In the Supreme Court of the State of California

KELVIN HARRISON, **Plaintiff and Appellant,** **v.** **BOARD OF PAROLE HEARINGS,** **Defendant and Respondent,** **THE PEOPLE OF THE STATE OF CALIFORNIA,** **Real Party in Interest.**	Case No. S199830

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Appellant disagreed with the determination by the Board of Parole Hearings ("BPH") that he was a mentally disordered offender ("MDO") and petitioned for a court hearing pursuant to subdivision (b) of Penal Code section 2966 on whether he met the criteria of Penal Code section 2962.[1] Following the court hearing under section 2962, subdivision (b), appellant was found to have met the criteria of an MDO and was committed to the State Department of Mental Health ("SDMH") for one year of mental health treatment.

Appellant contends he is entitled to a new court hearing under section 2966, subdivision (b), because the evidence presented at his hearing was insufficient to prove he had been evaluated and certified by mental health professionals in accordance with the certification process of section 2962, subdivision (d). Appellant claims the district attorney was required to prove the State complied with the certification process of section 2962, subdivision (d), at his hearing because the certification process is among the section 2962 criteria that are at issue in a hearing under section 2966, subdivision (b).

As respondent's brief on the merits explained, the substance of sections 2962 and 2966, legislative history of the MDO Act, decisional case law, public policy considerations, and decisions in cases involving analogous issues establish that compliance with the certification process of section 2962, subdivision (d), is not a factor which must be shown to the trier of fact at a hearing under section 2966, subdivision (b), because the certification process is not one of the substantive criteria of an MDO determination. The certification process is simply a procedural prerequisite for committing a prisoner to the SDMH for mental health treatment.

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

Hence, compliance with the certification process is a matter of law that should be decided by the trial court prior to the hearing.

ARGUMENT

I. THE PHRASE "THE CRITERIA OF SECTION 2962," AS USED IN PENAL CODE SECTION 2966, SUBDIVISION (b), DOES NOT INCLUDE THE CERTIFICATION PROCESS OF PENAL CODE SECTION 2962, SUBDIVISION (d)

As discussed in the respondent's brief on the merits, section 2966, subdivision (b), provides that a prisoner who disagrees with the determination of the BPH that he or she meets "the criteria of Section 2962" may file a petition for a hearing in the superior court on whether he or she met "the criteria of Section 2962" as of the date of his or her BPH hearing. The subdivision does not identify "the criteria of Section 2962" that are at issue in the hearing. (§ 2966, subd. (b).) Appellant contends the phrase "the criteria of Section 2962" refers to both the substantive criteria for an MDO determination listed in section 2962 and the certification process set forth in subdivision (d) of section 2962. (Appellant's Answer Brief on the Merits at 8-15.)[2] But the entire substance of sections 2962 and 2966 indicate the phrase "the criteria of Section 2962" refers only to the substantive criteria listed in section 2962, not the certification process. (Respondent's Brief on the Merits at 13-14.)[3]

Section 2962 lists all the conditions that, if met, require a prisoner to be treated by the SDMH as a condition of his or her parole. This section begins with the following clause: "As a condition of parole, a prisoner who

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[2] All further parenthetical references to the appellant's answer brief on the merits will be "ABOM."

[3] All further parenthetical references to the respondent's brief on the merits will be "RBOM."

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." Six subdivisions follow the colon at the end of that clause.

Subdivision (a)(1) of section 2962 states, "The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment."[4] Subdivision (b) of section 2962 provides, "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." Subdivision (c) of section 2962 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."

Subdivision (d) of section 2962, which consists of three paragraphs, provides:[5]

> (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

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[4] Paragraphs (2) and (3) of subdivision (a) define the terms "severe mental disorder" and "remission." (§ 2962, subds. (a)(2)-(3).)

[5] Because the certification process of subdivision (d) is at issue in this case of statutory interpretation, the entirety of the subdivision is cited herein.

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 Rehabilitation, 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 and Rehabilitation.

(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 Parole Hearings pursuant to this paragraph, then the Board of Parole Hearings shall order a further examination by two independent professionals, as provided for in Section 2978.

(3) If at least one of the independent professionals who evaluate the prisoner pursuant to paragraph (2) concurs with the chief psychiatrist's certification of the issues described in paragraph (2), this subdivision shall 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.

Subdivision (e) of section 2962 requires that the crime for which the prisoner was sentenced to prison be among the enumerated offenses. Subdivision (f) of section 2962 specifies, "As used in this chapter, 'substantial danger of physical harm' does not require proof of a recent overt act."

