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IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Conservatorship of the Person and Estate of E.B. PUBLIC GUARDIAN OF CONTRA COSTA COUNTY, Petitioner and Respondent, v. E.B., Objector and Appellant.	S_____ A157280 (Contra Costa County Superior Court No. P1801826)

On Review From The Court of Appeal
For The First Appellate District,
Division Five, Case No. A157280

After An Appeal From The Superior Court
For The State of California
County of Contra Costa, Case No. P1801826
Honorable Susanne M. Fenstermacher, Presiding

PETITION FOR REVIEW

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I. PETITION FOR REVIEW

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

Pursuant to California Rules of Court, rule 8.500(b)(1), Conservator and Petitioner, Public Guardian of Contra Costa County (hereafter "petitioner"), respectfully petitions this Court for review of the published decision of the Court of Appeal, First Appellate District, Division Five (Needham, J.) filed February 27, 2020, finding that equal protection requires that conservatees under the Lanterman-Petris-Short (LPS) Act be

afforded the same statutory right to refuse compelled testimony applicable to persons involuntarily committed as Not Guilty by Reason of Insanity ("NGI") under Penal Code section 1026.5(b)(7). The Court of Appeal Opinion (referred to herein as "OPN") is attached hereto as Appendix A. (Rule 8.504(b)(4).)1

II. ISSUE PRESENTED

1. Whether equal protection requires that LPS conservatees have the same right to invoke the statutory testimonial privilege for persons subject to involuntary NGI commitments under Penal Code section 1026.5(b)(7)?

III. INTRODUCTION AND REASONS FOR GRANTING REVIEW

LPS conservatees and NGI, Sexually Violent Predator ("SVP"), and Mentally Disordered Offender ("MDO") committees are not similarly situated. The First District Court of Appeal, Division One, correctly reached that conclusion in *Conservatorship of Bryan S.* (2019) 42 Cal.App.5th 190. Division Five, however, erred in coming to the opposite conclusion in the case below. (*Conservatorship of E.B.* (2020) 45

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All statutory and rule citations in this brief are to the California Welfare & Institutions Code and Rules of Court unless otherwise indicated.

Cal.App.5th 986, 997.) This Court should accept review, affirm the holding in *Conservatorship of Bryan S.*, and settle a conflict among the lower courts.

LPS Act proceedings are primarily designed to provide a procedure through which the government can care for people who cannot care for themselves. (*In re Qawi* (2004) 32 Cal.4th 1, 15.) By contrast, NGI commitments are designed to "protect society from dangerous people." (*Conservatorship of E.B.*, 45 Cal.App.5th at p. 1001 [Burns, J., concurring].) Despite this stark difference in the goal of those two proceedings, the court below held that the fact that LPS conservatees can be committed against their will "requires a finding that" LPS conservatees and NGIs, SVPs, and MDOs "are similarly situated for the purposes of requiring the state to justify" the disparate treatment in terms of the privilege not to testify. (*Id.* at 997.) In doing so, the court rejected the conclusion of the court in *Conservatorship of Bryan S.* that LPS conservatees are not similarly situated to NGI, MDO, and SVP involuntary commitments and, therefore, "equal protection does not require that they be free from the compulsion to testify." (*Conservatorship of Bryan S.*, 42 Cal.App.5th at p. 198.) There is now a split of authority between Divisions

Five and One of the First District Court of Appeal on this issue.

Petitioner is seeking review of the decision by the Court of Appeal in this case despite the fact that it affirmed the decision by the trial court on harmless error grounds. The split of authority on whether LPS Act conservatees can be compelled to testify will continue to cause confusion in the lower courts and will lead to inconsistent results on an important legal issue of statewide importance. Petitioner respectfully asks this Court to review the decision below to secure uniformity of decision and settle an important question of law. (Cal. Rules of Court, rule 8.500(b)(1).)

IV. STATEMENT OF THE CASE AND FACTS

For purposes of this petition for review only, and except as set forth herein, appellant adopts the procedural history and facts set forth in the Court of Appeal opinion. (OPN 1-5.)

V. LEGAL ARGUMENT

A. Overview of The LPS Act

E.B. was found to be gravely disabled following a jury trial and, pursuant to the LPS Act, the Public Guardian of Contra Costa County was

appointed as his conservator. The LPS Act, *inter alia*, governs the involuntary civil commitment of mentally ill persons who pose a danger to themselves, a danger to others, or who are gravely disabled and require inpatient psychiatric care.

At issue in the trial court below was whether E.B. is "gravely disabled" under Welfare & Institutions Code section 5008, subd. (h)(1)(A): "a condition in which a person, as a result of a mental health order, is unable to provide for his or her basic personal needs for food, clothing or shelter." While other commitment statutes under the LPS Act focus on public protection and specifically consider whether the person is a danger to others (Welf. & Inst. Code, §§ 5150, 5250, 5300, 5008(h)(1)(B), the LPS conservatorship at issue in this case pertains to grave disability due to a mental disorder causing an inability to provide for his food, clothing or shelter. (Welf. & Inst. Code, § 5008(h)(1)(A).) Danger and public protection are not at issue in E.B.'s case.

