IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **J.F.,** **Defendant and Petitioner.**	Case No. S248046

Court of Appeal, Fourth Appellate District, Division One, Case No. D071733
San Diego County Superior Court, Case No. SCD204096
The Honorable David J. Danielsen, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Per the order of this Court dated July 9, 2018, the issue to be briefed is:

> Must a commitment or recommitment as an mentally disordered offender be vacated if the underlying offense supporting the initial commitment is redesignated as a misdemeanor under Proposition 47?

INTRODUCTION

Appellant and Petitioner, J.F., (hereinafter "Petitioner") addresses the combined effect of two statutory schemes: the Mentally Disordered Offender ("MDO") Act and the felony resentencing portion of The Safe Neighborhoods and Schools Act ("Proposition 47"). (Penal Code[1], §§ 1170.18, 2960, et seq.; Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, pp. 70-74 ("Guide"); Cal. Const., art. II, § 10.)

Petitioner's commitment was continued under the MDO Act despite the fact the court redesignated his foundational felony to a misdemeanor at an uncontested Proposition 47 hearing. (*People v. Foster* (Feb. 27, 2018, D071733) [nonpub. opn.] pp. 5, 9 2018 LEXIS 1261 ("*J.F.* ") review granted Jun. 13, 2018, briefing ordered Jul. 9, 2018, S248046.) When challenged on appeal, the Court of Appeal followed its previous holding in *People v. Goodrich* (2017) 7 Cal.App.5th 699, in which it found the foundational felony was "irrelevant" at the recommitment stage. (*People v. Goodrich* (2017) 7 Cal.App.5th 699, 710 [review den. Apr. 12, 2017, S240242].) This decision allowed recommitment based on a mental disorder and dangerousness alone. (*Id.* at p. 711.) It also abrogated the purposes of both the MDO Act and Proposition 47. The Court of Appeal's

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[1] All subsequent statutory references are to the Penal Code unless otherwise specified.

reason for extending Petitioner's commitment sounds more like the basis for commitment under a statutory scheme like the Lanterman-Petris-Short ("LPS") Act, which does not require a felony conviction for commitment. (Welf. & Inst. Code, § 5000, et seq.)

The MDO Act only supports commitment to treat a mental disorder as it relates to a felony conviction. (§ 2960, et seq.) And Proposition 47 was intended to reduce felonies to misdemeanors "for all purposes," which this Court concluded includes all penalties unless specifically excluded. (Cal. Const., art. II, § 10; § 1170.18, subd. (k); *People v. Buycks* (2018) 5 Cal.5th 857, 888 ("*Buycks*").) Commitments are not specifically excluded. (See § 1170.18, subd. (k).) What's more, the Legislature expanded the benefits of Proposition 47 to include people found Not Guilty by Reason of Insanity ("NGI's") who are only subject to commitments. (§§ 1026.5, 1170.18, subds. (k) & (p), 1170.127.)

The reasoning in *Goodrich* is unsound. It is predicated on a static-dynamic dichotomy that is no longer valid in Petitioner's case in light of Proposition 47. Proposition 47 demonstrated that "conviction of a felony" is not a "static" event or criterion. The static-dynamic dichotomy analysis underlying *Goodrich* is no longer valid in cases like Petitioner's in which the felony conviction has been redesignated a misdemeanor "for all purposes." Therefore, *Goodrich* should be disapproved.

Further, Petitioner's right to equal protection was violated. The commitment for a similarly situated person under the Sexually Violent Predator ("SVP") Act was set aside after that person's predicate offense was reversed. (Welf. & Inst Code, § 5000, et seq.; See *In re Bevill* (1968) 68 Cal.2d 854.) To deny Petitioner similar treatment is a violation of equal protection. Also, Petitioner's right to due process of law was violated because the court continued his commitment under a statutory scheme only promulgated to treat behavior related to a felony conviction, though there is no longer a felony conviction in Petitioner's case. (See § 2962.)

This Court should hold that a commitment or recommitment as an MDO must be vacated when the foundational offense supporting the initial commitment was redesignated as a misdemeanor under Proposition 47.

STATEMENT OF FACTS

On or about January 17, 2007, Petitioner entered a 7-Eleven convenience store and grabbed cigarettes from behind the counter. (1CT pp. 6, 19; 2CT p. 6.) He told the clerk he was the police and could go anywhere he wanted. (1CT pp. 6, 19; 2CT p. 6.) The clerk grabbed his arm and Petitioner pushed the clerk away. (1CT pp. 6, 19; 2CT p. 6.) The clerk screamed and another clerk responded to help. (1CT p. 19.) Petitioner grabbed some cookies and left the store. (1CT p. 19.) The clerk was not injured. (1CT p. 19.)

Petitioner was arrested, all merchandize was recovered at the scene, and 7-Eleven did not suffer any loss. (1CT p. 13.) When asked about the incident, Petitioner stated: "I was homeless and hungry and not on meds." (2CT p. 6.)

STATEMENT OF THE CASE

A. The Foundational 2007 Felony Offense

On August 3, 2007, Petitioner pled guilty to grand theft of a person, in violation of section 487, subdivision (c), a felony offense at that time, and he was sentenced to state prison for 16 months. (1RT p. 6; 1CT pp. 8, 12; *J.F.*, *supra*, D071733, p 2.)

B. Petitioner's Initial Commitment and Recommitments

After completing his sentence, Petitioner was civilly committed to a state hospital as an MDO and his commitment was extended for several years. (1CT pp. 19, 20; *J.F.*, *supra*, D071733, p. 2.)

In October 2014, Petitioner was released to an outpatient conditional release program ("CONREP") program as an MDO on outpatient status, pursuant to sections 2970 and 2972. (1CT p. 20.) His outpatient status was renewed annually. (*J.F.*, *supra*, D071733, p. 3.)

C. Redesignation of Petitioner's Felony Offense To A Misdemeanor Under Proposition 47

On October 21, 2016, Petitioner filed a Petition for Reduction to Misdemeanor under section 1170.18, subdivisions (f), and (g), to reduce his 2007 felony conviction to a misdemeanor. (2CT p. 25.) The People did not oppose and the court granted the petition on October 27, 2016. (1CT p. 16; 2CT p. 25; *J.F.*, *supra*, D071733, p. 3.)

D. Denial of Petitioner's Motion to Dismiss MDO Commitment

On November 10, 2016, Petitioner filed a Notice of Motion to Dismiss his MDO Commitment and release him from CONREP. (2A[2] RT p. 104; 1CT p. 17.) Specifically, Petitioner requested the court "dismiss the request for continued involuntary treatment of a mentally disordered offender (MDO) as his conviction is a misdemeanor and is not a qualifying offense." (1CT p. 17.) Petitioner asserted his conviction was designated a misdemeanor "for all purposes," so the MDO Act did not apply to him. (1CT p. 21.)

On December 16, 2016, the trial court continued the hearing on the motion pending the decision in *Goodrich*, which would address whether reclassification of a felony to a misdemeanor precludes recommitment under the MDO Act. (3RT p. 67; 1CT p. 67; *Goodrich*, *supra*, 7 Cal.App.5th at p. 710.)

On January 17, 2017, Division One of the Fourth Appellate District Court of Appeal filed its decision in *Goodrich*, and held that reduction of the qualifying felony to a misdemeanor did not preclude recommitment under the MDO Act. (*Goodrich*, *supra*, 7 Cal.App.5th 699.) On February 3, 2017, the trial court denied Petitioner's motion citing *Goodrich*. (1CT p.

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[2] The two volumes of augmented Reporter's Transcripts are identified as "1ART" and "2ART."

68; *Goodrich*, *supra*, 7 Cal.App.5th 699; *J.F.*, *supra*, D071733, p. 3.)

Petitioner appealed this decision. (1CT pp. 59, 61; *J.F.*, *supra*, D071733.)

Petitioner remained in commitment under the MDO Act during the appeal. (4 RT p. 303; 1CT p. 68; 2CT p. 69; *J.F.*, *supra*, D071733, p. 3.)

E. The Court of Appeal's Affirmance Of The Denial of Petitioner's Motion, Citing *People v. Goodrich*.

On February 27, 2018, the California Court of Appeal, Fourth District, Division One, filed an unpublished decision in which it declined to depart from its holding in *Goodrich* and affirmed the San Diego Superior Court's order denying Petitioner's motion. (*J.F.*, *supra*, D071733, p. 2.)

ARGUMENT

I.

PETITIONER'S CONTINUED COMMITMENT UNDER THE MDO ACT WAS INVALID BECAUSE THE COURT REDESIGNATED THE FOUNDATIONAL FELONY A MISDEMEANOR UNDER PROPOSITION 47.

Petitioner contends a commitment under the MDO Act is a collateral effect of the redesignation of a felony offense to a misdemeanor under Proposition 47. Such commitment is invalidated where the foundational felony conviction is lost to Proposition 47 relief. The Court of Appeal and the *Goodrich* court held that Proposition 47 was irrelevant to MDO commitments. (*J.F.*, *supra*, D071733, p. 4; *Goodrich*, *supra*, 7 Cal.App.5th at p. 710.) An examination of the provisions of Proposition 47 and the MDO Act, and the intent and purpose behind each enactment, reveals the Court of Appeal and the *Goodrich* court were mistaken.

A. Relevant Law

1. Standard of Review

Issues regarding statutory construction are reviewed de novo. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) The court looks first "to the language of the statute, giving the words their ordinary meaning." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) The language is construed "in the context of the statute as a whole and the overall statutory scheme." (*Ibid.*) When interpreting a voter initiative, the court applies the same principles that govern statutory construction. (*Ibid.*)

2. The MDO Act

The Legislature enacted the MDO Act in 1985 to require offenders who have been convicted of violent crimes related to their mental disorders, and who continue to pose a danger to society, to receive mental health treatment until their mental disorder can be kept in remission. (§ 2960 et. seq.; *In re Qawi* (2004) 32 Cal.4th 1, 9.) The original purpose of the MDO Act is best described by the Senate Committee on Public Safety in its analysis of the MDO Act when it amended the Act in 1999:

> The MDO law was originally drafted in 1985 in SB 1296 (McCorquodale). The author, as quoted in the Assembly Public Safety Committee analysis, stated the reason for the bill:
>
> "There is no useful procedure for assuring mental health treatment for prisoners when their mental disorder was a factor in their committing a violent crime."
>
> The author further explained, as reflected in the Senate Judiciary Committee analysis, that consideration of the crime of conviction was necessary because prediction of an inmate's future dangerousness from his or her mental condition and prison conduct was inordinately difficult.

