SUPREME COURT
FILED

JUL - 5 2012

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IN THE SUPREME COURT OF CALIFORNIA

KELVIN HARRISON,

Plaintiff and Appellant,

v.

BOARD OF PAROLE HEARINGS,

Defendant and Respondent,

THE PEOPLE,

Real Party in Interest.

No. S199830

Fourth District Court of Appeal
Division Two
No. E051465

San Bernardino County
Superior Court
No. FELSS1001624

Hon. Katrina West
Judge of the Superior Court

Appellant's Answer Brief on the Merits

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By appointment of the Court of Appeal
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Assisted Case Program

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Table of Contents

Table of Authorities v

Issue Presented 1

Statement of the Case 1

Statement of Facts 3

Argument 7

1. **The issue presented arises in the context of appellant's argument that the evidence was insufficient to support the judgment in that there was no evidence showing the evaluation and certification required by subdivision (d) of Penal Code section 2962.** 7

2. **The phrase "the criteria of section 2962," which is used repeatedly in section 2966, is properly construed as referring to the terms of subdivisions (a) through (f) of section 2962.** 11

   A. The plain and explicit terms of section 2962 specify that the requirements of subdivision (d) of that section are among the "criteria" that determine whether a prisoner is subject to treatment as a condition of parole. 11

   B. There is no statutory ambiguity that would justify dependence upon extrinsic evidence of legislative intent. 15

   D. The extrinsic indicia of legislative intent cited by respondent are not sufficiently unambiguous to justify a departure from the explicit statutory terms. 19

3. **The cases cited by respondent provide scant support for respondent's proposed construction of sections 2962 and 2966.** 27

4. **The public policy considerations advanced by respondent do not support reading the phrase "the criteria of section 2962" as referring exclusively to those matters certified by a chief psychiatrist.** 33

5. The issue of whether subdivision (d) of section 2962 specifies one of the "criteria of Section 2962" does not turn on whether the requirements of subdivision (d) might in some circumstances be characterized as matters of procedure. 38

6. The instant case should be remanded for a full hearing under section 2966 on the criteria of section 2962..... 42

7. If this court holds in favor of respondent, the case should be remanded to the Court of Appeal for determination of the remaining issues. 45

Conclusion 46

Table of Authorities

CASES

Donnellan v. City of Novato (2001) 86 Cal.App.4th 1097 36
Ex parte Smith (1949) 33 Cal.2d 797 37
Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1998) 65 Cal.App.4th 1279 32
Ginns v. Savage (1964) 61 Cal.2d 520 32
Greenwood v. United States (1956) 350 U.S. 366 [76 S.Ct. 410, 100 L.Ed. 412] 26
Halbert's Lumber, Inc. v. Lucky Stores, Inc. (1992) 6 Cal.App.4th 1233 26
In re Manual G. (1997) 16 Cal.4th 805 ..... 40, 41
J.A. Jones Construction Co. v. Superior Court (1994) 27 Cal.App.4th 1568 19
Lennane v. Franchise Tax Bd. (1994) 9 Cal.4th 263 18
Lopez v. Superior Court (2010) 50 Cal.4th 1055 ..... 27, 31, 44
People v. Allen (2007) 42 Cal.4th 91 34
People v. Alvarez (2002) 27 Cal.4th 1161 ..... 27, 30
People v. Betts (2005) 34 Cal.4th 1039 ..... 38, 39
People v. Clark (2000) 82 Cal.App.4th 1072 ..... 27, 28, 29
People v. Cobb (2010) 48 Cal.4th 243 ..... 27, 31, 34
People v. Dieck (2009) 46 Cal.4th 934 15
People v. Francis (2002) 98 Cal.App.4th 873 ..... 27, 28, 30, 31
People v. Gonzalez (1990) 51 Cal.3d 1179 40
People v. Hannibal (2006) 143 Cal.App.4th 1087 ..... 27, 30, 31
People v. Knight (2004) 121 Cal.App.4th 1568 40
People v. Merfield (2007) 147 Cal.App.4th 1071 ..... 27, 29, 30
People v. Miller (1994) 25 Cal.App.4th 913 ..... 27, 32
People v. Murphy (2001) 25 Cal.4th 136 12
People v. Posey (2004) 32 Cal.4th 193 ..... 38, 39
People v. Richardson (2007) 156 Cal.App.4th 574 37
People v. Roberge (2003) 29 Cal.4th 979 37
People v. Sheek (2004) 122 Cal.App.4th 1606 ..... 27, 29
People v. Simon (2001) 25 Cal.4th 1082 39
People v. Snook (1997) 16 Cal.4th 1210 26

People v. Superior Court (Keifer) (1970) 3 Cal.3d 807 40
People v. White (1995) 32 Cal.App.4th 638 ..... 27, 32, 35
People v. Woodhead (1987) 43 Cal.3d 1002 17
Rojo v. Kliger (1990) 52 Cal.3d 65 12
Solberg v. Superior Court (1977) 19 Cal.3d 182 12
Wasatch Property Management v Degrate (2005) 35 Cal.4th 1111 26

STATUTES

Evid. Code, § 310 39
Evid. Code, § 312 39
Pen. Code, § 69 40
Pen. Code, § 243 4
Pen. Code, § 1126 39
Pen. Code, § 2684 9
Pen. Code, § 2962 ..... passim
Pen. Code, § 2962, subd. (a) 2, 43
Pen. Code, § 2962, subd. (a)(1) 13
Pen. Code, § 2962, subd. (b) 13, 27, 28, 41, 43, 44
Pen. Code, § 2962, subd. (c) 13, 41, 43, 44
Pen. Code, § 2962, subd. (d) ..... passim
Pen. Code, § 2962, subd. (d)(1) 10, 16, 17, 18, 25, 28, 29, 30, 34, 35, 36
Pen. Code, § 2962, subd. (d)(2) 10, 11
Pen. Code, § 2962, subd. (d)(3) 10
Pen. Code, § 2962, subd. (e) 14, 17, 25, 27, 28, 31, 44
Pen. Code, § 2962, subd. (e)(1) 41
Pen. Code, § 2962, subd. (e)(2) 41
Pen. Code, § 2962, subd. (e)(2)(P) 14
Pen. Code, § 2962, subd. (e)(2)(Q) 14
Pen. Code, § 2962, subd. (f) 14
Pen. Code, § 2962, subds. (a)-(d)(1) 28, 31
Pen. Code, § 2962, subds. (a)-(f) 12, 15
Pen. Code, § 2966 ..... 11, 15, 16, 18, 27, 29, 30, 31, 33, 41
Pen. Code, § 2966, subd. (a) 7, 17, 18, 37, 38
Pen. Code, § 2966, subd. (b) ..... passim

Pen. Code, § 2966, subd. (c) 2, 29, 30, 36, 42, 43, 44
Pen. Code, § 2970 31
Pen. Code, § 2972, subd. (a) 36
Pen. Code, § 2978 ..... 9, 10, 11
Pen. Code, § 2978, subd. (b) 11
Pen. Code, § 3001 42
Pen. Code, § 12031, subd. (a)(1) 40
Stats. 2010, ch. 219 (A.B. 1844), § 18 10
Stats. 2011, ch. 285 (A.B. 1402), § 20 10

OTHER AUTHORITIES

Assem. Com. on Public Safety, Conf. Com. Rep., Sept. 10, 1985 ..... 20, 25
Black's Law Dic. (7th ed. 1999) 37
CALCRIM No. 2670 40
Citizens Advisory Council, letter to Sen. Dan McCorquodale, April 22, 1985 21
Dan McCorquodale, "Background on Senate Bill 1296—March 26, 1985" 20, 21, 24
Dan McCorquodale, "Statement by Senator McCorquodale on Senate Bill 1296—March 26, 1985," 20, 21, 24
Department of Corrections and Rehabilitation, Enrolled Bill Rep., Sen. Bill No. 1296, Sept. 25, 1985 ..... 20, 25
Dept. of Finance, Bill Summary of Sen. Bill No. 1296—last amended on April 18, 1985 ..... 20, 22
Dept. of Finance, Bill Summary of Sen. Bill NO. 1296—last amended on June 25, 1985 ..... 20, 22
Dept. of Finance, Bill Summary of Sen. Bill No. 1296—last amended Sept. 10, 1985 ..... 20, 23
Fact Sheet for SB 1296 (McCorquodale) 21
Felix Frankfurter, *Some Reflections on the Reading of Statutes* (1947) 47 Colum. L. Rev. 527 12
Legis. Analyst, Analysis, Sen. Bill No. 1296, Aug. 29, 1985 ..... 20, 25
Legis. Analyst, Analysis, Sen. Bill No. 1296, May 2, 1985 ..... 20, 25
Legis. Counsel Bur., Opinion, Dec. 5, 1985 21
Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1296 as amended April 18, 1985 ..... 20, 25
Sen. Rules Com., "Conference Completed" Rep. 20

Sen. Rules Com., "In Conference" Rep. 20
State Dept. of Mental Health, Bill Analysis, Sen. Bill No. 1296, April 22, 1985 ..... 21, 24
State Dept. of Mental Health, Bill Analysis, Sen. Bill No. 1296, July 25, 1985 20
State Dept. of Mental Health, Enrolled Bill Rep., Sen. Bill No. 1296, Sept. 27, 1985 ..... 20, 25
Statement SB 1296 (McCorquodale), Assembly Public Safety Committee (Aug. 19, 1985) 19, 21, 24, 25
Third Reading Analysis, May 8, 1985 20

Issue Presented

As stated in Respondent's Brief on the Merits, the question presented is:

> 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?

