

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DANIEL LOPEZ,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
BERNARDINO COUNTY

Respondent,

THE PEOPLE OF THE STATE OF
CALIFORNIA

Real Party in Interest.

Supreme Court Case
No. **S172589**

Court of Appeal
Case No. G040679

San Bernardino County
Superior Court Case
No. FVAFS700968

**SUPREME COURT
FILED**

JAN 08 2010

Frederick K. Ohlrich Clerk
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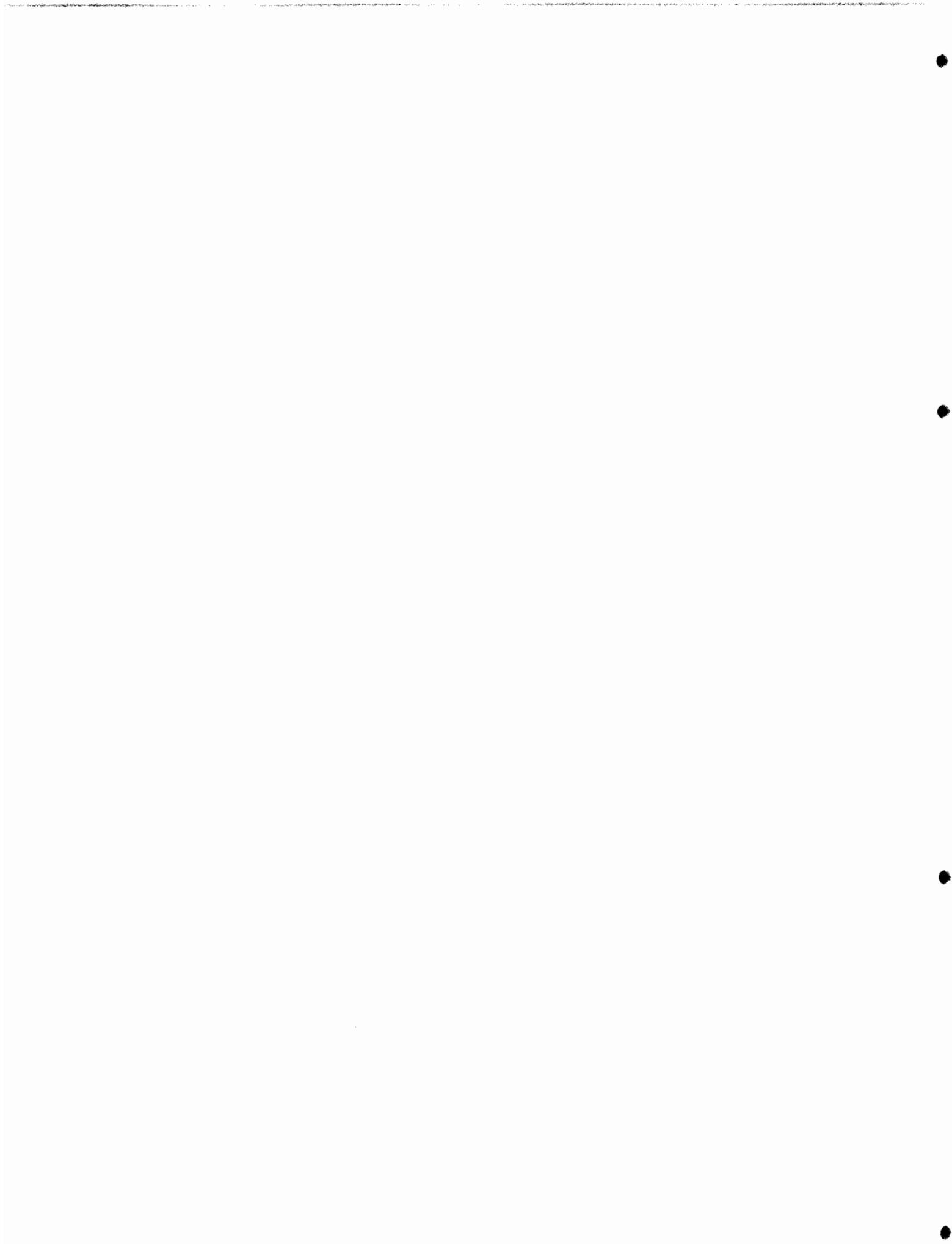
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REPLY BRIEF

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

I

**EXTENSION OF COMMITMENT WITHOUT ADJUDICATION OF
THE JURISDICTIONAL CRITERIA VIOLATES APPELLANT'S
STATE AND FEDERAL RIGHT TO DUE PROCESS OF LAW**

California has established a statutory scheme which must be followed in order to commit a person as a Mentally Disordered Offender. In this matter, the State seeks to deprive Appellant, Mr. Lopez, of his liberty without following the procedures mandated by its own statutes. Although there are various ways in which the State could have created a constitutionally valid statutory scheme for civil commitment, once the State

established its system, it must follow its own rules. By failing to do so, the State deprives appellant of his liberty without due process of law.

