In the Supreme Court of the State of California

KELVIN HARRISON,

Plaintiff and Appellant,

v.

BOARD OF PAROLE HEARINGS,

Defendant and Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Case No. S199830

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

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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?

INTRODUCTION

Pursuant to Penal Code section 2966, subdivision (a), a prisoner who has been certified as a mentally disordered offender ("MDO") may request a hearing before the Board of Parole Hearings ("BPH")[1] for the purpose of proving that the prisoner meets the criteria of Penal Code section 2962.[2] (§ 2962, subd. (a).) Under subdivision (b) of section 2966, a prisoner who disagrees with the BPH's determination that he or she meets the criteria of section 2962 may petition for a superior court hearing on whether he or she, as of the date of the BPH hearing, met the criteria of section 2962. (§ 2962, subd. (b).)

Under section 2962, a prisoner who meets the following criteria shall be treated by the State Department of Mental Health ("SDMH") as a condition of his or her parole: (1) the prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment; (2) the severe mental disorder caused or was an aggravating factor in the commission of the crime for which the prisoner was sentenced to prison;

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[1] At the time of appellant's hearing under Penal Code section 2966, subdivision (b), both Penal Code sections 2962 and 2966 referred to the Board of Parole Hearings as the Board of Prison Terms. Penal Code section 2962 was recently amended to reflect the agency's current title of the Board of Parole Hearings. (Stats. 2011, ch. 285, § 20, pp. 3023-3025.) To avoid confusion, respondent refers to the agency herein as the Board of Parole Hearings.

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

(3) 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 or release; (4) the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the SDMH evaluated the prisoner at a facility of the Department of Corrections and Rehabilitation ("DCR"),[3] and a chief psychiatrist of the DCR certified to the BPH that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission without treatment, that the severe mental disorder caused 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 the prisoner represents a substantial danger of physical harm to others because of his or her severe mental disorder; and, (5) the prisoner was sentenced to state prison for an enumerated crime. (§ 2962, subds. (a)-(e).)

As sections 2962 and 2966 have been interpreted by this Court and several intermediate appellate courts, a prisoner is an MDO when he or she meets the following six criteria: (1) the prisoner has a severe mental disorder; (2) the prisoner was convicted of an offense enumerated in section 2962, subdivision (e)(2); (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

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[3] At the time of appellant's hearing under section 2966, subdivision (b), section 2962 referred to the Department of Corrections and Rehabilitation as the Department of Corrections. Section 2962 was recently amended to reflect the agency's current title of the Department of Corrections and Rehabilitation. (Stats. 2011, ch. 285, § 20, pp. 3023-3025.) To avoid confusion, respondent refers to the agency herein as the Department of Corrections and Rehabilitation.

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.

In the instant case, appellant disagreed with the BPH's determination that he was an MDO and petitioned for a hearing under section 2966, subdivision (b). Following the hearing, the superior court found appellant met the criteria of an MDO and ordered that he be committed to the SDMH for one year. (Opinion at pp. 5-6.) The Court of Appeal reversed the superior court order on the ground that there was insufficient evidence to show appellant had been evaluated and certified by specified mental health professionals pursuant to section 2962, subdivision (d).[4] Specifically, the Court of Appeal found there was insufficient evidence that appellant had been evaluated by two qualified evaluators, the evaluators had made the

[4] Section 2962, subdivision (d), which sets forth the MDO certification process, consists of three paragraphs. Paragraph (1) specifies a prisoner must be evaluated by two specified mental health professionals and certified to the BPH as meeting the prescribed criteria by a chief psychiatrist of the DCR. Paragraph (2) specifies the BPH shall order a further examination by two independent professionals in the event that the two professionals who performed the evaluation pursuant to paragraph (1) do not concur on three of the prescribed criteria. Paragraph (3) specifies subdivision (d) applies to the prisoner if at least one of the independent professionals who evaluated the prisoner pursuant to paragraph (2) concurs with the chief psychiatrist's certification of the prescribed criteria described in paragraph (2). Unless otherwise indicated, respondent generally refers to the subdivision (i.e., "section 2962, subdivision (d)") in discussing the MDO certification process.

necessary findings, and a chief psychiatrist of the DCR[5] had certified appellant as an MDO. (Opinion at pp. 3, 13-19.) In reaching that conclusion, the Court of Appeal created a new and seventh MDO criterion – "the evaluation and certification criterion" – that must be established at a hearing under section 2966, subdivision (b). (Opinion at p. 19.)

While the law requires that a prisoner be evaluated and certified by specified mental health professionals pursuant to the certification process set forth in section 2962, subdivision (d), the evaluations and certification are merely procedural prerequisites for an MDO commitment. They are not, and have never been, one of the six prescribed substantive criteria for an MDO determination. Hence, compliance with the certification process of section 2962, subdivision (d), is neither a factor nor an element that the district attorney must prove to the trier of fact at a hearing under section 2966, subdivision (b). The language of sections 2962 and 2966, legislative history of the MDO Act (§§ 2960 et seq.), decisional case law, and public policy considerations, all support the conclusion that the district attorney is not required to prove compliance with the certification process of section 2962, subdivision (d), at a hearing under section 2966, subdivision (b).

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 BPH determined 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,

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[5] The Court of Appeal's Opinion referred to the chief psychiatrist of the SDMH. (Opinion at 3.) However, section 2962, subdivision (d), refers to the chief psychiatrist of the DCR. (§ 2962, subd. (d)(1).)

sustained its requirement that appellant be committed as an MDO and subjected 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 SDMH 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. (Opinion at p. 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 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 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 OR ELEMENT THAT MUST BE PROVED TO THE TRIER OF FACT AT A MENTALLY DISORDERED OFFENDER HEARING UNDER PENAL CODE SECTION 2966, SUBDIVISION (b)

In the instant case, the Court of Appeal reversed the superior court's order that appellant be committed to the SDMH as an MDO on the ground that there was insufficient evidence to show appellant had been evaluated by two qualified evaluators, that the evaluators had made the necessary findings, and that the chief psychiatrist of the DCR had certified appellant as an MDO. (Opinion at pp. 3, 13-14.) In reaching that decision, the Court of Appeal decided the district attorney was required to prove every criterion listed in section 2962 – including the certification process of subdivision (d) – at appellant's hearing under section 2966, subdivision (b).

Respondent respectfully submits the Court of Appeal incorrectly held the district attorney was required to prove compliance with the certification process of section 2962, subdivision (d), at appellant's hearing under section 2966, subdivision (b). While the certification process is listed in section 2962 as one of the "criteria" for an MDO commitment, the certification process itself is simply a procedural prerequisite for an MDO commitment. It is not one of the prescribed criteria – substantive requirements – for an MDO determination and certification. Hence, it is not a factor or element of the MDO determination that is being challenged at a hearing under section 2966, subdivision (b). The statutory language of sections 2962 and 2966, legislative history of the MDO Act, decisional case law interpreting sections 2962 and 2966, and public policy considerations all support the conclusion that the certification process of section 2962,

subdivision (d), is not one of the prescribed substantive criteria of an MDO determination that must be proved to the trier of fact at a hearing under section 2966, subdivision (b).

A. Overview of the Mentally Disordered Offender Act

In 1985, the Legislature enacted the MDO Act by passing Senate Bill 1296 (1985-1986 Reg. Sess.).[6] (Stats. 1985, ch. 1419, § 1, pp. 5011-5018; *People v. Allen* (2007) 42 Cal.4th 91, 97, fn. 3.) The Legislature established the MDO Act, vis-à-vis section 2960, in response to a dilemma caused by the determinate sentencing system. Finding the determinate sentencing system would inevitably lead to the release of mentally ill prisoners who constituted a significant threat to public safety, the Legislature created the MDO Act to place these mentally ill prisoners in the mental health system for appropriate treatment. (*People v. Allen*, *supra*, 42 Cal.4th at p. 97, citing Dept. of Mental Health, Enrolled Bill Rep., Sen. Bill No. 1296, Sept. 27, 1985, p. 4.)

