# In the Supreme Court of the State of California



**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**JEREMY FOSTER,**

**Defendant and Appellant.**

Case No. S248046

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

## RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## ISSUE PRESENTED

Whether recommitment under the Mentally Disordered Offender Act is valid despite the application of Proposition 47 to reduce appellant's previously qualifying felony to a misdemeanor that would not qualify for MDO Act treatment.

## INTRODUCTION

Appellant was convicted of felony theft and subsequently determined to be a Mentally Disordered Offender (MDO). After California voters passed Proposition 47, which reclassified certain felony offenses as misdemeanors in order to mitigate criminal punishment for nondangerous offenders, appellant successfully petitioned the superior court to redesignate his felony conviction as a misdemeanor.

Appellant now contends that because his initially qualifying offense is no longer a felony, his MDO recommitment should be dismissed and he should be released from the MDO outpatient program. Yet, as the plain language of the MDO Act establishes, MDO recommitment, such as appellant's, is predicated solely on a patient's current mental state, risk of dangerousness, and need for continued mental health treatment. Proof of a qualifying felony is not an element of recommitment. Thus, the redesignation of an MDO's qualifying felony does not affect any requisite element of recommitment.

The purpose of Proposition 47 and the MDO Act further support this conclusion. Proposition 47 was primarily enacted with public safety in mind. Certain offenders, who committed nonserious and nonviolent crimes, and did not pose a public risk, were given the opportunity to petition to reclassify their felony convictions as misdemeanors. Proposition 47, thus, mitigated penal consequences for nondangerous offenders. By stark contrast, MDOs, by their very definition, pose a substantial risk to the

public by virtue of their severe mental disorder. For this reason, the MDO Act provides nonpunitive civil commitment whereby such patients receive mental health treatment. Given the nature and purpose these enactments, it is clear that Proposition 47 was not intended to effectuate the release of MDO patients who currently have a severe mental disorder that renders them a danger to the public.

Finally, appellant's recommitment does not violate his right to equal protection. Contrary to appellant's contention, appellant is not similarly situated to the small number of sexually violent predator committees he has identified because their civil commitments were based on the existence of a qualifying offense; appellant's MDO recommitment is not. In any event, any disparate treatment would be justified because the state has a compelling interest in continuing treatment for a patient whose severe mental illness remains unremitted and who continues to pose a risk of substantial danger to others.

For these reasons, this Court should affirm the lower courts' denial of appellant's challenge to his MDO recommitment.

## STATEMENT OF THE CASE AND FACTS

Appellant entered a convenience store and, claiming to be a police officer, grabbed some merchandise, shoved the store clerk who tried to stop him, and fled. (Aug. CT 6.) Appellant appeared disheveled and wore a shirt on his shoe. (B230766 RT 306.)[1] When the clerk tried to stop appellant, he pushed her. (CT 1, 29; Aug. CT 6.) The clerk screamed, and another employee came to her assistance. (CT 19; Aug. CT 6.) Appellant stole some merchandise and fled. (CT 19; Aug. CT 6.)

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[1] Concurrently with this answer brief, respondent has filed a request for this Court to take judicial notice of the record in appellant's initial commitment, case number B230766.

Appellant was charged with robbery (Pen. Code, § 211)[2] but ultimately pleaded guilty to a violation of section 487, subdivision (c), which at the time defined felony grand theft as including the theft of any property "taken from the person of another." (CT 5-6, 8-10.) The trial court sentenced him to 16 months in prison. (CT 64.)

Prior to appellant's scheduled release date, the Board of Prison Terms (BPT) determined that appellant met the criteria for initial civil commitment as an MDO under section 2962, which requires, among other things, that the prisoner has a severe mental disorder that aggravated or caused an enumerated offense for which he was imprisoned. (B230766 CT 1.) Appellant challenged the BPT's determination pursuant to section 2966, subdivision (b) and a bench trial was held. (B230766 CT 1.) At the hearing, the trial court found that appellant met the requisite criteria for MDO commitment under section 2962, which included a finding that appellant was sentenced to prison for an offense in which he used force or violence. (B230766 CT 5; B230766 RT 306; See § 2962, subd. (e)(2)(P) [catchall MDO qualifying offense provision requiring that the "prisoner used force or violence, or caused serious bodily injury" during the commission of the offense].) The court found appellant to be an MDO and ordered him committed to the Department of State Hospitals for a period of one year as a condition of parole. (B230766 CT 5.)

Following the expiration of appellant's initial one-year MDO commitment and parole term, appellant was annually recommitted four times pursuant to section 2972. (CT 20.) In 2014, appellant was recommitted on an outpatient basis whereby he was ordered to serve his commitment in the Conditional Release Program (CONREP). (CT 20.)

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[2] Except where specified, all further statutory references are to the Penal Code.

Following the enactment of Proposition 47, which reclassified certain nonserious and nonviolent felonies as misdemeanors, appellant petitioned to redesignate his felony theft conviction to a misdemeanor as an offender who has completed his sentence under section 1170.18, subdivision (f). (CT 16; Aug. CT 25.) The trial court granted appellant's unopposed petition. (CT 16.)

Appellant subsequently filed a motion to dismiss his MDO recommitment on the basis that the misdemeanor redesignation of his felony conviction invalidated his recommitment. (CT 17-27.) The People filed a written opposition. (CT 28-44.) At a hearing, the superior court denied appellant's motion, relying on *People v. Goodrich* (2017) 7 Cal.App.5th 699, which held that the redesignation of a qualifying felony to a misdemeanor pursuant to Proposition 47 does not invalidate MDO recommitment. (4 RT 303-304.)

On the same date, the superior court held a recommitment renewal hearing. (4 RT 304.) Appellant submitted on two court-ordered evaluations, one of which reported that appellant suffered from schizophrenia which was not in remission, represented a substantial harm to others due to his disorder, and could safely be treated in CONREP. (Aug. CT 58-63.)[3] Appellant agreed to the one-year commitment extension and the trial court ordered him committed accordingly. (4 RT 304.)

Appellant appealed, arguing that the trial court had improperly denied his motion to dismiss the MDO recommitment and that the decision violated his right to equal protection because he is similarly situated to

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[3] The record contains three doctors' evaluations dated October 13, 2016, October 31, 2016, and February 3, 2017. Two of the evaluations recommended that appellant be recommitted as an MDO (Aug. CT 26-31, 58-63); the other evaluation recommended appellant's release from CONREP (AUG. CT 44-50).

Sexually Violent Predator (SVP) committees who have had their commitments dismissed when their qualifying felonies were reversed. In an unpublished decision, the Fourth District Court of Appeal affirmed the judgment. The Court of Appeal held that because appellant's qualifying offense was not a requisite element for recommitment, his recommitment "is not predicated upon his felony conviction; rather, it is predicated on his current mental state and dangerousness." (Slip opn. at p. 2.) Thus, the court held that the redesignation of a qualifying offense to a misdemeanor under Proposition 47 does not invalidate an MDO's recommitment. (*Ibid.*) The Court of Appeal also rejected appellant's equal protection claim, citing, among other reasons, that appellant was not similarly situated to the SVPs he identified. (Slip. opn. at p. 3.)

