S198990

LIU, J.

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **KELVIN HARRISON,** **Defendant and Appellant.**	Case No. S_____

Fourth Appellate District, Division Two, Case No. E051465
San Bernardino County Superior Court, Case No. FELSS1001624
The Honorable Katrina West, Judge

PETITION FOR REVIEW

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SUPREME COURT
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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent, the People of the State of California, respectfully petitions this Court to grant review in the above-entitled case pursuant to rule 8.500 of the California Rules of Court. A copy of the partially published opinion of the Court of Appeal, Fourth Appellate District, Division Two, filed December 23, 2011, is appended hereto.[1]

ISSUE PRESENTED

In a mentally disordered offender hearing under Penal Code section 2966, subdivision (b), is compliance with the certification process of Penal Code section 2962, subdivision (d), a factor that must be shown to the trier of fact or is it a matter of law to be decided by the trial court?

REASONS FOR REVIEW

Review is necessary to secure uniformity of decision and to settle important questions of law pertaining to the issue of whether compliance with the certification process of a mentally disordered offender ("MDO") is one of the factors that must be shown to the trier of fact at a hearing under Penal Code section 2966, subdivision (b).[2]

Section 2962 sets forth the six factors that must be decided by the trier of fact at a commitment hearing under section 2966, subdivision (b). In

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[1] By letter to be separately filed with this Court, respondent will also requesting that the opinion be depublished. (Cal. Rules of Court, rule 8.1125.)

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

addition to establishing these factors, section 2962 explains, in subdivision (d), the process by which a prisoner is certified as an MDO.

In the published portion of its decision, the Court of Appeal concluded there was insufficient evidence demonstrating the certification process of section 2962, subdivision (d). (Opn. at 20.) In reaching this conclusion, the Court of Appeal decided the certification process is one of the factors set forth in section 2962 ("2962 factors") that must be decided by the trier of fact at a hearing under section 2966, subdivision (b).

The Court of Appeal's decision is inconsistent with this Court's decision in *People v. Cobb* (2010) 48 Cal.4th 243, and all other court decisions that have identified the 2962 factors to be considered by the trier of fact at a hearing under section 2966, subdivision (b). (*Id.* at pp. 251-252; *People v. Hannibal* (2006) 143 Cal.App.4th 1087, 1094; *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2; *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1610; *People v. Francis* (2002) 98 Cal.App.4th 873, 876-877; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1075-1076.) Additionally, the Court of Appeal's decision conflicts with the standard jury instruction to be given at trial in a hearing under section 2966, subdivision (b), CALCRIM No. 3456 ["Initial Commitment of Mentally Disordered Offender As Condition Of Parole"]. CALCRIM No. 3456 lists six factors that must be proved by the prosecution; and, nowhere on that list is compliance with the certification process of section 2962, subdivision (d).

Because the Court of Appeal's ruling results in an unwarranted departure from the law and because of the likely recurrence of issues related to initial MDO commitment proceedings, a grant of review by this Court is necessary to determine whether compliance with the certification process of section 2962, subdivision (d), is a factor to be shown to the trier of fact at a hearing under section 2966, subdivision (b), or, instead, is

simply a procedural matter to be decided by the trial court prior to the hearing.

STATEMENT OF THE CASE

Appellant was convicted of a battery in violation of section 243 and sentenced to state prison for two years on March 25, 2009. (Supp. CT 1; RT 8, 10, 44.) After he served his sentence, the Board of Parole Hearings ("BPH") determined that he met the criteria for treatment as an MDO under section 2962. (Supp. CT 1.) Following a subsequent evaluation and determination by a forensic psychologist that appellant met the criteria, the BPH, on April 5, 2010, sustained its requirement that appellant be committed as an MDO and subject to treatment as a condition of his parole. (Supp. CT 1; RT 2, 4.)

Appellant disagreed with the BPH that he met the criteria of an MDO and filed a petition pursuant to section 2966, subdivision (b), requesting a hearing before the Superior Court to determine whether he met the MDO criteria as of the date of his hearing before the BPH. (Supp. CT 1.)

In the Superior Court, appellant waived a jury trial. (CT 5.) Following a bench trial on July 21, 2010, the Superior Court found appellant met the criteria for treatment as an MDO and ordered that he remain committed with the Department of Mental Health for one year, from April 5, 2010, to April 5, 2011. (CT 11-13; RT 87-88.)

Appellant appealed the judgment. The Court of Appeal reversed, requiring a new hearing under section 2966, subdivision (b), within 60 days. (Opn. at 20.)

STATEMENT OF FACTS

A. Testimony of the Prosecution's Expert

Dr. Robert Suiter, a forensic psychologist whose expertise was the evaluation of MDOs, testified that, on March 16, 2010, he conducted an

MDO evaluation of appellant at Patton State Hospital at the request of the BPH. (RT 2, 4.) In conducting the evaluation, Dr. Suiter considered: appellant's psychiatric records, which included two previous MDO evaluations; appellant's prison central file; and, his interview of appellant. (RT 4.)

Dr. Suiter testified that, at the time of the evaluation, appellant had a severe mental disorder and met the diagnostic criteria for schizophrenia – paranoid type. Dr. Suiter also allowed for the possibility that appellant could meet the diagnosis for a schizoaffective disorder. (RT 5-7.)

Dr. Suiter testified the information in appellant's records suggested that appellant had committed a serious or violent crime. According to the probation officer's report, appellant had been convicted of battery with serious bodily injury and sentenced to prison. (RT 8, 10, 44.) Based on the probation officer's report and his interview of appellant, Dr. Suiter opined that appellant's mental disorder was either an aggravating factor or the cause of appellant's underlying offense. (RT 9-10, 45.)