(Sen. Com. On Pub. Safety, Com. Analysis of Sen. Bill 279 (1999-2000 Reg. Sess.) Mar. 16, 1999, p. 5.)

"The MDO Act establishes a comprehensive scheme for treating prisoners who have severe mental disorders that were a cause or aggravating factor in the commission of the crime for which they were imprisoned." (*People v. Jauregui Garcia* (2005) 127 Cal.App.4th 558, 563 (reh'g den. Apr. 5, 2005).) There are three stages of commitment in the

MDO Act: the first is when the California Department of Corrections and Rehabilitation ("CDCR") and the Department of State Hospitals ("DSH")[3] first determine that an offender must be treated by the DSH as a condition of parole; the second occurs when both the parole and treatment are extended; and the third phase occurs when parole is terminated. (§§ 2962, 2970, 2972; *Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1062-1063 [disapproved in part by *People v. Harrison* (2013) 57 Cal.4th 1211, 1230, fn. 2 on an unrelated issue].)

In the first phase, the court must find the defendant meets six criteria:

1) the offender's severe mental disorder was a cause or aggravating factor in the commission of the underlying crime;
2) the offender was treated for at least 90 days preceding his or her release;
3) *the underlying crime was a violent crime as enumerated in section 2962, subdivision (e);*
4) the patient has a severe mental disorder,
5) the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and
6) that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others.

(§ 2962, subd. (d)(1); *Lopez, supra*, 50 Cal.4th at p. 1062, italics added.) The first three criteria have been characterized as "static" and "foundational" because "they concern *past events* that, once established, are

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3 DSH was previously named State Department of Mental Health.

incapable of change." (*Lopez*, *supra*, 50 Cal.4th at p. 1056, italics added.) The last three criteria are often described as "dynamic" because they are "capable of change over time and must be established at each annual review of the commitment." (*Id.* at p. 1062.)

The second phase occurs if the defendant's parole is continued beyond one year and is governed by section 2966, subdivision (c). (§§ 2962, 2966, subd. (c).) The third phase occurs after parole is terminated, and is governed by sections 2970 and 2972. (§§ 2970, 2972.) The third phase requires a petition under section 2972, subdivision (e), and new recommitment proceeding. (§ 2972, subd. (e).) In both the second and third phases, the court conducts a hearing for "continued treatment" to determine whether the person still meets the three "dynamic" criteria for the court to recommit the person for an additional year. (§§ 2970, 2972, subds. (a) & (c); *Lopez*, *supra*, 50 Cal.4th at p. 1056.) These criteria are the same as the final three "dynamic" criteria listed in section 2962 for the original commitment:

1) the patient has a severe mental disorder,
2) the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and
3) that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others.

(§§ 2962, 2972, subd. (c).) Commitment is not indefinite, rather, "an MDO has a right to be released unless the People prove beyond a reasonable

doubt that he or she should be recommitted for another year." (*People v. McKee* (2010) 47 Cal.4th 1172, 1201 ("*McKee II*").)

3. Proposition 47

In 2014, the voters approved initiative measure Proposition 47, titled The Safe Neighborhoods and Schools Act, adding section 1170.18 to the Penal Code and amending existing statutes to reduce penalties for certain theft and drug offenses. (Guide, *supra*, text of Prop. 47, § 2, at pp. 70-74; *People v. Gonzales* (2017) 2 Cal.5th 858, 862.) Section 1170.18 allows qualifying felony offenders to seek reclassification of their offenses to misdemeanors retroactively. (§ 1170.18, subd. (a); *Goodrich*, *supra*, 7 Cal.App.5th at p. 704.) A person who has already completed a felony sentence may petition to have his conviction designated a misdemeanor. (§ 1170.18, subds. (f) & (g).)

Proposition 47 expressly states it must be "broadly construed to accomplish its purposes" and "broadly construed to effectuate its purposes." (Guide, *supra*, text of Prop. 47, §§ 15, 18, p. 74; *People v. Bear* (2018) 25 Cal.App.5th 490, 498.) And section 1170.18, subdivision (k) extends the retroactive ameliorative effects of Proposition 47 to mitigate future collateral consequences of a felony conviction that is reduced under the measure. (§ 1170.18, subd. (k); *Buycks*, *supra*, 5 Cal.5th at pp. 18, 31.) If a felony conviction is resentenced under Proposition 47 it becomes a misdemeanor "for all purposes." (§ 1170.18, subd. (k).) Subsequently, "it

can no longer be said that the defendant 'was previously convicted of a felony.'" (*Buycks*, 5 Cal.5th at p. 889, quoting *People v. Tenner* (1993) 6 Cal.4th 559, 563.)

4. Principles of Statutory Construction

The court must first look to the text of the statute and use the plain meaning of that text if it is unambiguous. (*People v. Harrison*, *supra*, 57 Cal.4th at p. 1221.) Such review is used to determine the intent of the Legislature to effectuate the purpose of the law. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) Principles of statutory construction apply equally to voter initiatives and legislatively enacted statutes. (*People v. Park* (2013) 56 Cal.4th 782, 796.) Further, "[a]n enacting body is deemed to be aware of existing laws at the time legislation is enacted and to have enacted or amended a statute in light thereof; this principle applies as well to legislation enacted by voter initiative. (*People v. Superior Court* (*Cervantes*) (2014) 225 Cal.App.4th 1007, 1015).

B. Petitioner's Continued Commitment Under the MDO Act Without A Foundational Felony Is Invalid In Light Of The Full Statutory Scheme of The MDO Act.

1. The Purpose of the MDO Act

The purpose of the MDO Act is to ensure people who have had violent felony convictions "related to their mental disorders, and who continue to pose a danger to society, receive mental health treatment during and after the termination of their parole until their mental disorder can be

kept in remission." (§ 2960, et seq.; *In re Qawi, supra*, 32 Cal.4th at p. 9.) Notably, the Legislature did not extend the MDO Act to authorize involuntary civil commitment or to continue such commitment without a related violent felony offense. And "a finding of mental illness alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial care." (*O'Connor v. Donaldson* (1975) 422 U.S. 563, 575 [95 S.Ct. 2486, 45 L.Ed. 2d 396].)

2. The Court Relied On The Flawed Reasoning In *Goodrich* To Justify Petitioner's Continued Commitment Under The MDO Act.

The *Goodrich* court determined that a change to the foundational offense in an MDO commitment is "*irrelevant* after his or her initial commitment as an MDO." (*Goodrich, supra*, 7 Cal.App.5th at p. 710, italics added.) It reasoned that a court is not required to consider whether the first three foundational criteria were still met at the recommitment hearing. (*Ibid.*) In so doing, the court only looked at section 2972, subdivision (c), which states in relevant part that:

> [i]f the court or jury finds that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, the court shall order the patient recommitted...

(§ 2972, subd. (c).) Because the statute mentioned only these three criteria the *Goodrich* court reasoned the fact that the foundational felony had been

reduced to a misdemeanor under Proposition 47 had no effect on the commitment. (*Goodrich*, at p. 710.)

In Petitioner's case, the Court of Appeal derived its reasoning from *Goodrich*. (*J.F.*, *supra*, D071733, pp. 4, 5.) It explained: "[o]nce an individual has been determined to be an MDO and has been properly committed in an initial commitment proceeding the only things that must be established in a recommitment proceeding are [the three criteria listed in section 2972, subdivision (c)]." (*J.F.*, p. 5, citing *Goodrich* at pp. 710-711 and § 2972, subd. (c).) In other words, the Court of Appeal found that it did not need to verify that a recommitment under the MDO Act was related to a violent felony.

The court's reasoning is, however, flawed. It is reading section 2972, subdivision (c), in a vacuum, ignoring the context and other statutory provisions of the MDO Act. And it ignores the Act's purpose of treating those who have committed violent felonies. The language of a statute must be construed "in the context of the statute as a whole and the overall statutory scheme." (*Rizo*, *supra*, 22 Cal.4th at p. 685.) "Section 2970 does not exist in a statutory vacuum." (§ 2970 [criteria for commitment after parole]; *People v. Crivello* (2011) 200 Cal.App.4th 612, 617.) Similarly, section 2972 does not exist in a statutory vacuum, either. (§ 2972 [extended commitment criteria].) And the Legislative intent of the MDO Act applies throughout each stage of commitment. (Sen. Com. On Pub.

Safety, Com. Analysis of Sen. Bill 279 (1999-2000 Reg. Sess.) Mar. 16, 1999, p. 5.)

The MDO Act does not permit the government to involuntarily restrain a person for treatment related to a felony offense unless that person has committed a felony offense described by the Act. (But see *People v. Cobb* (2010) 48 Cal.4th 243, 251-252 ("*Cobb*")[4].) And, "if a defendant cannot be committed under section 2962, based on a failure of proof of the static criteria, he cannot later be recommitted under section 2970." (§ 2962, subds. (b) & (e); *Crivello*, *supra*, 200 Cal.App.4th at p. 617.) Also, "[t]he mental disorder for which extended involuntary treatment is sought must be the same mental disorder for which defendant was treated as a condition of his parole." (*Jauregui Garcia*, *supra*, 127 Cal.App.4th at p. 567.)

Further, a foundational felony conviction signifies there was a judicial determination that the defendant endangered public safety and their own safety as a result of their mental condition. (Cf. *In re Moye* (1978) 22 Cal.3d 457, 462-463 [superseded by the statute, § 1026.5].) Yet what was

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[4] In *Cobb*, this Court cited *Francis* for its finding that the three "static" criteria relevant to initial MDO commitment related to the past. (*Cobb*, at pp. 251-252, citing *People v. Francis* (2002) 98 Cal.App.4th 873, 879.) However, the three "dynamic" criteria were related to defendant's current condition. (*Cobb*, at p. 252.) *Cobb* held that even if the procedural safeguards of notice and opportunity to be heard were fulfilled at the initial commitment hearing they did not carryover to subsequent extension hearings such that the latter must be held before the defendant's scheduled release date. (*Ibid.*)

previously Petitioner's felony offense was redesignated as a misdemeanor under Proposition 47 "for all purposes." (1CT 16; *Buycks*, *supra*, 5 Cal.5th at p. 889.) This misdemeanor is not listed as a predicate offense in the MDO Act. (§ 2962, subd. (e).) As this foundational element of the commitment no longer exists, the continued commitment of Petitioner no longer serves the statutory purpose of the MDO Act.

