such treatments included antipsychotic medications and plethysmography. *Cope* interpreted *Williams* and *Weber* more broadly to include any treatment that involved "special liberty interests." Drugs used to suppress testosterone levels were specifically named as involving a liberty interest. Thus, when forensic psychiatrists recommend treatment with antipsychotics, plethysmography, drugs to suppress testosterone level, or other interventions that might be perceived as affecting such liberty interests, their justification should include a reasoned explanation as to why a less invasive treatment is not adequate to address one or more of the factors mentioned earlier: the nature of the crime, the history and characteristics of the defendant, encouragement of deterrence, protection of the public, and provision of rehabilitation.

In summary, *United States v. Cope* broadens the interpretation of liberty interests as they relate to required psychiatric treatment for parolees, both with respect to specific treatments (*e.g.*, testosterone-suppressing agents) and to any treatment that might pose a liberty interest. Given this ruling, forensic psychiatrists should work closely with attorneys and courts to explain the rationale and necessity of any required psychiatric treatment for parolees.

Sexually Violent Predators and Civil Commitment Proceedings

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Civil Commitment Proceedings for Sexually Violent Predators in Custody May Not Proceed if the Original Conviction Is Reversed

Under California's Sexually Violent Predator Act, Welfare and Institutions Code section 6601 et seq., a person can be civilly committed as a sexually violent predator (SVP) at the conclusion of a felony term, provided he or she has prior convictions for certain sexually violent offenses and a jury finds that the person has a mental disorder that makes it likely that he or she will engage in sexually violent criminal behavior. In the present case, *In re Smith*, 178 P.3d 446 (Cal. 2008), after SVP commitment proceedings were initiated against Mr. Smith, the felony conviction that was the basis of his custody at the time of these proceedings was reversed on appeal. The district attorney declined to retry him. The question this case poses is whether an SVP commitment can nonetheless proceed under these circumstances. The California Supreme Court held that an SVP commitment would not be authorized in these circumstances and therefore reversed the decision of the court of appeals.

Facts of the Case

In 1982, David Smith was convicted of four counts of oral copulation with a child under the age of 16 years and one count of sodomy of a child under the age of 16 years. In 1988, Mr. Smith was convicted of 15 counts of committing lewd and lascivious acts on a child under the age of 14 years. Mr. Smith was released on parole in July 1995 and completed parole in July 1998. He was obligated to register as a sex offender because of his prior offenses. In April 1999, Mr. Smith moved to Colorado from California; then, nine days later, he moved to New York. He claimed that he sent a change-of-address card in a timely manner, but the officer responsible for sex offender registration testified that he did not receive any such card. When Mr. Smith did not appear in September 1999 to complete his annual registration, the police began searching for him and arrested him in New York.

Convicted of failing to register as a sex offender, Mr. Smith was sentenced to five years in state prison in October 2000. The court of appeals affirmed his conviction and Mr. Smith petitioned for a review of his conviction in the California Supreme Court. While Mr. Smith was awaiting appeal, he was referred to the State Department of Mental Health for evaluation as a possible SVP, pursuant to Welfare and Institutions Code section 6601. Two psychiatric evaluators agreed that he met the SVP criteria. The district attorney filed a petition to have Mr. Smith committed as an SVP. In March 2004, the court reversed his conviction. The district attorney elected not to refile charges against Mr. Smith, who was already due to be released on parole by the time his conviction was reversed. After his conviction was reversed, and before the SVP commitment proceedings

progressed any further, Mr. Smith filed several *habeas corpus* petitions challenging the continuation of these proceedings. In July 2005, the court of appeals rejected Mr. Smith's argument that the SVP Act did not authorize commitment once his most recent conviction had been reversed, and also rejected his argument that his continued commitment violated his rights to due process and equal protection. The California Supreme Court granted Mr. Smith's petition for review.

Ruling and Reasoning

The California Supreme Court, in a unanimous opinion, reversed and remanded the judgment of the court of appeals with directions to grant Mr. Smith's petition for a writ of *habeas corpus*. The court evaluated three areas in arriving at its opinion: the statutory language of the SVP Act, the legislative history behind the SVP Act, and the applicability of the equal protection clause.

The SVP Act (Welfare and Institutions section 6601, subdivision (a)(2)) states that an SVP petition "shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law." Mr. Smith contended that section 6601(a)(2) refers to situations in which it is later determined that the individual's custody was unlawful at the time the petition was filed, because he or she should have been released earlier. He maintained that it does not refer to situations as in his present case, in which the conviction that was the basis of the individual's custody at the time the petition was filed had been reversed. Mr. Smith pointed to legislative findings contained in an uncodified portion of the statute that adopted section 6601(a)(2) which state that "where a petition for commitment of a sexually violent predator has been filed, it is not the intent of the Legislature that a person be released based upon a subsequent judicial or administrative finding that all or part of a determinate prison sentence, parole revocation term, or a hold placed pursuant to *section 6601.3* was unlawful" (Stats. 1999, ch. 136, § 3). Mr. Smith contended that the reversal of a conviction was qualitatively different from a finding that a sentence was unlawful. The people countered that the legislature's reference to "all or part" of a prison sentence is sufficiently broad to encompass reversal of a conviction, which would result in a determination that "all" of the resulting prison sentence was unlawful. The court concluded that it was unclear whether the legislature meant to include unlawful conviction when it spoke of "unlawful custody."

