IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DANIEL LOPEZ,

Petitioner,

vs.

THE SUPERIOR COURT OF THE COUNTY OF SAN BERNARDINO,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Case No. **S172589**

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Fourth Appellate District, Division Three, Case No. G040679
San Bernardino County Superior Court, Case No. FVAFS700968
Honorable Gilbert G. Ochoa, Judge

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ISSUE ON REVIEW

Can a person committed as a mentally disordered offender challenge that determination at the time of a petition to **extend** the commitment or can the question be litigated only at the time of the original certification?

INTRODUCTION

After conducting a hearing pursuant to § 2966(a)[1], the Board of Parole Hearings[2] ("Board") found Petitioner Daniel Lopez ("Petitioner") was a mentally disordered offender ("MDO"). The Board ordered he receive inpatient MDO treatment as a special condition of his parole. He was represented at the Board's hearing and participated in the proceedings. The Board had the burden of proof.

Afterward, Petitioner filed a § 2966(b) petition in the superior court. He requested a hearing on whether he met the criteria of § 2962. Petitioner's attorney filed his petition. Pursuant to § 2966(b), the Board's decision remained in effect.

Later, Petitioner, still represented, withdrew his § 2966(b) petition without prejudice. At the expiration of the one-year § 2962 commitment term Petitioner was recommitted under § 2966(c) for an additional year of MDO treatment while he remained on parole. Petitioner, with counsel at the Board's annual review, did not challenge ***this*** recommitment.

At the expiration of the one-year § 2966(c) recommitment term, Real Party in Interest sought to have Petitioner committed for MDO treatment

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[1] All references are to the Penal Code.

[2] Effective July 1, 2005, the former Board of Prison Terms was abolished, and all statutory references to it were deemed to be a reference to the Board of Parole Hearings. (§ 5075(a).) The parties, record, and courts cited continued to use "Board of Prison Terms" in many instances or had used "Board of Prison Terms" since the use was appropriate at the time. We use the word "Board" to refer to that agency.

for an additional year post-parole. In response, Petitioner filed a motion to dismiss on the grounds of insufficiency of evidence. He argued there had not been a prior trial court or jury adjudication on the "force and violence" aspect of his underlying offense.

The trial court denied Petitioner's motion to dismiss. It found that res judicata/collateral estoppel barred him from challenging the criteria underlying the Board's § 2962 commitment, since he had abandoned his challenge when he withdrew his § 2966(b) petition.

Petitioner now claims that in opposing the § 2970 petition he has a right to challenge the force or violence aspect of the commitment offense the Board determined at the § 2962 commitment stage. Petitioner says this is so because that criterion had never been determined by a trial court or jury and, as such, the preclusive effect of collateral estoppel/res judicata does not apply. Petitioner further argues that because his § 2966(b) petition was withdrawn without prejudice he preserved *ad infinitum* his right of challenge.

Petitioner is incorrect. Under the MDO Act (§§ 2960 *et seq.*), a § 2966(b) petition filed to challenge at trial the Board's § 2962 commitment determinations is the **only time** a parolee may challenge those determinations. While a withdrawal without prejudice of a § 2966(b) petition is not an adjudication on the merits of that petition and it does not bar a subsequent suit on the same cause of action, the cause of action must ***be*** the same. Moreover, refiling of a § 2966(b) petition must occur within the appropriate period. Here, Petitioner forfeited his challenge because the statutory period for a challenge of the Board's commitment runs concomitantly with the one-year term of commitment. Petitioner never refiled his petition during that term. He forfeited his right to challenge the Board's determinations at a trial.

Finally, because Petitioner forfeited his challenge, the Board's § 2962 determinations are the final determinations. They have a preclusive effect upon any MDO Act commitment/recommitment.

STATEMENT OF THE CASE

On December 30, 2002, Petitioner was charged with two felonies, attempted second-degree robbery[3] and carrying a concealed dirk or dagger.[4] (Response at Exhibit 2, p. 6.)[5] On April 6, 2004, he pled guilty to § 12020(a)(4). (Response at Exhibit 3, pp. 8-10.) Petitioner was sentenced to 16 months in state prison. Due to custody credits, he was released directly to parole. (Response at Exhibit 4, p. 12.)

On May 28, 2004, Petitioner was returned to custody for a parole violation. On July 12, 2004, he was again returned to custody. On August 3, 2004, Petitioner was detained for a third time. Finally, he was returned to custody on September 16, 2004, and incarcerated for 12 months. (Response at Exhibit 5, p. 14.)

On September 15, 2005, Petitioner was released on parole. He was ordered to participate in MDO treatment as a special condition of parole. (Response at Exhibit 6, p. 16.) On October 26, 2005, the Board held a hearing and determined Petitioner met all six criteria for commitment under

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[3] § 664/211.

[4] § 12020(a)(4).

[5] The Formal Response to Petition for Peremptory Writ of Mandate contained in the Court of Appeal record for G040679 is referred to as "Response," and cited by page number as "(Response, p. __)." References to pages contained in the Response's exhibits are cited as "(Response at Exhibit __, p. __)." The Petition for Peremptory Writ of Mandate contained in the same record is referred to as "Petition," and cited as "(Petition, p. __)." References to pages contained in the Petition's exhibits are cited as "(Petition at Exhibit __, p. __)."

§ 2962. This included criteria pertaining to his underlying offense. Counsel represented Petitioner. (Response at Exhibit 7, p. 17.)

On January 30, 2006, Petitioner, with counsel, filed a § 2966(b) petition to challenge the Board's § 2962 findings. (Response at Exhibit 8, p. 18.) On March 21, 2006, Petitioner, with counsel, withdrew the petition without prejudice. (Response at Exhibit 9, p. 20.)

On October 25, 2006, the Board reassessed Petitioner's continued MDO status. Petitioner was recertified under § 2966(c) for an additional year. Counsel represented Petitioner at the hearing. (Response at Exhibit 10, p. 25.)

On June 13, 2007, the People filed a § 2970 petition seeking MDO recommitment of Petitioner while he ceased to be on parole. (Response at Exhibit 11, p. 26.) On April 24, 2008, Petitioner filed a motion to dismiss on the grounds of insufficiency of the evidence. On May 1, 2008, Petitioner filed an amended motion. (Response at Exhibit 11, p. 31.) On May 16, 2008, Petitioner filed a reply. (Petition at Exhibit H, pp. 108-117.)

On May 23, 2008, a hearing on Petitioner's motion to dismiss was held before Judge Gilbert G. Ochoa. (Response at Exhibit 12, p. 35.) Judge Ochoa denied Petitioner's motion. Judge Ochoa found that res judicata/collateral estoppel barred Petitioner's arguments, as Petitioner had already had the opportunity to litigate the issue of his offense when he filed his § 2966(b) petition. Petitioner, however, elected to withdraw that petition. (Petitioner at Exhibit J, pp. 102-147).

On August 28, 2008, Petitioner filed a Petition for Writ challenging Judge Ochoa's decision. (Petition at Exhibit J, pp. 102-147).

On April 23, 2009, the Court of Appeal agreed with the trial court. It ruled that at the § 2970 stage, Petitioner's challenge to his original § 2962 certification was untimely and that in withdrawing his § 2966(b) petition and not reasserting that challenge prior to the expiration of the § 2962

commitment, Petitioner forfeited his right to litigate the Board's § 2962 determinations. Having forfeited his right of challenge, Petitioner was barred at the § 2970 recommitment stage from relitigating the Board's findings. (O.B. at Appendix A.)

On July 29, 2009, this Court granted review.

STATEMENT OF FACTS

On December 26, 2002, the victim, Mr. Burdette ("Burdette"), went to a Rialto laundromat. Petitioner was standing near the doors. As Burdette went to enter the laundromat, Petitioner approached him. Petitioner demanded that Burdette give him whatever change he had. Burdette denied having change and asked to be let alone. Petitioner stated, "I know you got some change for me, give me your change." Burdette responded, "I don't have any change for you, I'm going to do my laundry." Petitioner stepped back and Burdette entered the laundromat. (Response at Exhibit 1, p. 3.)

Burdette returned to his car to retrieve additional laundry items. Petitioner assailed him, in a more threatening manner. Petitioner stood very close and demanded Burdette give him any money in his pocket. Burdette told Petitioner to move out of the way of the entrance and to leave him alone. Petitioner then said, "Give me your fucking money. I know you have money. Give me your chump change." Burdette did not give Petitioner money, and moved past him to enter the laundromat. (Response at Exhibit 1, p. 3.)

Burdette again sought items from his car. He also decided to bring his steering column-locking device ("The Club"). He thought he might need it for self-defense. Petitioner approached Burdette from behind and followed Burdette into the laundromat. Petitioner took on a fighting stance directly in front of Burdette, standing within six inches of his face. He

confronted Burdette, demanding, "Give me all your money. I know you have money. Give me whatever money you have." Burdette feared for his safety. Petitioner reached into his front pocket. Burdette, fearing Petitioner was reaching for a knife or a gun, hit Petitioner with The Club. Petitioner ran away. Burdette chased him. (Response at Exhibit 1, p. 3.) Burdette asked someone to call the police. When Burdette saw Petitioner returning, he went inside the building.