What's more, a commitment is permitted under the MDO Act only for purposes of treating a mental illness as it relates to a felony conviction. (§ 2962.) And "the nature of a commitment must bear some reasonable relation to the purpose for which an individual is committed." (*Jackson v. Indiana* (1972) 406 U.S. 715, 738 [92 S.Ct. 1845, 32 L.Ed.2d 435].) However, the *Goodrich* court stated that recommitment "is not predicated upon his felony conviction; rather, it is predicated on his current mental state and dangerousness." (*Goodrich*, *supra*, 7 Cal.App.5th at p. 711.) The *Goodrich* court's explanation might be sufficient for a commitment under the LPS Act which does not require a felony related to the mental disorder. (See Welf. & Inst. Code, § 5000, et seq.) However, by denying a related felony is required to support commitment under the MDO Act the *Goodrich* court ignores the purpose of the Act.

A mental disorder without a related violent felony offense listed in the MDO Act is not the behavior for which the MDO Act was meant to treat. (§ 2962, subd. (e).) Petitioner submits *Goodrich* undermined the

purpose of the MDO Act by insisting on continued treatment after the foundational felony ceased to exist. On a practical level, the Department of Justice and the court must inform the CONREP program in future reports that Petitioner's previous offense is now a misdemeanor. (§§ 1604, 1619.) Any report discussing the qualifying offense as it relates to Petitioner's mental disorder refers to a misdemeanor conviction. This begs the question: what behavior are the state's therapists treating if it is not that which is related to a violent felony?

The *Goodrich* decision is unsound because it ignored key provisions of the MDO Act. The reasoning and the decision is contrary to the principles of statutory construction. And it ignored the purpose of the MDO Act, to treat dangerous felons.

C. The Combined Effect Of Proposition 47 And The MDO Act When The Only Foundational Felony Conviction Is Reduced To A Misdemeanor Is The Invalidation Of Any MDO Commitment Or Recommitment.

Petitioner submits a plain meaning reading of the statutory scheme in the MDO Act and Proposition 47 clearly indicate commitment and recommitment under the MDO Act are collateral effects of a felony conviction for purposes of Proposition 47.

1. When The Foundational Felony Is Invalidated Under Proposition 47, There Is No Basis For A Commitment Or A Recommitment Under A Plain Language Reading of the MDO Act.

The MDO Act expressly requires a foundational felony as a prerequisite for commitment. (§ 2962, subd. (e).) Petitioner submits that when the foundational felony is invalidated, whether by reversal or by the Legislature's redesignation of the offense as a misdemeanor, there is no longer a statutory basis for a commitment or a recommitment. Such logic underlies the manner in which courts have construed similar statutory schemes.

In *Smith*, this Court held that an SVP proceeding could not proceed against a person whose foundational conviction was reversed. (*In re Smith* (2008) 42 Cal.4th 1251, 1270 ("*Smith*").) Similarly, in *Franklin*, the Court of Appeal had reversed a felony that previously formed the basis for SVP commitment. (*In re Franklin* (2008) 169 Cal.App.4th 386, 389, 392 ("*Franklin*").) The *Franklin* court determined that there was no basis for either commitment or recommitment after the felony was reversed. (*Id.* at p. 392.) It would be inconsistent with analogous SVP cases if recommitment under the MDO Act did not also require the foundational felony.

Moreover, Proposition 47 was designed to ameliorate the collateral effects of specific past felony convictions because the law no longer deems those offenses egregious enough to be handled as felonies. (*Buycks*, *supra*,

5 Cal.5th at p. 886.) Proposition 47 expressly requires that any former felony reduced to a misdemeanor be treated as a misdemeanor "for all purposes." (§ 1170.18, subd. (k).) This statutory mandate would be violated if a defendant were recommitted in a new MDO proceeding despite the reduction of the requisite foundational felony to a misdemeanor.

2. *Lopez* Does Not Control When Proposition 47 Applies, Requiring The Court Treat The Redesignated Felony Conviction As A Misdemeanor "For All Purposes."

Only one published opinion addresses the intersection of Proposition 47 and the MDO Act: *People v. Goodrich*, written by the Fourth District Court of Appeal, Division One. (*Goodrich*, *supra*, 7 Cal.App.5th.) The *Goodrich* court reasoned that "when Goodrich was initially committed as an MDO pursuant to section 2962, he was determined to have met *all* of the requisite criteria; therefore, the record demonstrates that at the time Goodrich was initially committed as an MDO in 2008, he met the requisite factors for commitment." (§ 2962; *Goodrich*, at p. 710, original italics.) It reasoned that because only three criteria were listed in section 2972 for continued commitments, it need only address those three criteria. (*Goodrich*, at p. 710.) Therefore, it also said "a change in the committee's underlying offense is *irrelevant* after his or her initial commitment as an MDO." (*J.F.*, *supra*, D071733, p. 4, citing *Goodrich*, at p. 710.)

The *Goodrich* court based its reasoning on this Court's holding in *Lopez*. (*Lopez*, *supra*, 50 Cal.4th at p. 1062.) This court coined the terms

"static" and "dynamic" to describe the first three and last three criteria, respectively, from section 2962. (See § 2962, subds. (a) & (e); *Lopez*, at p. 1062.) The Legislature never used the words "static" or "dynamic." Rather, the *Lopez* court applied the reasoning from *Francis*, *supra*, 98 Cal.App.4th 873, that the last three criteria, "concern past events that once established, are incapable of change." (See § 2962, subd. (e); *Lopez*, at p. 1062, citing *Francis*, *supra*, 98 Cal.App.4th at pp. 878-879.) The *Francis* court explained that these first three criteria were "incapable of change" and "may not be relitigated" because "to allow relitigation of the circumstances surrounding appellant's commitment offense would violate the principles of res judicata and collateral estoppel." (*Francis*, at p. 879.) However, the *Francis* court's reasoning for not revisiting the initial criteria fails in Petitioner's case because the commitment offense did change, by statute, at the Proposition 47 hearing. (2 CT p. 25.)

This Court also based its reasoning on a plain meaning reading of sections 2970 and 2966, subdivision (c). (§§ 2970, 2966, subd. (c); *Lopez*, *supra*, 50 Cal.4th at p. 1066.) It noted how section 2970 provides that the only issue a court need determine at a recommitment hearing is whether the patient meets the last three criteria listed in section 2962. (§§ 2962, 2970; *Lopez*, at p. 1066.) And section 2966, subdivision (c), provides that when the Board of Parole Hearings determines both parole and mental health treatment should be continued, a hearing need a only address the last three

criteria. (§ 2966, subd. (c).) *Lopez* surmised that addressing the first three criteria would make section 2966, subdivision (c), irrelevant and "a reading of a statute rendering 'some words surplusage is to be avoided.' (*Lopez* at p. 1066, *citing McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110.)

While *Lopez* was certainly correct in that in most cases the foundational felony cannot change, this is not true in the occasional case where the foundational felony *does* in fact change. This may be due to appellate reversal or reduction, or, as in Petitioner's case, by legislative redesignation of the felony to a misdemeanor. However, this Court's generalized truth in *Lopez* describing the static nature of a foundational felony cannot have been intended to apply to cases where the foundational felony has in fact been reversed or reduced.

Regardless, *Lopez* does not control in Petitioner's case. *Lopez* holds that a defendant who does not challenge his initial MDO commitment on the ground the purported foundational felony is not an offense enumerated in section 2962, subdivision (c), is barred from later making this claim at the time of a recommitment. (*Lopez*, *supra*, 50 Cal.4th 1064.) Significantly, the defendant in *Lopez* did not contend his foundational felony had been reversed, reduced, or otherwise changed; instead, he sought to argue it did not qualify as an enumerated foundational felony in the first place. (*Id.* at p. 1060.) Also, he failed to raise this claim at the time of his

initial commitment. (*Ibid.*) Under these circumstances, this Court did not have occasion to address the impact of a judicial or legislative invalidation of the foundational felony prior to a recommitment proceeding. In sum, the use of the descriptions "static" and "incapable of change" for the foundational offense is not always accurate, and the *Lopez* court's reasoning is no longer applicable in light of the change made by Proposition 47.

Additionally, the reasoning in *Goodrich* is flawed because it is based on a circular argument:

> the express intent of Proposition 47 is to "reduce [] penalties for certain offenders convicted of *nonserious and nonviolent* property and drug crimes." [Citation] An MDO, however, is, by definition, a person who not only has a 'severe mental disorder," but who has served a prison sentence as a result of committing a serious or violent offense punishable by prison. . . . To apply Proposition 47 retroactively for the collateral purpose of invaliding an initial MDO commitment long after it was properly imposed would be at odds with the purpose intended by the voters.

(*Goodrich*, *supra*, 7 Cal.App.5th at p. 711, original italics.) This argument ignores the fact an offense reduced under Proposition 47 becomes a misdemeanor "for all purposes," and it can no longer be said that the defendant had a felony conviction. (§ 1170.18, subd. (k); *Buycks*, *supra*, 5 Cal.5th at p. 889.) What's more, the section regarding recommitment logically depends upon there having been a valid initial commitment, which includes the foundational felony. (See §§ 2962, 2970, 2972.) Then it

would be surplusage to add the foundational felony to the recommitment, and surplusage is to be avoided. (*Lopez*, *supra*, 50 Cal.4th at p. 1066.)

This reasoning in *Goodrich* also fails because, as this Court explained, the "for all purposes" phrase was "undeniably intended to have a retroactive effect." (*Buycks*, *supra*, 5 Cal.5th at p. 881.) The resentencing of a prior underlying felony conviction to a misdemeanor "reaches back" to enhancements imposed under section 12022.1 and 667.5 because it can no longer be said the person was previously convicted of a felony. (*Id.* at p. 889.) A conviction of the primary offense is not an element of an enhancement under these statutes but there must be proof of the conviction before the enhancement can be imposed. (*Id.* at pp. 889, 890, citing *People v. Smith* (2006) 142 Cal.App.4th 923, 935.)

Petitioner acknowledges an MDO is defined as a person who served a prison sentence for a violent felony. (§ 2962.) However, in Petitioner's case, the court applied section 1170.18 and changed his foundational felony into a misdemeanor "for all purposes." (§ 1170.18, subd. (k).) Now, it cannot be said that Petitioner was previously convicted of a violent felony. (2CT p. 25; *Buycks*, *supra*, 5 Cal.5th at p. 889.)

