SUPREME COURT OF CALIFORNIA
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SUPREME COURT NO. ____________________

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Respondent,<br><br>v.<br><br>J.F.,<br>Petitioner and Appellant. | Court of Appeal<br>No. D071733<br><br>Superior Court<br>No. SCD204096 |

**APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY**

Honorable DAVID J. DANIELSEN, Judge

# PETITION FOR REVIEW

**After the Unpublished Decision of the Court of Appeal, Fourth Appellate District, Division One, Affirming the Decision In Full.**

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By Appointment of the Court of
Appeal Under the Appellate Defenders, Inc.
Assisted Program

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**APPEAL FROM THE SUPERIOR COURT OF SAN BERNARDINO COUNTY**

Honorable DAVID J. DANIELSEN, Judge

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**PETITION FOR REVIEW**

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**After the Unpublished Decision of the Court of Appeal, Fourth Appellate District, Division One, Affirming the Decision in Full.**

TO THE HONORABLE CHIEF JUSTICE CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

This petition for review follows the unpublished decision of the Court of Appeal, Fourth Appellate District, Division One, filed February 27, 2018. A copy of the opinion is attached to this petition as an appendix.

## ISSUE PRESENTED

1. Whether recommitment under the Mentally Disordered Offender ("MDO") Act, Penal Code[1], sections 2970, et seq., is valid despite the application of section 1170.18, the codified version of the initiative commonly known as "Proposition 47" reducing Petitioner's previously qualifying felony to a misdemeanor that would not qualify for MDO Act treatment. (Prop. 47, as approved by voters, Gen. Elec (Nov. 4, 2014).) The Legislative intent for the MDO Act was to commit persons for psychological treatment and to protect the public from persons found to be not only dangerous due to mental illness but also having been imprisoned for a violent felony related to their mental illness. This issue includes within it the question of whether the Fourth District Court of Appeal, Division One, wrongly decided *People v. Goodrich* (2017) 7 Cal.App.5th 699 [review den. Apr. 12, 2017, S40242] ("*Goodrich*") because the superior court's decision in Petitioner's case relied on *Goodrich,* and the Court of Appeal in Petitioner's case did not believe *Goodrich* was wrongly decided.

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[1] All subsequent statutory references are to the Penal Code unless otherwise specified.

## NECESSITY FOR REVIEW

Under California Rules of Court[2], rule 8.500(b)(1), the Supreme Court may order review of a decision made by the Court of Appeal when necessary to settle an important question of law or to address an issue that affects the administration of justice or broad social issues. Here, the state's treatment of mentally ill individuals is reviewed. Petitioner was deprived of his fundamental liberty right to freedom from government restraint when his recommitment under the MDO Act was affirmed without a legitimate statutory basis in violation of his due process rights. By recommitting Petitioner under the MDO Act, the court also violated the equal protection clause, because the government could not continue to restrain a similarly situated person committed under the Sexually Violent Predator ("SVP") Act, Welfare and Institutions Code, section 6600, et seq.

As a result of the Court of Appeal's finding, Petitioner remains in commitment based upon a new recommitment order which would not have been possible but for the offense having been previously listed as a felony. However, his offense was reclassified as a misdemeanor, which Petitioner argued nullified all subsequent orders, including the initial commitment and any recommitment orders. This issue is of statewide importance because it

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[2] All subsequent rule references are to the California Rules of Court unless otherwise specified.

represents the state forcing mentally ill individuals with misdemeanors to remain involuntarily committed under an act intended only to commit felony offenders.

The court could have reversed the holding while maintaining the interest in public safety by instructing the state to reassess Petitioner under another statute which would serve the same purpose of protecting the public from a person who presents a danger to self or others through involuntary restraint and providing that person with psychiatric treatment, namely the Lanterman-Petris-Short ("LPS") Act. (Welf. & Inst. Code, § 5000, et seq.) Instead, it maintained several fallacies initially asserted in the *Goodrich* decision. It construed section 2962, the statute in the MDO Act referring to the qualifying felony criterion, as being static such that if the initial commitment was valid in the past, it could never be invalidated by any subsequent law, including section 1170.18. (*Goodrich, supra,* 7 Cal.App.5th 699; § 1170.18). It also misunderstood Petitioner's argument that section 1170.18 does not apply to the recommitment hearing but that the past application of section 1170.18 to the qualifying felony invalidated all subsequent recommitment hearings. To provide guidance to the Court of Appeal, this Court must grant review of this case.

The Court of Appeal chose not to publish its decision. However, "[t]he fact that opinions are not published in the Official Reports means nothing more than that they cannot be cited as precedent by other litigants

who are not parties thereto. But they are certainly available to any interested party." (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 712.) Therefore, although it cannot be cited, the holding in this opinion retains significance as other courts can look to it for guidance on how to proceed in their review of similar cases. Thus, it is important that this case be reviewed by this Court.

## STATEMENT OF CASE AND FACTS

Petitioner adopts the procedural and factual background as set forth in the Court of Appeal's Opinion. (Appendix 1 [Court of Appeal Opinion for *People v. J.F.* (Feb. 17, 2018, D071733) [nonpub. opn.] ["Opn."], pp. 2-3.) However, Petitioner summarizes his background here to provide a timeline in context with the decision and treatment of *Goodrich*. (*Goodrich, supra,* 7 Cal.App.5th 699.)

