August 4, 2020

The Honorable Jorge E. Navarrete
Clerk, California Supreme Court
Supreme Court of California
455 Golden Gate Ave., Ground Floor
San Francisco, CA 94102

Re: People v. Fraisure Smith, S263138 (Court of Appeal Case No. A155689, First Appellate District, Division 5; Solano County Superior Court No. FCR208822)

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY FRAISURE SMITH, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

Dear Mr. Navarrete:

This letter is respectfully submitted by California Attorneys for Criminal Justice (hereafter “CACJ”) pursuant to the California Rules of Court, Rule 8.500(g), in support of the Petition for Review filed by Fraisure Smith (hereafter referred to as “Petitioner”) in the above-entitled case.

Identification of Amicus Curiae

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including “to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California, and other applicable law,” and the
improvement of “the quality of the administration of criminal law.” (Article IV, CACJ By Laws.) CACJ’s membership consists of approximately 1,300 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than 45 years, CACJ has appeared before this Court as an *amicus curiae* on matters of importance to the administration of justice and to its membership.¹

**Interest of CACJ in this Matter**

Years before the United States Supreme Court ruled on the constitutional validity of statutes that permitted the indefinite commitment of persons with qualifying ‘disorders’ or ‘abnormalities’ likely to engage in ‘predatory acts of sexual violence’ in *Kansas v. Hendricks* (1997) 521 U.S. 346, one of the then leading scholars in criminology in the United States, Professor Edward Sutherland, had written an article titled “The Sexual Psychopath Laws” (1950) 40 J. CRIM. L. & CRIMINOLOGY 453, in which he noticeably raised questions about the assumptions and data on which ‘sexual psychopath’ laws – enacted as of that time in just four of the States, including California – had been predicated. His inquiry was focused on what information existed, including conviction rates for sex crimes and the relative prevalence of sex crimes and rates of recidivism of those convicted sex crimes. He reviewed data collected on each of these subjects and observed:

The sexual psychopath laws are based on a belief that persons who commit serious sex crimes have no control over their sexual impulses and will repeat their crimes again and again regardless of punishment or other experiences.

¹ The undersigned certify by their signatures and as officers of this Court that no compensation has been paid by any of the parties to this litigation, or by any interested party, other than by CACJ and/or by the undersigned, for any time spent in the research or production of this brief, or for any costs associated with it.
Professor Sutherland’s concern was that the ‘sexual psychopath’ laws were examples of laws based on questionable assumptions and would, in the end, be demonstrated to be applicable to only a very small population. *Id.*, at 554.

The questions that Professor Sutherland raised 70 years ago continue to be raised by those who currently study Sexually Violent Predator laws in California and elsewhere. See, Lave and Zimring, “Assessing the *Real* Risk of Sexually Violent Predators: Dr. Padilla’s Dangerous Data” (2018) 55 AM. CRIM. L.R. 705. This article, written by well-known scholars, focuses in part on data obtained during research on SVP programs in California’s State Hospital system. In their conclusion, they note that: “It would be hard to ignore a study showing that the vast majority of recently released individuals committed under the current SVP regime did not recidivate.” *Id.*, at 737. That is what Dr. Jesus Padilla’s study involving SVPs housed in the Department of State Hospitals in California found. Dr. Padilla was a clinical psychologist who worked in the California Hospitals system. As explained in the above article, questions have been raised about whether his research was ‘buried’ because it posed a possible threat to the continuation of the State’s well funded SVP programs. Also, TCR staff report, ‘Did California Authorities Suppress Research on Sexually Violent Predators’, www.thecrimereport.org, August 8, 2018, published by Center on Media, Crime and Justice, John Jay College of Criminal Justice.

Admittedly, the Court is not now being called upon to invalidate an SVP scheme that it has upheld as constitutionally valid. See, generally, *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138. CACJ’s interest in addressing SVP laws as written and as applied dates back to before its appearance as an *amicus curiae* in *Kansas v. Hendricks* (1997) 521 U.S. 346. Petitioner Smith is challenging the Court of Appeal’s interpretation on application of portions of the Sexually Violent Predators Act (Welfare & Institutions Code sections 6600, et seq., hereafter ‘W&I Code.’) CACJ has a historical interest in this subject matter.
Petitioner is correct in urging the Court to find that the Court of Appeal has upheld trial court rulings that, had the statutory scheme been applied as written, should have been disapproved of.