Section 2966 provides for review of MDO determinations. Subdivision (a) of section 2966 states, "A prisoner may request a hearing before the [Board of Parole Hearings], and the board shall conduct a

hearing if so requested, for the purpose of proving that the prisoner meets the criteria in Section 2962." Subdivision (b) provides, "A prisoner who disagrees with the determination of the [Board of Parole Hearings] 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 Parole Hearings] hearing, met the criteria of Section 2962." Subdivision (c) states, "If the [Board of Parole Hearings] continues a parolee's mental health treatment under Section 2962 when it continues the parolee's parole under Section 3001, the procedures of this section shall only be applicable for the purpose of determining if the parolee has a severe mental disorder, whether the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the parolee represents a substantial danger of physical harm to others."

Appellant contends the plain and explicit terms of section 2962 specify that the requirements of subdivision (d) of that section are among the "criteria" which determine whether a prisoner is subject to treatment as a condition of parole and, therefore, must be proved at a hearing under section 2966, subdivision (b). Appellant notes that the prefatory clause of section 2962 includes "the following criteria," ends with a colon, and is followed by the six subdivisions designated (a) through (f). Appellant claims the Legislature could hardly be more clear about "the criteria of Section 2962" including subdivision (d) of that section. (ABOM at 11-15.)

Appellant's construction of sections 2962 and 2966 is flawed because it focuses solely on the phrase "the criteria of Section 2962" in subdivision (b) of section 2966, the phrase "the following criteria" in section 2962, the colon that follows the prefatory clause in section 2962, and the "itemized" list of subdivisions in section 2962. (ABOM at 12.) Appellant overlooks

the entire substance of section 2962, as well as the framework of section 2966.

As the respondent's brief on the merits noted, statutory language is not considered in isolation in a case which involves statutory interpretation. Rather, the entire substance of the statute is considered in determining the scope and purpose of the provision. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Looking at the entire substance of section 2966, a reasonable conclusion is that "the criteria of Section 2962" in section 2966, subdivision (b), refers only to the substantive criteria of an MDO determination and does not include the evaluations and certification of section 2962, subdivision (d).

As discussed, subdivision (a) of section 2966 specifies that a prisoner may request a hearing before the BPH for the purpose of proving that the prisoner meets the criteria in section 2962. Subdivision (a) places the burden of proof on the person or agency who certified the prisoner under subdivision (d) of section 2962, and provides that the BPH shall appoint two independent professionals for further evaluation if the prisoner or any person appearing on his or her behalf at the hearing requests. (§ 2966, subd. (a).) Thus, the person or agency who certified the prisoner as an MDO must prove at the hearing that the prisoner meets the requirements to be classified as an MDO – i.e., the prisoner has a severe mental disorder, the disorder is not in remission or cannot be kept in remission without treatment, the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's underlying criminal behavior, 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 the prisoner represents a substantial danger of physical harm to others by reason of his or her severe mental disorder. (§ 2962, subd. (d)(1).) These requirements are essentially the same as those listed in subdivisions (a), (b), and (c), of

section 2962. Notably, subdivisions (b) and (e) of section 2962 require that the crime for which the prisoner was incarcerated is one of the crimes enumerated in subdivision (e). Thus, the focus of this administrative hearing is on the findings that were made by the mental health professionals who evaluated and certified the prisoner as an MDO.

While subdivision (a) of section 2966 gives a prisoner the opportunity for an administrative review of his or her MDO determination, as discussed, subdivision (b) of section 2966 gives the prisoner an opportunity for judicial review of the BPH's determination that he or she meets the requirements of an MDO. Thus, the focus of this court hearing is also on the findings that were made by the mental health professionals who evaluated and certified the prisoner as an MDO. This is evident from the fact that the statutory provision specifies evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the BPH hearing shall not be considered, the court may receive in evidence an affidavit or declaration of any mental health professional who was involved in the certification and hearing process, and the court may allow the contents of the affidavit or declaration to be considered in the rendering of a decision. (§ 2962, subd. (b).)

Finally, as set forth earlier, subdivision (c) of section 2966 applies to the extension of an MDO's commitment for treatment. It specifies that the procedures set forth in the section shall be applicable only for the purpose of determining whether 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 the parolee represents a substantial danger of physical harm to others by reason of his or her severe mental disorder. Whereas all of the prescribed substantive criteria for an MDO determination are at issue in the administrative hearing under subdivision (a) and the court hearing under subdivision (b), only three of

those prescribed substantive criteria are at issue in a hearing under subdivision (c).

