In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JEREMY FOSTER,

Defendant and Appellant.

Case No. S248046

Fourth Appellate District Division One, Case No. D071733
San Diego County Superior Court, Case No. SCD204096
The Honorable David J. Danielsen, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Whether recommitment under the Mentally Disordered Offender Act is valid despite the application of Proposition 47 to reduce appellant's previously qualifying felony to a misdemeanor that would not qualify for MDO Act treatment.

INTRODUCTION

Appellant was convicted of felony theft and subsequently determined to be a Mentally Disordered Offender (MDO). After California voters passed Proposition 47, which reclassified certain felony offenses as misdemeanors in order to mitigate criminal punishment for nondangerous offenders, appellant successfully petitioned the superior court to redesignate his felony conviction as a misdemeanor.

Appellant now contends that because his initially qualifying offense is no longer a felony, his MDO recommitment should be dismissed and he should be released from the MDO outpatient program. Yet, as the plain language of the MDO Act establishes, MDO recommitment, such as appellant's, is predicated solely on a patient's current mental state, risk of dangerousness, and need for continued mental health treatment. Proof of a qualifying felony is not an element of recommitment. Thus, the redesignation of an MDO's qualifying felony does not affect any requisite element of recommitment.

The purpose of Proposition 47 and the MDO Act further support this conclusion. Proposition 47 was primarily enacted with public safety in mind. Certain offenders, who committed nonserious and nonviolent crimes, and did not pose a public risk, were given the opportunity to petition to reclassify their felony convictions as misdemeanors. Proposition 47, thus, mitigated penal consequences for nondangerous offenders. By stark contrast, MDOs, by their very definition, pose a substantial risk to the

public by virtue of their severe mental disorder. For this reason, the MDO Act provides nonpunitive civil commitment whereby such patients receive mental health treatment. Given the nature and purpose these enactments, it is clear that Proposition 47 was not intended to effectuate the release of MDO patients who currently have a severe mental disorder that renders them a danger to the public.

Finally, appellant's recommitment does not violate his right to equal protection. Contrary to appellant's contention, appellant is not similarly situated to the small number of sexually violent predator committees he has identified because their civil commitments were based on the existence of a qualifying offense; appellant's MDO recommitment is not. In any event, any disparate treatment would be justified because the state has a compelling interest in continuing treatment for a patient whose severe mental illness remains unremitted and who continues to pose a risk of substantial danger to others.

For these reasons, this Court should affirm the lower courts' denial of appellant's challenge to his MDO recommitment.

STATEMENT OF THE CASE AND FACTS

Appellant entered a convenience store and, claiming to be a police officer, grabbed some merchandise, shoved the store clerk who tried to stop him, and fled. (Aug. CT 6.) Appellant appeared disheveled and wore a shirt on his shoe. (B230766 RT 306.)[1] When the clerk tried to stop appellant, he pushed her. (CT 1, 29; Aug. CT 6.) The clerk screamed, and another employee came to her assistance. (CT 19; Aug. CT 6.) Appellant stole some merchandise and fled. (CT 19; Aug. CT 6.)

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[1] Concurrently with this answer brief, respondent has filed a request for this Court to take judicial notice of the record in appellant's initial commitment, case number B230766.

Appellant was charged with robbery (Pen. Code, § 211)[2] but ultimately pleaded guilty to a violation of section 487, subdivision (c), which at the time defined felony grand theft as including the theft of any property "taken from the person of another." (CT 5-6, 8-10.) The trial court sentenced him to 16 months in prison. (CT 64.)

Prior to appellant's scheduled release date, the Board of Prison Terms (BPT) determined that appellant met the criteria for initial civil commitment as an MDO under section 2962, which requires, among other things, that the prisoner has a severe mental disorder that aggravated or caused an enumerated offense for which he was imprisoned. (B230766 CT 1.) Appellant challenged the BPT's determination pursuant to section 2966, subdivision (b) and a bench trial was held. (B230766 CT 1.) At the hearing, the trial court found that appellant met the requisite criteria for MDO commitment under section 2962, which included a finding that appellant was sentenced to prison for an offense in which he used force or violence. (B230766 CT 5; B230766 RT 306; See § 2962, subd. (e)(2)(P) [catchall MDO qualifying offense provision requiring that the "prisoner used force or violence, or caused serious bodily injury" during the commission of the offense].) The court found appellant to be an MDO and ordered him committed to the Department of State Hospitals for a period of one year as a condition of parole. (B230766 CT 5.)

