IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DANIEL LOPEZ

Petitioner,

v.

THE SUPERIOR COURT OF THE COUNTY OF SAN BERNARDINO,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Supreme Court Case No. S172589

Court of Appeal
Case No. G040679

San Bernardino County
Superior Court
Case No. FVAFS700968

REVIEW OF THE COURT OF APPEAL'S DENIAL OF THE PETITION FOR WRIT OF MANDATE

OPENING BRIEF ON THE MERITS

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THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	

OPENING BRIEF ON THE MERITS

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

ISSUE PRESENTED

Penal Code §2962 authorizes a parolee's involuntary commitment for mental health treatment where six foundational criteria are established. Three of the criteria are static or historical (not subject to change), and three are dynamic (subject to change with the passage of time). Where the historical criteria of the original certification have never been adjudicated by a court, may the civilly committed parolee challenge the foundational static criteria for the first time at the proceeding to extend commitment beyond parole pursuant to *Penal Code* §2970?

INTRODUCTION

Mr. Lopez, Petitioner for Writ of Mandate in this case, filed a Motion to Dismiss the petition to extend commitment pursuant to *People v. Sheek* (2004) 122 Cal. App. 4th 1606. Mr. Lopez asserted there was insufficient evidence to warrant proceeding to trial, because the discovery revealed an absence of force or violence in the commitment offense, one of the three jurisdictional prerequisites for continued MDO commitment under *Penal Code*[1] §2962. On May 23, 2008, a hearing was held, at which time the Respondent Court denied petitioner's Motion to Dismiss based upon *People v. Merfield* (2007) 147 Cal.App.4th 1071. The court erroneously found that the withdrawal of petitioner's Section 2966(b) petition during the first year of parole without adjudication had the preclusive effect of collateral estoppels/res judicata on each material element as if the petition had been fully adjudicated:

> It's what you actually litigated – or what you could have litigated and your client could have litigated that is in issue in that initial petition. He chose not to do that. So he waived the right to do that. And those first three criteria, as you pointed out, were static. ¶ So, even though he didn't, his attorney didn't stand up and point by point, by point argue the case, the fact they brought the petition and made a decision not to litigate it, makes it moot, makes, res judicata.

[Petition for Writ of Mandate, hereinafter Petition, Exhibit J, Transcript, at page 142, lines 27-28 through page 143, lines 1-7]

The Respondent Court chose not to follow the First Appellate District in *People v. Hayes* (2003) 105 Cal. App. 4th 1287, because the committee in *Hayes* "never challenged the initial commitment." [Petition,

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

Exhibit J, Transcript, p. 142, lines 15-16] Furthermore, the court did not embrace our Fourth Appellate District's ruling in *People v. Garcia* (2005) 127 Cal. App. 4th 558, stating that it was "distinguishable in that the DA in that case had went outside his authority of the statute." [Petition, Exhibit J, Transcript, at page 142, lines 18-19]

Consequently, the trial court's application of *People v. Merfield* (2007) 147 Cal.App.4th 1071 compels petitioner to proceed to trial deprived of the right to challenge the foundational elements that are mandated by Section 2962 but have never been adjudicated:

1. the use of force, violence, or threat thereof in the commitment offense, Possession of a Concealed Weapon;

2. the severe mental disorder as a cause or aggravating factor in the commission of the offense for which the parolee was imprisoned; and

3. the requisite 90 days of treatment.

Yet, the adjudication of foundational elements is jurisdictional to sustain the deprivation of liberty by way of involuntary commitment and extension thereof beyond the expiration of parole under Section 2970.

The trial court so held, even though the principles of collateral estoppel have been held not to preclude litigation of the three static criteria by the DA in a subsequent Section 2966 petition when the DA withdraws opposition short of adjudication in a prior petition proceeding [*People v. Coronado* (1994) 28 Cal.App.4th 1402]. The Court in *Coronado* held that withdrawal of opposition by the DA preserves the DA's ability to later adjudicate the elemental issues, but Respondent Court herein effectively held that withdrawal of the petition by the committee concedes the foundational criteria of an MDO commitment.

Rather than finding that the withdrawal of the petition without an adjudication preserved the issue of whether or not force or violence was involved in the commitment offense [*People v. Coronado*, *supra*], the Respondent Court erroneously found that withdrawal of the petition short of adjudication had the same preclusive effect as if the petition had been adjudicated against petitioner. *Merfield* was wrongly decided in that the doctrine of collateral estoppels/res judicata is inapplicable where an issue has never been litigated.

Furthermore, Respondent's reliance on *Merfield* to preclude challenge of the foundational elements at the first instance in a Section 2970 extension proceeding conflicts with holdings by the First Appellate District [*People v. Hayes* (2003) 105 Cal. App. 4th 1287] and the Fourth Appellate District [*People v. Garcia* (2005) 127 Cal. App. 4th 558], both of which have permitted litigation of the foundational elements for the first time at an extension proceeding. *Merfield* is factually distinguishable from the instant case, because it involved a Section 2966(b) petition, challenging an initial MDO certification. By contrast, *Hayes* and *Garcia* are procedurally aligned with petitioner's case, addressing a challenge to the jurisdictional elements at a Section 2970 proceeding to extend commitment. In adopting *Merfield* over *Hayes* and *Garcia*, Respondent effectively extended *Merfield* to a Section 2970 context, thereby contradicting *Hayes* and *Garcia*.

Petitioner filed a Petition for Writ of Mandate in the Court of Appeal, which was denied on April 23, 2009, in a published decision. *Lopez v. Superior Court*, 173 Cal. App. 4th 266. The gravamen of the prosecution's opposition to the writ petition rested on the doctrine of

collateral estoppel/res judicata as enunciated in *Merfield*[2]. Division Three of the Fourth Appellate District recognized that *Merfield* was wrongly decided, because the doctrine of issue preclusion cannot apply where the issue was never adjudicated by a court of competent jurisdiction. The Court of Appeal chose instead to predicate its denial of the Petition for Writ of Mandate on the doctrine of forfeiture. "[W]e prefer to ground our holding on the doctrine of forfeiture." *Lopez v. Superior Court*, *supra* at 278, fn 5. The Court reasoned that affording the patient the right to challenge the unadjudicated historical criteria that are foundational to the initial commitment at an extension proceeding would permit him to evade treatment and commitment simply because the historical criteria may not be provable due to the passage of time. *Id.* at 275.

Petitioner is exposed to involuntary recommitments in one-year increments every succeeding year, potentially for the remainder of his life. Although Mr. Lopez is confronted with a grave deprivation of liberty, the rulings of the courts below permanently foreclose any adjudication of the jurisdictional foundation of involuntary commitment under the MDO statute.

STATEMENT OF FACTS

On April 6, 2004, Daniel Xavier Lopez was convicted of violation of *Penal Code* §12020(a)(4), possession of a concealed dirk or dagger, for which the court sentenced him to 16 months in state prison. [Petition, Exhibit E, page 39].

The offense for which Mr. Lopez was charged and convicted occurred on December 26, 2002. According to the police report, at about

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[2]Formal Response to Petition for Writ of Mandate, hereinafter Response.

8:50 a.m. Mr. Allen Burdette arrived and parked his car directly in front of the Laundromat located at 659 S. Riverside in Rialto. [Petition, Exhibit E, page 41]. Mr. Lopez, who was laundering his clothes at the same location, approached Mr. Burdette at the door asking for change. Mr. Burdette declined. Mr. Lopez stepped back, and Mr. Burdette entered the Laundromat and proceeded to launder his clothes without incident. Mr. Burdette then returned to his car to get more laundry. Upon Mr. Burdette's re-entry into the Laundromat, Mr. Lopez approached again him stating, "Give me your fucking money. I know you have money. Give me your chump change." Mr. Burdette refused and moved past Mr. Lopez into the Laundromat without difficulty. Mr. Burdette again returned to his car to get his laundry supplies and grabbed his steering column locking device, "The Club." Upon Mr. Burdette's third entry into Laundromat, this time carrying "The Club," Mr. Lopez approached him again, reportedly assuming a "fighting stance" and said, "Give me all your money. I know you have money. Give me whatever money you have." Mr. Lopez never brandished a weapon nor announced his possession of a weapon. Mr. Burdette did not observe any weapon on Mr. Lopez. A third party witness did not report observation of any weapon. Yet, Mr. Burdette clubbed Mr. Lopez, striking him across the left side of his head, claiming that Mr. Lopez reached into his front pocket. Mr. Lopez then ran out of the Laundromat. Mr. Burdette chased him and asked the third-party witness to call 911. According to the dispatch log, the reporting party twice advised the police that Mr. Lopez did not have any weapons: a) once immediately after the incident at 8:51 a.m. and b) approximately six minutes later at 8:57 a.m., as the third-party witness watched Mr. Lopez flee and use the payphone in front of a 7-11 store. [Petition, Exhibit E, pages 52-53].

Police responded to the 911 call and contacted Mr. Lopez at a payphone. Upon detention at gunpoint, Officer Sandona asked Mr. Lopez if he had any weapons, to which he acknowledged he did. [Petition, Exhibit E, page 52]. A pat-down search of Mr. Lopez produced a knife/dagger from his right front pocket. [Petition, Exhibit E, page 43]. According to the Official Property Tag, Officer Gerard described the item as a dagger, without any details of dimensions or condition. *Id.* at 47. During the police interview with Mr. Lopez, Officer Gerard detected a "very strong odor of an alcoholic beverage about his breath and person." Officer Gerard observed that Mr. Lopez had bloodshot red, watery eyes. His speech was slurred, and he was confused when the officer asked him questions. Mr. Lopez reported that he had been drinking since 6:00 a.m. and, prior to his arrival at the Laundromat, he had ingested four-40 oz. bottles of beer. Mr. Burdette was uninjured. However, Mr. Lopez sustained injuries from being clubbed, for which the Rialto Fire Department indicated hospital attention was needed for stitches. [Petition, Exhibit E, page 50]. The police arrested Mr. Lopez and took possession of his clothing from the washer machine inside the Laundromat.

MEMORANDUM OF POINTS AND AUTHORITIES

I
THE LETTER AND SPIRIT OF THE MDO ACT REQUIRE CONSISTENCY AND CONTINUITY OF THE FOUNDATIONAL PREREQUISITES TO JUSTIFY THE DEPRIVATION OF A LIBERTY INTEREST BY WAY OF CIVIL COMMITMENT

In enacting the MDO statute, the Legislature contemplates mental health treatment for a specified group of prisoners, who have a 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. Section* 2960 [Emphasis added]

> The MDO Act establishes a comprehensive scheme for treating prisoners who have severe mental disorders that were a cause or aggravating factor in the commission of the crime for which they were imprisoned. The act addresses treatment in three contexts-first, as a condition of parole (Section 2962); then, as continued treatment for one year upon termination of parole (Section 2970); and finally, as an additional year of treatment after expiration of the original, or previous, one-year commitment (Section 2972).
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> *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1610, as cited in *People v. Garcia* (2005) 127 CaI.App.4th 558, 562 (Emphasis added).

In order to commit a prisoner to involuntary mental health treatment as a condition of parole, *Section* 2962 requires satisfaction of six foundational criteria at the initial certification:

1. The prisoner has a severe mental disorder;

2. The prisoner used force or violence, or threat of force or violence, in committing the underlying offense;

3. The severe mental disorder was one of the causes of or was an aggravating factor in the commission of the offense for which the prisoner was sentenced to prison (Section 2962(b);

4. The disorder was not in remission or capable of being kept in remission in the absence of treatment;

5. The prisoner was treated for the disorder for at least 90 days in the year before being paroled; and

6. By reason of his severe mental disorder, the prisoner represents a substantial danger of physical harm to others.

Specifically, Criterion 2 requires that the parolee receive a determinate sentence for:

1. Either an enumerated offense, pursuant to Section 2962(e)(2), or

2. A crime in which the prisoner used force or violence, or caused serious bodily injury, pursuant to Section 2962(e)(2)(P), or

3. A crime in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used. Section 2962(e)(2)(Q).

A parolee who disagrees with the Board of Prison Terms' [BPT] determination may file a petition in superior court requesting a hearing on whether the criteria for treatment have been met. "The hearing shall be a civil hearing; ... The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict." PC §2966(b).