(RBOM 1.)

Statement of the Case

On April 23, 2010, appellant filed a petition for a hearing under Penal Code section 2966, subdivision (b), seeking a review of the Board of Prison Terms determination on April 5, 2010, that appellant came within the terms of section 2962 and should therefore be subject to involuntary treatment. (Aug. CT 1.)[1] A court trial on this petition was held on July 21, 2010. (CT 11-12; RT 1-2.)

At the hearing, Dr. Robert Suiter, a psychologist, was called as a witness by the district attorney. (CT 11-12; RT 2, 3.) The parties stipulated that Dr. Suiter is an expert in the evaluation of mentally disordered offenders and in diagnosing persons with mental disorders. (RT 2.)

Appellant was called as a witness by his attorney. (CT 12; RT 50.)

At the conclusion of the hearing the court made the following findings:

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[1] Except as otherwise specified, statutory citations herein are to the Penal Code.

"[A]s of Board Prison Terms hearing on April 5th, 2010, that Mr. Harrison did, in fact, suffer from [sic] severe mental disorder.

That as of that date, that's [sic] severe mental disorder was not in remission or not kept in remission with that continued treatment.

And as of that date, April 5th, 2010 . . . because of his severe mental disorder, he did, in fact, pose a substantial danger of physical harm to others.

(RT 87-88.) The minutes recorded these findings as follows:

Court findings:

Pursuant to Penal Code section 2962 and 2966(c) [sic], the Court finds that the petitioner does meet the criteria of a mentally disordered offender as follows:

Petitioner has a severe mental disorder as defined by Penal Code section 2962(a); that Petitioner is not in remission; that Petitioner represents a substantial danger or [sic] physical harm to others.

(CT 12.)

The court ordered appellant committed until April 5, 2011. (RT 88.) The minutes show a commitment of "respondent" for an "additional" year. (CT 12-13.)

Appellant filed a notice of appeal 17 days later, on August 8, 2010. (CT 14.)

Division Two of the Fourth District Court of Appeal reversed the judgment in an opinion filed December 23, 2011. This court granted the People's petition for review on March 14, 2012. The People filed a brief on the merits May 11, 2012.

Statement of Facts

Dr. Suiter was asked by the Board of Prison Terms and Rehabilitation [sic] to conduct a certification mentally disordered offender ["MDO"] evaluation of appellant at Patton State Hospital, an evaluation that took place on March 16, 2010. (RT 4.) In conducting that evaluation, Dr. Suiter reviewed appellant's "psychiatrist records" at Patton State Hospital, records that included two previous MDO evaluations of appellant. (RT 4.) Dr. Suiter also considered certain documents from appellant's "prison central file." (RT 4.) And he interviewed appellant. (RT 4.)

Dr. Suiter formed the opinion that appellant at that time met the diagnostic criteria for schizophrenia paranoid type and possibly for schizoaffective disorder, referring to the latter as a "rule out diagnosis." (RT 5.) The most prominent symptoms displayed by appellant were florid delusions of a paranoid nature and, to a lesser degree, of a grandiose nature. (RT 5-6.) Specifically, appellant had the delusion that county officials in San Luis Obispo County had an interest in "effecting some harm to his character, to degrade him; to make it so no one would respond to him if he had some needs or requests of the County." (RT 6.) That is, the witness testified, the appellant had the delusion "that the personnel or the official [sic] of the [sic] San Luis Obispo County had, essentially, some vendetta against him and his family." (RT 6-7.) A probation report stated that appellant "sent thousands of letters and faxes through the years to local officials, warning them of racial discrimination, harassment, cover-ups." (RT 46.)

In reading the probation report and other records, Dr. Suiter discerned information that suggested to him that appellant had committed a serious or violent crime on November 23, 2008. (RT 8,

29.) The witness believed that appellant was ultimately convicted of a violation of Penal Code section 243, a battery with serious bodily injury. (RT 8, 44.) The probation report did not contain a victim statement as to the details of the offense. (RT 8.) Dr. Suiter testified that the probation officer said in the report that appellant was difficult to understand at the time that the probation officer interviewed him. (RT 9.) Dr. Suiter also testified that the probation report said that appellant and the victim were both homeless at the time of the offense. (RT 9.) The appellant and the victim "had had some interactions for approximately three days before the assault." (RT 9.) Dr. Suiter testified that the probation report said that appellant found a bag of grapes in the spot where he usually sat or slept. (RT 9-10.) Dr. Suiter testified that the report said that appellant believed the grapes to have been left by the victim and had described the grapes as having been filled with blood, "which he interpreted to mean that the victim had an intent to harm him in some manner." (RT 10.)

Dr. Suiter testified that the report said that appellant had said that the victim had attacked him with a pipe, and that appellant, in turn, "was able to take the pipe from the victim, and then assaulted the victim with the pipe, striking him in the legs and feet and ankles." (RT 10.) Based on this, together with other written materials, Dr. Suiter was of the opinion that appellant's mental disorder was "at least, an aggravating factor in the commission of that crime." (RT 10.)

Dr. Suiter was of the opinion that appellant was not in remission at the time of the interview. (RT 10.) This was based on the fact that at the interview appellant described "the history of many, many years of being, in his view, harassed and degraded, living in fear of harm by the officials of . . . San Luis Obispo County." (RT 10-11.)

Dr. Suiter testified that at the time of the interview, appellant "had at least 90 days of treatment for his condition within the year." (RT 11.) Dr. Suiter testified "from the time prior to being admitted to Patton State Hospital, he was—received psychiatrist services through the Prison Delivery System." (RT 11.) Dr. Suiter was of the opinion that appellant received services for treatment from April of 2009 until the date of the interview. (RT 12.)

Dr. Suiter was also of the opinion that appellant presented a substantial danger of physical harm to others. (RT 12.) This opinion was based on the witness's conclusion that appellant's disorder is chronic, that appellant has no meaningful insight into the nature of his disorder and no insight into the nature of his delusions. (RT 12.) The witness believed that appellant presented a danger because he was "prone to misinterpret environmental cues, and misinterpret them in a manner that . . . in his view meant that he was at risk." (RT 13.) The witness also considered "in reviewing his record, that he had substantial history of violent crimes for which he was either arrested or convicted," and two serious rules violations in prison within a year prior to the interview. (RT 13.)

Appellant testified that he had lived in San Luis Obispo for 21 years. (RT 55.) When he left his wife of ten years, appellant's house went into foreclosure and he became homeless. (RT 74). He then stayed in a motel two weeks out of the month and slept outside two weeks of the month. (RT 75.) He testified that he experienced racial discrimination and false accusations in his employment there, including during five years of working at Cal Poly University. (RT 55-56.) He said that in 1995 and 1996, he was stopped many times for jogging. (RT 56-57.) When he complained at the police department, he was told that in his case it was against the law to jog without a shirt and was

subjected to derogatory remarks as he left. (RT 57.) He testified that two weeks later he was "set up on a charge for furthermore [sic] as leaving one of my martial arts student's home, and situations have been going on every [sic] since then with law enforcement and confrontations with them." (RT 57.)

Appellant also testified that while in the military in South Korea, "I came down with depression and schizophrenia because I feared for my mother and sister's life because my sister's husband had threatened my mother and my sisters." (RT 57-58.) He testified that he was not treated for those illnesses while in the military, but that it was part of the reason he left the military. (RT 58.) He testified the he was honorably discharged with high honors that included a medal for his work teaching martial arts to civilian personnel. (RT 58.) His martial arts in the military included training for the 1980 Olympics. (RT 58.) After he left the military, appellant was treated for his mental issues at the Veterans Administration. (RT 58-59, 60.) Appellant also testified that his diagnosis includes post-traumatic stress syndrome. (RT 71-72.)

Of the many faxes and letters that Dr. Suiter had referred to, appellant said that he had sent information on a daily basis to the NAACP, and that he had also sent faxes and letters to the Reverend Al Sharpton, to President Bill Clinton's office, to Congresswoman Maxine Waters, to Judy Chu's office, to President George W. Bush's office, and to a kung-fu teacher, Grand Master Cha Chi Chong. (RT 63-64.) And, appellant testified, in 2006 he started filing documents by hand in the San Luis Obispo City Clerk's office on a daily basis. (RT 64, 69.) These included complaints that law enforcement did nothing when appellant's daughter was the victim of statutory rape at the age of 13. (RT 64-65.) Altogether, appellant estimated that he had sent approximately 6,000 pages of documents. (RT 65.)

Of the rules violations in prison, appellant testified that these were the result of fighting with cell mates who were "trying to belittle me as a man, in order to try to [sic] me their homosexual." (RT 67.) He said that there were no new charges because he used minimal force to protect himself. (RT 68.) Appellant testified that prior to the altercations he had contacted guards to try to get himself moved and that in the aftermath the guards lied about it. (RT 67.)