Following the expiration of appellant's initial one-year MDO commitment and parole term, appellant was annually recommitted four times pursuant to section 2972. (CT 20.) In 2014, appellant was recommitted on an outpatient basis whereby he was ordered to serve his commitment in the Conditional Release Program (CONREP). (CT 20.)

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[2] Except where specified, all further statutory references are to the Penal Code.

Following the enactment of Proposition 47, which reclassified certain nonserious and nonviolent felonies as misdemeanors, appellant petitioned to redesignate his felony theft conviction to a misdemeanor as an offender who has completed his sentence under section 1170.18, subdivision (f). (CT 16; Aug. CT 25.) The trial court granted appellant's unopposed petition. (CT 16.)

Appellant subsequently filed a motion to dismiss his MDO recommitment on the basis that the misdemeanor redesignation of his felony conviction invalidated his recommitment. (CT 17-27.) The People filed a written opposition. (CT 28-44.) At a hearing, the superior court denied appellant's motion, relying on *People v. Goodrich* (2017) 7 Cal.App.5th 699, which held that the redesignation of a qualifying felony to a misdemeanor pursuant to Proposition 47 does not invalidate MDO recommitment. (4 RT 303-304.)

On the same date, the superior court held a recommitment renewal hearing. (4 RT 304.) Appellant submitted on two court-ordered evaluations, one of which reported that appellant suffered from schizophrenia which was not in remission, represented a substantial harm to others due to his disorder, and could safely be treated in CONREP. (Aug. CT 58-63.)[3] Appellant agreed to the one-year commitment extension and the trial court ordered him committed accordingly. (4 RT 304.)

Appellant appealed, arguing that the trial court had improperly denied his motion to dismiss the MDO recommitment and that the decision violated his right to equal protection because he is similarly situated to

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[3] The record contains three doctors' evaluations dated October 13, 2016, October 31, 2016, and February 3, 2017. Two of the evaluations recommended that appellant be recommitted as an MDO (Aug. CT 26-31, 58-63); the other evaluation recommended appellant's release from CONREP (AUG. CT 44-50).

Sexually Violent Predator (SVP) committees who have had their commitments dismissed when their qualifying felonies were reversed. In an unpublished decision, the Fourth District Court of Appeal affirmed the judgment. The Court of Appeal held that because appellant's qualifying offense was not a requisite element for recommitment, his recommitment "is not predicated upon his felony conviction; rather, it is predicated on his current mental state and dangerousness." (Slip opn. at p. 2.) Thus, the court held that the redesignation of a qualifying offense to a misdemeanor under Proposition 47 does not invalidate an MDO's recommitment. (*Ibid.*) The Court of Appeal also rejected appellant's equal protection claim, citing, among other reasons, that appellant was not similarly situated to the SVPs he identified. (Slip. opn. at p. 3.)

ARGUMENT

I. THE APPLICATION OF PROPOSITION 47, WHICH MITIGATES CRIMINAL PUNISHMENT, DOES NOT INVALIDATE MDO RECOMMITMENTS BECAUSE RECOMMITMENTS ARE NOT BASED ON AN INITIALLY QUALIFYING CONVICTION, AND ARE NONPUNITIVE AND CIVIL IN NATURE

Recommitment under the MDO Act is predicated upon a patient's current mental state, dangerousness, and need for continued treatment, not on his or her past felony conviction. As a felony conviction is not a required element of MDO recommitment, the redesignation of the initially qualifying felony conviction under Proposition 47 does not invalidate the MDO recommitment. Appellant argues to the contrary, urging that an MDO's recommitment must be invalidated following the Proposition 47 redesignation of the initially qualifying felony to a misdemeanor because MDO recommitment is based upon initial MDO commitment, which requires a qualifying felony. (OBM 21-41.) But a plain reading of both

enactments, their expressed purposes, and this Court's recent decisions defeat his claim.[4]

A. An Overview of the Purpose of the Acts and a Plain Reading of Their Statutory Provisions

This case centers on the statutory interaction between the reclassification provisions of Proposition 47 and the treatment-based civil commitment scheme of the MDO Act.