In context, all three subdivisions of section 2966 indicate that only the prescribed substantive criteria of an MDO determination are at issue in the provided hearings. Neither the requirement that a prisoner was evaluated at a DCR facility by the person in charge of treating the prisoner and a practicing SDMH psychiatrist or psychologist nor the requirement that the prisoner was certified by a chief psychiatrist of the DCR is at issue. Unlike the prescribed substantive requirements that a prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment, that the severe mental disorder caused or aggravated the prisoner's underlying criminal behavior, that 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, that the prisoner represents a substantial danger of physical harm to others by virtue of his or her severe mental disorder, and that the prisoner's underlying criminal behavior resulted in a conviction for an enumerated offense, the evaluation and certification requirements of section 2962, subdivision (d), are simply part of the procedure by which a prisoner is committed for treatment as an MDO. While the substantive criteria set forth in section 2962, subdivisions (a), (b), (c), and (e), are akin to the defining traits of an MDO, the certification process of section 2962, subdivision (d), is merely a procedural prerequisite.

Bearing in mind that the legislative purpose of the MDO Act is to protect the public from persons who have severe mental disorders that either caused or were aggravating factors in the crimes for which they are incarcerated and that are not in remission or cannot be kept in remission at the time of their parole (§ 2960), the conclusion that the certification process of section 2962, subdivision (d), is a procedural requirement which

is not at issue in a hearing under section 2966, subdivision (b), is reasonable and logical. Intent on protecting the public from these persons, the Legislature would not have created a loophole that allows these persons to avoid MDO commitments simply because the triers of fact at their section 2966, subdivision (b), hearings find the evidence failed to establish that the evaluations and certification of section 2962, subdivision (d), were performed.

Looking at the substance of sections 2962 and 2966 in their entirety and in light of the purpose of the MDO Act, it is reasonable to conclude that the certification process of section 2962, subdivision (d), is merely a procedural prerequisite and is not one of the substantive criteria of an MDO determination that is at issue in a hearing under section 2966, subdivision (b).

II. THE LEGISLATIVE HISTORY OF THE MENTALLY DISORDERED OFFENDER ACT INDICATES THAT THE CERTIFICATION PROCESS OF PENAL CODE SECTION 2962, SUBDIVISION (d), IS SIMPLY A PROCEDURAL REQUIREMENT AND NOT A SUBSTANTIVE CRITERION OF A MENTALLY DISORDERED OFFENDER DETERMINATION

To the extent that the statutory language of sections 2962 and 2966 provides two reasonable interpretations as to whether the certification process of section 2962, subdivision (d), is one of the section 2962 criteria which must be proved at a hearing under section 2966, subdivision (b), the legislative history of the MDO Act reflects an intent by the Legislature to treat the certification process as a procedural prerequisite and not as a substantive "criterion" that is at issue in a hearing where an MDO determination is being challenged. The legislative history reveals that the term "criteria" referred to the substantive factors which determined whether a prisoner was an MDO and did not include the certification process of section 2962, subdivision (d).

As discussed in the respondent's brief on the merits, statements by the author of the MDO legislation, bill analyses prepared by the Senate Committee on Judiciary, the Senate Rules Committee, the SDMH, the Legislative Analyst, Assembly Committee on Public Safety, and enrolled bill reports prepared by the DCR and the SDMH, all refer to "criteria" as the substantive criteria of an MDO determination. These criteria included the following: a prisoner having a severe mental disorder that is not in remission or cannot be kept in remission; the mental disorder having caused or aggravated the prisoner's criminal behavior; the prisoner having been in treatment for the mental disorder either while he or she was in prison or for 90 days or more within the year prior to his or her release on parole; and, the prisoner's underlying crime having involved force or violence or the infliction of serious bodily injury. (RBOM at 16-22; Respondent's Motion for Judicial Notice, Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M.) The term "criteria" did not include the procedure by which specified mental health professionals evaluate and certify the prisoner as an MDO. (*Id.*)

Appellant, however, contends the legislative materials cited in the respondent's brief on the merits are not sufficiently unambiguous to justify a departure from the statutory terms of sections 2962 and 2966. Appellant asserts legislative materials are properly relied upon only when they are unambiguous. (ABOM at 19-33.) Appellant cites the following passage from *J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568 ("*J.A. Jones Construction Co.*"), as support:

> [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, [footnote] 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. [Citations.] Thus where statutory language was "inadequate" and the legislative history was "at best ambiguous," the United States Supreme Court recently rebuffed an argument that depended for its existence on a particular legislative intent. [Citation.] [¶] By looking for a *clear statement* of intent in the legislative history we avoid the "contamination" problem. [Footnote.] A clear statement of intent allows a court to reasonably indulge the inference that the individual members of the Legislature may have given at least a little thought to that statement before voting on the bill. [Footnote.]

(*J.A. Jones Construction Co.*, *supra*, 27 Cal.App.4th at pp. 1578-1579; italics in original. See also ABOM at 19.)