Three of the necessary six criteria relate to foundational issues that are not subject to change with the passage of time:

1. The prisoner used force or violence in committing the offense for which he received a determinate prison sentence, to wit;

2. The prisoner has a disorder which caused or was an aggravating factor in the committing offense; and

3. The prisoner was treated for the disorder for at least 90 days in the year before being paroled.

Because these criteria are historical and thus not subject to change, they are decided only once at the initial certification determining eligibility for the MDO classification. Once litigated, the historical factors become res judicata. *People v. Francis* (2002) 98 Cal.App.4th 873.

The remaining three criteria of Section 2962 are dynamic factors relating to mental status, which are capable of change:

1. The prisoner has a severe mental disorder;

2. The disorder was not in remission or capable of being kept in remission in the absence of treatment;

A. By Reason of His Severe Mental Disorder, the Prisoner Represents a Substantial Danger of Physical Harm to Others.

If the BPT continues a parolee's mental health treatment under Section 2962, the parolee only needs to meet the dynamic factors for further MDO commitment. Section 2966(c). Similarly, at the conclusion of parole, if the treatment provider recommends extension of the MDO commitment beyond parole, the DA may file petitions with the superior court to extend the commitment in one-year increments, proving the same three dynamic criteria. Sections 2970 and 2972.

Read in isolation, Section 2970 appears to suggest that a petition to extend a parolee's MDO status for an additional year requires proof of only three criteria:

1. The Prisoner has a severe mental disorder;

2. The disorder is not in remission or cannot be kept in remission if the person's treatment is not continued; and

3. By reason of his severe mental disorder, the prisoner represents a substantial danger of physical harm to others.

However, "[t]he fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." *People v. Pieters* (1991) 52 Cal. 3d 894, 898. The intent prevails over the letter, and the letter will be so read to conform to the spirit of the act. *Id.* at 899. A statute should be construed "with reference to the entire scheme of the law of which it is part so that the whole may be harmonized and retain effectiveness." *Id.*

Consistent with the principles of statutory construction, our Fourth District, Division Two, has held that a special proceeding for commitment pursuant to Sections 2970 and 2972 is not a commitment proceeding in isolation. Rather, a commitment under Sections 2970 and 2972 is an extension of a preceding commitment and must be consistent with the elemental criteria of the prior commitments. There must be continuity beyond the express statutory language so as to fulfill the Legislative intent that is foundational to the commitment scheme. In *People v. Garcia* (2005) 127 Cal.App.4th 558, the Fourth District, Division Two, reversed the judgment and directed the trial court to dismiss the Section 2970 commitment petition, because the DA lacked statutory authority to file the petition, and the trial court lacked jurisdiction to proceed on the petition.

Mr. Garcia had been treated for schizoaffective disorder, depressive type, as a condition of parole at Atascadero State Hospital for three years. Prior to his scheduled release from parole, the director of the hospital informed the DA that Mr. Garcia was in remission and that the Department of Mental Health was not recommending further involuntary treatment. Notwithstanding, the DA filed a Section2970 extension petition for commitment as an MDO. At trial, the prosecution pursued commitment based on a new diagnosis of pedophilia, as opposed to schizoaffective

disorder. The jury found the petition to be true, and Mr. Garcia was recommitted as an MDO. In reversing judgment, the Court held:

> ...the district attorney's showing in support of the petition for continued involuntary treatment was inadequate....The mental disorder for which extended involuntary treatment is sought must be the same mental disorder for which defendant was treated as a condition of his parole. **As we observed in *People v. Sheek*, the first step in requiring a prisoner to undergo involuntary treatment for a severe mental disorder is that the prisoner meet the six criteria set out in section 2962**, one of which is that the prisoner 'has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.' [Citations omitted.] ... **Therefore, both the letter and spirit of the statute require the prosecutor to show that the defendant was treated for the same mental disorder for which the extended commitment is sought.** The prosecutor did not do that in this case and instead presented evidence of an entirely new mental disorder and therefore a mental disorder for which defendant had never received treatment. **Treatment for the severe mental disorder is a prerequisite for an order extending a prisoner's commitment under the MDO Act**. *Ibid.* at page 567 (Emphasis added).

Even if the DA had been authorized to file the extension petition, proof of a severe mental disorder that was not the mental disorder for which Mr. Garcia was treated as a term and condition of his parole, is inadequate to warrant commitment under the MDO Act. As in *People v. Sheek* (2004) 122 Cal.App.4th 1606, the mental disorder for which a prisoner received 90 days treatment in prison must be the same mental disorder upon which commitment for treatment as a term and condition of parole is sought. "[T]he letter and the spirit of the statute" require continuity of the foundational elements for commitment beyond the letter of the law." *People v. Garcia*, *supra* at 567.

The Mentally Disordered Offender commitment process seeks to civilly commit persons for treatment, who suffer from a mental disorder as a result of which they committed violence, which caused them to be convicted of an offense for which they received a determinate sentence in state prison. Section 2960. The good faith and integrity of the statute requires that the inmate receive treatment while in prison for the mental disorder that is the basis for commitment while on parole. As well, the spirit of the statute requires that the basis for an extension of commitment beyond parole must be the same mental disorder for which the person was treated while on parole. The rationale for a Section 2970/2972 petition only requiring proof of the three dynamic criteria (severe mental disorder, remission, and present dangerousness) is the assumption that the static criteria (mental disorder as a cause or an aggravating factor in the commitment offense, force or violence in the commitment offense, and 90 days of treatment for the mental disorder in the year prior to release to parole) have already been adjudicated. Similarly, the rationale for Sections 2966(c) and 2970 requiring only proof of the three dynamic criteria is the assumption that the static criteria have already been adjudicated. The static criterion of a qualifying offense is foundational to an MDO commitment. To date, this foundational element has never been adjudicated in the case at bar. Respondent's order dismissing petitioner's challenge of the jurisdictional criterion effectively permits continued commitment beyond parole without a determination by a trial court or jury that the foundational element can be established.

II
WITHDRAWAL OF PETITIONER'S PC §2966(B) PETITION DURING THE FIRST YEAR OF HIS PAROLE WITHOUT ADJUDICATION CANNOT GIVE RISE TO THE PRECLUSIVE EFFECT OF COLLATERAL ESTOPPELS/RES JUDICATA; THE JURISDICTIONAL ELEMENTS MUST BE ACTUALLY LITIGATED IN ORDER TO EXTEND INVOLUNTARY COMMITMENT UNDER SECTION 2970

A. The Elements of Collateral Estoppel Have Not Been Established.

The doctrine of collateral estoppel precludes relitigation of issues "argued and decided in prior proceedings." *Lucido v. The Superior Court of Mendocino County* (1990) 51 Cal. 3d 335, 341 citing *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962) 58 Cal. 2d 601, 604. Its preclusive effect applies only upon satisfaction of four threshold requirements:

1. The issue sought to be precluded from litigation must be identical to that decided in a former proceeding.

2. This issue must have been ***actually litigated*** in the former proceeding.

3. It must have been necessarily decided in the former proceeding.

4. The decision in the former proceeding must be ***final on the merits***. *Id.* (Emphasis added)

The party asserting collateral estoppels bears the burden of establishing the requisite elements. *Id.*

The second requirement of **actually litigated** means the issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined..." *People v. Sims* (1982), 32 Cal. 3d 468, 484 The fourth requirement of a **final judgment** includes any prior adjudication of an issue in another action that is deemed "sufficiently firm" to be accorded preclusive effect based on the following factors:

1. whether the decision was not avowedly tentative;

2. whether the parties were fully heard;

3. whether the court supported its decision with a reasoned opinion; and

4. whether the decision was subject to an appeal. *Border Business Park, Inc. v. City of San Diego* (Cal. App. 4th Dist. 2006), 142 Cal. App. 4th 1538, 1565

A decision is **on the merits** when the substance of the issue is tried and determined. *Burdette v. Carrier Corp.* (2008) 158 Cal. App. 4th 1668, 1682, citing *Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, 77. Mr. Lopez appropriately filed a petition in San Luis Obispo Superior Court under Section 2966(b) on January 30, 2006, challenging the determination of the Board of Prison Terms (BPT) that he met the criteria of Section 2962. [Petition, Exhibit E, page 67] On March 21, 2006, Mr. Lopez's petition was withdrawn without prejudice[3]. [Petition, Exhibit E, page 64] The matter was not actually litigated, because there was no judicial or jury determination on the merits pursuant to Section 2966(b). No findings were made as to any of the three jurisdictional, static criteria of Section 2962. The court specified withdrawal without prejudice, denoting that the matter was not final, but rather preserved for subsequent revival. Clearly, Mr. Lopez's challenge to the BPT's determination that he met the criteria of

[3] "A dismissal **without prejudice ...**, is not a bar to another action by the plaintiff on the same cause...¶ An order of dismissal containing no statement that it is made without prejudice is not a bar to subsequent action, unless records show that there was an actual determination on the merits. *Gagnon Co. v. Nevada Desert Inn, Inc.* (1955) 45 Cal. 2d 448, 455 (Emphasis added). By contrast, "a dismissal **with prejudice** by plaintiff of its action is a bar to subsequent action on the same cause; otherwise there would be no meaning to the 'with prejudice" feature.'" *Id.*

Section 2962 as of the date of the BPT hearing was never adjudicated on the merits.

B. Withdrawal of the Section 2966(b) Petition Without an Adjudication Did Not "Concede" the Issue of Whether Mr. Lopez Met the Criteria of Section 2962; Rather, It Preserved It.

Case law has firmly established that once the three static criteria are adjudicated, collateral estoppel applies to any subsequent MDO commitment proceeding based on the same controlling conviction. *People v. Francis* (2002) 98 Cal.App.4th 873; *People v. Parham* (2003) 111 Cal.App.4th 1178. However, if the prior MDO proceeding did not in fact adjudicate whether or not the parolee met the criteria of Section 2962, then collateral estoppel does not apply and a subsequent MDO proceeding can be pursued based on the same controlling conviction. *People v. Coronado*, *supra*, as cited in *People v. Francis*, *supra* at page 878.

> In *Coronado*, the petitioner was convicted of a battery upon a police officer and sentenced to prison. Before his release, the BPT certified him as an MDO. At the MDO proceeding, the people indicated they could not go forward because they had medical evidence that the petitioner did not suffer from a severe mental disorder. He was released on parole. His mental state subsequently deteriorated and he was taken in to custody. When he was due for release the second time, the People sought an MDO certification. (Citations omitted.) Where an MDO's mental state has deteriorated while on parole, and he has been reincarcerated on the same underlying offense, the People may seek an MDO determination when he is due for release. ...The *Coronado* court did not conduct a hearing before the petitioner was released on parole. Rather, the People indicated they could not go forward. " [Emphasis added.]

Therefore, the principles of collateral estoppel did not preclude litigation of whether Mr. Coronado met the criteria of Section 2962,

because the three foundational, static criteria had never in fact been adjudicated. Rather, the prosecutor simply did not go forward with their opposition. The DA withdrew the opposition to the Section 2966(b) petition, because Mr. Coronado did not suffer from a severe mental disorder. While the element of a severe mental disorder ostensibly relates to a dynamic factor, it is also critical to the establishment of the jurisdictional[4], static criterion of causation: whether the severe mental disorder was a cause or aggravating factor in the commitment offense. Without the severe mental disorder, the prosecution could not establish the requisite causal connection between said disorder and the commission of the qualifying offense. Similarly in Mr. Lopez's case, the foundational, static criteria of Section 2962 have never been adjudicated. There has been no judicial or jury finding that his conviction for possession of a concealed weapon qualified as an offense under the MDO Act; no finding that a severe mental disorder was a cause or aggravating factor in his possession of a concealed weapon; and no finding that he received 90 days of treatment for the severe mental disorder. His petition was simply withdrawn without prejudice.

Whereas, in *People v. Francis*, *supra*, the Court of Appeal reversed the MDO commitment on the grounds of collateral estoppel. Therein, the parolee had successfully challenged his certification as an MDO. The expert upon whose testimony the trial court based its determination that Mr. Francis was not an MDO, opined that he did not suffer from a severe mental disorder, such that a finding that a severe mental disorder was an aggravating factor in the commission of the underlying offense was necessarily precluded. After three weeks out on parole, Mr. Francis was

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[4]The DA concedes that the static/historical criteria are jurisdictional to MDO commitment. Response, page27.

violated. After serving time for his parole violation, the BPT again certified him as an MDO. Mr. Francis filed a petition pursuant to Section 2966(b) challenging the determination that he met the 2962 criteria. The trial court denied Mr. Francis's petition. The Second District, Division Six, held:

> Of the criteria listed in section 2962, only three might be capable of change: the existence of a severe mental disorder; whether the disorder is in remission and whether the prisoner poses a serious threat of physical harm to others. The remaining three criteria concern past events that once established, are incapable of change: whether the prisoner used force or violence in committing the underlying offense; whether he was treated for the disorder for at least 90 days in the year before his release; and whether his severe mental disorder was one of the causes or an aggravating factor in the commission of the underlying offense. ...
>
> [T]the trial court necessarily also found that a severe mental disorder was not an aggravating factor in the commission of the battery. Because this element is incapable of change, it may not be relitigated. To allow relitigation of the circumstances surrounding appellant's commitment offense would violate the principles of res judicata and collateral estoppel. Thus, where a trial court has found that a severe mental disorder was not an aggravating favor in the commission of the crime, the People are precluded from seeking a second MDO determination based on the same underlying offense." *People v. Francis*, *supra*, at page 879.