The goals of the LPS Act include, "ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily

committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program." (Welf. & Inst. Code, § 5001; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 540-43; *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1009.) The LPS Act "also serves to protect the mentally ill from criminal victimization (§ 5001, subd. (g)) and from the myriad forms of suffering endured by those unable to care for themselves." (*Conservatorship of Ben C.*, 40 Cal.4th at p. 540.)

While an LPS conservatee found to be gravely disabled may be subject to a year-long confinement, "the LPS Act provides for a carefully calibrated series of temporary detentions for evaluation and treatment. 'The act limits involuntary commitment to successive periods of increasingly longer duration, beginning with a 72-hour detention for evaluation and treatment (§ 5150), which may be extended by certification for 14 days of intensive treatment (§ 5250). . . .'" (*Conservatorship of Ben C.*, 40 Cal.4th at p. 541 [quotation omitted].)

The 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. (§§ 5350, 5361.)" (*Id.*) Because

of the important liberty interests at stake, the LPS Act provides various safeguards for the potential conservatee before a one-year conservatorship may be imposed, including the right to a jury trial, the right to counsel at trial, a requirement that the conservatee's alleged grave disability be found beyond a reasonable doubt, and the requirement of a unanimous jury. (*Id.* at p. 541.)

Even after a one-year conservatorship is imposed, a conservatee may twice petition for rehearing during which the conservatee "need only prove by a preponderance of the evidence that he or she is no longer gravely disabled." The conservatee is entitled to appointed counsel on rehearing. (*Id.*)

At the end of one year, the conservatorship automatically terminates. (Welf. & Inst. Code, § 5361.) The conservator may file a petition for a one-year extension but such a petition must include the opinions of two well-qualified physicians or licensed psychologists that the conservatee is still gravely disabled. At a hearing to reestablish a conservatorship, "the standard of proof beyond a reasonable doubt and the rights to appointed counsel, to a court or jury trial, and to a unanimous jury verdict again apply. (§§ 5350, subd. (d), 5365; [Citations.]" (*Conservatorship of Ben C.*, 40

Cal.4th at p. 542.)

Some of the protections provided by the LPS Act are similar to those provided to criminal defendants; they recognize the liberty interests at stake in LPS Act proceedings while "taking into account the essential differences between the two systems. Ordinarily, once a criminal judgment and sentence are final, the trial court loses jurisdiction to correct error. (But see Pen. Code, § 1170, subd. (d).) The criminal defendant's only recourse then is to the courts of review. The LPS scheme is quite different because of the one-year limit on commitments and the ability of the conservatee to return twice to the trial court for reconsideration during that 12-month period." (*Id.* at p. 543.)

In *Ben C.*, the issue was whether LPS Act conservatorship proceedings were entitled to the same independent review by an appellate court as required in criminal appeals. This Court held that such independent review was not required by equal protection because LPS conservatees and criminal defendants were not similarly situated: "Criminal defendants face punishment, but an LPS commitment "'may not reasonably be deemed punishment either in its design or purpose.'" (*Id.* at p. 543

[citation omitted].)

B. The Appellate Court Erred in Finding That Equal Protection Requires That LPS Conservatees Be Afforded the NGI Statutory Testimonial Privilege

The court below erred in finding that equal protection requires that an LPS conservatee be afforded the same statutory testimonial privilege that has been granted to NGIs (Pen. Code, § 1026.5(b)(7)), SVPs (Pen. Code, § 6600 et seq.), and MDOs (Pen. Code, § 2960 et seq.). (*Conservatorship of E.B.*, 45 Cal.App.5th at p. 997.)

1. LPS Conservatees Under Section 5008(H)(1)(A) are Not Similarly Situated to NGIs, SVPs, or MDOs for Purposes of Testimonial Privilege

The first prerequisite to a claim under the equal protection clause is to show that the state adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. McKee* (2010) 47 Cal.4th 1172, 1202.) The question is whether persons are similarly situated "for purposes of the law challenged." (*Id.*) "If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold." (*People v. Curlee* (2015) 237 Cal.App.4th 709, 720, citing *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.) "Where two or more groups are properly distinguishable for purposes of the challenged

law, it is immaterial if they are indistinguishable in other respects." (*People v. Barrett* (2012) 54 Cal.4th 1081, 1107.)

The court in *Conservatorship of Bryan S.* held that because NGIs, SVPs, and MDOs and LPS Act conservatees "are not similarly situated, equal protection does not require that they be free from the compulsion to testify." (*Conservatorship of Bryan S.*, 42 Cal.App.5th at p. 198.) The court below erred in reaching the opposite conclusion.

In *Hudec v. Superior Court* (2015) 60 Cal.4th 815, this Court determined that NGIs facing a commitment extension hearing have a statutory right to refuse to testify in the People's case-in-chief pursuant to Penal Code section 1026.5(b)(7). (*Id.* at p. 831.)