When the police approached Petitioner, he admitted to having a knife in his front pocket. The police retrieved a large knife/dagger from the pocket. (Response at Exhibit 1, p. 3.) Burdette identified Petitioner as the person who tried to rob him. Petitioner was arrested for attempted robbery and carrying a dirk or dagger. Petitioner told the police, *inter alia*, Burdette's "mere presence was offensive to him" and Burdette had invaded his space and privacy. He also stated "he was a very spiritual person, and he could read thoughts and could get into Burdette's mind, and he knew that he was was just invading his privacy...." (Response at Exhibit 1, p. 4.)

I.

AN MDO COMMITTED UNDER § 2962 MAY ONLY LITIGATE THE BOARD'S DETERMINATIONS UNDERLYING THAT § 2962 COMMITMENT DURING THAT COMMITMENT TERM; WHERE NO CHALLENGE IS MADE DURING THE § 2962 COMMITMENT TERM, THE RIGHT IS FORFEITED AND THE § 2962 COMMITMENT CRITERIA MAY NOT BE LITIGATED AT A LATER TIME.

Petitioner claims that withdrawal of his § 2966(b) petition during his § 2962 commitment did not concede the matter of the force and violence associated with his underlying crime or forfeit his right to litigate that issue during any recommitment of him sought under the MDO Act. According to him, a § 2962 commitment requires a superior court adjudication of the commitment criteria and, in his case, there was "only" a Board hearing. Petitioner also claims that the withdrawal of his § 2966(b) petition "without prejudice" preserved his ability to challenge the criteria underlying the § 2962 commitment of him *ad infinitum*. Petitioner is clearly incorrect.

A. THE MDO ACT'S COMMITMENT/RECOMMITMENT SCHEME.

1. The Board's Authority To Certify A Prisoner For MDO Treatment As A Special Condition Of Parole Is Prescribed At § 2962.

The Board is an administrative agency with statutory "power to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole . . . ." (§ 3052; *see also* § 5076.2.) "[U]pon granting any parole to any prisoner [the Board] may also impose on the parole any conditions that it may deem proper." (§ 3053.) A parolee's terms and conditions of parole are reviewed annually under § 3001 and 15 C.C.R. § 2535.

i. A § 2962 Commitment Requires Proof Of Six Criteria.

The MDO Act was enacted to protect the public from prisoners who have dangerous, treatable mental disorders, and to provide treatment for them. (§ 2960; *People v. Taylor* (2008) 160 Cal.App.4th 304, 312; *People v. May* (2007) 155 Cal.App.4th 350, 357.) The statutory scheme is civil and nonpunitive. (*People v. Taylor, supra,* 160 Cal.App.4th at p. 312; *People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826, 830.) As a condition of parole, the Department of Mental Health ("DMH") may treat a prisoner as an MDO if certain conditions are met. (§ 2962; *People v. Allen* (2007) 42 Cal.4th 91, 99; *People v. May, supra,* 155 Cal.App.4th at p. 357; *People v. Morris* (2005) 126 Cal.App.4th 527, 536.) Specifically,

> [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(a)-(d)(1); *People v. Francis* (2002) 98 Cal.App.4th 873, 876-877.]

(*People v. Hannibal* (2006) 143 Cal.App.4th 1087, 1094; *see also People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2.) In this regard, the Board conducts MDO hearings and determines whether a determinate sentence prisoner being released to parole shall have MDO treatment as part of the special conditions of parole. (§§ 2960, 2962, and 5075.1; 15 C.C.R. § 2570 *et seq.*)

ii. A Board Finding That The § 2962 Criteria Are Met Following The Chief Psychiatrist's Certification.

As a condition of parole, a prisoner who meets the criteria set out in § 2962 at the time of parole release shall be treated as an MDO by DMH.[6] Before a § 2962 commitment, three specified mental health professionals must agree, and the chief psychiatrist of the Department of Corrections[7] ("CDCR") must certify to the Board, that the prisoner meets all six § 2962 criteria. (§ 2962(d); 15 C.C.R. § 2572.) The Board's Central Office Calendar Deputy Commissioner reviews each certification to ensure its validity and to confirm that the § 2962 criteria were met. If the Board finds the § 2962 criteria are met, it orders the prisoner's MDO treatment and notifies CDCR. (15 C.C.R. § 2573.) CDCR then informs the prisoner of the Board's decision. If § 2962 treatment is ordered, the prisoner is served with conditions of parole reflecting the MDO treatment as a special condition. (15 C.C.R. § 2574.) The prisoner is also informed in writing of his[8] ability to request a hearing before the Board respecting the § 2962 certification, and of his right to request evaluations from two independent professionals (as defined in § 2978). (§§ 2964(a) and 2966(a); 15 C.C.R. §§ 2574 and 2576.)

At this time, the prisoner may either: (a) sign the special condition of parole imposed pursuant to § 2962, and be transferred to a DMH facility;

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[6] A prisoner released to parole without MDO treatment who deteriorates and is reincarcerated on the same underlying offense may be committed under § 2962 upon a subsequent release to parole. (*People v. Coronado* (1994) 28 Cal.App.4th 1402, 1408.)

[7] Effective July 1, 2005, statutory references to the Department of Corrections are deemed a reference to the Department of Corrections and Rehabilitation, Division of Adult Operations. (§ 5000.)

[8] The masculine is used to refer to both genders.

(b) refuse to sign the special condition of parole imposed and be scheduled for a parole revocation hearing (*but see Terhune v. Superior Court* (1998) 65 Cal.App.4th 864); or (c) sign the special condition of parole and request a certification hearing before the Board. (15 C.C.R. § 2575.)

iii. A Board Finding That The § 2962 Criteria Are Met Following A Board Hearing.

Following the Board's decision requiring § 2962 treatment during parole, the prisoner can request a Board hearing to prove the criteria were met. The burden is on the Board to prove so at "a preponderance of evidence." (§ 2966(a); 15 C.C.R. § 2576.) A Deputy Commissioner conducts the hearing and an attorney must represent the prisoner. Attorney waivers are not accepted. (15 C.C.R. § 2576.)

At the hearing, the prisoner has the rights specified in 15 C.C.R. §§ 2245-2256. (15 C.C.R. § 2576.) These include: to be present at the hearing, speak on his own behalf, ask/answer questions, and for the Board not to consider non-confidential information unavailable to the prisoner (15 C.C.R. § 2247); to present relevant documents, including about disputed facts (15 C.C.R. § 2249); to an impartial panel (15 C.C.R. § 2250); to reasonable assistance in preparing (15 C.C.R. § 2251); and to a department representative's presence to ensure all relevant facts are heard and factual issues are presented (15 C.C.R. § 2252). All hearings are tape-recorded to include the evidence considered and the prisoner is entitled to a copy upon request. (15 C.C.R. §§ 2254 and 2576).

The prisoner is informed also that he has a right to request a superior court trial on the § 2962 criteria, and the Board provides a § 2966(b) petition form with filing instructions. (§ 2966(a); 15 C.C.R. § 2575). The prisoner is given a copy of the Board's decision, specifying the decision, reasoning, and information considered. (15 C.C.R. §§ 2255 and 2576).

iv. A Superior Court Hearing Contesting The Board's Determination That The § 2962 Criteria Were Met.

Following a Board hearing on whether the § 2962 criteria are met, under § 2966(b):

> A prisoner who disagrees with the determination of the [Board] that he or she meets the criteria of [§ 2962], may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the [Board] hearing, met the criteria of [§ 2962]. The court shall conduct a hearing on the petition within 60 calendar days after the petition is filed, unless either time is waived by the petitioner or his or her counsel, or good cause is shown. Evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the [Board] hearing shall not be considered. The order of the [Board] shall be in effect until the completion of the court proceedings. . . .

v. Summary Of Methods Of Establishing The § 2962 Criteria.

Thus, a § 2962 commitment may be established three ways:

(1) a CDCR chief psychiatrist certification to the Board, and the prisoner's acceptance of the Board's finding based on that certification;

(2) a Board hearing following the chief psychiatrist certification at the request of the prisoner, and the prisoner's acceptance of that certification following the Board hearing; or

(3) a superior court finding following a hearing at the request of the prisoner following the prisoner's dissatisfaction with the Board hearing certification.

vi. A § 2962 MDO Commitment Expires Upon A Parolee's Annual Review Of The Terms And Conditions Of Parole.

A parolee's terms and conditions of parole are reviewed annually in accordance with § 3001 and 15 C.C.R. § 2535. "In the event of a retention

on parole, the parolee shall be entitled to a review by the parole authority each year thereafter until the maximum statutory period of parole has expired." (§ 3001(d).) Thus, a § 2962 commitment expires upon the § 3001 parole review. 15 C.C.R. § 2580 also requires annual review of MDO certification. Any continued MDO commitment corresponding with the next period of parole occurs under § 2966(c).

2. The Board's Authority To Recertify A Prisoner For Continued MDO Treatment For A Subsequent Parole Period Is Prescribed At § 2966(c).

Where MDO treatment had been a special condition of parole, that special condition is reviewed as part of the § 3001 annual review and 15 C.C.R. § 2580, and may be continued under § 2966(c):

> If the [Board] continues a parolee's mental health treatment under [§ 2962] when it continues the parolee's parole under [§ 3001], the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the parolee represents a substantial danger of physical harm to others.

Under 15 C.C.R. § 2580(a):

> If the [Parole and Community Services Division] at the time of the review required by [15 C.C.R. § 2535] recommends that the parolee be retained on parole and to reaffirm the special condition of [MDO] treatment . . . and the decision of central office calendar is to retain and reaffirm, the parolee is entitled to an Annual Review Hearing conducted under [15 C.C.R. § 2580(b)].

i. A § 2966(c) MDO Commitment Requires Proof Of Only Three Criteria.