Similarly, in *People v. Parham* (2003) 111 Cal.App.4th 1178, 1182, the trial court, in addressing the initial Section 2966(b) petition, found that Mr. Parham did not suffer from a severe mental disorder at the time of the qualifying offense. By virtue thereof, the Court necessarily found that a severe mental disorder was not an aggravating factor in the commitment offense. Mr. Parham was released to parole. Thereafter his parole was

violated. After serving time for the violation, the BPT again certified him as an MDO. Mr. Parham filed a Section 2966(b) petition. The trial court denied the second petition. The Second District, Division Six, reversed the commitment, holding:

> The issue was essential to the prosecution because in order to prevail, it had to prove Parham's mental state at that time. Both sides litigated that issue. The prosecution was not entitled to a second opportunity to prove an element it did not establish in the prior case. (Citations omitted.) It could not seek to commit Parham again by using the same 1997 qualifying offense that was an issue in the first case.

Applying the principles of collateral estoppel, the reviewing court reversed the MDO commitment order. Thus, collateral estoppel precludes relitigation of the commitment criteria when they have been previously litigated. But, when the criteria were never in fact adjudicated because the prosecutor withdrew the opposition, collateral estoppel has no application.

C. The Trial Court's Extension of *People v. Merfield* to an Extension Proceeding Inappropriately PrecludeS the MDO Committee from Challenging Foundational Commitment Criteria that Have Not Yet Been Adjudicated.

Respondent court erroneously extended the holding of *People v. Merfield* (2007) 147 Cal.App.4th 1071, to the Section 2970 context. In *Merfield*, appellant filed a Section 2966(b) petition on October 4, 2004. On October 19, 2004, appellant withdrew his petition and the Court dismissed it without prejudice. He was advised by the Court that, "if you want to refile it within a reasonable time, ... you can do that, but as both lawyers have indicated, after a long period of time, certainly by the time of your next review, it becomes what we call moot and, so, you would not have the right to refile it after that period." His first year of civil commitment as a

Mentally Disordered Offender [MDO] expired on August 10, 2005. On December 5, 2005, appellant filed a second Section 2966(b) petition challenging the BPT determination that he met the criteria of commitment as an MDO in 2004. The trial court dismissed the petition. The Second District, Division Six, affirmed the dismissal on the grounds of mootness and waiver. The Court held:

> An inmate whom the BPT determines to be an MDO has a right to a court hearing on the six criteria only following the initial commitment determination. Once the time has passed for that first determination and proceedings have been instituted to extend the commitment, the inmate may only challenge the BPT's determination of his or her current mental status. (§2966, subd. (c)) This rule applies irrespective of whether the first commitment resulted from the inmate's acceptance of the BPT's determination or from a hearing conducted in the trial court. *Id.* at 1077

The Court concluded that the three static MDO criteria concerning past events (the use of force or violence in committing the convicted offense; the severe mental disorder was one of the causes or an aggravating factor in the commission of the convicted offense; and 90 days of treatment for the severe mental disorder) can only be challenged during the parolee's first year of commitment as an MDO. Thereafter, irrespective of whether or not the parolee filed a Section 2966(b) petition, or filed a petition but withdrew it prior to adjudication, the three static criteria of an MDO commitment can never again be challenged by the committee:

> While issues relating to those criteria are not actually "litigated" where the MDO does not petition for a hearing during his initial commitment, preclusive effect is also given to issues that could have been litigated in a prior proceeding. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal. App. 4th 1180, 1202) An MDO therefore has but one opportunity to challenge the BPT's

findings on the three criteria concerning past events. *Id.* at 1076

Merfield misapplies the doctrine of collateral estoppels/res judicata. An essential feature of res judicata is the requirement of a prior adjudication. According to the California Supreme Court, "The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. [Citation] ...'The doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in a subsequent litigation involving the same controversy.'" (Original italics) *Busick v. Workmen's Compensation Appeals Board* (1972) 7 Cal. 3d 967, 974. Furthermore, *Federation of Hillside v. City of Los Angeles* (2004) 126 Cal. App. 4th 1180, 1202, the authority upon which *Merfield* relies, cites *Busick, supra*, as follows:

> Res judicata applies if (1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceedings; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding. [Citation omitted] Res judicata bars the litigation not only of issues that were actually litigated but also issues that could have been litigated [citation omitted] [Emphasis added].

Stare decisis applies where the holding is limited to the facts of the particular case, but the holding of *Merfield* exceeds its facts. In *Merfield*, there had not been a prior adjudication by a court of competent jurisdiction, as required under *Busick, supra*. The petition was withdrawn without prejudice. Without the requisite prior adjudication, the preclusive effect of res judicata cannot arise. Thus in *People v. Coronado* (1994) 28 Cal.App.4th 1402, res judicata did not bar the prosecution from litigating the three jurisdictional elements in a subsequent MDO petition under Sections

2962 and 2966(b), because the prior petition had not been adjudicated. The language of *Merfield* that "preclusive effect is also given to issues that *could have been* litigated in a prior proceeding" denotes that issues that are necessarily encompassed in the prior adjudication should have been litigated at the earlier opportunity. However, it does not relate to the current circumstance where there has never been a prior adjudication on the merits of the foundational, historical elements.

According to the holding in *Merfield* and the Respondent herein, an individual who allegedly suffers from a severe mental disorder has only one opportunity to challenge the jurisdiction of the court to civilly commit him as an MDO on the three static criteria, and that challenge must occur within the first year of parole. Irrespective of whether the three static criteria are adjudicated, the committee waives any further challenge to the Court's jurisdiction to civilly commit him as an MDO on those three criteria.

Under *People v. Coronado*, *supra,* withdrawal of opposition to a Section 2966(b) petition by the prosecutor without an adjudication on the merits does not collaterally estop the DA from reasserting opposition on the same static criteria. Hence, a prosecutor, whose mental state is not in issue, does not "waive" his ability to litigate the jurisdictional criteria by virtue of withdrawing his opposition short of an adjudication on the merits. However, a parolee who suffers from a severe mental disorder, following *Merfield*, waives all right to challenge the jurisdiction of the court to civilly commit him by withdrawing his petition short of an adjudication on the merits. The only factual distinction between the opinions rendered in *Merfield*, *supra*, and *Coronado*, *supra*, is based on the identity of the litigant: a mental patient or a prosecutor. Such a distinction lacks legal justification.

The instant matter involves a Section 2970 petition to extend commitment beyond termination of parole. The three static prerequisites for Mr. Lopez to be committed as an MDO have never been adjudicated in a court of law. The facts underlying Mr. Lopez's conviction for possession of a concealed weapon are insufficient for the prosecutor to prove beyond a reasonable doubt that petitioner used force or violence, or the threat thereof in the commission of the qualifying offense. According to *Hayes* and *Garcia*, the jurisdictional elements must be actually and affirmatively established as a prerequisite to extension of an MDO commitment. Therefore, a withdrawal of a petition without adjudication cannot substitute as a determination on the merits by a court of competent jurisdiction. Petitioner, having withdrawn his petition short of adjudication, should be allowed to have his challenge to this foundational criterion addressed in the context of his Motion to Dismiss under *People v. Sheek* (2004) 122 Cal.App.4th 1606.

D. *Merfield* Cconflicts with the First and Fourth Appellate Districts, which Require Establishment of the Jurisdictional Elements at a Section 2970 Proceeding In Order to Extend Commitment Beyond Parole.

People v. Hayes (2003) 105 Cal. App. 4th 1287 is directly on point with the procedural facts of Mr. Lopez's matter. In *Hayes*, appellant was committed to Atascadero State Hospital as an MDO pursuant to Section 2962. On January 3, 2002, before his parole term ended, the prosecution petitioned to the superior court for continued involuntary commitment pursuant to Section 2970. The trial court granted the petition on June 3, 2002, extending Mr. Hayes's commitment for another year. Upon appeal, the First District reversed the judgment of the trial court, ruling that the commitment offense was not a qualifying offense. The court also noted:

> The record does not indicate that Hayes challenged his initial commitment on the ground that the offense of which he was convicted was not a proper basis for such a commitment. However, the People agree that the record of this case does not establish that Hayes is collaterally estopped from raising the issue in connection with his continued treatment. *Supra* at 1289, fn. 2

In *Hayes*, litigation of the jurisdictional, historical elements occurred at the first 2970 petition to continue involuntary commitment. Since there had not been a prior adjudication on the jurisdictional criterion of qualifying offense, the doctrine of collateral estoppels/res judicata did not apply, and the First Appellate District addressed the issue. In reaching the merits of the jurisdictional element, the court recognized that the foundational, historical criteria must be established to sustain extension of commitment. This course of action comports with the Legislative findings in Section 2960 and fulfills the mandate in Section 2962.

However, the Respondent Court chose not to follow *Hayes*, because the committee "never challenged the initial commitment in that case." [Exhibit J, Transcript, at page 142, lines15-16] The *Hayes* court noted that "[t]he record does not indicate that Hayes challenged his initial commitment on the ground that the offense of which he was convicted was not a proper basis for such a commitment." *Hayes*, *supra* at 1289, fn. 2 (Emphasis added). While Respondent Court assumed that the committee never filed a Section 2966(b) petition, the *Hayes* court did not detail such fact. The court specifically recognized that the committee had not made a challenge to the jurisdictional requirement of establishing conviction of a qualifying offense under Section 2962(e). *Hayes* was decided in 2003 and thus preceded *Merfield* by four years. Therefore, the prosecution's concession in *Hayes* that the committee was not collaterally estopped from

raising the foundational issue at a Section 2970 proceeding does not necessarily mean that the committee had never filed a Section 2962 petition. Given the extant case law in 2003, it means the issue had never been actually litigated.

The Fourth Appellate District accords with *Hayes* in addressing the jurisdictional element at the Section 2970 extension proceeding. In *People v. Garcia, supra*, the court held that the letter and spirit of the MDO statute require that the jurisdictional elements be established from the initial certification to the extension of involuntary commitment. However, the Respondent Court chose not to embrace *Garcia*, stating that it was "distinguishable in that the DA in that case had went outside his authority of the statute." [Exhibit J, Transcript, page 142, lines 18-19] However, such reasoning ignores the fact that, although the Court held that the DA did not have the authority to independently initiate a 2970 petition, *Garcia* actually reached the merits of whether a committee may challenge a jurisdictional element at an extension proceeding. In doing so, the Fourth Appellate District required that the jurisdictional elements be established before extension of commitment and that a 2970 extension must be predicated on those exact same elements. *Garcia* reinforces *Hayes* in amplifying that the statutory scheme requires both satisfaction and continuity of the three historical criteria before the court has jurisdiction to recommit under Section 2970. The rulings of courts below contravene *Hayes* and *Garcia* by effectively permitting extension of an MDO commitment without a fundamental adjudication of the jurisdictional elements.

III

THE PAROLEE DOES NOT FORFEIT CHALLENGE TO THE JURISDICTIONAL REQUIREMENTS OF INVOLUNTARY COMMITMENT WHERE HE WITHDRAWS HIS PC §2966(B) PETITION WITHOUT PREJUDICE

The DA asserts that Mr. Lopez waived and abandoned his challenge under *Merfield* and *People v. Rish* (2008) 163 Cal. App. 4th 1370 [5]. However, in *Merfield*, the court specifically admonished the prisoner as follows:

> [I]f you want to refile it within a reasonable time, ... you can do that, but as both lawyers have indicated, after a long period of time, certainly by the time of your next review, it becomes what we call moot and, so you would not have the right to refile it after that period[6]. *Merfield*, *supra* at 1074.

Mr. Merfield indicated that he understood that the petition would be moot after his initial commitment had expired. *Id.* However, in the instant case, there is no record of such colloquy between the court and Mr. Lopez. The record indicates only that Mr. Lopez was permitted to withdraw his petition "without prejudice."