People v. Curlee (2015) 237 Cal.App.4th 709, determined that NGIs are similarly situated to SVPs for the purposes of whether they may be compelled to testify at their commitment hearings, and therefore an analysis under equal protection should be considered. (*Id.* at pp. 720-721.) *Curlee* considered the following similarities between NGIs and SVPs in determining that they are similarly situated:

> The preconditions to commitment are similar: Both groups have committed a criminal act and have been found to suffer from a mental condition that might present a danger to others. [Citation.] At the end of the SVP's prison term, and at the end of the term for

> which an NGI could have been imprisoned, each is committed to the state hospital for treatment if, at the end of that period, the district attorney proves in a jury trial beyond a reasonable doubt that the person presents a danger to others as a result of a mental disease, defect, or disorder. (See §§ 6600, subd. (a)(1), 6604 [SVP]; Pen. Code, § 1026.5, subd. (b) [NGI]; *McKee I*, supra, 47 Cal.4th at pp. 1203, 1207.) The purpose of the commitment is the same: To protect the public from those who have committed criminal acts and have mental disorders and to provide mental health treatment for the disorders.

(*Curlee*, 237 Cal.App.4th at p. 720.)

The court in *People v. Dunley* (2016) 247 Cal.App.4th 1438, decided that MDOs are also similarly situated to NGIs and SVPs pursuant to *Curlee*, for purposes of the statutory testimonial privilege. (*Id.* at pp. 1446-50.)

LPS conservatorships, on the other hand, are not similarly situated to NGIs, SVPs or MDOs for the purpose of whether they may be compelled to testify at their commitment hearings. "[C]ertain protections for criminal defendants, including the right against self-incrimination and exclusion of certain evidence, have not been applied to LPS proceedings because they are contrary to the statute's purpose of providing assistance to disabled individuals unable to help themselves." (*Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604, 611-612, citing *Conservatorship of Baber* (1984) 153 Cal.App.3d. 542, 550; *Conservatorship of Susan T.*, 8 Cal.4th at p. 1020.)

a. LPS Conservatorships do not Require a Criminal Act or Have a Primary Purpose of Public Protection

The purpose of the LPS conservatorship under review is not to protect the public from dangerous persons that have committed criminal acts, as it is for NGIs, MDOs and SVPs, but for the well-being of the individual LPS conservatee. "The purpose of conservatorship . . . is to provide individualized treatment, supervision, and placement." (Welf. & Inst. Code, § 5350.1.) For LPS conservatorships, "[t]he state's purpose is solely one of remedial treatment [Citation]; it seeks neither retribution nor protection of society -- the government's primary interests in criminal prosecutions. [Citations] The Act serves to protect the person from the consequence of his own infirmity rather than to protect society from the person. . . ." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 237-38.)

Thus, the purpose of an LPS conservatorship under section 5008(h)(1)(A) is entirely different from that of NGIs, SVPs and MDOs as stated in *Curlee*. (See *Curlee*, 237 Cal.App.4th at p. 720.) As noted in *Conservatorship of Baber*, an LPS commitment "is not initiated in response, or necessarily related, to any criminal acts; it is of limited duration, expiring at the end of one year. . . . The sole state interest, legislatively expressed, is the custodial care, diagnosis, treatment and protection of persons who are

unable to take care of themselves and who for their own well-being and the safety of others cannot be left adrift in the community [§ 5001]. The commitment may not reasonably be deemed punishment either in its design or purpose. It is not analogous to criminal proceedings." (*Conservatorship of Baber*, 153 Cal.App.3d at p. 549, quoting *Cramer v. Tyars* (1979) 23 Cal.3d 131, 137.)

Although some gravely disabled persons have committed crimes, the focus of the LPS Act is on conserving persons that are gravely disabled because they cannot provide for their food, clothing, or shelter. The LPS Act proceedings are designed to ascertain "the true state of respondent's disability." (*Id.*) "A conservatorship proceeding is not a prosecution for a particular act, but an attempt to determine a condition which is subject to change." (*Id.* at p. 550.)

The court below noted that a "Murphy Conservatorship," under section 5008(h)(1)(B), is a conservatorship under the LPS Act that is focused on potential danger to others and public protection. (*Conservatorship of E.B.*, 45 Cal.App.5th at p. 994.) However, a Murphy Conservatorship is entirely unrelated to the Public Guardian's petition for a section 5008(h)(1)(A) conservatorship of E.B.

Although one of the general purposes of the LPS Act is to protect the public under Section 5001(c), this general purpose is not specifically directed at LPS conservatorships under section 5008(h)(1)(A). That section, at issue here, concerns the provision of food, clothing, shelter and treatment to a person with a mental disorder. (Welf. & Inst. Code, § 5008(h)(1)(A), 5001(e).)

As to Murphy Conservatorships, the law requires that trial courts "consider the purposes of protection of the public and treatment of the conservatee." (Welf. & Inst. Code, § 5350(b)(2).) This consideration is not specifically required for LPS conservatorships under section 5008(h)(1)(A). The absence of language relating to "public protection" in section 5008(h)(1)(A) is important for the equal protection analysis. "When a statute uses a particular term in one part and omits it in another, the omission typically signifies that the Legislature intended a different meaning." (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1504.)

b. The LPS Act Provides Significant Procedural Safeguards

Procedural safeguards were enacted under the LPS Act to protect an individual against erroneous commitment and "[t]o limit the stigma and loss of liberty. . . ." (*Conservatorship of Christopher A.*, 139 Cal.App.4th at p.