## ARGUMENT

### I. THE APPLICATION OF PROPOSITION 47, WHICH MITIGATES CRIMINAL PUNISHMENT, DOES NOT INVALIDATE MDO RECOMMITMENTS BECAUSE RECOMMITMENTS ARE NOT BASED ON AN INITIALLY QUALIFYING CONVICTION, AND ARE NONPUNITIVE AND CIVIL IN NATURE

Recommitment under the MDO Act is predicated upon a patient's current mental state, dangerousness, and need for continued treatment, not on his or her past felony conviction. As a felony conviction is not a required element of MDO recommitment, the redesignation of the initially qualifying felony conviction under Proposition 47 does not invalidate the MDO recommitment. Appellant argues to the contrary, urging that an MDO's recommitment must be invalidated following the Proposition 47 redesignation of the initially qualifying felony to a misdemeanor because MDO recommitment is based upon initial MDO commitment, which requires a qualifying felony. (OBM 21-41.) But a plain reading of both

enactments, their expressed purposes, and this Court's recent decisions defeat his claim.[4]

### A. An Overview of the Purpose of the Acts and a Plain Reading of Their Statutory Provisions

This case centers on the statutory interaction between the reclassification provisions of Proposition 47 and the treatment-based civil commitment scheme of the MDO Act.

#### 1. This Court interprets statutes and voter initiatives by looking to their plain language and, where the language is ambiguous, the relevant history behind their enactment

"The fundamental task of statutory construction is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (*People v. Cruz* (1996) 13 Cal.4th 764, 774-775, quoting *People v. Pieters* (1991) 52 Cal.3d 894.) In doing so, the language of the statute is given its ordinary and plain meaning. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) The statutory language is construed in the context of the statute as a whole and within the framework of the overall statutory scheme to effectuate the enactors' intent. (*Ibid.*) If the statutory language is ambiguous or subject to multiple reasonable interpretations, however,

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[4] In arguing that MDO recommitments should be dismissed following the redesignation of the initially qualifying felony, appellant groups together both recommitments and *initial* commitments. (OBM 21-47.) But appellant appeals only the denial of his motion to dismiss his recommitment. Appellant's petition for review to this Court did not purport to frame any issue about an initial MDO commitment. Whether an initial MDO commitment must be dismissed following a Proposition 47 redesignation would require a different analysis from the one governing MDO recommitments, and appellant does not offer specific analysis regarding initial commitments. Because such a claim is not at issue in this case and is outside the scope of the question upon which the Court granted review, the People do not address it here.

"courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265.)

The interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796.) In addition to the general principles of statutory construction, where the language of an enactment is ambiguous, the court will look to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L., supra*, 30 Cal.4th at p. 900; *People v. Floyd* (2003) 31 Cal.4th 179, 187-188 [The ballot pamphlet information is a valuable aid in construing the intent of voters].) Any ambiguities in an initiative statute are "not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent [electoral] intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782, internal citation and quotation omitted.) Ultimately, the court's duty is to interpret and apply the language of the initiative "so as to effectuate the electorate's intent." (*Robert L., supra*, 30 Cal.4th at p. 900.)

**2. The MDO Act was enacted to treat persons who were driven by a severe mental disorder to commit crimes and to provide procedures governing commitment and continued treatment through recommitment**

The Mentally Disordered Offenders Act "permits the government to civilly commit for mental health treatment certain classes of state prisoners during and after parole." (*In re Qawi* (2004) 32 Cal.4th 1, 23.) Recognizing that the then-existing civil commitment schemes were inadequate to deal with the growing class of prisoners whose criminality was driven by their severe mental disorders, the Legislature enacted the

MDO Act in 1986. The MDO Act requires that a prisoner who had been convicted of an enumerated offense involving force or violence, and who continued to pose a danger to society, receive mental health treatment until the disorder can be kept in remission. (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061.)

The Legislature determined that because "[m]aintain[ing] a determinate system will inevitably cause the release of some mentally ill inmates who constitute a significant threat to public safety[,] [t]his commitment will provide a mechanism for placing these mentally ill inmates in the mental health system for appropriate treatment which will increase the protection of the public. (Dept. of Mental Health, Enrolled Bill Rep., Sen. Bill No. 1296 (1985–1986 Reg. Sess.) Sept. 27, 1985, p. 4)." (*People v. Allen* (2007) 42 Cal.4th 91, 97.) The purpose of the act is therefore to "protect society by providing both a means for isolating these offenders and treatment for the underlying cause of their criminality." (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1054 (1985-1986 Reg. Sess.) as amended May 30, 1985, p. 2.)

The MDO Act provides mental health treatment in three stages: first, as a condition of parole following the completion of a prison term of an enumerated offense (§ 2962); second, as continued treatment for one year in conjunction with the extension of parole (§ 2966, subd. (c)); and third, as an additional year of treatment following release from parole (§§ 2970, 2972). (*Lopez*, *supra*, 50 Cal.4th at p. 1062; *People v. Blackburn* (2015) 61 Cal.4th 1113, 1122.) Because commitment under the MDO Act begins as a condition of parole, it is initially triggered by a conviction of an offense for which the offender was sentenced to prison, i.e., a felony. (See §§ 1170(a)(3), 2962, subd. (e).) Recognizing that a parolee's mental disorder may not be in remission even after receiving initial treatment through the end of the parole term, the Legislature established a procedure

allowing for the renewal and extension of an offender's commitment period. (§§ 2966, subd. (c); 2970, subd. (b); 2972, subd. (c).)

At the first stage, a prisoner is initially committed as an MDO if six criteria are met: (1) the prisoner has a severe mental disorder; (2) the disorder is not in remission or capable of being kept in remission; (3) the disorder was a causative or aggravating factor in an enumerated crime for which the prisoner was sentenced to prison; (4) the prisoner used force or violence during the commission of the crime; (5) the prisoner has been in treatment for the disorder for at least 90 days in the year prior to his release; and (6) due to the disorder, the prisoner poses a risk of serious danger to others. (§ 2962 subds. (a)-(d); *People v. Harrison* (2013) 57 Cal.4th 1211, 1218.) The qualifying offense must have resulted in a prison sentence and must be one of many enumerated offenses, including any offense in which force or violence was used. (§ 2962, (e)(2)(P).) A prisoner who meets these criteria is then certified as an MDO and is civilly committed for a period of one year as a condition of parole. (§ 2962, subd. (d)(1).) Challenges to this first phase of commitment are governed by sections 2964 and 2966. If an offender disagrees with the initial MDO certification, he or she may request a hearing under section 2966, subdivision (b) to challenge the commitment criteria. (*Lopez*, *supra*, 50 Cal.4th at p. 1062.)

