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

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

PENAL CODE

WELFARE & INSTITUTIONS CODE

COURT RULES

CALIFORNIA RULES OF COURT

OTHER AUTHORITIES

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OPENING BRIEF ON THE MERITS

INTRODUCTION

Petitioner's claim is that once his felony theft conviction was reduced to a misdemeanor theft pursuant to his Proposition 47 petition, he could not lawfully be recommitted as an MDO ("Mentally Disordered Offender") because there no longer existed a foundational felony offense under MDO law, and without a foundational felony offense, the state could no more recommit him to MDO incarceration than it could commit him as an MDO in the first place. To recommit Petitioner as an MDO without a

foundational felony offense was error for three reasons. First, it violated the terms of the MDO statutes, which require a foundational felony offense to support MDO incarceration. Second it violated the subsequent mandate of Penal Code,[1] section 1170.18, subdivision (k), that a former felony designated as a misdemeanor under Proposition 47 "shall be considered a misdemeanor for all purposes...." And third, it violated Petitioner's right to equal protection relative to similarly situated Sexually Violated Predator ("SVP") Act committees, for whom continued commitment is precluded when their foundational offense is invalidated after the initial commitment. (See Welf. & Inst Code, § 6600, et seq.)

Respondent advances several lines of argument to support its contrary interpretation of the MDO statutes. Each of these arguments is based on Respondent's central premise that the omission of the foundational felony offense from the recommitment criteria listed in section 2972 signals the Legislature's intent that the existence of such offense is irrelevant to recommitment, and that instead recommitment requires only the diagnosis of a dangerous and severe mental disorder.

This central premise of Respondent's fails for two reasons. First, section 2972's omission of a reference to the foundational felony offense

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

signals only the Legislature's assumption that any question regarding the existence of a foundational felony would already have been adjudicated adversely to the defendant at the initial commitment proceeding under section 2962, or in a section 2966 petitioner proceeding during the first year of commitment. Ordinarily, this assumption would be correct, and Petitioner concedes that at a recommitment proceeding the defendant may not question the existence of a foundational offense with an argument he or she made, or could have made, previously. Petitioner acknowledges this court so held in *Lopez v. Superior Court* (2010) 50 Cal.4th 1055 ("*Lopez*"). However, the MDO statute lacks any indicia the Legislature intended to authorize recommitment where, ***due to a subsequent change in the law***, there no longer exists a foundational felony that would permit commitment in the first place.

The second defect in Respondent's central premise is that it treats the commission of a foundational felony as little more than a formality, unrelated to dangerousness. On the fundamental question of whether a defendant is dangerous, Respondent urges sole reliance on a subjective diagnosis predicting future acts. But plainly the Legislature did not share this view—because it chose to impose both an objective and subjective requirement for MDO commitment. The objective requirement of the MDO Act is the commission of an enumerated foundational felony; the subjective requirement is the diagnosis of a severe mental disorder

indicating dangerousness. This reflected the Legislature's judgment that while a mental health professional's diagnosis is one necessary predictor of future dangerousness, it is not a solely sufficient basis for MDO commitment. The Legislature found the objective fact of a foundational felony was also necessary to support MDO commitment. This distinguishes commitment under the MDO Act (§ 2960, et seq.) from commitments under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000, et seq.), in which a crime is not required but the Legislature added additional safeguards including complex procedures, a conservatorship, and at least two doctors diagnosing the conservatee.

More recently, the electorate in enacting Proposition 47 implemented an updated view regarding the seriousness of Petitioner's theft offense, reducing it to a misdemeanor. This judgment by the electorate must now be engrafted onto the MDO statutory scheme. With Petitioner's theft no longer a felony, the MDO law's objective requirement of a foundational offense can no longer be met.

Respondent's contention that a predictive diagnosis alone supports MDO recommitment is reminiscent of Philip K. Dick's *The Minority Report*, in which the state's "PreCrime" unit incarcerated citizens based on a prediction they would commit a crime in the future. (Dick, The Minority Report (Pantheon Books, 2002) pp. 47, 93-94.) There is no evidence the Legislature intended to mimic this dystopian practice by permitting MDO

recommitment of a person who has not committed a foundational felony offense. Respondent's argument that the subjective science of predicting future behavior is an ample sole basis to confine citizens is contrary to the Legislative requirement of a foundational felony offense, and Respondent's argument should be rejected by this court.

Further, even if there were merit in Respondent's claim the Legislature was unconcerned with the existence of a foundational felony at the time of recommitment, the Legislature that enacted section 2972 was not the last word on this subject. The electorate's enactment of Proposition 47 expressly mandated that any former felony designated a misdemeanor pursuant to section 1170.18 be treated as a misdemeanor "for all purposes." (§ 1170.18, subd. (k).) Plainly, the prospective MDO recommitment of a person whose foundational felony has been reduced to a misdemeanor violates this mandate of Proposition 47.

Finally, Respondent's argument as to equal protection fails because this court has already held that MDO and SVP committees are similarly situated for equal protection purposes, and because the purported dissimilarity Respondent relies on, i.e., that an SVP defendant continues his or her initial commitment while an MDO defendant is ***re***committed, is an empty procedural distinction having no bearing on whether Petitioner's continued MDO incarceration violates equal protection.

ARGUMENT

I.

AN ORDER PURSUANT TO PROPOSITION 47 REDESIGNATING THE FOUNDATIONAL FELONY UNDERLYING A COMMITMENT UNDER THE MDO ACT TO A MISDEMEANOR INVALIDATES ALL SUBSEQUENT ORDERS FOR COMMITMENT OR RECOMMITMENT UNDER THE MDO ACT.

