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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, Respondent; LARRY NIELSEN, Real Party in Interest.	B278502 (Super. Ct. L.A. County No. ZM020122) OPINION AND ORDER GRANTING PEREMPTORY WRIT OF MANDATE

ORIGINAL PROCEEDINGS in mandate. Roberto Longoria, Judge. Petition granted.

Jackie Lacey, District Attorney, Phyllis C. Asayama and Matthew Brown, Deputy District Attorneys, for Petitioner.

No appearance for Respondent.

Ronald L. Brown, Public Defender, Kelly G. Emling, Acting Public Defender, Albert J. Menaster, Natalie Parisky, Nicole M. Campbell and Lara Kislinger, Deputy Public Defenders, for Real Party in Interest.

The People seek review of an October 12, 2016 order of the superior court granting a petition for writ of habeas corpus and motion to dismiss, resulting in the dismissal of a sexually violent predator (SVP) petition filed against real party in interest, Larry Nielsen.

The petition for writ of mandate was filed on October 25, 2016, and we issued a temporary stay order pending our disposition. We now grant the petition for writ of mandate and instruct the superior court to vacate its order dismissing the SVP petition and to reinstate the SVP petition and commitment proceedings.

BACKGROUND

The parties do not dispute the underlying facts. In 1982, Larry Nielsen was convicted in federal court of forcibly and violently abducting a 10-year-old girl, holding her for several days, and sexually assaulting her. He was sentenced to a federal sentence of 20 years for kidnapping. Nielsen was mandatorily released on April 26, 1994. After his release, in 1998 he

committed another sexual offense in California, during which he turned off the lights in a women's rest room, hid inside, and assaulted a woman who entered the rest room, pulling down her pants before she escaped. He was convicted in California of assault with intent to commit rape and assault with a deadly weapon, and sentenced to 19 years in prison.

In 1998, after the state conviction, the federal parole commission issued a warrant for Nielsen, which remains active. If he is found to have violated his federal parole, the maximum amount of time he would be required to serve upon resentencing is approximately 67 months, consisting of 3,030 days less credits for good time. Such a finding is discretionary, not mandatory, and any potential resentencing is not final. When Nielsen is returned to federal custody, the United States Parole Commission, after a recommendation from a hearing officer, will make a determination as to the disposition of Nielsen's parole revocation and resentencing.

In 2012, when Nielsen was scheduled for release on his California sentence, the People filed a petition to commit him as an SVP. The case has been continued several times, and Nielsen has not had a probable cause hearing on that petition. The parties do not dispute that the SVP petition filed with respect to Nielsen complied with the procedural requirements of the

Sexually Violent Predator Act (SVPA). (Welf. & Inst. Code, § 6600 et seq.)

In August 2016, Nielsen filed a petition for writ of habeas corpus and motion to dismiss the SVP petition in the superior court, contending that the superior court lacks jurisdiction to commit Nielsen as an SVP because of the pending federal detainer. Concluding that the federal detainer precluded Nielsen's release into the community, the superior court granted Nielsen's petition on October 12, 2016, and dismissed the SVP petition. The People's petition for writ of mandate followed. We issued an alternative writ on March 14, 2017.

The People assert that the superior court erred in dismissing the SVP petition for the following reasons: (1) revocation of Nielsen's federal parole and any resulting sentence are speculative; (2) the maximum sentence to which Nielsen could be subject is less than six years; and (3) the SVP petition may not be refiled by California after Nielsen is released from any federal sentence. Nielsen, on the other hand, contends that because he is not subject to immediate release into the community, the SVP petition should be dismissed for lack of jurisdiction.

DISCUSSION

The SVPA "was enacted to identify incarcerated individuals who suffer from mental disorders that predispose them to commit violent criminal sexual acts, and to confine and treat such individuals until it is determined they no longer present a threat to society." (*People v. Allen* (2008) 44 Cal.4th 843, 857.) Pursuant to the SVPA, "[a] petition may be filed under this section if the individual was in custody pursuant to his or her determinate prison term, parole revocation term, or hold pursuant to Section 6601.3, at the time the petition is filed." (Welf. & Inst. Code, § 6601, subd. (a)(2).) It is a civil procedure and is "designed ' "to provide 'treatment' to mentally disordered individuals who cannot control sexually violent criminal behavior" ' and to keep them confined until they no longer pose a threat to the public. [Citation.] Thus, '[t]he SVPA is not punitive in purpose or effect,' and proceedings under it are ' "special proceedings of a civil nature." ' " (*People v. Putney* (2016) 1 Cal.App.5th 1058, 1065 (*Putney*).)