***2007 Original Qualifying Felony Offense***

On August 3, 2007, Petitioner pled guilty to grant theft of a person, in violation of section 487, subdivision (c), then a felony offense, and he was sentenced to state prison for 16 months. (1 CT pp. 8-10, 19, 62, 64.)

***Petitioner's Initial Commitment Under MDO Act***

On April 27, 2012, Petitioner was civilly committed to a state hospital as an MDO pursuant to the MDO Act. (1 CT p. 20.)

On October 10, 2014, Petitioner was placed in an outpatient conditional release program ("CONREP"). (1 CT p. 20.)

***Reclassification of Petitioner's Qualifying Felony Offense to Misdemeanor***

On October 21, 2016, Petitioner filed a Petition for Reduction to Misdemeanor under section 1170.18, subdivisions (f), and (g), to reduce his 2007 felony conviction to a misdemeanor. (2 CT p. 25.) On November 4,

2016, Petitioner's 2007 felony conviction was reduced to a misdemeanor under section 1170.18. (2A RT p. 104; 1 CT pp. 16, 17, 20; 2 CT p. 25.)

***Superior Court's Decision Based On <u>Goodrich</u>***

On November 10, 2016, Petitioner filed a Motion to Dismiss his MDO commitment and release him from CONREP. (2A[3] RT p. 104; 1 CT pp. 16, 17, 20.) On December 16, 2017, the superior court continued the hearing on Petitioner's Motion to Dismiss to wait for the Court of Appeal's decision in *Goodrich.* (RT p. 204; 1 CT p. 67; *Goodrich, supra,* 7 Cal.App.5th 699.)

On January 17, 2017, the *Goodrich* opinion is filed in the California Court of Appeal, Division One. (*Goodrich, supra,* 7 Cal.App.5th 699.)

On February 3, 2017, the superior court denied Appellant's motion, based on the decision in *Goodrich*, found Petitioner remained in commitment under the MDO Act, and found Petitioner qualified for outpatient status. (4 RT p. 303; 1 CT p. 68; 2 CT p. 69; *Goodrich, supra,* 7 Cal.App.5th 699.)

On February 21, 2017, Petitioner filed an amended notice of appeal from the superior court's decision denying his petition to dismiss his MDO commitment. (1 CT p. 61.)

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[3] The two volumes of augmented Reporter's Transcripts are identified as "1A RT" and "2A RT."

***California Supreme Court Denied Review Of Goodrich***

On February 24, 2017, a petition for review was filed in *Goodrich.* (Appellate Court Case Information, *People v. Goodrich,* Case Number S2420242 <http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2178443&doc_no=S240242&request_token=NiIwLSIkXkw7WzBBSCFNSENIIFQ0UDxTJyJeTz5TUCAgCg==> [as of Apr. 6, 2018].)

On April 12, 2017, the California Supreme Court denied the petition for review of *Goodrich*. (*Goodrich, supra,* 7 Cal.App.5th 699.)

***Court of Appeal Declined to Overturn Goodrich And Affirmed The Superior Court's Decision***

On February 27, 2018, the California Court of Appeal, Fourth District, Division One, filed an unpublished decision affirming the San Diego Superior Court's order denying Petitioner's motion to dismiss his commitment after his qualifying felony was reduced to a misdemeanor. (Opn., p. 2.) Specifically, it found "no reason to depart from the reasoning in *Goodrich.*" (Opn., p. 2, citing *Goodrich, supra,* 7 Cal.App.5th 699.) The court further stated it: "disagree[d] with [Petitioner's] contention that the trial court's decision violates the equal protection clause because it results in the disparate treatment of different classes of civil committees." (Opn., p. 2.)

## ARGUMENT

## I.

## REVIEW IS NECESSARY FOR THIS COURT TO DETERMINE WHETHER A PERSON CAN LAWFULLY REMAIN INVOLUNTARILY COMMITTED UNDER THE MDO ACT AFTER THE UNDERLYING FELONY OFFENSE HAS BEEN REDUCED "FOR ALL PURPOSES" TO A NONVIOLENT MISDEMEANOR CONVICTION.

The sole issue on review is whether the state is authorized under the MDO Act to involuntarily recommit a person who was originally committed for a single felony offense which, by application of section 1170.18, has been changed "for all purposes" to a misdemeanor offense. (§ 1170.18, subd. (k).)

Only the Court of Appeal, Division One, has published a case on this issue, namely, *Goodrich*. (*Goodrich, supra,* 7 Cal.App.5th 699.) The trial court waited for the Court of Appeal to decide *Goodrich* before it decided to recommit Petitioner. (3 RT p. 67.)