Petitioner maintains that when the foundational felony that formed the basis for his commitment under the MDO Act was redesignated a misdemeanor "for all purposes" under Proposition 47, all subsequent orders for commitment or recommitment are invalid. In arguing against Petitioner, Respondent misconstrues the reasoning and holdings in *In re C.B.* (2018) 6 Cal.5th 118 and *People v. Buycks* (2018) 5 Cal.5th 857. Also, Respondent inaccurately claims that when the court redesignated Petitioner's foundational felony to a misdemeanor the nature of the crime remains the same. However, Proposition 47 represents the electorate's reassessment of the nature and seriousness of certain offense, including Petitioner's theft. Finally, Respondent reads sections 2970 and 2972—the statutes regarding recommitment under the MDO Act—as though they were completely separate from the MDO Act and argues recommitment can be based on subjective factors alone. However, the purpose of the MDO Act is to commit people to address their mental disorders that are related to a foundational felony. Thus, without the foundational felony any commitment or recommitment under the MDO Act is invalid.

A. Respondent Misconstrues *In re C.B.* and The Consolidated Case *People v. Guiomar* From *People v. Buycks* To Inaccurately Describe Collateral Consequences Of Proposition 47 As Limited, When A Felony Conviction Is Redesignated A Misdemeanor "For All Purposes."

Respondent cites two of this Court's recent cases—*In re C.B.* and *People v. Buycks*—to attempt to support its argument but does not consider their decisions as a whole. (Respondent's Answer Brief on the Merits ("ABM") pp. 24-26; *In re C.B.*, *supra*, 6 Cal.5th 118 and *People v. Buycks*, *supra*, 5 Cal.5th 857.) However, when read in full, both cases support Petitioner's arguments.

i. The Holding In *In re C.B.* Was Limited To Section 299, Which Provided Limited Circumstances When Expungements Can Be Made, Making It Distinguishable From The Present Case.

Respondent cites *In re C.B.* in which this Court found the criteria for expungements of DNA samples was not met for defendants C.B. and C.H. (ABM p. 26; *In re C.B.*, *supra*, 6 Cal.5th at p. 135.) In *In re C.B.*, this Court determined that previous submissions to the database of DNA samples and genetic profiles collected from juvenile offenders whose felonies were reclassified as misdemeanors under Proposition 47 could not be expunged. (*In re C.B.*, at pp. 121-122.) Respondent used this case in its argument that Proposition 47 does not reach collateral consequences. (ABM pp. 24-30.) However, Respondent's use of *In re C.B.* to support its argument fails.

The only reason the expungements were not required after the redesignation had nothing to do with the effect of Proposition 47. Rather, it was the specific statute, section 299, which governs retention of samples after they have been submitted and limits expungements to very specific situations. (*In re C.B., supra*, 6 Cal.5th at pp. 126, 128.) Subdivision (a) of section 299 allows for expungement of DNA samples from the databank program if the person requesting expungement meets three conditions: "(1) no past or present offense or pending charge which qualifies that person for inclusion," (2) no alternative legal basis for retention, and (3) compliance with 'the procedures set forth in subdivision (b).'" (*Ibid.*, quoting § 299, subd. (a).)

As to the first criterion, this Court specifically indicated that the appellants in *In re C.B.* met the first condition; Proposition 47 relief meant they no longer had a "past or present offense ... which qualifies [them] for inclusion." (*In re C.B.*, *supra*, 6 Cal.5th at p. 126.) The criterion regarding the foundational felony did not preclude expungement, as Respondent claims. Instead, this Court's reasoning supports Petitioner's claim that the court's order redesignating the felony a misdemeanor means there no longer is a felony. This is an example of a collateral consequence of Proposition 47 relief. *In re C.B.* clearly bolsters Petitioner's contention that the redesignation of a foundational felony to a misdemeanor is "for all purposes," includes collateral consequences beyond imprisonment.

While the appellants in *C.B.* met the first two conditions, their decision turned on the fact that they did not meet the third condition. (*In re C.B.*, *supra*, 6 Cal.5th at p. 126.) The third condition required written requests and also a lack of charges, acquittal, appellate reversal or a finding of factual innocence." (*Id.* at pp. 126, 128.) On its face, section 299 limits expungements to those circumstances, and "[n]othing in section 299 authorizes expungement on the ground that conduct previously deemed a felony is now punished only as a misdemeanor." (*Id.* at p. 128.) As this Court explained: "[i]n an important particular, the current scheme operates as it has since the databank's inception; a showing of changed circumstances eliminating a duty to *submit* a sample is an insufficient basis for *expungement* of a sample already submitted." (*Ibid.*) In other words, section 299 was particularly written to specify only limited circumstances in which expungement could occur. (*Ibid.*)

Not only is the holding in *In re C.B.* limited to cases involving expungement requests under section 299, it is limited to the particular facts and arguments of that case. (*In re C.B.*, *supra,* 6 Cal.4th at pp. 128, 135.) The limited application of this case is empathized in Justice Liu's concurrence: "Our holdings today ... are limited to the claims presented in these cases. As noted, neither C.B. nor C.H. pressed any claim that the state's retention of his DNA samples implicates a constitutionally protected privacy interest." (*Id.* at p. 135 (conc. opn. of Liu, J.).)