1. This Court interprets statutes and voter initiatives by looking to their plain language and, where the language is ambiguous, the relevant history behind their enactment

"The fundamental task of statutory construction is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (*People v. Cruz* (1996) 13 Cal.4th 764, 774-775, quoting *People v. Pieters* (1991) 52 Cal.3d 894.) In doing so, the language of the statute is given its ordinary and plain meaning. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) The statutory language is construed in the context of the statute as a whole and within the framework of the overall statutory scheme to effectuate the enactors' intent. (*Ibid.*) If the statutory language is ambiguous or subject to multiple reasonable interpretations, however,

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[4] In arguing that MDO recommitments should be dismissed following the redesignation of the initially qualifying felony, appellant groups together both recommitments and *initial* commitments. (OBM 21-47.) But appellant appeals only the denial of his motion to dismiss his recommitment. Appellant's petition for review to this Court did not purport to frame any issue about an initial MDO commitment. Whether an initial MDO commitment must be dismissed following a Proposition 47 redesignation would require a different analysis from the one governing MDO recommitments, and appellant does not offer specific analysis regarding initial commitments. Because such a claim is not at issue in this case and is outside the scope of the question upon which the Court granted review, the People do not address it here.

"courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265.)

The interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796.) In addition to the general principles of statutory construction, where the language of an enactment is ambiguous, the court will look to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L., supra*, 30 Cal.4th at p. 900; *People v. Floyd* (2003) 31 Cal.4th 179, 187-188 [The ballot pamphlet information is a valuable aid in construing the intent of voters].) Any ambiguities in an initiative statute are "not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent [electoral] intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782, internal citation and quotation omitted.) Ultimately, the court's duty is to interpret and apply the language of the initiative "so as to effectuate the electorate's intent." (*Robert L., supra*, 30 Cal.4th at p. 900.)

2. The MDO Act was enacted to treat persons who were driven by a severe mental disorder to commit crimes and to provide procedures governing commitment and continued treatment through recommitment

The Mentally Disordered Offenders Act "permits the government to civilly commit for mental health treatment certain classes of state prisoners during and after parole." (*In re Qawi* (2004) 32 Cal.4th 1, 23.) Recognizing that the then-existing civil commitment schemes were inadequate to deal with the growing class of prisoners whose criminality was driven by their severe mental disorders, the Legislature enacted the

MDO Act in 1986. The MDO Act requires that a prisoner who had been convicted of an enumerated offense involving force or violence, and who continued to pose a danger to society, receive mental health treatment until the disorder can be kept in remission. (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061.)

The Legislature determined that because "[m]aintain[ing] a determinate system will inevitably cause the release of some mentally ill inmates who constitute a significant threat to public safety[,] [t]his commitment will provide a mechanism for placing these mentally ill inmates in the mental health system for appropriate treatment which will increase the protection of the public. (Dept. of Mental Health, Enrolled Bill Rep., Sen. Bill No. 1296 (1985–1986 Reg. Sess.) Sept. 27, 1985, p. 4)." (*People v. Allen* (2007) 42 Cal.4th 91, 97.) The purpose of the act is therefore to "protect society by providing both a means for isolating these offenders and treatment for the underlying cause of their criminality." (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1054 (1985-1986 Reg. Sess.) as amended May 30, 1985, p. 2.)

The MDO Act provides mental health treatment in three stages: first, as a condition of parole following the completion of a prison term of an enumerated offense (§ 2962); second, as continued treatment for one year in conjunction with the extension of parole (§ 2966, subd. (c)); and third, as an additional year of treatment following release from parole (§§ 2970, 2972). (*Lopez*, *supra*, 50 Cal.4th at p. 1062; *People v. Blackburn* (2015) 61 Cal.4th 1113, 1122.) Because commitment under the MDO Act begins as a condition of parole, it is initially triggered by a conviction of an offense for which the offender was sentenced to prison, i.e., a felony. (See §§ 1170(a)(3), 2962, subd. (e).) Recognizing that a parolee's mental disorder may not be in remission even after receiving initial treatment through the end of the parole term, the Legislature established a procedure

allowing for the renewal and extension of an offender's commitment period. (§§ 2966, subd. (c); 2970, subd. (b); 2972, subd. (c).)