Petitioner did serve the time for his conviction that was once a felony. (1CT p. 19.) But this Court disapproved of *People v. Acosta* (2016) 247 Cal.App.4th 1072, which held that the "for all purposes" phrase only altered the status of the felony conviction. (*Buycks*, *supra*, 5 Cal.5th at

p. 889, fn. 13; *People v. Acosta* (2016) 247 Cal.App.4th 1072.) Instead, this phrase incorporates the fact that the defendant served a qualifying prior felony prison term for purposes of section 667.5, subdivision (b) enhancements. (*Buycks*, at p. 889, fn. 13.) The same rationale should apply here. A person should not be recommitted under the MDO Act merely because they served a prison sentence for a felony conviction that has been redesignated a misdemeanor "for all purposes."

The *Goodrich* court ignored the intent and purpose of Proposition 47's command that a conviction change to a misdemeanor "for all purposes." (§ 1170.18, subd. (k).) Instead, the *Goodrich* court blindly followed the *Lopez* static-dynamic dichotomy, and it did not reconcile this dichotomy with application of Proposition 47. Petitioner submits the reason for using a plain meaning reading of section 2970 became unsupportable after Proposition 47 because the new law allowed the foundational felony to be redesignated a misdemeanor.

Moreover, there was no need for the electorate to amend the MDO Act to indicate that the foundational felony criterion becomes dynamic when such felony is reduced to a misdemeanor under Proposition 47. A collateral effect of Proposition 47 would be limited in time to only those with MDO commitments prior to the implementation of Proposition 47 and for defendants without any other felony offense from which a continued MDO commitment could be based. Anyone convicted of Petitioner's

offense after Proposition 47 passed is now convicted of a misdemeanor and would not meet the criteria of the MDO Act. (§§ 1170.18, 2962, subd. (d).)

The reasoning in *Goodrich* and the present case violates the intent of both Proposition 47 and the MDO Act: it allows a person convicted of a misdemeanor "for all purposes" to be continually committed under the MDO Act, which is meant only for persons who were convicted of violent felonies.

3. A Canon of Statutory Construction Extends Proposition 47 Relief To MDO Commitments Because They Were Not Expressly Excluded.

Section 1170.18, subdivision (k), provides that a conviction reduced under the measure, "shall be considered a misdemeanor for all purposes" except restrictions on firearm access." (§ 1170.18, subd. (k).) The plain meaning of the terms "all purposes" encompasses all consequences related to the felony, including collateral ones. (See *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1227.) As the *Alejandro N.* court explained: "the statute explicitly addresses what, if any, exceptions should be afforded to the otherwise all-encompassing misdemeanor treatment of the offense, and because only the firearm restriction was included as an exception, the enactors effectively directed the courts not to carve out other exceptions to the misdemeanor." (*Ibid.*)

Further, this Court explained that the ameliorative provisions of Proposition 47 extends to all collateral effects other than those specifically

excluded: "under the canon of statutory construction of *expression unius est exclusion alterius*, 'where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed,' absent 'a discernable and contrary legislative intent.'" (*Buycks*, *supra*, 5 Cal.5th at p. 888, quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195.) The single exception to the broad effects of Proposition 47 is "that 'resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm' or prevent his or her conviction under provisions prohibiting certain narcotics offenders from possessing firearms." (§ 1170.18, subd. (k); *Buycks*, at pp. 887-888.)

For example, recidivist offenders were not expressly mentioned but they were not excluded from Proposition 47 relief. (*Buycks*, *supra*, 5 Cal.5th at p. 887.) As this Court explained, just because "Proposition 47 did not expressly mention recidivist offenders does not mean that voters intended to deny those resentenced under the measure any further mitigation of their punishment stemming from the collateral consequences of their original felony conviction." (*Ibid.*) Rather, because Proposition 47 identified a single exception to the collateral effects, it "fully extends to enhancements and subsequent offenses alleged with those offenses." (*Id.* at pp. 887-888.) Therefore, this Court found Proposition 47 relief extended to enhancements under sections 667.5 and 12022.1, which are based on recidivist offender status. (*Id.* at pp. 886-887.)

The *Goodrich* court determined that because the voter intent in passing Proposition 47 was to ensure public safety it was not meant to affect MDO recommitments. (*J.F.*, *supra*, D071733, p. 5; *Goodrich*, *supra*, 7 Cal.App.5th at p. 711.) However, there is no express mention of commitments or recommitments under the MDO Act in Proposition 47. Proposition 47 did not expressly exclude MDO recommitments from its relief. (See *Buycks*, *supra*, 5 Cal.5th at p. 888.) In light of this Court's holding in *Buycks*, the reasoning in *Goodrich* is incorrect.

4. *Goodrich* Incorrectly Framed the Issue As Whether Proposition 47 Applied Retroactively To Invalidate Petitioner's Initial MDO Commitment; In Fact, The Issue Is Whether Petitioner's Proposition 47 Reduction Applies Prospectively To Preclude His Recommitment As An MDO.

The *Goodrich* court determined that "Proposition 47 does not apply retroactively to invalidate an initial MDO commitment" because voters did not want it to be retroactively applied. (*J.F.*, *supra*, D071733, p. 5; *Goodrich*, *supra*, 7 Cal.App.5th at pp. 710-711.) However, a discussion of the retroactive application of Proposition 47 to the initial commitment is unnecessary because it was already validly applied to the foundational offense. Petitioner submits it was the *effect* of the change from a felony to a misdemeanor that invalidated the new recommitment because there was no felony remaining to support commitment under the MDO Act.

D. Even If The MDO Act Is Ambiguous The Ambiguity Must Resolve in Petitioner's Favor.

"[W]here a statute's terms are unclear or ambiguous, we may 'look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.'" (*In re M.M.* (2012) 54 Cal.4th 530, 536.) An analysis of legislative intent is required for the court to resolve this ambiguity. (*Harrison*, at p. 1221.) The court must consider section 1170.18 with the MDO Act together "to determine the Legislature's intent so as to effectuate the law's purpose." (*Ibid.*)

Proposition 47 clearly indicates the application a felony becomes a misdemeanor "for all purposes" and Petitioner submits this includes continued commitment under the MDO Act. (§ 1170.18, subd. (k).) Additionally, a reading of the MDO Act and Proposition 47 together, invokes two more rules of statutory construction and both require the court rule in Petitioner's favor.

1. The MDO Act Must Be Construed As Continually Requiring A Foundational Felony To Avoid A Difficult Constitutional Question

Where possible, a statute should be construed in a manner that avoids a difficult constitutional question. (*McKee II, supra,* 47 Cal.4th 1172, 1193; *N. Bay Reg'l Ctr. v. Sherry S.* (1989) 207 Cal.App.3d 449, 456-457.) This Court followed this practice in *Smith*:

> We conclude that both the People and Petitioner make reasonable arguments, based on the language and the legislative history of the statute—the former that an SVP commitment is authorized under these circumstances, the latter that it is not. Based on substantial constitutional concerns, however, and the practice of construing statutes where reasonable to avoid difficult constitutional questions, we hold that an SVP commitment would not be authorized in these circumstances, and therefore reverse the Court of Appeal.

(*Ibid.*) The reasoning in *Smith* should be applied to the present case.

Franklin reached a similar conclusion under facts similar to Petitioner's case. In *Franklin*, the defendant had been convicted of violent sex offenses in 1978 and 1981. (*Franklin, supra*, 169 Cal.App.4th at p. 388.) In 2001, he was committed and in 2004, he was recommitted, both under the SVP law. (*Ibid.*) In 2004 he was convicted of felony damage to jail property and sentenced to 25 years to life for that offense. (*Ibid.*) However, while serving that term, the conviction was reversed on appeal and reduced to a misdemeanor. (*Id.* at p. 389.) In 2006, the prosecution filed a petition seeking a second SVP recommitment. (*Id.* at p. 390.)

The *Franklin* court stated the issue before it: whether the holding in *Smith* that an SVP commitment was precluded where the foundational felony was reversed outright applies where the foundational felony is reversed and reduced to a misdemeanor. (*Franklin, supra,* 169 Cal.App.4th at p. 391.) It held *Smith* did apply, precluding Franklin's SVP recommitment. (*Id.* at p. 392.) The court explained that the SVP law

authorized a commitment only where the defendant is currently serving a determinate prison sentence. (*Ibid.*) However, as a result of the reduction of his felony offense to a misdemeanor on appeal, the defendant was not serving a determinate prison sentence when the prosecution initiated the second SVP recommitment. (*Ibid.*) Rather, he was incarcerated in prison awaiting transfer to the trial court to be resentenced as a misdemeanant. (*Ibid.*) Accordingly, the court ordered the recommitment petition dismissed and that the defendant be released from custody. (*Id.* at p. 393.) The *Franklin* court held that an SVP recommitment is precluded where the foundational felony has been reduced on appeal to a misdemeanor. (*Ibid.*)

Given the holding in *Franklin,* if the MDO Act were construed to permit recommitment when the foundational felony has been reduced to a misdemeanor under Proposition 47, this presents a constitutional equal protection issue. Rules of statutory construction require a court to construe the MDO Act to avoid this equal protection issue. (*McKee II, supra,* 47 Cal.4th at p. 1193.) Thus, the MDO Act must be read to preclude recommitment when the foundational felony has been redesignated a misdemeanor under Proposition 47.

The same statutory construction rule applies when construing the MDO Act to dispense with the requirement of a foundational felony in recommitment proceedings. A defendant who, after Proposition 47, commits a former felony reduced by Proposition 47 has no foundational

felony and so is not subject to the MDO Act. This is disparate treatment of those who committed their Proposition 47-affected offenses before versus after Proposition 47.

It is true that the Legislature may enact a prospective ameliorative criminal statute, inapplicable to defendants already serving final judgments for the same offense, and this does not violate equal protection. (*People v. Mora* (2013) 214 Cal.App.4th 1477, 1484.) But an MDO recommitment is not merely continued incarceration pursuant to a previous judgment; it is a *new* proceeding. (§ 2972, subd. (e).) It would violate equal protection to subject Petitioner to a new proceeding to recommit him as an MDO when a defendant who commits the same offense today is entirely outside the scope of the MDO Act. (§ 2962, subd. (e).)

Additionally, reading the statute in Petitioner's favor avoids a due process issue. The recommitment of an individual under the MDO Act absent the foundational felony ignores the purpose of commitments under the MDO Act. Its purpose is to involuntary confine an individual to address behavior related to the foundational felony. (§ 2962; *In re Qawi*, *supra*, 32 Cal.4th 1, 9.) An order continuing commitment under the MDO Act for reasons outside the purpose of that statute is an arbitrary order. Reading the statutory as allowing recommitment of a person after a foundational felony has been redesignated a misdemeanor violates Petitioner's right to due process of the law.

