IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DANIEL LOPEZ,

Petitioner,

v.

THE SUPERIOR COURT OF SAN BERNARDINO COUNTY

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

PETITION FOR REVIEW

After a Decision of the Court of Appeal for the Fourth Appellate District, Division Three, Denying a Petition for Writ of Mandate.

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PETITION FOR REVIEW

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

Petitioner, DANIEL LOPEZ, respectfully petitions this Court to grant review in the above-entitled matter following the decision of the Court of Appeal, Fourth Appellate District, Division Three, denying a petition for Writ of Mandate.

The decision of the Court of Appeal was filed on April 23, 2009. A copy of the decision is attached to this petition as Appendix A.

ISSUE FOR REVIEW

Penal Code §2962 authorizes a parolee's involuntarily 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 a prisoner files a petition under Penal Code § 2966 challenging an involuntary commitment, but subsequently withdraws that petition without prejudice, thereby accepting involuntary treatment, does the prisoner forfeit the right to challenge a static criteria (use of force or violence, or the threat thereof in the commission of the qualifying offense) at a subsequent Section 2966 hearing?

NECESSITY FOR REVIEW

Review is necessary to provide uniformity of decision and to settle important questions of law. In this case Petitioner filed a Motion to Dismiss the petition pursuant to *People v. Sheek* (2004) 122 Cal.App.4th 1606, asserting insufficient evidence to warrant proceeding to trial, in that the extant 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 §2962. The trial court, citing *People v. Merfield* (2007) 147 Cal.App.4th 1071, held withdrawal of the petition short of adjudication had the same preclusive effect as if the

petition had been fully adjudicated against petitioner, *i.e.*, the issue of force or violence was res judicata.

Merfield was wrongly decided, however, in that the doctrine of res judicata is inapplicable where an issue was never litigated. The Court of Appeal Division Three recognized the trial court's error by couching its holding in terms of forfeiture, stating, "[w]e prefer to ground our holding on the doctrine of forfeiture" (Court of Appeal Opinion, p. 12, footnote 5). "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" (Court of Appeal Opinion, p. 11, footnote 4).

But the Court of Appeal's application of the doctrine forfeiture is error as well. Although issue preclusion is applicable where an issue was actually litigated or could have been litigated, the issue is res judicata *only where a hearing was held* wherein the issue could have been adjudicated (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal. App.4th 1180). In this case Petitioner had no hearing whereby the issues regarding the static criteria could have been litigated. Moreover, the Court of Appeal failed to consider the effect of Petitioner's withdrawal of the Petition without prejudice. A dismissal without prejudice is not a bar to another action by the plaintiff on the same cause of action (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784 [176 Cal.Rptr. 104]).

This court should grant review because the trial court's ruling will preclude Petitioner from challenging any of the three static criteria that are foundational to a commitment as a Mentally Disordered Offender (MDO). Petitioner will then be compelled to proceed through trial before eventually seeking a remedy by appeal from an unfavorable judgment.

Review by this court is particularly compelling where Petitioner is confronted with a deprivation of liberty potentially for the rest of his life. Petitioner, by withdrawing his P.C. 2966 Petition without prejudice, reserved the right to challenge this deprivation of liberty at a later time, but the trial court's ruling has permanently foreclosed any adjudication of the jurisdictional foundation of involuntary commitment. Review by this court will prevent a needless and expensive trial and reversal, as Petitioner's motion to dismiss is dispositive of the underlying action.

Review by this Court affords the Court an opportunity to guide trial courts in resolving the erroneous construction that withdrawal of an initial MDO petition without adjudication effects a final determination on the merits and thereby precludes litigation of the static elements that are jurisdictional to an MDO commitment.

Further, this court should provide guidance to the trial courts in resolving the conflict of opinions among the appellate districts regarding the continuity of foundational elements required in subsequent involuntary recommitments of the parolee: the Second Appellate District (*People v.*

Merfield (2007) 147 Cal.App.4th 1071; 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).