The Legislature enacted the MDO Act in 1985 to require offenders who have been convicted of violent crimes related to their mental disorders, and who continue to pose a danger to society, to receive mental health treatment until their mental disorder can be kept in remission. (§ 2960 et. seq.; *In re Qawi* (2004) 32 Cal.4th 1, 9.) The original purpose of the MDO Act is best described by the Senate Committee on Public Safety in its

analysis of the MDO Act in its analysis for an amendment to the Act in 1999:

> The MDO law was originally drafted in 1985 in SB 1296 (McCorquodale). The author, as quoted in the Assembly Public Safety Committee analysis, stated the reason for the bill:
>
> "There is no useful procedure for assuring mental health treatment for prisoners when their mental disorder was a factor in their committing a violent crime."
>
> The author further explained, as reflected in the Senate Judiciary Committee analysis, that *consideration of the crime of conviction* was necessary because prediction of an inmate's future dangerousness from his or her mental condition and prison conduct was inordinately difficult.

(Sen. Comm. On Pub. Safety, Comm. Analysis of Sen. Bill 279 (Mar. 16, 1999) p. 5, emphasis added.)

There are three stages of commitment within the MDO Act: the first phase is when the California Department of Corrections and Rehabilitation ("CDCR") and the Department of State Hospitals[4] (DSH) first determine that an offender must be treated by the DSH as a condition of parole; the second phase occurs when both the parole and treatment are extended; and the third phase occurs when parole is terminated. (§§ 2962, 2970, 2972;

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[4] The Department of State Hospitals (DSH) was previously called the State Department of Mental Health (DMH). For consistency, Appellant will refer to this forensic mental health hospital system as "DSH" throughout this brief.

*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1062-1063 [disapproved in part by *People v. Harrison* (2013) 57 Cal.4th 1211 on an unrelated issue] (*Lopez*).)

In the first phase, the court must find the defendant meets six criteria:

> 1) the offender's severe mental disorder was a cause or aggravating factor in the commission of the underlying crime;
> 2) the offender was treated for at least 90 days preceding his or her release;
> 3) *the underlying crime was a violent crime as enumerated in section 2962, subdivision (e);*
>
> 4) the patient has a severe mental disorder,
> 5) the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and
> 6) that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others.

(§ 2962; *Lopez* at p. 1062, emphasis added.) The first three criteria have been termed "static" and "foundational" because "they concern *past events* that, once established, are *incapable of change*." (*Id.,* at p. 1056, emphasis added.) In comparison, the others are "dynamic" because they are "capable of change over time and must be established at each annual review of the commitment." (*Id.* at p. 1062.)

In the third phase, the court must conduct a hearing on the petition under section 2970 for continued treatment and find the person meets three "dynamic" criteria for the court to recommit the person for an additional year. (§§ 2970, 2972, subds. (a) & (c).) These criteria are the same as the

final three "dynamic" criteria listed in section 2962 for the original commitment:

1) the patient has a severe mental disorder,
2) the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and
3) that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others.

(§§ 2962, 2972, subd. (c).)

Additionally, California has a well-established rule that the validity of a civil commitment depends on the continued validity of the underlying criminal conviction, as evidenced by the Court of Appeal and Supreme Court nullifying a civil commitment when the requisite criminal conviction was invalid. (*Lopez*, *supra*, 2 Cal.3d 1055; *In re Bevill* (1968) 68 Cal.2d 854 [recommitment under former Mentally Disordered Sex Offender Act was invalid because the underlying conviction was based on a statute later declared unconstitutional]; see also *People v. Greene* (1973) 34 Cal.App.3d 622, 656 [acknowledging commitment under former Mentally Disordered Sex Offender Act would have been invalid if it were based solely on conviction that later was reduced on appeal to a misdemeanor].)

In 2014, the voters approved initiative measure Proposition 47, titled The Safe Neighborhoods and Schools Act, adding section 1170.18 to the Penal Code and amending existing statutes to reduce penalties for certain theft and drug offenses. (§ 1170.18, subd. (a); Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, pp. 70-74 (Voter Information

Guide); *People v. Gonzales* (2017) 2 Cal.5th 858, 862.) Section 1170.18 allows qualifying felony offenders to seek reclassification of their offenses to misdemeanors retroactively. (§ 1170.18, subd. (a); *People v. Goodrich, supra,* 7 Cal.App.5th at p. 704.) A person who has already completed a felony sentence may petition to have his conviction designated a misdemeanor. (§ 1170.18, subds. (f) & (g).) Section 1170.18, subdivision (k), provides that a conviction reduced under the measure "shall be considered a misdemeanor *for all purposes*" except restrictions on firearm access." (§ 1170.18, subd. (k), emphasis added.) The plain meaning of the terms "all purposes" encompasses all consequences related to the felony, including collateral ones. (See *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1227.)

In 2017, the Fourth District Court of Appeal, Division One, held that section 1170.18 did not apply to the MDO recommitment stage. (*Goodrich, supra,* 7 Cal.App.5th at p. 710.) The *Goodrich* court reasoned that "[i]n 2008, when Goodrich was initially committed as an MDO pursuant to section 2962, he was determined to have met *all* of the requisite criteria; therefore, the record demonstrates that at the time Goodrich was initially committed as an MDO in 2008, he met the requisite factors for commitment." (§ 2962; *Goodrich, supra,* 7 Cal.App.5th at p. 710, original italics.) The court based its decision on the premise that the qualification of the underlying crime, one listed in section 2962, subdivision (e), is

"incapable of change." (§ 2962, subd. (e); *Lopez*, supra, 50 Cal.4th at p. 1062.)