611.) Many of these procedural safeguards are dissimilar to the procedures for NGIs MDOs, and SVPs.

An LPS conservatee is entitled to a rehearing pursuant to section 5364 every six months, at which time he need only prove by a preponderance of the evidence that he is no longer gravely disabled. (Welf. & Inst. Code, § 5364; *In re Conservatorship of Person of John L.* (2010) 48 Cal.App.4th 131.) NGIs, MDOs, and SVPs are not afforded this lenient threshold to prove their commitment should be terminated.

Further, if an LPS conservator determines that the goals of the conservatorship have been reached and the conservatee is no longer gravely disabled, the conservator must report to the court and the court must terminate the conservatorship. (Welf. & Inst. Code, § 5352.6) This additional differentiation from NGI, MDO, and SVP further supports the conclusion that an LPS conservatee may be compelled to testify at trial. If the conservatee's circumstances have changed and he is no longer gravely disabled -- in that he is willing to accept meaningful treatment, has gained insight into his mental illness and has a feasible plan to provide for his food, clothing and shelter -- the conservator must dismiss the conservatorship. It is difficult for a court to make findings on these issues without hearing from

the conservatee.

Unlike NGI, SVP, or MDO committees, LPS conservatees may avoid commitment through the assistance of third parties such as family, friends or others. (Welf. & Inst. Code, § 5350(e).) The county-designated LPS conservatorship investigator must investigate all available alternatives to conservatorship; the conservatorship is considered the last resort. (Welf. & Inst. Code, § 5354, *Conservatorship of Susan T.*, 8 Cal.4th at p. 1010.)

The LPS conservatorship process also prioritizes non-state actors, such as family or other eligible persons, to be appointed as conservator before the county public guardian will be appointed. (Welf. & Inst. Code, § 5350(b)(1); Prob. Code, §§ 1812, 2920; see Welf. & Inst. Code, § 5350 [The procedures for LPS conservatorship are the same as Division 4 of the Probate Code commencing with sec. 1400, unless excepted.]) NGI, SVP, and MDO committees are not appointed a conservator to meet their ongoing needs for treatment, or to manage their care and finances. (Welf. & Inst. Code, § 5350.)

In LPS Proceedings, the trial court provides ongoing supervision focused on the LPS conservatee's current needs, condition, and progress. (*Conservatorship of Ben C.*, 40 Cal.4th at p. 543.) While LPS conservatees

have a right to receive the least restrictive placement under Welfare and Institutions Code section 5358 (a)(1)(A), NGI, SVP, and MDO committees are often initially placed at the State Department of State Hospitals. (Pen. Code, §§ 1601, 1026 (NGIs); Welf. & Inst. §§ 6601, 6604, 6608 (SVPs); Pen. Code, § 2962 (MDOs).) LPS conservators may step a conservatee down to a less restrictive placement without court approval (Welf. & Inst. Code, §5358), while NGI, SVP, and MDO committees are subject to a court supervised conditional release program. (Pen. Code, §1600 et seq.)

c. Case Law Support

This Court in *Hudec* acknowledged that it did not intend to overrule all other cases involving involuntary commitment and broadly confer the statutory right to refuse to testify afforded to NGIs. (60 Cal.4th at p. 830-832.) *Hudec* reasoned that intellectually disabled persons who pose a danger to themselves or others do not have a constitutional right to refuse to testify in commitment proceedings. (*Id.* at p. 830, citing *Cramer*, 23 Cal.3d at p. 139.) The courts have determined that commitment proceedings for intellectually disabled persons (Welf. & Inst. Code, §§ 6500-6513) are similar in aim and objective to LPS conservatorship commitments, including because they are not necessarily related to or initiated due to

criminal acts. (*Conservatorship of Ben C.*, 40 Cal.4th at p. 538; *Conservatorship of Susan T.*, 8 Cal.4th at p. 1015.) Further, the Court in *Hudec* did not analyze or overrule *Conservatorship of Baber*, 153 Cal.App.3d at p. 348-350, which denied LPS conservatees the right to refuse to testify at conservatorship proceedings.

The statutory schemes for the civil commitments of NGIs, MDOs, and SVPs are primarily designed to protect the public from dangerous people who have committed or been accused of criminal acts. By contrast, the LPS Act is designed to provide care for people who cannot care for themselves. In light of that stark difference, the court below erred in concluding that LPS conservatees are similarly situated to NGIs, SVPs, and MDOs for purposes of testimonial privilege.

2. Even if LPS Conservatees were Similarly Situated, the State has a Compelling Interest for Differential Treatment

The court below in *Conservatorship of E.B.* determined that, because LPS conservatees are similarly situated to NGIs, MDOs, and SVPs, the Public Guardian was required to justify the disparate treatment of LPS conservatees when requiring LPS conservatees to testify at trial.