2. If There Are Two Equally Reasonable Interpretations Of The MDO Act Regarding The Necessity Of Foundational Felonies For Recommitment, The Rule of Lenity Requires The Court Adopt The Interpretation Favoring Petitioner.

The rule of statutory interpretation known as the rule of "lenity" applies when "two reasonable interpretations of the same provision stand in relative equipoise." (*People v. Avery* (2002) 27 Cal.4th 49, 58.) Under the rule of lenity, "[c]ourts must resolve doubts as to the meaning of a statute in a criminal defendant's favor." (*Id.* at p. 57.)

Petitioner reads the MDO Act to require a foundational felony for all commitments made under the MDO Act, including recommitments under section 2972, subdivision (e). If the MDO Act is ambiguous as to whether the foundational felony is required for recommitments, such as when the foundational felony is redesignated a misdemeanor, the rule of lenity should apply and find that it is required.

E. The Legislature Expanded The Effects Of Proposition 47 Relief To Include NGI's, Those Who Would Only Face Commitment And Not Serve Prison Time, Adding To The Reasonableness Of Petitioner's Argument That MDO Commitments Are Collateral Effects Of Proposition 47 Resentencing.

In 2017, the Legislature amended Penal Code section 1170.18 and added Penal Code section 1170.127 through Assembly Bill 103 ("AB 103"). (§§ 1170.18, 1170.127; Assem. Bill No. 103 (2017 Reg. Sess.) § 2 ("AB 103").) The Legislature specifically stated its intent for doing so. (AB 103.) The Legislature wanted to allow NGI's committed for an

offense that would otherwise fall within the resentencing provisions of Propositions 36 and 47 to be able to petition the original committing court for relief. (AB 103.) The Legislature also intended to nullify *People v. Dobson* (2016) 245 Cal.App.4th 310, which held that an NGI was not eligible for relief under section 1170.126. (AB 103; *People v. Dobson* (2016) 245 Cal.App.4th 310, 314.) *Dobson* also held that section 1170.126 expressly excluded people who were not imprisoned. (*Dobson*, at p. 317.)

The Legislature expressly intended for NGI's committed to the DSH for offenses that would otherwise fall under the resentencing provisions of sections 1170.26 or 1170.18, including Proposition 47 relief, " to petition the original committing court for relief under those sections. (AB 103.) The only effect of AB 103 for NGI's would be the elimination of the commitment time. (§§ 1026.5, 1170.18, subd. (p), 1170.127.) Because the Legislature specifically intended to allow NGI commitments to be invalidated as collateral effects upon a successful Proposition 47 resentencing petition, it is reasonable to believe commitments in general are collateral effects of Proposition 47, including MDO commitments. Should this Court agree with Petitioner, it would be in line with the Legislature's intent to extend the effects of Proposition 47 to commitments for NGI's. (See § 1170.18, subd. (p).)

II.

PETITIONER'S RIGHT TO EQUAL PROTECTION WAS VIOLATED WHEN A FOUNDATIONAL OFFENSE PRECLUDES SUBSEQUENT COMMITMENTS UNDER THE SVP ACT BUT NOT UNDER THE MDO ACT AND NO STATE INTEREST IS SUPPORTED BY SUCH DISPARATE TREATMENT.

In the event this court rejects Petitioner's statutory construction argument and construes the MDO Act to authorize recommitment after the foundational felony is reduced to a misdemeanor pursuant to Proposition 47, then the statute violates Petitioner's right to equal protection. Under established law, a similarly situated SVP defendant cannot be recommitted after reversal or reduction of the foundational felony. Petitioner submits, nor can a defendant who commits the same offense after the enactment of Proposition 47 be subject to MDO commitment.

Commitment under the SVP Act cannot continue when the defendant's only qualifying sex offense is reversed. (See *Smith*, *supra* 42 Cal.4th at p. 1270.) Petitioner submits that the same reasoning should apply when the foundational offense supporting an MDO commitment is invalidated and to hold otherwise violates his right to equal protection in comparison with persons committed under the SVP Act.

The Court of Appeal declined to fully address Petitioner's equal protection argument after finding an SVP is not similarly situated to an MDO because an SVP does not qualify for Proposition 47 reductions. (§ 1170.18, subd. (i); *J.F.*, *supra*, D071733, p. 8.) Thereby, the court

confirmed "the incontrovertible point that SVP's and MDO's do not share identical characteristics. But the identification of the above differences does not explain why one class should bear substantially greater burden in obtaining release from commitment than the other." (*McKee II*, *supra*, 47 Cal.4th at p. 1203.) However, the similarity is not based on Proposition 47 prerequisites but rather on whether a state can continue commitment under the MDO Act in the absence of a foundational felony when it cannot do so under the SVP Act. This Court has already found MDO's and SVP similarly situated for equal protection purposes in *McKee II*. (*Ibid.* ("differences [did] not explain why one class should bear a substantially greater burden in obtaining release from commitment than the other").)

A review of cases involving commitments under the SVP Act and its forerunner, the former Mentally Disordered Sex Offender ("MDSO") law[5], demonstrates various courts agreed that removal of a foundational conviction prevented continued commitment. These courts did not directly hold that a civil commitment is invalid without a foundational conviction, rather, they discussed this concept in the reasoning for their holdings. (See *Franklin*, *supra*, 169 Cal.App.4th 386; *Smith*, *supra*, 42 Cal.4th 1251;

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[5] Under the MDSO law, former section 5500, et seq., unlike current SVP's, those committed under the MDSO law were civilly committed in lieu of a prison term, rather than after that term. (*McKee II*, *supra*, 47 Cal.4th at p. 1196.)

Bevill, supra, 68 Cal.2d 854.) Petitioner submits the reasoning in these cases is helpful and instructive for an analysis of the laws in the present case.

A. Standard of Review

Constitutional issues are reviewed de novo. (*Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67.)

B. An Equal Protection Claims Lies in This Case.

A claim under the equal protection clause requires two steps. (*McKee II, supra*, 47 Cal.4th at p. 1202.) First, the party must show that "the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*Ibid.*, original italics.) The groups need not be similarly situated for all purposes, but for purposes of the law challenged. (*Ibid.*)

In California there are various groups of individuals who, after being convicted of criminal activity, can be involuntarily committed to a state hospital because they pose a risk of danger to others if released into society. These include MDO's and SVP's.[6] Because the state Legislature added each group at different times, there is no uniform list of rights for

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[6] Also included in this list but not relevant to this discussion are: NGI's; conservatorships under the LPS Act; Mentally Retarded Offenders under Welfare and Institutions Code, section 6500, et seq. ("MRO's"); and dangerous minors under the meaning of Welfare and Institutions Code, section 1800 et seq. ("DM's").

involuntary civil commitment respondents. (§§ 1026.5 (NGI's), 2972, subd. (a) (MDO's); Welf. & Inst. Code, §§ 1801.5 (DM's), 5325 (LPS Conservatees), 6500 (MRO's), and 6603 (SVP's).

Similar to the MDO Act, the objectives of the SVP Act are not punitive: treatment for the committed individual and protection of the public. (*McKee II*, *supra*, 47 Cal.4th at p. 1194.) "Viewed as a whole, the SVPA is also designed to ensure that the committed person does not 'remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.'" (*Ibid.*, quoting *Kansas v. Hendricks* (1997) 521 U.S. 346, 364 [117 S.Ct. 2072, 138 L.Ed.2d 501].) And this Court in *McKee II* found SVP's and MDO's were similarly situated such that the People had a burden to prove beyond a reasonable doubt that an extended commitment was required for SVP's, the same burden required for MDO's. (*McKee II*, at p. 1203.) In *McKee I*, the appellate court focused on the differences in the dangers that each type of committee presented—the SVP posed a risk of potential sexually violent behavior, while an MDO presented a possible physical harm to others. (*People v. McKee* (2008) 160 Cal.App.4th 1517 ("*McKee I*").) In *McKee II*, this Court acknowledged these different characteristics, but found these groups were similarly situated because the purpose of the statutes controlling each was the same: "to protect the public from dangerous felony

offenders with mental disorders and to provide mental health treatment for their disorders." (*McKee II*, at p. 1203.)

The purpose of an extended commitment for an MDO remains the same as it did in *McKee II*. Therefore, SVP's remain similarly situated to MDO's because the purpose of the statute to allow an extended commitment is the same. (*McKee II*, *supra*, 47 Cal.4th at p. 1203; see also *In re Calhoun* (2004) 121 Cal.App.4th 1315, 1351-1352; accord, *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1156.) For this reason, Petitioner submits MDO's and SVP's are similarly situated for purposes of analyzing the effect of invalidating or removing the underlying felony offense after the commitment was imposed.

Once it is established that two groups are similarly situated, but the terms of commitment or recommitment are substantially less favorable for one group than the other, the People have the burden of justifying the disparate treatment. (*Buffington*, *supra*, 74 Cal.App.4th at p. 1155; *McKee II*, *supra*, 47 Cal.4th at pp. 1203, 1207.) In determining whether the justification is sufficient, the court must use the strict scrutiny test because involuntary civil commitment schemes involve the committed person's fundamental liberty interest. (*In re Moye* (1978) 22 Cal.3d 457, 465; *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 171, fn. 8.)

Under strict scrutiny review, "the state bears the burden of establishing not only that it has a compelling interest which justifies the law

but that the distinctions drawn by the law are necessary to further its purpose." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 17.) Further, "a discriminatory law will not be given effect unless its classification bears a close relation to the promoting of a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible. [Citations]." (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913].)

"Equal protection does not require all persons be dealt with identically but it does require the distinction have some relevance to the purpose for which the classification is made. [Citation]." (*Baxstrom v. Herold* (1965) 383 U.S. 107, 111 [86 S.Ct. 760, 15 L.Ed. 2d 260].) The SVP Act was "designed to last *only as long as that person meets the definition* of an SVP." (*McKee II*, *supra*, 47 Cal.4th at p. 1195, italics added.) Thus, once the person no longer meets the full definition of the SVP Act, the commitment cannot continue. Petitioner submits the same principle should apply to his situation: once a person no longer meets all of the criteria under the MDO Act, commitment cannot continue.

C. A Review of the Reasoning Used By Courts In Past Cases Involving Similarly Situated Civil Committees Under the SVP Act Indicate That a Foundational Conviction Is Necessary For Continued Commitment.