Dr. Suiter testified that appellant's schizophrenia was not in remission because appellant had no insight into the fact that he had a severe mental disorder and remained convinced of his beliefs that there was an organized conspiracy against him. (RT 10-11.) Dr. Suiter stated there was no "meaningful likelihood" that appellant's schizophrenia was in remission during the three weeks between his evaluation of appellant and appellant's subsequent BPH hearing on April 5, 2010. (RT 11.) Dr. Suiter also opined that appellant represented a substantial danger of physical harm to others because of appellant's severe mental disorder. (RT 12.) Dr. Suiter further testified that by the time he interviewed appellant, appellant had received at least 90 days of treatment for his condition within the year. (RT 11-12.)

Dr. Suiter concluded that appellant had a severe mental disorder which met the criteria of section 2962. (RT 12-13.)

B. Testimony of Appellant

Appellant acknowledged that he currently suffered from a mental illness and that he was diagnosed with depression and schizophrenia when he was discharged from the military. (RT 57-58.) Appellant, however, disagreed with Dr. Suiter's assessment that he was delusional. (RT 53, 55-57.) Appellant also did not believe his mental illness contributed to his underlying offense; rather, he attributed the incident to a racial attack and threats by the victim. (RT 61-62.) Appellant testified he sought and received mental health therapy while he was incarcerated in prison. (RT 76.)

ARGUMENT

I. COMPLIANCE WITH THE CERTIFICATION PROCESS OF PENAL CODE SECTION 2962, SUBDIVISION (d), IS NOT A FACTOR THAT MUST BE PROVED TO THE TRIER OF FACT AT A HEARING HELD UNDER PENAL CODE SECTION 2966, SUBDIVISION (b)

The MDO certification process described in section 2962, subdivision (d), is not one of the 2962 factors that must be proved by the prosecution at a hearing under section 2966, subdivision (b). Nor has the certification process ever been treated as such a factor. The certification process set forth in section 2962, subdivision (d), is simply the procedure by which a prisoner is determined to be an MDO and thereby committed for treatment as a condition of his parole. Thus, compliance with the certification process is not a substantive question to be decided by the trier of fact at a hearing under section 2966, subdivision (b). At most, the issue – akin to proper venue or jurisdiction in a criminal case – is a procedural question that should be decided by the trial court prior to the hearing and not by the trier of fact at the hearing. Because questions related to the certification process are procedural issues to be decided by a trial court, the fairest

solution for any absence of evidence as to the certification process in a record on appeal is to remand the case to the trial court for the purpose of determining whether the prisoner had been evaluated and certified by enumerated mental health professionals pursuant to section 2962, subdivision (d).

Section 2966, subdivision (b), provides that a prisoner who disagrees with the BPH's determination that he meets the criteria of section 2962 may file in the superior court of the county in which he is incarcerated or is being treated a petition for a hearing on whether he, as of the date of the BPH certification, met the criteria of section 2962. (§ 2966, subd. (b).)

As this Court has explained, a prisoner may be certified as an MDO if the six following criteria, as set forth in section 2962, are met: (1) the prisoner has a severe mental disorder; (2) the prisoner used force or violence in committing his underlying offense; (3) the severe mental disorder was a cause or an aggravating factor in the commission of the offense; (4) the severe mental disorder is not in remission or capable of being kept in remission without treatment; (5) the prisoner was treated for the severe mental disorder for at least 90 days in the year before his scheduled release; and, (6) the prisoner poses a serious threat of physical harm to others because of his severe mental disorder. (*People v. Cobb*, *supra*, 48 Cal.4th at p. 251-252, citing *People v. Hannibal*, *supra*, 143 Cal.App.4th at p. 1094, *People v. Merfield*, *supra*, 147 Cal.App.4th at p. 1075, fn. 2, and *People v. Francis*, *supra*, 98 Cal.App.4th at pp. 876-877.) Other courts also have stated that an MDO certification rests on the same six criteria. (*People v. Hannibal*, *supra*, 143 Cal.App.4th at p. 1094; *People v. Merfield*, *supra*, 147 Cal.App.4th at p. 1075, fn. 2; *People v. Francis*, *supra*, 98 Cal.App.4th at pp. 876-877.) In two of its prior decisions, the Court of Appeal in the instant case similarly stated that an MDO commitment rests on the same six criteria. (*People v. Sheek*, *supra*,

122 Cal.App.4th at p. 1608; *People v. Clark*, *supra*, 82 Cal.App.4th at p. 1075.) Likewise, CALCRIM No. 3456 ["Initial Commitment of Mentally Disordered Offender As Condition of Parole"], the standard jury instruction to be given at a hearing under section 2966, subdivision (b), makes clear that the same six criteria are the factors to be proved to the trier of fact.

Thus, the six aforementioned criteria for determining MDO status, as set forth in section 2962, are the 2962 factors to be proved by the prosecution at a hearing under section 2966, subdivision (b). In deciding that the certification process of section 2962, subdivision (d), is also one of the factors to be proved to the trier of fact at a hearing under section 2966, subdivision (b), the Court of Appeal in the instant case reached a decision that is entirely inconsistent with the decisions of this Court and other intermediate appellate courts, as well as the clear directives of CALCRIM No. 3456.

The Court of Appeal reached its decision in the instant case based on a footnote in this Court's decision in *Lopez v. Superior Court* (2010) 50 Cal.4th 1055. (Opn. at 7-8, 17.) The footnote stated:

> Section 2962 requires, as a condition of parole, that the State Department of Mental Health provide mental health treatment to those prisoners that meet the following criteria: The prisoner must have (1) "a severe mental disorder," (2) "that is not in remission or cannot be kept in remission without treatment," (3) "[t]he severe mental disorder [must have been] one of the causes of or ... an aggravating factor in the commission of the crime for which the prisoner was sentenced to prison," (4) "[t]he prisoner [must have] been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release," *(5) there must be an evaluation by enumerated mental health professionals that the prisoner satisfies the first three factors, and that the prisoner's mental disorder "represents a substantial danger of physical*

harm to others," and (6) that the prisoner's conviction was for a crime enumerated in subdivision (e).