Even assuming LPS conservatees are similarly situated and that the strict scrutiny test applies, the Court should find that the Public Conservator

-- the government -- has a compelling interest justifying the compelled testimony of E.B. in LPS conservatorship proceedings, and the disparate treatment of LPS conservatees under section 5008(h)(1)(A) is necessary to further its purpose: "the custodial care, diagnosis, treatment and protection of persons who are unable to take care of themselves and who for their own well being and the safety of others cannot be left adrift in the community." (*Conservatorship of Baber*, 153 Cal.App.3d at p. 549 [citing section 5001].)

Conservatorship of Baber determined there is a "compelling need for truth in conservatorship proceedings," in concluding that a proposed conservatee cannot refuse to testify at his or her own conservatorship trial. (*Id.* at p. 550.) As such, the courts have a compelling interest in receiving a proposed LPS conservatee's testimony to reveal to the trier of fact relevant physical and mental characteristics. (*Id.*)

To consider grave disability and whether a conservatee will accept meaningful treatment for his mental illness, it is critical to learn from the conservatee himself whether he is willing to accept treatment and medication for his mental illness, and whether he has insight regarding his mental illness. (*Conservatorship of Guerrero* (1999) 9 Cal.App.4th 442, 445-447.) The conservatee's current insight and state of mind are at issue

in a conservatorship trial under section 5008(h)(1)(A). The conservatee's plan to provide for his food, clothing and shelter is crucial for the determination of whether he is capable of providing for himself, and he should be questioned before the trier of fact regarding such when determining grave disability. "[T]he best interests of the potential conservatee would not be served by allowing [the conservatee] to engage in obfuscatory tactics." (*Conservatorship of Baber*, 153 Cal.App.3d at p. 549.) NGI, MDO, and SVP proceedings differ from that of a section 5008(h)(1)(A) conservatorship because the former consider overt acts of a dangerous felony crime, as well as the person's potential for substantial danger, which may be determined through more overt acts or threats.

Given that an LPS conservatorship concerns a person's ability to provide for his food, clothing and shelter, he must be asked about his plan regarding those issues to determine if he is gravely disabled A person that cannot provide for his food, clothing or shelter due to a mental disorder may have recently been homeless, paranoid, isolated, and hungry. There is a compelling interest to hear his testimony as to what occurred; there may be no other witness to his dire need for assistance to obtain food, clothing, or shelter while adrift in the community. (*Conservatorship of Baber*, 153

Cal.App.3d at pp. 549, 550.) Further, the trier of fact needs to be able to observe his demeanor to determine his ability to achieve the basic necessities of life and well being.

In sum, the state has a compelling interest in requiring an LPS conservatee to testify at his LPS conservatorship appointment hearing.

C. Review is Necessary Because the Decision in *Conservatorship of E.B.* Directly Conflicts with *Conservatorship of Bryan S.*

Conservatorship of Bryan S., 42 Cal.App.5th 190, was filed after E.B.'s jury trial and was considered and rejected by the court of appeal in *Conservatorship of E.B.* In *Conservatorship of Bryan S.*, Division One of the First District Court of Appeals decided that LPS conservatorships are not similarly situated to persons committed as NGI, MDO or SVP for the purpose of testimonial privilege. Therefore, the court in *Conservatorship of Bryan S.* found that the NGI statutory testimonial privilege does not extend to LPS conservatees on equal protection grounds. *Conservatorship of Bryan S.* reasoned that LPS conservatees are not similar to NGIs, SVPs and MDOs because LPS conservatees need not be found to have committed a crime or be a danger to others. (*Id.* at p. 196.) "As a result, there are far more placement options for conservatees, and these options include

noninstitutional settings." (*Id.*) Further, LPS conservatees must be placed in the least restrictive and most appropriate placement, including with family or friends. (*Id.* at pp. 196-197, Welf. & Inst. Code, § 5358, subds. (a)(1)(A), (c)(1).) "These differences are fatal to [Respondent's] equal protection claim." (*Id.* at p. 196.)

The court in *Conservatorship of Bryan S.* considered the purpose of NGI, SVP, and MDO commitments, i.e., protection of the public from persons found dangerous and in need of treatment for a mental disorder, and determined that the LPS conservatorship purpose differs. The LPS Conservatorship is "to provide prompt evaluation and treatment of persons with mental health disorders; to provide such people with individualized treatment, supervision, and placement services; and to encourage the use of all resources to accomplish these objectives. [Citations]." (*Id.* at p. 197.) The court in *Conservatorship of Bryan S.* emphasized that an LPS conservatee is not a criminal defendant, but often "a person in dire need of the state's assistance." (*Id.*; *Conservatorship of Baber* , 153 Cal.App.3d at 550.)