In Petitioner's case, the superior court based its decision on *Goodrich,* and continued Petitioner's recommitment. (4 RT p. 303; 1 CT p. 68; 2 CT p. 69.)

On appeal, Petitioner argued *Goodrich* was wrongly decided, citing the *Goodrich* court's inappropriate reliance on *Lopez* to disregard the full statutory scheme of the MDO Act when read with section 1170.18. (AOB, pp. 31-36.) *Goodrich* used the *Lopez* reasoning that a qualifying offense is "static" criterion, incapable of change. (*Goodrich, supra,* 7 Cal.App.5th at p. 708; *Lopez, supra*, 50 Cal.4th 1055.) And *Lopez* reasoned a defendant could not argue there was insufficient evidence of a static foundational element at any recommitment hearing, based on a plain meaning reading of section 2970. (§ 2970; *Lopez,* at p. 1066.)

Petitioner argued that because section 2970 was written prior to the addition of section 1170.18, it became ambiguous when faced with implementation of Proposition 47, thus making a plain meaning reading of 2970 improper under the principles of statutory construction. (§§ 1170.18; 2970; *People v. Harrison, supra,* 57 Cal.4th 1211.) Thus, Petitioner asserted that when considering section 1170.18 as a part of the statutory scheme with section 2970, the underlying offense criterion becomes capable of change.

In the present case, the Court of Appeal decided that *Goodrich* was correct, that recommitment under the MDO Act had a separate basis other than the initial commitment which did not require a felony offense. (Opn., pp. 2, 4, 5.) It reasoned that the voters did not want section 1170.18 to be retroactively *applied* to MDO recommitments. (Opn, p. 5.) However, section 1170.18 was already validly and retroactively applied to the qualifying felony and Petitioner argued that it was the *effect* of the change from a felony to a misdemeanor that *invalidated* the recommitment.

Instead, the court reasoned that because Petitioner was initially committed based upon a qualifying felony, the subsequent recommitment was then also valid, thereby ignoring any effect of the retroactive application of section 1170.18 changing the qualifying felony to a misdemeanor. (Opn, pp. 4, 5.) Specifically, the court based its decision on the *Goodrich* reasoning that "[i]n 2008, when Goodrich was initially committed as an MDO pursuant to section 2962, he was determined to have met *all* of the requisite criteria; therefore, the record demonstrates that at the time *Goodrich* was initially committed as an MDO in 2008, he met the requisite factors for commitment." (§ 2962; *People v. Goodrich, supra,* 7 Cal.App.5th at p. 710; Opn. p. 5.)

However, both *Goodrich* and Petitioner's unpublished decision, are both based on a circular argument:

> "the express intent of Proposition 47 is to 'reduce [] penalties for certain offenders convicted of *nonserious and nonviolent* property and drug crimes." [Citation] An MDO, however, is, by definition, a person who not only has a "severe mental disorder," but who has served a prison sentence as a result of committing a serious or violent offense punishable by prison. . . . To apply Proposition 47 retroactively for the collateral purpose of invaliding an initial MDO commitment long after it was properly imposed would be at odds with the purpose intended by the voters.

(*Goodrich, supra,* 7 Cal.App.5th at p. 711, original italics.) Petitioner agrees that an MDO is as a person who served a prison sentence for a violent felony. However, the application of section 1170.18 transformed Petitioner's and Goodrich's felonies into misdemeanors. Therefore, the definition which includes within itself a felony no longer applied to Petitioner or Goodrich who had misdemeanors due to the application of section 1170.18. In other words, they were no longer MDOs under the very definition the court used. Yet the court said recommitment was not precluded because they had been found to be MDOs previously and used that reasoning to validate its decision.

Petitioner further explained that MDOs are a subset of persons who have been convicted of certain offenses listed in section 2962 as qualifying offenses. (AOB, pp. 28-29.) A person could not be an MDO without a qualifying offense. (§ 2962.) However, a person could have both a mental illness and a criminal history and not be an MDO. Due to the reduction of his offense to a misdemeanor, Petitioner argued that was where he lied in

the spectrum of mental illness and California law. This concept was illustrated by a diagram in the opening brief. (AOB, p. 29.)

The *Goodrich* court further reasoned that voter intent in passing Proposition 47 was to ensure public safety and was not meant to affect MDO recommitments. (*Goodrich*, *supra*, 7 Cal.App.5th at p. 711.) But the court did not explain why at this time someone lacking a qualifying felony would not qualify as an MDO if that person is currently in prison but would fall under the definition of an MDO if that person had already completed prison time.

Regardless, Petitioner acknowledged the court's concerns about public safety. In oral argument, Petitioner reminded the court that if its concern lied with Petitioner representing a danger to the safety of the people, there are other ways to restrain Petitioner without the MDO Act. For example, the LPS Act is available to the state to involuntarily restrain and psychologically treat persons who represent a danger to the public. (Welf. & Inst. Code, sections 5500, et. seq.) The MDO Act was created in 1985 specifically to allow for commitment similar those under the LPS Act but based upon a qualifying, violent felony offense. (Sen. Comm. On Pub. Safety, Comm. Analysis of Sen. Bill 279 (Mar. 16, 1999) p. 8.) This was explained by the Senate Committee on Public Safety in its Analysis of Senate Bill 279, which amended section 2962 to identify specific violent felonies:

> . . . any person who is a danger to self or
> others, or who is gravely disabled, may be involuntarily committed and psychiatrically treated under the LPS law. A prior criminal conviction is not necessary. The MDO statutes include specific references to the LPS law as an alternative to the MDO process and specifically provide that such parolees may be placed in a state hospital. (Penal Code section 2974).