In *Putney*, the Court of Appeal reversed an order committing the defendant as an SVP because after the petition was filed, the defendant committed another offense in California and was sentenced to 25 years to life in prison. (*Putney*, *supra*, 1 Cal.App.5th at pp. 1062–1064.) As a result, the court held that the superior court lacked jurisdiction because the defendant had

no prospect of being released from custody. (*Id.* at p. 1069 ["the SVPA does not contemplate the commitment of people, like Putney, who pose no danger to the public because they have long prison terms left to serve"].)

The superior court, applying *Putney*, granted Nielsen's motion to dismiss based on such an asserted lack of jurisdiction because Nielsen is the subject of the federal detainer for a 1998 violation of his federal parole. The People assert that the reasoning in *Putney* does not apply because, unlike the final 25 years to life sentence in *Putney*, there is no certainty that Nielsen will be held in federal custody and the potential maximum sentence Nielsen is facing as a result of his violating federal parole is 67 months.

Nielsen asserts that the superior court lacked jurisdiction from the outset because, unlike *Putney*, in this case the federal detainer, filed in 1998 and confirmed in 2012, preceded the SVP petition and resulted in Nielsen not having a possibility of release at the time the SVP petition was filed. Nielsen fails to provide any authority for this position, which would thwart the legislative intent of the SVPA in circumstances in which anything other than immediate, unconditional release precludes an SVP from being released into the community.

The People argue, in contrast, that the requirement in *Putney* is consistent with prior cases in this court, including

People v. Superior Court (Perez) (1999) 75 Cal.App.4th 394. In *Perez*, the superior court dismissed an SVP petition because the SVP was subject to deportation. (*Id*. at p. 398.) The Court of Appeal issued a writ of mandate reinstating the petition, concluding that because the possibility of deportation was speculative, although Perez's underlying conviction made him deportable, the dismissal of the SVP petition was premature. (*Id*. at pp. 402, 405.) Nielsen's position is similar, in that it is not certain whether his federal parole will be revoked or when he might be reparoled. We agree that the facts of this case closely parallel *Perez* rather than *Putney*. Moreover, applying *Putney* to Nielsen's petition yields the same result because the finality and length of the subsequent sentence to which Putney was subject were central to the determination that the trial court lacked the authority to recommit Putney as an SVP. (*Putney, supra*, 1 Cal.App.5th at p. 1065 ["trial court should have dismissed this action after the criminal sentence became final"].) As such, the mere possibility of a federal sentence after a parole revocation hearing does not fit within the limited factual scenario presented by *Putney*.

"[A]s the Legislature stated in enacting the SVPA, the statute's 'primary purpose is to protect *the public* from "a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders [that] can be identified while

they are incarcerated." ' [Citations.] Consistent with this statutory language and purpose, numerous decisions have characterized SVPs as those who pose a danger if released into the community." (*Putney, supra*, 1 Cal.App.5th at p. 1069.) "Given the SVPA's unambiguous purpose of protecting the public, and the resulting lack of *any* indication that the statute was intended to allow civil commitment of offenders with long prison terms left to serve," the trial court had the authority to dismiss the SVP petition under circumstances in which a final, lengthy prison term and any other relevant factors ensure that Nielsen would not be released into the community. (*Id.* at p. 1070.) In Nielsen's case, however, that dismissal was premature. Accordingly, we grant the People's petition for a writ of mandate and instruct the superior court to vacate its order dismissing the SVP petition, to reinstate the SVP proceedings, and to litigate the SVP petition to its conclusion.

DISPOSITION

THEREFORE, let a peremptory writ issue, commanding respondent superior court to vacate its order of October 12, 2016, granting real party's petition for writ of habeas corpus and dismissing the sexually violent predator petition, to issue a new and different order denying same, and to reinstate the sexually violent predator petition and commitment proceedings. The temporary stay order is hereby terminated.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.