The MDO Act "'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.'" (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061, quoting *In re Qawi* (2004) 32 Cal.4th 1, 9.) The Act is neither penal nor punitive in nature. Instead, it is designed to protect the public from persons with severe mental disorders and to provide mental health treatment to these persons until the severe mental disorders which caused or were an aggravating factor in the person's criminal behavior are

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[6] The Legislature also passed Senate Bill 1054 (1985-1986 Reg. Sess.), which added section 2970 regarding the continued involuntary treatment of an MDO. (Stats. 1985, ch. 1418, § 1, pp. 5009-5011.) Because the instant case involves the initial certification of an MDO, respondent addresses only Senate Bill 1296 herein.

in remission and can be kept in remission. (*Lopez v. Superior Court*, *supra*, 50 Cal.4th at p. 1061; *In re Qawi*, *supra*, 32 Cal.4th at p. 9.) Like other involuntary civil commitment schemes, the MDO Act "represents a delicate balancing of countervailing public and individual interests." (*People v. Allen*, *supra*, 42 Cal.4th at p. 98.)

Section 2960 sets forth the findings made by the Legislature as to the disposition of mentally disordered prisoners at the time of their parole or upon termination of their parole. The Legislature's findings are as follows: (1) there are prisoners who have severe mental disorders which are treatable and either caused or were aggravating factors in the commission of the crimes for which they were incarcerated; (2) if the severe mental disorders of the prisoners are not in remission or cannot be kept in remission at the time of their parole or upon termination of parole, the prisoners are a danger to society; and, (3) to protect the public from those persons, it is necessary to provide mental health treatment until the severe mental disorders which caused or were aggravating factors in the commission of their criminal behavior is in remission or can be kept in remission. Section 2960 also specifies that the DCR must evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence and that each prisoner with a severe mental disorder should be provided with an appropriate level of mental health treatment while in prison and when returned to the community.

In 1986, the Legislature renumbered the provisions of the MDO Act set forth in section 2960. (*People v. Allen*, *supra*, 42 Cal.4th at p. 98, fn. 3.) The Legislature recodified the provisions outlining the requirements for an MDO commitment as section 2962. (Stats. 1985, ch. 1419, § 1, pp. 5011-5017; Stats. 1986, ch. 858, § 2, p. 2951.) The Legislature recodified the provisions authorizing a prisoner who disagreed with the determination that he or she met the criteria of an MDO to have a hearing before the BPH and

a subsequent hearing in the superior court as section 2966. (Stats. 1985, ch. 1419, § 1, pp. 5011-5017; Stats. 1986, ch. 858, § 4, pp. 2953-2954.)

1. Penal Code Section 2962

When section 2962 was added to the Penal Code in 1986, the code section provided that, as a condition of his or her parole, a prisoner must be treated by the SDMH if the following requirements are met: (1) the prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment; (2) the severe mental disorder caused or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison; (3) the prisoner had been in treatment for the severe mental disorder for 90 days or more within the year before the prisoner's parole or release; (4) before the prisoner's release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the SDMH evaluated the prisoner at a DCR facility, and the chief psychiatrist of the DCR certified to the BPH that (i) the prisoner has a severe mental disorder, (ii) the disorder is not in remission or cannot be kept in remission without treatment, and (iii) the severe mental disorder caused or was an aggravating factor in the prisoner's criminal behavior; and, (5) the prisoner was sentenced to prison for a crime in which he or she used force or violence or caused serious bodily injury as defined in paragraph (5) of subdivision (e) of section 243. (Stats. 1986, ch. 858, § 2, pp. 2951-2952.)

In 1987, the Legislature amended section 2962 to require the DCR's chief psychiatrist to also certify to the BPH that the prisoner had 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 the prisoner used force or violence or caused serious bodily injury in committing the crime for which he or she was sentenced to prison. (Stats. 1987, ch. 687, § 7, pp. 2180-2181.)

In 1989, the Legislature amended section 2962 to require the chief psychiatrist of the DCR to further certify that, by reason of the prisoner's severe mental disorder, the prisoner represented a substantial danger of physical harm to others. (Stats. 1989, ch. 228, § 1, pp. 1252-1253.)

In 1995, the Legislature amended section 2962 to enumerate the specific crimes for which the prisoner had to have been sentenced to state prison in order to be committed as an MDO. (Stats. 1995, ch. 761, § 1, pp. 5910-5912.)

Currently, section 2962 provides that a prisoner, as a condition of his or her parole, must be treated by the SDMH if the following requirements are met: (1) the prisoner has a severe mental disorder which is not in remission or cannot be kept in remission without treatment; (2) the prisoner's severe mental disorder caused or was an aggravating factor in the commission of the crime for which the prisoner is imprisoned; (3) the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release; (4) prior to the prisoner's release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the SDMH have evaluated the prisoner at a DCR facility, and the chief psychiatrist of the DCR has certified to the BPH that (i) the prisoner has a severe mental disorder, (ii) the disorder is not in remission or cannot be kept in remission without treatment, (iii) the severe mental disorder caused or was an aggravating factor in the prisoner's criminal behavior, (iv) 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 (v) the prisoner represents a substantial danger of physical harm to others because of his or her severe mental disorder; and, (5) the prisoner was sentenced to prison for an enumerated crime. (§ 2962, subds. (a) to (e); *People v. Allen, supra*, 42 Cal.4th at p. 99.)

2. Penal Code Section 2966

When section 2966 was added to the Penal Code in 1986, it authorized a prisoner to request a hearing before the BPH for the purpose of proving that he or she met the criteria of section 2962. Section 2966 required the BPH, if so requested, to conduct the hearing. (Stats. 1986, ch. 858, § 4, pp. 2953-2954.) If the prisoner disagreed with the BPH's determination that he or she met the criteria of section 2962, then he or she could petition for a hearing in the superior court on whether he or she met the criteria of section 2962. (Stats. 1986, ch. 858, § 4, pp. 2953-2954.) The superior court hearing was a civil hearing, but the standard of proof was beyond a reasonable doubt. (Stats. 1986, ch. 858, § 4, pp. 2953-2954.) If the trial was by a jury, the jury had to be unanimous in its verdict. The trial was to be a jury one unless waived by the prisoner and the district attorney. (Stats. 1986, ch. 858, § 4, pp. 2953-2954.)

In 1987, section 2966 was amended to specify the prisoner who disagreed with the BPH's determination that he or she met the criteria of section 2962, could petition for a hearing in superior court on whether he or she, *as of the date of the BPH hearing*, met the criteria of section 2962. (Stats. 1987, ch. 687, § 8, pp. 2181-2182; italics added to highlight the amendment.)

In 1994, section 2966 was amended to prohibit consideration of evidence offered for the purpose of proving the prisoner's behavior or mental status after the BPH hearing. Section 2966 was also amended to provide that the superior court could, upon the parties' stipulation, receive in evidence the affidavit or declaration of any psychiatrist, psychologist, or other professional person who was involved in the certification and hearing process, or any professional person involved in the evaluation or treatment of the prisoner during the certification process. Section 2966, as amended, further provided the affidavit or declaration could be read and the contents

thereof to be considered in the rendering of a decision or verdict in the trial proceeding. (Stats. 1994, ch. 706, § 1, pp. 3418-3419.)

B. The Legislature Has Not Expressly or Impliedly Required the District Attorney to Prove Compliance with the Certification Process of Penal Code Section 2962, Subdivision (d), at a Penal Code Section 2966, Subdivision (b), Hearing

The issue whether the district attorney must prove compliance with the certification process set forth in section 2962, subdivision (d), at a hearing under section 2966, subdivision (b), is a question of statutory interpretation because the answer depends largely on the understanding of the term "criteria" in section 2962.