(Sen. Comm. On Pub. Safety, Comm. Analysis of Sen. Bill 279 (Mar. 16, 1999) p. 8.)

Additionally, Petitioner argued the court's disparate treatment of SVPs and MDOs constituted a violation of the equal protection clause. (AOB, pp. 36-41.) Petitioner's comparison to SVPs was for the premise that a commitment under the SVP Act cannot be valid without a qualifying sex offense; similarly, the use of the MDO Act to commit a person required a qualifying felony. (AOB, pp. 40-41.) Petitioner did not argue that an SVP would fall under the purviews of section 1170.18, rather, Petitioner acknowledged that an SVP does not qualify for such relief. (ARB, p. pp. 13-14.) However, the Court of Appeal disregarded Petitioner's argument as invalid because an SVP does not qualify for section 1170.18 relief. (Opn., p. 8.) The court misread Petitioner's argument—the premise lied in the general invalidation of a commitment when the underlying felony is reduced or removed.

A claim under the equal protection clause requires two steps. (*People v. McKee* (2010) 47 Cal.4th 1172, 1202 (*McKee II).*) First, the party must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*Ibid.*) The groups need not be similarly situated for all purpose, but for purposes of the law challenged. (*Ibid.*) The Supreme Court in *McKee II* found SVPs and MDOs were similarly situated such that the People had a burden to prove beyond a reasonable doubt that an extended commitment was required for SVPs, the same burden required for MDOs. (*McKee II, supra,* 47 Cal.4th at p. 1203.) The Supreme Court further acknowledged these groups had different characteristics, but found they were similarly situated because the purpose of the statutes controlling each was the same: “to protect the public from dangerous felony offenders with mental disorders and to provide mental health treatment for their disorders.” (*McKee II,* at p. 1203.)

Once it is established that two groups are similarly situated, but the terms of commitment or recommitment are substantially less favorable for one group than the other, the People have the burden of justifying the disparate treatment. (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155; *McKee II, supra,* 47 Cal.4th at pp. 1203, 1207.) In determining whether the justification is sufficient, the court must use the strict scrutiny test because involuntary civil commitment schemes involve the committed person’s fundamental liberty interest. (*In re Moye* (1978) 22 Cal.3d 457,

465; *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 171, fn. 8.) "A discriminatory law will not be given effect unless its classification bears a close relation to the promoting of a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible. [Citations]." (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913.)

As the *McKee II* court explained, the SVP Act was "designed to last only as long as that person meets the definition of an SVP." (*People v. McKee, supra,* 47 Cal.4th at p. 1195.) Petitioner argued that California courts have determined that SVP status under the SVP Act is not authorized when the underlying felony conviction has been reduced to a misdemeanor or reversed. (AOB, pp. 40-41.) Petitioner cited *In re Smith* (2008) 42 Cal.4th 1251 for its holding that a civil commitment under the SVP Act was not authorized once the underlying conviction was reversed on appeal. (AOB, p. 40.) The Court of Appeal did not acknowledge *Smith* in its opinion.

Petitioner also cited *In re Franklin* (2008) 169 Cal.App.4th 386, 391-393, and briefly described the case as standing for the premise that the commitment of an SVP was not authorized after the original underlying conviction was reduced from a felony to a misdemeanor on appeal. (AOB, p. 40.) The Court of Appeal disregarded this argument as "inapposite" and

stated "*Franklin* does not hold that the reclassification of a felony conviction as a misdemeanor precludes the recommitment of an SVP committee. Instead it simply holds that an initial petition for commitment as an SVP must establish that the individual is currently incarcerated in prison for a felony offense." (Opn., p. 8.) Perhaps the holding of *Franklin* is better summarized thusly: the absence of a statutory prerequisite to lawful SVP civil commitment proceedings is a fatal flaw.

Regardless, *Smith* held that the reversal of an underlying felony would prevent continuation of SVP commitment proceedings, rather, the person must be retried and reconvicted. (*Smith,* at p. 484.) Petitioner reiterates the argument that if a person formerly considered an SVP no longer meets the definition of an SVP that person cannot be recommitted under the SVP Act. Therefore, neither should an MDO be recommitted without a qualifying offense. (AOB, p. 40.) But under *Goodrich* an MDO can be recommitted without a qualifying felony. (*Goodrich, supra,* 7 Cal.App.5th 699.) Petitioner submits this constitutes disparate treatment and thus violates the equal protection clause.

Petitioner further argued that a person today could not come within the bounds of the MDO Act if that person were convicted of the misdemeanor to which Petitioner's felony was reduced, another example of disparate treatment. (AOB, pp. 41-42.) However, the court read Petitioner's argument as based upon the "date of conviction." (Opn., p. 9.)