The procedures § 2966(c) refers to are the prisoner's rights to request a Board hearing concerning a chief psychiatrist-based § 2966(c) certification and to request a superior court hearing following the Board

hearing certification. Thus, whether the § 2966(c) commitment is effectuated from a chief psychiatrist-based or a Board hearing certification or a superior court hearing, the only three criteria considered are whether (1) the parolee has a severe mental disorder; (2) the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment; and (3) by reason of the severe mental disorder, the parolee represents a substantial danger of physical harm to others (collectively, the "dynamic criteria"). The timeframe under consideration at a § 2966(c) MDO certification is from expiration of the § 2962 certification. (*People v. Bell* (1994) 30 Cal.App.4th 1705, 1710.)

ii. A § 2966(c) MDO Commitment Statutorily Expires Upon A Parolee's Annual Review Of The Terms And Conditions Of Parole.

Section 2966(c) also provides that each new period of parole following a § 3001 parole review may include a § 2966(c) commitment, as long as the § 2966(c) criteria are met for the corresponding new parole period. Thus, each § 2966(c) commitment also lasts for one year. (*See also* 15 C.C.R. § 2580.)

3. Once The Prisoner Ceases To Be On Parole, The District Attorney May File A § 2970 Petition In The Superior Court To Effectuate A One-Year MDO Commitment.

Once a prisoner is no longer on parole, or is released from prison because the prisoner refused to agree to § 2962 treatment as a condition of parole, the Board ceases to have legal authority over the prisoner. Thus, the district attorney of the county of current/proposed MDO commitment may petition to commit the individual as an MDO for a one-year period under § 2970. This is consistent with the Legislative objectives that individuals whose severe mental disorders "are not in remission or cannot be kept in remission . . . upon termination of parole, [pose] a danger to society, and

the state has a compelling interest in protecting the public," and that "in order to protect the public from those persons it is necessary to provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission." (§ 2960.)

A § 2970 petition must be brought 180 days (unless good cause is shown for a reduction of time) before the prisoner's parole ends, or his release from prison is scheduled. (§ 2970.) The § 2970 petition must be brought upon the written recommendation of the state hospital or community program treating the prisoner whose parole term is set to expire, or the Director of Corrections if the prisoner was not paroled. (§ 2970.)

A § 2970 commitment hearing is conducted in accordance with § 2972, and is held before a trial court or jury. At the trial, the individual's MDO status must be proven beyond a reasonable doubt. (§ 2972(a).) The district attorney only has to prove the dynamic criteria. (§ 2972(c).) If the court or jury so finds the criteria are met, the court orders "the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to [DMH] if the person was in prison." (§ 2972(c).)

4. Subsequent One-Year MDO Recommitments May Be Effectuated Annually Through A District Attorney Filing.

Prior to the time a one-year § 2970 commitment is about to terminate, the district attorney of the county of MDO commitment may petition for recommitment for an additional one-year term. (§ 2972(e).) Recommitment proceedings follow § 2972 but only two of the dynamic criteria are considered. (§ 2972(e).)

B. A § 2962 COMMITMENT DOES NOT REQUIRE A SUPERIOR COURT ADJUDICATION.

In light of the § 2962 procedures, a superior court adjudication is **not** fundamentally required for a valid § 2962 commitment to occur. Indeed, a prisoner who never challenges the chief psychiatrist's certification is still validly certified for MDO treatment as a special condition of parole and committed under § 2962, having had no superior court adjudication. Similarly, a prisoner who challenges the chief psychiatrist's certification via requesting a Board hearing under § 2966(a), but who then never files a § 2966(b) petition in the superior court to challenge the findings of the Board certification hearing, also is validly certified for MDO treatment as a special condition of parole and committed under § 2962, having had no superior court adjudication.

The **only** time superior court adjudication is **required** for a § 2962 certification and commitment under § 2962 for MDO treatment as a special condition of parole *is when the prisoner files a § 2966(b) petition challenging the Board's § 2962 commitment.* While the prisoner has a right to request a superior court hearing concerning the Board's hearing determination that he met the § 2962 criteria, *he must affirmatively exercise that right.* Therefore, a superior court hearing is required only upon that event, and upon the event the prisoner does not later withdraw his § 2966(b) petition. Certainly, it is axiomatic that if the Legislature wanted to **require** superior court adjudication for **all** § 2962 commitments, it would have dispensed with the provisions for the chief psychiatrist-based and Board hearing certification processes and provided exclusively for superior court hearings. It **did not**. This Court must "presume the Legislature meant what it said, and the plain language of the statute governs." [Citation.]." (*People v. Morris, supra,* 126 Cal.App.4th at p. 536.)

Petitioner's claim that § 2962 commitment requires superior court adjudication of the § 2962 commitment criteria is incorrect.

C. THE RIGHT TO CHALLENGE THE BOARD'S § 2962 DETERMINATIONS VIA A § 2966(b) PETITION ENDS WHEN THE § 2962 COMMITMENT TERM EXPIRES, AND A § 2966(b) RIGHT THAT IS NEVER EXERCISED, OR IS EXERCISED BUT THEN WITHDRAWN AND NEVER REASSERTED WITHIN THE § 2962 COMMITMENT TERM, IS FORFEITED.

1. The MDO Act's Commitment/Recommitment Scheme Provides That Each Commitment Represents A Distinct Term With Regard To The Respective Criteria Considered And The Period Of MDO Commitment.

In light of the procedures described above, each term of §§ 2962, 2966(c), 2970, and 2972 MDO commitment/recommitment is a stand-alone event with its own beginning and expiration date. Further, each singular MDO commitment/recommitment term is dependent upon the individual's mental health picture as of the time a commitment/recommitment is sought, as described by the dynamic criteria. (*People v. Bell*, *supra,* 30 Cal.App.4th at p. 1710.) It is this very feature of providing for periodic review and finite terms of commitment/recommitment in the MDO Act's commitment/recommitment process that allows the MDO Act to comport with due process, "because if the basis for a commitment ceases to exist, continued confinement violates the substantive liberty interest in freedom from unnecessary restraint." (*People v. Allen, supra,* 42 Cal.4th at p. 104, *quoting Clark v. Cohen* (3d Cir.1986) 794 F.2d 79, 86.)

2. The MDO Act's Commitment/Recommitment Scheme Provides That The Six Criteria Of § 2962 Are To Be Established Exclusively At The Time Of The § 2962 Commitment Term.

Also in light of the procedures described above, the Legislature

clearly defined that the **only** time there is a requirement that the Board and/or superior court must find that: (1) "[t]he severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison" (§ 2962(b)); "[t]he 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" (§ 2962(c)); and (3) "[t]he crime referred to in [§ 2962(b)]" (§ 2962(e)) resulted in a determinate sentence under § 1170 and is either listed or described under § 2962(e)(2) (collectively, the "static criteria"), **is when the Board seeks to require MDO treatment under § 2962.**

Indeed, the Legislature plainly defined that upon either a § 2966(c) recommitment, or a § 2970 commitment, that the Board or the district attorney, as the case may be, need only prove the **three dynamic** criteria. (§§ 2966(c) and 2972(c).) Upon a § 2972(e) recommitment, the district attorney need only prove **two dynamic** criteria. Thus, under the plain language of §§ 2966(c), 2970, and 2972, there is **no** requirement for either the Board or the prosecutor to prove the **static** criteria.

3. The MDO Act's Commitment/Recommitment Scheme Clearly Prescribes That Criteria Required For A § 2962 Commitment Are Meant To Be Challenged Exclusively At The Time Of A § 2962 Commitment.

Also in light of the procedures described above, MDO procedures for commitment/recommitment make it clear that the Legislature provided a prisoner who wishes to challenge the six bases of the Board's § 2962 commitment not one, but two, distinct abilities to do so during the time of that § 2962 commitment **exclusively**. Section 2966(a) provides:

> A prisoner may request a hearing before the [Board], and the board shall conduct a hearing if so requested, **for the purpose of proving that the prisoner meets the criteria in [§ 2962].**

Afterward, § 2966(b) provides:

> **A prisoner who disagrees with the determination of the [Board] that he or she meets the criteria of [§ 2962],** may file in the superior court of the county in which he or she is incarcerated or is being treated a petition **for a hearing on whether he or she, as of the date of the [Board] hearing, met the criteria of [§ 2962].**

Thus, by the statutes' plain text, the Board and superior court hearings provided for in §§ 2966(a) and (b) **speak only to a § 2962 commitment.** The phrase "A prisoner who disagrees with the determination of the [Board] that he or she meets the criteria of [§ 2962]" clearly refers to the determination of the Board at the hearing the prisoner had requested under § 2966(a) due to the prisoner's dissatisfaction with the certification of the Board that was predicated upon the chief psychiatrist's certification. The phrase "may file in the superior court . . . a petition for a hearing on whether he or she, as of the date of the [Board] hearing, met the criteria of [§ 2962]" also clearly refers to the same Board hearing the prisoner had requested under § 2966(a). Therefore, the exclusivity of the boundaries of a § 2966(b) petition filed to challenge in the superior court the Board hearing determinations on the § 2962 commitment certification are clear. Moreover, § 2966(b) further provides that:

> Evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the [Board] hearing shall not be considered. The order of the [Board] shall be in effect until the completion of the court proceedings. . . . The court may, upon stipulation of both parties, 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 petitioner during the certification process. . . . If the court or jury reverses the determination of the [Board], the court shall stay the execution of the decision for five working days to allow for an orderly release of the prisoner.