Moreover, this Court in *In re C.B.* recognized the premise that Proposition 47 relief included expungements as potential collateral consequences included in Proposition 47 relief. But for C.B. and C.H. not fully meeting the third requirement in section 299, this Court noted they would have satisfied the conditions necessary to expunge their DNA after redesignation under Proposition 47. (See *In re C.B.*, *supra*, 6 Cal.5th at p. 126.) The statutory scheme regarding DNA expungement differs from the MDO Act in that there is no comparable criteria in the MDO Act that would hinder the effects of Proposition 47 like section 299 did in *In re C.B.* Therefore, finding that commitments and recommitments under the MDO Act are collateral consequences of a Proposition 47 redesignation would not be counter to the holding in *In re C.B.*

ii. The Bail-Jumping Enhancement In *People v. Guiomar* Is Distinguishable Because That Enhancement Requires Only A Felony Charges, Not A Felony Conviction.

In its argument regarding collateral consequences, Respondent also discussed the three cases consolidated into *People v. Buycks*. (ABM pp. 24-26.) In two of these cases, *People v. Buycks* and *People v. Valenzuela,* Respondent concedes that this Court found the redesignation of a felony to a misdemeanor invalidated later felony-based enhancements. (ABM pp. 24-25; citing *People v. Buycks*, *supra*, 5 Cal.5th at p. 896.) However, Respondent misconstrues this Court's decision regarding the third case,

People v. Guiomar, by stating: "this Court reached the opposite conclusion [in *Guiomar*]." (ABM p. 25.)

This Court decided the enhancement in the *Guiomar* case was not affected by the redesignation of the conviction of a felony to a misdemeanor because the specific enhancement statute did not require a felony conviction. Rather, the enhancement applied to persons "[c]harged with or convicted of the commission of a felony." (*People v. Buycks*, *supra*, 5 Cal.5th at p. 875.) That particular enhancement not only applied to felony convictions but it also applied when person was merely charged with a felony. (*Ibid.*) In contrast, the MDO Act only applies to persons convicted of felonies and does not to apply persons merely charged with felonies, or even charged with misdemeanors. (§§ 2960, 2962.)

In both *In re C.B.* and *Guiomar*, this Court's decision turned on the wording of the specific statutes involved. (*In re C.B.*, *supra*, 6 Cal.5th at p. 126; *People v. Buycks*, *supra*, 5 Cal.5th at p. 875.) They differ greatly from the present case. There is no provision in the MDO Act allowing commitment for charges or disallowing the committee to appeal the validity of the commitment if the felony changes by law after the initial commitment. In the absence of such provisions, a court is not precluded from providing a committee under the MDO Act with full Proposition 47 relief, including the invalidation of any continued commitment or recommitment.

iii. The Nature of A Felony Differs From A Misdemeanor Such That The Nature Of Petitioner's Crime Changes After Redesignation From A Felony to A Misdemeanor Under Proposition 47.

Respondent argues that the crimes listed as foundational offenses are not defined by their classification as felonies or misdemeanors but by the nature of their crimes. (ABM p. 31.) Therefore, Respondent contends that a change from felony to misdemeanor would not change the validity of the MDO commitment. (ABM p. 30.) Respondent's reasoning fails. Respondent ignores that the electorate in Proposition 47 reassessed the seriousness of certain crimes, including Petitioner's theft, and found they were not sufficiently serious to be felonies. This updated view does fundamentally change the nature and seriousness of Petitioner's crime.

As Respondent concedes, all the crimes listed for MDO eligibility are felonies. (ABM p. 31.) Respondent also concedes that a misdemeanor does not result in a prison sentence. (ABM p. 31, citing § 17, subd. (a).) Further, Respondent cites *Lopez* which discusses the "qualifying *felony*," thus showing this Court has recognized an MDO commitment is necessarily predicated on a *felony* offense. (ABM p. 22, citing *Lopez* (2010) 50 Cal.4th 1055, 1058.) And prison time is required for commitment under the MDO Act to occur. (§ 2960.)

An MDO commitment begins when the person is in prison and a psychiatrist determines the crime which led to their imprisonment was related to a mental disorder. (§§ 2960, 2962.) The MDO Act is premised

upon discovery of this mental disorder *while in prison.* (§ 2960.) Subsequent commitment and recommitment are considered terms of parole and post-parole care. (§§ 2960, et seq.) Therefore, a misdemeanor would never lead to commitment or recommitment under the MDO Act.

Petitioner reiterates the full statutory scheme must be considered; a single statute cannot be read in a vacuum. (See Petitioner's Opening Brief on the Merits ("OBM"), p. 28.) If a recommitment can be made after the foundational felony that previously supported the initial commitment and all prior recommitments has been changed by law to a misdemeanor then the recommitment is based solely on a prediction of dangerousness related to a mental illness. This is what Respondent argues. (ABM pp. 10, 14, 22, 24, 28, 29, 30, 42.)

The foundational felony represents the objective component of the MDO Act. Petitioner submits that deprivation of a person of their fundamental liberty interests there must be based upon something more than a single, subjective prediction about a person's potential dangerousness. Otherwise, more safeguards must be implemented to protect fundamental liberty interests.

Notably, there exists a statutory scheme allowing for commitment based on the diagnosis of a mental illness and presentation of a hazard to public safety: the LPS Act. (Welf. & Inst. Code, § 5000, et seq.) What differentiates commitments under the LPS Act from recommitments under

the MDO Act is that instead of the person's mental illness relating to a foundational felony, the commitment depends on whether the person is "gravely disabled[2]" as a result of the mental disorder. (*People v. Allen* (2007) 42 Cal.4th 91, 107; See § II-B, *supra*, for LPS Act procedures.)

