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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY SEAN ALLEN,

Defendant and Appellant.

_____/

H027835

(Santa Clara County Superior Court No. 171110)

Defendant Gregory Sean Allen challenges the trial court's August 2004 order purportedly extending from October 14, 2003 to October 14, 2004 his commitment as a mentally disordered offender (MDO). Allen claims that the trial court lacked jurisdiction to issue this order because no petition was filed seeking an extension of his commitment prior to the termination of his prior commitment. He alternatively claims that his right to due process was violated by extension of his commitment based on an untimely petition. We conclude that the statutory requirement that a petition be filed prior to the termination of an MDO commitment is a mandatory requirement with the consequence of dismissal for its violation. As this requirement was indisputably violated here over Allen's repeated objections, we are compelled to reverse the commitment order with directions to dismiss the petition.

I. Background

In 1994, Allen was convicted of sexual battery (Pen. Code, § 243.4, subd. (a)) and committed to state prison for a two-year term. He was committed to Atascadero State Hospital in 1997 for treatment during his parole period under Penal Code section 2962. Before the expiration of that commitment on October 12, 2000, a petition was filed seeking a one-year extension of his commitment as an MDO pursuant to Penal Code section 2970. In August 2000, the court issued an order extending his commitment to October 14, 2001. In June 2001, a petition was filed seeking another one-year extension of his commitment. In August 2001, the court issued an order extending his commitment to October 14, 2002. In August 2002, a petition was filed seeking another one-year extension of his commitment. That same month the court issued an order extending his commitment to October 14, 2003.

In April 2003, the medical director of Napa State Hospital, where Allen was then being held, sent a letter to the prosecutor recommending that a petition be filed seeking the extension of Allen's commitment. However, no new petition was filed in 2003, and Allen's MDO commitment terminated on October 14, 2003. On January 15, 2004, Allen, who was still being held at Napa State Hospital, filed a petition for a writ of habeas corpus. He asserted that the absence of a new petition prior to the termination of his prior commitment deprived the court of jurisdiction to extend his commitment.

On January 21, 2004, a petition was filed seeking an "an order extending" Allen's commitment "for one year." The petition stated that Allen's commitment "is set to **expire on October 14, 2003**." (Original emphasis.) On January 26, 2004, Allen filed a motion to dismiss the petition. He asserted that the failure to file the petition prior to the termination of his commitment deprived the court of jurisdiction and denied him due process. Allen claimed that, even if the court had jurisdiction, the

prosecutor had failed to show "good cause" for the belated filing. In response, the prosecutor asserted that he was not required to show "good cause" for the belated filing of the petition because Allen had suffered no "actual prejudice."

On February 27, 2004, the court denied both Allen's habeas petition and his motion to dismiss the extension petition. In June 2004, a petition was filed seeking an extension of Allen's commitment from October 14, 2004 to October 14, 2005. This petition asserted that Allen's "commitment is set to expire on October 14, 2004." On August 3, 2004, the court issued an order extending Allen's commitment from October 14, 2003 to October 14, 2004. Allen filed a timely notice of appeal.

II. Analysis

Up until 2003, the treatment of Allen as an MDO proceeded in accordance with the statutory scheme. He was initially committed in 1997 for treatment during his parole period pursuant to Penal Code section 2962. Before that commitment terminated in 2000, an initial petition under Penal Code section 2970 was filed to extend his commitment for another year and his commitment was extended. In 2001 and again in 2002, a petition was filed and an order was issued extending his commitment for an additional one-year period well in advance of the termination of the previous commitment period. His 2002 commitment terminated on October 14, 2003 without any new petition being filed to extend his commitment. It was only after Allen sought habeas corpus relief three months later that the prosecutor filed a petition to extend Allen's commitment. Allen objected to this untimely petition by means of a motion to dismiss in the trial court and, after that was denied, a petition for writ relief in this court. Nevertheless, the petition proceeded to trial, and the trial court issued an order extending Allen's commitment.

Allen claims that his dismissal motion should have been granted because the trial court lacked *jurisdiction* to proceed on an untimely petition. He contends that the

untimeliness of the petition invalidates the commitment order. Alternatively, he maintains that his due process rights were violated by the untimely filing of the petition.

The authority of a court to commit a person as an MDO or to extend a person's MDO commitment derives solely from the statutes enacted by the Legislature governing MDO commitments. "The commitment procedures set up by the subject statute are in the nature of special civil proceedings unknown to the common law. . . . Being a creature of statute, jurisdiction to enter an order of commitment pursuant thereto depends on strict compliance with each of the specific statutory prerequisites for maintenance of the proceeding." (*In re Raner* (1963) 59 Cal.2d 635, 639, internal quotation marks and citation omitted, original emphasis deleted.)

The statutorily authorized procedure for extending an MDO commitment begins when the medical director of the state hospital at which the person is being treated sends a written evaluation to the prosecutor "[n]ot later than 180 days prior to" the termination of the commitment "unless good cause is shown for the reduction of that 180-day period." (Pen. Code, § 2970.) After receiving the evaluation, "[t]he district attorney may then file a petition with the superior court for continued involuntary treatment for one year." (Pen. Code, § 2970.) "Prior to the termination of a commitment under this section, a petition for recommitment may be filed . . . ." (Pen. Code, § 2972, subd. (e).) "The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown." (Pen. Code, § 2972, subd. (a).)

Although these statutes provide for the good-cause excusal of the 180-day time limit and the 30-day time limit, they provide for no such excusal of the requirement that an extension petition be filed "[p]rior to the termination of a commitment." (Pen. Code, § 2972, subd. (e).) This requirement was indisputably violated when the

prosecutor filed the extension petition more than three months after the termination of Allen's 2002 commitment. The question that we must address is what the *consequence* is of the prosecutor's violation of this statutory requirement.

Allen argues that the consequence of this statutory violation is that the order extending his commitment is invalid. The consequence of the violation depends on whether this time limit should be deemed a "mandatory" or a "directory" requirement.[1]

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[1] Some courts make the error of confusing the mandatory/directory dichotomy with two species of "jurisdictional" errors by equating a violation of a "mandatory" requirement with a "lack of fundamental jurisdiction" and equating a violation of a "directory" requirement with "an excess of jurisdiction." (See *People v. Williams* (1999) 77 Cal.App.4th 436, 447-459.) "'A typical misuse of the term "jurisdictional" is to treat it as synonymous with 'mandatory.' There are many time provisions, e.g., in procedural rules, which are not directory but mandatory; these are binding, and parties must comply with them to avoid default or other penalty. But failure to comply does not render the proceeding *void . . . .*'" (*Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 274, italics added.) Only acts undertaken in the absence of fundamental jurisdiction are void; an act "in excess of jurisdiction" is not void but merely voidable. (*Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1088.) The distinction between void and voidable acts is important in many cases because voidable acts are subject to the doctrines of waiver and estoppel (*People v. Burnett* (1999) 71 Cal.App.4th 151, 179), while neither waiver nor estoppel can save a void act.

