf. *People v. Powell* (2004) 114 Cal.App.4th 1153, 1157-1159 (*Powell*) [relying on *Otis* to reject a claim that similar language in section 1026.5 required personal jury waiver in trial to extend the commitment of a person found not guilty by reason of insanity (NGI)].)

In *Montoya, supra*, 86 Cal.App.4th 825, counsel also waived a jury. Although the defendant did not object, he claimed on appeal that his personal waiver was required. (*Id.* at pp. 828-829.) In a more comprehensive analysis of the issue, the court acknowledged that in criminal trials, the constitutional right to a jury must be waived personally by the defendant. (*Id.* at p. 829; see U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; *People v. Collins* (2001) 26 Cal.4th 297, 304-308; *People v. Ernst* (1994) 8 Cal.4th 441, 446.) However, the court considered this personal-waiver rule inapplicable because an MDO trial is a fundamentally civil proceeding with criminal procedural protections. (*Montoya, supra*, 86 Cal.App.4th at pp. 829-830; cf. *Powell, supra*, 114 Cal.App.4th at p. 1157 [NGI commitment trial fundamentally civil]; *People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 485 [same].)

The court further observed that in civil actions, where there is a state constitutional right to a jury trial, and in ancillary criminal proceedings, where the right to a jury trial is statutory, a jury trial can be waived by either the person or the person’s attorney on his or her behalf. (*Montoya, supra*, 86 Cal.App.4th at pp. 829-830; see Cal. Const., art. I, § 16 [right to jury trial]; see Code of Civ. Proc., § 631 [prescribing types of waiver]; *Zurich General Acc. & Liability Ins. Co. v. Kinsler* (1938) 12 Cal.2d 98, 105 [waiver by party or counsel], overruled on other grounds in *Fracasse v. Brent* (1972) 6 Cal.3d 784, 792; *Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 510; *Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144, 148; see Code Civ. Proc., § 283, subd. (1) [counsel has authority to bind client in any of the steps of an action].)

Given this general rule, the question before the court was whether the MDO waiver provision itself required a personal waiver and thus precluded waivers by counsel.⁶ (*Montoya, supra*, 86 Cal.App.4th at p. 830.)

In concluding that statute permitted a waiver by counsel, the *Montoya* court followed *Otis*. It agreed that the statutory language did not expressly require a personal waiver or clearly preclude a waiver by counsel. It also agreed that the Legislature could not have intended to require a personal waiver and thereby deny counsel the authority to act on behalf of an incompetent MDO such as the MDO in *Otis*. (*Montoya, supra*, 86 Cal.App.4th at pp. 830-831.)

⁶ We note that the state constitutional right to a jury trial in a particular matter exists only if it existed at common law in 1850, when the state Constitution was first adopted. (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8.) Civil commitment trials are “initiated by a petition independently of a pending action and are of a character unknown at common law.” (*People v. Rowell* (2005) 133 Cal.App.4th 447, 451 (*Rowell*)) They are neither actions at law nor suits in equity and are instead considered a “special proceeding.” (Code Civ. Proc., §§ 21-23; see *Tide Water Assoc. Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 822; *Le Louis v. Superior Court* (1989) 209 Cal.App.3d 669, 678; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 65, subd. 20, pp. 139-140; e.g., *People v. Yartz* (2005) 37 Cal.4th 529, 535 [SVP commitment trial under Welf. & Inst. Code, § 6603]; *People v. Masterson* (1994) 8 Cal.4th 965, 974 (*Masterson*) [competence trial under § 1369]; *In re Gary W.* (1971) 5 Cal.3d 296, 309 [trial extending juvenile commitment under Welf. & Inst. Code, § 1800]; *In re De La O* (1963) 59 Cal.2d 128, 150 [narcotics addict commitment trial under former § 6450]; *Bagratiun v. Superior Court* (2003) 110 Cal.App.4th 1677, 1685, fn. 7 [commitment of mentally retarded person under Welf. & Inst. Code, § 6500].)