Moreover, the nature of the crimes previously categorized as felonies and redesignated as misdemeanors by Proposition 47 are "nonviolent and nonserious." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 70 ("Guide").) Respondent also acknowledged the purpose of Proposition 47. (ABM p. 20.) The superior court already found that Petitioner's crime was not violent or serious such that it could be reduced to a misdemeanor under Proposition 47. (1CT p. 16; 2CT p. 25; *People v. Foster* (Feb. 27, 2018, D071733) [nonpub. opn.] p. 3, 2018 LEXIS 1261 ("*J.F.*").) Therefore, Respondent's argument that Petitioner's crime could be considered by its nature appropriate for MDO Act commitment fails because the nature of his crime was not violent according to the electorate.

After the court redesignated Petitioner's felony to a misdemeanor, he is no longer convicted of a felony but a misdemeanor. This misdemeanor is

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2 "Gravely disabled" here means "[a] condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter." (Welf. & Inst Code, § 5008, subd. (h)(1)(A); *People v. Allen*, *supra*, 42 Cal.4th at p. 107.)

a completely different crime from the original felony. Even if the words "enumerated crime" are used in place of "felony" that does not change how the electorate views the nature of the crime as nonserious and nonviolent.

B. Penal Code Sections 2970 And 2972—The Statutes Addressing Recommitment Under The MDO Act—Cannot Be Read In A Vacuum And A Recommitment Under These Statutes Is Invalid Without A Foundational Felony Given The Full Statutory Scheme.

Respondent makes an unsupported, conclusory statement in its introduction that recommitment under the MDO Act is only meant to provide continued treatment for patients with unremitted mental disorders that continue to pose a threat to society. (ABM p. 22.) But this statement omits an essential component of the MDO Act: that the mental disorder is related to and led to the foundational felony. (§ 2960.)

Again, Respondent summarizes that "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." (ABM p. 27.) While Respondent continues to attempt to separate the recommitment statutes, sections 2970 and 2972, from the initial commitment statute, section 2962, in so doing Respondent shows how intertwined and dependent the recommitment is on the basis of the initial commitment. The recommitment statutes were written assuming the recommitment follows a valid initial commitment under the MDO Act. (§§ 2970, 2972.) It follows that one could not be recommitted under the

MDO Act without the foundational felony which formed the basis for the initial commitment. (§§ 2962, 2970, 2972.)

Petitioner poses this question in response: can one be recommitted without being initially committed? A plain reading of the MDO Act shows the answer is no. It is impossible to be re-committed without an initial commitment, and that initial commitment requires a foundational felony.

Respondent also argues that by using the terms "prisoner" and "parolee" during initial commitments and "person" and "patient" during recommitments makes the latter "distinct" from the commitment process. (ABM p. 23.) Respondent incorrectly argues this distinction separates the underlying purpose of a recommitment from that of an initial commitment under the MDO Act. However, the description of defendant changed from "prisoner" to "parolee" upon the beginning of his parole status, and to "person" or "patient" upon the completion of parole merely due to the change in the person's custody status.

Altogether, Respondent ignores the basic purpose of the MDO Act which is to treat a person's mental disorder that is related to a felony. (§ 2960.) Without the felony, it is merely a mental disorder and concern of dangerousness—that is not the purview of the MDO Act but of another statutory scheme such as the LPS Act, under Welfare and Institutions Code, section 5000, et seq.

C. The Court Of Appeal In *People v. Pipkin* Supports A Reading Of The Full Statutory Scheme Of The MDO Act When Considering The Validity Of A Recommitment Without A Foundational Felony.

Respondent cites *People v. Pipkin* (2018) 27 Cal.App.5th 1146, ("*Pipkin*"), for the First District Court of Appeal's commentary in Respondent's discussion of Petitioner's equal protection argument. (ABM p. 40.) Specifically, Respondent noted that the *Pipkin* court recognized, "the distinguishing factor" in the cases discussed "is that the initial commitment was found to be legally improper *from the outset*." (*Pipkin, supra*, 27 Cal.App.5th at p. 1151.) However, *Pipkin* furthers Appellant's arguments in many ways.

The question before the *Pipkin* court was "whether later redesignation of a qualifying offense under Proposition 47 should be viewed as destroying the foundational facts necessary to support an MDO's current recommitment, even when that MDO's initial commitment was entirely proper." (*Pipkin, supra*, 27 Cal.App.5th at p. 1151.) However, the *Pipkin* court declined to answer this question, finding the matter moot because Pipkin's commitment time had ended and the District Attorney did not file a new petition for recommitment. (*Id.* at pp. 1152, 1153.) The *Pipkin* court noted that this was an important question but did not believe the issue would evade review, citing the present case on review as an example that the issue would be addressed and explaining it was "suitable for definitive resolution by our high court." (*Ibid.*)

Respondent cites *Lopez*, *supra*, 50 Cal.4th 1055 and argues that the Legislature only required proof of the "dynamic" criteria for recommitments so the "static" criteria is somehow distinct from recommitments. (ABM pp. 22-24.) However, the foundational felony criterion is made capable of change by Proposition 47. (See OBM pp. 33-39.)