ARGUMENT AND AUTHORITIES

CACJ joins Petitioner and the California Public Defenders Association in urging this Court to review the Court of Appeal’s ruling in People v. Smith (2020) 49 Cal.App.5th 445 [citation set forth here for the convenience of the Court and parties]. It appears to CACJ that Petitioner is right in arguing that the Court of Appeal gave excessively short shrift to the factual history of developments in the case (see Petitioner’s Petition for Review, beginning at page 9, ‘Introduction and Summary of Issues and Fact’). Also, the Court of Appeal erred in finding a trial court can peremptorily dismiss a pending petition for unconditional discharge given initial rulings that had resulted in a trial setting date on the discharge petition. Petitioner persuasively points out that his Petition for Review should be reviewed against the backdrop of the full history of proceedings below, rather than based on the Court of Appeal’s abbreviated and muddled description of the procedural history in the case. As both Petitioner and CPDA point out, part of the predicate for the Court of Appeal’s eventual ruling here was a failure to acknowledge that the facts indicate that Petitioner should have been permitted to fully litigate his petition for unconditional release under W&I Code § 6608(m), pursuant to the procedures of W&I Code § 6605(a) and (b).

In Hubbart v. Superior Court, supra, 19 Cal.4th 1138, this Court was reviewing different issues than the ones presented by Petitioner Smith – though this Court was confronted in Hubbart with arguments questioning the constitutional validity of California’s SVP statutes. In rejecting these questions, this Court relied in part on the U.S. Supreme Court’s analysis in Hendricks, supra, 521 U.S. 346. The Court reiterated the view stated by the Supreme Court in Hendricks that one variable that assures SVP statutes of constitutional validity is that the duration of an extended commitment for an individual adjudicated SVP is the existence of a mental condition that justifies the segregation of the individual
from society at large. *Hendricks*, 521 U.S. at 363; *Hubbart*, *supra*, 19 Cal.4th at 1176. A change in that variable may result in curtailment, or termination, of the commitment.

In *Hubbart*, this Court acknowledged that part of the legal architecture employed by California that demonstrated California’s adherence to constitutional principles was a combination of the opportunity for new mental examinations for a person who has been adjudicated to be an SVP, together with judicial review of the commitment, and the opportunity for “...unconditional release and discharge if he prevails [in the proceeding provided for in W&I Code section 6605].” *Id.*, at 1177.

The problem framed here arises, as Petitioner rightfully points out, due to an incomplete discussion of the procedural history by the Court combined with a failure by the Court of Appeal to properly apply the prevailing rules of statutory construction to the statutes at issue in the analysis.

The Court of Appeal here was faced with statutory language that is unambiguous. Under the circumstances, as this Court has pointed out, that means that a reviewing court gives “…it a plain and commonsense meaning. [citations omitted].” *Los Angeles County MTA v. Alameda Produce Market* (2011) 52 Cal.4th 1100, 1106-07, *relying in part on People v. Murphy* (2001) 25 Cal.4th 136, 142. Petitioner had filed a petition for unconditional discharge that the trial court found sufficient and appropriate to set for trial. He was entitled to pursue the merits of the petition in a trial.

In his Petition for Review, Petitioner has quoted from the record below covering the timing of the filing of the Petition for Unconditional Release on March 7, 2016. It was filed while he was living in the community according to the Augmented Clerk’s Transcript cited in the Petition. Petitioner further explains that the record evidences the fact that the trial court did not conduct a hearing on the Petition until February 27, 2017, at a point at which the trial court found cause to proceed on the basis that Petitioner had marshaled a showing that he was no
longer a sexually violent predator. Following the procedure set forth in W&I Code § 6605(a), the Court calendared a trial setting date for the latter part of June 2017. (Petition, at pp.10-11.) As Petitioner explains and alleges in the Petition, and as is also explained in the Court of Appeal’s opinion, People v. Smith, 49 Cal.App.5th at 449-50, prior to the trial setting date, the prosecution filed a petition to revoke Petitioner’s conditional release status. That filing should not have automatically trumped the pending petition.