When faced with a question of statutory interpretation, a court first examines the language of the statute in question. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Although the statute's words are given a plain and commonsense meaning, they are not considered in isolation. A court looks to the entire substance of the statute in order to determine the scope and purpose of the provision. (*Id.*) When the statutory language is clear, a court need go no further. However, if the language supports more than one reasonable interpretation, then the court looks to a variety of extrinsic aids. These extrinsic aids include the objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. (*In re Lucas* (2012) 53 Cal.4th 839, 849; *People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.)

Section 2966, subdivision (b), provides that a prisoner who disagrees with the determination of the BPH that he or she meets the "criteria of Section 2962" may petition for a hearing in the superior court on whether he or she met the "criteria of Section 2962" as of the date of the BPH hearing. The subdivision, however, does not identify the section 2962

"criteria" that are at issue and which must be proved to the trier of fact at the superior court hearing. (§ 2966, subd. (b).) Nor does the subdivision specify that compliance with the certification process of section 2962, subdivision (d), must be proved to the trier of fact at the superior court hearing. (§ 2966, subd. (b).)

Meanwhile, section 2962 lists all the conditions that, if met, require the prisoner to be treated by the SDMH as a condition of his or her parole. The "criteria" listed in the code section are as follows: (1) the prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment (§ 2962, subd. (a)); (2) the severe mental disorder caused or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison (§ 2962, subd. (b)); (3) the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year (§ 2962, subd. (c)); (4) the person in charge of treating the prisoner, and a practicing psychiatrist or psychologist from the SDMH have evaluated the prisoner at a facility of the DCR, and a chief psychiatrist of the DCR has certified to the BPH that (i) the prisoner has a severe mental disorder, (ii) the disorder is not in remission or cannot be kept in remission without treatment, (iii) the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, (iv) 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 (v) the prisoner represents a substantial danger of physical harm to others by reason of his or her severe mental disorder (§ 2962, subd. (d)(1)); and, (5) the crime for which the prisoner was sentenced to prison is one of the crimes specified in subdivision (e) (§ 2962, subd. (e)).

At first glance, sections 2962 and 2966 may appear to require the district attorney to prove compliance with the certification process of section 2962, subdivision (d), at a hearing under section 2966, subdivision

(b), because the certification process is listed as one of the "criteria" in section 2962. (§§ 2962, subd. (d), and 2966, subd. (b).) However, a closer look at section 2962, subdivision (d)(1) – specifically, the criteria which the chief psychiatrist must certify to the BPH – indicates otherwise.

Section 2962, subdivision (d), specifies a chief psychiatrist of the DCR must find that certain conditions exist before he or she can certify the prisoner as an MDO. As previously noted, these conditions are that: (i) the prisoner has a severe mental disorder which is not in remission or cannot be kept in remission without treatment; (ii) the severe mental disorder was a cause or an aggravating factor in the crime for which the prisoner was imprisoned; (iii) 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, (iv) the prisoner represents a substantial danger of physical harm to others because of his or her severe mental disorder. (§ 2962, subd. (d)(1).) Because these conditions must be present before a chief psychiatrist can certify a prisoner as an MDO, these conditions are the "criteria" underlying an MDO determination. In other words, they are the factors used in determining whether a prisoner is an MDO. Because they are the defining traits of an MDO, they are the factors or elements of an MDO determination that are at issue in a hearing under section 2966, subdivision (b).

Notably, section 2962, subdivision (d), does not require the chief psychiatrist to certify to the BPH that specified mental health professionals performed the mandatory evaluations and certification of the prisoner. (§ 2962, subd. (d)(1).) The absence of this requirement suggests the certification process itself is simply a procedural requirement which is separate and apart from the substantive requirements underlying an MDO determination.

Simply stated, the statutory language of sections 2962 and 2966 supports two possible interpretations as to which "criteria" of section 2962 must be proved at a section 2966, subdivision (b), hearing. One interpretation is the certification process of section 2962, subdivision (d), is one of the "criteria" that must be proved at a hearing under section 2966, subdivision (b). The other interpretation is the certification process is not one of the "criteria" that must be proved at the hearing because it is not one of the conditions which render a prisoner an MDO.

The legislative history of the MDO Act, however, strongly supports the interpretation that the certification process of section 2962, subdivision (d), is only a procedural prerequisite and is not one of the prescribed substantive "criteria" which are at issue in a hearing where an MDO determination is being challenged. The analyses and reports of Senate Bill 1296, the genesis of the MDO Act, reveal that the term "criteria" – as used by the Legislature and state agencies – referred only to the substantive factors which determined whether a prisoner was an MDO and did not include the certification process of section 2962, subdivision (d).[7]

In statements dated March 26, 1985, and in a separate statement addressed to the Assembly Public Safety Committee on August 19, 1985, Dan McCorquodale (the author of the MDO legislation) explained Senate Bill 1296 required the SDMH to provide treatment for prisoners who met the following "criteria": (1) the prisoner was convicted of a crime in which he or she used force or violence or caused serious bodily injury; (2) the prisoner has a mental disorder which was treated while he or she was in prison; (3) the mental disorder was a cause of or an aggravating factor in

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[7] Respondent is submitting concurrently with this brief a separate motion for judicial notice attaching copies of all legislative materials referenced herein.

the commission of the crime for which the prisoner was sentenced to prison; and, (4) the mental disorder is not in remission or cannot be kept in remission. (Dan McCorquodale, "Background on Senate Bill 1296 – March 26, 1985," p. 3; Dan McCorquodale, "Statement by Senator McCorquodale on Senate Bill 1296 – March 26, 1985," p. 3; Dan McCorquodale, "Statement SB 1296 (McCorquodale) – Assembly Public Safety Committee – August 19, 1985," p. 2.) These "criteria" are essentially the same conditions that a chief psychiatrist must certify to the BPH as being present in an MDO. (§ 2962, subd. (d)(1).) Hence, the term "criteria" – as envisioned by the author of the MDO legislation and as conveyed to various committees – referred to the prescribed substantive factors which determined whether a prisoner was an MDO. The term "criteria" did not include the procedural prerequisite that specified mental health professionals evaluate and certify the prisoner.

An enrolled bill report prepared by the DCR similarly used the term "criteria" to refer to the conditions that the mental health professionals had to find present in a prisoner before the prisoner could be committed for treatment as an MDO. The enrolled bill report identified the "criteria" as: a prisoner having a severe mental disorder that is not in remission or cannot be kept in remission; the mental disorder having been a cause or aggravating factor in the prisoner's criminal behavior; the prisoner having been in treatment for the mental disorder for 90 days or more within the year prior to the prisoner's release on parole; and, the crime for which the prisoner was sentenced to prison having involved force or violence or the infliction of serious bodily injury. (Dept. of Corrections And Rehabilitation, Enrolled Bill Rep., Sen. Bill No. 1296, Sept. 25, 1985, p. 2.) Again, "criteria" referred to the substantive factors underlying an MDO determination. "Criteria" neither referred to nor included the certification process of section 2962, subdivision (d).

In its analysis of Senate Bill 1296, the Senate Committee on Judiciary also described "criteria" as those substantive factors which determined whether a prisoner was an MDO, i.e., the conditions that the mental health professionals had to find present in a prisoner before the prisoner could be committed for treatment as an MDO. The Senate Committee on Judiciary noted Senate Bill 1296 would affect those prisoners who met the following "criteria": (1) has a mental disorder which was not in remission or could not be kept in remission; (2) the mental disorder caused or was an aggravating factor in the commission of the crime for which he or she was sentenced; (3) had been in treatment for 90 days or more for the mental illness; and, (4) was convicted of a crime in which he or she used force or violence and caused serious bodily injury. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1296 as amended April 18, 1985, pp. 4-5.) Then, under a separate heading, the Senate Committee on Judiciary explained that Senate Bill 1296 would require the chief medical officer and the chief psychiatrist of the DCR and the person in charge of treating the prisoner to certify to the BPH that the affected prisoners met the four aforementioned "criteria." (*Id.* at p. 5.) The committee's use of separate descriptions of the "criteria" underlying an MDO determination and of the MDO certification process illustrate the term "criteria" was not meant to include the certification process itself. Again, the term "criteria" referred to the substantive factors which determined whether a prisoner was an MDO.