Appellant's reliance on *J.A. Jones Construction Co.* is misplaced because, unlike *J.A. Jones Construction Co.*, the instant case does not involve the type of confusion created by two bills which were introduced by the Legislature in direct response to an appellate court decision. (*J.A. Jones Construction Co.*, *supra*, 27 Cal.App.4th at pp. 1571, 1574, 1579.) Also, the instant case does not involve the legislative histories of two separate bills which lacked clear statements of the Legislature's intent and contradicted each other. (*Id.* at pp. 1574-1575.) Additionally, the instant case involves only the statements, reports, and analyses that were part of the legislative history of the MDO Act, which led to the enactment of sections 2962 and 2966. Hence, the Court of Appeal's comments in *J.A. Jones Construction Co.* about relying on legislative history only if it is unambiguous are inapplicable to the instant case and do not support appellant's contention that the extrinsic evidence of legislative intent is ambiguous.

III. DECISIONAL CASE LAW SUPPORTS THE CONCLUSION THAT COMPLIANCE WITH THE CERTIFICATION PROCESS OF PENAL CODE SECTION 2962, SUBDIVISION (d), NEED NOT BE PROVED AT A PENAL CODE SECTION 2966, SUBDIVISION (b) HEARING

As respondent's brief on the merits explained, this Court and several intermediate appellate courts have interpreted sections 2962 and 2966 and enumerated the following six prescribed substantive criteria of an MDO: (1) the prisoner has a severe mental disorder; (2) the severe mental disorder is not in remission or capable of being kept in remission without treatment; (3) the severe mental disorder was a cause of or an aggravating factor in the commission of the prisoner's underlying offense; (4) the prisoner was treated for the severe mental disorder for at least 90 days in the year before his or her scheduled release; (5) the underlying crime was an offense enumerated in section 2962, subdivision (e)(2), which includes an offense in which the prisoner used force or violence (see, § 2962, subd. (e)(2)(P) & (Q)); and, (6) the prisoner poses a serious threat of physical harm to others because of the severe mental disorder. (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061-1062 ("*Lopez*"); *People v. Cobb* (2010) 48 Cal.4th 243, 251-252 ("*Cobb*"); *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2; *People v. Hannibal* (2006) 143 Cal.App.4th 1087, 1094; *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1610; *People v. Francis* (2002) 98 Cal.App.4th 873, 876-877; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1075-1076.) (RBOM at 22-30.) Notably absent from the criteria list in any of these cases is the certification process of section 2962, subdivision (d).

Appellant, however, contends these cases provide scant support for the view that a district attorney is not required to prove compliance with the certification process of section 2962, subdivision (d), at a section 2966, subdivision (b), hearing because the certification process is simply a procedural prerequisite. Appellant claims none of the cited cases addressed the question of whether the certification process of section 2962,

subdivision (d), is one of the "criteria" of an MDO determination. Appellant also claims that to the extent the cited cases list criteria for the involuntary treatment of an MDO and the lists do not include the certification process of section 2962, subdivision (d), the lists are dicta. (ABOM at 27-33.)

The discussions regarding the prescribed substantive criteria of an MDO in the cited cases are not dicta because the discussions were necessary for the resolution of the issues presented therein. In *People v. Vang* (2011) 52 Cal.4th 1038 ("*Vang*"), this Court reminded that a particular discussion in a case is not dictum when it is necessary to the decision reached in the case. (*Id.* at p. 1047, fn. 3.)[6] As discussed below,

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[6] In *Vang, supra*, 52 Cal.4th 1038, Justice Chin explained:

> The Court of Appeal described this discussion as "dicta," a word commonly used as shorthand for the term "obiter dictum." We do not believe the discussion was obiter dictum. Black's Law Dictionary defines "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). – Often shortened to *dictum* or, less commonly, *obiter*." (Black's Law Dict. (9th ed. 2099) p. 1177, col. 2.) ("Dicta" is, of course, the plural form of "dictum." (*Ibid.*)
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> The defendant in *Gonzalez, supra*, 38 Cal.4th 932, 44 Cal.Rptr. 3d 237, 135 P.3d 649, relied on *Killebrew, supra*, 103 Cal.App.4th 644, 126 Cal.Rptr.2d 876, to argue the trial court had erred in permitting hypothetical questions. We rejected the argument, partly on the basis that it is incorrect to read *Killebrew* as prohibiting the "questioning of expert witnesses through the use of hypothetical questions." (*Gonzalez, supra*, at 946, fn. 3, 44 Cal.Rptr.3d 237, 135 P.3d 649.) The comment in *Gonzalez* in question thus directly

(continued...)

the lists of MDO criteria in the cited cases were necessary to the decisions reached by the courts therein.