(*Lopez v. Superior Court*, *supra*, 50 Cal.4th at p. 1059, fn. 3; italics added.)

The Court of Appeal's reliance on that footnote in *Lopez v. Superior Court*, *supra*, 50 Cal.4th 1055, is misplaced. A closer look at this Court's opinion in *Lopez v. Superior Court* indicates the footnote's suggestion that an evaluation by enumerated mental health professionals is one of the section 2962 criteria for an initial MDO commitment, and hence factors to be proved to the trier of fact at a hearing under section 2966, subdivision (b), is dictum. In discussing the section 2962 criteria for establishing MDO status, this Court identified the same six criteria that it had identified in *People v. Cobb*, *supra*, 48 Cal.4th at pp. 251-252. (*Lopez v. Superior Court*, *supra*, 50 Cal.4th at pp. 1061-1062, citing *People v. Cobb*, *supra*, 48 Cal.4th at pp. 251-252, and *People v. Francis*, *supra*, 98 Cal.App.4th at p. 879.) Those six criteria are also the same six criteria that were previously identified by other intermediate appellate courts. (*People v. Hannibal*, *supra*, 143 Cal.App.4th at p. 1094; *People v. Merfield*, *supra*, 147 Cal.App.4th at p. 1075, fn. 2; *People v. Francis*, *supra*, 98 Cal.App.4th at pp. 876-877; see also *People v. Sheek*, *supra*, 122 Cal.App.4th at p. 1608; *People v. Clark*, *supra*, 82 Cal.App.4th at p. 1075.) None of those criteria included the certification process of section 2962, subdivision (d).

In reaching its decision in the instant case, the Court of Appeal also relied on two other decisions, *People v. White* (1995) 32 Cal.App.4th 638, and *People v. Miller* (1994) 25 Cal.App.4th 913. (Opn. at 14-16, 17.) The Court of Appeal's reliance on those two decisions is similarly misplaced. Neither *People v. White* nor *People v. Miller* held that the certification process of section 2962, subdivision (d), is one of the six criteria for determining MDO status or factors to be proved to the trier of fact at a hearing under section 2966, subdivision (b). In both cases, the courts

simply found that the evidence adduced at trial demonstrated the prisoners had been evaluated for certification by persons in charge of their treatment, pursuant to section 2962, subdivision (d). (*People v. White*, *supra*, 32 Cal.App.4th at pp. 641-642; *People v. Miller*, *supra*, 25 Cal.App.4th at p. 915-916, 919-920.)

Simply stated, no other court has concluded that compliance with the certification process of section 2962, subdivision (d), is a criterion for determining whether a prisoner is an MDO or a factor to be proved to the trier of fact at a hearing under section 2966, subdivision (b). Contrary to the Court of Appeal's conclusion in the instant case, compliance with the certification process is not a factor that must be shown to the trier of fact at a hearing under section 2966, subdivision (b). (See *People v. Cobb*, *supra*, 48 Cal.4th at pp. 251-252; *People v. Hannibal*, *supra*, 143 Cal.App.4th at p. 1094; *People v. Merfield*, 147 Cal.App.4th at p. 1075, fn. 2; *People v. Sheek*, 122 Cal.App.4th at p. 1610; *People v. Francis*, *supra*, 98 Cal.App.4th at pp. 876-877; *People v. Clark*, *supra*, 82 Cal.App.4th at pp. 1075-1076.) Nor has such compliance with the certification process ever been treated as such a factor for consideration at a hearing under section 2966, subdivision (b).

Because compliance with the certification process of section 2962, subdivision (d), is not a factor that must be shown to the trier of fact at a hearing under section 2966, subdivision (b), it is, at best, a procedural issue that should be decided by the trial court prior to the hearing. Similar to whether venue is proper in a criminal proceeding or whether a court has jurisdiction to consider and decide a criminal action, the issue of whether the BPH adhered to the requirements of section 2962, subdivision (d), in certifying a prisoner as an MDO is a question of procedure that should be determined by the trial court before a trier of fact even decides whether the prisoner meets the criteria of an MDO. (See § 2966, subd. (b).)

In *People v. Posey* (2004) 32 Cal.4th 193, this Court explained the reasons why venue should be considered a question of law for determination by the court prior to trial rather than a question of fact for the jury at the conclusion of trial. The first reason is that the determination of venue by the court prior to trial advances the purposes underlying venue provisions, especially the principal purpose of protecting a defendant from being required to stand trial in a distant and unduly burdensome locale. (*Id.* at p. 210.) The second reason is that the determination of venue by the court prior to trial is "consistent with 'contemporary treatment of other, analogous ... issues' of procedure, which are distinct from issues of substance." (*Id.* at p. 210.) The third reason is that the determination of venue by the court prior to trial avoids the untoward consequence of an "'unwarranted acquittal'" if the jury returns a verdict of not guilty predicated solely on lack of proper venue. (*Id.* at p. 211.)

In *People v. Betts* (2005) 34 Cal.4th 1039, this Court analogized the determination of territorial jurisdiction in a criminal proceeding to the issue of proper venue. (*Id.* at pp. 1048-1049.) This Court explained that territorial jurisdiction, like venue, is a procedural question that does not determine the guilt or innocence of the accused. (*Id.* at p. 1049.)