Waiver and estoppel are not at issue in this case, and Allen does not claim that the trial court lacked fundamental jurisdiction but only that it acted in excess of its jurisdiction. "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) "But in its ordinary usage the phrase 'lack of jurisdiction' is not limited to these fundamental situations. For the purpose of determining the right to review by certiorari, restraint by prohibition, *or dismissal of an action*, a much broader meaning is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." (*Id.* at p. 288, italics added.) For instance, "[a] court may have jurisdiction to grant a new trial after motion based upon proper statutory grounds, but has no jurisdiction to make the order unless the moving party has given his notice of intention *within the prescribed statutory time*." (*Id.* at p. 289, italics added.) "Speaking generally, any acts

"If the failure to comply with a particular procedural step does not invalidate the action ultimately taken . . . the procedural requirement is referred to as 'directory.' If, on the other hand, it is concluded that noncompliance does invalidate subsequent action, the requirement is deemed 'mandatory.'" (*Edwards v. Steele* (1979) 25 Cal.3d 406, 410.) "[T]he 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates." (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.) Thus, Allen's argument will succeed only if this statutory requirement is deemed mandatory rather than directory.

"[I]n evaluating whether a provision is to be accorded mandatory or directory effect, courts look to the purpose of the procedural requirement to determine whether invalidation is necessary to promote the statutory design." (*People v. McGee* (1977) 19 Cal.3d 948, 958.) "[G]enerally, requirements relating to the time within which an act must be done are directory rather than mandatory or jurisdictional, unless a contrary intent is clearly expressed." (*Edwards v. Steele*, *supra*, 25 Cal.3d at p. 410.) "The intent to divest the court of jurisdiction by time requirements is not read into the statute unless that result is expressly provided or otherwise clearly intended." (*Garrison v. Rourke* (1948) 32 Cal.2d 430, 435.)

"In order to determine whether a particular statutory provision as to time is mandatory or directory, the court, as in all cases of statutory construction and

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which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are *in excess of jurisdiction*, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari." (*Id.* at p. 291, italics added.)

interpretation, must ascertain the legislative intent. In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time. [Citation.] When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose [citation], and the courts will look to see whether the provision is of the essence of the thing to be accomplished [citation]. While time provisions are often held directory, they will be considered mandatory if the language contains negative words or shows that the designation of the time was intended as a limitation of power, authority or right. [Citation.]" (*Pulcifer v. County of Alameda* (1946) 29 Cal.2d 258, 262.)

"It is, of course, difficult to lay down a general rule to determine in all cases when the provisions of a statute are merely directory and when mandatory or imperative, but of all the rules mentioned, the test most satisfactory and conclusive is whether the prescribed mode of action is of the essence of the thing to be accomplished, or, in other words, whether it relates to matters material or immaterial—to matters of convenience or of substance." (*Francis v. Superior Court* (1935) 3 Cal.2d 19, 28, internal quotation marks and citation omitted.)

Penal Code section 2972, subdivision (e) does not expressly provide that dismissal is the consequence for violation of the time limit for filing an extension petition, although the statutory language, which permits an extension petition to be filed only before the termination of the period, suggests that the termination of the period extinguishes the prosecutor's authority to file a petition. Even without an express provision in the statute for dismissal of untimely petitions, the time limit may be deemed mandatory if that is most consistent with the Legislature's intent and the statutory design, and the timely filing of the petition is a matter of substance rather than one of convenience.

We find this a fairly close question. Time limits are frequently found to be directory rather than mandatory, but the requirement that a petition to extend a commitment be filed prior to the commitment's termination is a matter of substance rather than one of convenience. It simply makes no sense to seek the *extension* of something that has *ended*. Indeed, the prosecutor's belated petition in this case serves as an example of the illogic of doing so. In January 2004, the prosecutor filed a petition seeking "an order extending" Allen's commitment which "*is set to* ***expire*** **on October 14, 2003**." (Original boldface, italics added.) But of course in *January 2004* Allen's commitment was not *set to expire* in October 2003. Allen's commitment *had terminated* in October 2003, three months prior to the filing of the petition. Nothing in the statutory scheme manifests a legislative intent to permit the initiation of proceedings to "extend" already ***terminated*** commitments.

"[E]very statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805.) Viewing this statutory scheme as a whole and attempting to harmonize all of its provisions, we can only conclude that the Legislature did not intend for courts to entertain extension petitions that were filed after the commitment period had terminated. The Legislature expressly provided in this statutory scheme for good-cause excusal of the 180-day and 30-day time limits but made no such provision for excusal of the requirement that the petition be filed before the termination of the commitment period. The 180-day and 30-day time limits were clearly intended to promote the expeditious resolution of pending extension petitions. Expeditious resolution of *pending* matters is a matter of convenience which may properly be deemed directory, but the requirement that a petition to extend a commitment be filed, thereby *initiating* an action, before the commitment terminates is a matter of substance which, in our view, must be deemed mandatory.

We have not uncovered any MDO case resolving the issue of whether this particular time limit is mandatory or directory. The only MDO case that has directly addressed a violation of this time limit is the Third District's decision in *Zachary v. Superior Court* (1997) 57 Cal.App.4th 1026. *Zachary* did not reach the mandatory/directory issue because the Third District chose to resolve the case on Zachary's claim that his due process rights had been violated. The petition to extend Zachary's MDO commitment was filed 24 days after his commitment terminated. Zachary moved to dismiss the petition on the grounds that it was untimely and would deny him due process. (*Zachary*, at p. 1030.) The prosecutor conceded his negligence in failing to timely file the petition, but the court denied Zachary's dismissal motion on the ground that the danger to society outweighed any prejudice to Zachary. Zachary then sought writ relief in the Third District. (*Zachary*, at p. 1030.)

The sole contention analyzed by the Third District in its opinion was Zachary's claim that he had been denied due process. (*Zachary v. Superior Court*, *supra*, 57 Cal.App.4th, at p. 1037 [declining to consider "jurisdictional issue"].) The Third District noted that, while certain time limits in Penal Code sections 2970 and 2972 were statutorily subject to good-cause excusal, the requirement that the petition be filed before the termination of the commitment period was not statutorily subject to good-cause excusal. (*Zachary*, at pp. 1031-1032.) The court proceeded to balance the prejudice to Zachary against the justification for the delay. It rejected the prosecution's claim that the "potential danger to the public" from Zachary's release should be balanced against the prejudice he suffered as a result of the untimely petition. (*Zachary*, at p. 1035.) The Third District found that Zachary was entitled to writ relief because he had been prejudiced by being confined beyond the termination of his commitment term and no justification had been offered for the delay. (*Zachary*, at p. 1036.) The superior court was ordered to dismiss the petition. (*Zachary*, at p. 1037.)

Another case that mentioned but did not resolve the issue before us is this court's decision in *People v. Williams*, *supra*, 77 Cal.App.4th 436. The issue in *Williams* was whether the requirement in Penal Code section 2972, subdivision (a) that "[t]he trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown" was mandatory or directory. The petition to extend Williams's commitment had been filed 18 days before the termination of the commitment. Williams claimed that the 30-day requirement was "mandatory" and jurisdictional, and therefore the trial court lacked jurisdiction to try him on the petition. (*Williams*, at pp. 445-446.)

This court rejected Williams's contention. Initially, this court considered whether the 30-day time provision was "mandatory or directory" and concluded that it was directory. (*People v. Williams*, *supra*, 77 Cal.App.4th at p. 447.) "In contrast to section 2972(a) is section 2972, subdivision (e). This subdivision [(e)] establishes a deadline based on the MDO's release date, providing, '*Prior to the termination of a commitment* under this section, a petition for recommitment may be filed . . . .' [Citation.] The difference in these subdivisions indicates to us that when the Legislature intends to prescribe a trial commencement deadline or make the scheduled release date a deadline, it does so expressly and not by implication." (*Williams*, at p. 452.)