The decision in *Conservatorship of E.B.* is in direct conflict with *Conservatorship of Bryan S. Conservatorship of E.B.* found that E.B. was

similarly situated to NGIs for purposes of the law in question: the NGI statutory right not to testify against themselves. (*Conservatorship of E.B.*, 45 Cal.App.5th at pp. 991-992.) The court reasoned that although the LPS statute focuses on the prompt evaluation and treatment of persons with serious mental disorders regardless of criminal activity, "this does not change the nature of the confinement under its provisions and the resulting deprivation of liberty." (*Id.* at p. 993.) A conservatee may be placed in a mental hospital for up to a year by his conservator, with the possibility of additional year-long extensions, and in effect, "[t]he theoretical maximum period of detention is life as successive petitions may be filed." (*Id.* at pp. 993-994, citing *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 223-224.) The court in *Conservatorship of E.B.* determined that an LPS conservatee faces involuntary commitment similar to NGIs, MDOs and SVPs, even if the reason behind it is "more benevolent." (*Conservatorship of E.B.*, 45 Cal.App.5th at 994.)

The court in *Conservatorship of E.B.* determined that although the reasons underlying an LPS commitment were not identical to NGI, MDO and SVP commitments, they overlapped. (*Id.*) The court rejected *Conservatorship of Bryan S.*'s reasoning (*Id.* at p. 997), looked at the

primary purpose of NGI, MDO, and SVP commitments to protect the public from dangerous persons and to treat their mental health disorder (*Id.* at p. 994), and determined that "while a LPS conservatee need not be proved dangerous to the public in all circumstances, one purpose of the LPS Act is to 'guarantee and protect public safety.' (Welf & Inst. Code, § 5001, subd. (c).)" (*Id.*) In emphasizing a public protection purpose, the court pointed to other sections of the LPS Act specifically addressing "dangerous" persons, even though they did not pertain to the section 5008(h)(1)(A) conservatorship proceedings for E.B.

The court in *Conservatorship of E.B.* considered that, "[t]he primary benefit of compelled testimony in a case involving involuntary commitments is that it produces a more accurate verdict by allowing the trier of fact to observe firsthand the demeanor of the person the state seeks to commit. [Citations].)" (*Id.*) And the need for a more accurate verdict is more compelling for a conservatorship under section 5008(h)(1)(A), than it is for an NGI, SVP or MDO proceeding.

When a person lacks capacity or ability to provide for their food, clothing, and shelter because of a serious disability, the government steps in to provide these basic necessities for survival. A trier of fact must be able

to observe the person's demeanor, insight, and plan for self-care to ensure that their best interests and well-being are met. If the NGI statutory testimonial privilege is extended over broadly to apply to any involuntary commitment, then persons with serious disabilities in need of treatment and residential placement will be negatively impacted, including section 5008(h)(1)(A) LPS conservatees, dementia patients under Probate Code section 2356.5, and persons with developmental disabilities under section 6500. The decision below contradicts *Hudec*'s determination that it did not intend to apply the right to refuse testimony to all types of civil commitments. (*Hudec*, 60 Cal.4th at 830-832.)

The court in *Conservatorship of E.B.* determined that the Public Guardian had not offered a compelling reason as to why the right against compelled testimony should not apply. (*Id.* at pp. 994-997.) To the contrary, the reasons detailed above are compelling reasons. There are hardly any state interests more compelling than ensuring that seriously disabled persons are provided with the basic necessities of food, clothing and shelter if they are incapable of providing for themselves.

We respectfully request that this Court accept review to resolve this conflict in case law. We request this Court adopt the reasoning in

Conservatorship of Bryan S., overrule the lower court's decision in this case and find that equal protection does not require the NGI statutory testimonial privilege to apply to LPS conservatorship proceedings under section 5008(h)(1)(A).

VI. CONCLUSION

LPS Act proceedings involve important rights and serve to protect vulnerable individuals who may be gravely disabled and unable to care for themselves and obtain basic needs, including food, clothing and shelter. Based on the current split in authority, some LPS Act conservatees may be compelled to testify at trial while others may be allowed to refuse to testify despite the possible damage that might result from that refusal. That disparate result is probable based on the current conflict in the law on this issue. Trial courts and the parties to LPS Act proceedings need legal clarity on this important constitutional issue.

Respectfully, *Conservatorship of E.B.*, 45 Cal.App.5th 986, was wrongly decided and the Court should follow the reasoning in *Conservatorship of Bryan S.*, 42 Cal.App.5th 190. LPS conservatorships for persons gravely disabled under section 5008(h)(1)(A) are not similarly situated to NGI, MDO, or SVP commitments for the purpose of the NGI

statutory testimonial privilege. The issue of danger and public protection was not relevant to grave disability in the LPS conservatorship proceeding of E.B. A criminal act was not at issue, and equal protection was not violated.

This Court should grant review of this petition to resolve the conflict of decisions from the two Divisions of the First District Court of Appeals in *Conservatorship of Bryan S.* and *Conservatorship of E.B.*, and to settle the matter of law.

Date: April 23, 2020

Respectfully submitted,

Sharon L. Anderson
County Counsel

/s/
By: Steven P. Rettig
Assistant County Counsel
Attorney for Real Party in Interest

CERTIFICATE REGARDING LENGTH OF BRIEF
(Rule of Court 8.204 (c)(1))

I, Steven P. Rettig, Assistant County Counsel, certify under penalty of perjury that, according to the computer program on which this brief was produced, it contains approximately 6,257 words.