In a “special proceeding,” the right to a jury trial is generally a matter of legislative grant, and not constitutional right. (*Corder v. Corder* (2007) 41 Cal.4th 644, 656, fn. 7 [state constitutional right not applicable in special proceedings]; *Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 76; *Agricultural Labor Relations Bd. V. Tex-Cal. Land Management, Inc.* (1987) 43 Cal.3d 696, 707; *Rowell, supra*, 133 Cal.App.4th at p. 452; *People v. Williams* (2003) 110 Cal.App.4th 1577, 1590 [no constitutional right to trial in civil commitment proceedings].) Nevertheless, the general rule in civil actions that either a party *or* counsel can waive a jury also applies in “special proceedings” unless otherwise provided by statute. (See *John L., supra*, 48 Cal.4th at p. 148.) Thus, the court in *Montoya* correctly looked to the waiver provision to see whether it precluded waivers by counsel.

The court acknowledged that in general a person could “be mentally disordered for some purposes and not for others.” (*Montoya, supra*, 86 Cal.App.4th at p. 831.) However, the court pointed out that there, the defendant’s mind was not functioning normally, and he had repeatedly and recently demonstrated poor judgment and aberrant behavior. In upholding counsel’s waiver, the court found “no reason to believe that defendant was capable of making a reasoned decision about the relative benefits of a civil jury trial compared to a civil bench trial.” (*Ibid.*, fn. omitted.)

We agree with these courts’ view of the waiver provision. It does not expressly provide that the MDO must “personally” waive a jury or that a waiver must be “personal.” Moreover, the term “the person” in the phrase “unless waived by both the person and the district attorney” (§§ 2966, subd. (b); 2972, subd. (a)) does not automatically or necessarily convey the notion that the only valid waiver is one personally made by the MDO. Nor does the waiver provision clearly reflect a legislative intent to impose such a limitation or preclude a waiver by counsel on behalf of “the person.” In this regard, we too observe that the Legislature knows how to require a personal waiver, and when it has intended to do so, it has used clear and unambiguous language. (E.g., § 861, subd. (a)(1) [requiring personal waiver of statutory right to continuous preliminary examination]; § 977, subd. (b)(1) [same re waiver of presence at arraignment]; Welf. & Inst. Code, § 1801.5 [same re right to a jury in trial to extend juvenile detention].)

Defendant notes that section 2972, subdivision (a) requires that the “attorney for the person” be given a copy of the extension petition. Defendant asserts that use of “the person” and the “attorney for the person” in different parts of the subdivision shows that the Legislature distinguishes between the two. From this, defendant infers that specifying only one reflects a legislative intent to exclude the other. More specifically, in requiring a jury trial unless waived by “the person,” the Legislature intended to restrict the

provision to personal waivers by the MDO and exclude waivers by counsel. We are not persuaded.

Section 2972, subdivision (a) requires the court to advise “the person of his or her right to be represented by an attorney and of the right to a jury trial” and also provides that “[t]he attorney for the person shall be given a copy of the petition, and any supporting documents.” Obviously, the advisement provision mentions only the MDO because it is the MDO, not counsel, who has the right to a jury trial and appointed counsel; and it is only the MDO who needs to be informed of those rights. Similarly, the other provision mentions only counsel because when counsel is appointed for an MDO, counsel assumes management of the case, including the MDO’s case file, and therefore, it is counsel, not the MDO, who will be given relevant documents to review and maintain. In our view, therefore, use of “the person” and “the attorney for the person” in these parts of the subdivision merely reflects contextual logic and not a legislative intent to limit or exclude.

The waiver provision is different because the procedural act of waiving a jury does not necessarily relate to only the MDO or counsel. As noted, the general rule in civil cases is that a jury trial can be waived by the party or counsel. For this reason, the use of “the person” here and “the attorney for the person” there in different parts of the subdivision does not clearly reveal a legislative intent to require personal waivers and exclude waivers by counsel.