That evidence outside of the Board's § 2962 hearing respecting the mental health of the prisoner is deemed irrelevant, the order of the Board remains in place pending a § 2966(b) superior court hearing, and the superior court may receive in evidence an affidavit or declaration of a person "who was involved in the certification and hearing process" all speak directly to the fact that ***only*** **the Board's § 2962 hearing certification is at issue.** Since the six criteria germane to a § 2962 commitment are only examined upon the § 2962 commitment, a § 2966(b) petition filed in the superior court to challenge the Board hearing determinations on the § 2962 commitment **necessarily is the only time at which the prisoner may challenge those six criteria.**

To be sure, there is no other provision under the MDO Act under which a prisoner is authorized to challenge the static criteria. As discussed above, §§ 2966(c), 2970, and 2972 do not require proof of the static criteria. Sections 2966(c), 2970, and 2972 also do not address litigation of the static criteria upon recommitment. Again, what is germane at those points of commitment/recommitment is the individual's mental health picture as of the time commitment/recommitment is sought, as defined by the dynamic criteria. (*People v. Bell, supra,* 30 Cal.App.4th at p. 1710.)

4. A Request For A Superior Court Adjudication Of The § 2962 Commitment Criteria That Is Withdrawn And Not Reasserted Before The Expiration Of The Commitment Term Is Forfeited.

As discussed above, a parolee's terms and conditions of parole are reviewed annually. Under § 2966(c) and 15 C.C.R. § 2580(a), a § 2962 commitment in effect as a special condition of a parole period under review expires at the time of the annual review. This period necessarily serves as a terminal point regarding the prisoner's right to challenge the Board's § 2962 commitment hearing determinations by way of filing a § 2966(b) petition since the § 2962 commitment term has expired. This was the

conclusion of *People v. Merfield, supra,* 147 Cal.App.4th at p. 1077:

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

The *Merfield* court held that reconsideration of the § 2962 criteria at a recommitment proceeding is barred when the prisoner elects not to litigate them in the first instance, *i.e.,* at the time of and pending the duration of the § 2962 petition, or forfeits or abandons that right, because the issue becomes moot at the expiration of the § 2962 commitment term. (*People v. Merfield, supra,* 147 Cal.App.4th 1071, 1076; s*ee also People v. Gibson* (1988) 204 Cal.App.3d 1425, 1429.)

In the same way, the filing and subsequent withdrawal of a § 2966(b) petition filed to challenge a § 2966(c) recommitment forfeits a superior court challenge to that recommitment when there is no renewal of the withdrawn § 2966(b) petition filed prior to the time the § 2966(c) recommitment expires. The expiration of the § 2966(c) recommitment moots a challenge to it. The *Merfield* court explained:

> We also agree with the trial court's conclusion that Merfield waived his right to file a petition challenging the Board's initial commitment determination. When Merfield withdrew his first petition ... his attorney, the prosecutor, and the court all made clear to him that while he had reserved the right to refile the petition at a later date, 'by the time of your next review ... it becomes what we call moot and, so, you would not have the right to refile it after that period.' Although Merfield sent the court a letter ... stating that he wished to 'achieve decertification from the MDO scheme and to be released forthwith,' that letter, and the petition he [later]

> filed ... were submitted after his initial commitment had expired and the Board's [initial] determination that he qualified for recommitment for an additional year.
>
> The record belies Merfield's claim that he was '[g]iven ... multiple and confusing explanations' regarding the deadline to challenge his initial commitment. Moreover, while we agree that his ... letter 'clearly indicated his understanding that he retained his right to challenge his commitment ...,' he had the right at that time to file a petition challenging the Board's recommitment determination .... While he filed such a petition through counsel ... he withdrew that petition as well and apparently did not seek to refile it before the one-year recommitment period had expired as well. Merfield simply fails to demonstrate that he was misled or legitimately confused about the time limit on his right to challenge his initial commitment. Accordingly, the petition he filed challenging his initial commitment after its expiration was properly dismissed on the grounds of mootness and waiver.

(*People v. Merfield, supra,* 147 Cal.App.4th 1071, 1076.)

While in the present case there is no record indicating that the trial court warned Petitioner of the consequences of withdrawing his § 2966(b) petition challenging the § 2962 Board commitment determinations, and Petitioner bemoans this (O.B., p. 26), under the MDO Act, no such warning is required regarding what the MDO Act already makes clear. Furthermore, as in *Merfield*, Petitioner was represented at each stage of his § 2962 certification process. The § 2966(a) Board hearing and Petitioner's § 2966(b) petition list "Vern Kalshan"[9] as his attorney at the Board hearing. (Response at Exhibit 7, p. 17, and at Exhibit 8, p. 18.) Petitioner's § 2966(b) petition (Response at Exhibit 8, p. 18; Petition at Exhibit E, p. 67) and minute orders respecting that petition (Petition at Exhibit E, pp. 64-66) show that "Jennifer Fehlman"[10] was his attorney including when

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[9] *See* State Bar No. 48078.

[10] *See* State Bar No. 95307.

Petitioner's petition was withdrawn.

As in *Merfield*, Petitioner filed a petition challenging the Board's findings. He had an opportunity to litigate the issue in superior court. He had legal representation. He chose to withdraw his petition. He never refiled his § 2966(b) petition prior to the expiration of the § 2962 commitment term. As in *Merfield*, Petitioner forfeited his right to challenge the Board's findings as to the § 2962 commitment. Simply, his withdrawal of his § 2966(b) petition and his not seeking to refile it before the expiration of the commitment term **means he never sought a determination from the superior court on the § 2962 commitment criteria.** Thus, the motion to dismiss Petitioner filed within the § 2970 commitment proceeding was properly denied.

A similar result occurred in *People v. Rish* (2008) 163 Cal.App.4th 1370, 1384:

> because Rish never sought a determination from the trial court as to whether he was suitable for outpatient treatment pursuant to [§ 2972 (d)], he forfeited his claim that the trial court erred in failing to make such a ruling. [*See, People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9, (although the terms 'wavier' and 'forfeiture' are often used interchangeably, '"waiver is the 'intentional relinquishment or abandonment of a known right'" whereas '"forfeiture is the failure to make the timely assertion of a right"'); *People v. Rowland* (1992) 4 Cal.4th 238, 259, ('no review can be conducted' where the defendant fails to secure a ruling from the trial court as '"[t]he absence of an adverse ruling precludes any appellate challenge."').]

Petitioner's withdrawal of his § 2966(b) petition to his § 2962 commitment and his failure to refile that petition prior to the expiration of that § 2962 commitment term forfeited his § 2966(b) claim.

5. A Withdrawal Without Prejudice Of A § 2966(b) Petition Challenging A § 2962 Board Commitment Cannot Preserve That § 2966(b) Challenge *Ad Infinitum*.

Petitioner asserts that his "withdrawal without prejudice" of his § 2966(b) petition preserved for him *ad infinitum* the right to litigate the Board determinations of the § 2962 commitment. Petitioner is mistaken.

> A dismissal without prejudice has the effect of a final judgment in favor of the defendant insofar as it terminates the proceeding and concludes the right of the parties in the particular action. [*Gagnon Co., Inc. v. Nevada Desert Inn* (1955) 45 Cal.2d 448, 455.] Such a dismissal filed within the time of the applicable statute of limitations does not bar a subsequent action on the same cause filed within the applicable statutory period. [*Kinley v. Alexander* (1955) 137 Cal.App.2d 382, 387.]

(*Nolan v. Workers' Comp. Appeals Bd.* (1977) 70 Cal.App.3d 122, 128-129.)

While it is true that the MDO Act does not provide a formal statute of limitations, it is nevertheless clear from the statutory scheme what the Legislature intended: that the endpoint for filing a § 2966(b) petition is the endpoint of the § 2962 commitment term. As discussed above, under § 2966(c) and 15 C.C.R. § 2580(a), a § 2962 commitment in effect as a special condition of the then-expiring period of parole under review *expires* at the time of the § 3001 annual review. This period necessarily serves as the endpoint to the ability of the prisoner to challenge, and reassert any previously withdrawn challenge, to the Board's § 2962 commitment hearing determinations by way of filing (or re-filing) a § 2966(b) petition since the § 2962 commitment term has expired. To construe the statutory scheme in any other manner would lead to absurd results.

Moreover, timeframes pertinent to a "withdrawal without prejudice" cut both ways: "a dismissal **filed within the time of the applicable**

statute of limitations does not bar a subsequent action on the same cause **filed within the applicable statutory period**." (*Nolan v. Workers' Comp. Appeals Bd.*, *supra,* 70 Cal.App.3d at pp. 128-129.) Petitioner wishes to acknowledge an applicable statute of limitations-like timeframe exists for his withdrawal in order to argue that he effectively preserved his right to relitigate that petition in the future, yet makes like an ostrich when he is done with it. It does not work that way.

To be sure, well-settled canons of statutory construction require the Court to "consider the statute read as a whole, harmonizing the various elements by considering each clause and section in the context of the overall statutory framework," and to construe the MDO Act in a way "that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. [Citation.]" (*People v. Arias* (2008) 45 Cal.4th 169, 186.)