In *Lopez*, *supra*, 50 Cal.4th 1055, this Court granted review to decide whether the Court of Appeal correctly concluded that the static factors of an MDO commitment must be litigated during the initial one-year commitment period. (*Id.* at p. 1061.) To answer that question, this Court needed to first address the different factors of an MDO determination. Hence, this Court's discussion of the MDO criteria was not dictum.

Likewise, this Court's discussion of the MDO criteria in *Cobb*, *supra*, 48 Cal.4th 243, was not dictum. The issue presented for review in *Cobb* was whether due process principles required an MDO prisoner to be released when a trial for the purpose of extending his commitment did not start before his scheduled release date. (*Id.* at pp. 246-247.) In deciding whether the Court of Appeal properly concluded that the prisoner had not been denied due process because the prisoner had been given notice and an opportunity to be heard when he was initially committed as an MDO, this Court needed to identify the six substantive criteria of an MDO determination to facilitate a discussion on which criteria are relevant to an initial MDO certification, which criteria are relevant for the continued treatment of a prisoner as an MDO, and whether the notice and opportunity to be heard as to the initial MDO certification could serve as a substitute for the hearing to reevaluate whether the prisoner's current condition justified an extension of his commitment. (*Id.* at p. 241, 251-252.) Thus, this Court's enumeration of the MDO criteria in *Cobb* was necessary to explain

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(...continued)

> responded to the defendant's argument and was necessary to fully explain why that argument lacked merit.

(*Vang*, *supra*, 52 Cal.4th at p. 1047, fn. 3.)

whether the Court of Appeal's decision was erroneous. (*Id.* at pp. 252-253.)

Similarly, the lists of the MDO criteria in *Hannibal*, *supra*, 143 Cal.App.4th 1087, *Sheek*, *supra*, 122 Cal.App.4th 1606, *Francis*, *supra*, 98 Cal.App.4th 873, and *Clark*, *supra*, 82 Cal.App.4th 1072, were not dicta. The lists were relevant and essential to the decisions that were reached in those cases. In *Hannibal*, *Sheek*, and *Clark*, the defendants challenged the sufficiency of the evidence as to various MDO criteria. (*Hannibal*, *supra*, 143 Cal.App.4th at pp. 1089, 1096-1097; *Sheek*, *supra*, 122 Cal.App.4th at pp. 1610-1611; *Clark*, *supra*, 82 Cal.App.4th at pp. 1075, 1083-1084.) Before discussing the evidence in support of the MDO criteria at issue, the courts needed to identify the criteria of an MDO. Hence, the lists of the prescribed substantive MDO criteria were necessary for the courts to reach their decisions in *Hannibal*, *Sheek*, and *Clark*.

Additionally, in *Hannibal*, *supra*, 143 Cal.App.4th 1087, the court also addressed the issue of whether res judicata and collateral estoppel principles barred the relitigation of a prisoner's mental state at the time of his underlying crime. (*Hannibal*, *supra*, 143 Cal.App.4th at pp. 1093-1094.) In *Francis*, the court similarly decided whether double jeopardy and res judicata principles barred the relitigation of a prisoner's mental state. (*Francis*, *supra*, 98 Cal.App.4th at p. 874.) Because the lists of MDO criteria were relevant to discuss the prisoners' mental states, the lists were necessary to the decisions reached in the two cases. Therefore, the lists of MDO criteria in those cases were not dicta.

In *Merfield*, *supra*, 147 Cal.App.4th 1071, a prisoner filed a petition challenging his initial MDO determination after his commitment had been extended for an additional year pursuant to section 2966, subdivision (c). A trial court dismissed the prisoner's petition on the grounds of mootness and waiver. On appeal, the prisoner argued that his initial commitment could

never be moot because the BPH was required to find he met six criteria to support his initial commitment while only three of those criteria were required for his commitment. To explain why the prisoner's argument lacked merit, the court had to identify the MDO criteria and discuss why the prisoner had but one opportunity to challenge the BPH's findings on some of those criteria. (*Id.* at pp. 1075-1076.) Thus, the list of MDO criteria in *Merfield* was not dictum.

In short, *Lopez, supra,* 50 Cal.4th 1055, *Cobb, supra,* 48 Cal.4th 243, *Merfield, supra,* 147 Cal.App.4th 1071, *Hannibal, supra,* 143 Cal.App.4th 1087, *Sheek, supra,* 122 Cal.App.4th 1606, *Francis, supra,* 98 Cal.App.4th 873, and *Clark, supra,* 82 Cal.App.4th 1072, all support the view that a district attorney is not required to prove compliance with the MDO certification process at a hearing under section 2966, subdivision (b).