This court distinguished *Zachary* on this ground. "The plain language of section 2972, subdivision (e), together with other provisions, reflects a legislative intent to prohibit the filing of a petition, and the initiation of commitment proceedings, *after* a parole period or previous commitment has expired. In our view, therefore, the petition in *Zachary* was not only untimely but unauthorized, and the trial court erred as a matter of law in denying the pretrial motion to dismiss the petition." (*People v. Williams*, *supra*, 77 Cal.App.4th at p. 455.) Because the 30-day time provision in

Williams was directory rather than mandatory and Williams had waived any error by failing to object below, this court affirmed the commitment order. (*Williams*, at pp. 459-461.)

A number of cases address whether time limits in *other* commitment schemes, including those applicable to mentally disordered sex offenders (MDSOs) and those found not guilty by reason of insanity (NGIs), are mandatory or directory. Since the distinction between mandatory and directory time limits is essentially one of statutory interpretation, the cases considering different statutory schemes are generally distinguishable. MDSOs and NGIs are not similar to MDOs because MDSOs and NGIs have been committed for treatment "in lieu of criminal punishment" while MDOs have already been criminally punished and would be entitled to release but for the MDO proceedings. (*In re Moye* (1978) 22 Cal.3d 457, 463.)

One of the earliest of these cases was *In re Johns* (1981) 119 Cal.App.3d 577. Johns sought habeas corpus relief after his commitment as an NGI was extended. He claimed that the late filing of the petition had deprived the court of jurisdiction to extend his commitment. The pertinent statutory provision, Penal Code section 1026.5, provided at that time: "The petition shall be filed no later than 90 days before the expiration of the original commitment."[2] (*Johns*, at p. 579; Stats. 1979, § 3, ch. 1114, p. 4053; (Pen. Code, former § 1026.5, subd. (b)(2)).) However, the statute also provided that "[t]he time limits of this section are not jurisdictional." (*Johns*, at p. 580.) Johns's commitment period had been due to expire on October 19, 1980. The extension petition was filed on August 7, 1980, 17 days after the 90-day limit set in the statute. (*Johns*, at p. 579.) An order extending the commitment was filed prior to the expiration of the commitment period. (*Johns*, at p. 580.) Since the Legislature had

[2] The statute also required that the petition be filed "[p]rior to the termination of a commitment . . . ." (Pen. Code, former § 1026.5, subd. (b)(8); Stats. 1979, § 3, ch. 1114, p. 4053.)

expressly provided that the time limits were not jurisdictional, a due process analysis was applied, and the court determined that Johns had not been prejudiced by the delay in the filing of the petition. (*Johns*, at pp. 580-581.) *People v. Echols* (1982) 138 Cal.App.3d 838 dealt with the same issue as *Johns* and reached the same conclusion. (*Echols*, at pp. 839-843 [court not deprived of jurisdiction where petition filed 62 days before expiration of NGI commitment period].)

People v. Pacini (1981) 120 Cal.App.3d 877 was another NGI case, but in *Pacini* the petition to extend the commitment was filed five weeks *after the expiration of the commitment period*. (*Pacini*, at pp. 881-882.) Pacini claimed that the extension of his commitment was invalid because the petition was untimely. The Court of Appeal viewed the issue as one of statutory interpretation. Because Penal Code section 1026.5, subdivision (b) provided that an NGI commitment could be extended "only" if a petition was filed prior to the expiration of the commitment period, the court concluded that noncompliance with that requirement was a jurisdictional error that rendered invalid the extension of the commitment even though a subsection of Penal Code section 1026.5, subdivision (a)(2) provided that "[t]he time limits of this section are not jurisdictional." (*Pacini*, at pp. 888-890 and fn. 7.) In the Third District's view, the explicit requirements in subdivision (b) took precedence over the general reference to "time limits" in subdivision (a). (*Pacini*, at pp. 890-891.)

People v. Saville (1982) 138 Cal.App.3d 970 was an NGI case in which the petition to extend the commitment was filed five days after the expiration of the commitment period. (*Saville*, at p. 972.) Saville sought and obtained a dismissal of the petition based on lack of jurisdiction. (*Saville* at p. 972.) The Court of Appeal, with scarcely any discussion beyond a determination of the correct date upon which the period expired, affirmed the dismissal based on *Pacini*. (*Saville*, at pp. 972-973.)

In *People v. Dias* (1985) 170 Cal.App.3d 756, the end of Dias's MDSO commitment period had been calculated based on the assumption that he was not

entitled to custody credit for the time (more than two years) he had spent in custody at a private locked sanitarium and a private locked convalescent hospital. The petition to extend his commitment was filed prior to the calculated date but more than a year and a half after the time when his commitment would have expired if he had been given custody credit for that time. Dias moved to dismiss on the ground that he was entitled to custody credit, so the petition was untimely. The trial court denied his motion and extended his commitment. (*Dias*, at pp. 758-759.)

On appeal, Dias renewed his claim that the commitment extension was invalid because he had been entitled to custody credit for that time and consequently the petition had not been timely filed. (*People v. Dias, supra*, 170 Cal.App.3d at p. 760.) The Court of Appeal agreed with Dias that he had been entitled to custody credit for the time he spent in custody at the private hospitals and therefore the petition had not been timely filed. (*Dias*, at pp. 760-762.) It then proceeded to the question of whether the fact that the petition had not been timely filed meant that the extension of his commitment was invalid. (*Dias*, at p. 762.) The statute that governed MDSO commitments at that time, Welfare and Institutions Code section 6316.2, provided: "Such petition shall be filed no later than 90 days before the expiration of the original commitment." (Welf. & Inst. Code, former § 6316.2, subd. (b).) Relying on *Johns*, *Echols* and a third NGI case, the Court of Appeal posited that the MDSO time limits were "not jurisdictional." (*Dias*, at p. 762.) Yet the court asserted that "an order for extended commitment will generally be *void* if the petition was filed after the commitment expired [citations] or so close to the expiration date that defendant does not have a fair opportunity to prepare for trial [citations]." (*Dias*, at p. 762, italics added.) "However, an order for extended commitment will be valid even though the petition was filed after expiration of the commitment if, as a result of legislative or judicial change, the term expired without a reasonable opportunity to prepare and file the petition. [Citations.]" (*Dias*, at pp. 762-763.) The court concluded that the error

in calculating the date on which Dias's commitment period would end was excusable for "good cause" because "the relevant statute was not explicit and there was no controlling judicial decision directly on point." (*Dias*, at p. 763.) The court recognized that its excusal of the error conflicted with the decision in *Saville*, but it summarily rejected *Saville*'s conclusion that such an error was inexcusable. (*Dias*, at p. 763.)