A better case for such a restrictive view of “the person” could be based on provisions in sections 2964 and 2966 which state that certain acts may be performed by either the person or the person’s attorney.⁷ Under the maxim of statutory construction

⁷ Under section 2964, subdivision (a), when an MDO on outpatient status is returned to a secure facility, the Department of Mental Health (Department) must hold a hearing within 15 days “unless the patient or the patient’s attorney agrees to a continuance.” Under section 2964, subdivision (b), a person can seek outpatient status by requesting a hearing before the Board of Prison Terms (Board), and at the hearing “the

expressio unius est exclusio alterius, the expression of one thing implies the exclusion of the other. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 389.)

Moreover, where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning. (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 343.) Given the provisions authorizing action by either the person or counsel, one could argue that because the waiver provision expressly refers only to a waiver by “the person,” the Legislature intended to require personal waivers and exclude waivers by counsel.

We point out, however, that a rule of construction is not a “straightjacket” to be blindly followed in disregard of its consequences and other factors that give a clue to the Legislature’s intent. (*People v. Jones* (1988) 46 Cal.3d 585, 599; e.g., *People v. Johnson* (1964) 162 Cal.App.3d 1003, 1012.) Indeed, our duty is to avoid absurd or anomalous results. (*People v. Martinez* (1995) 11 Cal.4th 434, 448.) With this in mind, we find that although the inferential logic of this argument may be sound, the consequences that flow from it are illogical and anomalous and therefore, to be avoided.

First, we note that for a variety of reasons—e.g., treatment schedules, health, mental condition—MDOs in state hospitals routinely elect to waive, through counsel, their presence at pretrial hearings. Moreover, because these pretrial hearings are often brief and involve procedural and scheduling matters, courts do not order the MDO’s presence until the day of trial. Such was the case here. Counsel must of course be able to act on the MDO’s behalf when he or she is absent. For that reason, it appears illogical to prohibit counsel from waiving the statutory right to a jury trial in an MDO’s absence

prisoner or any person appearing on his or her behalf” can request the appointment of psychological professionals. Similarly, under section 2966, subdivision (a), a prisoner can request a hearing before the Board to determine MDO status, and at that hearing “the prisoner or any person appearing on his or her behalf” can request the appointment of psychological professionals. And under 2966, subdivision (b), a prisoner file a petition in court challenging the Board’s MDO determination, and the court must conduct a hearing within 60 days “unless either time is waived by the petitioner or his or her counsel.”

when, as here, counsel does so with the MDO's knowledge and consent and instead require the court to bring the MDO to court simply to secure his or her express, personal waiver. This is especially so because in a party's absence, an attorney has authority to waive the *constitutional* right to a jury trial in civil actions at the client's direction or with the client's knowledge and consent.

We further note that although competency to stand trial is not necessarily a prerequisite in a civil proceeding to commit a person who is dangerous due to his or her mental illness (see *People v. Moore* (2010) 50 Cal.4th 802, 829 [competence not required in SVP commitment or recommitment]; *People v. Angeletakis* (1992) 5 Cal.App.4th 963, 967-968 [same re NGI commitment]), mental competence is essential for a valid waiver because a waiver must be knowing, intelligent, and voluntary. (*In re Hannie* (1970) 3 Cal.3d 520, 526-527; *People v. Charles* (1985) 171 Cal.App.3d 552, 559.) However, as *Otis* and *Montoya* observe, some MDOs, like those in *Otis* and *Montoya*, may be so delusional or otherwise affected by their mental disorders that they lack the capacity to know or understand what is in their own best interests and make a rational decision. Such incompetency would preclude a knowing and intelligent waiver. (See *People v. Wrentmore* (2011) 196 Cal.App.4th 921, 930-931 [suggesting that incompetent MDO cannot waive right to appointed counsel and self-represent].) If an MDO were incompetent and counsel concluded that waiving a jury was in the MDO's best interests, a personal waiver requirement would bar counsel's waiver and thus prevent counsel from effectively protecting the MDO's interests. Indeed, such a requirement would give an incompetent MDO power to veto or overrule an effort by counsel to waive a jury.⁸ (See

⁸ Although a personal waiver is required in criminal cases, the anomaly of making an incompetent defendant face a jury trial even though counsel concludes that a bench trial would better serve the defendant's interests would not arise because an incompetent defendant cannot be tried at all. (§ 1368; see also *Drope v. Missouri* (1975) 420 U.S. 162, 172.)