A review of case law regarding the SVP Act that addresses the relationship between foundational convictions and commitment is relevant to Petitioner's equal protection argument. In making the holdings in the following cases, the courts held that the conviction which formed the basis for commitment under the act was necessary for any order of commitment under the act. (See *Smith*, *supra*, 42 Cal.4th 1251; *Franklin*, *supra*, 169 Cal.App.4th at p. 392; *Bevill*, *supra*, 68 Cal.2d 854.) Petitioner submits the reasoning applied in the following cases should equally apply to commitments under the MDO Act.

The question in *Smith* was: "whether SVP proceedings can proceed against a person after reversal on appeal of the felony conviction that was the basis of the person's custody at the time of the initiation of those proceedings." (*Franklin*, *supra*, 169 Cal.App.4th at p. 391, citing *Smith*, *supra*, 42 Cal.4th at p. 1255.) The *Smith* court held that such proceedings could not proceed, and that "if the People seek to continue SVP proceedings against someone whose present conviction ha[d] been reversed, it must retry and reconvict him." (*Smith*, *supra*, 42 Cal.4th at p. 1270.) The court's reasoning is equally applicable to the present case because it looked at both the language and the legislative history of the

SVP Act in its reasoning for its decision. (*Id.* at pp. 1255, 1263, 1265, 1269.)

The *Smith* court noted that the Legislature did not directly address the effect of a reversed conviction on subsequent commitments; the court described such a reversal as an invalidation of the very judicial determination that made the original custody lawful. (*Smith*, *supra*, 42 Cal.4th at pp. 1261, 1262.) It then found committees under the SVP Act and the LPS Act were similarly situated, and explained: "[i]n terms of potential dangerousness, a person whose felony conviction has been reversed *is in the same position as* someone who was charged with, but not convicted of, a felony offense, yet it is undisputed that the latter could not be subject to SVP proceedings." (*Id.* at p. 1269, italics added.) Further, "mental health professionals may well conclude that the individual has a diagnosis ... or they may make other predictions about his future dangerousness. But ... those diagnoses and predictions alone cannot be the basis of an *extended* civil commitment." (*Ibid.*, italics added.) What made Smith previously eligible for continued civil commitment was his past criminal history, and once that conviction was removed the *Smith* court could not justify continued commitment under the SVP Act. (*Id.* at pp. 1269, 1270.)

Similarly, *Franklin* involved the reversal of a felony to a misdemeanor on appeal; the conviction was the basis for the SVP

commitment. (*Franklin*, *supra*, 169 Cal.App.4th at p. 389.) The underlying reasoning in *Franklin* was that the absence of a statutory condition cannot be used for initial commitment, let alone recommitment. (*Id.* at p. 392.) The appellate reversal of his felony conviction rendered Franklin a misdemeanant in prison awaiting transportation to superior court for a hearing. (*Id.* at pp. 389, 392.) As the *Franklin* court explained: "the absence of a statutory condition precedent to lawful SVP commitment proceedings is a *fatal flaw.*" (*Id.* at p. 392, italics added.)

This Court addressed the concept of requiring a foundational conviction to authorize commitments in *Bevill.* (*Bevill*, *supra*, 68 Cal.2d 854.) This Court was considering the MDSO law, the purpose of which is analogous to the current MDO Act:

> The primary purpose of quarantining mentally disordered sex offenders is protection of the public, and the Legislature has ordained that that group of persons from whom the public must be protected is to be identified by, *inter alia*, the fact of conviction for the perpetration of a criminal act. [...]

(*Bevill*, at p. 861, original italics.) Bevill was convicted of a misdemeanor violation of public decency and was committed and recommitted under the MDSO Act. (*Bevill*, *supra*, 68 Cal.2d at p. 857.) He was transferred to a prison because he could not benefit from further treatment but remained a danger to society. (*Ibid.*) During recommitment, he filed a habeas corpus petition attacking the validity of his imprisonment on the ground that he was convicted under an unconstitutional statute. (*Id.* at p. 856.)

In *Bevill*, this Court concluded that the validity of a commitment under the MDSO law was affected by the validity of the foundational conviction, so the commitment would be invalidated if the conviction were invalidated. (*Bevill*, *supra*, 68 Cal.2d at pp. 858, 859.) This Court found Bevill's conviction was not valid and ordered he be discharged from commitment, but noted "that nothing we decide here precludes the initiation of civil commitment proceedings under any appropriate statute." (*Id.* at p. 863.) Further, "[t]he structure of the statute itself manifests the integral and continuing relation foreseen to exist between commitment and conviction." (*Id.* at p. 861.)

As this Court summarized: "[l]egislative history, the *raison d'etre* of the conviction requirement, and the structure and fabric of the statute all attest that a valid commitment must be based upon a valid conviction. (*Bevill*, *supra*, 68 Cal.2d at p. 862, original italics.) And "[i]f the convictions are invalid the statute provides no basis to commit even those accused of the most socially dangerous conduct. (*Id.* at p. 861, citing *People v. McCracken* (1952) 39 Cal.2d 336, 346 [a defendant's sexual psychopathic status cannot be determined until after conviction for child stealing and murder].) In sum, this Court held the validity of civil commitments and recommitments depended on the continuing validity of the underlying offense upon which they were predicated. (*Smith*, *supra*, 42 Cal.4th at pp. 1269-1270; *Bevill*, *supra*, 68 Cal.2d at p. 865.)

However, in Petitioner's case, the Court of Appeal disregarded *Smith* as "largely irrelevant." (*J.F.*, *supra*, D071733, p. 6, fn. 5.) And it called *Franklin* inapposite. (*Id.* at p. 8 ["it simply holds that an initial petition for commitment as an SVP must establish that the individual is currently incarcerated in prison for a felony offense"].) In so doing, it declined to consider the reasoning used by these courts.

Further, the Court of Appeal dismissed any discussion of treatment of commitments related to sex offenses because Proposition 47 does not apply to sex offenses. (*J.F.*, *supra*, D071733, p. 8.) However, the disparate treatment Petitioner suffered did not lie in the characteristics of the underlying conviction, or the application of Proposition 47. Rather, it was the failure to give any effect to the change in the foundational conviction on the validity of his recommitments.

Petitioner submits that, regardless of the cause of the change to the foundational offense, once that offense is removed subsequent commitments cannot continue. Petitioner submits it was logical for these courts to recognize that the statutory scheme used to support the commitment required a conviction and related mental disorder the statute was intended to address. To continue a commitment after the foundational conviction is invalidated contravenes the purpose of the committing statute. This same logic, and result, should apply to the MDO Act.

D. The Court's Disparate Treatment of MDO's Including Petitioner Involves Fundamental Liberty Interests So Even If Such Treatment Is Based On The Date Of Conviction It Is Subject To Strict Scrutiny, And, Regardless, Such Treatment Is Not Supported By A Compelling State Interest.

If Petitioner's court had followed the reasoning used in *Smith*, *Franklin*, and *Bevill*, he would have had to have a felony conviction for a qualifying offense. (*Smith*, *supra*, 42 Cal.4th 1251; *Franklin*, *supra*, 169 Cal.App.4th 386; *Bevill*, *supra*, 68 Cal.2d 854.) Petitioner was no longer convicted of a foundational felony after resentencing under Proposition 47. (§§ 1170.18; 2692, subd. (e).) Petitioner clearly was prejudiced because if he committed the same offense today he would not be eligible for commitment under the MDO Act.

1. The Court of Appeal's Assertion That Petitioner's Disparate Treatment Was Based On The Date Of Conviction Is Incorrect In Light Of *Buycks*.

The Court of Appeal's holding regarding the retroactive application of Proposition 47 conflicts with this Court's decision in *Buycks* which found that Proposition 47 retroactively applied because there was no exception listed. (*Buycks*, *supra*, 5 Cal.5th at pp. 881.) *Buycks* addressed enhancements under sections 667.5 and 12022.1, and held that the provisions of Proposition 47 are expressly retroactive such that person is to be treated as if the measure had been in effect at the time of the offense. (§ 1170.18, subd. (a) & (f); *Buycks*, *supra*, 5 Cal.5th at pp. 881, 889.)

If Petitioner was retried for the same offense today he could not be committed as an MDO. (See § 2962, subd. (e).) Petitioner's right to equal Protection was violated when the court subjected him to a new proceeding for recommitment when a defendant who commits the same offense today is outside the scope of the MDO Act

Regardless, the difference is not the date of conviction but the date of the redesignation. And the date of redesignation should not matter when the effect of the redesignation is applicable "for all purposes." (§ 1170.18, subd. (k).) As this Court explained in *Bevill*: "[i]f the convictions are valid society will be protected under the sentences imposed; if the convictions are invalid the statute provides no basis to commit even those accused of the most socially dangerous conduct." (*Bevill, supra*, 68 Cal.2d 854 at p. 861.) And "[o]bviously, if an offender's initial commitment is improper, any extended commitment would also be improper." (*People v. J.S.* (2014) 229 Cal.App.4th 163, 171.) And "[a] person who was never committed as an MDO could not be recommitted as an MDO." (*Crivello, supra*, 200 Cal.App.4th at pp. 617-618.)

2. The MDO Act Is A Statute Addressing A Fundamental Liberty Interest And Thus It Requires Strict Scrutiny Review.

The Court of Appeal focused Petitioner's claim of unequal treatment on the date of conviction and "not made on the basis of race, alienage, national origin, gender or legitimacy." (*J.F., supra*, D071733, pp. 8-9,

citing *People v. Mora*, *supra*, 214 Cal.App.4th at p. 1483.) Then it stated Petitioner's disparate treatment was rationally related to a legitimate state interest. (*J.F.*, p. 9.) It relied on *People v. Floyd* to explain that disparate treatment based on the date of conviction by applying only prospectively does not violate equal protection if only rationally related to a legitimate state interest. (*J.F.*, p. 9; citing *People v. Floyd* (2003) 31 Cal.4th 179, 191.)

Floyd is distinguishable from the present case because *Floyd* was based on the sentence of a conviction. (*Floyd*, *supra*, 31 Cal.4th at pp. 182, 183.) Petitioner submits the sentencing hearing in *Floyd* is analogous to Petitioner's resentencing hearing, not the subsequent hearing at which the court denied Petitioner's request to invalidate his MDO commitment. Also, *Floyd* discussed the application of Proposition 36 which the Legislature intended to be prospective only, whereas Proposition 47 specifically states it can be retroactively applied. (*Id.* at p. 182.)