STATEMENT OF THE CASE AND FACTS

Petitioner filed a petition under Penal Code §2966(b) in San Luis Obispo Superior Court on January 30, 2006, challenging the determination of the Board of Prison Terms (BPT) that he met the criteria of Section 2962 (Petition for Writ of Mandate, hereinafter Petition, Exhibit E, page 67). On March 21, 2006, Mr. Lopez's Petition was withdrawn without prejudice (Petition, Exhibit E, page 64). No findings were made as to any of the three jurisdictional, static criteria of Penal Code §2962.

On July 6, 2007, an initial hearing was held on the Penal Code §2970 petition filed on June 18, 2007, against Petitioner, seeking to extend his involuntary commitment as a Mentally Disordered Offender (MDO) on the allegations that Petitioner meets the criteria of Section 2970 (Petition, Exhibit A, page 1; Exhibit B, pages 2-4).

On April 24, 2008, petitioner filed a Notice of Motion and Motion to Dismiss the Petition on the Grounds of Insufficiency of Evidence to warrant pursuit of trial, in that there is insufficient evidence of force or violence being used in the commitment offense (Petition, Exhibit E, pages 21-72).

On May 1, 2008, Petitioner filed an Amended Notice of Motion to Dismiss the Petition on the Grounds of Insufficiency of Evidence, advancing the hearing date from June 27, 2008, to May 23, 2008 (Petition, Exhibit F, pages 72-77).

On May 12, 2008, Opposition to Motion to Dismiss the Petition on the Grounds of Insufficiency of the Evidence was filed by the District Attorney (Petition, Exhibit G, pages 78-107).

On May 16, 2008, Petitioner filed his Reply Brief re Motion to Dismiss the Petition on the Grounds of Insufficiency of the Evidence (Petition, Exhibit H, pages 108-117).

On May 23, 2008, a hearing was held, at which time the Respondent Court denied Petitioner's Motion to Dismiss the Petition on Grounds of Insufficiency of the Evidence. The court found that the withdrawal of the Penal Code §2966(b) petition on March 21, 2006, had the effect of establishing each material element that could have been litigated and was necessary to the decision:

> 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.

On June 27, 2008 Petitioner filed a Petition for Writ of Mandate in the Court of Appeal Fourth Appellate District, Division Two. On July 18, 2008 the matter was transferred from Division Two to Division Three. The Court of Appeal, Division Three, denied the Petition on April 23, 2009.

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

I

THE LETTER AND SPIRIT OF THE MDO ACT REQUIRE THAT FOUNDATIONAL PREREQUISITES BE ESTABLISHED 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 (Penal Code §2960).

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); *People v. Sheek* (2004) 122 Cal.App.4th 1606,

1610, as cited in *People v. Garcia* (2005) 127 Cal.App.4th 558, 562 (Emphasis added).

In order to commit a prisoner to involuntary mental health treatment as a condition of parole, Penal Code §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 (Penal Code §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, criteria 2 requires that the parolee receive a determinate sentence for:

1. Either an enumerated offense, pursuant to Penal Code §2962(e)(2), or

2. A crime in which the prisoner used force or violence, or caused serious bodily injury, pursuant to Penal Code §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 (Penal Code §2962(e)(2)(Q)).

A parolee who disagrees with the Board of Prison Terms' 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" (Penal Code §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;
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 rationale for a Penal Code §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 Penal Code §§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.

The remaining three criteria of Penal Code §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;
3. 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 §2962, the parolee needs to meet only the dynamic criteria for further MDO commitment (Penal Code §2966(c)). Similarly, at the conclusion of parole, if the treatment provider recommends extension of the MDO commitment beyond parole, the district attorney may file petitions with the superior court to extend the commitment in one-year increments, proving the same three dynamic criteria (Penal Code §§2970 and 2972).