As discussed above, the overall statutory framework of the MDO Act distinguishes between § 2962 and subsequent commitment/ recommitment proceedings. Upon §§ 2966(c), 2970, and 2972 proceedings, there is no requirement of proof of the static criteria, and these sections do not address litigation of the static criteria. Instead, what is germane at those points are the **dynamic** criteria to examine whether, at each stage, the individual remains a danger to society due to severe mental illness, and whether the public should be protected from that individual and the individual should continue to benefit from mental health treatment under the MDO Act. (§ 2960.) To construe within this clear statutory scheme that the Legislature intended to grant a patient right to challenge his § 2962 certification at any time at the MDO's pleasure, so long as no court has adjudicated the § 2966(c) petition, would frustrate the MDO Act's purpose.

Undeniably, it would be an absurd result if, due to the prisoner's own decision-making, he would be allowed to later lament the decision and, in the end, be afforded even more procedural protections than those who did choose to avail themselves timely of the protections afforded under the MDO Act. Furthermore, the People would be extremely prejudiced. Specifically, under the MDO Act, the People have no right of their own accord at the § 2962 stage to initiate formal litigation of the initial six criteria. That right is preserved solely for the prisoner. Thus, without the prisoner invoking the right to litigate the Board's § 2962 finding, the People are wholly deprived of their ability to prove their case as to all six criteria at the § 2966(b) time when the MDO Act specifically provides the prisoner with an opportunity to litigate those matters.

To allow a situation where the prisoner has forfeited that right and yet, the prisoner at any time thereafter may then litigate the Board's findings places the People – who had been ready to litigate the issues at the § 2962 stage – in an inequitable position. Namely, the People would be forced to have to try to prove facts to support findings years or even decades after the § 2962 certification at a time when the burden of doing so has become frustrated or too great, such as from witnesses or other evidence no longer being available or memories having faded. (*See People v. Allen* (2008) 44 Cal.4th 843, 866 ["we consider 'the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' [*People v. Otto* (2001) 26 Cal.4th 200, 210.]."] As a result, and in sharp contrast to the stated goals of the MDO Act, a dangerous MDO could evade treatment simply because a static criterion could not be proved due to the passage of time. (§ 2960.)

While Petitioner advances that dissipation of evidence through the passage of time does not prejudice the People because hearsay evidence

may establish the static criteria (O.B., pp. 29-31), this contention is meritless. The portion of the relevant provision to which Petitioner refers states:

> **The court may, upon stipulation of both parties,** 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 petitioner during the certification process. **The court may** allow the affidavit or declaration to be read and the contents thereof considered in the rendering of a decision or verdict in any proceeding held pursuant to subdivision (b) or (c), or subdivision (a) of [§ 2972].

(§ 2966(b).) Thus, from the term "upon stipulation of both parties" it is clear that whether or not declarations/affidavits will be allowed into evidence becomes, in the first instance, a matter of agreement between the parties. Next, from the terms "the court may," it also is clear that whether or not declarations/affidavits will be allowed in as evidence, and whether the contents can be read and considered in the rendering of a decision, is entirely discretionary with the court. None of this is a given.

Moreover, Petitioner puts the cart before the horse. An interpretation allowing § 2962 petition litigation at any time **would precede any stipulation of both parties as to the evidence**. What does Petitioner propose the People do in the case where Petitioner will ***not*** stipulate to the evidence? And, quite frankly, **why would** a § 2966(b) petitioner stipulate, since those declarations/affidavits form the very basis of what he is contesting? Furthermore, to the extent that form of evidence is all the evidence the People may have in a given case, there is simply no motivation whatsoever for the MDO to stipulate to it.

Petitioner's proposal also forces a one-size-fits-all trial on the People, since it could bar live witnesses should they be required. Aside from forgetting it is a civil and not a criminal proceeding, Petitioner knows

"the DA's office is obligated not only to prosecute with vigor, but also to seek justice" (O.B., p. 30 fn. 8). Thus, Petitioner also must know the People cannot be boxed into a one-size-fits-all "prosecution" wherein they could not admit their best evidence. Petitioner's proposal also completely ignores hearsay problems that might arise with records that form the basis of the declarants' opinions (*e.g.,* lack of a probation report, or failure to meet a business record exception as in a police report). He also skirts how the declarants' opinions will not be admitted for the truth of the matter respecting factual issues, such as those about the underlying crime and whether it involved force or violence. (*See People v. Dean* (2009) 174 Cal.App.4th 186.)

Finally, where does it end? If Petitioner here were allowed to go back and litigate the issue of his underlying crime (despite the forfeiture of his § 2966(b) petition) on the basis that the petition was withdrawn without prejudice and the expiration of the § 2962 petition did not effectuate an endpoint to his ability to re-file that § 2966(b) petition or re-hash those arguments, would he additionally at another date be allowed to claim that, since he did not litigate the subject of the connection between that crime and his mental illness when the Board made its findings at his § 2962 proceeding, and he did not elect to litigate that issue when he argued the merits of his withdrawn with prejudice § 2966(b) petition, that he should also be able to litigate that criterion post-initial commitment since the § 2966(b) petition was withdrawn with prejudice? Indeed not. This would be allowing Petitioner to play fast and loose with the administration of justice, with absurd and prejudicial results, to say nothing of the law's respect for the finality of judgments.[11]

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[11] Petitioner contends "The DA, in opposing dismissal of its 2970 petition" . . . "admits that it has not suffered any prejudice by Mr. Lopez's challenge to the jurisdictional criteria at the extension proceeding

II.
COLLATERAL ESTOPPEL APPLIES TO THE BOARD'S § 2962 DETERMINATIONS WHEN THERE IS NO § 2966(b) CHALLENGE TO THOSE FINDINGS.

Petitioner advances the trial court erred when it found that his withdrawal of his § 2966(b) petition challenging the Board's § 2962 commitment of him had a preclusive effect on his ability to challenge the Board's determinations in any subsequent recommitment hearings. Petitioner claims that it was in error because a trial court or jury had not adjudicated the § 2962 criteria and thus, res judicata/collateral estoppel does not apply. Petitioner is wrong.[12]

A. THE MDO ACT CONTEMPLATES A PRECLUSIVE EFFECT BEING PLACED UPON § 2962 HEARING DECISIONS OF THE BOARD WHEN THOSE DECISIONS GO UNCHALLANGED BY THE PRISONER.

In the MDO Act, the Legislature specifically provided for a statutory scheme where, upon a § 2962 commitment, six criteria are considered. The

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five years after the commission of the underlying offense and two years after the initial certification." (O.B. at p. 30.) Petitioner has disingenuously taken great license with what was stated in the Response at pp. 39-41. Further, Real Party in Interest is obligated to advance its arguments with vigor and to seek justice, which includes not forfeiting a claim by not timely asserting it. For Real Party in Interest to request a superior court trial instead of a dismissal under the circumstances presented is to speak nothing whatsoever about the quality, quantity, or nature of our available evidence to proceed. Certainly no concessions were made.

[12] Petitioner asserts that the Court of Appeal "recognized that [*People v. Merfield* (2007) 147 Cal.App.4th 1071] was wrongly decided, because the doctrine of issue preclusion cannot apply where the issue was never adjudicated by a court of competent jurisdiction." (O.B., p. 5.) This is another entirely disingenuous assertion. The Court of Appeal stated, "We therefore do not address his contention his motion was not barred by res judicata or collateral estoppel, because the issue of whether his predicate crime involved force or violence was never adjudicated in a court." (O.B. at Appendix A, p. 12.)

Legislature also provided that, upon any ***re***commitment, only dynamic commitment criteria are considered. This is the statutory scheme, regardless of whether or not a prisoner challenges any or all of the original six factors of the § 2962 commitment in superior court. It is clear from the MDO Act's procedural structure, then, that the Legislature meant for there to be a preclusive effect of a determination on the static criteria upon any §§ 2966(c), 2970, and 2972 commitment/recommitment, even where the Board's decision underlies the determinations. The statutory structure of the MDO Act makes it clear at the outset that, at the §§ 2966(c), 2970, and 2972 commitment/recommitment phase, Petitioner would be barred from challenging the § 2962 commitment criteria decided at the § 2962 phase. Petitioner chose to not to so when he had the opportunity to. Indeed, Petitioner's withdrawal of his petition and his not re-filing it prior to the expiration of the § 2962 commitment term establishes he knowingly forfeited the ability. The fact that the Board decided the § 2962 criteria is inconsequential to Petitioner's present aim.

As discussed above, a § 2962 commitment may be effectuated by three methods. In light of the § 2962 procedures, a superior court adjudication is **not** fundamentally required for a valid § 2962 commitment or for a Board certification to have a preclusive effect. Indeed, a prisoner who never challenges the chief psychiatrist's certification is still validly certified under § 2962. Similarly, a prisoner who challenges the chief psychiatrist's certification by requesting a Board hearing under § 2966(a), but who thereafter does not file a § 2966(b) petition in the superior court to challenge the Board hearing certification, also is still validly certified under § 2962.

Moreover, administrative decisions have a collateral estoppel effect when the agency's proceedings possess a judicial character:

> 'Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.' [*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.] The doctrine applies 'only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] . . . 'Even assuming all the threshold requirements are satisfied, however, our analysis is not at an end. We have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting.' [*Id.* at pp. 342-343.]
>
> We have recognized that '[c]ollateral estoppel may be applied to decisions made by administrative agencies.' [*People v. Sims* (1982) 32 Cal.3d 468, 479.] For an administrative decision to have collateral estoppel effect, it and its prior proceedings must possess a judicial character. [*Ibid.*] Indicia of proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision. [*Id.* at p. 480.]