IV. PUBLIC POLICY CONSIDERATIONS ALSO SUPPORT THE CONCLUSION THAT COMPLIANCE WITH THE CERTIFICATION PROCESS OF PENAL CODE SECTION 2962, SUBDIVISION (d), NEED NOT BE PROVED AT A PENAL CODE SECTION 2966, SUBDIVISION (b), HEARING

Appellant contends the public policy considerations advanced in the respondent's brief on the merits do not support an interpretation of the phrase "the criteria of Section 2962" in section 2966 "as referring exclusively to those matters certified by a chief psychiatrist." (ABOM at 33-38.) First, respondent did not intend to suggest that the matters certified by a chief psychiatrist were the only substantive criteria of an MDO determination which must be proved at a section 2966, subdivision (b), hearing. Respondent referred to those matters which must be certified by a chief psychiatrist simply to highlight the Legislature's distinction between the procedure for committing a prisoner to the SDMH for treatment as an MDO and the substantive factors which determined whether a prisoner was an MDO.

Second, as respondent's brief on the merits explained, requiring proof of compliance with a procedural prerequisite at a court hearing held for the purpose of deciding whether a prisoner met the substantive requirements of his or her MDO determination at the time of his or her BPH hearing would not advance the legislative purpose of the MDO Act. The addition of an evaluation and certification criterion to the factors which must be proved at the court hearing could complicate the issues for a jury. The nuances of the certification process and possible variances in the certification process (e.g., the person who evaluated the prisoner and is in charge of treating him or her might not be a psychologist or psychiatrist but a graduate student who is working under the direct supervision of a licensed psychologist or psychiatrist, the person who evaluated the prisoner is a member of an interdisciplinary team that oversees the prisoner's treatment, or a person who is in charge of treating the prisoner is also the chief psychiatrist) might distract a jury from its focus on whether the prisoner met the prescribed substantive criteria of an MDO at the time of his or her BPH hearing.

Appellant claims this Court has already rejected an argument based on the legislative purpose of the MDO Act. (ABOM at 33-34.) Appellant cites the following discussion from *Cobb*, *supra*, 48 Cal.4th at p. 253:

> 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." [Citation.]

(ABOM at 33-34.)

Appellant, however, fails to include the remainder of that discussion, which explains why this Court found the Attorney General to be only

partially correct in *Cobb, supra*, 48 Cal.4th 243.[7] The rest of the discussion indicates this Court found the Attorney General to be only partially correct because of the circumstances in *Cobb*. In *Cobb*, an MDO's trial on the extension of his commitment for treatment did not commence until 23 days after his parole release date. (*Id.* at pp. 247-249.) This Court decided that the MDO, at the end of his commitment, was entitled, as a matter of due process, to release pending his trial on the extension petition unless good cause to continue the trial was shown or he waived time. (*Id.* at p. 249.) The instant case does not involve the denial of due process to appellant or a commitment extension trial that took place after the parole release date. Contrary to appellant's suggestion, this Court did not issue a wholesale rejection of all arguments based on the legislative purpose of the MDO Act.

Appellant asserts the purpose of protecting the public from persons whose severe mental disorders make them a danger would not be advanced by "squandering" the State's resources upon the extended confinement of persons who are not truly MDOs. (ABOM at 34.) While appellant claims respondent's view of whether a district attorney must prove compliance with the MDO certification process at a section 2966, subdivision (b),

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[7] The rest of the discussion is as follows:

> Section 2970(a) protects an MDO's interest by requiring, among other things, that a commitment extension trial begin "no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown." The Attorney General's construction would render the waiver/good cause provisions surplusage, violating the rule of construction that courts should, if possible, accord meaning to every word and phrase in a statute to effectuate the Legislature's intent.

(*Cobb, supra*, 48 Cal.4th at p. 253.)

hearing is dependent upon the assumption that the State's resources are limitless, appellant fails to recognize that his view to the contrary is equally dependent upon the assumption that the State has unlimited resources. Aside from lengthening a court hearing due to the trier of fact's added responsibility of having to decide whether the State complied with the procedural prerequisites for an MDO commitment, requiring the mental health professionals who evaluated and certified a prisoner to testify about the procedural aspects of the prisoner's certification could delay the hearing and result in the expenditure of more of the State's resources. Scheduling conflicts could arise from the unavailability of a courtroom or a trial judge, the mental health professionals who were involved in the prisoner's certification process, the district attorney, the attorney representing the prisoner, and/or the hospital or facility staff who will be transporting the prisoner to court. Also, requiring the mental health professionals to testify about the procedural aspects of the prisoner's certification for the purpose of proving compliance with section 2962, subdivision (d), would inevitably take away the time that these mental health professionals would have spent in treating patients and/or overseeing the administration of the prison's mental health system.