People v. Minahen (1986) 179 Cal.App.3d 180 had similar facts to those in *Dias* except that *Minahen* was an NGI proceeding rather than an MDSO proceeding. The calculation of the date on which the NGI commitment period would expire was wrong due to a legal error regarding custody credits, and the petition to extend the commitment was filed six months after the expiration of the commitment. (*Minahen*, at p. 185.) *Minahen* noted that Penal Code section 1026.5, subdivision (b)(2) then provided that the "petition . . . shall be filed no later than 90 days before the expiration of the original commitment *unless good cause is shown*."[3] (*Minahen*, at p. 187, original italics; Stats. 1984, § 5, ch. 1488, italics added.) *Minahen* chose to interpret *Pacini* "as meaning only that such procedure [the requirement that the petition be filed before expiration of the commitment] should be enforced *absent good cause* for relieving the district attorney from the consequence of a late filing." (*Minahen*, at p. 188, italics added.) To the extent that *Pacini* held anything more, *Minahen* declined to follow it. (*Minahen*, at p. 189.)

[3] What *Minahen* failed to note was that this amended version of Penal Code section 1026.5 (adding the "unless good cause is shown" language) had not taken effect at the time that the petition to extend Minahen's commitment was filed and the order extending his commitment issued in 1984. (Stats. 1984, § 5, ch. 1488 [effective January 1, 1985.].) Furthermore, Penal Code section 1026.5, subdivision (b)(8) continued to require the petition to be filed "[p]rior to the termination of a commitment" and contained no good-cause excusal language.

None of these cases convinces us that the time limit in Penal Code section 2972, subdivision (e) is directory rather than mandatory. First, only *Pacini*, *Saville*, *Dias* and *Minahen* considered whether a requirement that an extension petition be filed before the expiration of a commitment was a mandatory requirement. Second, *Pacini* and *Saville* both concluded that such a requirement was mandatory and required dismissal of the petition. Third, *Dias* was an MDSO case in which the court acknowledged that the filing of a petition after the expiration of the commitment would "generally" require dismissal but concluded that the unusual circumstances of that case, in which a subsequent "legislative or judicial change" altered the timing of the expiration of the commitment, dictated a different result. (*Dias*, at pp. 762-763.) *Minahen* was an NGI case with the same unusual fact scenario as *Dias*. No such unusual circumstances are present in this case, and we need not address whether such circumstances would produce a different result. Finally, unlike the NGI statutory scheme, the MDO statutory scheme does not expressly provide that its "time limits . . . are not jurisdictional."

The dissent claims that we "read into the statute" a dismissal requirement or create such a requirement by "mere implication." Our conclusion that the Legislature intended this provision to be mandatory is based on the entire statutory scheme. It is simply not true, as the dissent posits, that a violation of a statutory time limit never requires dismissal unless the statute expressly says so. A court may find that the remedy is dismissal for violation of a time limit if "that result is expressly provided *or otherwise clearly intended*." (*Garrison v. Rourke*, *supra*, 32 Cal.2d at p. 435, italics added.) In our view, the Legislature "clearly intended" that dismissal be the remedy when an extension petition was not filed prior to the termination of the commitment. We do not read this intention into the statute or create it by implication. Our conclusion is based on the clear intent that the Legislature has expressed throughout the statutory scheme.

The dissent's narrow reliance on the broad overall purpose of the statutory scheme is inapt. "[C]ourts look to the purpose *of the procedural requirement* to determine whether invalidation is necessary to promote the statutory design." (*People v. McGee*, *supra*, 19 Cal.3d at p. 958, italics added.) Here, as we have discussed, the Legislature clearly intended for this time limit to bar the initiation of extension proceedings after the commitment terminated. While the result may be that an individual who continues to require involuntary mental health treatment may not continue to be committed as an MDO when no proceedings to do so are initiated by this mandatory deadline, other civil commitment procedures are available and may be utilized to ensure that the public is protected and the individual continues to receive appropriate services. The dissent's narrow view of the Legislature's intent would deem each and every provision of all civil commitment statutes to be directory simply because the overall purpose of these statutes is to protect the public and provide mental health treatment. We do not believe that the Legislature intended that dismissal never be required regardless of the nature of the statutory violation.

We are convinced that the Legislature did not contemplate permitting trial courts to entertain extension petitions filed after the termination of an MDO commitment, and therefore the Legislature intended for *this* time limit to be mandatory and for dismissal to be the consequence for its violation.[4] The appropriate disposition is therefore reversal of the trial court's order and dismissal of the petition. Nevertheless, as the Third District accurately stated in *Zachary*: "We agree with the court in *People v. Hill*, *supra*, 134 Cal.App.3d at page 1060: '[S]ince we certainly derive no satisfaction from [directing the dismissal of an MDPA petition which might well have been granted] if timely made, we note that if [Allen] even now continues to

[4] Consequently, we need not reach Allen's contention that his due process rights were violated.

represent a significant danger to himself or others, proceedings may yet be instituted, as they should have been at the time of the hearing here under review, in accordance with the terms of the Lanterman-Petris-Short Act [Welf. & Inst. Code, § 5000 et seq., especially §§ 5300-5309].'" (*Zachary v. Superior Court*, *supra*, 57 Cal.App.4th at p. 1036, fn. 9.)

III. Disposition

The order of commitment is reversed, and the trial court is directed to dismiss the petition.

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Mihara, J.

I CONCUR:

_____

McAdams, J.

BAMATTRE-MANOUKIAN, ACTING P.J., CONCURRING AND DISSENTING.

I agree with the majority that the August 3, 2004 order of recommitment in this case must be reversed. However, I disagree with the majority's holding that the time limit to file a recommitment petition under the Mentally Disordered Prisoner Act (MDPA, Pen. Code, § 2960 et seq.)[1] is jurisdictional or mandatory rather than directory, because "the intent to divest the court of jurisdiction by time requirements" cannot be read into section 2972, subdivision (e), "unless that result is expressly provided or otherwise clearly intended." (*Garrison v. Rourke* (1948) 32 Cal.2d 430, 435 (*Garrison*), overruled on another point by *Keane v. Smith* (1971) 4 Cal.3d 932, 939.) I would respectfully defer to the Legislature to amend section 2972, subdivision (e), to make the time limit for filing a recommitment petition mandatory or jurisdictional, if that is the intent of the Legislature.

I also agree with the holding in *Zachary v. Superior Court* (1997) 57 Cal.App.4th 1026 (*Zachary*), that where the recommitment petition was not filed before the defendant's most recent commitment period expired, the petition should be dismissed if the defendant's due process rights have been violated. Defendant is entitled to a hearing to determine whether his due process rights were violated. A determination of whether defendant's due process rights were violated requires a weighing of the justification for the delay in filing the recommitment petition against the prejudice suffered by the defendant as a result of the delay. (*Id*. at p. 1036.) Because no due process hearing has been held in this case, I would remand the matter to the trial court for a hearing to balance any proffered reasons for the delay in filing the recommitment petition against the resulting prejudice to defendant to determine

[1] All further statutory references are to the Penal Code.

whether defendant's due process rights were violated. If, after remand, the trial court finds that defendant's due process rights were violated, then the recommitment petition must be dismissed.

BACKGROUND

On October 29, 1993, defendant sexually assaulted a 51-year-old woman with Down's Syndrome. He was convicted of sexual battery (§ 243.4) and was sentenced on March 28, 1994, to two years in state prison. On May 12, 1994, June 15, 1994, and again on December 25, 1994, while incarcerated, defendant assaulted correctional officers. He was convicted of battery on a correctional officer (§ 4501.5) following the last incident, and was due to be released on October 14, 1997. However, following an evaluation by a psychiatrist, he was found to meet the criteria of a mentally disordered offender (MDO) under section 2962 of the MDPA and was transferred to Atascadero State Hospital on January 29, 1997, with a scheduled release date of October 14, 2000. His original commitment was then extended under section 2970 three times, on August 16, 2000, August 21, 2001, and August 29, 2002.