The second phase of MDO commitment is governed by section 2966, subdivision (c). It authorizes the Board of Prison Terms (BPT) to continue an MDO's commitment when it continues the MDO's parole under section 3001 for a one-year period. (§ 2966, subd. (c); *Lopez*, *supra*, at pp. 1062-1063 ["an MDO is committed for one-year periods and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year"].) Following the BPT's recommendation, an MDO's commitment will be continued for one year if the following three criteria are proved: (1) the MDO has a current severe

mental disorder; (2) "the severe mental disorder is not in remission or cannot be kept in remission without treatment"; and (3) by reason of the mental disorder, the offender represents a substantial danger of physical harm to others. (§ 2966, subd. (c).)

In the third and final phase of MDO commitment, governed by sections 2970 and 2972, the MDO's parole term has expired so the MDO is no longer on parole during this commitment period. Under section 2970, if, prior to the termination of the parolee's treatment under section 2962, the medical professionals treating the patient determine that "the parolee's or prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment," the People may petition to recommit the MDO for an additional one-year term. (§ 2970.) An MDO may be recommitted under this section, if the three criteria set forth in section 2966, subdivision (c) are met. (§ 2972, subd. (c) [(1) the MDO has a current severe mental disorder; (2) "the severe mental disorder is not in remission or cannot be kept in remission without treatment;" and (3) by reason of the mental disorder, the offender "represents a substantial danger of physical harm to others].) In a recommitment hearing, the People bear the burden of proving the MDO's severe mental disorder beyond a reasonable doubt. (§ 2972, subd. (a).)

During this third phase, an MDO may be placed in outpatient treatment "if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis." (*People v. Gregerson* (2011) 202 Cal.App.4th 306, 314, internal citations omitted; § 2972, subd. (d).)

### 3. Proposition 47, the Safe Neighborhoods and Schools Act, reclassifies certain nonserious and nonviolent felonies as misdemeanors

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act," and it became effective the next day. (Cal. Const., art. II, § 10 (a) ["An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise"]; *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328 (*Diaz*).)

The purpose of Proposition 47 is fourfold: to (1) "ensure that people convicted of murder, rape, and child molestation will not benefit;" (2) "reduce felonies for [certain] nonserious, nonviolent crimes like petty theft and drug possession" to misdemeanors; (3) "authorize consideration of resentencing for anyone who is currently serving a sentence" for the listed offenses; and (4) "require a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70; *Diaz*, *supra*, 238 Cal.App.4th at p. 1328.)

To achieve these goals, Proposition 47 reclassified as misdemeanors certain nonserious and nonviolent theft- and drug-related offenses that previously were felonies. (*People v. Buford* (2016) 4 Cal.App.5th 886, 903; *Diaz*, *supra*, 238 Cal.App.4th at p. 1325.) Proposition 47 also created a new resentencing provision—section 1170.18—which allows persons convicted of a reclassified offense prior to Proposition 47's effective date to petition for a reduction of their felony. (*People v. Pinon* (2016) 6 Cal.App.5th 956, 961.) The statute distinguishes between two classes of such persons: petitioners who are still serving a sentence and those who have completed a sentence. (*Ibid.*)

A person currently "serving a sentence for a [felony] conviction" may petition for recall of the felony sentence under section 1170.18, subdivision (a). A petition under this provision requires that the trial court determine whether the prior conviction would be a misdemeanor. If so, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

A person who was currently serving a sentence but was resentenced under subdivision (b) of 1170.18 "shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence," unless the court exercises its discretion to release the person from parole. (§ 1170.18, subd. (d).) A person subject to this parole term is placed under the supervision of the Department of Corrections and, if a court finds the parolee has violated parole, it may revoke parole and impose a term of custody no longer than the original sentence. (*Ibid.*; *People v. Morales* (2016) 63 Cal.4th 399, 409.)

By contrast, redesignation proceedings for a person who has "completed his or her sentence" are governed by subdivisions (f) and (g). Under section 1170.18, subdivision (f), eligible persons who have completed their sentence for an offense that Proposition 47 changed from a felony to a misdemeanor may file an application to have the felony conviction redesignated as a misdemeanor before the trial court that entered the judgment. (§ 1170.18, subd. (f); see *People v. Shabazz* (2015) 237 Cal.App.4th 303, 310-311.) Thereafter, "The court shall designate the felony offense or offenses as a misdemeanor." (§ 1170.18, subd. (g).)

A felony conviction that is recalled and resentenced under subdivision (b) or redesignated as a misdemeanor under subdivision (g) is considered a misdemeanor "for all purposes." (§ 1170.18, subd. (k).)

### B. MDO Recommitment Is Not Invalidated by the Proposition 47 Redesignation of the Initial MDO-Qualifying Felony Because the Qualifying Felony Is Not a Requirement of MDO Recommitment

MDO recommitments, such as appellant's, remain valid following the granting of Proposition 47 relief. MDO recommitment was designed to provide continued treatment for patients with unremitted mental disorders that continue to pose a threat to society. For this reason, a felony conviction is not a required element for MDO recommitment. Because a felony conviction is not an element of MDO recommitment, the redesignation of the qualifying felony to a misdemeanor does not invalidate the recommitment. Moreover, the intent and purpose of each act supports MDO recommitment even after the initially qualifying conviction has been reduced from a felony to a misdemeanor.

#### 1. A plain reading of the governing MDO provisions establishes that a felony conviction is not required for an MDO recommitment

Unlike initial commitments which require all six criteria set forth in section 2962, MDO recommitments only require a determination of the three criteria related to the committee's present mental disorder and dangerousness. The qualifying felony conviction, as this Court has acknowledged, is not an element of recommitment.

In *Lopez*, the Court held that an MDO cannot challenge the validity of the qualifying felony after the initial year of commitment has expired. (*Lopez*, *supra*, 50 Cal.4th at p. 1058.) The defendant in *Lopez* was committed as an MDO under section 2962 and his initial commitment was continued for an additional year. (*Id.* at p. 1060.) When the People filed a motion to recommit the defendant under section 2970, the defendant moved to dismiss the recommitment on grounds that his commitment offense did not qualify as an enumerated offense under section 2962 and that the lack

of this "foundational criterion" rendered his recommitment improper. (*Ibid.*)

The Court rejected the defendant's claim. (*Id.* at p. 1058.) In doing so, it closely analyzed the statutes governing initial MDO commitments (§ 2962) and recommitments (§§ 2970 and 2972). The Court noted that "the first three criteria outlined in section 2962 are capable of change over time, and must be established at each annual review of commitment." (*Lopez*, at p. 1062.) These "dynamic" criteria require that (1) the offender suffer from a severe mental disorder, (2) the disorder is not or cannot be kept in remission, and (3) the MDO poses a risk of danger to others. (*Ibid.*; § 2962, subd. (a).) The remaining criteria on the other hand are "static" or "foundational" and involve past events and conduct. (*Ibid.*) While the initial MDO commitment governed by section 2962 requires proof of all six criteria, this Court observed that recommitment governed by sections 2970 and 2972 only requires proof of the three dynamic criteria:

> Sections 2966, subdivision (c), section 2970, and section 2972, read individually and collectively, reveal that the Legislature intended an MDO to be permitted to challenge the static factors justifying his or her commitment only during the initial one-year period of treatment; once that period ends, the statutory language contemplates a challenge *based only upon the dynamic factors justifying continued treatment.*

(*Lopez*, *supra*, at p. 1065 (emphasis added); see also *People v. Cobb* (2010) 48 Cal.4th 243, 252 [the three static criteria "are relevant *only* to the initial certification"].)