Lopez holds that the "static" factor of the foundational felony could not be contested at the recommitment hearing. (*Lopez*, *supra*, 50 Cal.4th at p. 1058.) But the court relied on the fact the defendant had two previous opportunities to contest this issue: the initial commitment proceeding and a section 2966 petition during the first year of commitment. (*Lopez*, *supra*, 50 Cal.4th at pp. 1063-1064.) This court did not suggest that a recommitment could remain proper where, due to a change in the law the foundational felony is redesignated a misdemeanor.

The *Pipkin* court also noted that the Fourth District Court of Appeal addressed this issue in *People v. Goodrich*. (*Pipkin*, *supra*, 27 Cal.App.5th at p. 1152, citing *People v. Goodrich* (2017) 7 Cal.App.5th 669.) The *Pipkin* court confirmed the Fourth District relied on *Lopez*, which found certain foundational factors are incapable of change. (*Pipkin*, at p. 1152; *Lopez*, *supra*, 50 Cal.4th at p. 1062.) As the *Pipkin* court explained:

> in the wake of Proposition 47, the character of the underlying crime has proven to be significantly less immutable than was likely envisioned by our high court. Nevertheless, *Goodrich* relies on this

> distinction to support its determination that redesignation of a qualifying offense as a misdemeanor does not preclude later MDO recommitment.

(*Pipkin*, at p. 1152.) While not directly disagreeing with the Fourth District, it draws the same question as Petitioner did in the OBM.

The *Pipkin* court also shared Petitioner's concerns about using the definition of an MDO committee to support recommitment under the MDO Act after the redesignation of the foundational felony to a misdemeanor. (*Pipkin*, at p. 1153.) The *Pipkin* court "do[es] not find the issue to be as clear cut as *Goodrich* suggests." (*Ibid.*) As the *Pipkin* court explained: "it does not necessarily follow that the validity of that recommitment is not still premised upon the continuing existence of the qualifying conviction." (*Ibid.*)

Petitioner also agrees with the *Pipkin* court's observation of the voter intent for Proposition 47:

> ...while the electorate admittedly intended the remedies available under Proposition 47 to be limited to nonserious and nonviolent property and drug crimes, it is not immediately obvious how that same electorate would react upon learning that throwing some punches in pursuit of a cell phone (a crime now classified by that electorate as a misdemeanor) could subject an offender to indefinite civil commitment.

(*Pipkin*, *supra*, 27 Cal.App.5th at p. 1153.) Petitioner submits the same can be said for his crime: pushing a clerk out of the way after taking cookies and cigarettes, believing he could do so because he thought he was a police officer or at least stating as much. (1CT pp. 6, 19; 2 CT p. 6.)

D. A Comparison Between Commitments Under The SVP Act And The MDO Act Are Not Invalidated By The Differences In Length Of Their Respective Commitment Time.

Respondent argues that the treatment of committees under the SVP Act and MDO Act are not comparable due to the amount of time of each commitment. (ABM p. 41-43.) Specifically, SVP commitment is indeterminate and an MDO commitment lasts for one year with each petition for recommitment another year at a time. (§§ 2970, subd. (b); 2972, subd. (c); Welf. & Inst. Code, §§ 6604, 6605, subd. (b).) Also, Respondent argues that a foundational felony is an element for commitment under the SVP Act, but not for recommitment under the MDO Act. (ABM p. 38-40.) Impliedly, Respondent agrees that the foundational felony is an element for the initial commitment under the MDO Act.

Once again, Petitioner recalls that the statute regarding recommitment under the MDO Act cannot be read in a vacuum but with the full statutory scheme in mind. Further, a recommitment under the MDO Act cannot be made without the initial commitment. The statute regarding recommitment need not restate the foundational felony element because it was previously assumed that the felony was incapable of change. (*Lopez*, *supra*, 50 Cal.4th at p.1056.) However, Proposition 47 makes the felony criteria capable of change. (OBM pp. 33-39.)

Therefore, it follows that a recommitment under the MDO Act cannot be valid without a foundational felony. When that felony is

dissolved by the application of Proposition 47, there is no foundational felony to support any commitment under the MDO Act.

E. Respondent Reuses The Flawed Reasoning From *Goodrich* To Argue That MDO's Are Dangerous By Definition, But Their Crimes Have Been Deemed Nonviolent And Nonserious By Virtue of The Proper Redesignation Of Their Underlying Felonies To Misdemeanors Under Proposition 47.

Respondent echoed the reasoning in *Goodrich* by arguing: "MDOs, by their very definition, pose a substantial risk to the public by virtue of their mental disorder." (ABM pp. 10-11.) Respondent again used this flawed reasoning in its argument that the redesignation of the foundational felony under Proposition 47 was not meant to apply to persons who were also committed under the MDO Act. (ABM pp. 31-32.) Having a mental disorder alone does not make a person dangerous to the public. (See OBM pp. 26-31.) And there are other methods available under the LPS Act for protecting the public from persons with mental disorders who do pose a danger. (Welf. & Inst. Code, § 5000, et seq.)

Respondent also disregards how the electorate intended the effects of a redesignation to a misdemeanor under Proposition 47 be "for all purposes." (§ 1170.18, subd. (k).) Involuntary confinement under the MDO Act derives from a foundational felony which led to imprisonment and works both as a substitute for parole and for post-parole transition. Even though commitment is not "punishment" per se like a prison term, it

nonetheless involves the deprivation of "significant liberty interests." (*Pipkin supra*, 27 Cal.App.5th at p. 1153.)