Executed this 23rd day of April, 2020, at Martinez, California.

/s/

Appendix A

Court of Appeal Opinion

Filed: 2/27/20

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

Conservatorship of the Person and Estate of E.B..	
PUBLIC GUARDIAN OF CONTRA COSTA COUNTY, Petitioner and Respondent, v. E.B., Objector and Appellant.	A157280 (Contra Costa County Super. Ct. No. P18-01826)

Appellant E.B. was found to be gravely disabled following a jury trial at which he was called as a witness over his objection. He appeals from an order appointing respondent the Public Guardian of Contra Costa County (public guardian) as his conservator under the Lanterman-Petris-Short (LPS) Act and determining that his current placement in a mental health rehabilitation facility was the least restrictive and most appropriate placement. (Welf. & Inst. Code, § 5350, 5358, subd. (c)(1).) Appellant's sole contention is that he had a right to refuse to testify under the equal protection clause, because that right has been statutorily granted in proceedings to extend the commitment of persons found not guilty by reason of insanity (NGI), and he is entitled to the same protection. (Pen. Code, § 1026.5.) We respectfully disagree with the recent decision in

Conservatorship of Bryan S. (2019) 42 Cal.App.5th 190 (*Bryan S.*) and conclude that LPS conservatees are similarly situated with NGI's and with individuals subject to other involuntary civil commitments for purposes of the right against compelled testimony. But because the error was harmless in this case, we affirm.

I. BACKGROUND

Appellant has been diagnosed with schizophrenia. He was placed under an LPS temporary conservatorship and on November 14, 2018, the public guardian filed a petition under the LPS Act seeking appointment of a conservator and alleging that appellant was gravely disabled as a result of a mental disorder, was unable or unwilling to accept treatment voluntarily, and was unable to manage his financial resources. The court denied appellant's written objection to compelled testimony and a jury trial was held at which appellant was called as one of three witnesses who testified.

A. *Dr. Levin*

Psychiatrist Michael Levin, M.D., worked for Contra Costa County at the Concord Mental Health Clinic and evaluated clients for the public guardian's office. He testified that appellant had diagnostic symptoms of schizophrenia in the area of affect. Appellant was blunted and flat, and showed signs of "thought blocking," where he would stop during conversations and be in his own thoughts for a while. One reason for thought blocking is auditory hallucinations. Appellant takes three drugs to treat his schizophrenia: the mood stabilizer Lithium Carbonate, the highest dose of a monthly injection called Invega Sustenna, and a very potent medication called Clozaril, which requires that a patient's white cell blood count be taken weekly. Appellant had told Dr. Levin that people have said he has schizophrenia, but he has it "[n]ot that much."

In Dr. Levin's opinion, appellant had signs of anosognosia, meaning he had limited insight into his illness and it would be more difficult for him to cooperate with treatment. He had last worked 12 to 13 years ago assisting his father as a mechanic, and had been living on supplemental security income (SSI) ever since. Dr. Levin believed that appellant was gravely disabled and has a major psychiatric illness. When appellant decompensates, he becomes more agitated, labile (emotionally unstable) and paranoid. Dr. Levin did not believe appellant would be able to negotiate for food and shelter, noting that he has not been able to do so in the past and that his current plan was to return to an apartment where he had previously lived.

B. *James Grey*

James Grey, a licensed marriage and family therapist, first had contact with appellant when Grey was employed as a mental health clinical specialist at the Concord Adult Mental Health Clinic. He testified that he began assisting as appellant's case manager in 2016, because appellant's paranoid behaviors were causing his housing to be at risk. Appellant was then living in a specialized housing program that reduced his rate of rent so he could live independently on SSI. He had removed and attempted to change door locks, vandalized the apartment and taken the heater off the wall to look for monitoring devices. Grey set up clinic appointments and offered appellant transportation, but appellant was inconsistent in complying with medication and treatment. Sometimes, he was agitated and unwilling to go to the clinic.

Grey noticed that appellant had bottles of medication that were months old, as well as unfilled prescriptions written by the psychiatrist. Appellant failed to cash many of his weekly checks for personal needs, which Contra Costa County issued to appellant in its role as his money manager. Appellant once refused to cash a check at a bank because there were female

tellers and he thought they were judging him because the check had the County's name on it.

In 2017, Grey went to work with the public guardian and was assigned to appellant's case as deputy conservator after a temporary conservatorship was ordered. Appellant was being treated at San Jose Behavioral Health, an in-patient hospital for people with mental illnesses, which released him to a shelter against the advice of Grey, who did not believe appellant could provide for his own food, clothing or shelter. Appellant ended up in an emergency psychiatric facility within a week, was again discharged against Grey's advice, and was transferred to an inpatient psychiatric emergency hospital. From there, he went to Contra Costa Medical Center and later to Crestwood Napa Valley, also known as Crestwood Angwin. Grey visited appellant at the hospital and Crestwood, where he found him to be guarded and paranoid, with an extremely flat affect and a disorganized thought process. Appellant sometimes believed his mother was not actually his mother and that people around him were out to get him. He still failed to take his medications and adhere to treatment with Grey as his case manager. During the last few weeks before trial, Grey had met with appellant and he reluctantly took his medication in an agitated, frustrated manner. Appellant's only plan if released was to return to his old apartment, but he did not present Grey with a lease or other verification he had rented the unit.