Similar to the issues of venue and territorial jurisdiction, whether a prisoner was evaluated and certified by the enumerated mental health professionals of section 2962, subdivision (d), is not an issue of substance but, rather, an issue of procedure that should be decided by the trial court before trial at a hearing under section 2966, subdivision (b). Compliance with the certification process of section 2962, subdivision (d), is not one of the six criteria that determine whether a prisoner is an MDO or factors that must be proved to the trier of fact at the hearing. Hence, any question of compliancy with the certification process has no bearing on whether the prisoner is mentally disordered or not. (See *People v. Betts*, *supra*, 34

Cal.4th at pp. 1048-1049; *People v. Posey*, *supra*, 32 Cal.4th at pp. 210-211.) At most, compliance with the certification process is a procedural issue that should be decided by the court before a trial is held to determine whether the prisoner meets the criteria of an MDO.

Moreover, the determination of whether a prisoner was certified in accordance with section 2962, subdivision (d), by the court prior to trial rather than by a trier of fact at the conclusion of trial protects the prisoner from even having to challenge his certification as an MDO. (See *People v. Posey*, *supra*, 32 Cal.4th at p. 210.) Such a determination also avoids "the untoward consequence" of a finding by the trier of fact that the prisoner did not meet the criteria of an MDO simply because the certification process of section 2962, subdivision (d), had not been adhered to. (See *People v. Posey*, *supra*, 32 Cal.4th at p. 211.)

Because the certification process of section 2962, subdivision (d), is a procedural issue akin to venue in a criminal case, a prisoner challenging his MDO certification at a hearing under section 2966, subdivision (b), should be required to raise a timely objection to the certification process before the hearing. As this Court held in *People v. Simon* (2001) 25 Cal.4th 1082, a defendant in a criminal proceeding forfeits a claim of improper venue if he fails to raise such an objection before the commencement of trial. (*Id.* at p. 1086.) This Court explained that "the interests of both the accused and the state support a requirement that any objection to the proposed location of a felony trial must be specifically raised prior to the commencement of trial, *before* the defendant is required to undergo the rigors and hardship of standing trial in an assertedly improper locale, and *before* the state incurs the time and expense of conducting a trial in that county." (*Id.* at pp. 1086-1087; italics in original.) Similarly, a prisoner challenging his MDO certification should be required to raise any issue concerning the

certification process before a hearing is held under section 2966, subdivision (b), to determine whether he meets the criteria of an MDO.

Furthermore, because questions related to the certification process of section 2962, subdivision (d), are procedural in nature, the fairest solution for any absence of evidence as to the certification process in a record on appeal is to remand the case to the trial court – rather than requiring an entirely new trial – for the purpose of holding further proceedings to determine whether the prisoner had been evaluated and certified by enumerated mental health professionals as required by section 2962, subdivision (d). (See § 1260.)

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this petition for review be granted.

Dated: February 2, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 3,617 words.

Dated: February 1, 2012

KAMALA D. HARRIS
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Attachment

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APELLATE DISTRICT

DIVISION TWO

FILED
DEC 23 2011
COURT OF APPEAL FOURTH DISTRICT

KELVIN HARRISON,

Plaintiff and Appellant,

v.

BOARD OF PAROLE HEARINGS,

Defendant and Respondent;

THE PEOPLE,

Real Party in Interest.

E051465

(Super.Ct.No. FELSS1001624)

OPINION

APPEAL from the Superior Court of San Bernardino County. Katrina West, Judge. Reversed with directions.

Ronald R. Boyer, under appointment by the Court of Appeal, for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts III.B, III.C.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lilia E. Garcia and Quisteen S. Shum, Deputy Attorneys General, for Real Party in Interest.

The Board of Parole Hearings (BPH) determined that appellant Kelvin Harrison was a mentally disordered offender (MDO) and therefore subject to treatment as a condition of parole. (Pen. Code, § 2962.) Appellant filed a petition in superior court challenging this determination. (Pen. Code, § 2966, subd. (b).) After a hearing lasting a total of about two hours, at which one witness (an expert) testified for the People, one witness (appellant himself) testified for appellant, and neither side introduced any exhibits, the trial court found that appellant was indeed an MDO.

In this appeal, appellant contends:

1. There was insufficient evidence that:

a. Appellant had been imprisoned for an qualifying offense. (Pen. Code, § 2962, subd. (e).)

b. Appellant had been in treatment for at least 90 days within the year prior to his parole or release date. (Pen. Code, § 2962, subd. (c).)

c. Appellant had received the required evaluation and certification. (Pen. Code, § 2962, subd. (d).)

2. The trial court did not make all of the necessary factual findings.

3. The trial court erroneously ordered appellant committed for a year, rather than ordering that he be subject to treatment as a condition of parole.

In the unpublished portion of this opinion, we will hold that there was sufficient evidence that appellant had been imprisoned for a qualifying offense and that he had been in treatment for 90 days within the year prior to his parole or release date. This evidence included the testimony of the expert, even though that testimony was based on hearsay, because appellant did not object. In the published portion of this opinion, however, we will hold that even when the expert's testimony is considered, there was insufficient evidence that appellant had been evaluated by two qualified evaluators, that the evaluators had made the necessary findings, and that the chief psychiatrist of the State Department of Mental Health had certified appellant as an MDO, as required.

Accordingly, we must reverse. As we will discuss, double jeopardy does not bar a retrial on remand. There is no reason to suppose that, in any such retrial, the trial court will fail to make all of the necessary factual findings or will fail to order the appropriate disposition. Thus, we need not address appellant's other contentions.

I

FACTUAL BACKGROUND

A. *Testimony of the People's Expert.*

The parties stipulated that Dr. Robert Suiter was qualified as an expert in psychology.