The Senate Rules Committee also used the term "criteria" to refer only to the prescribed substantive factors which determined whether a prisoner was an MDO. In its analysis of Senate Bill 1296, the Senate Rules Committee noted the bill mandated prisoners who met "specified criteria" to be treated by the SDMH as a condition of their parole. (Sen. Rules Com., "In Conference" Rep., p. 3; Sen. Rules Com., "Conference Completed" Rep., p. 3.) The Senate Rules Committee then described the

certification process, stating the person in charge of treating the prisoner and a psychiatrist or psychologist from the SDMH would be required to evaluate the prisoner at a DCR facility and a chief psychiatrist of the DCR would have to certify to the BPH that the prisoner met the "criteria." (*Id.*) Hence, the Senate Rules Committee also drew a distinction between the prescribed substantive criteria that must be met before a prisoner would be found to be an MDO and the certification process by which the prisoner would be deemed an MDO. Unlike the other factors which determined whether a prisoner was an MDO, the certification process was simply the procedure which the State needed to follow in order to commit an MDO for treatment with the SDMH as a condition of his or her parole.

A bill analysis by the SDMH also demonstrates the differentiation between the prescribed substantive criteria of an MDO and the certification process. In describing the procedure by which prisoners would be recommended for treatment as MDOs, the SDMH explained that clinical representatives from the DCR and SDMH would evaluate the prisoner to determine if the prisoner "meets the criteria for commitment," the BPH would have two independent clinicians evaluate the prisoner if the DCR and SDMH representatives disagreed on the appropriateness of commitment, and the BPH could commit the prisoner to the SDMH if both panelists agreed the prisoner meets the "admission criteria." (State Dept. of Mental Health, Bill Analysis, Sen. Bill No. 1296, July 25, 1985, p. 2.) The SDMH's description of the certification process indicates the term "criteria" referred to those substantive factors which determined whether a prisoner was an MDO. The certification process itself was viewed separately and apart from the substantive criteria of an MDO.

An enrolled bill report prepared by the SDMH leaves no doubt that the term "criteria" was not meant to include the certification process of section 2962, subdivision (d). In its report, the SDMH made separate

findings as to the "commitment criteria" and as to the "evaluation" process. It identified the "[c]ommitment criteria" as the following: (1) the prisoner has a severe mental disorder which is not in remission or cannot be kept in remission; (2) the severe mental disorder caused or aggravated the prisoner's commission of the crime; (3) the prisoner had been in treatment for 90 days or more during the last year of incarceration; and, (4) the prisoner used force or violence in the commission of the crime. (State Dept. of Mental Health, Enrolled Bill Rep., Sen. Bill No. 1296, Sept. 27, 1985, pp. 1-2.) In describing the process by which a prisoner would be committed for mental health treatment, the SDMH explained Senate Bill 1296 authorized the BPH to commit a prisoner if the enumerated mental health professionals agreed that the prisoner met the "commitment criteria." (*Id.* at p. 2.) Similar to the DCR, the SDMH understood the term "criteria" as referring to the prescribed substantive factors which determined whether a prisoner was an MDO. The term "criteria" was not understood as including the certification process.

The analyses of Senate Bill 1296 by the Legislative Analyst also reflect the common understanding that the term "criteria" referred to the prescribed substantive criteria of an MDO and did not include the certification process. The Legislative Analyst noted that Senate Bill 1296 required prisoners who met certain "criteria" to receive treatment from the SDMH as a condition of their parole. The Legislative Analyst further noted that Senate Bill 1296 also "[s]pecifie[d] the *procedure* for determining whether a parolee meets the *criteria* and thus must receive such treatment." (Legis. Analyst, Analysis, Sen. Bill No. 1296, May 2, 1985, pp. 1-2; Legis. Analyst, Analysis, Sen. Bill No. 1296, Aug. 29, 1985, p. 1; italics added.) The Legislative Analyst clearly differentiated between the process by which a prisoner would be certified as an MDO and the prescribed substantive factors that determined whether a prisoner was an MDO. Similar to the

Senate Committees which analyzed Senate Bill 1296, the DCR, and the SDMH, the Legislative Analyst did not view the term "criteria" as including the process by which prisoners are to be certified as MDOs.

A Third Reading Analysis for the Senate similarly reflects the differentiation between the certification process and the prescribed substantive criteria of an MDO. In summarizing the certification process, the analysis specified the chief psychiatrist and the person in charge of treating the prisoner "would have to certify the prisoner met the *criteria* to the [BPH]." (Third Reading Analysis, May 8, 1985, p. 2; italics added.) This description of the certification process shows "criteria" referred to the substantive factors which determined whether a prisoner was an MDO. "Criteria" did not include the certification process.

An analysis by the Assembly Committee on Public Safety reflects the BPH determination that is at issue at a hearing under section 2966, subdivision (b), is the finding that a prisoner meets the prescribed substantive criteria of an MDO. (Assem. Com. on Public Safety, Conf. Com. Rep., Sept. 10, 1985.) The committee observed Senate Bill 1296 would: authorize the extended commitment of a mentally ill prisoner upon *a finding by the BPH that the prisoner* was *suffering from a severe mental disorder which contributed to the commission of a violent felony and that the disorder could not be kept in remission without treatment*; and, allow a prisoner who disagreed with *the BPH's finding to have a hearing in the superior court on that issue*. (*Id.*; italics added.) Hence, the BPH's finding that the prisoner meets the prescribed substantive criteria of an MDO is the issue to be decided at a superior court hearing. Whether the mental health professionals complied with the certification process is not the issue.

Therefore, while the statutory language of sections 2962 and 2966 may give rise to two different conclusions as to what factors or elements of an MDO determination must be proved to a trier of fact at a hearing under

section 2966, subdivision (b), the legislative history of the MDO Act strongly supports the conclusion that the certification process – though a requirement for an MDO commitment – need not be proved to the trier of fact at a hearing under section 2966, subdivision (b). As reflected in the various reports and analyses of Senate Bill 1296, the certification process of section 2962, subdivision (d), was neither understood nor considered to be one of the MDO "criteria."[8] The certification process is nothing more than a procedural requirement – the procedure by which prisoners had to be certified as MDOs in order to be committed for treatment.

C. The Courts Also Have Not Required the District Attorney to Prove Compliance with the Certification Process of Penal Code Section 2962, Subdivision (d), at a Penal Code Section 2966, Subdivision (b), Hearing

Similar to the legislative committees and state agencies that analyzed Senate Bill 1296, this Court and the intermediate appellate courts that have interpreted sections 2962 and 2966 have found the "criteria" underlying an MDO determination are the prescribed substantive factors which determine

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[8] The legislative history of the MDO Act includes documents that either list the certification process as one of the "criteria" for the commitment of an MDO, refer to some of the prescribed substantive criteria as procedural aspects of the bill, or state the purpose of a superior court hearing is to determine whether the prisoner meets the criteria of section 2960. (Dept. of Finance, Bill Summary of Sen. Bill No. 1296 – last amended on April 18, 1985; Dept. of Finance, Bill Summary of Sen. Bill No. 1296 – last amended on June 25, 1985; Dept. of Finance, Bill Summary of Sen. Bill No. 1296 – last amended Sept. 10, 1985; State Dept. of Mental Health, Bill Analysis, Sen. Bill No. 1296, April 22, 1985; "Fact Sheet for SB 1296 (McCorquodale)"; Citizens Advisory Council, letter to Sen. Dan McCorquodale, April 22, 1985, pp. 1-2; Legis. Counsel Bur., Opinion, Dec. 5, 1985, pp. 2-3.) However, none of these documents specify compliance with the certification process is a criterion to be proved to the trier of fact at a superior court hearing.

whether a prisoner is an MDO. Those "criteria" do not include the certification process of section 2962, subdivision (d).