Mr. Lopez is also entitled to due process of law under the United States Constitution (U.S. Const., 5th and 14th Amendments.) The United States Supreme Court has considered a closely related issue in *Hicks v. Oklahoma* (1980) 447 U.S. 343. In *Hicks*, the Supreme Court reviewed a criminal case in which the defendant was entitled, under State law, to be sentenced by a jury. The jury imposed a mandatory 40-year prison term, which was subsequently declared unconstitutional by an Oklahoma court. The defendant then sought to have his 40-year sentence set aside and to have a jury resentence him. The Oklahoma appellate court declined to do so. The court reasoned that, although the mandatory prison term imposed was unconstitutional, the defendant was not prejudiced by the impact, because the sentence he received was within the range of punishments he could have received even under a correct interpretation of the law. *Id.* at 344-345.

The Supreme Court overruled the appellate court, finding that the state courts had violated the defendant's due process rights. The Supreme Court noted that, although it was possible to characterize the right to be sentenced by a jury as nothing more than a procedural right of state law, once the state has provided for the imposition of criminal punishment in a certain fashion, the defendant's interest in requiring the state to follow the designated process was not "merely a matter of state procedural law." *Id.* at 346. Instead, "[t]he defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of the statutory discretion...and that liberty interest is one that the Fourteenth Amendment

preserves against arbitrary deprivation by the state.” *Id.* The defendant in *Hicks* had a due process right to compel the state to follow the statutory procedures it had created to sentence him. Similarly, Appellant, Daniel Lopez, has a due process right to require the State to follow its statutory procedures in order to deprive him of his liberty by committing him as a Mentally Disordered Offender (MDO).

California has established a detailed statutory scheme for committing persons as mentally disordered offenders. *Penal Code* §2960-2981¹. Section 2960 articulates the Legislature’s intent to apply MDO commitments to individuals who have a “severe mental disorder that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated.” Consonant with the legislative declaration in §2960, §2962 enumerates the jurisdictional criteria that must be established in order to involuntarily commit a parolee as an MDO, specifying the following historical elements:

1. a severe mental disorder² was one of the causes, or was an aggravating factor in the commission of the crime;
2. the crime for which the parolee received a determinate term is either enumerated, or, involved forced, violence, or the threat thereof; and
3. the parolee received 90 days of treatment for said severe mental disorder in the year prior to release.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² §2962 defines a “severe mental disorder” as excluding a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances.

The three prerequisites of a qualifying mental disorder, causation, and a qualifying offense must be adjudicated in order to initially commit the parolee and extend his commitment beyond parole. In the instant matter, the record raises factual issues as to the existence of a qualifying “severe mental disorder” as well as causation/aggravating factor. Although a severe mental disorder excludes addiction to or abuse of intoxicating substances, the police report records that Officer Gerard detected a “very strong odor of an alcoholic beverage about his breath and person.” Officer Gerard observed that Mr. Lopez had bloodshot red, watery eyes. His speech was slurred, and he was confused when the officer asked him questions. Mr. Lopez reported that he had been drinking since 6:00 a.m. and, prior to his arrival at the Laundromat, he had ingested four-40 oz. bottles of beer. (Statement of Facts, AOB, page 7). Hence, the four corners of the police report raise controversy as to causation of the offense, as well as whether the offense underlying the conviction qualifies for MDO commitment, both of which are jurisdictional criteria under the State’s statutory scheme.

Mr. Lopez preserved his foundational challenge to the commitment criteria by timely filing his §2966(b) petition and withdrawing it without prejudice. [Exhibits to Petition for Peremptory Writ and Writ of Mandate, pages 67 & 64.] Having reserved the issues, he renewed his challenge to the jurisdictional criteria by filing his motion to dismiss the §2970 petition for insufficiency of the evidence. [Exhibits to Petition for Peremptory Writ and Writ of Mandate, pages 21-72.] Mr. Lopez has asserted his rights provided by the State under its MDO statute. Constitutional due process requires that the State, in seeking to deprive Mr. Lopez of his liberty, proceed in compliance with the statutory scheme established for MDO commitment.