The person with a commitment or recommitment under the MDO Act is tied to the foundational felony. The electorate decided certain offenses were "nonserious" and "nonviolent," including Petitioner's foundational felony. (Guide, p. 70.) Therefore, the electorate determined that Petitioner's crime was not violent or serious. It does not frustrate the electorate's intent to change the consequences of that underlying crime to match that of a misdemeanor.

The MDO Act has no misdemeanors identified as enumerated crimes. A person with a misdemeanor conviction today would never be involuntarily confined under the MDO Act. A person who has had their felony redesignated a misdemeanor has not perpetrated anything more violent. It furthers both the Legislative intent of the MDO Act and the electorate intent of Proposition 47 to consider commitments and recommitments under the MDO Act collateral consequences of the foundational felony.

F. Persons Under the MDO Act Have Served Prison Time So The Legislature Did Not Need To Include Them When It Added A Statute To Allow Persons Not Guilty By Reason Of Insanity ("NGI's") To Receive Relief Under Proposition 47 Because They Did Not Serve Prison Time.

Respondent argues that because the Legislature did not reference persons committed under the MDO Act when it extended Proposition 47 to

persons found not guilty by reason of insanity ("NGI's") through section 1170.127 that it intended to exclude the MDO Act from Proposition 47 relief. (ABM p. 34.) Respondent is mistaken.

Specifically, Respondent claims that under the rule of construction *expressio unius est exclusion alterius*, that a person committed under the MDO Act is excluded from Proposition 47 relief because the Legislature added relief for NGI's but did not mention MDO's. (ABM p. 35.) However, "[t]he maxim *expressio unius est exclusion alterius* cannot perform its proper role of resolving an ambiguity in statutory language or uncertainty in legislative intent in the absence of ambiguity or uncertainty; it will not be utilized to contradict or vary a clear expression or legislative intent, ..." (*Williams v. Los Angeles Metro. Transit Auth.* (1968) 68 Cal. 2d 599, 603.) However, section 1170.127 was not ambiguous.

The Legislature stated its purpose for adding section 1170.127 was to provide NGI's with Proposition 47 relief because they were never imprisoned and Proposition 47 relief had previously been limited to persons who had prison time. (§ 1170.127; Assem. Bill No. 103 (2017 Reg. Sess.) § 2 ("AB 103"); *People v. Dobson* (2016) 245 Cal.App.4th 310, 314.) The Legislature nullified the holding in *People v. Dobson* which held that Proposition 47 had expressly excluded people who were not imprisoned. (AB 103; *People v. Dobson, supra*, 245 Cal.App.4th at p. 317.)

NGI's are never imprisoned, as Respondent concedes. (ABM, p. 35.) However, commitment under the MDO Act can only begin during imprisonment. (§ 2960.) Therefore all persons committed and recommitted under the MDO Act have been imprisoned. Due to their time spent in prison, the Legislature did not need to mention persons committed under the MDO Act in this statute.

MDOs were not specifically excluded. That the Legislature did not mention MDO's when it added NGI's does not mean it meant to exclude them. This was an inclusive statute meant to include people who had not served prison time and never would serve prison time. By definition, MDOs have served prison time. There was no need to add them to this particular statute because it addressed only a subgroup that did not serve prison time.

G. Both Recommitments And Initial Commitments Under the MDO Act Are Under Review, But Petitioner Is Limited To Discussing Recommitments Because This Appeal Involves A Recommitment.

In a footnote, Respondent argues Appellant could not address initial commitments claiming they are outside the scope of the question upon which this Court granted review. (ABM p. 15.) However, 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?

Appellant focused on recommitments because the order appealed was for recommitment, not initial commitment. (1CT pp. 59, 61.) On appeal, Petitioner is limited to addressing issues in the appellate record. (*People v. Kelly* (1992) 1 Cal.4th 495, 545.) Petitioner submits the premise behind the reason why the MDO Act requires a foundational felony for recommitment also applies to initial commitments: it is the overall purpose of the MDO Act to treat mental disorders related to one of the enumerated foundational felonies. (See §§ 2960, 2962, subd. (b).)

II.

COMMITTEES UNDER THE MDO ACT AND THE SVP ACT ARE SIMILARLY SITUATED AND ANY CONCERN FOR PUBLIC SAFETY DOES NOT SUPPORT INVALID USE OF THE MDO ACT TO CONTINUE THEIR COMMITMENTS.

A. Persons Committed Under The SVP Act And The MDO Act Are Similarly Situated For Purposes Of This Case.

Respondent disagrees that persons committed under the SVP Act and the MDO Act are similarly situated. (ABM pp. 38-40; OBM pp. 49, 51-52.) Respondent believes the recommitment statutes do not include a felony as a required element. However, both acts have elements that include foundational felonies. The statutes regarding recommitment under the MDO Act assume some of these elements were already met at the initial commitment stage. Respondent further contends that the length of the commitments under each act prevents them from being similarly situated. (ABM p. 28.) However, the length of the commitment is not relevant for purposes of analyzing the effect of the validity of any commitment without a foundational felony.

i. The Foundational Felony Is An Element Of The MDO Act In Light Of The Full Statutory Scheme, Assumed To Have Been Met Prior To The Initial Commitment, Such That Recommitment Need Not Specify It But It Is Required For Recommitment To Be Valid.

Respondent argues that the foundational felony is an element for commitment under the SVP Act but not for recommitment under the MDO Act. (ABM p. 38.) For this reason, Respondent argues that commitments

under the MDO Act cannot be compared to those under the SVP Act. However, this argument also fails.

Again, Respondent is isolating the recommitment statute from the overall statutory scheme of the MDO Act. Again, the recommitment assumes the foundational felony was already established under the statutory scheme.