On April 4, 2003, the medical director of Napa State Hospital sent a letter to the District Attorney of Santa Clara County requesting that a petition for continued involuntary commitment be filed as to defendant, noting that defendant's current one-year period of treatment was due to expire on October 14, 2003. Attached to the letter was an evaluation report dated March 17, 2003, that stated that "[i]n spite of drug regimen changes . . . [defendant] claims he still hears voices and responds to internal stimuli. . . . He assaulted a peer and ended up in restraint and seclusion on July 24, 2002. He continues to have inappropriate sexual behavior."

On January 15, 2004, defendant filed a petition for writ of habeas corpus in the trial court, seeking his release from Napa State Hospital because no petition to extend his involuntary commitment beyond October 14, 2003, had been filed. The district attorney filed a petition to extend defendant's involuntary commitment under section

2970 on January 21, 2004. On January 26, 2004, defendant filed a motion to dismiss the recommitment petition, arguing that the failure of the district attorney to file the petition prior to the date defendant's commitment expired on October 14, 2003, violated his right to due process and deprived the court of jurisdiction to extend his commitment. Defendant alternatively argued that, even assuming the court had jurisdiction to extend his commitment, no good cause existed to justify the district attorney's failure to file a timely petition. The district attorney filed opposition to defendant's motion to dismiss the petition, arguing that the time limits in sections 2970 and 2972 were directory rather than jurisdictional so that defendant's continued confinement was not unlawful. At a hearing on February 27, 2004, the trial court denied both the habeas petition and the motion to dismiss, "follow[ing] the thinking set forth in the People's moving [*sic*] papers."

On April 30, 2004, defendant filed both a petition for writ of habeas corpus (H027390) and a petition for writ of mandate (H027392) in this court challenging the trial court's February 27, 2004 order. On June 15, 2004, this court requested opposition to both petitions. The opposition was filed on July 1, 2004, and defendant's reply was filed on July 6, 2004. On August 3, 2004, defendant waived his right to a jury trial on the recommitment petition and submitted the matter to the trial court on the district attorney's petition and the evaluation report dated March 17, 2003. The trial court found the allegations in the petition to be true, and extended defendant's commitment to October 14, 2004. On August 6, 2004, this court consolidated defendant's two writ petitions and issued an order to show cause. The Attorney General filed a motion in this court on August 12, 2004, to vacate the order to show cause and to dismiss the writ petitions because the trial court proceedings of August 3, 2004, rendered the petitions moot. Defendant filed a notice of appeal from the trial court's August 3, 2004 order on August 16, 2004, and filed opposition to the

motion to dismiss the writ petitions on August 19, 2004. On September 17, 2004, this court dismissed defendant's writ petitions as moot.

In his appeal from the August 3, 2004 order, defendant contends that, because the petition to extend his commitment was filed more than three months after he should have been released, the petition for recommitment "was not authorized by statute" and violated his "state and federal constitutional rights to due process." Therefore, the recommitment order should be reversed.

THE MDPA

The Legislature enacted the MDPA in order to protect the public and to ensure mental health treatment for prisoners who have a treatable, severe mental disorder. As stated in the MDPA, "The Legislature finds that there are prisoners who have a treatable, severe mental disorder that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated. Secondly, the Legislature finds that if the severe mental disorders of those prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, there is a danger to society, and the state has a compelling interest in protecting the public. Thirdly, the Legislature finds that in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission." (§ 2960.)

To effectuate the legislative intent, "[t]he MDO statutes require certain offenders who have been convicted of enumerated violent crimes to submit to continued treatment by the State Department of Mental Health as a condition of their parole. (§ 2962.)" (*People v. Fernandez* (1999) 70 Cal.App.4th 117, 125 (*Fernandez*).) "Before a prisoner may be classified as an MDO under section 2962, both the person in charge of treating the prisoner and a practicing psychiatrist or

psychologist from the State Department of Mental Health must evaluate the prisoner, and a chief psychiatrist from the Department of Corrections must then certify to the Board of Prison Terms that the prisoner meets the statutory criteria . . . . (§ 2962, subd. (d)(1).)[2]" (*Fernandez*, *supra*, at p. 125.) "If the prisoner's severe mental disorder is put into remission during the parole period, and can be kept in remission, the Department of Mental Health must discontinue treating the parolee. (§ 2968.) If, however, the parolee's severe mental disorder is not in remission at the end of the parole period or cannot be kept in remission without treatment, the MDO statutes provide procedures for extending the treatment for one year beyond the final parole termination date. (§ 2970; [Citation].)" (*Fernandez*, *supra*, at p. 126, fn. omitted.)

Petitions to extend involuntary treatment are subject to specific time requirements. "Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee . . . shall submit to the district attorney . . . his or her written evaluation on

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[2] "As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment: [¶] . . . [¶] (d)(1) Prior to release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others. . . ." (§ 2962.)

remission. . . . [¶] The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. . . ." (§ 2970.)

"The court shall conduct a hearing on the petition under Section 2970 for continued treatment. . . . The hearing shall be a civil hearing, . . . [¶] . . . The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown." (§ 2972, subd. (a).)

"*Prior to the termination of a commitment under this section, a petition for recommitment may be filed* to determine whether the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others. *The recommitment proceeding shall be conducted in accordance with the provisions of this section*." (§ 2972, subd. (e), italics added.)

STATUTORY INTERPRETATION

My determination of the question whether the time limit to file a recommitment petition is mandatory or directory is aided by well established principles of statutory interpretation. This court independently determines the proper interpretation of a statute. The matter is a question of law, so we are not bound by the lower court's interpretation. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) As this court has previously stated, "[t]here is no simple test to determine whether a statutory requirement is mandatory or directory. [Citation.] As in all cases of statutory interpretation, the court ' "must ascertain the legislature's intent. In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time. [Citation.] When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose

[citation] . . . ." (*People* v. *Williams* (1999) 77 Cal.App.4th 436, 448 (*Williams*), citing *Morris v. County of Marin* (1977) 18 Cal.3d 901, 910.)

As noted in *Fernandez*, "the general rule is that 'requirements relating to the time within which an act must be done are directory rather than mandatory or jurisdictional, unless a contrary intent is clearly expressed.' " (*Fernandez, supra*, 70 Cal.App.4th at pp. 128-129, citing *Edwards v. Steele* (1979) 25 Cal.3d 406, 410 (*Edwards*).) Therefore, "[t]he intent to divest the court of jurisdiction by time requirements is not read into the statute unless that result is expressly provided or otherwise clearly intended." (*Garrison*, *supra*, 32 Cal.2d at p. 435.) "While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. [Citations.] Consequently, an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication." (*Id*. at p. 436.)

DISCUSSION

In the case before us, defendant seeks reversal of the order to extend his involuntary commitment under section 2970 to October 14, 2004. He argues that the failure of the district attorney to file the petition for recommitment prior to the termination of his commitment period on October 14, 2003, deprived the court of "jurisdiction to proceed on the recommitment petition," that "the MDPA does not authorize the filing of a petition after expiration of the prior commitment," and that his "state and federal constitutional rights to due process" were violated.