At the first stage, a prisoner is initially committed as an MDO if six criteria are met: (1) the prisoner has a severe mental disorder; (2) the disorder is not in remission or capable of being kept in remission; (3) the disorder was a causative or aggravating factor in an enumerated crime for which the prisoner was sentenced to prison; (4) the prisoner used force or violence during the commission of the crime; (5) the prisoner has been in treatment for the disorder for at least 90 days in the year prior to his release; and (6) due to the disorder, the prisoner poses a risk of serious danger to others. (§ 2962 subds. (a)-(d); *People v. Harrison* (2013) 57 Cal.4th 1211, 1218.) The qualifying offense must have resulted in a prison sentence and must be one of many enumerated offenses, including any offense in which force or violence was used. (§ 2962, (e)(2)(P).) A prisoner who meets these criteria is then certified as an MDO and is civilly committed for a period of one year as a condition of parole. (§ 2962, subd. (d)(1).) Challenges to this first phase of commitment are governed by sections 2964 and 2966. If an offender disagrees with the initial MDO certification, he or she may request a hearing under section 2966, subdivision (b) to challenge the commitment criteria. (*Lopez*, *supra*, 50 Cal.4th at p. 1062.)

The second phase of MDO commitment is governed by section 2966, subdivision (c). It authorizes the Board of Prison Terms (BPT) to continue an MDO's commitment when it continues the MDO's parole under section 3001 for a one-year period. (§ 2966, subd. (c); *Lopez*, *supra*, at pp. 1062-1063 ["an MDO is committed for one-year periods and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year"].) Following the BPT's recommendation, an MDO's commitment will be continued for one year if the following three criteria are proved: (1) the MDO has a current severe

mental disorder; (2) "the severe mental disorder is not in remission or cannot be kept in remission without treatment"; and (3) by reason of the mental disorder, the offender represents a substantial danger of physical harm to others. (§ 2966, subd. (c).)

In the third and final phase of MDO commitment, governed by sections 2970 and 2972, the MDO's parole term has expired so the MDO is no longer on parole during this commitment period. Under section 2970, if, prior to the termination of the parolee's treatment under section 2962, the medical professionals treating the patient determine that "the parolee's or prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment," the People may petition to recommit the MDO for an additional one-year term. (§ 2970.) An MDO may be recommitted under this section, if the three criteria set forth in section 2966, subdivision (c) are met. (§ 2972, subd. (c) [(1) the MDO has a current severe mental disorder; (2) "the severe mental disorder is not in remission or cannot be kept in remission without treatment;" and (3) by reason of the mental disorder, the offender "represents a substantial danger of physical harm to others].) In a recommitment hearing, the People bear the burden of proving the MDO's severe mental disorder beyond a reasonable doubt. (§ 2972, subd. (a).)

During this third phase, an MDO may be placed in outpatient treatment "if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis." (*People v. Gregerson* (2011) 202 Cal.App.4th 306, 314, internal citations omitted; § 2972, subd. (d).)

3. Proposition 47, the Safe Neighborhoods and Schools Act, reclassifies certain nonserious and nonviolent felonies as misdemeanors

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act," and it became effective the next day. (Cal. Const., art. II, § 10 (a) ["An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise"]; *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328 (*Diaz*).)

The purpose of Proposition 47 is fourfold: to (1) "ensure that people convicted of murder, rape, and child molestation will not benefit;" (2) "reduce felonies for [certain] nonserious, nonviolent crimes like petty theft and drug possession" to misdemeanors; (3) "authorize consideration of resentencing for anyone who is currently serving a sentence" for the listed offenses; and (4) "require a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70; *Diaz*, *supra*, 238 Cal.App.4th at p. 1328.)

To achieve these goals, Proposition 47 reclassified as misdemeanors certain nonserious and nonviolent theft- and drug-related offenses that previously were felonies. (*People v. Buford* (2016) 4 Cal.App.5th 886, 903; *Diaz*, *supra*, 238 Cal.App.4th at p. 1325.) Proposition 47 also created a new resentencing provision—section 1170.18—which allows persons convicted of a reclassified offense prior to Proposition 47's effective date to petition for a reduction of their felony. (*People v. Pinon* (2016) 6 Cal.App.5th 956, 961.) The statute distinguishes between two classes of such persons: petitioners who are still serving a sentence and those who have completed a sentence. (*Ibid.*)

A person currently "serving a sentence for a [felony] conviction" may petition for recall of the felony sentence under section 1170.18, subdivision (a). A petition under this provision requires that the trial court determine whether the prior conviction would be a misdemeanor. If so, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

A person who was currently serving a sentence but was resentenced under subdivision (b) of 1170.18 "shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence," unless the court exercises its discretion to release the person from parole. (§ 1170.18, subd. (d).) A person subject to this parole term is placed under the supervision of the Department of Corrections and, if a court finds the parolee has violated parole, it may revoke parole and impose a term of custody no longer than the original sentence. (*Ibid.*; *People v. Morales* (2016) 63 Cal.4th 399, 409.)