Further, Respondent concedes that in *Franklin*, "the defendant was a misdemeanant at the time the prosecutor filed the SVP petition." (ABM p. 29, emphasis omitted; citing *In re Franklin* (2008) 169 Cal.App.4th 386, 392) Similarly, Petitioner was a misdemeanant when his motion to find the recommitment moot was filed. Just as a new commitment order could not stand once Franklin became a misdemeanant, Petitioner's recommitment petition cannot stand after he became a misdemeanant.

ii. The Difference In The Length of Time Of Commitments Under The SVP Act and The MDO Act Are Not Relevant To The Analysis In This Case And Committees From These Acts Are Similarly Situated.

Respondent also tries to distinguish the SVP Act from the MDO Act based upon the length of commitment under each, claiming this is a compelling interest to treat them differently. These are not materially different commitment schemes, as Respondent suggests. (ABM p. 28.)

Petitioner maintains that committees under the SVP Act and the MDO Act are similarly situated. A difference in the specific elements of

these statutes or the length of their commitments do not prove otherwise. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1203.)

The foundational felony is an element for the initial commitment. (§ 2962, subd. (b).) The recommitment builds upon the elements of the initial commitment, only listing those which were capable of change, until Proposition 47 came about. (*Lopez, supra*, 50 Cal.4th at p.1056; see ABM pp. 33-35.) Therefore, it was previously not necessary to list the foundational felony as a new element because the recommitment assumes original elements were already met.

B. Public Safety Concerns Do Not Justify Misapplication Of The MDO Act, Especially When Another Statutory Scheme Is Available That Addresses Such Concerns.

Petitioner submits misapplication of the law is not supportable here. It is especially concerning when involuntary commitments are at issue, which involve "significant liberty interests." (*Pipkin, supra*, 27 Cal.App.5th at p. 1153.) It is even more troublesome that another, more appropriate statutory scheme is available to address any public safety concerns, that does not require a foundational felony exists: the Lanterman-Petris-Short ("LPS") Act. (Welf. & Inst Code, § 5000, et seq.)

"[T]he LPS Act asks whether as a result of a mental disorder, a person is a danger to self or *others*—the latter of which is similar to the MDO Act." (*People v. Allen, supra*, 42 Cal.4th at p. 107, emphasis in original, citations omitted.) Both "the MDO Act and the LPS Act share

two significant common goals—the treatment of mentally disordered persons and the protection of the public." (*People v. Allen*, at p. 106.) The main difference is the LPS Act is not designed to accommodate the mentally disordered criminal offender. (*Id.* at p. 105, citing Assem. Select Com. On Mentally Disordered Criminal Offenders, Public Hearing on House Res. No. 88 (1973-1974 Reg. Sess.) testimony of Assemblyman Lanterman, p. 1.)

The LPS Act was enacted in 1969 "[t]o provide prompt evaluation and treatment of persons with serious mental disorders." (Welf. & Inst Code, § 5001, subd. (b); *People v. Allen*, *supra*, 42 Cal.4th at p. 105.) If the Legislature wanted to authorize involuntarily confinement of someone based on the subjective qualifications listed in the recommitment statutes of the MDO Act[3] alone it could have done so in the LPS Act, but it did not. Again, in place of the MDO Act's objective requirement that mental disorder be related to an enumerated foundational felony, the LPS Act included the objective requirement that a person must be "gravely disabled" as a result of the mental disorder. (*People v. Allen*, at p. 107.)

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[3] The presence of a severe mental disorder which is not in remission and cannot be kept in remission without treatment, and risk of substantial danger of physical harm to others by reason of his or her severe mental disorder. (§ 2972, subd. (c).)

What's more, "[b]efore a person may be found to be gravely disabled and subject to a year-long confinement, the LPS Act provides for a carefully calibrated series of temporary detentions for evaluation and treatment." (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 541 ("*Ben C.*").) These procedures[4] are more complicated than the MDO Act's one-year recommitment procedures. (*People v. Allen*, *supra*, 42 Cal.4th at pp. 106, 107.) "This series of temporary detentions may culminate in a proceeding to determine whether the person is so disabled that he or she should be involuntarily confined for up to one year. ***Because of the important liberty interests at stake, correspondingly powerful safeguards protect against erroneous findings***." (*Ben C.*, *supra*, 40 Cal.4th 529 at p. 541, emphasis added.)

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[4] The LPS Act "limits involuntary commitment to successive periods of increasingly longer duration, beginning with a 72-hour detention for evaluation and treatment, which may be extended by certification for 14 days of intensive treatment; that initial period may be extended for an additional 14 days if the person detained is suicidal. The 14-day certification may be extended for an additional 30-day period for further intensive treatment. Persons found to be imminently dangerous may be involuntarily committed for up to 180 days beyond the 14-day period. After the initial 72-hour detention, the 14-day and 30-day commitments each require a certification hearing before an appointed hearing officer to determine probable cause for confinement unless the detainee has filed a petition for the writ of habeas corpus. A 180-day commitment requires a superior court order. (Welf. & Inst. Code, §§ 5150, 5250, 5256, 5256.1, 5260, 5262, 5270.15, 5275, 5276, 5300, 5301; *People v. Allen*, *supra*, 42 Cal.4th at p. 106, citations omitted.)