Dr. Suiter testified that on March 16, 2010, he conducted an MDO evaluation of appellant. He considered appellant's probation report, psychiatric records, and prison

central file. Those records included two previous MDO evaluations of appellant. He also interviewed appellant.

According to the probation report, appellant had been convicted of battery with serious bodily injury and sentenced to prison. When the crime was committed, in November 2008, both appellant and the victim were homeless. Appellant told the probation officer that he found a bag of grapes where he normally slept, and he believed that the victim had left them for him. According to appellant, the grapes were filled with blood, which meant that the victim intended to harm him. Appellant claimed that the victim attacked him with a pipe. Appellant took the pipe away from the victim and hit him with it. However, one day before the crime, appellant had told police that he was going to kill the victim.

Dr. Suiter diagnosed appellant as suffering from either paranoid schizophrenia or schizoaffective disorder. Appellant had the delusional belief that San Luis Obispo County officials were out to get him and his family. In Dr. Suiter's opinion, appellant's mental disorder either caused or was an aggravating factor in appellant's commission of the underlying offense.

Also in Dr. Suiter's opinion, appellant's mental disorder was not in remission. Appellant remained convinced that San Luis Obispo County officials were conspiring against him. Dr. Suiter concluded that appellant, due to his mental disorder, presented a substantial danger of physical harm to others.

Finally, based on appellant's hospital records, Dr. Suiter testified that appellant had been in continuous treatment from April 2009 through at least March 16, 2010.

B. *Testimony of Appellant.*

Appellant conceded that he "currently suffer[ed] from a mental illness . . . ." He also admitted that he left the military because he "came down with . . . schizophrenia." He testified, however, that he was not delusional; rather, San Luis Obispo County officials really had been conspiring against him, since 1997 or 1998. Appellant did not believe that his mental illness contributed to the underlying offense. Rather, he attributed that incident to "a racial attack and death threats by the [victim] . . . ."

Appellant's testimony, including the meandering and unfocused style of his responses, was typical (at least to a layperson) of a paranoid schizophrenic.

II

PROCEDURAL BACKGROUND

In April 2010, appellant filed a petition for a hearing with respect to whether he was an MDO. In the petition, he alleged that he had been due for release on February 28, 2010, but on April 5, 2010, the BPH had determined that he was an MDO and had sustained the requirement that he be subject to treatment as a condition of parole.

Appellant waived a jury trial. In July 2010, after a bench trial, the trial court entered the following order:

"Pursuant to Penal Code Section[s] 2962 and 2966(c) [*sic*; should be subdivision (b)], the court finds that the petitioner does meet the criteria of a mentally disordered offender as follows:

"Petitioner has a severe mental disorder as defined by Penal Code Section 2962(a); . . . Petitioner is not in remission; . . . Petitioner represents a substantial danger o[f] physical harm to others. [¶] . . . [¶]

"The Court orders Respondent [*sic*] committed to the State Department of Mental Health for an additional year . . . ."

III

THE SUFFICIENCY OF THE EVIDENCE

A. *Statutory Background.*

"'The Mentally Disordered Offender Act (MDO Act), enacted in 1985, requires that offenders who have been convicted of violent crimes related to their mental disorders, and who continue to pose a danger to society, receive mental health treatment . . . until their mental disorder can be kept in remission. [Citation.]' [Citation.] . . .

"The MDO Act provides for treatment of certified MDO's at three stages of commitment: as a condition of parole, in conjunction with the extension of parole, and following release from parole. [Penal Code s]ection 2962 governs the first of the three commitment phases, setting forth the six criteria necessary to establish MDO status; these criteria must be present at the time of the State Department of Mental Health's and

Department of Correction and Rehabilitation's determination that an offender, as a condition of parole, must be treated by the State Department of Mental Health. . . .

"Challenges to the first phase of commitment are governed by [Penal Code] sections 2964 and 2966, subdivisions (a) and (b). [Penal Code s]ection 2964 provides in pertinent part that '[a]ny prisoner who is to be required to accept treatment pursuant to [s]ection 2962 shall be informed in writing of his or her right to request a hearing pursuant to [s]ection 2966.' [Penal Code s]ection 2966, subdivisions (a) and (b), set forth the procedure an MDO may utilize to challenge the propriety of his or her initial commitment. Should an individual disagree with an MDO certification decision, he or she may request a hearing before the BPH, and may request that independent mental health professionals evaluate the offender. [Citation.] If '[a] prisoner . . . disagrees with the determination of the [BPH] that he or she meets the criteria of [s]ection 2962, [he or she] may file . . . a petition for a hearing on whether he or she, as of the date of the [BPH] hearing, met the criteria of [s]ection 2962.' [Citation.]" (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061-1063.)

In such a challenge to the first phase of commitment, the People have the burden of proving beyond a reasonable doubt (Pen. Code, § 2966, subd. (b)) six criteria: (1) the prisoner has been sentenced to prison for a qualifying offense; (2) "[t]he prisoner has a severe mental disorder"; (3) the disorder "is not in remission or cannot be kept in remission without treatment"; (4) the disorder "was one of the causes of or was an aggravating factor in the commission of [the] crime"; (5) "[t]he prisoner has been in

treatment for the . . . disorder for 90 days or more within the year prior to the prisoner's parole or release"; and (6) specified mental health professionals have evaluated the prisoner and have found that criteria (2)-(4) are satisfied, and the chief psychiatrist of the Department of Corrections and Rehabilitation has certified that criteria (2)-(5) have been satisfied and also that "by reason of his or her . . . disorder the prisoner represents a substantial danger of physical harm to others." (Pen. Code, § 2962; see also *Lopez v. Superior Court*, *supra*, 50 Cal.4th at p. 1059, fn. 3.)