However, the State seeks to abridge those rights by escaping the mandate of establishing the jurisdictional criteria beyond a reasonable doubt to a court or jury. As previously discussed, proof of the jurisdictional criteria beyond a reasonable doubt to a unanimous jury verdict fulfills both the statutory obligations and the due process imperative of safeguarding against arbitrary, wrongful deprivation of liberty. (Section V, AOB, pp. 32-35.) California has established a process by which individuals can be civilly committed as MDOs. Having established that process, California has created a due process right in every individual guaranteeing that the State will not commit him as an MDO without complying with its own statutes. The rulings by the courts below curtailed appellant's rights under the MDO Act and Constitutional due process by improperly applying collateral estoppel and forfeiture to avoid adjudication of the jurisdictional criteria.

II THE BPT DETERMINATION SHOULD NOT BE ACCORDED THE PRECLUSIVE EFFECT OF COLLATERAL ESTOPPEL

A. The BPT Determination Was Not a Final Judgment

The application of collateral estoppel requires the prior determination to be a **final judgment**. *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal. App. 4th 1538, 1565, Fourth District, Division One. Whether the determination of an issue in a prior action is deemed "sufficiently firm" to be accorded preclusive effect is based on the following factors:

1. whether the decision was not avowedly tentative;
2. whether the parties were fully heard;

3. whether the court supported its decision with a reasoned opinion; and
4. whether the decision was subject to an appeal. *Id.*

In the MDO context, the decision of the BPT is not intended to have the conclusive effect of a final judgment. The ultimate forum for adjudication of the MDO criteria resides in the superior court. Under the statutory scheme, “[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.... If the court or jury reverses the determination of the Board of Prison Terms, the court shall stay the execution of the decision for five working days to allow for an orderly release of the prisoner.” §2966(b) By providing the prisoner the right to a de novo adjudication in superior court, the Legislature intended the BPT determination as an intermediate, provisional decision, subject to review and abrogation by the court or jury.

Respondent asserts that the BPT determination should be given preclusive effect where its decision is unchallenged. (Respondent’s Answer, Section II A.) However, in the instant matter, Mr. Lopez did challenge the BPT determination by timely filing his §2966(b) petition. When he withdrew his petition, Mr. Lopez was careful to preserve his right to renew the challenge by ensuring the designation of “withdrawal without prejudice.” Mr. Lopez then asserted that right through his subsequent Motion to Dismiss under *People v. Sheek* (2004) 122 Cal.App.4th 1606, challenging the jurisdictional criteria. Mr. Lopez appealed the BPT

determination by requesting a de novo adjudication pursuant to §2966, thereby foreclosing the conclusive effect of the BPT decision.

B. The BPT Hearing Did Not Afford Mr. Lopez an Opportunity to Fully Litigate the MDO Criteria; Therefore, Its Decision Does Not Preclude De Novo Review in The Superior Court.

Respondent asserts that collateral estoppel effect should be applied to an administrative determination where the proceedings possessed a “judicial character,” citing *People v. Sims* (1982) 32 Cal. 3d 468, 479. (Respondent’s Answer, Section II A, page 30.) However, Respondent’s reliance on *Sims* is unavailing. In *Sims*, the Department of Social Services (DSS) of Sonoma County filed a “Notice of Action,” seeking to reduce Ms. Sims’ cash assistance and recoup overpayment of benefits on grounds that she failed to report that the children’s stepfather had been employed and living at home. Ms. Sims requested a “fair hearing” pursuant to *Welfare and Institutions Code* §19050 to challenge the County’s action. Prior to the administrative hearing, the county filed a criminal complaint alleging fraud that was the subject of the County’s “Notice of Action.” At the fair hearing, Ms. Sims presented evidence to refute the allegations of fraud. Mr. Charles Sims testified at the hearing that, during the time in question, he lived at a different address. The County did not present any evidence. The hearing officer found that the County failed to meet its burden of proof that Ms. Sims had fraudulently obtained welfare benefits. The County did not seek judicial review of the decision. Subsequently, Ms. Sims moved for dismissal of the criminal action on the ground that the decision at the fair hearing barred the criminal prosecution under the doctrine of collateral estoppel. The trial court granted Ms. Sims’ motion to dismiss the information, and the state appealed.