Petitioner has made it clear that the Court of Appeal has failed to obey the canons of statutory interpretation, including pertinent pronouncements from this Court. In doing so, Petitioner persuasively argues that the Court of Appeal essentially grafted into the SVP laws interpretations that are at odds with the plain meaning of the statutory scheme.

Petitioner also persuasively argues that the trial court’s initial hearing of February 27, 2017, on the petition should have propelled the trial court towards an adjudication in which the State would need to meet its burden to establish Petitioner’s continuing danger and likelihood of future sexually violent criminal behavior within the meaning of W&I Code § 6605.

The Court of Appeal’s ruling in this case dignifies the dismissal of the petition for unconditional discharge in a way that cannot be reconciled with other Court of Appeal rulings that have examined the question of what standard applies to such a dismissal. Here, Petitioner was further along in the process of the adjudication of his petition than was the defendant in People v. Reynolds (2010) 181 Cal.App.4th 1402, 1406-08. In Reynolds, the Court of Appeal found it proper, under the circumstances, to apply an abuse of discretion standard to the dismissal of a petition that emphasized by the failure of the defendant to object to the dismissal: “To the contrary, he expressly agreed to a dismissal without prejudice to

---

2 On this issue, Petitioner cites the Clerk’s Transcript at pages 121-127 and the Augmented Clerk’s Transcript, including a Minute Order dated February 27, 2017.
permit defendant to refile at a later date, once his circumstances change.”  *Id.*, at 1408.³

Petitioner rightly points out that in *Hubbart v. Superior Court, supra, 19 Cal.4th 1138*, this Court upheld California’s SVP scheme in part because the Court followed the dictates of the United States Supreme Court by permitting the release of individuals who no longer fit the criteria for continuing detention and commitment.  *Id.*, at 1166-67.

Petitioner correctly points out that the move to revoke Petitioner’s conditional release did not undermine the showing that had been made to satisfy the trial court that Petitioner was on track to demonstrate that he fit criteria for unconditional discharge spelled out under W&I Code § 6605(a). Petitioner had made a sufficiently persuasive initial showing that the trial court should have followed the dictates of the statutory scheme and permitted him to go forward to trial. The Court of Appeal’s opinion undermines the statutes that were being interpreted and applied here.

³ In *Reynolds*, the accused had filed his petition for unconditional release *pro se*, but he was represented by counsel at the hearing, thus explaining the Court of Appeal’s choice of language.
CONCLUSION

For the reasons stated, this Court should grant review.

Dated: August 4, 2020

Respectfully submitted,
STEPHEN K. DUNKLE, Chair
JOHN T. PHILIPSBORN, Vice Chair
CACJ Amicus Curiae Committee

By: s/ John T. Philipsborn
John T. Philipsborn
SBN 83944
Counsel for CACJ
PROOF OF SERVICE

I, Stephen K. Dunkle, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 222 E. Carrillo St., Ste. 300, Santa Barbara, CA 93101.

On today’s date, I served the within document entitled:

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY FRAISURE SMITH, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Santa Barbara, CA, addressed as set forth below;

( X) By electronically transmitting a true copy thereof;

Jean F. Matulis                                          Karen Z. Bovarnick
P.O. Box 1237                                           Office of the Attorney General
Cambria, CA 93428                                       455 Golden Gate, Ave., Ste. 11000
Counsel for Fraisure Smith, Defendant and Appellant     San Francisco, CA 94102-3664
                                                Counsel for The People, Plaintiff and Respondent
Superior Court of Solano County                           Court of Appeal
600 Union Avenue                                         First Appellate District, Division 5
Fairfield, CA 94533                                       350 McAllister Street
                                                       San Francisco, CA 94102-7421
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 4th day August, 2020, at Santa Barbara, California.

Signed: s/ Stephen K. Dunkle