Applying the rules of statutory interpretation, I would find that the statutory time limitation to file a recommitment petition contained in section 2972, subdivision (e), is directory rather than jurisdictional or mandatory. The majority's contrary conclusion that the statute is jurisdictional or mandatory divests the court of jurisdiction by mere implication. No published case has addressed this specific issue. However, a number of published cases have addressed whether the time limits in the

MDPA are mandatory or directory. These cases have held that the time limits in the MDPA are directory, but that an untimely petition must be dismissed if the defendant's due process rights have been violated. In addition, MDPA proceedings are civil in nature (§ 2972, subd. (a)), and several cases discussing the time limitations in other civil commitment statutory schemes have found them to be directory.

The time limit to file a recommitment petition under the MDPA is directory

The MDPA states that a recommitment petition "may be filed" prior to the termination of a commitment period. (§ 2972, subd. (e).) Although it can be implied that the Legislature intended by this language to require that a recommitment petition be filed prior to the termination of a commitment period, an intent to defeat the exercise of the court's jurisdiction may not be supplied by implication. (*Garrison*, *supra*, 32 Cal.2d at p. 436.) And, the statute further states that the recommitment proceeding shall be conducted in accordance with the other provisions of the statute. (§ 2972, subd. (e).) Other provisions of the statute permit the time limit to conduct a hearing on the recommitment petition to be waived by the person or upon a showing of good cause. (§ 2972, subd. (a) ["The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown"].) Thus, a review of other provisions of the statute supports the finding that a legislative intent to divest the court of jurisdiction to conduct a hearing on the recommitment petition simply because the petition was not filed before the prior recommitment period expired should not be read into the statute. (*Garrison, supra,* 32 Cal.2d at p. 435.) A contrary conclusion would divest the court of jurisdiction by mere implication. That the statute does not provide for a penalty, such as dismissal, if a recommitment petition is not filed prior to the termination of a prior commitment period, also supports a conclusion that the time requirement is directory.

Moreover, a mandatory time limit is inconsistent with the express purpose of the MDPA. The express purpose of the MDPA is to protect the public from individuals who are a danger to society by providing mental health treatment to individuals who have a severe mental disorder, which was one of the causes of or an aggravating factor in those individuals' prior criminal behavior, until that disorder is in remission and can be kept in remission. (§ 2960.) The requirement that a recommitment petition be filed before the end of a commitment period is designed not only to benefit the individual by ensuring continued mental health treatment, but also to ensure that individuals who pose a danger to society will not be released from confinement until their severe mental disorder is in remission and can be kept in remission. The purposes of the MDPA would be defeated if the time requirement for filing a recommitment petition was mandatory or jurisdictional, and therefore required automatic dismissal of an untimely recommitment petition.

Other time limits in the MDPA are directory

Although no published case has directly addressed the issue before us, a number of published cases have considered whether the time limits in other provisions of the MDPA are mandatory or directory.

In *People v. Kirkland* (1994) 24 Cal.App.4th 891, the defendant contended that the order for his recommitment under section 2970 was void because the trial of the continued treatment petition did not begin at least 30 days before his parole termination date as required by section 2972, and no good cause was shown for beginning the trial later. The trial had begun just six days before the defendant was due to be released because his parole period had expired, and the trial court never explicitly determined whether there was good cause for the delay. Instead, the trial court denied the defendant's motion to dismiss because it found that the late trial commencement did not violate the defendant's due process rights. (*Id*. at p. 913.) Division Two of the Fourth District Court of Appeal found that the defendant could

not claim prejudice from the trial not beginning at least 30 days before his release date because the trial concluded five days before defendant was due to be released. (*Id*. at p. 914.) Given defendant's failure to show prejudice, the appellate court found that only a minimal showing of prosecutorial diligence was necessary to establish good cause for the late trial commencement. (*Id*. at pp. 915-916.) "[T]hree factors, each beyond the prosecutors' control—the late remission evaluation, the misinformation regarding defendant's release date, and defendant's ill-timed move to Vacaville—appear to have been the major reasons for their failure to meet the 30-day deadline." (*Id*. at p. 915.) "We hold that the prosecution's failure to meet the 30-day deadline did not cause defendant any cognizable prejudice, and the prosecution delay, which resulted in the late beginning of trial, was reasonably justifiable. Therefore, the trial court did not abuse its discretion in denying the motion to dismiss posited on the failure to begin the trial" before the 30-day deadline. (*Id*. at p. 916.)

In *Zachary*, the defendant's recommitment petition was not filed "until 24 days after the most recent commitment expired." (*Zachary*, *supra*, 57 Cal.App.4th at p. 1029.) The Third District Court of Appeal stated: "[I]n requiring the completion of trial prior to the termination of the MDPA parole commitment or recommitment, the MDPA incorporates principles of due process. 'We have recognized that for the ordinary citizen, commitment to a mental hospital produces "a massive curtailment of liberty," [citation], and in consequence "requires due process protection." [Citations.] The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital "can engender adverse social consequences to the individual" and that "[w]hether we label this phenomena [*sic*] a 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual." [Citations.] Also, "[a]mong the historic liberties" protected by the Due

Process Clause is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." [Citation.]' [Citation.]" (*Id*. at p. 1032.)

"The MDPA accommodates procedural due process by requiring the filing of the commitment petition prior to the expiration of the commitment, and requiring trial to commence 30 days prior to expiration in order to ensure that trial is completed prior to expiration of the commitment." (*Zachary*, *supra*, 57 Cal.App.4th at p. 1034.) The *Zachary* court declined to decide whether this deadline was jurisdictional. "Given our conclusion as to the due process claim relied upon by petitioner, we need not decide the jurisdictional issue." (*Id*. at p. 1037.) Instead, the court concluded that the petitioner "has suffered prejudice, i.e., 24 days of unauthorized confinement in a state mental hospital prior to the filing of the petition for recommitment, followed by continued unauthorized confinement to date. Moreover, the People proffered no justification for the delay, conceding the delay was caused entirely by the district attorney's negligence." (*Id*. at p. 1036.) Under these circumstances, the court held that the recommitment petition should have been dismissed as a denial of due process.

In *Fernandez*, *supra*, 70 Cal.App.4th 117, the defendant sought reversal of a trial court's order extending his commitment pursuant to section 2970, arguing on appeal, as he did in a motion to dismiss in the trial court, that the trial court lacked jurisdiction because neither the 180-day rule in section 2970 nor the 30-day rule in section 2972 had been met. (*Id*. at pp. 126-127.) The letter recommending to the district attorney that the defendant's commitment be extended was issued less than 60 days before defendant's release date. The district attorney filed a petition pursuant to section 2970 to extend the defendant's commitment more than 30 days before defendant's release date. The case was called for trial seven days prior to defendant's release date, the defendant waived his right to a jury trial, and the deputy district attorney stated that she was ready to proceed. The defendant then moved to continue the trial in order to file written materials in support of a motion to dismiss the petition.

The motion to dismiss was heard and denied, and trial testimony was heard, after defendant's release date. (*Id*. at pp. 121-122.) This court agreed with the trial court's finding that the People had failed to show good cause for failing to meet the 180-day deadline. (*Id*. at pp. 127-128.) We then considered the general rule that statutory time limits are directory unless a contrary intent is clearly expressed (see *Edwards, supra*, 25 Cal.3d at p. 410.), the express legislative purpose of the MDPA, and cases interpreting analogous statutes. "[O]n the basis of the clear legislative purpose of section 2970, the general rules for interpreting such statutes, and guidance from cases interpreting statutes with similar deadlines and purposes, we hold that the 180-day rule of section 2970 is directory." (*Fernandez, supra*, 70 Cal.App.4th at p. 130.)