In prison, appellant received mental health therapy in the form of medications. (RT 75.)

Argument

1. The issue presented arises in the context of appellant's argument that the evidence was insufficient to support the judgment in that there was no evidence showing the evaluation and certification required by subdivision (d) of Penal Code section 2962.

Prisoners with serious mental disorders who are due to be released on parole and who meet specified criteria may be required to undergo treatment by the State Department of Mental Health ["SDMH"]. (§ 2962.) Upon the initial imposition of such a condition of parole, the prisoner may request a hearing before the Board of Parole Hearings ["BPH"], which was previously referred to as the Board of Prison Terms. (§ 2966, subd. (a).) Such a hearing is "for the purpose of proving that the prisoner meets *the criteria in Section 2962.*" (§ 2966, subd. (a), emphasis supplied.) The outcome of that hearing is subject to judicial review under subdivision (b) of section 2966, which provides:

> A prisoner who disagrees with the determination of the Board of Prison Terms that he or she meets *the criteria of*

> *Section 2962*, may file in the superior court of the county in which he or she is incarcerated or is being treated a petition for a hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met *the criteria of Section 2962.*

(§ 2966, subd. (b), emphasis supplied.)

In the instant case, appellant did file such a petition. (Aug. CT 1.) A hearing was held. Among the issues that appellant has raised on the appeal from the judgment after that hearing is the contention that the evidence was insufficient as to one of the criteria of section 2962. Specifically, appellant contends that the evidence is insufficient to show satisfaction of the evaluation and certification required by subdivision (d) of section 2962.

Subdivision (d) of section 2962 requires completion of a detailed evaluation and certification process. That process includes evaluations by two mental health professionals, one of whom must be involved in treating the individual. It also includes a certification by a chief psychiatrist from the Department of Corrections and Rehabilitation ["CDCR"] on four criteria. If there is a disagreement among the professionals, additional evaluations are required. (§ 2962, subd. (d)(2).)

At the time of the hearing in the instant case, the full statutory statement of this criterion was as follows:

> As a condition of parole, a prisoner *who meets the following criteria* shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:
>
> ...
>
> (d)(1) Prior to release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental

Health have evaluated the prisoner at a facility of the Department of Corrections, and a chief psychiatrist of the Department of Corrections has certified to the Board of Prison Terms that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684, the certification shall be by a chief psychiatrist of the Department of Corrections, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections.

(2) If the professionals doing the evaluation pursuant to paragraph (1) do not concur that (A) the prisoner has a severe mental disorder, (B) that the disorder is not in remission or cannot be kept in remission without treatment, or (C) that the severe mental disorder was a cause of, or aggravated, the prisoner's criminal behavior, and a chief psychiatrist has certified the prisoner to the Board of Prison Terms pursuant to this paragraph, then the Board of Prison Terms shall order a further examination by two independent professionals, as provided for in Section 2978.

(3) Only if both the independent professionals who evaluate the prisoner pursuant to paragraph (2) concur with the chief psychiatrist's certification of the issues described in paragraph (2), shall this subdivision be applicable to the prisoner. The professionals appointed pursuant to Section 2978 shall inform the prisoner that the purpose of their examination is not treatment but to determine if the prisoner meets certain criteria to be involuntarily treated as a mentally disordered offender. It

is not required that the prisoner appreciate or understand that information.

(§ 2962, subd. (d) [West's California Penal Code, 2010 Desktop ed.], emphasis supplied.)[2]

In the instant case, there was no evidence that the required evaluation and certification process occurred, and the trial judge did not make a finding on this criterion. (RT 87-88; CT 12.) There was no evidence that a person in charge of treating appellant had evaluated appellant on the specified criteria. (§ 2962, subd. (d)(1).) There was no evidence that a practicing psychiatrist or psychologist from the SDMH evaluated appellant. (*Ibid.*) There was no testimony that Dr. Suiter was employed by the SDMH. (*Ibid.*) There was no evidence that appellant was evaluated at a facility of the CDCR. (*Ibid.*) There was no evidence that a chief psychiatrist of the CDCR had appellant's case certified to the BPH in accordance with the requirements of subdivision (d)(1) of section 2962. Nor was there evidence that appellant had been evaluated by a person in charge of his treatment at a state hospital and a practicing psychiatrist or psychologist from the CDCR. (*Ibid.*)

Further, there was no evidence as to whether any of the professionals identified in subdivision (d)(1), if they did evaluate appellant, concurred or failed to concur. (§ 2962, subd. (d)(2).) Nor was there evidence that appellant was or was not evaluated pursuant to section 2978. (*Ibid.*) Nor was there evidence of the appointment of two

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[2] Section 2962 has subsequently been amended to reflect the redesignation of the Board of Prison Terms as the Board of Parole Hearings and the Department of Corrections as the Department of Corrections and Rehabilitation and to provide that a concurrance of one of the two independent evaluators is sufficient under paragraph (3) of subdivision (d). (Stats. 2010, ch. 219 (A.B. 1844), § 18; Stats. 2011, ch. 285 (A.B. 1402), § 20.)

independent professionals from the list specified in section 2978. (§§ 2962, subd. (d)(2), 2978, subd. (b).)

The Court of Appeal in the instant case reversed the judgment on the ground that the evidence was insufficient on this criterion. (Slip Op., at p. 20.) On review in this court, respondent makes no argument that the evidence was sufficient to meet these requirements, but argues only that subdivision (d) of section 2962 is not among "the criteria of Section 2962" at issue in a hearing pursuant to subdivision (b) of section 2966.

Because subdivision (d) of section 2962 is among the criteria at issue in a hearing pursuant to subdivision (b) of section 2966, the evidence was insufficient to support the judgment and the order of commitment should be reversed.

2. The phrase "the criteria of section 2962," which is used repeatedly in section 2966, is properly construed as referring to the terms of subdivisions (a) through (f) of section 2962.

A. The plain and explicit terms of section 2962 specify that the requirements of subdivision (d) of that section are among the "criteria" that determine whether a prisoner is subject to treatment as a condition of parole.

The hearing in the instant case was governed by the terms of subdivision (b) of section 2966. (Aug. CT 1.) Section 2966 refers repeatedly to the "criteria of Section 2962." In the prefatory clause to section 2962, the Legislature uses the term "criteria" to specify the prerequisites to ordering mental health treatment as a condition of parole.

> As a condition of parole, a prisoner ***who meets the following criteria*** shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

(§ 2962, emphasis supplied.) This clause ends with a colon and is followed by six subdivisions, designated (a) through (f). The Legislature could hardly be more clear that the "criteria of Section 2962" refers to subdivisions (a) through (f) of that section.

"'[W]hen statutory language is ... clear and unambiguous there is no need for construction and courts should not indulge in it." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 73, quoting *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198.) The statutory reference to "the following criteria," with a colon followed by an itemized list is as unambiguous as a statute can be.

> Even in matters legal some words and phrases, though very few, approach mathematical symbols and mean substantially the same to all who have occasion to use them.

(Felix Frankfurter, *Some Reflections on the Reading of Statutes* (1947) 47 Colum. L. Rev. 527, 534.) Respondent concedes that this is how the statute reads, at least on "first glance," and uses the same grammatical structure to express this concession. (RBOM 14 ["The 'criteria' listed in the code section *are as follows:* ... ." (Emphasis supplied.)] See also RBOM 1-2, 2-3, 9, 10, 11.) By using the phrase "the following criteria," followed by an itemized list, the Legislature clearly expressed that the items on the list are the criteria.

Further, statutory language is construed not in isolation, but in the context in which it appears. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) In light of the fact that each of the other subdivisions of section 2962 indisputably serves to delineate the criteria for ordering

treatment as a condition of parole, the inference is strong that the Legislature intended the requirements of subdivision (d), too, to be among the criteria.

The first subdivision of section 2962 specifies, "The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment." (§ 2962, subd. (a)(1).) The balance of that subdivision defines the terms "severe mental disorder" and "remission." This subdivision is plainly one of the criteria characterizing a prisoner subject to mandatory treatment as a condition of parole.

The second subdivision specifies, "The 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, subd. (b).) This, too, is plainly one of the criteria characterizing a prisoner subject to mandatory treatment as a condition of parole. It is difficult to imagine any other role for this subdivision.

The third subdivision specifies, "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." (§ 2962, subd. (c).) Again, there is no other apparent way to read this subdivision except that it is one of the criteria characterizing a prisoner subject to mandatory treatment as a condition of parole.

The fifth subdivision specifies:

> (e) The crime referred to in subdivision (b) meets both of the following criteria:
>
> (1) The defendant received a determinate sentence pursuant to Section 1170 for the crime.

(2) The crime is one of the following:

. . . .

(§ 2962, subd. (e).) The balance of this subdivision enumerates 15 specific crimes or classes of crime followed by two general provisions, one of which extends to any other crime in which the prisoner used force or violence or caused serious bodily injury and the other of which extends to any crime in which the prisoner credibly threatened the use of force or violence likely to produce substantial physical harm. (§ 2962, subds. (e)(2)(P), (e)(2)(Q).) Again, this subdivision plainly requires that only those persons who have been convicted of a specified crime and received a determinate sentence for that crime are subject to mandatory treatment as a condition of parole. This subdivision provides another criterion.