(*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943-944.)

As discussed in Part I, the Board's § 2962 hearing has a judicial character. The threshold requirements of collateral estoppel thus are present. The Board resolved disputed factual issues that the parties had an adequate opportunity to litigate, and the issue Petitioner wishes to now relitigate is identical to an issue decided in that prior proceeding. (*Id.* at pp. 943-944; *see also Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341-342

["The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same."].)

As the United States Supreme Court described:

> The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata [or claim preclusion], a final judgment on the merits of an action precludes the parties or their privies from relitigating issues [or claims] that were or could have been raised in that action. [*Cromwell v. County of Sac* (1876) 94 U.S. 351, 352.] Under collateral estoppel [or issue preclusion], once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. [*Montana v. United States* (1979) 440 U.S. 147, 153.]

(*Allen v. McCurry* (1980) 449 U.S. 90, 94.)

Thus defined, the doctrines serve to prevent relitigation of an issue actually and necessarily decided in a previous action, as well as issues that could have been raised in that action. (*See also White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 761.) The doctrines were designed "to promote judicial economy, preserve the integrity of the judicial system, and protect litigants from harassment by vexatious litigation." (*In re Bush* (2008) 161 Cal.App.4th 133, 146, *citing Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829.) The doctrines are rules "of fundamental and substantial justice, ... which should be cordially regarded and enforced by the courts...." (*Federated Department Stores, Inc. v. Moitie* (1981) 452 U.S. 394, 401.) At the same time, the doctrines are deemed inappropriate "if considerations of policy or fairness outweigh [their purpose] as applied in a specific case." (*In re Bush, supra,* 161 Cal.App.4th at p. 146, *citing Vandenberg v. Superior Court, supra,* 21 Cal.4th at p. 829.) For example, "[w]hen an issue decided in a prior proceeding is a pure question of law

rather than one of fact, a prior determination is not conclusive if injustice would result or if the application of collateral estoppel would be contrary to the public interest." (*In re Bush*, *supra,* 161 Cal.App.4th at p. 147, *citing City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64.)

For purposes of the doctrines, "a final determination on the merits can be a judgment, a motion, or an order that determines a substantial matter of right on issues of law or fact." (*People v. Howie* (1995) 41 Cal.App.4th 729, 736, *citing Sunkler v. McKenzie* (1900) 127 Cal. 554, 556; *Anderson v. Great Republic L. Ins. Co.* (1940) 41 Cal.App.2d 181, 196.) As discussed, it also can be an administrative hearing decision.

Indeed, the very nature of the MDO Act's statutory procedures for commitment/recommitment make it clear that the intent of the Legislature was to accord a preclusive effect on a Board determination of the § 2962 criteria where it goes unchallenged under § 2966(b). The Legislature clearly defined the Board's general parole decision-making authority and its specific and affirmative role in the MDO process. (*See, e.g.*, §§ 3001, 3052, 3053, 5076.2, 2960 *et seq.*) The Legislature specifically prescribed the commitment/recommitment procedures in order to effectuate efficiently the goals stated in § 2960, as well as to provide procedural protections against unwarranted MDO commitments. The provision in § 2966(b) allowing, by agreement of the parties and approval of the court, for the submission of declarations or affidavits of those involved in the § 2962 certification process in a § 2966(b) superior court hearing is other indicia of Legislative intent to allow for efficiency balanced with fairness. Moreover, the lack of the need to re-prove the static criteria in subsequent commitments evinces the same. (*People v. Francis* (2002) 98 Cal.App.4th 873, 878-879.) It is this very act of removing the static criteria from the post-§ 2962 commitment/recommitment process and the focus on the present situation concerning the dynamic criteria that shows the Legislative intent to have

the criteria decided at the § 2962 stage to have a preclusive effect.

People v. Merfield, supra, 147 Cal.App.4th at p. 1075-1076, set this out, and further acknowledged the Board's authority and affirmative role in the process:

> The practical effect of this distinction is that the three criteria concerning past events need only be proven once, while the Board must find that the parolee meets the other three criteria at the time of the annual hearing in order to continue treatment for an additional year.

In light of the statutory structure of the commitment/recommitment procedures of the MDO Act, as well as the settled case law on the fact that administrative agency decisions of a judicial character have a preclusive effect, holding that "[u]nder the doctrines of res judicata and collateral estoppel, issues relating to the three criteria concerning past events that have been litigated in an MDO proceeding cannot be relitigated in a subsequent proceeding," is a correct application of the Legislature's clear intent even when it is the Board whose proceeding decides them. (*People v. Merfield, supra,* 147 Cal.App.4th at p. 1076, *quoting People v. Hannibal, supra,* 143 Cal.App.4th 1087, 1094; *see also People v. Francis, supra*, 98 Cal.App.4th 873; *People v. Parham* (2003) 111 Cal.App.4th 1178.) So, too, is a finding that res judicata/collateral estoppel apply when issues relating to the static criteria concerning past events could have been litigated in the superior court but, at the prisoner's election, they were not. This is because, absent a challenge to the Board's § 2962 findings by the prisoner, the Board findings are final and the prisoner is then certified and committed. Further, where a prisoner does seek to challenge the § 2962 certification, the Board's certification remains in place pending the outcome of the § 2966(b) hearing, which speaks to the authority and weight the Legislature accords the Board decision.

Indeed, it is only in the most strictest sense that, "in order for res judicata or collateral estoppel to apply there must be a *final* judgment or determination of an issue" from a court of law. (*People v. Scott* (2000) 85 Cal.App.4th 905, 919, *citing* 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment § 306, p. 856, emphasis original.) The doctrines also hold that the judgment need only be "final in the sense that no further judicial act remains to be done to end the litigation." (*Id.*) Where the Board makes the § 2962 determination and the determination goes unchallenged, it ***is*** "final in the sense that no further judicial act remains to be done to end the litigation." (*People v. Scott, supra,* 85 Cal.App.4th at p. 919.) The unchallenged Board's determination "determines a substantial matter of right on issues of law or fact." (*People v. Howie, supra,* 41 Cal.App.4th at p. 736.) The doctrines apply to issues "that were or could have been raised in that action." (*Allen v. McCurry, supra*, 449 U.S. at p. 94; *see also People v. Merfield, supra,* 147 Cal.App.4th at p. 1076.) There is no injustice at all in applying the doctrines where a prisoner knowingly and willingly chooses not to litigate the Board's § 2962 hearing certification. (*See People v. Tatum* (2008) 161 Cal.App.4th 41, 66 ["It should go without saying that regardless of the strength (or weakness) of the underlying case for [a prisoner's] involuntary commitment, that commitment must be accomplished through the procedures set forth by our Legislature and consistent with the due process rights vested in every citizen by the federal and state Constitutions," *citing People v. Allen, supra,* 42 Cal.4th at p. 98]; *People v. Hill* (1982) 134 Cal.App.3d 1055, 1060-1061 ["Our belief in the concept of judicial restraint, and our deference to the powers granted our coequal governmental partners, cannot be limited to those instances where, after viewing the fruits of their labors, we find them good"].)

B. GIVEN THE PRECLUSIVE EFFECT PLACED UPON § 2962 BOARD HEARING DECISIONS WHEN THOSE DECISIONS GO UNCHALLENGED, THE TRIAL COURT CORRECTLY APPLIED *MERFIELD*.

Petitioner asserts that the trial court's reliance on *People v. Merfield, supra,* 147 Cal.App.4th 1071, to preclude his ability to challenge the foundational elements the Board determined at his § 2962 commitment is erroneous, because *Merfield* conflicts with *People v. Hayes* (2003) 105 Cal.App.4th 1287 and *People v. Garcia* (2005) 127 Cal.App.4th 558. Petitioner also asserts that *Merfield* misapplied the doctrines of res judicata/collateral estoppel and exceeded its facts, and states that the trial court erroneously extended *Merfield*. These contentions are without merit.

It is true that in *Hayes*, the court allowed Hayes to challenge at the recommitment phase his underlying offense as not qualifying under § 2962. (*People v. Hayes*, *supra,* 105 Cal.App.4th at p. 1289.) Hayes was charged with a violation of § 452(b). (*Id.* at p. 1288.) Before his parole term ended, the district attorney petitioned for § 2970 recommitment. Hayes waived his right to a jury trial, and the trial court granted the § 2970 petition. (*Id.* at p. 1289.) Hayes appealed, contending his conviction for *recklessly* setting a fire could not support commitment under the MDO Act as a matter of law. (*Id.* at 1290.) The appeals court agreed, and found that Hayes' underlying conviction did not support the initial § 2962 commitment under that statute. (*Id.* at 1291.) This, however, does not make *Hayes* controlling. *Hayes* is entirely distinguishable.

First, it is unclear is why the court entertained Hayes' appeal. There is only a brief, footnoted reference to the underlying conditions that resulted in the appeals court considering the issue:

> The record does not indicate that Hayes challenged his initial commitment on the ground that the offense of which he was convicted was not a proper basis for such a commitment. However, the People agree that the record of this case does

> not establish that Hayes is collaterally estopped from raising the issue in connection with his continued commitment.