Appellant concedes that there was sufficient evidence of three of these criteria: the requisite disorder, the requisite nonremission, and the requisite causation. He contends, however, that there was insufficient evidence of the remaining three criteria: the requisite underlying offense, the requisite treatment, and the requisite evaluation and certification.

"We review the court's finding on an MDO criterion for substantial evidence, drawing all reasonable inferences, and resolving all conflicts, in favor of the judgment. [Citations.]" (*People v. Martin* (2005) 127 Cal.App.4th 970, 975.) Appellant argues that the trial court failed to make all of the necessary findings; he further argues that it entered an inappropriate judgment, by ordering him committed for one year, instead of ordering that he be subject to treatment as a condition of parole. Thus, according to appellant, the trial court is not entitled to the benefit of a presumption that it made all of the implied findings that it would normally have to make in an initial commitment proceeding. We need not reach this issue, as ultimately we conclude that, even under the ordinary standard

of review, at least one of the necessary findings was not supported by substantial evidence.

B. *Evidence of a Qualifying Offense.*

The underlying offenses that can qualify a prisoner as an MDO include any crime "in which the prisoner . . . caused serious bodily injury . . . ." (Pen. Code, § 2962, subd. (e)(2)(P).) Dr. Suiter testified that, according to the probation report, appellant had been convicted of battery with serious bodily injury.

Defendant argues that this was hearsay. However, "[u]nder a[] long-standing rule, 'incompetent hearsay admitted without objection is sufficient to sustain a finding or judgment.'" (*Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1268, fn. omitted.)

Defendant therefore also argues that his counsel was not required to object. As he notes, "California law permits . . . qualified expert[s] . . . to 'rely upon and testify to the sources on which they base their opinions [citations], including hearsay of a type reasonably relied upon by professionals in the field. [Citations.]' [Citation.]" (*People v. Nazary* (2010) 191 Cal.App.4th 727, 749.) However, as defendant also notes, "'[a]lthough experts may properly rely on hearsay in forming their opinions, they may not relate the out-of-court statements of another as independent proof of the fact.' [Citation.]" (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743.)

Basically, appellant reasons that the hearsay was admissible as the basis for Dr. Suiter's opinions, albeit not for its truth. Thus, his trial counsel had no reason to object, and the failure to object should not be deemed a forfeiture.

Certainly if this had been a jury trial, trial counsel could not have just sat on his hands. "[P]rejudice may arise if, '"under the guise of reasons,'" the expert's detailed explanation "'[brings] before the jury incompetent hearsay evidence.'" [Citation.]' [Citation.] ' . . . Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]' [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 403.) Thus, either a hearsay objection or an objection under Evidence Code section 352 would have been appropriate. Finally, in a jury trial, even assuming the hearsay was admissible as a basis for the expert's opinion and was not prejudicial, trial counsel still would have had to request a limiting instruction. (Evid. Code, § 355.) In the absence of such a request, an appellant could not complain that the jury was allowed to rely on otherwise inadmissible hearsay.

Appellant argues, however, that his trial counsel was not required to object or to request a limiting instruction because this was a bench trial. He cites *People v. Martin*, *supra*, 127 Cal.App.4th 970 [Second Dist., Div. Six]. *Martin*, like this case, was an MDO proceeding. There, three doctors opined, based on the probation report, that the underlying offense was a crime of "force or violence" (Pen. Code, § 2962, subd. (e)(2)(P)) so as to qualify the appellant for MDO treatment. (*Martin*, at p. 976.) The appellate court held that these experts' opinion "opinions were substantial evidence that

appellant's . . . conviction was a qualifying offense. [Citation.]" (*Id.* at p. 977.)[1] The appellant "acknowledge[d] that the experts were allowed to base their opinions on hearsay matter such as the probation report, but . . . argue[d] that they should not have been allowed to testify to the details of the report." (*Martin*, at p. 977.) The appellate court responded: "[A]ppellant was tried before the court. A judge is presumed to know and follow the law. [Citation.] We must assume that the court in this case considered the testimony about the probation report's contents solely for the proper purpose of assessing the experts' credibility, and not as independent proof of the facts contained therein." (*Ibid.*)

The presumption that a judge knows and follows the law applies solely on appeal. It is not a presumption on which counsel can safely rely during the course of trial. One of the reasons why we require a contemporaneous objection "'is to encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors and provide the defendant with a fair trial.' [Citation.]" (*People v. Carrillo* (2004) 119

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1 *Martin* is actually somewhat problematic for appellant. If we were to apply it here, it would mean that Dr. Suiter's opinion *by itself* constituted substantial evidence that the underlying offense involved serious bodily injury; the fact that he relied on hearsay in forming that opinion would be irrelevant. (See also *People v. Valdez* (2001) 89 Cal.App.4th 1013, 1016-1017 [Second Dist., Div. Six]; *People v. Miller* (1994) 25 Cal.App.4th 913, 917-919 [Second Dist., Div. Six].) We question, however, whether the fact that a crime involves serious bodily injury, as in this case, or force or violence, as in *Martin*, is properly a matter for expert opinion. (See Evid. Code, § 801, subd. (a) [expert's opinion must be "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact"].)

Cal.App.4th 94, 101.) Counsel cannot just sit back and "presume" the court will do the right thing.