Contrary to the DA's claim of waiver and abandonment, a withdrawal without prejudice preserves Mr. Lopez's right to renew his

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[5]Response, pages 32-34.

[6]Technical mootness is not be a bar to consideration on the merits of the issues raised, where the committee is subject to recertification as an MDO, the issue presented is of recurring importance and is likely to evade review due to time constraints of the one-year MDO commitment cycle. *People v. Jenkins* (1995) 35 Cal. App. 4th 669, 672, fn. 2; *People v. Rish, supra* at 1380-1831. Here, the historical criteria are foundational to the deprivation of the parolee's liberty by way of involuntary commitment. The matter involves an infringement of due process magnitude that will recur. As the fundamental elements have never been adjudicated, the prerequisites of commitment will evade review in each successive extension proceeding and thereby vitiate the integrity of the state actions.

challenge to the commitment criteria. *Gagnon Co. v. Nevada Desert Inn, Inc., supra* at 455. *Code of Civil Procedure* §581(b)(1) gives a plaintiff the right to dismiss his action without prejudice "at any time before the actual commencement of trial. A dismissal "without prejudice" retains a plaintiff's right to file a new action on the same allegations if done within the statute of limitation. *W.G. Wells v. Marine City Properties, Inc. et al.* (1981) 29 Cal. 3d 781, 784. The MDO Act does not prescribe a statute of limitation in which to file a challenge to the jurisdictional criteria mandated in Section 2962. As the court has never actually adjudicated the jurisdictional elements, the preclusive effect of res judicata/collateral estoppel does not arise, and Mr. Lopez may litigate the unadjudicated criteria at a subsequent proceeding. *People v. Coronado, supra.*

The DA's reliance on *People v. Rish* (2008) 163 Cal. App. 4th 1370, 1384 is unavailing. In *Rish*, the committee proceeded to a court trial challenging the three dynamic criteria of continued involuntary commitment under Section 2972(c); however, he did not affirmatively request judicial determination of his suitability for outpatient treatment as provided in Section 2972(d). The court of appeal held that Mr. Rish waived determination on the issue of outpatient placement. Unlike the mandatory foundational criteria of Section 2962 to be determined by a jury, outpatient placement is strictly a determination within the discretion of the trial court. *Section* 2972(d). Treatment pursuant to an MDO commitment may continue on an inpatient or outpatient basis as the court deems appropriate. However, treatment cannot continue at all where the jurisdictional elements have not been established. The court has no authority to involuntarily commit an individual who does not fall within the purview of Sections 2960 and 2962. The absence of the historical factors

presents a jurisdictional defense that cannot be forfeited and can be raised at any time. See *People v. James Thomas Williams* (1999) 21 Cal. 4th 335, 338 [The Court declined application of the forfeiture rule to the jurisdictional defense of the statute of limitations].

Rish is further distinguishable in that there was an actual adjudication of the commitment criteria. The extension petition was fully litigated at a court trial, resulting in a judgment of recommitment. The issue of outpatient placement was encompassed within the recommitment proceeding, but was not affirmatively asserted therein. The committee was deemed to have forfeited the issue by his failure to seek a placement determination at that trial. By contrast, Mr. Lopez was permitted to withdraw his Section 2966(b) without prejudice. He has never had an adjudication of the foundational commitment criteria by a court of competent jurisdiction. Mr. Lopez has not conceded the foundational criteria. Jurisdiction for civil commitment cannot be conferred by consent, waiver, or estoppel. *People v. John T. Williams* (1999) 77 Cal. App. 4th 436, 447; *Summers v. Superior Court* (1959) 53 Cal.2nd 295, 298.

IV
APPLICATION OF THE FORFEITURE RULE SUBVERTS THE MENTALLY DISORDERED OFFENDER ACT

The Court of Appeal acknowledged that the historical criteria have never been adjudicated by a court. *Lopez v. Superior Court*, *supra* at 277. The Court therefore chose to deny the Petition for Writ of Mandate on grounds that Mr. Lopez's challenge to the jurisdictional criteria at the extension proceeding was untimely. *Id.* at 279. While acknowledging that the MDO Act does not expressly specify a deadline by which to challenge the criteria of the original certification, the Court invoked the forfeiture rule to avoid the "absurd consequences" of allowing the committee to win

release through successful adjudication of the jurisdictional elements. *Id.* at 275 The Court was concerned with the dissipation of evidence and disadvantage to the DA:

> Years or even decades after the initial certification, an MDO could force the adjudication of the static criteria regarding the predicate crime, its connection to the mental disorder at that time, and the prisoner's initial 90-treatment, even though evidence has grown stale, witnesses have disappeared, and memories have faded. A dangerous MDO could evade treatment and commitment simply because a historical criterion could not be proved due to the passage of time. ¶ Such an interpretation would prejudice the People, who have no right under the statute to initiate an adjudication of the static criteria[7]. *Id.*

A. **Dissipation of Evidence through the Passage of Time Does Not Prejudice the DA Because the Historical Elements Are Established by Hearsay Evidence through Expert Testimony**.

MDO case law establishes that proof of the historical criteria may be adduced through testimony of expert witnesses, obviating the prosecution's burden of producing live witnesses. A psychiatrist or psychologist may render an opinion on the force or violence criterion and may rely on documentary evidence, such as the probation report from the underlying case in formulating that opinion. *People v. Martin* (2005) 127 Cal App 4th 970, 976-977. The expert's opinion is substantial evidence that the conviction is a qualifying offense. *Id.* As historical criteria are established

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[7]The Court of Appeal endorsed the DA's contention that an unchallenged BPT determination should be accorded finality and preclusive effect; otherwise, the prosecution would be deprived of "any opportunity whatsoever to litigate the initial commitment criteria, unless the prisoner invokes his right to challenge the BPT determination." The DA complains that he has no authority in his own right to initiate any proceeding concerning the initial six commitment criteria. Response, pages 14-19.

through expert testimony, dissipation of evidence, if any, through the passage of time would not disadvantage the prosecution. The DA, in opposing dismissal of its 2970 petition, conceded that adjudication of the jurisdictional criteria is appropriate at the extension proceeding[8]. In doing so, the prosecution admits that it has not suffered any prejudice by Mr. Lopez's challenge of the jurisdictional criteria at the extension proceeding five years after the commission of the underlying offense and two years after the initial certification.

The jurisdictional elements of an MDO commitment may be established at anytime by way of expert testimony relying on hearsay. There is no additional burden upon the State, because the jurisdictional criteria are litigated only once. As illustrated in *People v. Hayes*, *supra*, and *People v. Garcia* (2005) 127 Cal. App. 4th 558, the jurisdictional elements are reviewable in the first instance at the 2970 extension proceeding. The parties and the court must ensure that continued commitment comports statutory and constitutional imperatives. To implement the legislative policies enunciated in Section 2960, the DA must be vigilant[9] to establish the jurisdictional criteria. The basis of continued commitment exists only where the jurisdictional elements are judicially established in compliance with Sections 2960 and 2962.

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[8] Response, pages 39-41.

[9] "The DA's office is obligated not only to prosecute with vigor, but also to seek justice. This theme was stressed almost half a century ago by the United States Supreme Court in *Berger* v. *United States* (1935) 295 U.S. 78, 88 '[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *People v. Conner* (1983) 34 Cal. 3rd 141, 148.

Mr. Lopez is potentially exposed to lifetime commitment. Given the magnitude of the deprivation, "periodic reviews are required because if the basis for a commitment ceases to exist, continued confinement violates substantive due liberty interest in freedom from unnecessary restraint." *People v. Allen, supra* at 103-104, citing *Clark v. Cohen* (3d Cir. 1986) 794 F.2d 79, 86. Despite the feasibility of proof, forfeiture has been perfunctorily applied to the jurisdictional prerequisites without due consideration of the countervailing Constitutional imperative.

B. **Forfeiture Frustrates the Policy Objectives of Section 2960 by Commanding the Imperative of Immediate Litigation to the Exclusion of Treatment.**

In order to protect the public, the Legislature deemed it "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 can be kept in remission." *Section* 2960 . Under the MDO statutory scheme, a patient alleged to be an MDO who withdraws his Section 2966(b) petition will be committed to treatment and not released into the public. If the MDO waives the right to challenge a subsequent petition for extension of commitment, he will again be committed to treatment. By affording the patient the option to defer litigation of his commitment without incurring forfeiture, the statutory scheme encourages patients to voluntarily embrace treatment and thereby fulfill the tandem objectives of treatment and public safety. The DA incurs no new burden, because the jurisdictional elements are decided only once. Postponement of litigation promotes judicial economy by saving the enormous costs of trial. However, the rulings of *Merfield* and the courts below force patients to inundate the court system with litigation in the first

year of parole when the parolee may be in the throes of mental illness. Foreclosure of the patients' right to challenge the jurisdictional elements penalizes those who chose to voluntarily accept treatment, while encouraging others who need treatment to attempt evasion by invoking a technicality, e.g. patients with 89 days of treatment instead of the require 90 days. Given the magnitude of the liberty interest, the patient who willingly accepts treatment should not be held to have jeopardized his jurisdictional challenge to involuntary commitment. Where one is mentally impaired so as to warrant a complete deprivation of his liberty, the system cannot in good faith deem that he is a position to knowingly waive or forfeit a jurisdictional challenge to his commitment.

V
CONSTITUTIONAL DUE PROCESS AND THE PUBLIC POLICIES EMBODIED IN THE MDO STATUTORY SCHEME PROHIBIT APPLICATION OF COLLATERAL ESTOPPEL TO A BPT DETERMINATION OF THE COMMITMENT CRITERIA BY THE LOWER STANDARD OF A PREPONDERANCE OF THE EVIDENCE

A. Constitutional Underpinnings of Involuntary Commitment

"[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *People v. Allen*, (2007) 42 Cal. 4th 91, 99; *Humphrey v. Cady* (1972) 405 U.S. 504, 509 [31 L.Ed.2d 394, 92 S.Ct. 1048]. Mr. Lopez is potentially facing involuntary commitment for the rest of his life in one-year increments. *People v. Allen*, *supra* at 103. Thus, the power to civilly commit is tempered by constitutional restrictions placed on the states in implementing these statutes. It is well settled that the Due Process Clause of the Fourteenth Amendment imposes substantive, as well as procedural,

limitations on state actions that impair the liberty interests of individuals. This "substantive component of the Due Process Clause bars certain arbitrary, wrongful governmental actions regardless of the procedures used to implement them." *Foucha v. Louisiana* (1992) 504 U.S. 71, 80 [118 L.Ed.2d 437, 112 S.Ct. 1780].

"[T]he standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict." [PC §2966, relative to MDO commitment of parolees, and §2972, relative to MDO commitment after the expiration of parole.] The constitutional foundations for the statutory standard of proof of beyond a reasonable doubt stem from the due process clause of the California Constitution and the Fourteenth Amendment to the U.S. Constitution. *People v. Burnick* (1975) 14 Cal.3d 306. Similarly, the statutory requirement of a unanimous verdict is grounded in constitutional due process requirements. *People v. Feagley* (1975) 14 Cal.3d 338. The rationale is that the liberty interests involved in civil commitment proceedings are no less fundamental than those in criminal proceedings.

In *People v. Burnick* (1975) 14 Cal.3d 306, the California Supreme Court held that under the old MDSO statutory scheme (WIC 6300 et.seq.), the Respondent was entitled to the whole panoply of criminal protections; hence, the standard of proof required for a respondent to be civilly committed therein, notwithstanding the absence of specific statutory language, was held to be "beyond a reasonable doubt."

The *Burnick* court examined two U.S. Supreme Court cases, *Specht v. Patterson* (1967) 386 U.S. 605 and *In re Winship* (1970) 397 U.S. 358 and stated at pages 324-325:

> To summarize, *Specht* teaches us that "whether denominated civil or criminal", sexual psychopath proceedings are subject to the "full panoply" of the protections of the due process clause...in turn, *Winship* instructs that the due process clause requires proof beyond a reasonable doubt not only of the guilt of a defendant in a traditional criminal prosecution **but also of the dispositive fact or facts in any proceeding in which the state threatens to deprive an individual of his "good name and freedom"...under *Specht*, this defendant is entitled to all the safeguards of due process of law, and under *Winship*, those safeguards must include the standard of proof beyond a reasonable doubt** [Emphasis added].