Subsequently, the conservator may petition the court for a one-year extension.[5] The detailed procedures in the LPS Act show that the Legislature accounted for the lack of an obvious objective factor like the mental disorder-related foundational felony in the MDO Act, thereby protecting the fundamental liberty interests involved. In contrast, the recommitment statutes of the MDO Act do not provide for such protections. Petitioner submits this is because the recommitment statutes continue to depend upon the continued existence of the objective factor—the foundational felony related to the mental disorder. Redesignating the foundational felony to a misdemeanor removes the objective basis under which the recommitment was authorized by the Legislature and, therefore, invalidates recommitment under the MDO Act.

In this case, the MDO Act is no longer a legitimate basis for involuntarily confining Petitioner. If the state has compelling interest in treating a person or patient whose illness remains unremitted and continues to pose a risk to public safety, the state must proceed under another avenue the Legislature created for that purpose, such as the LPS Act.

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[5] The petition must include the opinion of two physicians or licensed psychologists with doctoral degrees in psychology and at least five years of postgraduate experience in treating and diagnosing emotional and mental disorders that the conservatee remains gravely disabled. (Welf. & Inst. Code, § 5361; *Ben C.*, *supra*, 40 Cal.4thf 529 at p. 542.)

III.

APPELLANT'S DUE PROCESS CLAIM IS VALID AND RESPONDENT DOES NOT PROVE OTHERWISE.

Respondent's sole argument addressing the violation of Petitioner's right to due process of the law is based on Respondent's contention that Petitioner's recommitment comports with the legislative intent of the MDO Act and Proposition 47. (ABM p. 43, citing *Hale v. Morgan* (1978) 22 Cal.3d 388, 398.) Respondent is wrong because both the legislative intent of the MDO Act and the electorate intent in Proposition are violated by Petitioner's recommitment.

The intent of the MDO Act is to address a person's mental disorder that is related to a foundational felony. (§ 2960; OBM pp. 26-27.) Petitioner's foundational felony was redesignated a misdemeanor. Without a foundational felony, it cannot be said that his mental disorder relates to a felony.

The intent of the electorate in Proposition 47 was in part to treat all felonies that were redesignated misdemeanors as misdemeanors "for all purposes." (§ 1170.18, subd. (k); Guide, pp. 70-74.) A person with a misdemeanor cannot serve prison time. Without time in prison, the state cannot proceed with commitments under the MDO Act. (See § 2960 ["prisoners who have a treatable, severe mental disorder that was one of the

causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated."])

Petitioner's recommitment is not "procedurally fair and reasonably related to a proper legislative goal." (*Hale v. Morgan*, *supra*, 22 Cal.3d at p. 398.) It was a violation of Petitioner's right to due process of the law for the court to deny his motion to dismiss his commitment under the MDO Act after his foundational felony that formed the basis for such commitment was redesignated a misdemeanor. (OBM pp. 64-72.)

IV.

SHOULD THE MOTION FOR JUDICIAL NOTICE BE GRANTED, THIS COURT NEED NOT CONSIDER RESPONDENT'S REFERENCE TO ADDITIONAL FACTS NOT IN THIS APPEAL BECAUSE THEY ARE NOT RELEVANT TO THE ISSUE ON REVIEW.

Petitioner has filed an Opposition to Respondent's Motion for Judicial Notice. However, if Respondent's Motion for judicial Notice is granted, Petitioner reiterates that the facts addressed in the supplemented documents are irrelevant to any discussion of the issue on review. Specifically, Respondent includes reference to case number B230766.

Exhibits A and B are not relevant to the case presently under review. This issue addresses whether the San Diego Superior Court erred in denying Petitioner's motion to dismiss his MDO recommitment and the Court of Appeal erred in affirming this decision. Petitioner's motion was denied after the San Diego Superior Court reduced the underlying felony to a misdemeanor under Proposition 47. It is not necessary to provide the expert's testimony when the issue remains that a petition for recommitment requires an underlying felony to support the government's continued involuntary confinement of a person.

Further, Exhibits A and B contain facts that are not part of the record in the appeal on review by the Fourth District Court of Appeal, Division One, or the San Diego Superior Court. Petitioner was not afforded the ability to address the validity of the statements in the Court of Appeal.

CONCLUSION

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

Dated: January 14, 2019

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I, Michelle D. Peña, hereby certify in accordance with California Rules of Court, rule 8.504(c)(1) that this brief contains 7,527 words 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: January 14, 2019

Respectfully submitted,

Michelle D. Peña
State Bar No. 30374

RE: *People v. J.F.*, Supreme Court Case No. S248046;
Court of Appeal Case No: D071733;
San Diego County Superior Court Case No. SCD204096

PROOF OF SERVICE

(Code Civ. Proc. § 1013a, subd (2); Cal. Rules of Court, rules 8.71(f) and 8.77)

I am an active member of the State Bar of California and not a party to this action. My electronic service address is: mdplaw@outlook.com. My business address is: The Law Office of Michelle D. Peña, 3830 Valley Centre Dr., Ste. 705, PMB 706, San Diego, CA 92130.

On January 14, 2019, I served the persons and/or entities listed below by the method indicated a copy of the document: **APPELLANT'S REPLY BRIEF ON THE MERITS**. For those marked "Served Electronically," I transmitted a PDF version of the above-entitled document by TrueFiling electronic service or by e-mail to the e-mail service address(es) as provided below. Transmission occurred at approximately 2:15 p.m.

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I declare under penalty of perjury that the foregoing is true and correct, and this was executed on January 14, 2019, at San Diego, California.

Michelle D. Peña, Attorney at Law
Declarant
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