The final subdivision, subdivision (f), is a legislative disavowal of a criterion that might otherwise be inferred. It provides, "As used in this chapter, 'substantial danger of physical harm' does not require proof of a recent overt act." (§ 2962, subd. (f).) The effect of this subdivision is to explicitly exclude "a recent overt act" from the criteria that are prerequisite to mandatory treatment as a condition of parole. As such, subdivision (f), plays a limiting role in the overall specification of the criteria that make a prisoner subject to treatment as a condition of parole.

That leaves the fourth subdivision, subdivision (d) of section 2962. Might subdivision (d) somehow be read as something other than one of the criteria referenced by the prefatory language of the section? Certainly, such a reading is difficult to reconcile with the structure of the section, including the colon that follows the prefatory clause. It is also difficult to reconcile with the fact that each of the other

subdivisions of that section indubitably constitute "the following criteria" referenced in the prefatory clause.

Section 2962 is exquisitely clear: it states that the itemized provisions of subdivisions (a) through (f) of that section delineate the "criteria of Section 2962." Subdivision (d) of section 2962 is plainly among those criteria.

B. There is no statutory ambiguity that would justify dependence upon extrinsic evidence of legislative intent.

Respondent asserts that there is an alternate possible reading of the term "criteria of Section 2962" as used in section 2966, and therefore the statutory term is ambiguous. Based on this asserted ambiguity, respondent asks this court to seek clarity in evidence of legislative intent outside the words of the statute. (RBOM 15-16.) A statutory provision is ambiguous, however, only if it is susceptible to two reasonable interpretations. (*People v. Dieck* (2009) 46 Cal.4th 934, 940.) Because respondent does not advance an alternative reasonable interpretation of sections 2962 and 2966, resort to extrinsic evidence of legislative intent is unjustified.

Respondent concedes that "at first glance, section 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." (RBOM 14-15, citing §§ 2962, subd. (d), and 2966, subd. (b).) Respondent asserts, however, that closer scrutiny will reveal ambiguity in that section 2962 includes within its terms subdivision (d), which in turn specifies the conditions

that must exist before a chief psychiatrist can "certify a prisoner as an MDO." (RBOM 15.)

> 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).

(RBOM 15.)

Is it a reasonable reading of subdivision (b) of section 2966 that in its repeated use of the phrase "the criteria of Section 2962," the Legislature meant to refer exclusively to the facts that a chief psychiatrist "has certified" as specified in subdivision (d)(1) of section 2962? Certainly, it is not a reading that is readily reconciled with the fact that the Legislature in section 2966 specified section 2962, generally, and did not specify subdivision (d)(1) of section 2962, in particular. It is also not readily reconciled with the fact that the Legislature used the term "criteria" in the prefatory language of section 2962 and did not use the term "criteria" in subdivision (d)(1) of section 2962.

Nor does subdivision (d)(1) naturally lend itself to a reading that would support the meaning that respondent urges upon the court. That subdivision provides:

> (d)(1) Prior to release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health *have evaluated* the prisoner at a facility of the Department of Corrections and Rehabilitation, and a chief psychiatrist of the Department of Corrections and Rehabilitation *has certified* to the Board of Parole Hearings that the prisoner has a severe mental disorder, that the

> disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others.

(§ 2962, subd. (d)(1), emphasis supplied.)

This provision requires that the person in charge of the prisoner's treatment and a mental health professional "have evaluated" the prisoner and that a chief psychiatrist "has certified" certain facts. (§ 2962, subd. (d)(1).) This is language that puts in issue the fact that the evaluations and the certification occurred and does not put in issue the truth of the matters certified. These are not statutory terms that are reasonably read as specifying "the criteria in Section 2962."

Further, notably absent from the facts specified as having been certified pursuant to subdivision (d)(1) of section 2962 is the fact that the prisoner has been convicted of an offense specified in subdivision (e) of section 2962. In order to adopt the interpretation of section 2966 urged by respondent, this court would have to read the requirement of conviction of such an offense as not being among the matters in issue at the hearings before the BPH and before the court pursuant to subdivisions (a) and (b) of section 2966, respectively. Indeed, under the construction offered by respondent, subdivision (e) of section 2962 serves no purpose. As a general proposition, this court avoids such constructions. "It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.) For this reason, too, it is not reasonable to read the clause of subdivision (d)(1) of section

2962 regarding what the chief psychiatrist must certify as specifying "the criteria in Section 2962."

An ambiguity in the meaning of the phrase "the criteria in Section 2962," as used in subdivisions (a) and (b) of section 2966, is essential to the respondent's argument that the court should look beyond the terms of the statute in search of the statute's meaning. Argues respondent:

> 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.

(RBOM 16.) Based on this purported ambiguity, respondent undertakes a review of documents that accompanied the legislative process. (RBOM 16-22.) In context, "the criteria of Section 2962," is not reasonably read as referencing the matters that a chief psychiatrist "has certified" pursuant to subdivision (d)(1) of section 2962. Without an alternative, reasonable reading of the statutory terms, there is no ambiguity that justifies looking elsewhere for the meaning of the statutes.

> If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs. ... Where the statute is clear, courts will not interpret away clear language in favor of an ambiguity that does not exist.

(*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268, citations, internal quotation marks omitted.)

D. The extrinsic indicia of legislative intent cited by respondent are not sufficiently unambiguous to justify a departure from the explicit statutory terms.

In the search for clear meaning, even where ambiguity in a statute justifies resort to the documents that accompanied the legislative process, those materials are properly relied upon only when they, in turn, are unambiguous.

> [R]eading the tea leaves of legislative history is often no easy matter. Even assuming there is such a thing as meaningful collective intent, courts can get it wrong when what they have before them is a motley collection of authors' statements, committee reports, internal memoranda and lobbyist letters. Related to this problem are the facts that legislators are often "blissfully unaware of the existence" of the issue with which the court must grapple, and, as mentioned above, ambiguity may be the deliberate outcome of the legislative process. In light of these factors, the wisest course is to rely on legislative history only when that history itself is unambiguous.

(*J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1578, citations and footnote omitted.)

In the instant case, the respondent urges that the true meaning of the phrase "the criteria of Section 2962," can be found in a statement by the author of the legislation, an enrolled bill report of the CDCR, two senate committee analyses, an assembly committee analysis, an analysis and an enrolled bill report by the SDMH, two analyses by the Legislative Analyst, and a third reading analysis for the Senate. (RBOM 16-21, citing Statement SB 1296 (McCorquodale), Assembly Public Safety Committee (Aug. 19, 1985), p. 2 [Exhibit A];[3] Dan

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[3] Exhibit references are to the tabbed exhibits submitted with respondent's motion for judicial notice.

McCorquodale, "Background on Senate Bill 1296—March 26, 1985", p. 3 [Exhibit E]; Dan McCorquodale, "Statement by Senator McCorquodale on Senate Bill 1296—March 26, 1985," p. 3, [Exhibit F]; Department of Corrections and Rehabilitation, Enrolled Bill Rep., Sen. Bill No. 1296, Sept. 25, 1985, p. 2 [Exhibit L]; Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1296 as amended April 18, 1985, p. 4-5 [Exhibit B]; Sen. Rules Com., "In Conference" Rep., p. 3 [Exhibit H]; Sen. Rules Com., "Conference Completed" Rep., p. 3 [Exhibit J]; State Dept. of Mental Health, Enrolled Bill Rep., Sen. Bill No. 1296, Sept. 27, 1985, p. 2, [Exhibit M]; State Dept. of Mental Health, Bill Analysis, Sen. Bill No. 1296, July 25, 1985, p. 2 [Exhibit I]; Legis. Analyst, Analysis, Sen. Bill No. 1296, May 2, 1985, p. 1-2, [Exhibit C]; Legis. Analyst, Analysis, Sen. Bill No. 1296, Aug. 29, 1985, p. 1, [Exhibit D]; Third Reading Analysis, May 8, 1985, p. 2 [Exhibit K]; Assem. Com. on Public Safety, Conf. Com. Rep., Sept. 10, 1985, p. 1 [Exhibit G].) Respondent also urges, in a footnote, that the court should not be guided or troubled by three Department of Finance bill summaries, an SDMH analysis, a letter from the Citizens Advisory Council, an opinion letter from the Legislative Counsel Bureau, or a "fact sheet" from the author of the bill that "list the certification process as one of the 'criteria' for the commitment of an MDO, refer to some of the prescribed substance 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." (RBOM 22, fn. 8 citing Dept. of Finance, Bill Summary of Sen. Bill No. 1296—last amended on April 18, 1985 [Exhibit O]; Dept. of Finance, Bill Summary of Sen. Bill NO. 1296—last amended on June 25, 1985 [Exhibit T]; Dept. of Finance, Bill Summary of Sen. Bill No. 1296—last amended Sept. 10, 1985 [Exhibit Q]; State Dept. of Mental Health, Bill

Analysis, Sen. Bill No. 1296, April 22, 1985 [Exhibit P]; Fact Sheet for SB 1296 (McCorquodale) [Exhibit S]; Citizens Advisory Council, letter to Sen. Dan McCorquodale, April 22, 1985, pp. 1-2 [Exhibit N]; Legis. Counsel Bur., Opinion, Dec. 5, 1985, pp. 2-3 [Exhibit R].) By the respondent's own admission, this is not an unambiguous legislative history.