(*People v. Hayes*, *supra,* 105 Cal.App.4th at p. 1289, fn. 2.) The footnote fails to dispel anything about the underlying record, or the People's position on the issue of collateral estoppel in light of that record, or even the appeals court's position on whether it should have addressed, *sua sponte*, whether or not Hayes' point should have been deemed moot or precluded in light of the record there. What the footnote does reveal, however, is that the court was alert to the fact that collateral estoppel may have applied. It did not, however, reach that issue.

Second, the initial commitment of Hayes was made after:

> the Legislature amended [§ 2962's] enumeration of qualifying offenses. The amendments added subdivision (e)(2)(Q), which authorized commitment based upon a crime in which the person expressly or impliedly threatened another with the use of force or violence; it also amended subdivision (e)(2)(L), which previously had listed only arson causing great bodily injury under section 451, subdivision (a). [Stats. 1999, ch. 16, § 1; *see People v. Macauley,* (1999) 73 Cal.App.4th 704, 708.] Amended subdivision (e)(2)(L) lists arson in violation of [§ 451(a) (arson causing great bodily injury), or arson in violation of any other provision of [§ 451] (arson) or in violation of [§ 455] (attempted arson) when the act posed a substantial danger of physical harm to others.

(*People v. Hayes, supra,* 105 Cal.App.4th at p. 1291.) Thus, Hayes' § 2962 commitment was legally erroneous *ab initio* because Hayes' conviction was not a qualifying offense under either § 2962(e)(2)(A)-(O) or (P)-(Q). The Legislature's inclusion of two other arson offenses requiring *willful and malicious* conduct, *i.e.,* arson causing great bodily injury (§ 451(a)), and arson in violation of any other provision of § 451 (arson) or in violation of § 455 (attempted arson) when the act posed a substantial danger of physical harm to others, together with the "aggravated nature of the other crimes specified in [§ 2962(e)(2)]" served to prevent Hayes' crime – a *reckless*

conduct crime – from ever falling under the ambit of § 2962. (*People v. Hayes, supra,* 105 Cal.App.4th at p. 1291, *quoting People v. Anzalone* (1999) 19 Cal.4th 1074, 1081.)

Here, however, there is nothing akin to *Hayes*. Petitioner pled guilty to a violation of possession of carrying a concealed dirk or dagger. Unlike § 452(b), § 12020(a)(4) can be (and here is):

> A crime in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used. For purposes of this subparagraph, substantial physical harm shall not require proof that the threatened act was likely to cause great or serious bodily injury.

(§ 2962(e)(2)(Q).) In addition, in *Hayes*, the People did not challenge whether res judicata/collateral estoppel applied to the Board's findings. Here, the People do.

To argue *Hayes* applies, Petitioner speculates. This is particularly so regarding Petitioner's underlying contention that *Hayes* stands for the proposition that the MDO Act requires judicial proceedings resulting in court-issued final orders for the doctrines of collateral estoppel/res judicata to apply. *Hayes* does not hold or even consider that. Speculation over an issue is not a circumstance under which precedent is either gleaned or "followed." "An appellate opinion is not authority for propositions not considered by the court." (*People v. Rosales* (2005) 129 Cal.App.4th 81, 87, *citing People v. Sapp* (2003) 31 Cal.4th 240, 262 and *People v. Scheid* (1997) 16 Cal.4th 1, 17.)

Petitioner's reliance on *People v. Garcia, supra,* 127 Cal.App.4th 558, is also flawed. The issue in *Garcia* was that, at the time of Garcia's recommitment hearing, the district attorney went forward of his own accord to recommit Garcia on the basis of a new diagnosis, *i.e.*, a mental disorder

different from that which had underlain the § 2962 commitment. The court found that:

> both the letter and spirit of the statute require the prosecutor to show that the defendant was treated for the same mental disorder for which the extended commitment is sought. [*People v. Sheek,* (2004) 122 Cal.App.4th 1606, 1611.] The prosecutor did not do that in this case and instead presented evidence of an entirely new mental disorder and therefore a mental disorder for which defendant had never received treatment. Treatment for the severe mental disorder is a prerequisite for an order extending a prisoner's commitment under the MDO Act.

(*People v. Garcia*, *supra,* 127 Cal.App.4th at p. 567.) *Garcia*, therefore, also is entirely distinguishable.

In *Garcia*, the holding focused on the fact the prosecutor never should have proceeded on recommitment in the first place. This was because the director of the facility providing treatment to Garcia recommended that recommitment not be pursued because Garcia's severe mental disorder was in remission. When the district attorney proceeded with recommitment anyway, based on a wholly new diagnosis, the district attorney lacked statutory authority to file the petition. Thus, the trial court properly granted Garcia's motion to dismiss. (*Id.* at p. 661.)

The difference in Petitioner's and Garcia's arguments is dispositive. The issue in *Garcia* was not merely whether the prosecutor could substitute a new, unfound fact (the new diagnosis) for a previously found fact (the former diagnosis). Clearly, the statutory scheme states that the prosecutor could not. The issue was also that the prosecutor never had the statutory authority to proceed in the first instance. (*Id.* at p. 562.)

What *Garcia* did not deal with is Petitioner's situation: whether an unchanged fact (here, Petitioner's underlying qualifying crime), that the Board found to meet the § 2962 commitment criteria without Petitioner's § 2966(b) contest, should be, or even can be, reconsidered at the

recommitment stage. Petitioner's issue has nothing to do with the issue of the prosecutor's authority to proceed on recommitment. Moreover, even though *Garcia* involved a jurisdictional element under a § 2962 commitment because of the new diagnosis, like *Hayes*, *Garcia* did not analyze whether the MDO Act requires judicial proceedings resulting in final orders for collateral estoppel/res judicata to apply to § 2962 commitment determinations.[13] *Garcia* also does not hold that reconsideration of the static criteria at recommitment proceedings is not barred when the prisoner elected not to litigate them in the first instance, or forfeited his ability to do so.

People v. Merfield, supra, 147 Cal. App. 4th 1071, most closely parallels Petitioner's situation. *Merfield* thus controls. *Merfield,* unlike *Hayes* and *Garcia,* directly addresses whether collateral estoppel/res judicata applies here. *Merfield* also makes clear that Board hearing determinations made at the § 2962 commitment stage have a preclusive effect when they go unchallenged. Because these issues are clear and considered holdings in *Merfield*, *Merfield* applies.

In *Merfield*, a § 2962 commitment began. Merfield then filed a § 2966(b) petition. Next, Merfield withdrew that petition, which the court dismissed without prejudice. After § 2962 commitment of Merfield, recommitment was sought. Merfield again initially challenged the recommitment petition, and again withdrew his challenge. Merfield then filed a second petition to challenge the initial Board commitment. The court dismissed that second petition on the grounds of mootness and waiver. (*Id.* at p. 1074.) In doing so, the court stated:

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[13] Petitioner also variously cites *People v. Francis, supra,* 98 Cal.App.4th 873 and *People v. Parham, supra,* 111 Cal.App.4th 1178, for the proposition that the MDO Act requires judicial proceedings resulting in final orders for collateral estoppel/res judicata to apply to determinations at § 2962 commitment. Neither court made that express ruling.

> Merfield's latest petition challenging the Board's initial determination that he qualified as an MDO in 2004 was plainly moot because it was filed after his one-year commitment pursuant to that determination had expired. Although the statutory scheme does not refer to any time limit on the right to petition for a hearing challenging the Board's commitment decision, we have previously recognized that the appeal from a commitment order following such a hearing is moot once the commitment period has expired. [*People v. Jenkins* (1995) 35 Cal.App.4th 669, 672, fn. 2; *People v. Gibson* (1988) 204 Cal.App.3d 1425, 1429.] It necessarily follows that a petition challenging the commitment that is filed after that period has expired is also moot.

(*People v. Merfield, supra,* 147 Cal. App. 4th at pp. 1074-1075.)

The facts in *Merfield* are nearly identical to this situation. Petitioner, like Merfield, was initially certified under § 2962 after the Board held a hearing. Like Merfield, Petitioner filed a § 2966(b) petition. Like Merfield, Petitioner withdrew his petition, and he did not again seek to challenge the Board findings prior to the expiration of the § 2962 commitment. The *Merfield* rationale is directly applicable on the issue of why Petitioner is now barred at the § 2970 stage from challenging the Board's finding as to the force or violence Petitioner used in committing the underlying offense. The court also stated:

> Merfield nevertheless contends that his initial commitment "can never be moot" because the Board was required to find that he met six criteria to support the initial commitment, while only three of those criteria were required for his recommitment. We disagree. Three of the original criteria "concern past events that once established, are incapable of change[.]" [*People v. Francis* (2002) 98 Cal.App.4th 873, 879.] By contrast, the other three criteria are based on evidence as it existed at the time of the Board's initial commitment hearing or the annual review hearing continuing that commitment-namely, whether the prisoner is currently suffering from a severe mental disorder, whether that disorder is not in remission or cannot be kept in remission without treatment, and whether he presently represents a substantial

> danger of physical harm to others by reason of that disorder. [*See People v. Bell* (1994) 30 Cal.App.4th 1705, 1710; §§ 2962(d)(1), 2966(c).]
>
> The practical effect of this distinction is that the three criteria concerning past events need only be proven once, while the Board must find that the parolee meets the other three criteria at the time of the annual hearing in order to continue treatment for an additional year. "Under the doctrines of res judicata and collateral estoppel, issues relating to the three criteria concerning past events that have been litigated in an MDO proceeding cannot be relitigated in a subsequent proceeding. [Citation.]" [*People v. Hannibal* (2006) 143 Cal.App.4th 1087, 1094.] While issues relating to those criteria are not actually 'litigated' where the MDO does not petition for a hearing during his initial commitment, preclusive effect is also given to issues that *could have been* litigated in a prior proceeding. [*Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202.] An MDO therefore has but one opportunity to challenge the Board's findings on the three criteria concerning past events. The MDO may do so by petitioning for a hearing in the superior court of the county in which he is incarcerated on the Board's initial commitment decision *before that commitment has expired.*

(*People v. Merfield*, *supra,* 147 Cal.App.4th at pp. 1075-1076, emphasis original.)