In this case, trial counsel was required to raise the hearsay issue for one additional reason: It was not at all clear that the hearsay was *inadmissible* hearsay. For example, hearsay statements in a probation report may be admissible under the business records exception and/or the official records exception to the hearsay rule. (Evid. Code, §§ 1270-1272, 1280.) Here, Dr. Suiter testified to appellant's statements to the probation officer about the underlying offense. Appellant's own statements could have been admissible under the party admission exception (Evid. Code, § 1220); the probation officer's account of those statements could have been admissible under the official records exception. (*People v. Monreal* (1997) 52 Cal.App.4th 670, 676-679, disapproved on other grounds in *People v. Trujillo* (2006) 40 Cal.4th 165, 178-179, 181, fn. 3; cf. *People v. Campos* (1995) 32 Cal.App.4th 304, 309-310 [opinions in probation report were not records of act, condition, or event, and hence not admissible under business records or official records exception].)

A statement in the probation report that appellant was convicted of battery with serious bodily injury would likewise be admissible under the official records exception. Admittedly, the People would have had to lay a proper foundation. Appellant cannot argue, however, that they failed to do so, precisely because his trial counsel never objected. If he had objected, the trial court would have had an opportunity to determine whether the necessary foundation had been laid; if the trial court ruled that it had not, the

People would have had an opportunity to lay an additional foundation. Thus, all of the usual policy reasons militate in favor of the conclusion that, by failing to object, trial counsel forfeited appellant's present contention.

C. *Evidence of Treatment.*

As already noted, the People had to prove that "[t]he prisoner ha[d] been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release." (Pen. Code, § 2692, subd. (c).)

Based on appellant's medical records, Dr. Suiter testified that appellant had been in continuous treatment from April 2009 through at least March 16, 2010. As we held in part III.B, *ante*, because appellant's trial counsel did not object to this testimony, it constitutes substantial evidence.

Appellant argues that there was no evidence of his parole or release date; hence, there was no evidence that this treatment occurred within the year prior to his parole or release. In his own petition, however, appellant stated that he was due for release on February 28, 2010. The trial court could properly treat this as an admission. Indeed, under the usual rules of civil pleading, it was a binding and conclusive "judicial admission." (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.)

D. *Evidence of the Requisite Evaluations.*

As noted, the People had to prove that appellant had been evaluated by certain mental health professionals.

Specifically, under Penal Code section 2962, before the BPH can require treatment as a condition of parole, one of the criteria that must be met is that "the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others." (Pen. Code, § 2962, subd. (d)(1).)

Alternatively, if the two evaluators disagree with each other, "the Board of Prison Terms shall order a further examination by two independent professionals . . . ." (Pen. Code, § 2962, subd. (d)(2).) "[A]t least one of the independent professionals [must] concur[] with the chief psychiatrist's certification . . . ." (*Ibid.*)

Under Penal Code section 2966, the People have the burden of proving that all of the criteria listed in Penal Code section 2962 have been satisfied. (Pen. Code, § 2966, subd. (b).)

In *People v. Miller*, *supra*, 25 Cal.App.4th 913, the reports of three doctors were admitted into evidence — Dr. Zil, Dr. Kincaid, and Dr. Gandhi. Dr. Zil was a chief

psychiatrist of the Department of Corrections. Dr. Kincaid was a psychologist for the Department of Mental Health. Dr. Gandhi was a psychiatrist at the California Medical Facility, where the appellant was housed. (*Id.* at p. 916.) The court held that this was sufficient evidence that the requisite evaluations had been performed. (*Id.* at pp. 919-920.) For example, it was inferable that Dr. Gandhi was the person in charge of the appellant's treatment. (*Id.* at p. 920.)

Similarly, in *People v. White* (1995) 32 Cal.App.4th 638, the reports of Dr. Kinkaid, a psychologist with the Department of Mental Health,[2] and Doctor Pickens, a psychologist at the California Medical Facility, were admitted into evidence. (*Id.* at p. 640.) In addition, Dr. Zil, the chief psychiatrist, had certified that the appellant met all of the required criteria. (*Id.* at p. 641.) None of the witnesses were able to identify the person in charge of the appellant's treatment; there was evidence, however, that Dr. Zil was "in charge of all the other doctors" and "the person ultimately responsible for the treatment of all patients." (*Id.* at p. 640.)

The appellate court held that this was sufficient evidence that the appellant had been evaluated by "the person in charge of treating" him. (*People v. White*, *supra*, 32 Cal.App.4th at p. 641.) " . . . Doctor Zil, the person in charge of treatment for all prisoners, was the person in charge of treating [the appellant]. . . . [T]here was substantial evidence that Doctor Pickens was in charge of treating and evaluating White under

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[2] Possibly the same as the Dr. "Kincaid" in *Miller*.

Doctor Zil's supervision." (*Id.* at pp. 641-642.) The court went on to suggest, however, that "[t]he Department of Mental Health may wish to revise its forms or procedures in order to make it easier for the trier of fact at a 2966 hearing to determine that the evaluations come within the requirements of Penal Code section 2962." (*Id.* at p. 642, fn. 1.)

Here, Dr. Suiter testified that appellant's records included two previous MDO evaluations. Those evaluations themselves, however, were never offered into evidence. Thus, we have no way of knowing whether appellant was certified by the chief psychiatrist. We have no way of knowing whether appellant was evaluated by "the person in charge of [his] treatment." Likewise, we have no way of knowing whether he was evaluated by "a practicing psychiatrist or psychologist from the State Department of Mental Health." And, most important, we have no way of knowing whether the evaluators concluded that appellant did meet the requisite criteria.

At oral argument, the People argued that the provisions of Penal Code section 2962, subdivision (d) regarding the evaluation and certification are merely procedural prerequisites, not substantive elements that the People must prove. However, it is impossible to square this view with either the statutory law or the case law.

Penal Code section 2962 provides that "a prisoner who meets the following criteria shall be required to be treated" as a condition of parole. Subdivisions (a) through (e) then set forth those criteria. (Subdivision (f) is a definition to be used in applying the other

criteria.) We see no way to parse the statute such that "the following criteria" embraces subdivisions (a), (b), (c) and (e), but not subdivision (d).