In *In re Winship*, *supra*, 397 US 358, 364, the United States Supreme Court recognized that proof beyond a reasonable doubt by the government is a necessary precaution to reduce the margin of error in fact finding:

> 'Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt.' Due process commands that no man shall lose his liberty unless the Government has borne the burden of ... convincing the fact finder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of the fact the necessity of reaching a subjective state of certitude of the facts in issue.'

Furthermore, the reasonable doubt standard serves the public interest by promoting community confidence and respect in the application of the law: "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of this guilt with utmost certainty." *Id.*

The California Supreme Court reinforced the rationale of *Burnick* and extended its protection to require jury unanimity in civil commitments:

> In *People* v. *Burnick* [citation], we hold that a mentally disordered sex offender committed for an indeterminate period to a state mental hospital suffers such a massive curtailment of liberty and such lingering moral stigma that he is entitled to the same standard of proof beyond a reasonable doubt accorded to a criminal defendant. For the same reasons, a mentally disordered sex offender committed to such a hospital is entitled to a unanimous verdict. *People v. Feagley, supra,* 14 Cal.3d 338, 351.

Jury unanimity is a fundamental right provided as a safeguard against wrongful commitment. *Id.* at 352.

B. By its Provision of Rigorous Due Process Safeguards, the MDO Statutory Scheme Contemplates Supremacy of the Court or Jury as the Forum for Determination of the MDO Criteria.

Under the provisions of PC §2966 a "prisoner may request a hearing before the Board of Prison Terms, and the board shall conduct a hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962." PC §2966(a). The standard of proof used by the BPT shall be a preponderance of the evidence. *Code of Regulations*, Title 15 §2576(b)(1). The hearing is decided by a single Deputy Commissioner. *Code of Regulations*, Title 15 §2576(b)(9). The prisoner's rights at a BPT hearing are set forth in *Code of Regulations*, Title 15 §2245-2256[10], which do not include the rights to cross-examination and to presentation of witnesses and experts in his own defense.

"A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets the criteria of Section 2962, may file in

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[10] *Code of Regulations*, Title 15 §2576(b)(3)

the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962." PC §2966(b) This second hearing is a de novo adjudication of the commitment criteria. At the civil trial, Mr. Lopez would have the federal constitutional right to compulsory process and to put on a defense case under the Sixth Amendment. *Washington v. Texas* (1967) 388 U.S. 14; *Holmes v. South Carolina* (2006) 126 S.Ct. 1727. Therefore, evidence and testimony from doctors and witnesses not present during the administrative hearing are usually and expected to be presented. The civil proceeding is a trial "de novo," not limited in any way to the evidence considered at the BPT hearing. The standard of proof at the civil hearing is beyond a reasonable doubt, borne by the DA. PC §2966(b) Trial shall be by jury, unless waived, and the verdict shall be unanimous. *Id.* The order of the BPT shall remain in effect until the completion of the court proceedings. *Id.* If the court or jury reverses the determination of the BPT, the court shall stay the execution of the decision for five working days to allow for an orderly release of the prisoner. *Id.*

By providing for judicial or jury abrogation of every BPT commitment order throughout each year of parole, the statutory scheme establishes a hierarchy in which the BPT hearing serves as an informal, intermediate review and the court or jury is the final arbiter of the facts. By statutory design, the BPT determination is not accorded the conclusiveness of a final judgment. The statute's provision for de novo adjudication by proof beyond a reasonable doubt to a unanimous jury verdict evidences a policy in favor of the jury or trial court as the forum for full and fair

litigation of the MDO criteria. *Lucido v. The Superior Court of Mendocino*, *supra*. at 351

Assuming arguendo that the threshold requirements have been satisfied, the analysis continues and must address the public policies underlying collateral estoppel:

> [T]he public policies underlying collateral estoppels – preservation of the integrity of the judicial system, promotion of judicial economy, and protection litigants from harassment by vexatious litigation – strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy. *Id.* at 342-343.

In *Lucido,* the California Supreme Court prohibited the application of collateral estoppel where it would supplant the criminal trial process as the intended forum of factual determinations. *Id. at* 349. In the underlying case, the prosecution alleged indecent exposure against the petitioner, using the same factual incident as the basis for both a revocation petition and a subsequent criminal filing. Earlier at the probation revocation hearing, the court found that "clear and convincing evidence was not produced by the prosecution to establish that defendant committed a violation of PC section 314(1) .... Accordingly, defendant's probation is not violated on this ground." *Id.* at 341. Thereafter, petitioner moved to dismiss the new filing on the ground that relitigation of the same charge was collaterally estopped by the revocation hearing decision.

The Court cited with approval the Court of Appeals' decision in *Chamblin v. Municipal Court* (1982) 130 Cal. App. 3d 115:

> Because probation revocation hearings utilize procedures less formal than those available in criminal trials, collateral estoppel should not preclude religitation of the .. charges: 'The procedure and protections of a formal criminal trial, such as the rules of evidence and the right to a jury trial,

> belong to the People as well as to the defendant. These rights are simply not available in a probation revocation .... The rule urged by the appellant would have the effect of barring full and fair litigation of the question of a defendant's criminal guilt due to a less formal proceeding which involved entirely different purposes, policies, and procedures and issues.' *Id.* at 344.

The Court rejected the argument that application of collateral estoppel in this context would promote judicial economy by reducing the number of court proceedings. *Id.* at 350. The Court held that "[w]hatever the efficiencies of applying collateral estoppel in this case, they pale before the importance of preserving the criminal trial process as the exclusive forum of determining guilt or innocence as to new crimes." *Id.* at 351.

Where a deprivation of liberty is involved, the interests of efficiency and judicial economy must subordinate to the paramount imperatives of due process. Here, Mr. Lopez was committed at a BPT proceeding by a single administrative officer applying the lowest standard of proof - *a preponderance of the evidence* – to the jurisdictional criteria. The procedures used at the administrative hearing are less formal than the safeguards afforded in superior court. The civil trial is a de novo adjudication. Trial is not limited to a review of the evidence heard by the BPT. In the de novo review at the judicial level, the MDO Act mandates a jury trial, unless waived; proof beyond a reasonable doubt by the prosecution; and a unanimous jury verdict. PC §2966(b) Trial is conducted in accordance to the Evidence Code. Mr. Lopez is afforded the constitutional rights of cross-examination and presentation of defense witnesses and experts of his selection. The rigorous procedural safeguards afforded at the de novo adjudication are intended to protect the individual from wrongful commitment. *In Re Winship*, *supra* at 324-325, 364. The

heightened due process provisions are unavailable at the BPT hearing. The objective of the BPT hearing is to supervise parole and enforce its terms and conditions. By contrast, the objective of the de novo adjudication in the trial court is full and fair litigation of the commitment criteria to protect against wrongful commitment.

The Respondent Court specifically rejected the prosecution's argument that the BPT determination effected res judicata/collateral estoppel upon the instant challenge[11]. The due process protections specified in the statutory scheme indicate the Legislature's designation of the superior court as the forum for full and fair litigation of the MDO criteria. Contrary to the DA's assertion[12], the MDO Act's provision for de novo adjudication of each BPT determination by rigorous procedural safeguards contemplates that the jury or the court is the final arbiter of the jurisdictional criteria. The BPT hearing serves different objectives, and each of its commitment determinations is subordinate to the de novo adjudication and abrogation by the trial court. Clearly, the statutory design contemplates that BPT commitment orders are not final judgments. To accord a BPT determination the preclusive effect of a final adjudication of the jurisdictional elements of commitment would subvert the letter and spirit of the MDO statute. Commitment of Mr. Lopez in violation of constitutional due process undermines the integrity of the judicial system. *In re Winship*, *supra* at 364.

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[11]Petition, Exhibit J, Transcript, page 12, lines 6-18; page 19, lines 2-12.

[12] Response, page 13-21.

VI
CONVICTION FOR VIOLATION OF PC §12020(a)(4) IS NOT A QUALIFYING OFFENSE FOR INVOLUNTARY COMMITMENT UNDER THE MDO STATUTE

A. Only the Commitment Offense Is Relevant to the Determination of Qualification under the MDO Statute, Not Other Crimes Mr. Lopez May Have Committed in Association with the Commitment Offense.

In order to commit a parolee for involuntary psychiatric treatment under the MDO Act, the parolee must have received a determinate sentence[13] for an offense enumerated by PC §2692(e)(2). Mr. Lopez challenges the sufficiency of the evidence relative to the criterion in PC §2692(e)(2). Mr. Lopez received a determinate sentence of one year, four months, for possession of a dirk or dagger. This offense is not enumerated in PC §2962(e)(2). The enumerated offenses include serious felonies: attempted murder; voluntary manslaughter; mayhem; kidnapping; rape; arson; "robbery wherein it was charged and proved that the defendant *personally used* a deadly or dangerous weapon," carjacking "if it is charged and proved that the defendant *personally used* a deadly or dangerous weapon;" any felony in which the defendant *used* a firearm *which use was charged and proved;* arson; etc.

Only the commitment offense may be considered and not those appellant may have committed in perpetrating the commitment offense. *People v. Green* (2006) 142 Cal. App.4th 907, 913. In *Green*, appellant was charged with violation of PC §594(a), vandalism, and §422, making criminal threats. The appellant had been detained in the police car following an allegation of shoplifting. While in the patrol car, he became

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[13] Section 2962(e)(1)

angry and kicked out the window of the car, shattering it. In the course of the breaking the window, appellant threatened the life of the victim. Pursuant to plea bargain, appellant was convicted vandalism and the charge of criminal threats was dismissed. The court ruled that vandalism was not a qualifying offense under the MDO statute, because it involved the application of force against property, rather than against a person as required by the statute. *Id.* In arriving at that conclusion, the court declined to consider the prosecution's argument regarding the criminal threats, because that charge was dismissed. *Id.*

In *People v. Kortesmaki* (2007) 156 Cal. App. 4th 922, 926-927, the appellate court applied *Green* and found that the trial court erred in basing its order to commit appellant for MDO treatment on an offense for which appellant was not convicted. In *Kortesmaki,* appellant was convicted of possession of flammable material with intent to set fire to property in violation of PC §453(a). According to the probation report, appellant had asked two men approaching a liquor store if they would mind if he started a fire in the dumpster area. The customers notified the store clerk, who found the defendant sitting next to the dumpster, which was on fire. The appellant talked about Waco, Texas. He said he was a Hell's Angel and asked the store clerk if he wanted him to prove it. The police found appellant in the adjacent field with burn marks on his body. They also found smoldering debris and fresh burn marks that went three to four feet up the side of the wall. The appellant was charged with arson, in violation of PC §451(d). Pursuant to a plea bargain, the arson charge was dismissed in exchange for a plea to violation of PC §453(a). The trial court, in affirming the BPH's MDO certification, found that:

> [Appellant's] crime created a situation which endangered many people. Embers could have set other structures on fire; people could have been injured in that manner...responding firefighters could have been injured, they could have hit pedestrians or vehicles that had the misfortune of getting in their way as there was a code three response. So setting a fire, I believe, does fall within the criteria and many people were endangered by the offense. *Id.* at 926.

The court of appeals rejected the trial court's reasoning. Appellant was convicted of possession of flammable or combustible materials with the intent to set fire to property. "Although there is evidence indicating that appellant actually carried out his intent in this regard and thereby committed the crime of arson, he was not convicted of that crime." *Id.* ***"Other crimes the prisoner may have committed in perpetrating the commitment offense are irrelevant to the determination whether that offense meets the criteria for MDO treatment."*** *Id.* at 927 (Emphasis added). The trial court's approach of premising its MDO affirmance on the dismissed charge of arson was "unsound." *Id.* "Because he was not serving his prison sentence for committing arson, his MDO commitment cannot be sustained on the basis of that crime." *Id.* "For the same reason, there is no merit in the People's claim that it is proper to consider evidence purporting to demonstrate that appellant threatened the liquor clerk after the fire he started had been extinguished." *Id.*

However, the court found that there nevertheless was sufficient evidence to sustain a finding that appellant's commitment offense qualified as a crime involving an implied threat to use force likely to produce substantial harm. Appellant, carrying a bottle containing a flammable liquid, approached two men outside a liquor store and told them he was going to start a fire and then did so. The two men took appellant's statements seriously and immediately informed the store clerk. The fire

was large enough to leave substantial scorch marks on the wall of the building. The court found that this constituted an implied threat sufficient to meet the requirement of subdivision (e)(2)(Q). *Id.* at 298.