The court held that despite the fact that a person with said misdemeanor today would not be subject to the MDO Act, Petitioner was not receiving disparate treatment because it is based on the date of their conviction and thus not based on "race, alienage, national origin, gender or legitimacy, which all require a greater level of scrutiny. [Citation]." (Opn., p. 9.) However, Petitioner did not argue the date of conviction, rather, Petitioner argued in its briefing that the effective date of section 1170.18 was irrelevant as Petitioner's underlying felony offense was already retroactively applied and changed the underlying offense to a misdemeanor. (ARB, p. 18.) Further, Petitioner argued it was inappropriate that the effect of said change which the voters intended "for all purposes" should keep him involuntarily committed under the MDO Act when a person who committed the same misdemeanor would not be validly committed under the MDO Act. (ARB, p. 18.)

Petitioner's recommitment under the MDO Act without a qualifying felony to support the Legislative intent of the statutory scheme deprives him of his fundamental liberty interest without due process under the Fifth Amendment of the Constitution. (U.S. Const., 5th Amend.) Similarly, it violates what the United Nations has long acknowledged as basic human rights: life, liberty, security of person, and freedom of movement. (U.N. General Assembly, Universal Declaration of human Rights, 217 (III) A,

1948, Paris, art. 3, 13 <http://www.un.org/en/universal-declaration-human-rights/ > [as of Apr. 6, 2018].)

Despite Petitioner’s argument, Division One found “no reason to depart from the reasoning in *Goodrich.”* (Opn., p. 2.) Review is necessary to correct the injustice being reinforced by the Court of Appeal by its continued reliance on *Goodrich*, allowing continued involuntary commitment inappropriately based on the MDO Act.

## CONCLUSION

For the reasons discussed above, Petitioner hereby requests this court grant this petition for review to determine whether Petitioner's essential fundamental liberty interest of a person to be free from government restraint without a fully authorized statutory basis can be justified by the reasoning in *Goodrich*. To wit, that because Petitioner's commitment was initially valid in 2012 when the qualifying offense was a felony it does not matter that his qualifying offense became a misdemeanor in 2016 because subsequent recommitment hearings do not reassess the initial three "static" requirements even. And to determine whether the application of section 1170.18 renders the qualifying offense criterion "dynamic" for cases involving the application of section 1170.18 to the qualifying offense.

Dated: April 6, 2018 Respectfully submitted,

/s/
MICHELLE D. PEÑA
State Bar No. 303744
Attorney for Petitioner and Appellant,
J.F.

## CERTIFICATION OF WORD COUNT

I, Michelle D. Peña, hereby certify in accordance with California Rules of Court, rule 8.360(b)(1), that this brief contains 4,750 words as calculated by the Microsoft Word for Mac software in which it was written.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Dated: April 6, 2018

Respectfully submitted,

/s/
Michelle D. Peña
State Bar No. 303744

# APPENDIX I

# OPINION OF COURT OF APPEAL

Filed 2/27/18

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JEREMY JOHN FOSTER,<br><br>Defendant and Appellant. | D071733<br><br><br><br>(Super. Ct. No. SCD204096) |

APPEAL from an order of the Superior Court of San Diego County, David J. Danielson, Judge. Affirmed.

Michelle D. Peña, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Randall Einhorn and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Jeremy John Foster appeals from an order denying his motion to dismiss his civil commitment as a mentally disordered offender (MDO). Foster's commitment began

after he completed serving his prison sentence for a felony theft offense. In late 2016 Foster successfully petitioned to have his underlying offense redesignated as a misdemeanor pursuant to The Safe Neighborhoods and Schools Act, Penal Code section 1170.18,[1] which became effective after the voters approved Proposition 47 in 2014. Foster's "motion to dismiss" argued that the redesignation of his original offense as a misdemeanor means that he no longer meets the criteria for a commitment as an MDO, and, therefore, he was entitled to be released.

On appeal, Foster renews his argument. This court recently considered and rejected an identical argument in *People v. Goodrich* (2017) 7 Cal.App.5th 699 (*Goodrich*). We see no reason to depart from the reasoning in *Goodrich*. Additionally, we disagree with Foster's contention that the trial court's decision violates the equal protection clause because it results in the disparate treatment of different classes of civil committees. Accordingly, we affirm the trial court's order denying Foster's motion to dismiss his commitment.

FACTUAL AND PROCEDUAL BACKGROUND

In August 2007 Foster pled guilty to grand theft of a person, in violation of section 487, subdivision (c), a felony offense. The court sentenced Foster to a determinate term of 16 months in prison. After completing his sentence and then being civilly committed in a state hospital for several years as an MDO, Foster was released in October 2014

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1 All further statutory references are to the Penal Code unless otherwise indicated.

under an outpatient program. His outpatient status as an MDO has been renewed annually.

"In November 2014, voters approved Proposition 47, 'the Safe Neighborhoods and Schools Act,' which became effective on the day after its passage." (*Goodrich, supra*, 7 Cal.App.5th at p. 705.) "Among other things, Proposition 47 added section 1170.18, which permits individuals to petition the trial court to redesignate certain felony offenses as misdemeanors." (*Ibid*.)