Moreover, in only three of the documents provided by respondent as extrinsic evidence of legislative intent are there lists of prerequisites to mandatory treatment that exclude reference to the certification process. (RBOM 16-17, citing Statement SB 1296 (McCorquodale), Assembly Public Safety Committee (Aug. 19, 1985), p. 2 [Exhibit A], Dan McCorquodale, "Background on Senate Bill 1296—March 26, 1985", p. 3 [Exhibit E], and Dan McCorquodale, "Statement by Senator McCorquodale on Senate Bill 1296—March 26, 1985," p. 3, [Exhibit F].) But four of the documents provided by respondent include lists of the prerequisites to mandatory treatment that include reference to the certification process.

Three summaries by the Department of Finance informed the legislators that certification was a prerequisite to the involuntary commitment of a parolee to a state hospital.

> This bill would additionally permit the CDC to involuntarily commit inmates to State Hospitals as a condition of parole when the prisoner has:
>
> 1) a mental disorder which is not in remission or cannot be kept in remission
> 2) the mental disorder caused, was one of the causes, or was an aggravating factor in commission of the crime for which the prisoner was sentenced.
> 3) the prisoner has been in treatment for 90 days or more while in prison

4) *certification by Corrections and/or Mental Health that 1) or 2) above exist or that the inmate will not follow appropriate voluntary treatment.*
5) committed a crime in which the prisoner used force or violence or caused serious bodily injury

Prisoners meeting these criteria will be committed to the Department of Mental Health for inpatient treatment.

(Dept. of Finance, Bill Summary of Sen. Bill No. 1296—last amended on April 18, 1985, p. 1-2 [Exhibit O], emphasis supplied.)

This bill would additionally permit the CDC to involuntarily commit inmates to State Hospitals as a condition of parole when the prisoner has:

1) a mental disorder which is not in remission or cannot be kept in remission
2) the mental disorder caused, was one of the causes, or was an aggravating factor in commission of the crime for which the prisoner was sentenced.
3) the prisoner has been in treatment for 90 days or more while in prison
4) *certification by Corrections and/or Mental Health that 1) or 2) above exist or that the inmate will not follow appropriate voluntary treatment.*
5) committed a crime in which the prisoner used force or violence or caused serious bodily injury

Prisoners meeting these criteria will be committed to the Department of Mental Health for inpatient treatment.

(Dept. of Finance, Bill Summary of Sen. Bill No. 1296—last amended on June 25, 1985, p. 2 [Exhibit T], emphasis supplied.)

This bill would additionally permit the CDC to involuntarily commit inmates to State Hospitals as a condition of parole when the prisoner has:

1) a severe or major mental disorder which is not in remission or cannot be kept in remission.

2) the mental disorder caused, was one of the causes, or was an aggravating factor in the commission of the crime for which the prisoner was sentenced.
3) the prisoner has been in treatment for 90 days or more while in prison
4) *certification by Corrections and/or Mental Health that 1) or 2) above exist or that the inmate will not follow appropriate voluntary treatment.*
5) committed a crime in which the prisoner used force or violence or caused serious bodily injury.

Prisoners meeting these criteria will be committed to the Department of Mental Health for inpatient treatment.

(Dept. of Finance, Bill Summary of Sen. Bill No. 1296—last amended on Sept. 10, 1985, pp. 1-2, [Exhibit Q], emphasis supplied.)

In addition, an analysis of the bill by the SDMH contains a similar summary that informed legislators that certification would be a prerequisite to involuntary treatment as a condition of parole:

1. This bill provides that certain mentally ill prison inmates should be retained for treatment in order to protect the public. Prison inmates may be involuntarily committed to the Department of Mental Health as a condition of parole from prison if the following applies:

a. The prisoner has a mental disorder which is not in remission and for which he received treatment while in prison.

b. The prisoner has a mental disorder which caused the crime or was an aggravating factor in its commission.

c. *The prisoner is certified by the Corrections and/or Mental Health staff to the Board of Prison Terms to meet the first criteria and will not follow appropriate voluntary treatment.*

d. The prisoner committed a crime by force or caused serious bodily injury in its commission.

(State Dept. of Mental Health, Bill Analysis, Sen. Bill No. 1296, April 22, 1985, [Exhibit P], emphasis supplied.)

Further, several of the referenced documents support inferences contrary to the construction that respondent urges in that they are contrary to reading "the criteria of Section 2962" as referring exclusively to the matters to be certified by a chief psychiatrist.

The first items related to the legislative process that respondent offers are two statements by Senator McCorquodale regarding Senate Bill 1296. (RB 16-17, citing Statement SB 1296 (McCorquodale), Assembly Public Safety Committee (Aug. 19, 1985), p. 2 [Exhibit A]; Dan McCorquodale, "Background on Senate Bill 1296—March 26, 1985", p. 3 [Exhibit E]; Dan McCorquodale, "Statement by Senator McCorquodale on Senate Bill 1296—March 26, 1985," p. 3 [Exhibit F].) The author said of the bill:

> SB 1296 requires the Department of Mental Health to provide treatment for parolees who meet 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 severe mental disorder which was treated while he or she was in prison.
> 3) The severe mental disorder caused, was one of the causes of, or was an aggravating factor in the commission of the crime for which the prisoner was sentenced to prison.
> 4) The prisoner's severe mental disorder is not in remission or cannot be kept in remission.

(Statement SB 1296 (McCorquodale), Assembly Public Safety Committee (Aug. 19, 1985), p. 2 [Exhibit A]. Accord, Dan McCorquodale, "Background on Senate Bill 1296—March 26, 1985", p. 3 [Exhibit E]; Dan McCorquodale, "Statement by Senator

McCorquodale on Senate Bill 1296—March 26, 1985," p. 3, [Exhibit F].) Respondent says of this, "These 'criteria' are essentially the same conditions that a chief psychiatrist must certify to the BPH as being present in an MDO." (RBOM 17, citing § 2962, subd. (d)(1).) But they are not.

In particular, the chief psychiatrist is not required to certify that "[t]he prisoner was convicted of a crime in which he or she used force or violence or caused serious bodily injury." (Statement SB 1296 (McCorquodale), Assembly Public Safety Committee (Aug. 19, 1985), p. 2 [Exhibit A].) Rather, the element of having been convicted of a crime in which the prisoner used force or violence or caused serious bodily injury appears in subdivision (e) of section 2962, a fact that supports the proposition that subdivision (e), along with the other subdivisions of section 2962, is a criterion of section 2962. And, conversely, this fact is inconsistent with the construction proposed by respondent that the "criteria of Section 2962" are exclusively the matters to be certified by a chief psychiatrist.

The same is true of several of the other documents offered by the respondent as extrinsic evidence of legislative intent. Each asserts that conviction of a crime involving force or violence is a prerequisite to imposing involuntary treatment on a parolee. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1296 as amended April 18, 1985, p. 5 [Exhibit B]; Legis. Analyst, Analysis, Sen. Bill No. 1296, May 2, 1985, p. 1, [Exhibit C]; Legis. Analyst, Analysis, Sen. Bill No. 1296, Aug. 29, 1985, p. 1, [Exhibit D]; Assem. Com. on Public Safety, Conf. Com. Rep., Sept. 10, 1985, p. 1 [Exhibit G]; Department of Corrections and Rehabilitation, Enrolled Bill Rep., Sen. Bill No. 1296, Sept. 25, 1985, p. 2 [Exhibit L]; State Dept. of Mental Health, Enrolled Bill Rep., Sen.

Bill No. 1296, Sept. 27, 1985, p. 2, [Exhibit M].) Each, then, is evidence against the construction proffered by respondent.

In sum, the legislative history materials upon which respondent relies do not unambiguously support the respondent's suggested construction. The various materials upon which respondent would have this court base its construction of the phrase "the criteria of Section 2962," do not supply the kind of clear statement of legislative intent that would justify a departure from the explicit words of the statute.

> In ascertaining the meaning of a statute, we look to the intent of the Legislature as expressed by the actual words of the statute. (*People v. Snook* (1997) 16 Cal.4th 1210, 1215, 69 Cal.Rptr.2d 615, 947 P.2d 808.) We examine the language first, as it is the language of the statute itself that has "successfully braved the legislative gauntlet." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238, 8 Cal.Rptr.2d 298.) "It is that [statutory] language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor. The same care and scrutiny does not befall the committee reports, caucus analyses, authors' statements, legislative counsel digests and other documents which make up a statute's 'legislative history.'" (*Ibid.*)

(*Wasatch Property Management v Degrate* (2005) 35 Cal.4th 1111, 1117-1118.)

Although the statute is clear, the extrinsic evidence of legislative intent is ambiguous. In such circumstances, the language of the statute should govern. (*Greenwood v. United States* (1956) 350 U.S. 366, 374 [76 S.Ct. 410, 100 L.Ed. 412].)