In the instant matter, as compelled by *Kortesmaki*, the dismissed charge of attempted robbery is irrelevant and cannot be considered in the determination of whether the offense for which Mr. Lopez received a determinate offense involved force or violence under Section 2962(e)(2). As to whether the convicted offense qualifies under Section 2962(e)(2)(p), there is no evidence that Mr. Lopez, in possessing a concealed dirk/dagger, used force or violence upon the person of Mr. Burdette or caused serious bodily injury. The police report indicates that Mr. Burdette sustained no injury. Mr. Lopez never touched Mr. Burdette. The only physical contact occurred when Mr. Burdette clubbed Mr. Lopez on the head, inflicting serious injuries to the point of requiring referral to the hospital for possible stitches. It was Mr. Lopez who suffered great bodily injury.

As to the issue of qualification under PC §2962(e)(2)(q), there is no evidence that Mr. Lopez, in possessing a concealed dirk/dagger, expressly or impliedly threatened Mr. Burdette with the use of force or violence likely produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force of violence would be used. Mr. Lopez never touched Mr. Burdette; he never used the knife in the course of his contact with Mr. Burdette nor in his flight from Mr. Burdette; he never threatened Mr. Burdette with the use of a knife; he never brandished the knife; he never stated he possessed a knife.

Mr. Burdette did not receive any injuries; he never saw the knife; he never knew Mr. Lopez possessed a knife. Before clubbing Mr. Lopez, Mr. Burdette had been in and out of the Laundromat twice, each time rebuffing

Mr. Lopez's requests for money without any consequence and each time unaware of any physical or verbal threat involving a knife. The Call Detail Information twice indicated that Mr. Lopez was negative for weapons. In his relay of information to 911 immediately afterward via the third party witness, Mr. Burdette reported that Mr. Lopez did not have any weapons. The third party witness, while on cell phone to 911 as he observed Mr. Lopez in flight ending at the payphone, reported that Mr. Lopez did not have any weapons. The police, upon encountering Mr. Lopez, did not observe any weapons. The knife only surfaced after the fact as a product of police detention at gunpoint and in response to police interrogation as to possession of any weapons. The police retrieved the knife without incident. This is the first instance in which knowledge of the knife emerged.

Unlike the facts in *Kortesmaki* supporting the finding of an implied threat of force or violence, Mr. Lopez, in possessing a concealed dirk/dagger, did not communicate to Mr. Burdette or anyone else of its existence: (1) he made no statements regarding possession of the knife; (2) he did not show the knife to anyone; (3) he did not use the knife; and (4) he did not hurt anyone. Unlike the facts of *Kortesmaki,* Mr. Lopez's possession of a concealed dirk/dagger did not necessitate any corrective action by Mr. Burdette, the third party witness, or the police to avert harm to themselves and others. Actually, it was Mr. Lopez who was seriously injured and in retreat for his safety.

B. The *Hayes* Court Was Aware of PC §2962(e)(2)(Q) but Elected Not to Invoke Its Application so as to Limit the Reach of the Catch-All Provision to Serious Offenses of an "Aggravated Nature."

In *People v. Hayes* (2003) 105 Cal. App. 4th 1287, the committee had ignited a fire in a hotel room. It is significant that the appellate court, with full awareness of the catch-all provision of PC §2962(e)(2)(q) for offenses involving the threat or implied threat of force/violence, chose not to qualify reckless fire setting as a commitment offense.

The offenses specified in PC §2962(e)(2) closely parallel the violent felonies designated as strikes under PC §667.5(c). In designating offenses involving weapons, the statute requires that the use of weapons be charged and proven:

1. Any robbery wherein it was charged and proved that the defendant *personally used* a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery [PC §2962(e)(2)(D) (Emphasis added)];

2. Carjacking, as defined in subdivision (a) of Section 215, if it is charged and proved that the defendant *personally used* a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of the carjacking [PC §2962(e)(2)(E) (Emphasis added)];

3. Any felony in which the defendant *used* a firearm which use was charged and proved as provided in Section 12022.5, 12022.53, or 12022.55 [PC §2962(e)(2)(M) (Emphasis added)];

The appellate court in *People v. Hayes, supra*, held that given the "aggravated nature" of the enumerated offenses in PC §2962(e)(2) and the Legislature's specific inclusion of two types of arson requiring willfulness and malice, the trial court erred in extending the defendant's commitment as

an MDO where the defendant's arson conviction under PC §452 required a showing only that he acted recklessly.

In *Hayes*, a fire had begun in defendant's hotel room. The hotel manager, smelling smoke, entered the room and found the dresser on fire and Mr. Hayes sitting in a corner saying, "The devil came in my room." The manager extinguished the fire. Mr. Hayes received three year state prison after pleading guilty to recklessly setting the fire in violation of PC §452. During his parole period, Mr. Hayes was committed as an MDO pursuant to PC §2962. Before his scheduled termination of parole, the prosecution petitioned for continued involuntary commitment under PC §2970. After trial, the court granted the petition to extend Mr. Hayes' MDO commitment. The appellant court reversed the Mr. Hayes' commitment, holding that a conviction for recklessly causing a fire under PC §452 was not a qualifying offense under MDO law.

The court's analysis was compelled by the principles of statutory construction, specifically: *expressio unius est exclusio alterius*, or "the expression of one thing is the exclusion of another." *Id.* at 1290. The court cited *People v. Anzalone* (1999) 19 Cal. 4th 1074, for the proposition that "the evident legislative intent underlying section 2962 was to require treatment of defendants as MDO's only in certain ***limited*** situations, namely where, because of mental disorder, the prisoner inflicted serious bodily injury or committed such forcible or violent crimes as manslaughter, mayhem, kidnapping rape or robbery *with dangerous weapons use*." *Id. at* 1291 (Original italics) (Emphasis added). The court acknowledged the addition of PC §2962(e)(2)(q) in response to *Anzalone*, authorizing commitment based upon a crime in which the person expressly or impliedly threatened another with the use of force of violence. *Id.* However, despite

the availability of PC §2962(e)(2)(q) as a premise for qualifying an MDO offense, the court conspicuously chose not to permit Mr. Hayes's MDO extension under this catchall provision. The court further noted that in the same amendment that added PC §2962(e)(2)(q), the Legislature also designated arson under PC §§ 451 and 455 as qualifying offenses:

> Given the Legislature's specific inclusion of two types of unlawfully causing or attempting to cause a fire, both of which require a showing of willfulness and malice, and the "**aggravated nature** of the other crimes specified in section 2962, subdivision (e)(2)" (*People v. Anzalone, supra, 19 Cal 4th at p. 1081*), we conclude the Legislature did not intend to include *recklessly* causing a fire among the offense that qualify an offender for commitment as an MDO. *Id.*(Emphasis added)

The court chose a strict construction to effectuate the Legislature's intent of limiting qualifying MDO offenses to crimes of an "aggravated nature" in which the severe mental disorder was a cause or aggravating factor. The MDO Act contemplates application to persons convicted of violent felonies akin to strike offenses enumerated in PC §667.5(c), such as homicide, rape, mayhem, kidnapping. *People v. Green, supra* at 912, citing *People v. Collins* (1992)10 Cal. App. 4th 690, 697. To denigrate the purview of PC §2962(e)(2) to encompass nonviolent offenses would subject a parolee to potential lifetime confinement for minor conduct in contravention of the legislative intent. *People v. Collins, supra* at 697.

Applying *Hayes* to the instant matter, simple possession of a concealed dirk/dagger is not a qualifying offense under the MDO statute. Mr. Lopez's conviction involved a general intent crime, which by definition lacks the "willfulness and malice" specified in PC §2962(e)(2) offenses. It does not approach the "aggravated nature" that characterizes the serious

felonies enumerated in PC §2962(e)(2): no serious bodily injury was inflicted, as no one was hurt; the concealed dirk/dagger was not used in the commission of any offense – hence, no weapon use was ever charged. No threat was made while in possession of the knife. No intent to use the knife was manifested. The attempted robbery and special allegation of a violent felony pursuant to PC §667.5(c) were dismissed, and their factual predicates cannot be considered per *Kortesmaki.* Therefore, as the instant conviction does not satisfy the requisite foundational element embodied in PC §2962(e)(2), the petition to continue Mr. Lopez's commitment as an MDO must fail.

C. *People v. Ramirez* Is Inapposite as Its Finding of an Implied Threat Is Limited to Custodial Settings.

The DA relies on *People v. Ramirez* (1990) 50 Cal. 3d 1158 for the proposition that possession of a dirk/dagger involves the implied threat to use force or violence as a matter of law. However, the facts of *Ramirez* are distinguishable as situational to a custodial setting. In *Ramirez*, the petitioner was a prisoner of the California Youth Authority. While at the infirmary, the petitioner dropped a *sharpened* eight-and-one-half-inch table knife that had been concealed under his clothing. After the knife dropped, the petitioner handed it to one of the nurses without making any threatening statements or gestures. *Id.* at 1186. The court adopted the Attorney General's assertion that "possession of a ***concealed sharpened knife in a California Youth Authority facility*** is criminal activity that involves 'the implied threat to use force or violence'" under factor (b) of PC §190.3. *Id.* (Emphasis added) The Attorney General's position was premised on

People v. Harris (1981) 28 Cal. 3d 935, 962-963, where the prisoner possessed a "wire garotte and a ***prison-made knife while in jail...***" *Id.* (Emphasis added)

In addition to the situational context, the *Ramirez* court also considered the purpose for possession of the knife. The court cited *In re Quintus W.* (1981) 120 Cal. App. 3d 640, 645, where the petitioner was found carrying a kitchen knife for protection: "At the time the officer found the knife appellant stated 'Hey, man, that's my knife. I carry it for protection. There are some dudes trying to jack me up.'" This statement was "material to show that appellant carried the knife knowingly and with the intent to use it for a 'dangerous . . . purpose.'" *Id.* The court also relied on *People v. Grubb* (1965) 63 Cal. 2d 614, 620, wherein an altered baseball bat, taped at the smaller end, heavier at the unbroken end, was found to be usable as a "billy" and clearly not possessed for the purpose of playing baseball. The court in *Grubb* noted that the Legislature had sought to outlaw the classic instruments of violence and their homemade equivalents, but also "sought likewise to outlaw possession of the sometimes-useful object when ***the attendant circumstances, including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicated that the possessor would use the object for a dangerous, not harmless purpose***." *Id.* (Emphasis added) Therefore, the analysis of whether possession of a dirk/dagger involved the implied threat of force compels a fact-specific consideration of the attendant circumstances.

In *Ramirez*, it is unlawful to possess any weapon in a prison setting. Here, in the community, it is permissible for Mr. Lopez to possess a knife for a peaceful purpose, so long as it is not concealed. Here, the illegality

resides in the concealment, not the possession itself. Unlike, *In re Quintus*, there is no evidence that Mr. Lopez possessed the knife for protection in anticipation of possible attacks. The evidence log did not include a picture of the knife, and did not describe physical characteristics of the knife. There is no indication that the knife was sharpened, altered, or homemade. The attendant circumstances indicate Mr. Lopez encountered Mr. Burdette at 8:50 a.m. in broad daylight at a public Laundromat. Mr. Burdette moved freely in and out of the Laundromat five times, encountering Mr. Lopez only upon entry. Once past Mr. Lopez, he laundered his clothes unmolested. During the entire time, Mr. Lopez never brandished a weapon and never announced the possession of a weapon. When Mr. Burdette returned to the Laundromat with The Club, Mr. Lopez did not reach for the knife. Even after Mr. Burdette clubbed him, Mr. Lopez never drew the knife. Mr. Lopez never responded to violence with violence. Throughout his flight from Mr. Burdette as he was running to the pay phone at the 7-11, Mr. Lopez never drew his knife. As the police descended upon him and detained him, Mr. Lopez never used the knife. The circumstances indicated that Mr. Lopez did not possess an intention to use the knife, neither offensively nor defensively.

CONCLUSION

This petition implicates a due process deprivation of Constitutional dimensions wherein Mr. Lopez is exposed to potentially lifelong recommitment without the opportunity to contest jurisdictional elements of commitment as expressly identified by the Legislature in Section 2960 and mandated in Section2962. Qualification of the commitment offense under Section 2962 is jurisdictional to involuntary commitment under the MDO

CERTIFICATION

I, Lyly Brantley, declare that I am an attorney duly licensed and admitted to the practice of law before all courts of the State of California and am a Deputy Public Defender for the County of San Bernardino. I am the attorney of record for petitioner Daniel Lopez in case number FVAFS700968.