In stating only a rational review was required, the Court of Appeal avoided discussing the disparate treatment Petitioner suffered when compared to people similarly situated under statutory schemes which required strict scrutiny review. (See *People v. Olivas* (1976) 17 Cal.3d 236, 243.) However, if the statute challenged on equal protection grounds affects a fundamental interest, such as personal liberty, the statute must be reviewed under a strict scrutiny standard. (*Olivas*, at p. 243, citing *Serrano*

v. Priest (1971) 5 Cal.3d 584, 597.) And "[a]s the United States Supreme Court has authoritatively written, 'commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called criminal or civil.'" (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225, citing *In re Gault* (1987) 387 U.S. 1, 50 [87 S.Ct. 1428, 18 L.Ed.2d 527].) Strict scrutiny review requires the state prove that the statute furthers a compelling interest and the distinction created by the statute is necessary to further that interest. (*Olivas*, at p. 243.)

3. There Is No Compelling Interest Furthered By Requiring An MDO Commitment To Continue After The Foundational Felony Was Redesignated A Misdemeanor Under Proposition 47 That Cannot Be Addressed By Other Statutory Provisions.

The Court of Appeal reasoned that the differential treatment being applied to people who now would not undergo MDO commitment because they would not be charged of a felony after Proposition 47 amounts to an argument of "unequal treatment of convicted defendants based on the date of their conviction." (*J.F.*, *supra*, D071733, pp. 8-9.) The court claimed the resulting disparate treatment of individuals under the MDO Act is based on their date of conviction which is rationally related to a legitimate state interest. (*Ibid.*)

Further, the Court of Appeal implied a legitimate state interest for disparate treatment of MDO committees under Proposition 47. (*J.F.*, p. 9.)

However, it did not indicate the interest protected because it claimed there was no disparate treatment. (*Id.* at p. 6.)

The state's interest is found in the purpose of the MDO Act: to ensure people who have violent felony convictions "related to their mental disorders, and who continue to pose a danger to society, receive mental health treatment during and after the termination of their parole until their mental disorder can be kept in remission." (§ 2960, et seq.; *In re Qawi*, *supra*, 32 Cal.4th 1, 9.) But Petitioner no longer has a felony conviction. (*Buycks*, *supra*, 5 Cal.5th at p. 889.) It does not follow that the public needs to be protected from a nonviolent misdemeanant.

Even if Petitioner's argument had been made regarding the date of conviction, the disparate treatment of MDO committees is not rationally related to any legitimate state interest nor does it further a compelling state interest. Thus, the Court of Appeal's disparate treatment of Petitioner compared to that of a person similarly situated under the SVP Act violated Petitioner's right to equal protection of the law.

III.

THE COURT OF APPEAL'S DECISION TO CONTINUE PETITIONER'S COMMITMENT UNDER THE MDO ACT VIOLATED HIS RIGHT TO DUE PROCESS OF THE LAW.

Petitioner submits his recommitment under the MDO Act without a foundational felony ignores the Legislative intent of the statutory scheme and deprives him of his fundamental liberty interest without due process of law. (U.S. Const., 5th Amend.; Cal. Const., art. I, §§ 7, 15.) Once the court resentenced Petitioner such that he no longer had a foundational felony, the basis for commitment under the MDO law no longer existed: to treat the mental illness as it related to a felony. (§ 2960, et seq.; *In re Qawi*, *supra*, 32 Cal.4th 1, 9.) After his resentencing, the court was required to "cease" his commitment. (See *O'Connor*, *supra*, 422 U.S. at p. 580 (conc. opn. of Burger, C.J.).) It should have granted his motion to dismiss. The court's failure to do so was a violation of Petitioner's right to due process of law. (*Ibid.*)

A. Standard of Review

When an issue raises a "pure question of law involving the application of the due process clause," review is de novo. (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 285.)

B. Due Process Protects Individuals Against Arbitrary Civil Commitments And Any Order Of Commitment Under The MDO Act Of A Person Who Does Not Have A Foundational Felony Is An Arbitrary Order.

"[T]he touchstone of due process is protection of the individual against arbitrary action of government." (*Wolff v. McDonnell* (1974) 418 U.S. 539 [94 S.Ct. 2963, 41 L.Ed.2d 935].) And due process is not satisfied by mere formal procedural correctness. (*Foster v. Illinois* (1947) 332 U.S. 134, 136 [67 S.Ct. 1716, 91 L.Ed. 1955].)

"[T]he Due Process Clause specially protects fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" (*Washington v. Glucksberg* (1997) 521 U.S. 702, 720-721 [117 S.Ct. 2302, 138 L.Ed.2d 772], quoting *Moore v. East Cleveland* (1977) 431 U.S. 494, 503 [97 S.Ct. 1932, 52 L.Ed.2d 531].) Similarly, the United Nations has long acknowledged as basic human rights: life, liberty, security of person, and freedom of movement. (U.N. General Assembly, Universal Declaration of Human Rights, 217 (III) A, 1948, Paris, art. 3, 13 <http://www.un.org/en/universal-declaration-human-rights/> [as of Sep. 20, 2018].)

As the California Legislature has recognized, civil commitment proceedings involve fundamental interests that are no less fundamental than those in criminal proceedings. (*In re Gary W.* (1971) 5 Cal.3d 296, 307.) Civil commitment results in a "real deprivation of liberty," a loss of

freedom and a socially debilitating stigma. (*People v. Burnick* (1975) 14 Cal.3d 306, 319, 320.) "[I]nvoluntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." (*O'Connor*, *supra*, 422 U.S. at p. 580 (conc. opn. of Burger, C.J.).) "States must ensure due process protections and safeguard liberty interests when a person is civilly committed." (*People v. Allen* (2007) 42 Cal.4th 91, 98, citing *Addington v. Texas* (1979) 441 U.S. 418 [99 S.Ct. 1804, 60 L.Ed.2d 323].)

A commitment must be based on a legitimate state interest and the reasons for commitment must be established in an appropriate proceeding. (*O'Connor*, *supra*, 422 U.S. at p. 580 (conc. opn. of Burger, C.J.).) "Equally important, confinement must cease when those reasons no longer exist." (*Ibid.*) And the Due Process Clause "requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." (*Jackson v. Indiana*, *supra*, 406 U.S. at p. 738.)

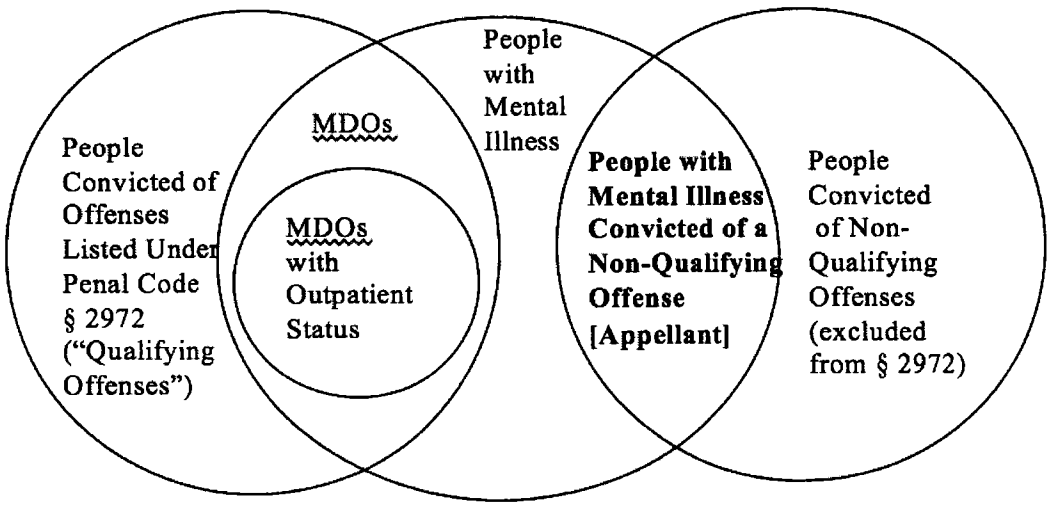
C. The Only Purpose For Commitment Under The MDO Act Is To Treat A Person For A Mental Disorder Related To A Violent Foundational Felony Conviction And Protect The Public From Such An Individual.

California has a well-established rule that the validity of a civil commitment depends on the continued validity of the underlying criminal

conviction. (*Lopez*, *supra*, 50 Cal.4th 1055.) This concept is evidenced by the Court of Appeal and this Court nullifying a civil commitment when the requisite criminal conviction has become invalid. (*Bevill*, *supra*, 68 Cal.2d 854; see also *People v. Greene* (1973) 34 Cal.App.3d 622, 656 [acknowledging commitment under former MDSO Act would have been invalid if it were based solely on conviction that later was reduced on appeal to a misdemeanor].)

A valid MDO commitment cannot occur without a proper foundational conviction. (§ 2962; *Crivello*, *supra*, 200 Cal.App.4th at p. 614.) Nor can a person be in a CONREP facility on outpatient status without being an MDO. (§§ 1606, 2972.1.) Petitioner is no longer considered convicted of a felony. (*Buycks*, *supra*, 5 Cal.5th at p. 889.) Petitioner would not be an MDO at an initial commitment hearing. (§ 2962.) If he were not an MDO, he also could not have CONREP status. (§§ 1606, 2972.1.)

However, a person can have both a mental illness and a criminal history and not be an MDO. After the reduction of his offense to a misdemeanor, this is now where Petitioner lies in the spectrum of mental illness as it relates to California's criminal laws. This concept is illustrated by the following diagram:



The MDO Act does not encompass all people who have mental illness, nor does it include those who have a mental illness and commit an offense not listed as a qualifying offense under section 2972. There are people who could use mental health assistance or people who present a danger to the public but they do not fall under the purview of the MDO Act. These include people who present a danger to society but have no mental illness and do not have a current conviction, people with mental illnesses who have committed nonviolent crimes but do not present a danger to society, and people with mental illnesses who are not dangerous and have convictions for offenses not listed under section 2972. The Legislature did not intend or authorize this group of people to be involuntarily civilly committed under the MDO Act. (§ 2960.)

Moreover, there are statutes that permit the government to restrain a person with a mental disorder other than the MDO Act. For example, the LPS Act is available to the state to involuntarily restrain and

psychologically treat persons who represent a danger to the public. (Welf. & Inst. Code, § 5000, et. seq.)

The MDO Act was created in 1985 specifically to allow for commitment similar those under the LPS Act but based upon a qualifying, violent felony offense. (Sen. Com. On Pub. Safety, Com. Analysis of Sen. Bill 279 (1999-2000 Reg. Sess.) Mar. 16, 1999, p. 8.) This purpose was set forth by the Senate Committee on Public Safety in its Analysis of Senate Bill 279, which amended section 2962 to identify specific violent felonies:

> . . . any person who is a danger to self or others, or who is gravely disabled, may be involuntarily committed and psychiatrically treated under the LPS law. A prior criminal conviction is not necessary. The MDO statutes include specific references to the LPS law as an alternative to the MDO process and specifically provide that such parolees may be placed in a state hospital. (Penal Code section 2974).