This court also acknowledged that in sections 2960 and 2962 the Legislature referred to the MDO as a "prisoner" or "parolee" but in section 2972 referred to the MDO as "person" or patient." (*Lopez*, *supra*, at p. 1065.) "This linguistic shift suggests the Legislature acknowledged that the recommitment process outlined in section 2972 is distinct from the initial commitment process." (*Ibid.*)

By requiring proof of only the dynamic criteria to justify recommitment, the Legislature demonstrated its clear intent to continue to treat patients, not prisoners, who continue to suffer from severe mental disorders. In other words, although the MDO Act requires initial commitment for those who, among other things, have committed an enumerated felony that was caused by their severe mental illness, recommitment addresses a more specific concern: providing continued treatment for those already in the MDO system who received initial treatment but continue to suffer from ongoing mental health problems. An MDO is recommitted, not because of a qualifying offense, but because the initial treatment was insufficient in keeping the MDO's mental illness in remission.

### 2. Under a plain reading of Proposition 47, as recently interpreted in *Buycks* and *C.B.*, the redesignation of an MDO-qualifying felony does not invalidate an MDO recommitment

As the existence of the qualifying felony conviction has no bearing on an MDO's recommitment, so it must be that the redesignation of that felony conviction under Proposition 47 also has no bearing on an MDO's recommitment. This Court recently considered the effect of Proposition 47 upon collateral consequences of a former felony conviction in *People v. Buycks* (2018) 5 Cal.5th 857 and *In re C.B.* (2018) 6 Cal.5th 118, which are instructive here.

In *Buycks*, the Court addressed whether Proposition 47 requires the dismissal of various felony-based enhancements. (*Buycks*, *supra*, 5 Cal.5th 857.) The decision in *Buycks* involved three consolidated cases raising similar issues: *People v. Buycks* (S231765) [on-bail enhancement under section 12022.1, subdivision (b)]; *People v. Valenzuela* (S232900) [prison prior term under section 667.5, subdivision (b)]; and *In re Guiomar* (S238888) [failure to appear under section 1320.5]. (*Buycks*, at p. 871.)

The Court held that "Proposition 47's mandate that the resentenced or redesignated offense 'be considered a misdemeanor for all purposes' . . . permits defendants to challenge felony based . . . enhancements when the underlying felonies have been subsequently resentenced or redesignated as misdemeanors." (*Id.* at p. 872.) The Court concluded that Proposition 47 required the dismissal of the two-year sentencing enhancement Buycks had received for committing a felony offense while on bail for an earlier felony offense. (*Id.* at pp. 871, 896.) The Court also reasoned that Buycks's earlier felony offense was redesignated to a misdemeanor and the redesignation of that offense negated an element of the challenged enhancement. (*Id.* at p. 896.)

The Court reached a similar conclusion in the *Valenzuela* case. There, Valenzuela received a one-year sentence enhancement for having served a prior prison term under section 667.5, subdivision (b). (*Buycks*, at p. 871.) The felony underlying Valenzuela's prior-prison-term enhancement was subsequently redesignated to a misdemeanor. (*Ibid.*) The Court concluded that because the reclassified felony conviction underlying the enhancement negated an element required to support the enhancement, it should have been stricken. (*Id.* at p. 896.)

On the other hand, in *Guiomar*, this Court reached the opposite conclusion. There, the defendant received an eight-month enhancement under section 1320.5 for failing to appear on a felony charge, of which he was later convicted. (*Id.* at p. 871.) Following Guiomar's successful Proposition 47 petition, the felony conviction was reduced to a misdemeanor. (*Ibid.*) This Court observed that a failure-to-appear enhancement under section 1320.5 applies to persons "charged with or convicted of the commission of a felony." (§ 1320.5.) Noting that Proposition 47 did not affect Guiomar's status as a person charged with a felony, this Court held that the redesignated offense did not negate the

required elements of the enhancement; thus, the enhancement was properly imposed. (*Id.* at p. 896.)

This Court addressed a similar "collateral consequences" issue in its most recent case addressing Proposition 47. In *C.B.*, the defendants were minors declared wards of the court based on offenses that were felonies when committed, which required that the minors' DNA samples be submitted to the State. (*C.B.*, *supra*, 6 Cal.5th at p. 121.) After the passage of Proposition 47, the minors successfully petitioned for their felony offenses to be reclassified as misdemeanors. (*Id.* at pp. 121, 126.) On appeal, the minors argued that because their reclassified offenses no longer triggered an obligation to submit a DNA sample, the reclassification of their felony offenses to a misdemeanor "for all purposes" entitled them to have their DNA expunged from the DNA databank. (*Id.* at pp. 121, 125.)

This Court rejected their claim and held that the redesignation of the minors' offenses from a felony to a misdemeanor pursuant to section 1170.18 did not entitle them to have their DNA samples removed from the DNA databank. (*Id.* at p. 128.) This Court concluded that although the redesignation of the offenses meant that the minors no longer had a qualifying offense that required DNA *submission*, the redesignation did not affect the criteria for DNA *expungement*. (*Ibid*, italics added.) As this Court noted, "[o]n the face of the statute, eligibility for expungement is confined to these circumstances[:] . . . (1) charges were either not filed or were dismissed, (2) charges resulted in an acquittal, (3) any conviction was reversed and the case dismissed, or (4) the petitioner was found factually innocent." (*Id.* at pp. 128-129, citing § 299, subd. (b)(1) - (4).)

As this Court explained, because section 299 does not authorize expungement "on the ground that conduct previously deemed a felony is now punished only as a misdemeanor[,]" . . . "a showing of changed circumstances eliminating a duty to submit a sample is an insufficient basis

for expungement of a sample already submitted." (*Id.* at p. 128, italics omitted." This Court thus concluded that, "redesignation of a category of offenses can terminate the duty to submit samples. But redesignation is largely immaterial to *expungement*, which does not hinge on whether an offense would give rise to a duty to submit were it committed today. There is no inconsistency between treating a redesignated offense as a misdemeanor for all purposes and declining to expunge a previously submitted DNA sample." (*Id.* at p. 129, italics in original.) The Court also held that applying Proposition 47 to allow DNA expungement would not advance the enactment's purpose of reducing punishment for certain crimes because the retention of DNA samples is not punishment. (*Id.* at p. 131.)