"Because we hold that the 180-day time requirement of section 2970 is directory, the section 2970 petition here is not automatically invalid. Therefore, in addition to the statutory deadlines, we consider whether defendant's due process rights were violated by the delay. Considerations of due process require an inquiry into whether defendant was harmed by the delay. [Citations.] [¶] In conducting such an analysis under section 2970 and similar statutes, courts have adopted the due process test used under both federal and state speedy trial decisions, which involves a balancing of any prejudicial effect of the delay against the justification for the delay. [Citations.] Except where there has been an extended delay, prejudice will not be presumed, and it will be incumbent upon the defendant to demonstrate actual prejudice. [Citations.] If the defendant fails to demonstrate prejudice, the court need not consider the reasons for the delay. [Citations.]" (*Fernandez*, *supra*, 70 Cal.App.4th at p. 131.)

In *Fernandez*, this court found that the district attorney was ready to proceed seven days prior to the defendant's scheduled release date, that the trial court found that the failure to meet section 2970's 180-day rule was good cause for the failure to meet section 2972's 30-day rule, and that defense counsel confirmed that the district

attorney had made every effort to bring the trial to a speedy resolution. "On these facts, the trial court did not abuse its discretion in finding good cause" for the failure to meet the 30-day deadline. (*Fernandez, supra,* 70 Cal.App.4th at p. 134.)

In *Williams,* trial on the commitment petition commenced on May 20, 1997, two days after the defendant's scheduled release date of May 18, 1997, without objection by the defendant and without a showing of good cause. (*Williams, supra*, 77 Cal.App.4th at pp. 440-441, 445-446.) This court concluded that the requirement that the trial commence before the 30-day deadline is "directory and not mandatory." (*Id.* at p. 451.) "[N]either the language of section 2972(a) nor the purpose of that section and the MDPA in general reveals a legislative intent to make the release date a mandatory jurisdictional deadline" (*id*. at p. 454); and "by not making a proper objection and motion to dismiss before trial, defendant waived any claim based on a failure to comply with section 2972(a)." (*Id*. at p. 461, fn. omitted.)

In dicta, however, this court agreed with the result of *Zachary,* but disagreed with some of that court's reasoning. "The plain language of section 2972, subdivision (e), together with other provisions, reflects a legislative intent to prohibit the filing of a petition, and the initiation of commitment proceedings, *after* a parole period or previous commitment has expired. In our view, therefore, the petition in *Zachary* was not only untimely but unauthorized, and the trial court erred as a matter of law in denying the pretrial motion to dismiss the petition." (*Williams, supra*, 77 Cal.App.4th at p. 455.) "However, given our analysis of section 2972(a) and overall purpose of the MDPA, we question the *Zachary* court's view that the Legislature intended to 'guarantee' the completion of trial before expiration of a previous commitment term. We also question the court's suggestion that a showing of excuse or justification by the prosecution would have made a difference. As noted, the MDPA does not provide a 'good cause' exception to section 2972, subdivision (e). Finally, and notwithstanding

the court's view of legislative intent, *Zachary* does not suggest that the release date is a mandatory jurisdictional deadline." (*Id*. at p. 456, fn. omitted.)

In *People v. Noble* (2002) 100 Cal.App.4th 184 (*Noble*), the defendant contended that the petition to extend his commitment was untimely filed. His scheduled release date was January 15, 2001, and the district attorney filed the petition to extend his commitment on December 13, 2000. At a hearing on January 11, 2001, the trial court denied the defendant's motion to dismiss the petition as untimely. Trial on the petition commenced on February 7, 2001, after defendant's scheduled release date. (*Id*. at pp. 187-188.) Division Six of the Second District Court of Appeal, following *Williams*, found that the 30-day trial deadline in section 2972, subdivision (a), is directory rather than mandatory. (*Noble*, *supra*, 100 Cal.App.4th at p. 188.) "A trial commenced less than 30 days before an MDO's scheduled release date is not automatically invalid, nor does the trial court lose jurisdiction if trial commences after the deadline has passed. [Citation.]" (*Ibid*.) The court distinguished *Zachary* "because here the petition to extend defendant's MDO commitment was filed well before his prior term expired. [Citation.] Moreover, defendant has demonstrated no prejudice from the relatively brief delay at issue here. [Citation.] There was no deprivation of due process." (*Ibid*.)

Other civil commitment statutes

Other appellate decisions support my determination that the trial court's power to hear or decide the case was not lost when the recommitment petition was not filed before the expiration of defendant's prior commitment period. Proceedings under the MDPA are civil in nature (§ 2972, subd. (a)), and a number of published cases have addressed whether time limits in other civil commitment statutory schemes are mandatory or directory. Most of these cases have found the time limits to be directory.

In *In re Johns* (1981) 119 Cal.App.3d 577 (*Johns*), the court found that section 1026.5, allowing for extended commitment of defendants found not guilty by

reason of insanity, specifically provides that "*[t]he time limits of this section are not jurisdictional*." (*Id*. at p. 579, original italics; see, § 1026.5, subd. (a)(2).) Other courts have found the deadlines of section 1026.5 to be directory rather than jurisdictional. (See e.g., *People v. Echols* (1982) 138 Cal.App.3d 838, 841-842 (*Echols*); *People v. Dougherty* (1983) 143 Cal.App.3d 245, 247; *People v. Mord* (1988) 197 Cal.App.3d 1090, 1116-1117.)

In *People v. Pacini* (1981) 120 Cal.App.3d 877 (*Pacini*), the petition to extend the defendant's commitment under section 1026.5 was filed over five weeks after the expiration of the defendant's maximum commitment date. (*Id*. at pp. 881-882.) On appeal, the defendant contended that the district attorney's failure to timely file the petition under section 1026.5 deprived the trial court of jurisdiction to extend his commitment. (*Id*. at p. 882.) The court, without discussing *Johns*, found that the 90-day time limit in section 1026.5, subdivision (b)(2), for filing a petition to extend a commitment was jurisdictional notwithstanding the "not jurisdictional" language in subdivision (a)(2) of the same section. (*Pacini, supra,* 120 Cal.App.3d at pp. 889-890.)

In *People v. Saville* (1982) 138 Cal.App.3d 970, the petition for extended commitment under section 1026.5 was filed five days after the defendant's maximum term of commitment expired. Citing *Pacini*, but without further discussion, the appellate court found that the trial court properly declined to entertain the petition. (*Id*. at p. 974.)