Pursuant to section 1170.18, Foster petitioned to have his felony theft conviction redesignated as a misdemeanor. The People did not oppose the petition and the court granted the petition on October 27, 2016.

Thereafter, Foster moved to dismiss his MDO commitment. He argued that the redesignation of his theft conviction as a misdemeanor meant it was no longer a qualifying offense, a necessary precondition to his commitment as an MDO. After continuing the hearing on Foster's motion to dismiss to await finality of this court's decision in *Goodrich*, the trial court denied the motion and recommitted Foster as an MDO to the outpatient program. Foster submitted on the reports recommending the renewal of his outpatient status, waiving his rights other than the right to appeal the court's ruling on his motion to dismiss.

DISCUSSION

I

Foster's appeal is largely premised on a single, narrow issue: whether the redesignation of his original offense as a misdemeanor means that he no longer meets the

criteria for an MDO commitment. This precise issue was considered by a panel of this court in *Goodrich, supra*, 7 Cal.App.5th 699.

In *Goodrich*, this court held that the redesignation of an offense under Proposition 47 does not preclude a recommitment as an MDO. As we explained, an initial MDO commitment is governed by section 2962, which sets forth six criteria necessary to establish an individual's MDO status. (*Goodrich*, *supra*, 7 Cal.App.5th at p. 706.) One criterion is that the individual was sentenced to prison for an enumerated crime, which qualifies only if the defendant "received a determinate sentence pursuant to Section 1170 for the crime." (§ 2962, subds. (b), (e)(1).) In other words, the qualifying offense must be a felony.

This criterion, along with two others, is described as a "static" or "foundational" factor. (*Goodrich*, *supra*, 7 Cal.App.5th at p. 708.) After the initial commitment, if the People are seeking a recommitment after the expiration of the one-year term, only the existence of the other three criteria (i.e., that the offender suffers from a severe mental disorder, that the illness is not or cannot be kept in remission, and that the offender poses a risk of danger to others) must be established at the annual review. (*Id.* at pp. 707-708.)

Accordingly, a change in the committee's underlying offense is irrelevant after his or her initial commitment as an MDO. In *Goodrich*, this court concluded that "there is no requirement that the People present evidence to establish the existence of the three 'static' criteria (i.e., that the mental disorder was a cause of or an aggravating factor in an enumerated crime; that the individual was sentenced to prison for the crime; and that the individual had been in treatment for the disorder for 90 days or more in the year

preceding his or her release on parole) at a recommitment proceeding. Rather, once an individual has been determined to be an MDO and has been properly committed in an initial commitment proceeding, the only things that must be established in a recommitment proceeding are 'that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others.' (§ 2972, subd. (c).) Thus, at Goodrich's recommitment proceeding, the court was not required to consider whether Goodrich had served a sentence for any offense. Goodrich's current commitment is not predicated upon his felony conviction; rather, it is predicated on his current mental state and dangerousness. His prior felony conviction is not a factor bearing on his current recommitment. It is undisputed that, at the time he was initially committed as an MDO, he had suffered a felony conviction for which he served a sentence in prison and that the initial commitment was proper. Nothing about Proposition 47 changes this." (*Goodrich*, *supra*, 7 Cal.App.5th at pp. 710-711, italics omitted.) Additionally, we held that Proposition 47 does not apply retroactively to invalidate an initial MDO commitment. (*Ibid.*)

We discern no compelling reason to depart from *Goodrich*. (*People v. Bolden* (1990) 217 Cal.App.3d 1591, 1598.) Although Foster is on outpatient status rather than committed to a state hospital, the requirements for the renewal of his outpatient status are identical to the recommitment procedures in all aspects relevant to any possible effect of

Proposition 47. (§ 2972.1, subds. (d) & (e).) Thus, the trial court correctly denied Foster's motion to dismiss the petition to renew his outpatient status.

II

Foster also contends that the trial court's decision to not dismiss the recommitment proceeding violates his rights under the equal protection clause because he is similarly situated to civil committees under the Sexually Violent Predators (SVP) Act. To support his contention, Foster relies on *In re Franklin* (2008) 169 Cal.App.4th 386 (*Franklin*), which he believes determined that "commitment as SVP was not authorized after the underlying conviction was reduced from felony to misdemeanor on appeal."[2] As argued by Foster, if SVP and MDO committees are similarly situated and the government cannot demonstrate a compelling interest in their disparate treatment, release under the SVP Act following a reclassification of a felony offense to a misdemeanor would require a similar release under the MDO Act.

This argument, however, relies on a mistaken understanding of the SVP Act and the *Franklin* decision. Like the MDO Act, the SVP Act provides for an involuntary civil commitment based on a diagnosed mental disorder that contributed to a felony offense

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2 Foster also relies upon *In re Smith* (2008) 42 Cal.4th 1251 to support his equal protection claim predicated on the differential treatment of MDOs and SVPs. *Smith*, however, involved the complete reversal of an SVP's underlying criminal conviction on appeal, after which the petitioner was not retried. Although the Supreme Court concluded in *Smith* that such a situation precludes further SVP commitment, that situation is entirely distinct from the situation presented here, where Foster's underlying criminal conviction is valid and final. The redesignation of his offense under Proposition 47 is not comparable to the situation in *Smith*, which is accordingly largely irrelevant to Foster's argument on appeal.

and that currently makes the person a danger to the health and safety of others. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1185-1186 [discussion of SVP procedures before passage of Proposition 83].) During the time period relevant to the *Franklin* decision upon which Foster relies, the SVP Act provided for an initial two-year term of commitment that could only be extended if the People petitioned for a recommitment for another two-year term. (*McKee,* at pp. 1185-1196.)