By contrast, redesignation proceedings for a person who has "completed his or her sentence" are governed by subdivisions (f) and (g). Under section 1170.18, subdivision (f), eligible persons who have completed their sentence for an offense that Proposition 47 changed from a felony to a misdemeanor may file an application to have the felony conviction redesignated as a misdemeanor before the trial court that entered the judgment. (§ 1170.18, subd. (f); see *People v. Shabazz* (2015) 237 Cal.App.4th 303, 310-311.) Thereafter, "The court shall designate the felony offense or offenses as a misdemeanor." (§ 1170.18, subd. (g).)

A felony conviction that is recalled and resentenced under subdivision (b) or redesignated as a misdemeanor under subdivision (g) is considered a misdemeanor "for all purposes." (§ 1170.18, subd. (k).)

B. MDO Recommitment Is Not Invalidated by the Proposition 47 Redesignation of the Initial MDO-Qualifying Felony Because the Qualifying Felony Is Not a Requirement of MDO Recommitment

MDO recommitments, such as appellant's, remain valid following the granting of Proposition 47 relief. MDO recommitment was designed to provide continued treatment for patients with unremitted mental disorders that continue to pose a threat to society. For this reason, a felony conviction is not a required element for MDO recommitment. Because a felony conviction is not an element of MDO recommitment, the redesignation of the qualifying felony to a misdemeanor does not invalidate the recommitment. Moreover, the intent and purpose of each act supports MDO recommitment even after the initially qualifying conviction has been reduced from a felony to a misdemeanor.

1. A plain reading of the governing MDO provisions establishes that a felony conviction is not required for an MDO recommitment

Unlike initial commitments which require all six criteria set forth in section 2962, MDO recommitments only require a determination of the three criteria related to the committee's present mental disorder and dangerousness. The qualifying felony conviction, as this Court has acknowledged, is not an element of recommitment.

In *Lopez*, the Court held that an MDO cannot challenge the validity of the qualifying felony after the initial year of commitment has expired. (*Lopez*, *supra*, 50 Cal.4th at p. 1058.) The defendant in *Lopez* was committed as an MDO under section 2962 and his initial commitment was continued for an additional year. (*Id.* at p. 1060.) When the People filed a motion to recommit the defendant under section 2970, the defendant moved to dismiss the recommitment on grounds that his commitment offense did not qualify as an enumerated offense under section 2962 and that the lack

of this "foundational criterion" rendered his recommitment improper. (*Ibid.*)

The Court rejected the defendant's claim. (*Id.* at p. 1058.) In doing so, it closely analyzed the statutes governing initial MDO commitments (§ 2962) and recommitments (§§ 2970 and 2972). The Court noted that "the first three criteria outlined in section 2962 are capable of change over time, and must be established at each annual review of commitment." (*Lopez*, at p. 1062.) These "dynamic" criteria require that (1) the offender suffer from a severe mental disorder, (2) the disorder is not or cannot be kept in remission, and (3) the MDO poses a risk of danger to others. (*Ibid.*; § 2962, subd. (a).) The remaining criteria on the other hand are "static" or "foundational" and involve past events and conduct. (*Ibid.*) While the initial MDO commitment governed by section 2962 requires proof of all six criteria, this Court observed that recommitment governed by sections 2970 and 2972 only requires proof of the three dynamic criteria:

> Sections 2966, subdivision (c), section 2970, and section 2972, read individually and collectively, reveal that the Legislature intended an MDO to be permitted to challenge the static factors justifying his or her commitment only during the initial one-year period of treatment; once that period ends, the statutory language contemplates a challenge *based only upon the dynamic factors justifying continued treatment.*

(*Lopez*, *supra*, at p. 1065 (emphasis added); see also *People v. Cobb* (2010) 48 Cal.4th 243, 252 [the three static criteria "are relevant *only* to the initial certification"].)

This court also acknowledged that in sections 2960 and 2962 the Legislature referred to the MDO as a "prisoner" or "parolee" but in section 2972 referred to the MDO as "person" or patient." (*Lopez*, *supra*, at p. 1065.) "This linguistic shift suggests the Legislature acknowledged that the recommitment process outlined in section 2972 is distinct from the initial commitment process." (*Ibid.*)