According to the word count on the computer program (Microsoft Word) used to prepare this brief, the word count is 13,997, from the sections entitled Issue Presented through the Conclusion; therefore, the brief does not exceed 14,000 words.

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

Executed this 16th day of October 2009, at San Bernardino, California.

Lyly Brantley
Deputy Public Defender

Act. The issue was preserved when the trial court permitted Mr. Lopez to withdraw his petition without prejudice. As there has never been an adjudication on the merits by a court of competent jurisdiction, the preclusive effect of res judicata/collateral estoppel does not apply. According to *Hayes* and *Garcia*, jurisdictional criteria are reviewable at the 2970 proceeding. Pursuant to *Kortesmaki* and *Hayes*, the underlying offense of possession of a dirk/dagger does not qualify as a commitment offense under Section 2962.

Petitioner respectfully prays for relief from the lower court ruling, requesting that this Court issue a writ commanding the Respondent Court to vacate and set aside its order of May 23, 2008, denying petitioner's motion to dismiss the Section 2970 petition extending his involuntary commitment as a Mentally Disordered Offender, and to enter a new order granting petitioner's motion to dismiss said petition.

Dated this 16th day of October, 2009.

Respectfully Submitted:
DOREEN BOXER
Public Defender

By: _____
LYLY BRANTLEY
Deputy Public Defender
Attorney for DANIEL LOPEZ

APPENDIX A

Filed 4/23/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANIEL LOPEZ, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	G040679 (Super. Ct. No. FVAFS700968) O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of San Bernardino County, Gilbert G. Ochoa, Judge. Petition denied.

Doreen Boxer, Public Defender, Lyly Brantley and Pamela P. King, Deputy Public Defenders, for Petitioner.

No appearance for Respondent.

Michael A. Ramos, District Attorney, Grover D. Merritt and Grace B. Parsons, Deputy District Attorneys, for Real Party in Interest.

Petitioner Daniel Lopez seeks a writ of mandate directing the superior court (1) to vacate its order denying his motion to dismiss the People's petition under Penal Code section 2970, and (2) to address the merits of his motion to dismiss.[1] The People's section 2970 petition sought to extend Lopez's commitment to a state hospital as a mentally disordered offender MDO for an additional year. Lopez's motion to dismiss the petition argued he was not an MDO because his underlying crime did not involve force or violence as required under section 2962. We deny Lopez's petition for a writ of mandate because his challenge to his original certification as an MDO is untimely.

FACTS

On December 26, 2002, Lopez attempted to rob a laundromat patron. As the victim attempted to enter the laundry, Lopez approached him demanding "whatever change he had in his pocket." When the victim said he had no change "and to leave him alone," Lopez stated, "I know you got some change for me, give me your change." The victim replied, "I don't have change for you, I'm going to do my laundry." Lopez stepped back. The victim entered the laundromat and prepared to wash his laundry. The victim then went out to his vehicle to get more laundry and his detergent.

When the victim reentered the laundromat, Lopez approached him "in a more threatening manner, standing very close to him, and demanded that he give him any money that he had in his pocket." The victim told Lopez to move out of the way and "leave him alone." Lopez said, "Give me your fucking money. I know you have money. Give me your chump change." The victim went back out to his vehicle to pick up other "necessities . . . , as well as his steering column locking device ('The Club')" for protection if necessary.

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

After the victim had been in the laundromat for several minutes, Lopez approached him from behind and entered into a "fighting stance directly in front of him within six inches of his face." Lopez demanded, "Give me all your money. I know you have money. Give me whatever money you have." Lopez "reached down into his front pocket." The victim, afraid that Lopez "might have a knife or a gun," hit him across the head with the Club.

Lopez ran outside. He was apprehended shortly thereafter, and police found a knife located in his right front pocket.

Lopez was read his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. He stated, inter alia, the victim's "mere presence was offensive to him" and the victim had invaded his space and privacy. Lopez stated "he was a very spiritual person, and he could read thoughts and could get into [the victim's] mind, and he knew that [the victim] was just invading his privacy . . . ."

Lopez was charged with attempted second-degree robbery (§§ 664, 211), and carrying a concealed dirk or dagger (§ 12020, subd. (a)(4)). He pleaded guilty to carrying a concealed dirk or dagger. The court sentenced him to 16 months in prison. Based on defendant's in-custody credits at the time, he was released directly to parole.

One month later, Lopez violated parole, was returned to custody, and was then released again. Two months after that, he again violated parole, was returned to custody, and was released a third time. This sequence recurred the following month and then the month after that, except this last time Lopez was kept in custody for a year, until September 2005. At that time, he was released on parole with the special condition that he participate in treatment with the Department of Mental Health pursuant to section 2962.

At an October 2005 certification hearing where Lopez was present with counsel, the Board of Parole Hearings[2] (the Board) found that Lopez met section 2962's criteria for an MDO, based in part on his December 26, 2002 possession of a concealed dirk or dagger.

In January 2006, Lopez filed a petition pursuant to section 2966, subdivision (b), requesting a trial to determine whether he met the MDO criteria. The next month, Lopez, who was represented by counsel, withdrew his petition without prejudice. The record does not disclose why he withdrew his petition.

At an October 2006 annual review hearing where Lopez was present with counsel, he was recommitted as an MDO for an additional year of treatment. He was scheduled to be discharged in October 2007.

On June 18, 2007, the People filed a petition to extend Lopez's commitment under section 2970 for an additional year. Lopez moved to dismiss the People's section 2970 petition on grounds of insufficient evidence. He argued the foundational element that an MDO have used force or violence in committing the underlying crime — an element generally required for commitment under section 2962, subdivision (e)(2) — was never adjudicated.

The court denied Lopez's motion to dismiss the People's section 2970 petition, ruling Lopez's motion was moot and precluded under the doctrine of res judicata, and that he had waived his right to challenge the Board's determination made at the certification hearing.

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[2] Effective July 1, 2005, the former Board of Prison Terms was abolished, and all statutory references to the Board of Prison Terms was deemed to be a reference to the Board of Parole Hearings. (§ 5075, subd. (a).) We adopt the new designation, although the record in this case continues to refer to the former.

DISCUSSION

Lopez contends that, "in opposing the prosecution's [section 2970 petition] to extend his commitment as [an MDO] past the expiration of parole," he had a right to challenge the absence of a foundational element mandated by section 2962 — "force or violence in the commitment offense" — that has "never been determined by a trial court or jury." "Because this argument raises an issue of statutory construction, we apply a de novo standard of review." (*People v. Rish* (2008) 163 Cal.App.4th 1370, 1381.)

Overview of the Act

The Mentally Disordered Offender Act (the Act) requires offenders convicted of certain enumerated crimes related to their mental disorders to receive "mental health treatment during and after the termination of their parole until their mental disorder can be kept in remission" and they no longer pose a danger to society. (*In re Qawi* (2004) 32 Cal.4th 1, 9.) The Act provides for two potential stages of treatment: (1) treatment during the period of parole (§ 2962), and (2) treatment continuing after the parole period has ended (§§ 2970, 2972).

The first stage comes into play when a prisoner who meets the criteria set forth in section 2962 is required, as a condition of parole, to be treated for a mental disorder. (*Ibid.*) Section 2962 establishes six criteria for an MDO: (1) the "prisoner has a severe mental disorder"; (2) the disorder "is not in remission or cannot be kept in remission without treatment" (§ 2962, subd. (a)); (3) the disorder caused or aggravated the prisoner's "commission of a crime for which the prisoner was sentenced to prison" (§ 2962, subd. (b)); (4) the prisoner was treated for the disorder for at least 90 days in the year prior to his or her parole or release (§ 2962, subd. (c)); (5) statutorily designated mental health professionals have evaluated the prisoner and certified to the Board that the prisoner meets the above criteria *and* that because of the mental disorder "the prisoner

represents a substantial danger of physical harm to others" (§ 2962, subd. (d)); and (6) the prisoner received a determinate sentence for the predicate crime, and the crime is one of those listed in section 2962, subdivision (e)(2), which includes any crime "in which the prisoner used force or violence, or caused serious bodily injury" (§ 2962, subd. (e)(2)(P)), or any crime "in which the perpetrator expressly or impliedly threatened another with the use of [sufficient] force or violence" (§ 2962, subd. (e)(2)(Q)).

Three of these criteria are deemed foundational or historical issues that are not subject to change with the passage of time. Once established, these criteria "are incapable of change." (*People v. Francis* (2002) 98 Cal.App.4th 873, 879.) These static criteria are: (1) the disorder caused or aggravated the commission of the predicate crime, (2) the prisoner received a minimum 90-day treatment prior to parole or release, and (3) the crime is described in section 2962, subdivision (e). (*Ibid.*) The remaining criteria are dynamic factors subject to change over time. Thus, at some point, the prisoner may no longer suffer from a disorder; the disorder may be in remission and may stay in remission without treatment; and/or the prisoner may cease to present a danger to others. (*Id.* at pp. 878-879.)

Any prisoner required to accept treatment under section 2962 must be given written notice of his or her right under section 2966 to request a hearing. (§ 2964, subd. (a).) Under section 2966, a prisoner is entitled, upon request, to a hearing before the Board, where the person or agency who certified the prisoner as an MDO bears the burden of proving the prisoner meets section 2962's criteria. (§ 2966, subd. (a).) If the prisoner disagrees with the Board's determination that he or she meets the criteria, the prisoner may petition the superior court for a hearing. (§ 2966, subd. (b).) The prisoner has a right to counsel, and the standard of proof is beyond a reasonable doubt. (*Ibid.*) The trial is by jury unless waived by both the prisoner and the People. (*Ibid.*)

Subdivision (c) of section 2966 provides: "If the [Board] continues a parolee's mental health treatment under Section 2962 when it continues the parolee's

parole under Section 3001, the procedures of this section shall *only* be applicable for the purpose of determining if the parolee has a severe mental disorder, whether the parolee'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 parolee represents a substantial danger of physical harm to others."[3] (Italics added.) "[T]he use of the word, 'only,' refers to the fact that only three criteria need to be satisfied in continuing a parolee's commitment as an MDO as contrasted to [all six section 2962 criteria] which must be met to satisfy the requirement for the initial certification as an MDO." (*People v. Bell* (1994) 30 Cal.App.4th 1705, 1710.)

A parolee's treatment is discontinued if his or her mental disorder is "put into remission during the parole period, and can be kept in remission." (§ 2968.)

The second stage of treatment under the Act, which involves continuation of a patient's treatment after the termination of parole, is generally governed by sections 2970 and 2972. If, "[n]ot 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 . . . , the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment," the People may "file a petition with the superior court for continued involuntary treatment for one year." (§ 2970.) The petition must specify the current, non-historical criteria "that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others." (*Ibid.*) A court hearing must be conducted on the petition for continued treatment. The patient has a

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[3] Section 3001 mandates that a parolee be discharged from parole after specified periods of continuous parole unless the Board, "for good cause, determines that the person will be retained" on parole. "In the event of a retention on parole, the parolee shall be entitled to a review by the parole authority each year thereafter until the maximum statutory period of parole has expired." (§ 3001, subd. (d).)

right to counsel, and the standard of proof is beyond a reasonable doubt. The trial is by jury unless waived by both the prisoner and the People. (§ 2972, subd. (a).) If the factfinder finds the petition's allegations of the dynamic factors to be true, the court must order the patient recommitted "for a period of one year from the date of termination of parole . . . or the scheduled date of release from prison . . . ." (§ 2972, subd. (c).)

The same procedure applies when, prior to termination of a one-year period of recommitment, a patient's severe mental disorder "is not in remission or cannot be kept in remission without treatment, and . . . by reason of [the] severe mental disorder, the patient represents a substantial danger of physical harm to others." (§ 2972, subd. (e).) If the People's section 2972 petition for continued treatment is found true, the court must order the patient recommitted for a period of one year from the date of termination of the previous commitment. (§ 2972, subds. (c) & (e).) "Petitions to extend the commitment for additional one-year terms may be filed indefinitely, so long as the person's severe mental disorder is not in remission and causes the person to represent a substantial danger of physical harm to others." (*People v. May* (2007) 155 Cal.App.4th 350, 358.)

Denial of Lopez's Motion to Dismiss was Proper

We turn to Lopez's contention he is entitled to a court hearing on the static criterion of whether his predicate crime involved force or violence. Based on the statute's plain language, the court's ruling denying Lopez's motion to dismiss the People's petition for recommitment under section 2970 was proper. Section 2970 specifies that the *only* issue to be determined at a court hearing at the recommitment stage is whether the patient meets the dynamic criteria. (§ 2966, subds. (b) & (c).)