Read in isolation, Penal Code §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 p. 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 principles of statutory construction, the Fourth District, Division Two, has held that a special proceeding for commitment pursuant to Penal Code §§2970 and 2972 is not a commitment proceeding in isolation. Rather, a commitment under Penal Code §§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 (*People v. Garcia* (2005) 127 Cal.App.4th 558).

As the court observed in *People v. Sheek, supra*, 122 Cal.App.4th 1606, 1610 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. 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.

The Trial Court's Ruling

The trial court's denial of Petitioner's Motion to Dismiss was based primarily on *People v. Merfield, supra*, 147 Cal.App.4th 1071. In *Merfield*, appellant filed a Penal Code §2966(b) petition on October 4, 2004. On October 19, 2004 appellant withdrew his petition and the Court dismissed it without prejudice. Appellant was advised by the Court[1], "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" (*Merfield, supra*, at p. 1074).

Appellant's first year of civil commitment as a Mentally Disordered Offender expired on August 10, 2005. On December 5, 2005, appellant

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[1] The *Merfield* court cited no authority for the proposition that withdrawal of a P.C. 2966 without prejudice would render a subsequent challenge under that section moot.

filed a second Penal Code §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 concluded the three static MDO criteria concerning past events (whether the parolee 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) 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 Penal Code §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.

Merfield was wrongly decided in that it misapplies the doctrine of 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 (*Busick v. Workmen's Compensation Appeals Board* (1972) 7 Cal. 3d 967,

974). *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 [italics added].

In *Merfield*, however, there was no prior adjudication by a court of competent jurisdiction, as required under *Busick*. As in the instant case, the P.C. 2966 petition in *Merfield* was withdrawn without prejudice. Thus, without the requisite prior adjudication, the preclusive effect of res judicata cannot arise. *Merfield's* statement that "preclusive effect is also given to issues that *could have been* litigated in a prior proceeding" denotes that issues necessarily encompassed in the prior adjudication should have been litigated at the earlier opportunity. It does not relate to the current circumstance where there had never been a prior adjudication on the merits of the foundational, historical elements of Penal Code §2962 (See *Federation of Hillside v. City of Los Angeles, supra,* 126 Cal. App. 4th 1180, 1202). Therefore, in this case, Petitioner's withdrawal of a petition without adjudication cannot substitute as a determination on the merits by a court of competent jurisdiction. The trial court's ruling was error.

The Court of Appeal's Ruling

As previously discussed, a special proceeding for commitment pursuant to Penal Code §§2970 and 2972 is not a commitment proceeding in isolation. A commitment under Penal Code §§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 (*People v. Garcia* (2005) 127 Cal.App.4th 558).

Continuity of the statutory scheme, thus, requires satisfaction of the three static criteria before the court has jurisdiction to proceed under Penal Code Section 2970. Although the Court of Appeal correctly observed the MDO Act does not explicitly set a deadline for a prisoner to challenge the Board's original certification of the prisoner as an MDO, the Court chose to ignore the statutory requirement that the first three static factors be established. The Court instead focused solely on the issues to be determined at the Section 2966 hearing.

Consistent with the statutory scheme, establishment of the first three static criteria is mandatory and a court lacks jurisdiction to proceed under Section 2970 until these criteria are satisfied. Nothing in Section 2966 authorizes the court to proceed under Section 2970 where the first three statutory criteria are not satisfied.

The Court of Appeal chose to couch its holding in terms of the doctrine of forfeiture, presumably on the court's recognition that res judicata requires prior litigation of the static criteria, which did not occur here. But the Court's application of the doctrine of forfeiture ignores a critical fact: Petitioner withdrew his P.C. 2966 petition without prejudice. This means he reserved the right to re-file it at a later time. As a general rule, dismissal without prejudice is not a bar to another action by the plaintiff on the same cause of action (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784 [176 Cal.Rptr. 104]).