Appellant further asserts that requiring proof of compliance with the MDO certification process at a hearing under section 2966, subdivision (b), would not affect judicial resources because section 2966, subdivision (b), permits a court, upon the parties' stipulation, to receive in evidence an affidavit or declaration by a mental health professional or other professional person who was involved in the certification and hearing process or in the treatment of the prisoner during the certification process. (ABOM at 36-37.) Appellant assumes that every county defense bar and attorney representing an MDO is amenable to entering into such a stipulation. In reality, an attorney representing an MDO is not required to stipulate to the

admission of an affidavit or declaration by a mental health professional and may not wish to risk facing an allegation of rendering ineffective assistance. Under these circumstances, the likelihood of a stipulation for the admission of an affidavit or declaration by a mental health professional may be slim to none.

As to the principle of fairness, appellant disagrees that the BPH hearing under section 2966, subdivision (a), gives a prisoner the prior opportunity to challenge the requisite evaluations and certification. Appellant claims subdivisions (a) and (b) of section 2962 use virtually identical language in stating that the purpose of each hearing is to prove the prisoner meets the criteria of section 2962. (ABOM at 37-38.) While the general purpose of the two hearings is to prove that a prisoner meets the criteria of an MDO, the interest of fairness lies in the fact that the agency or person who certified the prisoner as an MDO bears the burden of proof at the BPH hearing. (§ 2962, subd. (a).) Hence, any issue with the requisite evaluations and certification would have – and should have – come to light at the BPH hearing.

V. BECAUSE THE CERTIFICATION PROCESS OF PENAL CODE SECTION 2962, SUBDIVISION (d), IS A PROCEDURAL PREREQUISITE AND NOT A SUBSTANTIVE CRITERION OF A MENTALLY DISORDERED OFFENDER, THE QUESTION OF WHETHER THE STATE OR ITS AGENTS COMPLIED WITH THE CERTIFICATION PROCESS IS A PROCEDURAL ISSUE THAT SHOULD BE DECIDED BY THE TRIAL COURT

As discussed above and in the respondent's brief on the merits, the statutory language of sections 2962 and 2966, the MDO statutory scheme, the legislative history of the MDO Act, decisional case law, and public policy all support the conclusion that the certification process of section 2962, subdivision (d), is simply a procedural requirement for an MDO commitment. It is not a substantive criterion of an MDO determination. Hence, compliance with the certification process is not a factual issue that

must be decided by the trier of fact at a hearing under section 2966, subdivision (b). The question of whether the State or its agents complied with the certification process is akin to the issue of whether venue is proper in a criminal proceeding or whether a court has jurisdiction to consider and decide a criminal matter, procedural questions decided by the trial court. (RBOM at 33-34.)

Appellant distinguishes compliance with the certification process from venue and territorial jurisdiction on the ground that it is the consequence of the decision about venue or territorial jurisdiction that is the matter of procedure, not the facts that are to be found in making the decision. As to venue, appellant states that 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. (ABOM at 38-42.) However, the question as to whether the State or its agents complied with the certification process of section 2962, subdivision (d), is no different than appellant's explanation of venue. Regarding the issue of compliance with the MDO certification process, the fact to be found is whether the specified mental health professionals performed the requisite evaluations and certification of a prisoner and the legal consequence is a decision as to whether the court hearing under section 2966, subdivision (b), should even be held. After all, if a prisoner has not been certified in compliance with section 2962, subdivision (d), then there is no reason to have the court hearing under section 2966, subdivision (b). Similar to territorial jurisdiction, venue, or an alleged violation of the right to speedy trial in a criminal matter (*see People v. Posey* (2004) 32 Cal.4th 193, 212 ["The facts bearing on the defendant's right to a speedy trial, the two-dismissal rule, and prosecutorial destruction of evidence are distinct from guilt or innocence; they go to whether the defendant should be tried in the first place and therefore properly are determined by the court prior to the commencement of any

trial."]), all parties have an interest in resolving this procedural question before trial.

Appellant suggests that there are other criteria in section 2962 which may also be considered to be matters of procedure. He refers to the following subdivisions: subdivision (b), which requires the prisoner to have been sentenced to prison; subdivision (c), which requires the prisoner to have been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release; and paragraphs (1) and (2) of subdivision (e), which require the prisoner to have received a determinate sentence for a specified crime. (ABOM at 41.)