3. The cases cited by respondent provide scant support for respondent's proposed construction of sections 2962 and 2966.

Respondent cites seven cases for the proposition that the courts have not required a district attorney to prove compliance with subdivision (d) of section 2962 at a hearing pursuant to subdivision (b) of section 2966. (RBOM 22-27, citing *Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061-1062, *People v. Cobb* (2010) 48 Cal.4th 243, 251-252, *People v. Hannibal* (2006) 143 Cal.App.4th 1087, 1094, *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2, *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1610, *People v. Francis* (2002) 98 Cal.App.4th 873, 876-877, and *People v. Clark* (2000) 82 Cal.App.4th 1072, 1075-1076.) Respondent also dismisses two cases as insignificant because "[n]either of those decisions ... 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)." (RBOM 30, citing *People v. White* (1995) 32 Cal.App.4th 638, and *People v. Miller* (1994) 25 Cal.App.4th 913.) Because the same may be said of all these cases, because none of these cases addressed the question of whether the certification process of subdivision (d) of section 2962 is one of the "criteria" of an MDO determination, they provide little or no guidance on the issue presented here. Cases are not authority for propositions not considered. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

In 2000, the Court of Appeal in *People v. Clark* was presented with the arguments regarding the right against self incrimination at a hearing under section 2966 and sufficiency of the evidence on the criteria specified in subdivisions (b) and (e) of section 2962. (*People v. Clark,*

supra, 82 Cal.App.4th at pp. 1075, 1079.) In passing, the court itemized six criteria in section 2962. (*Id.* at 1075-1076.) Absent from the *Clark* court's itemization is the evaluation and certification required by subdivision (d) of section 2962, but then that court was not presented with any question regarding subdivision (d) of section 2962. The issue presented in the instant case was not considered.

In considering the sufficiency of the evidence, however, the court in *People v. Clark* looked to subdivisions (b) and (e) as supplying the elements in issue in that case. (*Id.* at p. 1083.) The court did not adopt the interpretation urged by respondent here in that it did not look to the factors to be certified by the chief psychiatrist pursuant to subdivision (d)(1) of section 2962 as providing the elements to be proved at the court hearing. Moreover, had the court adopted the interpretation urged by respondent here, the court in *People v. Clark* would have had no need to consider the sufficiency of the evidence on the question of force or violence in the underlying offense, because that is not a factor specified in subdivision (d)(1) of section 2962.

In 2002, the Court of Appeal in *People v. Francis* considered the question of whether principles of res judicata apply to a finding that the offense of which the prisoner had been convicted was the product of a severe mental disorder. (*People v. Francis, supra,* 98 Cal.App.4th at pp. 874-875, 877, 879.) In this context, citing section 2962, subdivisions (a) to (d)(1), the court itemized six elements that a "trial court must consider" at a hearing under section 2966. (*Id.* at pp. 876-877.) While the court cited subdivision (d)(1) as among the criteria of section 2962 (*id.* at p. 877), the court did not otherwise mention the evaluation and certification required by that subdivision. And the court did not have occasion to consider whether the evaluation and certification required

by that subdivision would need to be proved at a hearing under section 2966. Again, the issue presented in the instant case was not considered.

People v. Sheek was a People's appeal addressing the question of the People's right to a jury trial in a section 2966 hearing. (*People v. Sheek, supra,* 122 Cal.App.4th at p. 1608.) In the trial court, the People had failed to make a legally sufficient offer of proof on the issue of whether the prisoner had been treated for his serious mental disorder for 90 days in the year prior to parole. (*Id.* at pp. 1608-1609, 1611.) While the court cited *People v. Clark* and section 2962 for six factors that make a person subject to commitment as an MDO, the court did not mention the evaluation and certification requirements of subdivision (d)(1) of that section and had no occasion to consider the evaluation and certification requirements of that subdivision. Not considered by the court in *People v. Sheek* was the respondent's proposition that subdivision (d) is not among the criteria of section 2962, but rather that "the criteria of Section 2962" as used in section 2966 refers only to the matters to be certified by the chief psychiatrist pursuant to that subdivision. The issue was not presented.

People v. Merfield, involved a prisoner who waived his right to a hearing under subdivision (b) of section 2966. (*People v. Merfield, supra,* 147 Cal.App.4th at pp. 1073-1074.) At a subsequent hearing to extend his commitment under subdivision (c) of section 2966, the appellant in that case sought to contest the issue of whether his underlying offense had been the product of his severe mental disorder. (*Id.* at p. 1073.) The court held that the appellant had waived his right to challenge his initial commitment and that any issues with respect to his initial commitment were moot given that the term of that commitment had expired. (*Id.* at pp. 1074-1076.) Moreover, the commitment restraining

the appellant in *People v. Merfield* at the time of seeking to raise this issue was governed by subdivision (c) of section 2966. That section specifically provides that the only issues to be determined at that point are "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." (§ 2966, subd. (c); *People v. Merfield, supra,* 147 Cal.App.4th at p. 1077.) The court had no occasion to consider whether the evaluation and certification requirements of subdivision (d)(1) of section 2962 were among the "criteria of Section 2962" as that term is used in section 2966. *People v. Merfield* is not authority for a proposition not considered. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1176.)

In *People v. Hannibal*, the Court of Appeal considered issues of the right to self-representation in a section 2966 hearing and of res judicata. (*People v. Hannibal, supra,* 143 Cal.App.4th at pp. 1092-1096.) The court also considered the sufficiency of the evidence on the issues of whether the appellant's severe mental disorder was in remission or could be kept in remission and of whether his severe mental disorder was a cause or aggravating factor in his commission of the controlling offense. (*Id.* at pp. 1096-1097.) The court had no occasion to consider the requirements of subdivision (d) of section 2962, or whether those requirements are among the "criteria of Section 2962" as that phrase is used in section 2966. *People v. Hannibal* is not authority for a proposition not considered. Like the court in *People v. Francis*, however, the court in *People v. Hannibal*, in citing the source of the criteria for

mandatory treatment under section 2962, cited subdivisions (a) to (d)(1) of that section. (*Id.* at p. 1094.)

In *Lopez v. Superior Court*, this court considered the question of whether a person whose commitment was being extended under section 2970 could at that time challenge the initial order for treatment under section 2962, specifically as to whether he had been convicted of an offense enumerated in subdivision (e) of section 2962. (*Lopez v. Superior Court, supra,* 50 Cal.4th at pp. 1057-1058.) This court noted the certification requirements of subdivision (d) of section 2962, in the course of interpreting whether at a hearing under section 2970 an individual could raise the issue of whether his offense was listed in subdivision (e) of section 2962. (*Id.* at pp. 1059, fn. 3, 1064, citing § 2962, subd. (d).) This court did not have occasion in *Lopez v. Superior Court* to consider whether at a hearing pursuant to section 2966, the district attorney was required to prove the facts specified in subdivision (d) of section 2962.

People v. Cobb involved the legal consequences of the failure to comply with the statutory requirement that the trial on a hearing to compel treatment after the expiration of parole begin 30 days before the person's release. (*People v. Cobb, supra,* 48 Cal.4th at pp. 246, 249-250.) In passing, this court quoted *People v. Francis* for its enumeration of the six criteria that must be proved "for the initial MDO certification." (*Id.* at p. 251-252, citing *People v. Francis, supra,* 98 Cal.App.4th at 876-877, emphasis omitted.) The quote includes the citation of subdivisions (a) to (d)(1) as the source of those criteria. (*Ibid.*) But, as in each of the other decisions cited by respondent, this court had no occasion in *People v. Cobb* to consider the statutory construction issue raised in the instant case.

Unlike the other cases cited by respondent, the criterion of subdivision (d) of section 2962 was central to the cases of *People v. White, supra,* 32 Cal.App.4th 638 and *People v. Miller, supra,* 25 Cal.App.4th 913. Those cases raised the issue of sufficiency of the evidence on that element. (*People v. White, supra,* 32 Cal.App.4th at pp. 639, 641; *People v. Miller, supra,* 25 Cal.App.4th at p. 219.) It is true that in those cases, if the respondent or the court even considered the idea that subdivision (d) of section 2962 did not provide one of the criteria of that section, it is not reflected in the opinions. Although the analysis of those opinions depended upon the proposition that subdivision (d) does specify a criterion that it was the district attorney's burden to prove, it cannot be said that the proposition, or the negation of that proposition, was considered by either court. The most that can be said of *People v. White* and *People v. Miller* is that had either court considered whether or not subdivision (d) of section 2962 was or was not a criterion of section 2962, it would have been a holding not a dictum.

The term "obiter dictum" refers to a thing that a court has said in passing, a thing not essential to the court's decision.

> In every case, it is necessary to read the language of an opinion in light of its facts and the issues raised, in order to determine which statements of law were necessary to the decision, and therefore binding precedent, and which were general observations unnecessary to the decision. The latter are dicta, with no force as precedent.