Powell, supra, 114 Cal.App.4th at p. 1158 [an insane person should not be able to veto counsel's decision to waive a jury].)

In our view, prohibiting counsel from waiving a jury at an MDO's direction or with the MDO's authorization and prohibiting counsel from waiving on behalf of an incompetent MDO represent anomalous consequences interpreting of the Act to require a personal waiver and prohibit waivers by counsel. For that reason, we consider it unreasonable to infer from the statutory language such a restrictive and exclusive legislative intent. (Cf. *Conservatorship of Mary K., supra*, 234 Cal.App.3d 265, 271) [rejecting claim that counsel's waiver at conservatee's direction was ineffective because personal waiver was required].)

Moreover, in construing statutes, “[w]e may not under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.” (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349; accord *Estate of Griswold* (2001) 25 Cal.4th 904, 917.) Nor may we insert requirements or limitations that would cause the statute to conform to a presumed intent that is not otherwise manifest in the existing statutory language. (*Citizens to Save California v. California Fair Political Practices Com.* (2006) 145 Cal.App.4th 736, 747-748, *Tain v. State Bd. of Chiropractic Examiners* (2005) 130 Cal.App.4th 609, 617.) In all, “[o]ur duty is to construe the statute so as to avoid absurd or anomalous results.”

Given our analysis of the statutory language, policy considerations, and potential consequences, we decline to insert a personal waiver requirement into the statute. Rather, we conclude that the waiver provision permits counsel to waive a jury at an MDO's direction, with an MDO's knowledge and consent, or as in *Otis* and *Montoya*, on behalf of an incompetent MDO.

Here, counsel waived defendant's right to a jury after representing to the court that he had discussed the matter with defendant, and defendant wished to waive a jury. When the bench trial commenced, defendant did not object or otherwise express surprise that

there was no jury. Under the circumstances, we conclude that counsel's waiver was valid, and it was proper for the court to proceed with a bench trial.

VI. DISPOSITION

The commitment order is affirmed.

RUSHING, P.J.

I CONCUR:

PREMO, J.

ELIA, J., Concurring

I respectfully concur in the judgment on the ground no reversible error has been shown. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [error must be affirmatively shown]; cf. *Conservatorship of John L.* (2010) 48 Cal.4th 131, 148 ["When a statutory right in a civil commitment scheme is at issue, the proposed conservatee may waive the right through counsel if no statutory prohibition exists. (E.g., *People v. Rowell* (2005) 133 Cal.App.4th 447, 452-454 . . . [in sexually violent predator recommitment proceeding, trial court properly accepted counsel's representation that client wanted court trial instead of jury trial]; [*Conservatorship of Mary K.* (1991) 234 Cal.App.3d 265,] 271 . . .)."])

On the appellate record before us, it appears that appellant knew of his statutory right to a jury trial and he consented to, or wished to have, a court trial. (See maj. opn., *ante*, at pp. 2, 6.) Thus, this case does not present the issue, and it is unnecessary for this court to decide, whether appellant's counsel had authority to waive a jury without appellant's approval or over appellant's objection or whether, as the majority indicates, "the Act contemplates that an MDO can control the decision to waive a jury" unless the person is incompetent. (See maj. opn., *ante*, at pp. 9, 15-16.) "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (*Mills v. Green* (1895) 159 U.S. 651, 653 [16 S.Ct. 132]; see *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.)

ELIA, J.