The California Supreme Court affirmed the dismissal. The Court cited *United States v. Utah Constr. Co.* (1966) 384 U.S. 394, wherein the United States Supreme Court held that collateral estoppel may be applied to administrative determinations “[w]hen an administrative agency is *acting in a judicial capacity* and *resolves the disputed issues of fact* properly before it which the parties have had an *adequate opportunity to litigate.*” *Id.* at 479 (Original italics.) In ascertaining whether an agency acted “in a judicial capacity,” the court looked for indications that the administrative proceeding possessed a “judicial character.” *Id.* In *Sims*, the Court noted that DSS allowed both parties to call, examine, and cross-examine witnesses as well as introduce documentary evidence. *Id.* at 480. Upon request, the Chief Referee was required to subpoena material witnesses. *Id.* The inquiry is whether the parties had a “***fair adversary proceeding*** in which they could ***fully litigate***” their claims. *Id.* at 481 (Emphasis added). The court further recognized that the Legislature established a unique statutory scheme to effectuate the policy of resolving AFDC fraud cases outside the criminal justice system. *Id.* at 489.

In contrast, Mr. Lopez did not receive a fair adversary proceeding in which he could fully litigate the jurisdictional issues of commitment. The standard of proof used by the BPT “shall be” by a preponderance of the evidence. *Code of Regulations*, Title 15 §2576(b)(1). The hearing is before a single Deputy Commissioner. *Code of Regulations*, Title 15 §2576(b)(9). Mr. Lopez’s rights at a BPT hearing as set forth in the *Code of Regulations*, Title 15 §2245-2256³, do not include the right to cross-examine state experts, to present favorable witnesses, and to secure competent experts to conduct an examination and assist his attorney in the

³ *Code of Regulations*, Title 15 §2576(b)(3)

evaluation, preparation, and presentation of the defense. While the BPT may commission “independent” evaluators, such provision fails due process, because the BPT-appointed experts have no duty to advance Mr. Lopez’s interests and assist in the presentation of his defense. *Jones v. Ryan* (2009) 583 F.3d 626, 639 (U.S. Court of Appeals, Ninth District). In *Ake v. Oklahoma*, the United States Supreme Court held that evaluation by a neutral court psychiatrist does not satisfy due process, (1985) 470 U.S. 68, 83-84. The assistance of a defense expert would allow a meaningful presentation of a defense and reduce the risk of inaccurate resolution:

[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination. *Id.* at 83.

At Mr. Lopez’s MDO certification hearing of October 26, 2005, he was not permitted access to a defense expert. The only witness who testified at the 20-minute hearing was Dr. Weaver, an adverse witness requested by the State [Exhibits to Petition for Peremptory Writ and Writ of Mandate, page 62]. Unlike *Sims*, under the parole procedures for MDO certification, Mr. Lopez was not permitted to call witnesses in his own defense. While Ms. Sims had the right to compel the hearing officer to subpoena witnesses on her behalf, Mr. Lopez was not so empowered. Although Mr. Lopez was permitted the attendance of an attorney, this was an illusory right as defense counsel did not possess the right to cross-examine the State experts. Defense counsel was not afforded the right to secure an expert of his own

selection to assist in the presentation of a meaningful defense within the contemplation of Constitutional Due Process.

The Legislature in *Sims* fashioned a statutory scheme to advance the policy of resolving AFDC fraud cases within the administrative process. The interest at the “fair hearing” in *Sims* was pecuniary, the recovery of overpayments in benefits. Here, the interest involves the ultimate deprivation of liberty. Hence, the Legislature established a statutory scheme to safeguard against wrongful commitment by designating the judicial forum as the final arbiter the MDO criteria. The Legislature specified enhanced procedural protections to ensure accuracy in the determination of the issues. “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(b). This second hearing is a *de novo* adjudication of the commitment criteria. At the civil trial, Mr. Lopez would have the federal constitutional right to compulsory process and to put on a defense case under the Sixth Amendment. *Washington v. Texas* (1967) 388 U.S. 14; *Holmes v. South Carolina* (2006) 547 U.S. 319. Therefore, evidence and testimony from defense doctors and witnesses that were not permitted at the BPT hearing would be presented at the trial. The civil proceeding is a trial “*de novo*,” not limited in any way to the evidence considered at the BPT hearing. The trial would be conducted in accordance with rules of evidence. The standard of proof at the civil hearing is proof beyond a reasonable doubt, borne by the DA. §2966(b). Trial shall be by jury, unless waived, and the verdict shall be unanimous. *Id.* The order of the