In *Franklin*, a civil committee under the SVP Act petitioned for a writ of habeas corpus seeking the dismissal of a pending petition for civil recommitment. Franklin's first two-year commitment as an SVP began in 2001 premised on a petition alleging two rape convictions, a voluntary manslaughter conviction, and a conviction for possession of a controlled substance in state prison. (*Franklin, supra*, 169 Cal.App.4th at p. 388.) In 2004, during his first recommitment term, he was convicted of another felony offense: willful and intentional damage to jail property in excess of $400. (*Ibid.*) Apparently because he was sentenced to an indeterminate prison term under the Three Strikes Law, the People did not seek his recommitment as an SVP when his term lapsed in August 2005. (*Franklin,* at p. 391.) In 2006, however, the appellate court reversed Franklin's felony conviction for damaging jail property and the case was remanded for resentencing as a misdemeanor. (*Id.* at p. 389.)

Shortly thereafter, the prosecutor then filed a new petition for *re*commitment as an SVP while Franklin was in custody awaiting misdemeanor resentencing. (*Franklin, supra*, 169 Cal.App.4th at p. 390.) The appellate court, however, explained that because Franklin's civil commitment had lapsed, the People could not seek *re*commitment, but

rather would have to seek a new initial civil commitment. (*Id.* at pp. 391-392.) But because a person is lawfully subject to an SVP civil commitment only if the individual is in state prison custody either serving a determinate term prison sentence or whose parole has been revoked, Franklin could not be civilly committed. (*Id.* at p. 392.)

Thus, the decision in *Franklin* does not hold that the reclassification of a felony conviction as a misdemeanor precludes the recommitment of an SVP committee. Instead, it simply holds that an initial petition for commitment as an SVP must establish that the individual is currently incarcerated in prison for a felony offense. Accordingly, the *Franklin* decision is inapposite.

Setting aside *Franklin*, Foster is generally mistaken in relying on the redesignation of an underlying felony via Proposition 47 to preclude recommitment as an SVP to establish his equal protection claim. To be committed as an SVP, a person must have been convicted of a "sexually violent offense." (Welf. & Inst. Code, § 6600, subds. (a)(1), (b).) Proposition 47 expressly precludes relief for any person convicted of a "sexually violent offense" as defined by the SVP Act. (Pen. Code, §§ 1170.18, subd. (i), 667, subd. (e)(2)(C)(iv)(I).) Therefore, an SVP committee cannot have his or her underlying felony offense redesignated as a misdemeanor pursuant to Proposition 47.

Finally, Foster argues that applying Proposition 47 to preclude an MDO commitment for a person that commits grand theft of a person *after* Proposition 47's effective date, but allowing the recommitment of Foster, who was convicted of grand theft of a person before Proposition 47's effective date, also violations the equal

protection clause. In other words, he contends the unequal treatment of convicted defendants based on the date of their conviction is unconstitutional.

Disparate treatment based on the date of conviction is not made on the basis of race, alienage, national origin, gender or legitimacy, which all require a greater level of scrutiny. (See *People v. Mora* (2013) 214 Cal.App.4th 1477, 1483.) A statute that results in the disparate treatment of individuals based on their date of conviction by applying only prospectively is rationally related to a legitimate state interest and " ' "the [Fourteenth] Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." ' " (*Id.* at p. 1484, quoting *People v. Floyd* (2003) 31 Cal.4th 179, 191.)

For these reasons, Foster does not establish any violation of the equal protection clause warranting a reversal of the trial court's decision.

DISPOSITION

The order is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.

RE: *People v. J.F.*, Court of Appeal No: D071733; Superior Court No. SCD204096

**ATTORNEY'S CERTIFICATE OF ELECTRONIC SERVICE AND SERVICE BY MAIL**

(Code Civ. Proc., § 1013a, subd. (2); Cal. Rules of Court, rules 8.71(f) and 8.77)

I, Michelle D. Peña, certify:

I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is mdplaw@outlook.com and my business address is Law Office of Michelle D. Peña, 3830 Valley Centre Dr., Ste. 705, PMB 706, San Diego, CA 92130. On April 6, 2018, I served the persons and/or entitites listed below by the method indicated. For those marked "Served Electronically," I transmitted a PDF version of PETITION FOR REVIEW by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. Transmission occurred at approximately 4:20 p.m. For those marked "Served by Mail," I deposited in a mailbox regularly maintained by the United States Postal Service at San Diego, California, a copy of the above document in a sealed envelope with postage fully prepaid, addressed as provided below.

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I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed on April 6, 2018, at San Diego, California.

/s/
Michelle D. Peña, Attorney at Law
Declarant
State Bar No. 303744