Even if we deemed Lopez's motion to be a challenge to the Board's original October 2005 certification that he met all the section 2962 criteria (static and dynamic), such a challenge is untimely at this late date. True, the Act does not explicitly

set a deadline for a prisoner to challenge, pursuant to section 2966, subdivision (b), the Board's original certification of the prisoner as an MDO. But settled canons of statutory construction require us to "consider the statute read as a whole, harmonizing the various elements by considering each clause and section in the context of the overall statutory framework," and to construe the Act in a way "that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.)

The overall statutory framework of the Act distinguishes between a prisoner's initial MDO certification and subsequent proceedings, and stresses that, at a recommitment hearing during the Act's second phase of treatment, only the dynamic criteria are considered. In other words, the pertinent inquiry at that stage is whether the patient remains a danger to society because he or she suffers from a *current* mental disorder that is not in remission or cannot be kept in remission without treatment. This emphasis on the patient's current mental state is consistent with the Legislature's intent, in enacting the Act, to provide treatment to persons who pose a danger to society due to severe mental disorders and to protect the public from them. (§ 2960.)

To construe the Act to grant a patient a statutory right to challenge his or her original certification as an MDO at any time ad infinitum, so long as no court has previously adjudicated the particular issue challenged, would lead to absurd results and frustrate the Act's purpose. Years or even decades after the initial certification, an MDO could force the adjudication of the static criteria regarding the predicate crime, its connection to the mental disorder at that time, and the prisoner's initial 90-day treatment, even though evidence has grown stale, witnesses have disappeared, and memories have faded. A dangerous MDO could evade treatment and commitment simply because a historical criterion could not be proved due to the passage of time.

Such an interpretation would prejudice the People, who have no right under the statute to initiate an adjudication of the static criteria. Under section 2966, the prisoner alone is entitled to request a hearing before the Board and petition for a superior court hearing on the original MDO certification. Thus, only the prisoner can determine whether and when the static criteria will be adjudicated in a court. The Act authorizes the People only to petition for recommitment under sections 2970 or 2972, based solely on the dynamic criteria. Here, the People stood ready at the time of Lopez's original MDO certification to litigate issues such as whether his underlying offense involved force or violence. Lopez, however, chose to withdraw his petition for a court hearing and attempted to raise the issue for the first time through his motion to dismiss more than five years after his commission of the predicate crime and more than two years after his initial certification as an MDO.

We conclude that — so long as a prisoner has received timely notice of his or her right under section 2966 to request a hearing on the original MDO certification, and unless specific compelling circumstances justify a delayed request for a hearing — a prisoner forfeits the right under the Act to request a hearing on the original MDO certification unless he or she files a petition prior to the expiration of the initial commitment. (See *People v. Rish, supra*, 163 Cal.App.4th at p. 1384 ["because [defendant] never sought a determination from the trial court as to whether he was suitable for outpatient treatment . . . , he forfeited his claim that the trial court erred in failing to make such a ruling"]; *People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9 ["'forfeiture is the failure to make the timely assertion of a right'"]; *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2 ["a person who fails to preserve a claim forfeits that claim"].)

In *People v. Merfield* (2007) 147 Cal.App.4th 1071 (*Merfield*), after the defendant's initial one-year commitment had expired, he filed a section 2966 petition challenging the Board's original certification of him as an MDO. (*Id.* at p. 1074.) He had previously filed and withdrawn a section 2966 challenge to the original MDO

certification and had been warned by the court, "'[A]fter a long period of time, certainly by the time of your next review, it becomes what we call moot and, so, you would not have the right to refile it after that period.'" (*Merfield*, at p. 1074.) The Court of Appeal affirmed the trial court's dismissal of the defendant's petition filed after the initial one-year commitment expired, explaining: "An inmate whom the [Board] determines to be an MDO has a right to a court hearing on the six criteria only following the initial commitment determination. Once the time has passed for that first determination and proceedings have been instituted to extend the commitment, the inmate may only challenge the [Board's] determination of his or her current mental status. [Citation.] This rule applies irrespective of whether the first commitment resulted from the inmate's acceptance of the [Board's] determination or from a hearing conducted in the trial court." (*Id.* at p. 1077.)

The *Merfield* court based its holding "on the grounds of mootness and waiver."[4] (*Merfield, supra*, 147 Cal.App.4th at pp. 1076.) First, the defendant "waived his right to file a petition challenging the [Board's] initial commitment determination." (*Ibid.*) He failed "to demonstrate that he was misled or legitimately confused about the time limit on his right to challenge his initial commitment." (*Ibid.*) Second, the defendant's petition was moot: "[T]rial courts consider the merits of timely filed

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[4] *Merfield* also held the defendant's petition was barred by principles of res judicata and collateral estoppel: "'Under the doctrines of res judicata and collateral estoppel, issues relating to the three criteria concerning past events that have been litigated in an MDO proceeding cannot be relitigated in a subsequent proceeding. [Citation.]' [Citation.] While issues relating to those criteria are not actually 'litigated' where the MDO does not petition for a hearing during his initial commitment, preclusive effect is also given to issues that *could have been* litigated in a prior proceeding. [Citation.] An MDO therefore has but one opportunity to challenge the [Board's] findings on the three criteria concerning past events. The MDO may do so by petitioning for a hearing in the superior court of the county in which he is incarcerated on the [Board's] initial commitment decision *before that commitment has expired.*" (*Merfield, supra*, 147 Cal.App.4th at p. 1076.)

petitions that are subsequently rendered technically moot as the result of the delays inherent in the judicial process, which are beyond the petitioner's control. Where, as here, the *petitioner* causes the delay by waiting until after the commitment order has expired to seek relief, the petition is untimely and is subject to dismissal on the ground of mootness." (*Id.* at p. 1075.) Although Lopez here challenges the recommitment petition by filing a motion to dismiss, rather than a section 2966 petition, the principle is the same. The static factors may only be challenged with a section 2966 petition challenging the original commitment. The static factors may not be challenged after his original commitment has expired.

Lopez's challenge to his original MDO certification, brought after his initial commitment expired, is untimely. He has thereby forfeited his right to challenge the static factors.[5] We therefore do not address his contention his motion was not barred by res judicata or collateral estoppel, because the issue of whether his predicate crime involved force or violence was never adjudicated in a court. We note also that defendant's filing in January 2006 of a section 2966, subdivision (b) petition challenging his original certification as an MDO, and his subsequent withdrawal of that petition, are irrelevant to our analysis here. What matters is that defendant never challenged his original certification during the appropriate time period.

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[5] We prefer to ground our holding on the doctrine of forfeiture. Although the doctrines of waiver, forfeiture, and mootness caused by the passage of time are closely related, the preferred terminology to describe the loss of right by failure timely to assert it is "forfeiture." "Over the years, cases have used the word 'waiver' loosely to describe two related, but distinct, concepts: (1) losing a right by failing to assert it, more precisely called forfeiture; and (2) intentionally relinquishing a known right. '[T]he terms "waiver" and "forfeiture" have long been used interchangeably. The United States Supreme Court recently observed, however: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'"'" (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.)

The Cases Relied on by Defendant are Inapposite

Defendant relies principally on three cases — *People v. Coronado* (1994) 28 Cal.App.4th 1402 (*Coronado*), *People v. Garcia* (2005) 127 Cal.App.4th 558 (*Garcia*), and *People v. Hayes* (2003) 105 Cal.App.4th 1287 (*Hayes*). Contrary to his arguments, however, these cases do not support his assertion that he has a never ending right to a court hearing at any time on any issue relating to the static criteria so long as that issue has not previously been fully adjudicated in court.

Coronado does *not* conflict with *Merfield,* nor does it have any application here. In *Coronado*, a psychiatrist certified the prisoner as an MDO prior to his release on parole, and the prisoner petitioned the court for relief. (*Coronado, supra,* 28 Cal.App.4th at p. 1404.) But by the time of the court hearing, the prisoner no longer suffered from a severe mental disorder, the People could not "go forward," the petition was granted, and the prisoner was therefore discharged on parole. (*Id.* at pp. 1404-1405.) Seven months later, he "was taken into custody because of a deteriorating mental condition," he was recertified as an MDO, and he again petitioned the superior court for relief. The court determined he met the MDO criteria (including static criteria). (*Id.* at pp. 1404-1406.) On appeal the prisoner contended his release "'from confinement as an MDO prevented the [Board] from re-certifying him an MDO at a later date for the same committing felony sentence.'" (*Id.* at p. 1404.) The appellate court affirmed the trial court's determination the prisoner was an MDO, holding "that where, as here, the mental health aspect has changed after reincarceration on parole for the same underlying offense, the People are not foreclosed from seeking an MDO determination where parole is again imminent." (*Id.* at p. 1408.) Significantly to our analysis, the prisoner in *Coronado* never forfeited his right timely to petition the superior court for relief. The only issue addressed in *Coronado* was whether a second MDO certification could be upheld while the prisoner was still on parole based upon the same underlying offense.

In *Garcia*, *supra*, 127 Cal.App.4th 558, the Court of Appeal held that district attorneys are empowered to initiate commitment proceedings under section 2970 only if mental health officials have first determined that "the prisoner's severe mental disorder is not in remission, or cannot be kept in remission without treatment." (*Garcia*, at p. 562.) The district attorney in *Garcia* filed a section 2970 petition for continued involuntary treatment of the prisoner as an MDO, even though mental health professionals recommended against pursuing recommitment because the prisoner's schizoaffective disorder "was in remission and he was no longer a danger of physical harm to others . . . ." (*Garcia*, at p. 563.) The district attorney merely substituted pedophilia as the prisoner's severe mental disorder, and the trial court ordered the prisoner recommitted for a one-year period. (*Ibid.*) "Because the prosecutor did not have statutory authority to initiate commitment proceedings under section 2970," the Court of Appeal reversed the trial court's order. (*Id.* at p. 567.) *Garcia* examined the limits of the district attorney's statutory authority and is inapposite to the case at hand.

Finally, in *Hayes, supra,* 105 Cal.App.4th 1287, which preceded *Merfield*, the Court of Appeal did consider at the recommitment stage a static criterion and, finding that the prisoner's underlying offense was not a qualifying crime under the Act as a matter of law, reversed the trial court's continuation of the prisoner's involuntary treatment. (*Hayes*, at p. 1288-1289.) *Hayes* is distinguishable in two important respects. First, in a footnote, the court noted: "The record does not indicate that Hayes challenged his initial commitment on the ground that the offense of which he was convicted was not a proper basis for such a commitment. However, the People agree that the record of this case does not establish that Hayes is collaterally estopped from raising the issue in connection with his continued treatment." (*Id.* at p. 1289, fn. 2.) In other words, the People chose to ignore whether the prisoner was precluded from litigating a static criteria at a recommitment proceeding. Specifically, the issue of forfeiture was not raised. Cases are not authority for issues not raised. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620

[appellate decision is authority "only 'for the points actually involved and actually decided'"].) Second, the determination that the prisoner's offense was not a qualifying crime involved no factual inquiries, since the appellate court held as a matter of law that the predicate crime (recklessly setting a fire) was deliberately excluded by the Legislature from the offenses enumerated in section 2962, subdivision (e)(2). (*Hayes,* at pp. 1290-1291.)

Here, Lopez has stated no reason for his delay in seeking adjudication of the factual inquiry of whether his 2002 crime involved force or violence. His challenge to this historical criterion, raised during the recommitment stage of his treatment, is untimely. His challenge has been forfeited.[6]

DISPOSITION

The defendant's petition for a peremptory writ of mandate is denied.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.

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[6] In his reply brief, Lopez contends his commitment violates his constitutional right to due process of law because his original certification as an MDO by the Board required only proof by a preponderance of the evidence under the California Code of Regulations. We do not address this issue since it was raised in the reply brief.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Cathy A. Honseler declares as follows:

I am a citizen of the United States, employed by the County of San Bernardino, State of California, working in the Public Defender's office. I am over the age of eighteen years and am not a party to this action. My business address is 364 N. Mt. View Ave., San Bernardino, California 92415-0005. In such capacity, I am familiar with the regular and reliable system of United States mail used in the County of San Bernardino for transmission of documents served by the said United States mail system.

On October 16, 2009, I served the within PETITION FOR REVIEW RE: DANIEL LOPEZ, PETITIONER, CASE # S172589; on the following in this action by placing true copies in envelopes in the mail addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed at San Bernardino, California, on October 16, 2009.

Cathy A Honseler

Cathy A. Honseler
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