Under Penal Code section 2966, subdivision (a), the hearing before the BPH is "for the purpose of proving that the prisoner meets the criteria in Section 2962." Then, if the prisoner seeks review in the trial court, the issue is "whether he or she . . . met the criteria of Section 2962." (Pen. Code, § 2966, subd. (b).) Once again, we see no way to read this as excluding the evaluation and certification criterion set forth in Penal Code section 2962, subdivision (d). Moreover, if it *did* exclude this criterion, the fact that an appropriate evaluation had *not* been performed would appear to be irrelevant; it would not even be an affirmative defense. In a worst-case scenario, a prisoner could be "railroaded" without any evaluation whatsoever.

Finally, we do not write on a blank slate. Both *People v. Lopez* and *People v. Miller*, *supra*, construed Penal Code section 2966 as requiring the People to prove at trial that the criterion in Penal Code section 2962, subdivision (d) was met. The People have asked us not to follow these cases, but we find them persuasive, and there is no contrary authority on point.

The People argue that appellant forfeited this contention by failing to object to the qualifications of the evaluators. This misses the point. The People have the burden of proving all of the MDO criteria beyond a reasonable doubt, specifically including the evaluation and certification criterion. (Pen. Code, § 2966, subd. (b); *People v. White*, *supra*, 32 Cal.App.4th at pp. 641-642; *People v. Miller*, *supra*, 25 Cal.App.4th at pp. 919-

920.) An appellant is not required to object at trial in order to preserve a contention of insufficiency of the evidence. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217.)

Next, the People note that Dr. Suiter also testified that he was an "independent evaluator," and thus, *anytime* he is called upon to perform an MDO evaluation, the prisoner "has had at least two previous MDO evaluations, where it was determined that he met all six criteria." He added, "I know those facts, of anyone that I'm evaluating for a certification evaluation, [even] if I haven't seen a single document." The People argue that it was reasonably inferable that the prior evaluators did conclude that appellant met the necessary criteria. Dr. Suiter, however, appears to have been misstating the law. A potential MDO must be examined by an independent professional only if (1) the first two evaluators *disagree* as to one or more of the MDO criteria (Pen. Code, § 2962, subd. (d)(2)), or (2) the prisoner requests an independent evaluation (Pen. Code, § 2966, subd. (a)). Thus, Dr. Suiter may have meant that, when he is called in, there have been at least two previous MDO evaluations, in at least *one* of which it was determined that the prisoner met the MDO criteria.[3]

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[3] Appellant argues that independent professionals (like Dr. Suiter) may be called in even if *neither* of the two initial evaluators finds that the MDO criteria have been met. Penal Code section 2962, subdivision (d)(2) is, at best, ambiguous on this point, and we are skeptical that this is what the Legislature actually intended. Fortunately, however, we need not decide this question.

Dr. Suiter also misstated the law when he claimed that the prior evaluators would have determined that "all six criteria" were met. The evaluators are only required to opine regarding three of the six criteria: "[T]hat (A) the prisoner has a severe mental disorder, (B) that the disorder is not in remission or cannot be kept in remission without treatment, [and] (C) that the severe mental disorder was a cause of, or aggravated, the prisoner's criminal behavior . . . ." (Pen. Code, § 2962, subd. (d)(2).) For example, the first two evaluators obviously cannot address the sixth criterion, which is whether the prisoner has *already* been evaluated by two evaluators.

This legal nitpicking points to a larger problem. Dr. Suiter was testifying based on a legal conclusion. Such testimony, however, is not substantial evidence. (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841.) Moreover, he was not testifying about what actually occurred in appellant's case; he was testifying based on the speculative assumption that the legal requirements for an MDO proceeding (as he understood them) had, in fact, been complied with. But this was sheer bootstrapping. The fact that those requirements had been complied with was the very point that the People had to prove and the trial court had to determine. "[A]n expert's opinion testimony does not achieve the dignity of substantial evidence where the expert bases his or her conclusion on speculative, remote or conjectural factors. [Citation.]" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Finally, even assuming Dr. Suiter's testimony *was* substantial evidence that both of the prior evaluators found that the relevant MDO criteria had been met, there *still* was no

evidence as to the *identity* of the prior evaluators. As appellant points out, there was not even any evidence that they evaluated him in connection with his most recent imprisonment, rather than at some earlier time.

In sum, then, there was insufficient evidence to support the evaluation and certification criterion.

IV

DISPOSITION

The order appealed from must be reversed. Because the MDO scheme is civil, double jeopardy does not apply (*People v. Francis* (2002) 98 Cal.App.4th 873, 877); thus, the matter may be retried. (*People v. Dodd* (2005) 133 Cal.App.4th 1564, 1571, fn. 3.) Any new hearing on the petition must be held within 60 days after the issuance of our remittitur, unless appellant or his counsel waives time or good cause is shown. (See Pen. Code, § 2966, subd. (b).) The determination that appellant is subject to treatment as a condition of parole will remain in effect "until the completion of the court proceedings." (*Ibid.*)

In light of our disposition, appellant's additional contentions are moot. (*People v. Dodd*, *supra*, 133 Cal.App.4th at p. 1571, fn. 3.)

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

CODRINGTON
J.

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Harrison**
No.: **S** _____

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 1, 2012, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Ron Boyer
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Two copies

The Honorable Katrina West, Judge
c/o San Bernardino Superior Court Clerk
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San Bernardino, CA 92415

The Honorable Michael A. Ramos
District Attorney
San Bernardino District Attorney's Office
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California Court of Appeal
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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on February 1, 2012, to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 1, 2012, at San Diego, California.

Carole McGraw
Declarant

Carole McGraw
Signature

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