Like the bail jumping enhancement in *Guiomar* and the DNA expungement statute in *C.B.*, the recommitment of an MDO remains valid because it is not a based upon the existence of a felony conviction. Indeed, recommitment under the MDO Act focuses on continuing treatment of persons who have already received initial MDO treatment while on parole but, nevertheless, continue to suffer from severe mental disorders. As the purpose of the MDO recommitment is to provide dangerous patients with continuing mental healthcare, recommitment does not require the existence of any felony conviction. (See *Cobb*, *supra*, 48 Cal.4th at p. 252 [the three static criteria "are relevant only to the initial certification"].) Thus, as the qualifying felony is not necessary to support MDO recommitment, under *Buycks* and *C.B.*, the redesignation of the initially qualifying felony to a misdemeanor does not require the dismissal of the MDO's recommitment.

Lower court authority is in accord. In *Goodrich*, which the superior court relied on in this case, the Fourth District Court of Appeal addressed the precise issue here: whether the redesignation of a qualifying offense to a misdemeanor under Proposition 47 precludes recommitment as an MDO. (*Goodrich*, *supra*, 7 Cal.App.5th at pp. 705-706.) The defendant in

*Goodrich* was convicted of felony grand theft, initially committed as an MDO in 2008, repeatedly recommitted every year thereafter, and, in 2015, successfully petitioned to redesignate his qualifying felony conviction to a misdemeanor under section 1170.18, subdivision (a). (*Id.* at p. 705.) The *Goodrich* court compared the requisite criteria for the initial MDO commitment to that of recommitment. Unlike in an initial commitment proceeding, "there is no requirement that the People present evidence to establish the existence of the three "static" criteria . . . at a recommitment proceeding." (*Id.* at p. 711.) Thus, because the defendant's foundational felony was not an element of his recommitment, "[his] current commitment is not predicated upon his felony conviction rather, it is predicated on his current mental state and dangerousness." (*Ibid.*) Accordingly, the *Goodrich* court rejected the defendant's argument that, in light of the redesignation of his felony theft conviction, his 2015 recommitment was improper. (*Goodrich*, *supra*, 7 Cal.App.5th at pp. 709-710.)

Nonetheless, appellant maintains that because his qualifying felony was reduced, it could no longer support his recommitment, likening his circumstance to cases in which an SVP's qualifying felony was invalidated. (OBM 32.) The cases appellant relies upon generally stand for the proposition that a qualifying offense that has been subsequently deemed to be invalid at the outset cannot support a civil committee's commitment or recommitment. That situation is not comparable to an MDO recommittee because SVP commitments involve a materially different commitment scheme. An SVP is committed once, for an indeterminate period of time, and the qualifying felony is required for this commitment. By contrast, an MDO is initially committed for a period of one year and a qualifying offense is required to support the initial commitment; however, an MDO may be recommitted annually and the recommitment does not require a felony conviction.

In *In re Smith* (2008) 42 Cal.4th 1251, 1254 (*Smith*), this Court held that the defendant's SVP commitment was unauthorized after his qualifying felony conviction was reversed on appeal. There, after the defendant's qualifying sexually violent offense was reversed, the People chose not to retry him, but proceeded with their pending SVP petition against the defendant. (*Id.* at pp. 1255-1256.) Unlike MDO recommitment, SVP commitment requires a qualifying felony conviction. The *Smith* court held that because a qualifying offense is required for commitment as an SVP, the reversal of the qualifying offense invalidates any pending commitment. (*Id.* at pp. 1268-1270.) In the instant case, on the other hand, appellant's MDO *recommitment* does not require a qualifying felony conviction. As the SVP commitment requires a felony conviction but MDO *recommitment* does not, the *Smith* case is materially distinguishable.

Similarly, in *In re Franklin* (2008) 169 Cal.App.4th 386, 389 (*Franklin*), the defendant's felony conviction was reversed for insufficient evidence. Because the evidentiary failure pertained only to the element that made the crime a felony instead of a misdemeanor (the value of the property), the Court of Appeal reduced the conviction to a lesser included misdemeanor offense, and the defendant was released. (*Ibid.*) The offender was subsequently committed as an SVP based on the conviction that already had been reversed and was classified as a misdemeanor. (*Id.* at pp. 389-390, 392.) As the court explained, because the defendant was a misdemeanant *at the time the prosecutor filed the SVP petition* and because the defendant was no longer in custody on a felony conviction at the time the prosecutor filed the SVP petition, "the absence of the statutory condition precedent to lawful SVP civil commitment proceedings against him is a fatal flaw." (*Id.* at p. 392.) Like in *Smith*, because Franklin's SVP commitment required a qualifying felony, it could not be based on a

misdemeanor offense. Appellant's MDO recommitment has no such requirement.

These cases only recognized that the statutory provisions of SVP commitment require a qualifying felony offense. Appellant's reliance on these cases is misplaced because unlike under the MDO Act, there is only one initial and indeterminate commitment period under the SVP Act. As explained above, this distinction—that the SVP Act does not provide for any recommitment but the MDO Act does—is material. MDO recommitment, unlike SVP initial commitment, does not require a felony conviction. Because this is so, the reduction of a qualifying felony offense to a misdemeanor must affect SVP commitment but does not affect MDO recommitment. Essentially, *Smith* and *Franklin* echo the principle applied in *Buycks* and weaken rather than support appellant's claim. Because the SVPs' qualifying offenses were an element of their commitment and, by virtue of the reversal of this offense, were legally invalid to support their commitment, their commitments were properly dismissed. By contrast, in appellant's case, his qualifying felony, though reduced to a misdemeanor, had no effect on his already-completed initial commitment, and was not an element of his recommitment.

### 3. The release of redesignated MDOs, who by definition pose a "substantial danger of physical harm to others," would subvert the purpose of Proposition 47 which is to reduce penalties for nonserious and nonviolent offenders

To the extent there is any ambiguity about the operation of the plain terms of the MDO Act and Proposition 47 in this context, the purpose and intent of each enactment shows that an MDO recommitment remains valid even after a Proposition 47 reduction of the initially qualifying felony.