In *Lopez v. Superior Court*, *supra*, 50 Cal.4th 1055, this Court explained section 2962 sets forth six criteria necessary to establish MDO status and which must be present when the determination is made that a prisoner must be treated by the SDMH as a condition of parole. (*Id.* at pp. 1061-1062.) The first three criteria outlined in section 2962 are capable of change over time – they are "that an offender suffers from a severe mental disorder, that the illness is not or cannot be kept in remission, and that the offender poses a risk of danger to others." (*Id.* at p. 1062.) The latter three criteria outlined in section 2962 are incapable of change over time – they are "that the offender's severe mental disorder was a cause or aggravating factor in the commission of the underlying crime, that the offender was treated for at least 90 days preceding his or her release, and that the underlying crime was a violent crime as enumerated in section 2962, subdivision (e)." (*Id*, citing *People v. Cobb* (2010) 48 Cal.4th 243, 251-252, and *People v. Francis* (2002) 98 Cal.App.4th 873, 879.) Notably missing was the inclusion of the procedural prerequisites to an MDO determination.

In *People v. Cobb*, *supra*, 48 Cal.4th 243, this Court enumerated the six criteria of section 2962 as follows: (1) the prisoner has a severe mental disorder; (2) the prisoner used force or violence in committing the 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. (*Id.* at pp. 251-252, citing *People v. Hannibal* (2006) 143

Cal.App.4th 1087, 1094, *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2, and *People v. Francis*, *supra*, 98 Cal.App.4th at pp. 876-877.) Once again, there was no mention of the procedural prerequisites.

Several intermediate appellate courts have also observed an MDO determination rests upon the six aforementioned criteria of the prisoner having a severe mental disorder, the prisoner having used force or violence in committing the underlying offense, the prisoner having a disorder which caused or was an aggravating factor in committing the offense, the disorder not being in remission or capable of being kept in remission without treatment, the prisoner having been treated for the disorder for at least 90 days in the year before being paroled, and the prisoner posing a threat of physical harm to other people because of the disorder. (*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 *People v. Francis*, *supra*, 98 Cal.App.4th 873, Francis appealed from the order of the trial court committing him to Atascadero State Hospital as an MDO. He claimed double jeopardy and res judicata barred the relitigation of his mental state, which was the subject of a prior MDO proceeding. (*Id.* at p. 874.) In reviewing Francis's claim, the Court of Appeal identified the six criteria of an MDO certification. (*Id.* at pp. 876-877.) The Court of Appeal explained:

> Section 2962 lists the criteria that must be met to qualify a prisoner as an MDO. The trial court must consider whether 1) the prisoner as a severe mental disorder; 2) the prisoner used force or violence in committing the underlying offense; 3) the severe mental disorder was one of the causes or an aggravating factor in the commission of the offense; 4) the disorder is not in remission or capable of being kept in remission without treatment; 5) the prisoner was treated for the disorder for at least 90 days in the year before his release; and 6) by reason of his

> severe mental disorder, the prisoner poses a serious threat of physical harm to others. (§ 2962, subds. (a)-(d)(1).) . . .

(*People v. Francis*, *supra*, 98 Cal.App.4th at pp. 876-877.)

In *People v. Hannibal*, *supra*, 143 Cal.App.4th 1087, Hannibal also appealed from the order of the trial court committing him to treatment as an MDO following a hearing under section 2966, subdivision (b). (*People v. Hannibal*, *supra*, at p. 1090, 1092.) Hannibal claimed the trial court erred in concluding the relitigation of his mental state at the time of his controlling offense, which was the subject of a prior MDO proceeding, was not barred by principles of res judicata and collateral estoppel. (*Id.* at pp. 1093-1094.) In reviewing Hannibal's claim, the Court of Appeal specifically noted the six criteria for an MDO commitment as follows:

> A prisoner may be committed for treatment as a condition of parole if (1) he has a severe mental disorder; (2) he used force or violence in committing the underlying offense; (3) the severe mental disorder was one of the causes or an aggravating fact in the commission of that offense; (4) the disorder is not in remission or capable of being kept in remission without treatment; (5) he was treated for the disorder for at least 90 days in the year before his release; and (6) by reason of his severe mental disorder, he poses a serious threat of physical harm to others. (§ 2962, subds. (a)-(d)(1); *People v. Francis* (2002) 98 Cal.App.4th 873, 876-877, 120 Cal.Rptr.2d 90.)

(*People v. Hannibal*, *supra*, 143 Cal.App.4th at p. 1094.)

In *People v. Merfield*, *supra*, 147 Cal.App.4th 1071, Merfield also challenged the BPH's determination that he qualified as an MDO. In discussing the six criteria for an initial MDO commitment, the Court of Appeal specified:

> The six criteria for the initial commitment are: (1) the prisoner has a severe mental disorder; (2) he used force or violence in committing the underlying offense; (3) his severe mental disorder was a cause or aggravating factor in his commission of that offense; (4) the disorder is not in remission or capable of being kept in remission without treatment; (5) he

> was treated for the disorder for at least 90 days in the year prior to his parole; and (6) as a result of his disorder, he represents a substantial danger of physical harm to others. (§ 2962.)

(*People v. Merfield, supra*, 147 Cal.App.4th at p. 1075, fn. 2.)

In two of its prior decisions, the Court of Appeal in the instant case similarly observed an MDO determination rests upon the same six criteria which this Court and other intermediate appellate courts have identified. (*People v. Sheek* (2004) 122 Cal.App.4th 1606, 1610; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1075-1076.) In *People v. Clark, supra*, 82 Cal.App.4th 1072, Clark appealed from the trial court's determination that she met the criteria of an MDO. In reviewing Clark's claims on appeal, the Court of Appeal explained the criteria upon which an MDO determination rests, as follows:

> A determination that a defendant requires treatment as an MDO rests on six criteria, set out in section 2962: the defendant (1) has a severe mental disorder; (2) used force or violence in committing the underlying offense; (3) had a disorder which caused or was an aggravating factor in committing the offense; (4) the disorder is not in remission or capable of being kept in remission absent treatment; (5) the prisoner was treated for the disorder for at least 90 days in the year before being paroled; and (6) because of the disorder, the prisoner poses a serious threat of physical harm to other people. . . .

(*People v. Clark, supra*, 82 Cal.App.4th at pp. 1075-1076.)

In *People v. Sheek, supra*, 122 Cal.App.4th 1606, the People appealed the trial court's granting of Sheek's petition under section 2966, subdivision (b). The trial court found the evidence was insufficient to show Sheek had been treated for his severe mental disorder for at least 90 days in the year before being paroled. (*Id.* at pp. 1608-1609.) In agreeing with the trial court, the Court of Appeal identified the criteria for an MDO determination as follows:

> The MDO Act is a civil commitment statute that provides for treatment as a condition of parole for one year for certain offenders about to be released on parole. An offender is eligible for commitment under the MDO Act if all of the following six factors are met: (1) the prisoner has a severe mental disorder; (2) the prisoner used force or violence in committing the underlying offense; (3) the prisoner had a disorder which caused or was an aggravating factor in committing the offense; (4) the disorder is 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) because of the disorder, the prisoner poses a serious threat of physical harm to other people. (§ 2962; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1075-1076, 98 Cal.Rptr.2d 767.) . . .

(*People v. Sheek, supra*, 122 Cal.App.4th at p. 1610.)

In short, this Court and the intermediate appellate courts which have identified the section 2962 "criteria" of an MDO determination agree there are six requirements which must be met before a prisoner may be found to be an MDO and which need to be proved at a hearing under section 2966, subdivision (b). None of those criteria, as outlined in section 2962, is the certification process of section 2962, subdivision (d). (*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, supra*, 147 Cal.App.4th at p. 1075, fn. 2; *People v. Sheek, supra*, 122 Cal.App.4th at p. 1610; *People v. Francis, supra*, 98 Cal.App.4th at p. 876-877; *People v. Clark, supra*, 82 Cal.App.4th at pp. 1075-1076.) Thus, the Court of Appeal in the instant case stands alone in holding the MDO certification process is one of the section 2962 "criteria" that must be proved to the trier of fact at a hearing under section 2966, subdivision (b).