(Sen. Com. On Pub. Safety, Com. Analysis of Sen. Bill 279 (1999-2000 Reg. Sess.) Mar. 16, 1999, p. 8.)

The Court of Appeal's decisions in Petitioner's case and in *Goodrich* sanction the involuntary commitment of Petitioner based on diagnoses of mental illness and predictions of dangerousness alone. (*J.F.*, *supra*, D071733; *Goodrich*, *supra*, 7 Cal.App.5th 699.) These circumstances might permit an LPS commitment. (See Welf. & Inst. Code, § 5000, et seq.) Petitioner submits continuing his commitment without a foundational felony is a violation of his due process rights and the court is involuntarily

restraining Petitioner against his will without a Legislatively authorized statutory basis.

Petitioner is prejudiced by the court's decision to require that he retain his MDO status without a foundational felony. Petitioner would not be an MDO if he committed the same offense today because it is not a qualifying offense under section 2962 due to the amendment of section 1170.18 by Proposition 47. And Petitioner is not a proper subject for the CONREP program if he is not an MDO.

D. Concerns For Public Safety Do Not Outweigh An Individual's Right To Protection From Invalid Government Restraint Especially When Both Interests Are Served By The Proper Application Of Other Statutes That Do Not Require A Felony Conviction.

When a fundamental right is recognized, due process completely forbids infringement of that right "unless the infringement is narrowly tailored to serve a compelling state interest.." (*Reno v. Flores* (1993) 507 U.S. 292, 301-302 [113 S.Ct. 1439, 123 L.Ed.2d 1].) Thus, a "[c]ommitment must be justified on the basis of a legitimate state interest." (*O'Connor*, *supra*, 422 U.S. at p. 580, (conc. opn. of Burger, C.J.).)

The Court of Appeal did not address whether there was a legitimate state interest and implied a rational basis existed but did not even identify that. However, the purposes of the MDO Act include both public protection and protection of the patient's rights. (*Cobb*, *supra*, 48 Cal.4th at p. 253.) Thus, the ordered treatment should be centered upon the

behavior involved in the felony. Yet, no felony-based treatment can be made without a felony.

The state's interest in public safety and the patient's safety can be met without violating an individual's due process rights through the use of other statutory schemes such as the LPS Act. This way the state's interest are based upon a foundation of legitimate statutory justification. (Welf. & Inst. Code, § 5000, et seq.; See Sandefur, *In Defense of Substantive Due Process* (2012) vol. 35, No. 1, Harv. J. Law & Pub. Pol'y 283 ("Sandefur").) Such interests should not be protected by making an arbitrary order under the MDO Act so that the ends justify the means.

E. Petitioner Was Prejudiced By The Court's Decision To Arbitrarily Continue Commitment Under The MDO Act Without A Related Foundational Felony From Which A Therapist Would Base Treatment.

"An arbitrary act has either no reasons to explain it or only reasons that would with equal plausibility justify the opposite act." (Sandefur, at p. 292.) The lack of a felony conviction in this case precludes initial commitment under the MDO Act, a fact the Court of Appeal acknowledged. (§ 2962; *J.F.*, *supra*, D071733, p. 4.) Yet the Court of Appeal concluded the MDO Act—an act intended to treat people with mental illnesses related to a felony—allows for extended commitment without a foundational felony, or "*any* offense." (§ 2962; *J.F.*, p 5, italics added.)

Petitioner submits that, when viewing the statutory scheme of the MDO Act as a whole, commitment is rationalized by the need to treat a person for mental illness that caused a felony and without the felony there is no basis to commit under the MDO Act at all—not just at the initial commitment stage. It bears repeating that the mental disorder at issue for the extension proceedings must be the same mental disorder that was treated during the defendant's parole. (*People v. Jauregui Garcia*, *supra*, 127 Cal.App.4th at p. 567.) Thus, the court is ordering continued treatment for an illusory purpose—an illness related to a nonexistent felony.

The order continuing Petitioner's commitment under the MDO Act because Petitioner was once properly found an MDO because he was previously convicted a felony while also recognizing that he is no longer convicted of that felony is an arbitrary order. (*J.F.*, *supra*, D071733, p. 5.) Petitioner submits the court's decision to use the MDO Act to support any commitment and order treatment for an illusory purpose is an arbitrary governmental act which violates Petitioner's right to due process of the law.

IV.

THE RESENTENCING COURT ALREADY ADDRESSED EVERY ASPECT OF PETITIONER'S SENTENCE, INCLUDING DANGEROUSNESS, MAKING THE SUBSEQUENT HEARING REGARDING PETITIONER'S MDO COMMITMENT MOOT AND A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE.

A. Standard of Review

Where facts are uncontradicted, issues of double jeopardy raise questions of law and thus are reviewed de novo. (*People v. Davis* (2011) 202 Cal.App.4th 429, 438.)

B. The Order Continuing Petitioner's Recommitment After The Resentencing Hearing Equates With Double Jeopardy.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitutions provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." (U.S. Const., 5th Amend.)

Applying "the full resentencing rule," this Court and "the Courts of Appeal have concluded that the resentencing court has jurisdiction to modify *every* aspect of the sentence, and not just the portion subjected to the recall." (*Buycks*, *supra*, 5 Cal 5th at p. 893, italics in original.) And a resentencing hearing under section 1170.18 requires the resentencing court to resentence the defendant generally, creating an exception to the rule of finality not just for the count but for the entire case. (*Id.* at p. 894.)

What's more, the application of the effects of a misdemeanor "for all purposes" is not restricted by any further judicial evaluation of a defendant's risk of danger to public safety. (*Buycks*, *supra*, 5 Cacl.5th. at p. 883.) Instead, "for all purposes" takes effect after the resentencing court has assessed the Petitioner's risk of danger to public safety in reducing the sentence for the underlying felony under section 1170.18. (*Ibid.*) Thus, Petitioner and Goodrich's risk of danger was already adjudicated and any discussion about potential dangerousness for purposes of commitment under the MDO Act was moot. (*J.F.*, *supra*, D071733; *Goodrich*, *supra*, 7 Cal.App.5th 699.) The hearing after the resentencing hearing at which the court continued Petitioner's commitment amounted to relitigation of the dangerousness already made at resentencing. Invalidation of any continued commitment should have been subsumed within the orders made at the resentencing hearing.

The effects of Petitioner's misdemeanor sentence were already adjudicated by the resentencing court. Thus, Petitioner submits the decision to deny his motion to dismiss and continue Petitioner's MDO commitment amounted to double jeopardy. (U.S. Const., 5th Amend.)

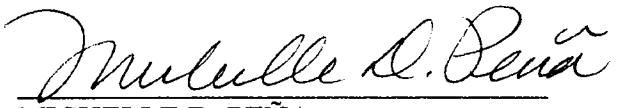
CONCLUSION

Involuntary commitment of a person by the government is a delicate area of the law where personal liberties are involved. There must be a legitimate statutory basis by which a court can continue such a commitment when the foundation for that commitment changes. To do otherwise undermines the legitimacy of the legal system.

Therefore, Petitioner requests this Court reverse the Court of Appeal's decision and overturn or disapprove *People v. Goodrich* (2017) 7 Cal.App.5th 699.

Dated: September 21, 2018

Respectfully submitted,



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Attorney for Petitioner, J.F.

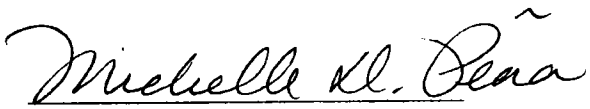
CERTIFICATION OF WORD COUNT

I, Michelle D. Peña, hereby certify in accordance with California Rules of Court, rule 8.360(b)(1), that this brief contains 13,926 words (13,875 in the brief and 51 in the Venn Diagram) as calculated by the Microsoft Word for Mac software in which it was written.

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

Dated: September 21, 2018

Respectfully submitted,



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PROOF OF SERVICE

People v. J.F.

Supreme Court No. S248046; Court of Appeal No: D071733; Superior Court No. SCD204096

I, the undersigned, declare that I am over 18 years of age, an active member of the State Bar of California, employed in the County of San Diego, California, and not a party to the within entitled cause. My business address is listed above. My electronic service address is mdplaw@outlook.com.

I served the attached: **OPENING BRIEF ON THE MERITS** as follows:

USPS: By placing copies of the above-named document in a sealed envelope, with the correct postage, and depositing them in the United States Postal Service, to each of the following persons at the following addresses on September 21, 2018:

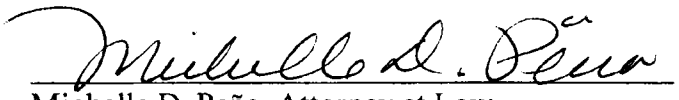
J.F. (address of record)	SUPREME COURT OF CALIFORNIA 350 McAllister Street, Room 1295 San Francisco, CA 94102-4797 (In addition, one e-submitted PDF version of brief)

ELECTRONIC SERVICE: By sending the above-named document from my electronic service address of mdplaw@outlook.com, to each of the following persons at the following authorized email service addresses on September 21, at approximately 7:00 p.m.:

Fourth District, Division One COURT OF APPEAL 750 B Street, Suite 300 San Diego, CA 92101	Attn: Judge David J. Danielsen SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN DIEGO Appeals.Central@SDCourt.ca.gov
Attn: Stacy Tyler, Esq. ATTORNEY GENERAL SDAG.Docketing@doj.ca.gov	Attn: Alejandro Balvaneda, Esq. SAN DIEGO COUNTY PUBLIC DEFENDER Primary Public Defender's Office (PPD) ppd.eshare@sdcounty.ca.gov
APPELLATE DEFENDERS INC. eservice-court@adi-sandiego.com	Attn: Robert Stein, Esq. SAN DIEGO COUNTY DISTRICT ATTORNEY DA.Appellate@sdcda.org

I further declare I electronically filed a copy of this document to the California Supreme Court using the TrueFiling website https://www.truefiling.com in compliance with the Terms of Use and California Rules of Court, rules 8.70 et seq., and 8.500(f)(1), et seq., in addition to the paper copy as noted above.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on September 21, 2018 at approximately 7:00 p.m.



Michelle D. Peña, Attorney at Law