(*Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1301, citing *inter alia Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) To the extent that each of the cases cited by respondent offers a list of factors prerequisite to the involuntary treatment of a prisoner as a condition of parole under section 2962, the failure of those lists to include a reference to the evaluation and certification required by

subdivision (d) of that section is at most dicta. The issue presented here was not present in those cases; it was not briefed or argued in those cases; it was not decided in those cases. The things said or not said in passing are of little guidance to this court.

4. The public policy considerations advanced by respondent do not support reading the phrase "the criteria of section 2962" as referring exclusively to those matters certified by a chief psychiatrist.

The respondent offers several public policy considerations in support of respondent's proposed alternate reading of sections 2962 and 2966. (RBOM 31-33.) None of these provide the support that respondent seeks.

First, respondent argues that requiring the district attorney to prove compliance with the evaluation and certification requirements of subdivision (d) of section 2962 "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." (RBOM 31.) This kind of argument has been rejected by this court previously.

> The Attorney General is only partially correct. Public protection is an important purpose of the legislation. Another is protection of the patient's rights. "Like other involuntary civil commitment schemes, the MDO Act's comprehensive statutory scheme ... represents a delicate balancing of countervailing public and individual interests."

(*People v. Cobb, supra,* 48 Cal.4th at p. 253 quoting *People v. Allen* (2007) 42 Cal.4th 91, 98.)

Moreover, the respondent's argument is dependent upon an assumption that the state's resources are limitless. The purpose of protecting the public from persons whose severe mental disorders make them a danger is not furthered by squandering the state's resources upon the extended confinement of persons who do not truly belong in that category. Both for the protection of the patient's rights and for the protection of the public, the state has an interest in the greater reliability of these determinations. That interest is furthered by giving effect to the evaluation and certification requirements of subdivision (d) of section 2962.

Respondent also asserts a public interest in not "complicat[ing] the issues for a jury because of the myriad of variances in the certification process." (RBOM 31.) Respondent suggests, "the person who evaluated the person 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." (RBOM 31.) The statute requires an evaluation by "the person in charge of treating the prisoner." (§ 2962, subd. (d)(1).) Given the facts hypothesized by respondent, the question of who is in charge in such a situation would be a question of law, but reason suggests that if the graduate student is working under the direct supervision of a licensed psychologist or psychiatrist, it is the licensed psychologist or psychiatrist who is in charge.

Respondent suggests that the person who evaluated the prisoner might be a member of the treatment team who was not the person in charge of treating the prisoner. (RBOM 31.) This is not a problem of proof but a problem of the state hospital not complying with the terms

of the statute. The argument seems to be that because the state might not always comply with the requirements of the statute and because such a lapse might on some occasion result in the release of a prisoner who might otherwise remain confined, then this court as a matter of policy should turn a blind eye to the statutory provision. Where the Legislature has specifically required an evaluation from the person in charge of treatment, it is not for this court as a matter of policy to read that requirement out of the statute. Although no system is perfect, the public safety and the rights of prisoners are better protected by the diligence of state officers and not by an abandonment of the rule of law. The requirement of an evaluation by the person in charge of treatment is not so subtle that state hospitals would not understand what is required and not so onerous that as a matter of public policy this court should strike it from the law.

Respondent suggests that there might be a difficulty if "the person 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." (RBOM 31-32, citing *People v. White, supra,* 32 Cal.App.4th at p. 641.) The statute requires evaluations by two people, one being the person in charge of treatment and the other being a psychologist or psychiatrist from outside the institution where the person is being treated. (§ 2962, subd. (d)(1).) That is, if the individual is being treated at a facility of the CDCR, then an evaluation by a psychologist or psychiatrist from the SDMH is required in addition to that of the person in charge of treatment, and if the individual is being treated by the SDMH, then an evaluation "shall be done at the state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections and Rehabilitation." (§ 2962, subd. (d)(1).)

The statute does not explicitly require that the certification be done by a third person. Regardless of whether the person is being treated at a facility of the CDCR, or being treated by the SDMH, the certification is to be done by a chief psychiatrist of the CDCR. (§2962, subd. (d)(1).) Nothing in the terms of the statute excludes that chief psychiatrist from being "the person in charge of treatment" if the individual is at a facility of the CDCR. And nothing in the terms of the statute excludes that chief psychiatrist from being "a practicing psychiatrist or psychologist from the Department of Corrections and Rehabilitation" if the person is being treated by the SDMH.

Respondent suggests, "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." (RBOM 32.) But subdivision (b) of section 2966 specifically provides for the admission and consideration of written evidence from psychologists and psychiatrists at the hearing before the superior court.

> 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 considered in the rendering of a decision or verdict in any proceeding held pursuant to subdivision (b) or (c), or subdivision (a) of Section 2972.

(§ 2966, subd. (b).)

Moreover, the essence of "certification," is the presentation of a document attesting to the truth of specified matters. "A certificate is '"a written testimony to the truth of any fact."'" (*Donnellan v. City of Novato* (2001) 86 Cal.App.4th 1097, 1106, citations omitted.) "[T]he word

'certify' means '[t]o attest as being true.'" (*People v. Richardson* (2007) 156 Cal.App.4th 574, 590, citing Black's Law Dic. (7th ed. 1999) p. 220, col. 2; see also *Ex parte Smith* (1949) 33 Cal.2d 797, 800-801.) The requirement that a chief psychiatrist "has certified" the specified facts to the BPH carries with it the understanding that a written testament to the truth of the specified facts has been made. If, as is required, a chief psychiatrist "has certified" to the BPH the facts that the statute specifies, the presentation to the court of that certificate is not burdensome or time-consuming.

Finally, respondent suggests that "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 ... and certifications." (RBOM 32.) The prior opportunity to which the respondent refers is the hearing before the BPH pursuant to subdivision (a) of section 2966. There are two flaws to this argument.

If the prisoner indeed has an opportunity to challenge the requisite evaluations and certifications at the hearing before the BPH, it is because subdivision (a) of section 2966 provides that "the board shall conducting a hearing . . . for the purpose of proving that the prisoner meets *the criteria in Section 2962.*" (Emphasis supplied.) This is virtually identical to the language in subdivision (b) of section 2966 that respondent asserts does not include an opportunity to challenge the certification and evaluation required by subdivision (d) of section 2962. Whatever this language means in subdivision (a) of section 2966, it means the same thing in subdivision (b) of section 2966. (*People v. Roberge* (2003) 29 Cal.4th 979, 987.)

Further, if the principle of fairness as articulated by respondent were sufficient to excuse the proof in court of compliance with

subdivision (d) of section 2962 because the individual had already had a chance to contest that compliance before the BPH, then the hearing before the court provided in subdivision (b) of section 2966 should be dispensed with entirely.. It is a principle that applies with equal force to each of the other criteria of section 2962. Indeed, the language of subdivision (b) of section 2966 is clear that the hearing before the court is to re-examine the facts as they existed at the time of the hearing before the BPH. The hearing before the court is a "hearing on whether he or she, as of the date of the Board of Prison Terms hearing, met the criteria of Section 2962." (§ 2966, subd. (b).) Subdivision (b) of section 2966 provides for de novo judicial review of the administrative hearing provided in subdivision (a) of section 2966. No asserted principle of fairness would read that right to a de novo judicial hearing out of the statute.

In sum, none of the public policies cited by respondent support excluding subdivision (d) of section 2962 from the criteria that must be proved at a hearing pursuant to subdivision (b) of section 2966.

5. The issue of whether subdivision (d) of section 2962 specifies one of the "criteria of Section 2962" does not turn on whether the requirements of subdivision (d) might in some circumstances be characterized as matters of procedure.

Respondent analogizes the issue in the instant case to the issues of venue and territorial jurisdiction presented in *People v. Posey* (2004) 32 Cal.4th 193, and *People v. Betts* (2005) 34 Cal.4th 1039. Respondent argues that the requirements of subdivision (d) of section 2962 are matters of procedure and that matters of procedure are to be determined by the judge and not by the finder of fact at trial. (RBOM 34.) R

But respondent's argument conflates the facts to be found with the legal consequences flowing from the finding.

With respect to venue, for example, the fact to be found is the location of the charged criminal act and the legal consequence is a decision as to where the trial should be held. In *Posey* and *Betts*, it was the consequences of the decision that were matters of procedure, not the facts to be found. *Posey* and *Betts* do not stand for the proposition that matters of procedure might not be elements to be found by a jury or a judge when the consequence of the decision is a criminal conviction or a civil commitment or mandatory treatment as a condition of parole.

In addressing whether the issue of venue was to be decided by the jury or by the court, this court held in *People v. Posey*:

> Fundamentally, the distinction between questions of law for the court (§ 1126; Evid. Code, §§ 310, 312) turns on whether the issue presented relates to the substantive matter of guilt or innocence to be determined at trial or, instead, concerns a procedural matter that does not itself determine 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). (See *People v. Simon* [(2001)] 25 Cal.4th [1082,] 1110, fn. 18., 108 Cal.Rtpr.2d 385, 25 P.3d 598.) If an issue implicates guilt or innocence as a substantive matter, it generally lies within the province of the jury, but an issue involving a procedural matter generally lies within the province of the court.

(*People v. Posey, supra,* 32 Cal.4th at p. 206.)