Appellant is mistaken about these other subdivisions being procedural matters because these other subdivisions list some of the defining traits of an MDO, i.e., substantive criteria of an MDO. Naturally, an MDO must have been sentenced to prison for a determinate sentence; otherwise, the State or its agents would not be able to commit the prisoner to the SDMH for mental health treatment as a condition of the prisoner's parole under the MDO Act. (§ 2962, subds. (b) and (e)(1).) Further, the fact that a prisoner has been in treatment for a severe mental disorder for 90 days or more within the year prior to his or her parole or release and the fact that the prisoner was convicted of a violent offense enumerated in section 2962, subdivision (e)(2), are additional "characteristics" of an MDO. These two substantive criteria reflect the substantial danger of physical harm that the prisoner presents to others by virtue of his or her severe mental disorder. Simply stated, the requirements described in subdivisions (b), (c), and (e) of section 2962 all define a person who should be committed for treatment as an MDO because he or she represents a substantial danger of physical harm to others by virtue of his or her severe mental disorder. Contrary to appellant's suggestion, subdivisions (b), (c), and (e) of section 2962 do not entail procedural matters.

VI. THE INSTANT MATTER NEED NOT BE REMANDED FOR A FULL HEARING UNDER SECTION 2966, SUBDIVISION (b)

As respondent noted in the respondent's brief on the merits, appellant did not challenge the MDO certification process prior to the direct appeal. Accordingly, he forfeited his objection to the certification process. Alternatively, a fair solution for any absence or lack of direct evidence as to the certification process in the instant case would be to remand the case to the trial court – rather than have a new trial – for the limited purpose of holding proceedings to determine whether appellant received the requisite evaluations and certification. (RBOM at 42-43.)

Appellant claims the instant case should be remanded for a full hearing under section 2966 because the trial judge addressed only three of the substantive criteria on the record – specifically, whether he had a severe mental disorder, whether the severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether he represents a substantial danger of physical harm to others by reason if his severe mental disorder. Appellant believes the trial judge was under the misguided impression that she was conducting a hearing under section 2966, subdivision (c). (ABOM at 42-43.)

A judge is presumed to know the law, recognize the relevant facts, and apply the correct statutory and case law in the judicial decision-making process. (*People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Martin* (2005) 127 Cal.App.4th 970, 977.) Although the trial court's minutes for the hearing referred to section 2966, subdivision (c), the reporter's transcript reflects the judge knew the hearing was being held pursuant to section 2966, subdivision (b), and was aware of the findings that she needed to make.[8] (RT 1, 87-88.) Thus, the instant matter need not be remanded for a full hearing under section 2966, subdivision (b)

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[8] Following the parties' closing arguments, the judge announced her findings as follows:

> In looking at Penal Code Section 2962, subdivision 3(q), it appears that a 422, threatening crime, can be considered for purposes of determining whether the committing offense qualified. But I don't see anywhere in the statute that threatening physical harm would suffice to meet the third criteria. But I don't think it's necessary in order for the Court to reach a decision with regard to [appellant] at this time.
>
> But, the record should be clear . . . that in making the findings that I'm about to make, that I'm not relying on Dr. Suiter's opinion that [appellant] [poses] a substantial danger of physical harm to others by virtue of Dr. Suiter's opinion that he may threaten someone with physical harm, orally in the future.
>
> Based on the evidence that I heard, the Court does find that as of Board of Prison Terms hearing on April 5th 2010, that [appellant] did, in fact, suffer from severe mental disorder.
>
> That as of that date, that[ ] severe mental disorder was not in remission or not kept in remission with that continued treatment.

(continued...)

CONCLUSION

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

(...continued)

> And as of that date, April 5th 2010 – keep in mind, I'm not being asked at this hearing to determine whether [appellant] [poses] a substantial danger of physical harm to others at the present time.
>
> I'm to determine whether he [poses] such a danger as of April 5th, 2010. And based on that, I do find that as of that date, because of his severe mental disorder, he did, in fact, pose a substantial danger of physical harm to others.
>
> His commitment, now, will be until when, [prosecutor]?
>
> [¶] . . . [¶]
>
> 4/5/11.
>
> All right. [Appellant], sir, again, thank you for your service to the country, and for the way you conducted yourself during this hearing.
>
> I wish you the best of luck and in the future.

(RT 87-88.)

For the aforementioned reasons and those stated in the respondent's brief on the merits, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal.

Dated: August 13, 2012

Respectfully submitted,

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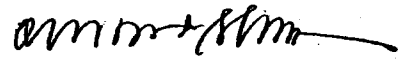

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 7,061 words.

Dated: August 13, 2012

KAMALA D. HARRIS
Attorney General of California

QUISTEEN S. SHUM
Deputy Attorney General
Attorneys Respondent

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

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

I declare:

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

On August 13, 2012, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Two copies

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

Court of Appeal of the State of California
Division Two
3389 Twelfth Street
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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on August 13, 2012, to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 13, 2012, at San Diego, California.

Carole McGraw
Declarant

Carole McGraw
Signature

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