The Court of Appeal's holding was based largely on the holding of *People v. Merfield*, *supra*, 147 Cal.App.4th 1071. As discussed previously, the holding in *Merfield* was based on the court's misapplication of the doctrines of res judicata and collateral estoppel. The *Merfield* court also based its holding on the grounds of mootness and "waiver." The court's finding of waiver was based on the trial court's admonition to the parolee 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" (*Merfield* at p. 1074). In this case, however, the court permitted Petitioner to withdraw his P.C. 2966 without prejudice. The court's order permitting withdrawal of the

Petition without prejudice was an indication by the court that Petitioner could refile the petition at a later date. There was no evidence of waiver.

The Court of Appeal lists other reasons justifying its holding that Petitioner forfeited his right to a hearing under Section 2966. The Court argues that granting a statutory right to challenge an original certification as an MDO would lead to absurd results, ie., the lapse of time would permit a dangerous MDO to evade treatment and commitment.

But under the statutory procedures set forth in the MDO Act a parolee alleged to be an MDO who withdraws a P.C. 2966 petition will be committed to treatment and not released into the public. If the MDO waives the right to challenge a subsequent petition for involuntary commitment, the MDO will, once again, be committed to treatment. This is not an absurd result. This procedure is consistent with the Legislature's intent in enacting MDO Act, i.e., to provide treatment to persons who pose a danger to society due to severe mental disorders and to protect the public from them (§2960).

The Court of Appeal contends further that permitting a parolee to file a P.C. 2966 challenge at a later date will prejudice the People because the evidence will have grown stale, witnesses will have disappeared, and memories will have faded (Opinion p. 9). This contention is unpersuasive. The Legislature has provided for prosecution of a crime many years after its

commission. Statutes of limitation reflect the Legislature's awareness that cases may be proved up at any time in the future. [2]

Petitioner filed his Motion to Dismiss in the instant case a mere two years after his initial certification as an MDO. Given the magnitude of the deprivation of liberty that will result from the lower's construction of the MDO Act (potential lifetime commitment), the more reasonable interpretation is that foundational criteria may be raised subsequent to an initial MDO certification. Such a construction does not defeat the purposes of the Act because a parolee who defers litigation of the static criteria will receive the necessary mental health treatment required by the MDO Act. Public safety is advanced because the parolee will be confined in a secure facility, and more importantly the parolee's right to Due Process is preserved.

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[2] P.C. 801.6 – Elder Abuse: 5-year limitation
P.C. 801.5 – Fraud Offenses: 4-year limitation
P.C. 801.2 – Child Pornography: 10-year limitation
P.C. 800 – Offense punishable by 8 years in prison: 6-year limitation
P.C. 799 – Offenses punishable by death or life without possibility of parole: No limitation

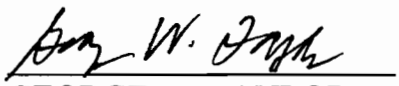
CONCLUSION

For the reasons set forth in this petition it is respectfully urged that the Petition for Review be granted.

Dated: April 30, 2009

Respectfully Submitted,

DOREEN B. BOXER,
Public Defender

By: 

GEORGE W. TAYLOR
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Attorneys for Petitioner
DANIEL LOPEZ

WORD CERTIFICATION UNDER RULE 8.204(c)

I, George Taylor, state under penalty of perjury of the laws of the State of California that this PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 4,182 words including footnotes as measured by the Microsoft Word 2007 word-count feature.

Executed this 30th day of April, 2009, at San Bernardino, California.

Respectfully Submitted,

DOREEN BOXER
Public Defender

By: _____
GEORGE W. TAYLOR
Deputy Public Defender
LYLY BRANTLEY
Deputy Public Defender

Attorneys 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)

OPINION

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:

That I am a citizen of the United States and 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.

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 May 1, 2009, pursuant to my duties I served the within PETITION FOR REVIEW; on the following in this action by placing true copies in envelopes addressed as follows then sealing said envelopes and PLACING IN THE MAIL taking to the following addresses.

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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 May 1, 2009.

Cathy A. Honseler