In *People v. Minahen* (1986) 179 Cal.App.3d 180, 189-191 (*Minahen*) a petition to extend the defendant's commitment pursuant to section 1026.5 was timely filed according to the release date calculated by the Board of Prison Terms (BPT). However, after the defendant's commitment term was extended, it was discovered that the BPT had incorrectly calculated the defendant's term, and that the petition was therefore untimely. (*Id.* at p. 185.) The appellate court found that the requirement of

filing a petition before the expiration of a prior commitment "should be enforced absent good cause for relieving the district attorney from the consequence of a late filing." (*Id*. at p. 188.) The court held that the BPT's error constituted such good cause. (*Id*. at p.191.) The court therefore concluded that the trial court had the power to extend the defendant's commitment, as the defendant "had not actually been released from confinement when the petition was filed," (*id.* at p. 191) and the district attorney had acted "without any fault" in a timely manner based on the erroneous computation by the BPT. (*Ibid*.) "[W]e perceive no reason why an extension petition cannot be filed and considered after the original commitment term has expired upon a showing of good cause as to why the petition was not timely filed and assuming the defendant is afforded procedural due process." (*Id*. at p. 189, fn. omitted.) The court considered procedural due process to involve "adequate notice and full opportunity to be heard on the extension petition." (*Id*. at p. 186.)

In *People v. Dias* (1985) 170 Cal.App.3d 756 (*Dias*), the defendant was committed as a mentally disordered sex offender under former section 6316.2 of the Welfare and Institutions Code. His original projected release date was November 12, 1981. That date was later recalculated as April 21, 1984 on the theory he was not entitled to credit for time spent as an outpatient. A petition for extended commitment was filed on August 30, 1983, and the defendant was recommitted for a two-year period. (*Id.* at pp. 758-759.) On appeal, the court agreed that the defendant was entitled to credit for time spent as an outpatient, which rendered the recommitment petition untimely. (*Id*. at p. 762.) However, the court rejected the claim that the untimely filing rendered the resulting commitment order invalid: "The record before us contains no hint of negligent or intentional wrongdoing by the persons charged with determining defendant's release date. The error resulted from a mistake of law on an issue where the relevant statute was not explicit and there was no controlling judicial decision directly on point. In this situation, we do not believe that the error should be

fatal to the extended commitment order. Given the evidence showing defendant continues to present a substantial danger of bodily harm to others, neither defendant nor the public would benefit by defendant's release at this time." (*Id*. at p. 763; see also *People v. Curtis* (1986) 177 Cal.App.3d 982, 988 [the time requirements of former Welf. & Inst. Code, § 6316.2 were directory not mandatory].)

In *Garcetti v. Superior Court* (1998) 68 Cal.App.4th 1105 (*Garcetti*), the defendant was committed as a sexually violent predator (SVP) under former Welfare and Institutions Code section 6601. The petition for the defendant's commitment was filed after the defendant's parole was revoked twice for psychiatric treatment. The defendant sought dismissal on the ground that his parole was unlawfully revoked and he was unlawfully in the custody of the Department of Corrections at the time he was referred for evaluation under the SVP act. (*Id.* at p. 1108.) The appellate court held that the circumstances of defendant's parole revocation did not deprive the trial court of jurisdiction to entertain the SVP petition. The court reviewed the statutory scheme as it existed at the time the petition was filed,[3] the twin purposes of public protection and ensuring treatment to the dangerous mentally ill, and case law pertinent to interpretation and application of the SVP act, and concluded that the trial court erred in dismissing the petition simply because the defendant was not lawfully in custody at the time the petition was filed. (*Id*. at pp. 1110-1118.) "[S]uch defect [did not deprive] the trial court of jurisdiction to entertain the petition for commitment under the SVP Act." (*Id*. at p. 1118.)

Defendant is entitled to a due process hearing

The Attorney General concedes that, statutory time limits aside, a defendant has the right to timely recommitment proceedings. However, the Attorney General argues

[3] The SVP act has since been amended to provide that a SVP petition may be filed while an individual is in custody pursuant to a hold placed pursuant to the act. (§ 6601, subd. (a)(2); 1999 Stats., ch. 136, § 1.)

that due process requires balancing the reasons for the delay in filing a recommitment petition against the resulting prejudice to the defendant. (See *Johns, supra*, 119 Cal.App.3d at p. 581; *Fernandez, supra*, 70 Cal.App.4th at p. 131.) The Attorney General further argues that *Zachary* was wrongly decided, and that the *Zachary* court's reasoning that a defendant is prejudiced simply by virtue of unauthorized confinement should be rejected as overbroad as prejudice is not presumed from delay. The Attorney General contends: "Prejudice may be shown by loss of material witnesses due to lapse of time, loss of evidence because of fading memory attributable to the delay, or other circumstances contributing to an unfair trial. 'Prejudice is a factual question to be determined by the trial court.' (*People v. Hill* (1984) 37 Cal.3d 491, 499.)"

As in *Williams, supra*, 77 Cal.App.4th at page 458, defendant's argument here is that the trial court automatically lost jurisdiction over him once his scheduled release date passed, that the petition "was not authorized by statute," and that his "state and federal constitutional rights to due process" were violated. Again, I find no language in section 2972, subdivision (e), that precludes the finding that a recommitment petition may be filed and trial may be commenced after the expiration of the prior commitment period where there is no deprivation of due process and the defendant is not prejudiced. The intent to divest the court of jurisdiction by time requirements cannot be read into the statute. Moreover, the express purpose of the MDPA to protect the public would be defeated if the time limit to file a recommitment petition were mandatory or jurisdictional.

In this case, I would conclude, just as we concluded in *Fernandez* and *Williams*, that the trial court did not automatically lose its power to hear or decide the case when defendant's scheduled release date passed. (*Fernandez, supra*, 70 Cal.App.4th at pp. 128-130 [180-day rule of § 2970 is directory]; *Williams, supra*, 77 Cal.App.4th at p. 440 [30-day rule in § 2972, subd. (a), is directory].) In addition, appellate courts

have construed the time periods for filing a recommitment petition under other civil commitment statutes not to be mandatory or jurisdictional. (*Dias*, *supra*, 170 Cal.App.3d at p. 763; *Minahen*, *supra*, 179 Cal.App.3d at p. 189.) Accordingly, I conclude that the time limit to file a recommitment petition under section 2972, subdivision (e) is directory and not mandatory or jurisdictional. I would respectfully defer to the Legislature to amend the statute to make the time limit for filing a recommitment petition mandatory or jurisdictional, if that is the intent of the Legislature.

Defendant is entitled to a determination by the trial court whether his due process rights were violated by the filing of the recommitment petition after the expiration of his prior period of commitment. A determination of whether defendant's due process rights were violated requires a weighing of the justification for the delay in filing the petition against the prejudice suffered by defendant as a result of the delay. (*Zachary*, *supra*, 57 Cal.App.4th at p. 1036.) In this case, there was a showing in the trial court that defendant continues to present a substantial danger to society. However, the district attorney presented no evidence as to why the recommitment petition was untimely filed, because the trial court found that it had jurisdiction to proceed and that defendant's continued confinement was not unlawful. The trial court did not balance any prejudicial effect of the delay against the justification for the delay.

Accordingly, I would remand the matter to the trial court for a hearing to determine whether defendant's due process rights have been violated by balancing the reasons for the delay against the resulting prejudice to defendant. If, after remand, the court finds a violation of due process, then the recommitment petition must be dismissed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable Alfonso Fernandez
Attorneys for Respondent:	Bill Lockyer Attorney General of the State of California Robert R. Anderson Chief Assistant Attorney General Gerald A. Engler Senior Assistant Attorney General Rene A. Chacon Supervising Deputy Attorney General Ralph Sivilla Deputy Attorney General
Attorney for Appellant:	Michael Kresser Under Appointment by the Sixth District Appellate Program

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