First, it bears noting that section 2962 does not actually require that the MDO be convicted of a "felony." Rather, the section provides that an

individual can be committed as an MDO if that person was a prisoner, committed an enumerated offense, was sentenced to a determinate sentence under section 1170, and was placed on parole. (See § 2962, subds. (a)(1) and (b) [requiring that an MDO have a severe mental disorder that caused or was an aggravating factor in "the commission of a crime for which the prisoner was sentenced to prison"].) Section 2962 enumerates a number of required qualifying felony offenses, but it does not refer to the enumerated offenses as a "felonies."[5] Section 2962 also states that an MDO-qualifying offense can be any crime in which the prisoner used threats, force, violence, or caused great bodily injury. (§ 2962, subds. (e)(2)(P) & (Q).) Notably, this catchall qualifying offense provisions under which appellant was committed, subsection (P), does not specify that the offense must be a felony. Rather, the required offense is generally described as a "crime." (§ 2962, subd. (e)(2)(P).) It is true that only a felony can result in a prison sentence. (§ 17, subd. (a).) Yet the drafters chose to refer to the qualifying offense as a crime that resulted in a prison sentence, rather than a felony. By its express terms, the provision defines a qualifying offense not by its classification (i.e. felony or misdemeanor), but by its nature (i.e. use of force or violence, resulting prison sentence). This suggests that the Legislature did not consider the particular classification of the offense to be of special significance, even as to the initial MDO commitment.

Second, MDOs do not fit within the class of offenders the voters intended Proposition 47 to relieve. The express purpose of Proposition 47 is to "reduce the number of nonviolent offenders in state prisons" and reduce penalties for certain nonserious and nonviolent offenders. (*People*

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[5] Subdivision (e)(2)(M) of section 2962 is the only provision that defines its qualifying offense as "[a]ny felony in which the defendant used a firearm[.]"

*v. Gonzales* (2017) 2 Cal.5th 858, 569- 870.) Proposition 47 was intended to benefit offenders who are "not likely to pose a danger of physical harm to others." (*Goodrich, supra*, 7 Cal.App.5th at p. 711.) By stark contrast, an MDO is defined as a person who not only has a severe mental disorder, but who continues to represent a "substantial danger of physical harm" to others.[6] The electorate intended for Proposition 47 to release certain nondangerous offenders from prison; it did not intend that Proposition 47 would release from a state hospital mentally disordered patients who pose a "substantial" risk of harm to others.

Third, and finally, MDO commitment is not a punitive measure or collateral consequence warranting ameliorative relief under Proposition 47. Both this Court and the United States Supreme Court have consistently acknowledged the civil and nonpunitive nature of MDO commitments. Pointing to the legislative findings expressed in section 2960, which identifies the goals of the MDO Act as treating offenders and protecting the public, this Court has specifically found that the MDO Act is not punitive or penal in nature. (*In re Qwai* (2004) 32 Cal.4th 1, 9; *Lopez, supra*, 50

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[6] Appellant argues that by virtue of the fact that his felony conviction was successfully redesignated as a misdemeanor, his "risk of danger was already adjudicated and any discussion about potential dangerousness for purposes of commitment under the MDO Act was moot" and violated principles of double jeopardy. (OBM 73-74.) Appellant is mistaken that his redesignation included a finding of nondangerousness. As appellant had completed serving his sentence on his felony offense, he filed his petition under section 1170.18, subdivision (f), which, unlike subdivision (a) governing petitioners who are "currently serving" a sentence, does not require a court's determination regarding the petitioner's "unreasonabl[e] risk of danger[.]" (§ 1170.18, subds. (a), (b), and (f).) Contrary to appellant's claim, his felony sentence was *redesignated*, not recalled and resentenced. Therefore, in granting appellant's subdivision (f) petition, the lower court did not make any finding as to his dangerousness. And in any event, the double jeopardy doctrine does not apply to civil commitments. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1195.)

Cal.4th at p. 1061; *People v. Blackburn* (2015) 61 Cal.4th 1113, 1122.) "The MDO Act is not penal or punitive, but is instead designed to 'protect the public' from offenders with severe mental illness and provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission." (*Lopez*, *supra*, at 50 Cal.4th at p. 1061, internal citations omitted.)

United States Supreme Court precedent is in accord. In *Addington v. Texas* (1979) 441 U.S. 418, the Court evaluated which standard of proof was constitutionally adequate for civil commitment cases, concluding that criminal standards of proof were not appropriate. (*Id.* at p. 424.) In reaching that conclusion, the Court stated that a "civil commitment proceeding can in no sense be equated to a criminal prosecution" because civil proceedings are not punitive. (*Id.* at p. 428.) Whereas the ultimate question in criminal proceedings centers on the defendant's guilt and subsequent punishment, the Court explained, civil commitment proceedings focus on "[w]hether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy[.]" (*Id.* at pp. 428-429.) In *Allen v. Illinois* (1986) 478 U.S. 364, the Court similarly decided that Illinois's sexually violent predator statute was not a criminal statute but was civil in nature. The Court again based its holding on the nonpunitive and treatment-based nature of the commitment scheme, stating that the civil commitment scheme was not punitive in either its purpose or effect. (*Id.* at pp. 369-371.)

This Court has recognized that Proposition 47's "misdemeanor for all purposes" provision extends the Act's ameliorative effects not only to the felony conviction that is redesignated but also to any "collateral consequences." (*Buycks*, *supra*, 5 Cal.5th at p. 883.) A collateral consequence for purposes of Proposition 47 entails "increased punishment"

that is the result of the conviction at issue. (*Id.* at p. 878.) The *Buycks* decision repeatedly highlights this punishment-alleviating purpose of Proposition 47. (See, e.g., *Id.* at p. 887.) Because MDO commitment is not a punishment (*Lopez*, *supra*, 50 Cal.4th at p. 1061), application of Proposition 47 so as to invalidate appellant's recommitment would frustrate the Legislature's and electorate's intent.

**4. That NGIs were expressly afforded Proposition 47 relief while MDOs were not demonstrates the Legislature's intent to exclude MDO recommitments from dismissal under Proposition 47**

Recent legislative amendments permitting the application of Proposition 47 to NGIs further supports the legislative intent to bar such application from MDO recommitments. Appellant claims that because the Legislature carved out an exception providing NGIs Proposition 47 relief, "it is reasonable to believe commitments in general are collateral effects of Proposition 47, including MDO commitments." (OBM 47.) But really the opposite interpretation is more logical.

In 2017, the Legislature amended section 1170.18 to add subdivision (p), which states as follows:

> A person who is committed to a state hospital after being found not guilty by reason of insanity pursuant to Section 1026 may petition the court to have his or her maximum term of commitment, as established by Section 1026.5, reduced to the length it would have been had the act that added this section been in effect at the time of the original determination. Both of the following conditions are required for the maximum term of commitment to be reduced.

(§ 1170.18, subd. (p), amended by Stats.2017, c. 17 (A.B.103), § 26, eff. June 27, 2017.) In adding the subdivision (p) exception, the Legislature expressly stated that the amendment was a response to *People v. Dobson* (2016) 245 Cal.App.4th 310, 316-319, which held that NGIs currently

committed to a state hospital could not be resentenced under section 1170.126 (Proposition 36), because that provision—like Proposition 47's parallel provision—applied by its plain terms only to those in prison. (Legis. Counsel's Digest, Assem. Bill. No. 103, Stats. 2017, c. 17 (2017-2018 Reg. Sess.), Summary Dig.)