BPT shall remain in effect until the completion of the court proceedings. *Id.* If the court or jury reverses the determination of the BPT, the court shall stay the execution of the decision for five working days to allow for an orderly release of the prisoner. *Id.*

The rigorous formalities prescribed in superior court proceedings are rooted in constitutional due process⁴ and evidence the Legislature's intent that the courts serve as the forum of full and fair litigation of the MDO criteria. As previously discussed in *Lucido v. The Superior Court of Mendocino* (1990) 51 Cal. 3d 335⁵, the California Supreme Court declined to apply collateral estoppel effect to a prior probation revocation determination, because the revocation proceeding utilized lesser procedures and protections than those afforded at a criminal trial, such as the rules of evidence, proof beyond a reasonable doubt, and the right to a jury trial. To give preclusive effect to a prior determination at a less formal proceeding that involved entirely different purposes, policies, and procedures would bar full and fair litigation of the issues. *Id.* at 344. Although denominated as civil, MDO cases are inherently akin to criminal trials, because they also involve the deprivation of liberty. By its mandate of enhanced due process protections in the de novo superior court proceeding, the Legislature recognized the gravity of the consequences and the concomitant imperative for accurate determination of the commitment criteria. By all indications, the trial court is the locus of full and fair litigation. The BPT, on the other hand, serves the different interest of parole supervision. Its lesser procedural protections do not serve the due process imperative against wrongful commitment. To apply collateral estoppel to a BPT

⁴ Previously discussed in Appellant Opening Brief, Section V(A), pages 32-37.

⁵ Appellant Opening Brief, Section V(B), pages 36-39.

determination would effectively defeat the prisoner's right to the full and fair adjudication by a jury as guaranteed by Constitutional Due Process and Section 2966.

CONCLUSION

This petition challenges a due process violation of Constitutional dimensions wherein Mr. Lopez is exposed to potentially lifelong recommitment without the opportunity to contest jurisdictional elements of commitment as expressly identified by the Legislature in Section 2960 and mandated in Section 2962. Constitutional Due Process requires that the State, in seeking to deprive Appellant of his liberty, proceed in compliance with the statutory scheme established for MDO commitment. The State, therefore, must establish the jurisdictional criteria beyond a reasonable doubt to a court or jury. Furthermore, collateral estoppel should not apply to the BPT determination, based on a mere preponderance of the evidence, wherein Mr. Lopez did not receive a full and fair opportunity to litigate the jurisdictional criteria.

Petitioner respectfully prays for relief from the lower court ruling, requesting that this Court issue a writ commanding the Respondent Court to vacate and set aside its order of May 23, 2008, denying petitioner's motion to dismiss the Section 2970 petition extending his involuntary commitment as a Mentally Disordered Offender, and to enter a new order granting petitioner's motion to dismiss said petition.

Dated this 7th day of January, 2010.

Respectfully Submitted:
DOREEN BOXER
Public Defender

By:


LYLly BRANTLEY
Deputy Public Defender
Attorney for DANIEL LOPEZ

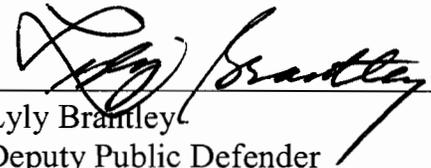
CERTIFICATION

I, Lyly Brantley, declare that I am an attorney duly licensed and admitted to the practice of law before all courts of the State of California and am a Deputy Public Defender for the County of San Bernardino. I am the attorney of record for petitioner Daniel Lopez in case number FVAFS700968.

According to the word count on the computer program (Microsoft Word) used to prepare this brief, the word count is 3,660; therefore, the brief does not exceed 14,000 words.

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

Executed this 7th day of January 2010, at San Bernardino,
California.


Lyly Brantley
Deputy Public Defender

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Cathy A. Honseler declares as follows:

I am a citizen of the United States, employed by the County of San Bernardino, State of California, working in the Public Defender's office. I am over the age of eighteen years and am not a party to this action. My business address is 364 N. Mt. View Ave., San Bernardino, California 92415-0005. In such capacity, I am familiar with the regular and reliable system of United States mail used in the County of San Bernardino for transmission of documents served by the said United States mail system.

On January 7, 2010, I served the within APPELLANT'S REPLY BRIEF RE: DANIEL LOPEZ, CASE # S172589; on the following in this action by placing true copies in envelopes in the mail addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed at San Bernardino, California, on January 7, 2010.


Cathy A. Honseler
Paralegal, San Bernardino Public Defender