The location of an act in most cases relates only to matters like venue. In those cases, the finding of fact as to the location of the act is made by the judge because the legal consequence of the finding is a matter of procedure, not because there is something procedural about the location of the act. If the Legislature makes it a crime to commit a

specific act in one place but not in another, then the place where the act is committed is an element of the offense. For example, former section 12031, subdivision (a)(1), prohibited carrying a loaded firearm in an incorporated city or in specified places in unincorporated territory. (*People v. Knight* (2004) 121 Cal.App.4th 1568, 1573-1574.) As to that statute, the location of the act would be an element of the offense. As an element of the offense, it would be for the jury to make a finding regarding the location of the act and not because the location of the act is inherently substantive.

Similarly, whether an officer is engaged in the course of his duty is a fact that may be an element of an offense or may relate to a matter of procedure such as the admission of evidence. Penal Code section 69 makes it an offense knowingly to resist an officer in the performance of his or her duty. As to that offense, whether the officer was in the lawful performance of his or her duty is an element of the offense. (*In re Manual G.* (1997) 16 Cal.4th 805, 816-817.) When the officer being engaged in the lawful performance of his or her duty is an element, the jury may be asked to determine, for example, whether an officer was making an unlawful arrest at the time of the offense. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217; CALCRIM No. 2670.) As to any charge, however, whether the officer has engaged in an unlawful arrest may be a matter of procedure to be determined by the judge for the purpose of determining whether the Fourth Amendment precludes admission of some evidence. (E.g., *People v. Superior Court (Keifer)* (1970) 3 Cal.3d 807, 812-813.) When a person is charged with a violation of section 69, the issue of whether an officer was not engaged in a lawful duty because an arrest was unlawful is "an issue [that] implicates guilt or innocence as a substantive matter," notwithstanding the fact that the lawfulness of

an arrest might in another context be a matter with consequences that were procedural only.

The determination of whether it is an element of the offense or not is made by reference to the terms of the statute. (*In re Manual G., supra,* 16 Cal.4th at pp. 816-817.) If the statute defining the offense specifies that a particular fact is an element of the offense, proof of that element to the jury is not excused by the fact that in another context it might have a legal consequence that is a matter of procedure only.

The evaluation and certification of subdivision (d) of section 2962 are an "element" of section 2962 because the words of section 2962 make them so. That they might in another context be characterized as matters of procedure does not negate their character as an element.

Furthermore, there are other criteria in section 2962 that might equally be considered to be matters of procedure. Subdivision (b) of section 2962 requires that the individual was sentenced to prison. Subdivision (c) of section 2962 requires that "[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." Subdivision (e)(1) requires that the prisoner received a determinate sentence. Subdivision (e)(2) requires that the prisoner was sentenced for a specified crime. While each of these facts might be characterized as matters of procedure, it would not be reasonable for that reason to exclude them from "the criteria of Section 2962" that must be proved at a hearing pursuant to section 2966.

Whether or not a matter is an element of an offense is determined by reference to the statute defining the offense, not by reference to whether it might be characterized as a matter of procedure. To the extent that there is an analogy between the elements of a

criminal offense and the "criteria of Section 2962," the referenced criteria must be determined by reading the language of the statute and not by whether they might in some circumstances be characterized as matters of procedure.

6. The instant case should be remanded for a full hearing under section 2966 on the criteria of section 2962.

Respondent asks this court to remand the instant case for a hearing exclusively on the issue of whether there had been the evaluations and certification required by subdivision (d) of section 2962. (RBOM 41-42.) Regardless of whether such an approach might be appropriate in some other case, it is particularly inappropriate in the instant case.

It appears from the record in the instant case that the judge at the time of the hearing was under the misapprehension that she was conducting a hearing not under subdivision (b) of section 2966, but under subdivision (c) of that section. (CT 12; RT 87-88.) Under subdivision (c) of section 2966, the only issues before the court are "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." (§ 2966, subd. (c) .) That subdivision applies "[i]f the Board of Prison Terms continues a parolee's mental health treatment under Section 2962 when it continues the parolee's parole under Section 3001." (§ 2966, subd. (c) .) Section 3001 provides that, for good cause, a parolee can be retained on parole subject to annual review. (§ 3001.)

In the instant case, the judge made findings consistent with subdivision (c) of section 2966, but insufficient for subdivision (b) of that section.

> Based on the evidence that I heard, the Court does find that as of Board Prison Terms hearing on April 5th, 2010, that Mr. Harrison did, in fact, suffer from [sic] severe mental disorder.
>
> That as of that date, that's [sic] severe mental disorder was not in remission or not kept in remission with that continued treatment.
>
> And as of that date, April 5th, 2010 . . . because of his severe mental disorder, he did, in fact, pose a substantial danger of physical harm to others.

(RT 87-88.)

Further, the minutes recorded the court's findings with a specific reference to subdivision (c) of section 2966.

> Court findings:
>
> Pursuant to Penal Code section 2962 and *2966(c)*, the Court finds that the petitioner does meet the criteria of a mentally disordered offender as follows:
>
> Petitioner has a severe mental disorder as defined by Penal Code section 2962(a); that Petitioner is not in remission; that Petitioner represents a substantial danger or [sic] physical harm to others.

(CT 12, emphasis supplied.)

The judge made no finding that the mental disorder was one of the causes or an aggravating factor in the commission of the crime for which appellant was sentenced to prison. (Cf. § 2962, subd. (b).) The judge made no finding that appellant had been in treatment for his mental disorder for 90 days or more within the year prior to his parole or release. (Cf. § 2962, subd. (c).) The judge made no finding that

appellant had been given a determinate sentence for an offense specified in subdivision (e) of section 2962.

At the conclusion of the hearing, the trial court made an order citing subdivision (c) of section 2966, an order that was consistent with subdivision (c) of section 2966, but an order not consistent with subdivision (b) of that section.

> Petitioner shall remain committed to the State Department of Mental Health as a Mentally disordered offender PC2966c/2962.
>
> The Court orders Respondent [sic] committed to the State Department of Mental Health for an additional year, from 04/05/10 to 04/05/11.

(CT 12-13; RT 88.) At the conclusion of a hearing pursuant to subdivision (b) of section 2966, the court should either uphold or set aside the condition of parole requiring mandatory treatment. There would be no occasion at that juncture to order a one-year commitment.

The error that is the focus of this court's grant of review is not the only error in this case. Appellant never had a hearing pursuant to subdivision (b) of section 2966, and in addition to failing to determine whether the criterion of subdivision (d) of section 2962, had been proved, the court also failed to make a determination of the criteria of subdivisions (b), (c), and (e), of section 2962. Moreover, this court has held that at subsequent proceedings under the MDO Act, appellant will not be permitted to contest these criteria. (*Lopez v. Superior Court, supra,* 50 Cal.4th at p. 1064.) Without a remand for a full hearing, appellant will never have a chance to put the People to their burden on those criteria. Accordingly, a remand for determination of subdivision (d), only, would be inappropriate.

7. If this court holds in favor of respondent, the case should be remanded to the Court of Appeal for determination of the remaining issues.

In the Court of Appeal, appellant raised several issues in addition to that which was the basis for the Court of Appeal's decision reversing the judgment. The Court of Appeal did not address some of those issues because it reversed based on the insufficiency of the evidence on the criterion of subdivision (d) of section 2962. (Slip Op. at p. 21.) Specifically, the Court of Appeal did not address appellant's arguments that the trial court did not make the requisite findings of fact and that the trial court erred by imposing a one-year commitment. (Slip Op. at p. 2.)

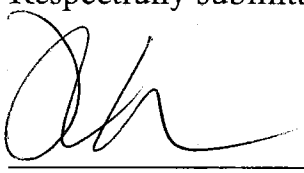
Should this court adopt the construction urged by respondent and hold contrary to the Court of Appeal on the question presented for review, appellant's case should be remanded to the Court of Appeal for determination of the remaining issues on appeal.

Conclusion

Because the evidence was insufficient to show that appellant was evaluated and certified in accordance with the requirements of subdivision (d) of section 2962, the judgment of commitment should be reversed.

Dated: July 3, 2012

Respectfully submitted,



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Certification of Word Count

I, Ron Boyer, attorney for appellant, certify that the attached brief was produced on a computer and that by the word count of the computer program used to prepare the brief, the attached brief contains 13,327 words, including footnotes.

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

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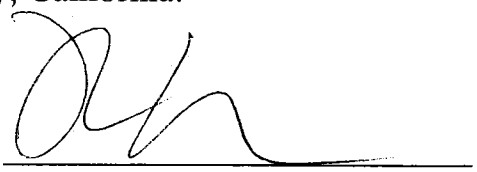

Ron Boyer

Certificate of Service

I, Ron Boyer, declare that I am over the age of eighteen years, a citizen of the United States, and a resident of the State of California. My business address is 1563 Solano Ave., #246, Berkeley, California. I am not a party to the cause described in the affixed document.

On July 3, 2012, I served the affixed: Appellant's Brief on the Merits

Re: *People v. Kelvin Harrison,* No. S199830

by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, placed this day in the United States mail at Albany, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true. Executed on July 3, 2012, at Albany, California

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