The Court of Appeal's decision in the instant case is not only at odds with this Court's decision in *People v. Cobb, supra*, 48 Cal.4th 243, and the decisions of other intermediate appellate courts, but also conflicts with the

standard jury instruction for initial MDO commitment proceedings, CALCRIM Number 3456 ["Initial Commitment of Mentally Disordered Offender As Condition Of Parole"]. CALCRIM Number 3456 does not require the prosecution to prove compliance with the MDO certification process to the trier of fact at a section 2966, subdivision (b), hearing. CALCRIM Number 3456 specifies the prosecution must prove that, at the time of the prisoner's certification by the BPH: (1) the prisoner was convicted of an offense enumerated in section 2962, subdivision (e)(2); (2) the prisoner has a severe mental disorder; (3) that disorder was a cause of the prisoner's underlying offense or an aggravating factor in the commission of the offense; (4) the prisoner was treated for the disorder for at least 90 days within the year before his parole release date; (5) the disorder was not in remission or could not be kept in remission without treatment; and, (6) the prisoner represented a substantial danger of physical harm to others because of his disorder. Pursuant to the jury instruction, the prosecution is not required to prove compliance with the MDO certification process.

In deciding the certification process of section 2962, subdivision (d), is a criterion that must be proved at a hearing under section 2966, subdivision (b), the Court of Appeal in the instant case relied on the third footnote in this Court's decision of *Lopez v. Superior Court*, *supra*, 50 Cal.4th 1055. In that footnote, this Court 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) 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.)

Turning to the fifth requirement listed in the third footnote of *Lopez v. Superior Court*, *supra*, 50 Cal.4th 1055, respondent agrees one of the substantive "criteria" of an MDO determination is the prisoner posing a substantial danger of physical harm to others by virtue of his or her severe mental disorder. Respondent, however, respectfully submits any suggestion in the same sentence that an evaluation by enumerated mental health professionals is one of the substantive criteria which must be proved at a hearing under section 2966, subdivision (b), is dictum. (*Id.* at p. 1059, fn. 3.) In discussing the prescribed substantive criteria of an MDO determination in the opinion, this Court identified the same six criteria that were previously identified by this Court in *People v. Cobb*, *supra*, 50 Cal.4th 243, and by several intermediate appellate courts. (*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; *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, and *People v. Clark*, *supra*, 82 Cal.App.4th at p. 1075.) None of the previously identified MDO criteria was the certification process of section 2962, subdivision (d). (*Lopez v. Superior Court*, *supra*, 50 Cal.4th at pp. 1061-1062; *People v. Cobb*, *supra*, 48 Cal.4th at pp. 251-252, citing *People v. Hannibal,supra,* 143 Cal.App.4th at 1087, 1094, *People v. Merfield* (2007) 147 Cal.App.4th

1071, 1075, fn. 2, and *People v. Francis* (2002) 98 Cal.App.4th 873, 876-877.) Based on this Court's analysis of the six MDO criteria in the *Lopez v. Superior Court* decision, the Court of Appeal's reliance on the third footnote in that decision is misplaced.

The Court of Appeal also reached its conclusion in the instant case by relying on two other intermediate appellate court decisions, *People v. White* (1995) 32 Cal.App.4th 638, and *People v. Miller* (1994) 25 Cal.App.4th 913. (Opinion at pp. 14-16, 17.) Neither of those decisions, however, specifically held the certification process of section 2962, subdivision (d), is one of the "criteria" of an MDO determination or an element which must be proved to the trier of fact at a hearing under section 2966, subdivision (b). In both of those cases, the reviewing courts simply found the evidence adduced at trial demonstrated the prisoners had been evaluated by persons in charge of their treatment, as directed by 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 pp. 915-916, 919-920.)

In sum, this Court and the intermediate appellate courts that have interpreted sections 2962 and 2966, subdivision (b), have determined six "criteria" must be met before a prisoner is committed for treatment as an MDO. None of those "criteria" is the certification process of section 2962, subdivision (d). Hence, decisional case law also supports the conclusion that the district attorney is not required to prove compliance with the certification process of section 2962, subdivision (d), at a hearing under section 2966, subdivision (b).

D. Public Policy Considerations are Compelling for Concluding the District Attorney is Not Required to Prove Compliance with the Certification Process of Penal Code Section 2962, Subdivision (d), at a Penal Code Section 2966, Subdivision (b), Hearing

Considerations of public policy and fairness also weigh against the Court of Appeal's conclusion that the district attorney must prove compliance with the certification process of section 2962, subdivision (d), at a hearing under section 2966, subdivision (b).

Requiring the District Attorney to prove compliance with a procedural requirement at a hearing held for the purpose of proving the prisoner met the substantive requirements of an MDO determination at the time of his or her hearing before the BPH would not advance the legislative purpose of the MDO Act, which is to protect the public from persons whose severe mental disorders caused or were an aggravating factor in their criminal behavior and to provide mental health treatment to these persons until their mental disorders are in remission and can be kept in remission. (*Lopez v. Superior Court*, *supra*, 50 Cal.4th at p. 1061; *In re Qawi*, *supra*, 32 Cal.4th at p. 9.)

Adding an "evaluation and certification criterion" to the factors which must be proved at the hearing under section 2966, subdivision (b), has the potential to complicate the issues for a jury because of the myriad of variances in the certification process. For example, the person who evaluated the prisoner and is in charge of treating him or her might not be a psychologist or psychiatrist but rather, a graduate student who is working under the direct supervision of a licensed psychologist or psychiatrist. Or, the person who evaluated the prisoner might not be the person who is solely in charge of treating the prisoner but, rather, is a member of an interdisciplinary treatment team for the ward where the prisoner was a patient. Or, the person who was in charge of treating the prisoner also

happens to be the chief psychiatrist who certified the prisoner as having met all the requirements for MDO status. (See, *People v. White*, *supra*, 32 Cal.App.4th at p. 641.) Instead of focusing on whether the prisoner met the prescribed substantive criteria of an MDO at the time of his or her hearing before the BPH, a jury could become preoccupied with the nuances of the certification process and the variances that could arise. With the possibility of the jury becoming distracted by the nuances and variances that could arise in the certification process, there is the likelihood of an unwarranted finding based on the certification process alone. The untoward consequence of an unwarranted finding certainly would not advance the legislative purpose of the MDO Act, i.e., identifying and providing mental health treatment to the mentally disordered prisoners who present a risk of physical harm to the public.

Additionally, requiring proof of compliance with the MDO certification process at a hearing under section 2966, subdivision (b), would not promote the interest of judicial economy. Given that the purpose of the hearing is to determine whether the prisoner met the criteria for MDO status at the time of his or her hearing before the BPH, the amount of time and money that could be inhered in having to litigate every procedural facet of the certification process could result in far greater expenditures of state and county funds.

Further, the addition of a new criterion to be proved at a section 2966, subdivision (b), hearing, infringes upon the principle of fairness because a prisoner has a prior opportunity to challenge the requisite evaluations, certification, and/or qualifications of the mental health professionals who performed those evaluations and certifications. Before the hearing under section 2966, subdivision (b), even commences, the prisoner will already have had a hearing before the BPH. (See § 2966, subd. (a).) If the prisoner had any objections to the certification process, the prisoner or anyone

appearing on his or her behalf at the BPH hearing could have raised them at that hearing so that the BPH could have addressed them and minimized the possibility of needless litigation in the courts. After all, the person or agency who certified the prisoner under section 2962, subdivision (d), bears the burden of proving, at that BPH hearing, that the prisoner met the criteria for MDO status. (§ 2966, subd. (a).) Thus, any concerns about the process by which the prisoner was evaluated and certified as an MDO could have been easily addressed at that BPH hearing. Moreover, the fact that the BPH is required to appoint two qualified independent professionals if the prisoner or any person appearing on his or her behalf at the BPH hearing requests such an appointment, strongly suggests the BPH could just as easily order the DCR and SDMH to redo the requisite evaluations and certification if the BPH found any non-compliance with the original evaluations and certification. (See § 2966, subd. (a).) Hence, in the interest of fairness, the district attorney should not be required to also prove compliance with the certification process at the superior court hearing.