Moreover, as discussed above, administrative decisions have a collateral estoppel effect when the agency's proceedings possess a judicial character. (*See, e.g., Pacific Lumber Co. v. State Water Resources Control Bd., supra,* 37 Cal.4th at pp. 943-944; *People v. Sims* (1982) 32 Cal.3d 468, 479 (superseded by statute as stated in *People v. Preston* (1996) 43 Cal.App.4th 450); *Lucido v. Superior Court, supra,* 51 Cal.3d at pp. 341-342.) In holding that collateral estoppel/res judicata apply to the Board's findings at the § 2962 commitment stage, *Merfield* also holds that the MDO Act does not require judicial proceedings resulting in final orders from a superior court on the § 2962 commitment where the prisoner had the

opportunity to litigate the § 2962 commitment and chose not to do so. This conclusion is consistent with long-established law on res judicata/collateral estoppel and with other case law in the MDO Act context. (*See, e.g., People v. Francis*, *supra,* 98 Cal.App.4th 873 [finding collateral estoppel doctrine barred prosecutor's ability to relitigate issue of prisoner's qualifying mental disorder upon second petition to certify prisoner as MDO, since that issue had already been decided under first petition]; *People v. Parham, supra,* 111 Cal.App.4th 1178 [finding prosecutor was not entitled to a second opportunity to prove that mental disorder was a factor in underlying offense when it had failed to do so in previous certification petition].)

Finally, Petitioner contends that in *People v. Coronado, supra,* 28 Cal.App.4th 1402, it was the absence of adjudication on the merits in a § 2966(b) superior court hearing brought to challenge the Board's § 2962 certification that did not bar the Board from later certifying Coronado under a new § 2962 commitment at the time Coronado's mental illness re-manifested. This is incorrect. In *Coronado*, the prisoner's circumstances changed, and it was precisely that change that allowed the prosecutor to go forward at the § 2966(b) hearing on a new § 2962 commitment. Specifically, although the Board had previously determined at its hearing that Coronado met the criteria of § 2962, after Coronado's filing of his § 2966(b) petition to challenge that determination, Coronado's severe mental health issues remitted. Thus, the prosecutor informed the court that he could not go forward on the § 2966(b) proceedings because the prisoner presently did not meet the criteria. (*Id.* at pp. 1404-1406.) Coronado was thus released on parole without the presence of mental illness or MDO treatment. His mental illness later returned, however, and he was returned to custody. Upon his new parole release, that mental illness continued apace. Thus, the change in Coronado's mental health allowed the Board to

proceed anew on a § 2962 commitment and the prosecutor to defend that commitment at a new § 2966(b) proceeding. (*People v. Coronado, supra,* 28 Cal.App.4th 1402 at pp. 1404-1406.)

III.
PETITIONER'S UNDERLYING OFFENSE IS, NEVERTHELESS, A QUALIFYING OFFENSE.

Even if Petitioner were afforded another opportunity to challenge the force or violence aspect of his underlying offense, he would not prevail. In order to qualify a prisoner for § 2962 commitment, among the static criteria is whether the prisoner's severe mental disorder was a cause or aggravating factor in the prisoner's incarcerative crime. (§ 2962(b).) There are delineated crimes and a "catch all" provision providing "[a] crime not enumerated in subparagraphs (A) to (O), inclusive, in which the prisoner *used force or violence,* or caused serious bodily injury...." (§ 2962(e)(2)(P), emphasis added.) The facts of Petitioner's case clearly show his crime met § 2962(e)(2)(P) criteria.

Here, Petitioner approached Burdette and demanded whatever money he had. When Burdette asked to be left alone, Petitioner continued with his harassment. The second time Petitioner approached Burdette he did so in a more threatening manner. Petitioner stood very close and demanded Burdette's money. When Burdette again told Petitioner to leave him alone, Petitioner's threats escalated and he stated, "Give me your fucking money. I know you have money. Give me your chump change."

Feeling threatened, and believing he might have to defend himself, Burdette retrieved his Club. He brought The Club into the laundromat solely for self-protection. Petitioner re-approached and confronted Burdette with a fighting stance, standing a mere six inches from Burdette's face. Petitioner again, and even more forcefully, demanded Burdette's money.

What is critical is that, at that point, Burdette was in **fear for his safety.** Despite Petitioner's demands Burdette did not respond. In response to Burdette's noncompliance and nonreaction, Petitioner reached down to his front pocket. It was at this furtive movement that Burdette reacted. Burdette was in such fear that Petitioner might have a weapon and was about to use it that Burdette justifiably defended himself. Burdette hit Petitioner with his Club. Whereas Petitioner claims he never touched or brandished the knife he was carrying, ample evidence exists Burdette was, nevertheless, fearful that Petitioner had a weapon and that he was reaching for it to use it.

Unmistakably, when an aggressive person is repeatedly confronting another at an escalating level, and that aggressor reaches into his pocket, there is an implied threat created that the aggressor is reaching for a weapon. It was entirely reasonable for Burdette to have reacted to this perceived threat. In terms of Petitioner's conviction, § 12020(a)(4) specifically required that the knife be concealed. Petitioner's claim that his possession of the knife did not necessitate any corrective action from Burdette is absolutely false. Burdette had to hit Petitioner to prevent Petitioner from pulling the knife out and using it on him.

Indeed, but for Burdette's reaction to Petitioner's actions, the outcome may have been different. The knife was capable of ready use, and capable of causing substantial physical harm and death to Burdette. The requisite mental state of force and violence can be inferred from the evidence.[14] The facts here establish all that § 2962(e)(2)(P) requires.

In *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187, the court found the same:

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[14] *See* CALJIC 12.41 (2001 Revision) (now CALCRIM 2501).

> The fact that defendant. . .did not actually use the sharpened knife in a threatening or violent manner when his possession of the weapon was discovered. . .does not mean that he did not engage in criminal conduct involving the implied threat to use force or violence. The concealed possession of the type of 'dirk' or 'dagger' involved here [*see In re Quintus W.* (1981) 120 Cal.App.3d 640, 643-645] is prohibited precisely because such an implement is a "classic instrument[ ] of violence" [*People v. Grubb* (1965) 63 Cal.2d 614, 620] that is 'normally used only for criminal purposes.' [*See People v. Wasley* (1966) 245 Cal.App.2d 383, 386].

(*People v. Ramirez, supra,* 50 Cal.3d at pp. 1186-1187; *see also People v. Kortesmaki* (2007) 156 Cal.App.4th 922, 924 [concluding conviction for possession of flammable/combustible materials with intent to set fire to property "involved an implied threat to use force or violence against another person, and therefore constitutes a qualifying offense under [§ 2962(e)(2)(Q)]."].)

Thus, even if Petitioner were allowed, post-§ 2962 commitment, to challenge the Board's finding, he could not prevail. His conviction for § 12020(a)(4) is a qualifying offense.

CONCLUSION

For all of the foregoing reasons, the trial court's denial of Petitioner's motion to dismiss was proper.

Dated: November 18, 2009.

Respectfully submitted,
MICHAEL A. RAMOS,
District Attorney,
GROVER D. MERRITT,
Lead Deputy District Attorney

Grace B. Parsons
GRACE B. PARSONS,
Deputy District Attorney
Appellate Services Unit

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 13,984 words.

Dated: November 19, 2009.

Respectfully submitted,
MICHAEL A. RAMOS,
District Attorney,
GROVER D. MERRITT,
Lead Deputy District Attorney

Grace B. Parsons

GRACE B. PARSONS,
Deputy District Attorney
Appellate Services Unit

SAN BERNARDINO COUNTY
OFFICE OF THE DISTRICT ATTORNEY

PROOF OF SERVICE BY UNITED STATES MAIL

STATE OF CALIFORNIA	)		
	)	ss.	**DANIEL LOPEZ**
COUNTY OF SAN BERNARDINO	)		**S172589**

Sheila Rappleye says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; and that my business address is 412 W. Hospitality Lane, San Bernardino, California 92415-0042.

That I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

That on November 19, 2009, I served the within:

RESPONDENT'S ANSWER BRIEF ON THE MERITS

on interested parties by depositing a copy thereof, enclosed in a sealed envelope for collection and mailing on that date following ordinary business practice at San Bernardino, California, addressed as follows:

Attorney General's Office
P. O. Box 85266
San Diego, CA 92186-5266

Clerk of the Court
Court of Appeal
Fourth District, Division Three
925 N. Spurgeon Street
Santa Ana, CA 92701

I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on November 19, 2009.

Sheila Rappleye

SAN BERNARDINO COUNTY
OFFICE OF THE DISTRICT ATTORNEY

PROOF OF SERVICE BY UNITED STATES MAIL

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