In turning to the legislative history to clarify the legislature's intention, the court referenced several prior cases that led to the addition of section 6601(a)(2) in 1999. These cases outlined that SVP commitment could proceed despite clerical or legal error in an individual's custody. As long as the department of corrections did not unlawfully hold a defendant in custody through negligent or intentional wrongdoing, SVP commitment hearings could proceed. Mr. Smith argued, however, that "If the purpose of the amendment was to make sure that potential SVPs do not go free simply because 'the constable has blundered,' then it would not apply to Mr. Smith, who would not be escaping SVP proceedings because of governmental error, but rather would be subject to these proceedings due to such error" (*In re Smith*, p 452). The people argued that prior cases go beyond mere extensions of sentences and include erroneous parole revocations, which are similar to erroneous convictions. The people also pointed out that the purpose behind the original SVP Act was to identify a small but extremely dangerous group of sexually violent predators who have diagnosable mental disorders while they are incarcerated. The court concluded that both sides made reasonable interpretations of the statute. On the one hand, the legislature did not expressly consider the situation of the person subject to SVP proceedings whose conviction is reversed, and on the other hand, the legislature intended for the SVP Act to have a broad sweep and conceivably to extend to such persons.

Despite the ambiguities of the statutory language and legislative history, the court concluded that constitutional concerns favored Mr. Smith's interpretation of the statute. Specifically, section 6601(a)(2) as construed by the people, violated the equal protection clause of the Fourteenth Amendment to the United States Constitution and its California equivalent. If Mr. Smith's conviction was valid, then differential treatment would be justifiable under equal protection terms because Mr. Smith would have been adjudicated to be a greater danger to society. However, since the conviction was reversed, differential treatment violated equal protection terms. Therefore, the court concluded that section 6601(a)(2) does not apply to reversed convictions.

Discussion

California's SVP Act was intended to identify a small but dangerous group of sexually violent predators for civil commitment proceedings following their release from prison. The constitutional question in this case is whether individuals whose original convictions have been reversed during custody are being treated differently than those subject to general civil commitment statutes. The court examined *Jackson v. Indiana*, 406 U.S. 715 (1972), and its California equivalent, *Conservatorship of Hofferber*, 616 P.2d 836 (Cal. 1980), which outlined several principles: generally speaking, no individual or group when being civilly committed may be denied substantive or procedural protections that are provided to the population as a whole; on the other hand, the legislature may make reasonable distinctions between its civil commitment statutes based on a showing that the persons are not similarly situated, meaning that those who are reasonably determined to represent a greater danger may be treated differently than the general population; and in particular, those who are criminally convicted may be distinguished, at least initially, from the general population for civil commitment purposes because their criminal acts demonstrate that they potentially pose a greater danger to society than those not in the criminal justice system. With these principles in mind, the question becomes whether Mr. Smith was being treated differently from those who are subject to the state's general civil commitment statute, and if so, whether that differential treatment was reasonable. On the one hand, convicted persons can be treated differently than nonconvicted persons under the SVP Act because these individuals have been adjudicated to be more dangerous than the general population. In other words, differential treatment for this group does not violate the equal protection clause of the Fourteenth Amendment. On the other hand, as the court proposed, in terms of potential dangerousness, a person whose felony conviction has been reversed is in the same position as someone who has been charged with, but not convicted of, a felony offense. It is undisputed that the latter could not be subject to SVP proceedings. Therefore, why should someone with a reversed conviction be subject to SVP commitment hearings? The court's decision in this case that section 6601(a)(2) violates equal protection terms if it were to be extended to reversed convictions demonstrates that individuals with reversed convictions cannot be treated differently than the general population. The court ruled that given the constitutional concerns outlined, it did not construe California's statute as currently written to apply to reversed convictions. In the future, however, it could be possible for the legislature to amend the SVP Act so that it would constitutionally apply to individuals with reversed convictions, as long as a distinction is specifically made in the statute that this particular population is more dangerous than the general population.

Court-Mandated, Long-Acting Antipsychotic Medication as a Condition of Supervised Release

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The Fourth Circuit Court of Appeals Approves the Order of Forced Intramuscular Medication as a Condition of Release

In *United States v. Holman*, 532 F.3d 284 (4th Cir. 2008), the U.S. Court of Appeals for the Fourth Circuit upheld a district court ruling mandating involuntary long-acting antipsychotic medication as a condition of supervised release. In issuing its opinion, the court considered the interpretation of the Federal Sentencing Guidelines in light of *Washington v. Harper*, 494 U.S. 210 (1990), and *Sell v. United States*, 539 U.S. 166 (2003). In November 2008, the U.S. Supreme Court denied *certiorari* on appeal (*Holman v. United States*, 129 S. Ct. 522 (2008)).

Facts of the Case

Philip A. Holman pleaded guilty to various drugs and weapons charges in 1993 and 1996. While serving his sentence for the 1993 charges, he displayed symptoms that ultimately led to a diagnosis of schizoaffective disorder, bipolar type. During his time in prison, Mr. Holman vacillated in his compliance with treatment, including oral antipsychotic medication. Pe-