The Legislature's inclusion of the NGI exception recognized a fundamental characteristic of NGIs that is not applicable to MDOs. Unlike MDOs, a person found not guilty by reason of insanity under section 1026 is immediately ordered committed to the Department of State Hospitals. (§ 1026, subd. (a).) The NGI finding "directly exposes" the person to an extended term of commitment (*People v. Lomboy* (1981) 116 Cal.App.3d 67, 73), equivalent to the "longest term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted." (§ 1026.5, subd. (a)(1).) Because NGI's are never imprisoned, the Legislature's textual remedy was required to make the provisions of Proposition 47 applicable to them by way of calculating their terms of commitment. The same textual problem does not apply to MDOs, who are initially sentenced to prison and whose recommitments are not dependent on the initially qualifying felony conviction.

Moreover, even if appellant were right that the Legislature's NGI amendment reflected a desire to bring a similar class of civil committees within the scope of Proposition 47, the exclusion of MDOs must be taken as an indication that the Legislature intended them *not* to be covered. The long-established rule of construction, *expressio unius est exclusio alterius*, holds that "where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403; see also *People v. Oates* (2004) 32 Cal.4th 1048.) This maxim is based on the principle that if the Legislature intended to include a particular group or class within its ambit of legislation, it would

have referred to the group explicitly. (See *People v. Municipal Court (Runyan)* (1978) 20 Cal.3d 523, 551.)

It must be presumed then, that when enacting subdivision (p), the Legislature was aware of statutes, existing related laws, and judicial decisions, and "intended to maintain a consistent body or rules." (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199; *People v. Harrison* (1989) 48 Cal.3d 321, 329.) As that is so, it must also be presumed that the Legislature was aware of the other civil commitment schemes, including MDO recommitments, when it provided the exception for NGIs in subdivision (p). The Legislature was also aware that a number of judicial decisions have discussed and compared the two groups. (See *People v. McKee* (2010) 47 Cal.4th 1172.) By adding subdivision (p) of section 1170.18, the Legislature made clear its intention to include NGIs within Proposition 47 and not to provide a similar provision for MDOs.

## II. APPELLANT'S RECOMMITMENT DOES NOT VIOLATE EQUAL PROTECTION BECAUSE RECOMMITTED MDOS ARE NOT SIMILARLY SITUATED TO SVPS WHOSE COMMITMENTS ARE BASED ON A QUALIFYING OFFENSE; IN ANY EVENT, THE STATE'S COMPELLING INTEREST JUSTIFIES ANY DISPARATE TREATMENT

Appellant argues that he has an equal protection right to have his recommitment dismissed pursuant to Proposition 47 because he is similarly situated to SVPs who have had their commitments dismissed under various circumstances. (OBM 48-63.) In support of his claim, appellant cites a few cases involving unique circumstances which he claims establish that the reclassification of a felony requires the dismissal of SVP commitment. (OBM 54-58.) However, the cases he relies upon are factually and legally inapposite; thus, appellant fails to establish that he is similarly situated to the SVPs in those cases. Nevertheless, any disparate treatment was justified. Therefore, appellant's equal protection claim should be rejected.

### A. An Equal Protection Challenge Is Premised on the Principle That Any State Classification or Law Must Treat Similar Groups Similarly

The concept of equal protection recognizes that a state-adopted law or classification must treat similarly situated persons equally. (*People v. Brown* (2012) 54 Cal.4th 314, 328.) The California and the United States Supreme Courts "have used the equal protection clause to police civil commitment statutes to ensure that a particular group of civil committees is not unfairly or arbitrarily subjected to greater burdens." (*McKee*, 47 Cal.4th at p. 1199.)

"'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.'" (*McKee*, *supra*, 47 Cal.4th at p. 1202, quoting *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 252.) "This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" (*Cooley*, *supra*, 29 Cal.4th at p. 252, quoting *People v. Gibson* (1988) 204 Cal.App.3d 1425.) If similarly situated groups are treated differently, the second step is for the court to determine whether such disparate treatment is justified by applying the applicable level of scrutiny. (*People v. Noyan* (2014) 232 Cal.App.4th 657, 666.) The applicable scrutiny level depends "upon the nature of the distinctions" the law establishes. (*People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1269.) Any classification that impinges on the exercise of a fundamental right is subject to strict scrutiny and will be upheld only if it is necessary to further a compelling state interest. (*Ibid.*)

### B. MDO Recommittees Like Appellant Are Not Similarly Situated to SVP Committees Whose Qualifying Convictions Have Been Vacated or Reduced

In support of his claim, appellant relies on the holdings in *Smith*, *Franklin*, and *In re Bevill* (1968) 68 Cal.2d 854, which he argues establish that an SVP's commitment must be dismissed if the qualifying felony is reversed. (OBM 48.) MDO recommittees like appellant, however, are not similarly situated to the SVPs in those cases, since the dismissal or reduction of their qualifying convictions eliminated an element of their current commitment, unlike MDO recommittees whose initially qualifying convictions were relevant only to the initial commitment period and not to their recommitment.

In *Smith*, after SVP proceedings were initiated against the defendant, the defendant's qualifying sexually violent offense was reversed, and the People chose not to retry him on the offense. (*Smith*, *supra*, 42 Cal.4th at p. 1255.) This Court held that, under these circumstances, where the defendant's qualifying offense had been reversed and he was not retried or reconvicted, the pending SVP petition must be dismissed. (*Id.* at p. 1269.) Similarly, in *Bevill*, this Court held that a mentally disordered sex offender—the precursor to the modern SVP—had to be discharged after the statute the defendant's qualifying offense was based upon was declared unconstitutional. (*Id.* at p. 863.)

In *Franklin*, the defendant was committed as an SVP and was ordered to a two-year initial commitment based on two qualifying rape convictions, amongst other offenses. (*Franklin*, *supra*, 169 Cal.App.4th at p. 388.)[7] He

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[7] As originally enacted, the SVP Act provided for a two-year initial commitment subject to subsequent petitions for continued committed. (Former § 6604.) In November 2006, Proposition 83 was enacted which (continued...)

was subsequently recommitted for an additional two-year term. (*Ibid.*) During his recommitment, the SVP was convicted of another felony offense, intentional damage to jail property, and sentenced to an indeterminate prison term under the Three Strikes law. (*Ibid.*) The People did not seek to recommit the SVP when his recommitment term expired. (*Id.* at p. 389.) Thereafter, defendant's conviction in the jail property case was reversed and the matter was remanded for resentencing on the offense as a misdemeanor and subsequently released from custody. (*Id.* at pp. 389-390.) After the People filed a new SVP petition seeking commitment, the defendant petitioned for writ of habeas corpus seeking the dismissal of the petition. (*Id.* at pp. 390-391.)