In short, public policy considerations do not support the Court of Appeal's conclusion that the district attorney is required to also prove compliance with the certification process of section 2962, subdivision (d), at a hearing under section 2966, subdivision (b).

E. The Question of Whether the State or Its Agents Complied with the Certification Process of Penal Code Section 2962, Subdivision (d), is a Procedural Issue to Be Decided by the Trial Court

As indicated by the statutory language of section 2962, subdivision (d), the legislative history of the MDO Act, and decisional case law, the certification process of section 2962, subdivision (d), is not one of the prescribed substantive criteria of an MDO determination. It is neither a factor nor an element that must be proved to the trier of fact at a hearing under section 2966, subdivision (b). Indeed, whether a prisoner had been

evaluated and certified by the specified mental health professionals at a specified facility does not determine whether the prisoner is a person who has a severe mental disorder that is not in remission or cannot be kept in remission without treatment, a person who has a severe mental disorder that was a cause or aggravating factor of his or her underlying criminal behavior, or a person whose severe mental disorder renders him or her a substantial danger of physical harm to others. The certification process is simply a procedural prerequisite for committing the prisoner to the SDMH for treatment.

Because compliance with the certification process does not decide whether a prisoner is an MDO, it is not a substantive matter that requires a factual determination by the trier of fact at a hearing under section 2966, subdivision (b). Similar to the issue of 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 specified mental health professionals evaluated and certified a prisoner pursuant to section 2962, subdivision (d), is a procedural question that should be decided by the trial court before the trier of fact has to decide whether the prisoner met the criteria of an MDO. (§ 2966, subd. (b).)

In *People v. Posey* (2004) 32 Cal.4th 193, this Court granted review to resolve an issue concerning venue that was noted but left unresolved in *People v. Simon* (2001) 25 Cal.4th 1082, relating to the soundness and continuing vitality of the rule that declared the issue of whether a criminal action had been brought in a place appropriate for trial to be a question of fact to be decided by the jury at the conclusion of trial rather than a question of law to be decided by the court before trial. (*People v. Posey*, *supra*, 32 Cal.4th at p. 199.) In *People v. Simon*, this Court concluded a defendant forfeits a claim of improper venue when he or she fails

specifically to raise such an objection before the commencement of trial. (*People v. Simon, supra*, 32 Cal.4th at p. 200.)

In *People v. Posey, supra*, 32 Cal.4th 193, the Marin County District Attorney charged Posey with two counts of sale of cocaine base and alleged that Posey committed the crimes in the counties of Marin and San Francisco. Before and during trial, Posey unsuccessfully objected to venue, claiming Marin County was not the appropriate place for trial. During the trial, Posey presented his objection to venue as his sole defense. (*Id.* at p. 201.) The trial court instructed the jury on the charged crimes and on venue and directed the jury to decide the question of guilt or innocence before deciding the question of venue. Following deliberations, the jury returned verdicts finding Posey guilty of the charged crimes but was unable to agree on venue. Thereupon, the court declared a mistrial on the issue of venue. After rejecting the prosecution's suggestion that the court resolve the question of venue itself, the court empanelled a second jury and conducted a second trial on the issue of venue. The second jury decided venue was in Marin County, and the court rendered a judgment of conviction against Posey. On appeal, the Court of Appeal affirmed the judgment and rejected Posey's venue contentions. (*Id.* at p. 203.)

In *People v. Posey, supra*, 32 Cal.4th 193, this Court concluded the rule that venue is a question of fact for determination by the jury should be rejected in favor of a rule that venue is a question of law for determination by the court. (*Id.* at p. 215.) This Court found the rule that venue was a question of fact for the jury was unsound because: (1) the rule impeded the purposes underlying the venue provisions by putting off any finding on venue until after the defendant had been required to undergo the rigors and hardship of standing trial in an improper locale and after the State had incurred the time and expense of conducting a trial; (2) the rule was inconsistent with the contemporary treatment of other analogous issues

inasmuch as venue was a procedural question involving the appropriateness of a place for a defendant's trial and not a substantive question relating to the defendant's guilt or innocence of the charged crime; and, (3) the rule threatened the untoward consequence of an unwarranted acquittal when the jury returned a verdict of not guilty predicated solely on the lack of proper venue. (*Id.* at pp. 200-201, 210-211.)

In analyzing the soundness of the rule that venue was a question of fact for the jury, this Court considered whether venue was a question of law for the court or a question of fact for the jury. First, this Court noted the distinction between questions of fact for the jury and questions of law for the court turns on whether the issue presented relates to the substantive matter of guilt or innocence to be determined at trial or concerns a procedural matter that does not affect guilt or innocence but either precedes the trial (such as whether to change venue), affects the conduct of the trial (such as whether to admit certain evidence), or follows the trial (such as whether to order a new trial). This Court determined questions of fact relating to the substantive issue of guilt or innocence are within the jury's province, whereas questions of law concerning procedural issues which do not themselves determine guilt or innocence – including any underlying questions of fact – are within the court's province. (*Id.* at pp. 205-206.) Second, this Court noted that, in criminal actions, venue does not implicate the trial court's fundamental jurisdiction in the sense of personal jurisdiction (the court's authority to proceed against a particular defendant in a criminal action) or subject matter jurisdiction (court's authority to consider and decide the criminal action itself). (*Id.* at pp. 207-208.) Last, this Court noted venue is not a part or aspect of substantive criminal law and, therefore, does not constitute an element of any crime. This Court held venue is simply a procedural prerequisite for prosecution. (*Id.* at p. 208.) Based on these considerations, this Court concluded venue should be

considered a question of law to be decided by the court before trial rather than a question of fact to be decided by the jury at the conclusion of the trial. (*Id.* at p. 210.)

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.) Betts was convicted in Riverside County on various counts involving lewd acts committed on a child. Some acts were committed in California but outside of Riverside County, and some were committed outside of California. This Court granted review to decide if the determination whether a California court has jurisdiction over a criminal proceeding when a prosecution is brought in California and the alleged criminal activity occurred in part outside of California, is to be made by the trial court or the jury. This Court concluded that, similar to the issue of venue, the question of whether a California court has jurisdiction to adjudicate a charge of a crime committed in whole or in part outside of California is a matter to be determined by the trial court rather than by a jury. (*Id.* at pp. 1043-1044.)

In *People v. Betts*, *supra*, 34 Cal.4th 1039, this Court found territorial jurisdiction to be similar to venue in that territorial jurisdiction frequently involves questions of fact but is a procedural issue which does not determine the guilt or innocence of the accused. Applying the rationale in *People v. Posey*, *supra*, 32 Cal.4th 193, this Court concluded the trial court, rather than a jury, should decide the issue of territorial jurisdiction. (*People v. Betts*, *supra*, 34 Cal.4th at p. 1049.) While this Court recognized venue merely establishes the appropriate place for trial whereas territorial jurisdiction implicates the authority of the trial court to consider and decide the criminal action, this Court found the distinction is not controlling on the issue of whether a jury trial is required. This Court reasoned the jurisdictional nature of an issue does not make it more suitable for jury

determination and, in fact, the contrary is true because jurisdiction is not related to guilt or innocence. (*Id.*) This Court further noted personal and subject matter jurisdiction in a civil case ordinarily are issues for the court and not a jury. (*Id.* at p. 1049, fn. 2.) In addition, this Court reasoned that trial courts routinely resolve issues which determine whether the cases before them can be prosecuted, even when those issues present factual as well as legal questions (e.g., whether a violation of a defendant's speedy trial rights requires dismissal of a case; whether prosecutorial misconduct resulting in a mistrial bars retrial; and, whether an action should be dismissed because the prosecution has destroyed evidence). (*Id.* at pp. 1049-1050.)