The Court of Appeal held that because the defendant was no longer an SVP at the time the new petition was filed, the People could not seek recommitment, but rather had to seek a new initial commitment. (*Id.* at p. 390.) As the court further observed, an SVP petition could only be filed against a person if that person was in state custody serving a determinate prison sentence or whose parole had been revoked. (*Id.* at p. 392.) Because the defendant was a misdemeanant and was not serving a determinate prison sentence at the time the new SVP petition was filed, the petition was legally invalid. (*Ibid.*)

All of these cases involved circumstances in which the SVPs' present commitment depended on a qualifying felony conviction and thus was not supportable once the conviction had been vacated or reduced. In particular, as the Court of Appeal below put it, *Franklin* merely held that "an initial petition for commitment as an SVP must establish that the individual is

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(...continued)
provided for indeterminate commitment terms for SVPs. (*People v. McDonald* (2013) 214 Cal.App.4th 1367, 1374.)

currently incarcerated in prison for a felony offense." (Slip opn. at p. 3.) The *Franklin* court did not hold that the reduction of a qualifying felony offense to a misdemeanor requires a dismissal of SVP commitment. Nor do the SVP cases appellant relies upon involve a similar circumstance to appellant's, in which civil recommitment no longer depends on the presence of the initially qualifying felony conviction but is based only on continuing treatment of a formerly incarcerated civil committee. As SVP commitments require a qualifying felony conviction but MDO recommitment does not, the two groups are not similarly situated.

The defendants in *Smith* amd *Bevill* share another significant characteristic that differentiates them from recommitted MDOs: their initial commitment was never valid. As the First District Court of Appeal recently held: "Of course, the distinguishing factor in all of these cases is that the initial commitment was found to be legally improper from the outset. Thus, it could not be viewed as supplying the requisite foundation for subsequent recommitments. Here, in contrast, no one disputes that [the defendant's] initial MDO designation was legally sound at the time it occurred." (*People v. Pipkin* (2018) 27 Cal.App.5th 1146 [238 Cal.Rptr.3d 723, 727].) Here, the redesignation of appellant's qualifying felony to a misdemeanor under Proposition 47 did not invalidate his conviction; it merely reclassified it. Accordingly, because Proposition 47 did not change the validity of appellant's previously-served initial commitment, he is not similarly situated to those committees whose initial commitments were held to be invalid.

### C. The State Has a Compelling Interesting in Preventing the Immediate Release of Recommitted MDOs Whose Qualifying Offense Does Not Dictate Their Commitment and Whose Unremitted Severe Mental Illnesses Render Them a Risk to the Public

Even if this Court determines that a recommitted MDO is similarly situated to the groups discussed above, the next step is to determine whether the disparate treatment survives a specific level of scrutiny. Here, given the fundamental liberty interests at stake, any classification must survive strict scrutiny. (*McKee*, *supra*, 47 Cal.4th at p. 1210 ["...fundamental distinctions between classes of individuals subject to civil commitment are subject to strict scrutiny..."]; *People v. Green* (2000) 79 Cal.App.4th 921, 924 ["Strict scrutiny is the appropriate standard against which to measure claims of disparate treatment in civil commitment"].) Which is to say, "the state has burden of establishing it has a compelling interest that justifies the law and the distinctions, or disparate treatment, made by that law are necessary to further its purpose." (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1335 (*McKee II*).)

Assuming appellant is similarly situated to the defendants in *Bevill*, *Smith*, and *Franklin*, the State has a compelling interest in its different treatment of recommitted MDOs and SVPs. By its statutory definition, SVPs are persons who have committed a sexually violent offense, have a diagnosed mental disorder, and, due to their disorder, pose a danger to the public. (§ 6600, subd. (a).) An SVP is committed for an indeterminate term and may be released from commitment upon a finding that the committee does not pose a risk of danger to the public and is not likely to commit a sexually violent offense. (§§ 6604, 6605.) SVPs are thus committed for a single indeterminate term that is based upon a qualifying sexually violent felony.

Notably, the nature of an SVP's qualifying offense—a sexually violent offense—has been determined to be a significant component in evaluating their recidivism, a factor that justified the disparate treatment of SVPs as compared to MDOs and NGIs in *McKee II*. There, the Court of Appeal recognized substantial expert testimony establishing that sex offenders reoffended at a higher rate than certain other offenders, including homicide offenders, and also had a significantly higher rate of sexual reoffense than nonsex offenders. (*McKee*, *supra*, 207 Cal.App.4th at p. 1340.) An SVP's qualifying offense then not only directly supports their indeterminate commitment but it justifies the length of this commitment by establishing that SVPs are more likely to reoffend due to the nature of their qualifying offense.

On the other hand, recommitted MDOs are committed for one-year terms that may be continued annually, and their recommitment does not require a supporting felony commitment. Nor is MDO commitment in general premised on a particular danger of recidivism for certain types of crimes. Rather, MDO recommitment focuses on treating patients whose severe mental disorder render them a danger to the public. Unlike for SVPs, an MDO's qualifying offense does not subject the MDO to indeterminate commitment.

Based on the differences in nature between SVPs and MDOs, the Legislature could have determined that the reversal or reduction of an SVP's qualifying offense is of greater and more direct relevance to the SVP's continued civil commitment than is the reversal or reduction of an MDO recommittee's initially qualifying felony conviction. Recommitted MDOs whose recommitment is based on their mental state and continuing dangerousness, not their qualifying offense, and who are only committed for one-year terms, are not subject to an indeterminate period of commitment due to the nature of their qualifying offense and the

heightened danger of recidivism based on that offense. Thus, the State has a compelling interest in treating the two groups of civil committees slightly differently in terms of structuring the length of their commitments, resulting in a concomitant difference in the effect of the reduction of the initially qualifying offense.

As appellant's recommitment comports with the legislative intent of the MDO Act and Proposition 47, and does not violate equal protection principles, his continued recommitment following the redesignation of his qualifying felony to a misdemeanor also does not violate due process principles. (See OBM 64-71; *Hale v. Morgan* (1978) 22 Cal.3d 388, 398 [an enactment does not violate due process so long as it is "procedurally fair and reasonably related to a proper legislative goal"].)

## CONCLUSION

For the reasons stated above, the Court of Appeal's decision should be affirmed.

Dated: December 11, 2018

Respectfully submitted,

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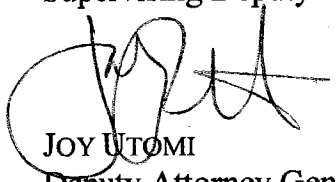

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## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 9,626 words.

Dated: December 11, 2018

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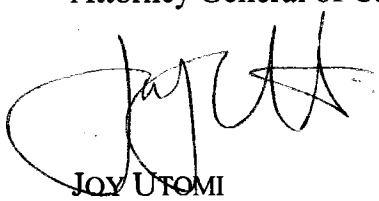

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