In *People v. Betts*, *supra*, 34 Cal.4th 1039, this Court found practical considerations also supported the conclusion that territorial jurisdiction should be decided by the court. This Court indicated that unless a jury is instructed to return a separate special verdict on territorial jurisdiction before returning a general verdict, a finding that the court did not have the authority to try the defendant can result in an unwarranted acquittal. (*People v. Betts*, *supra*, 34 Cal.4th at p. 1051.) Additionally, a challenge to a court's fundamental subject matter jurisdiction strikes at the foundation of the court's authority and thus should be determined by the court as a matter of law before the trial. Treating jurisdiction as a threshold matter that should be challenged before the trial not only gives a defendant substantial procedural safeguards, but also serves the interests of judicial efficiency and economy. (*Id.* at pp. 1051-1052.) "'If only a jury could determine subject matter jurisdiction, a defendant would always be put through the expense, anxiety, and uncertainty of a trial and the only mechanism to challenge jurisdiction would be an appeal after the conclusion of trial.'" (*Id.* at p. 1052.) If, however, the issue can be resolved by the court before

trial, the defendant will have the opportunity to seek immediate review through a writ proceeding. (*Id.*)

Based on the rationale of *People v. Posey*, *supra*, 32 Cal.4th 193, and *People v. Betts*, *supra*, 34 Cal.4th 1039, the issue of whether an MDO had been evaluated and certified by mental health professionals pursuant to section 2962, subdivision (d), is a question of law that should be decided by the trial court before the hearing under section 2966, subdivision (b), even commences. First, if in fact a prisoner had not been evaluated and certified by mental health professionals pursuant to section 2962, subdivision (d), then a hearing on whether the prisoner met the criteria of an MDO would be pointless and a waste of money and resources for the state and the county in which the hearing is to be held. Second, deciding whether a prisoner had been evaluated and certified by mental health professionals pursuant to section 2962, subdivision (d), before the trier of fact decides whether the prisoner met the criteria of an MDO avoids the consequence of an unwarranted finding where the trier of fact decides the prisoner is not an MDO simply because the prisoner had not been evaluated and certified by mental health professionals pursuant to section 2962, subdivision (d). Third, the determination of whether a prisoner had been evaluated and certified in accordance with section 2962, subdivision (d), by the trial court prior to the section 2966, subdivision (b), hearing, as opposed to a determination by the trier of fact at the conclusion of the hearing, protects the prisoner from even having to challenge his status as an MDO if in fact he or she had not been evaluated and certified by specified mental health professionals. (*People v. Posey*, *supra*, 32 Cal.4th at pp. 210-211.) Thus, any issue related to the certification process of section 2962, subdivision (d), is a matter that should be determined by the trial court – rather than a jury – prior to the hearing under section 2966, subdivision (b).

Furthermore, because any issue related to the certification process of section 2962, subdivision (d), is a procedural question akin to venue in criminal proceedings, an MDO's failure to raise a timely objection to the certification process should also amount to a forfeiture of his or her objection. As this Court held in *People v. Simon*, *supra*, 25 Cal.4th 1082, a defendant in a criminal proceeding forfeits a claim of improper venue if he or she 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.) Given the time and expense incurred in conducting a hearing under section 2966, subdivision (b), an MDO who does not object to the certification process before the hearing commences should similarly be found to have forfeited his or her objection. Moreover, allowing a prisoner to wait until after he or she learns if the verdict is favorable before objecting to the certification process would give the prisoner a "trump card" for nullifying an unfavorable verdict and obtaining all the advantages of a new hearing. Thus, a prisoner should be required to present any objection to the certification process before the hearing under section 2966, subdivision (b), commences.

In sum, the question of whether a prisoner had been certified pursuant to section 2962, subdivision (d), is a procedural issue that has no bearing on whether a prisoner is an MDO. Hence, it is a question of law that should be decided by the trial court prior to the hearing under section 2966, subdivision (b). Because the question is simply a procedural issue, a prisoner's failure to object to the certification process prior to the hearing

under section 2966, subdivision (b), should result in a forfeiture of his or her objection.

F. Because Compliance with the Certification Process Set Forth in Penal Code Section 2962, Subdivision (d), is a Procedural Question, an Appropriate Remedy in the Instant Case is to Remand the Case to the Trial Court for the Limited Purpose of Holding Further Proceedings to Decide Whether Appellant Had Been Evaluated and Certified Pursuant to Penal Code Section 2962, Subdivision (d)

As previously discussed, the issue of whether a prisoner had been evaluated and certified by specified mental health professionals pursuant to section 2962, subdivision (d), is a procedural question that should be decided by the trial court. Because questions related to the certification process are procedural in nature, a fair solution for the absence or lack of evidence as to the certification process in the instant case is to remand the case to the trial court – rather than require an entirely new trial – for the limited purpose of holding further proceedings to determine whether the prisoner had been evaluated and certified by mental health professionals in accordance with section 2962, subdivision (d). (Cf. *People v. Lynch* (2010) 182 Cal.App.4th 1262, 1274-1275, 1277-1278 [limited remand to determine timeliness of criminal action under statute of limitations].)

Pursuant to section 1260, a court is authorized to reverse, affirm, or modify a judgment or order appealed from and to "remand the cause to the trial court for such further proceedings as may be just under the circumstances." In the instant case, appellant had not given the district attorney or the superior court any indication that he would be complaining about the State's compliance with the certification process. Also, nothing in section 2966, subdivision (b), decisional case law, or the applicable standard jury instruction, required the district attorney to prove compliance with the certification process at the hearing. Under these circumstances, the

"just" remedy would not be a whole new trial, but rather, a limited remand to the trial court for further proceedings to decide: (1) whether appellant had been evaluated by the person in charge of treating him and by a practicing psychiatrist or psychologist from the SDMH; and, (2) whether a chief psychiatrist of the DCR had certified to the BPH that appellant had a severe mental disorder that was not in remission or could not be kept in remission without treatment, that the severe mental disorder was a cause or aggravating factor in appellant's criminal behavior, that appellant had been in treatment for the severe mental disorder for 90 days or more prior to his parole release day, and that appellant represented a substantial danger of physical harm to others because of his severe mental disorder. (§ 2962, subd. (d)(1).) Allowing appellant to have an entirely new trial where he can challenge every substantive facet of the MDO determination anew even though he is challenging only a finite and discrete procedural aspect of that determination, would give him a tremendous windfall – especially in light of the fact that he has already been found twice of having met the prescribed substantive criteria of an MDO. (CT 11-13; Supp. CT 1; RT 2, 4, 87-88.)

CONCLUSION

In sum, the question of whether a prisoner had been certified pursuant to section 2962, subdivision (d), is a procedural issue that is separate and apart from the substantive question of whether the prisoner met the prescribed criteria of an MDO. Hence, the question of compliance with the certification process is a question of law to be decided by the trial court and not by the trier of fact at a hearing under section 2966, subdivision (b).

Appellant forfeited his objection to the certification process because he did not raise it until his direct appeal. Alternatively, because questions related to the certification process are procedural in nature, a fair solution for any absence or lack of direct evidence as to the certification process in

the instant case is to remand the case to the trial court – rather than require a new trial – for the limited purpose of holding proceedings to determine whether appellant had been evaluated and certified by mental health professionals in accordance with section 2962, subdivision (d).

For the aforementioned reasons, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal.

Dated: May 10, 2012

Respectfully submitted,

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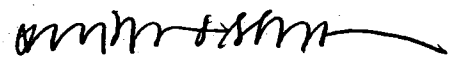

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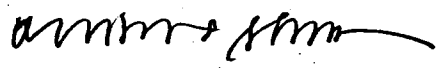
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 13,980 words.

Dated: May 10, 2012

KAMALA D. HARRIS
Attorney General of California



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

Case Name: **People v. Harrison**
No.: **S199830**

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 May 10, 2012, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** 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:

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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 May 10, 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 May 10, 2012, at San Diego, California.

Carole McGraw
Declarant

Carole McGraw
Signature

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