C. *Appellant*

Appellant testified that he had been staying at a board and care in Angwin, and before that he had been in a mental health unit. Asked if he knew why he was there, appellant responded, "I didn't know T-Con had to deal with being here and being there. It has nothing to do with each other." He then testified that Grey said he needed extra care. Asked what he wanted

to happen, he said, "Oh, I even kind of have really spoken not too clearly about this. But I'm more towards the neutrality and leaving enough area of a cushion that I could have—so I could leave the temporary conservatorship because maybe it's that I don't need it. And I know I have a mental health—mental health. [¶] I know what it is. I live with it. I take medications for it. When I know I don't need medications, I don't need medications. [¶] But if you will there's always a little strike pad here that we can always roughly just braze and find my history find out my – and my future means too. I'm trying to save this for myself."

Asked if he believed he had a mental disorder, appellant testified that he had attention deficit disorder as a kid, and then it changed. "I just had a learning disability. They didn't say anything about anxiety disorders or any manic problem or anything else like that." Asked about his medication, he named Lithium Carbonate and Clozaril. He didn't really understand why he was taking these medications; the medical doctors just decided he would take them. "I was admitted out of unbreeching contract. There's something just going on." He acknowledged that he was "sort of still dependent" on the program at Angwin. He would take his medications if released from the hospital and would get them at Rite Aid. Asked how he would pay for food if released, appellant said, "Pay for food? Rely on the conservatorship."

II. DISCUSSION

A person is "gravely disabled" and may be placed in an LPS conservatorship when he or she has, "[a] condition in which a person, as a result of a mental health disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter." (Welf. & Inst. Code, § 5008, subd. (h)(1).) Appellant contends, as a matter of equal protection, that in the jury trial on the petition to establish an LPS conservatorship under this

provision, he should not have been compelled to testify over his objection. We agree that he is similarly situated to persons subject to involuntary civil commitments who are not compelled to testify against themselves and that the court should have held an evidentiary hearing on whether the disparity was justified.

A. *Equal Protection—Disparate Treatment of LPS Conservatees*

"Under both the United States and California Constitutions, a person has the right to refuse to answer potentially incriminating questions put to him or her in any proceeding; in addition, the defendant in a criminal proceeding enjoys the right to refuse to testify at all." (*People v. Dunley* (2016) 247 Cal.App.4th 1438, 1446 (*Dunley*); see U.S. Const., 5th & 14th Amends.; Cal. Cont., art. 1, § 15.) There is no constitutional right to refuse to testify in civil proceedings, including in LPS commitment proceedings. (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137–138 (*Cramer*); *Conservatorship of Bones* (1987) 189 Cal.App.3d 1010, 1017 (*Bones*); *Conservatorship of Barber* (1984) 153 Cal.App.3d 542, 550 (*Barber*).)

In *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 818 (*Hudec*), our Supreme Court concluded that persons who had been found NGI could not be compelled to testify at commitment extension hearings even though they were civil in nature because Penal Code section 1026.5, subdivision (b)(7), which governs such proceedings, incorporates " ' "the rights guaranteed under the federal and State Constitutions for criminal proceedings." ' " (*Id.* at p. 826, italics omitted.) *Hudec* thus recognizes that persons subject to an NGI extension proceeding have a statutory right not to testify against themselves, even if they do not have a constitutional right not to do so.

Appellant acknowledges that there is no constitutional right not to testify against oneself in conservatorship trials, and further acknowledges

that the LPS Act does not create a statutory right similar to the NGI statute. (*Bones*, *supra*, 189 Cal.App.3d at p. 1017; *Barber*, *supra*, 153 Cal.App.3d at p. 550.) But he argues that equal protection principles require that we apply the same rule regarding compelled testimony in LPS proceedings as we do under *Hudec* in NGI proceedings.

" ' "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." [Citations.] This inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' [Citation.] In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws." (*People v. McKee* (2010) 47 Cal.4th 1172, 1202 (*McKee*).) If the two groups are similarly situated, the next question is whether the state has justified the disparate treatment, applying either the "rational basis" or "strict scrutiny" test, as appropriate, to analyze the statute's constitutionality. (*People v. Shields* (2011) 199 Cal.App.4th 323, 333.)

In *McKee*, *supra*, 47 Cal.4th at pages 1183–1184, the court considered whether equal protection principles were violated by an amendment that changed the two-year commitment term for sexually violent predators (SVP's) to an indeterminate term from which the SVP could be released only if he proved by a preponderance of the evidence that he no longer qualified under the law. The defendant argued SVP's were similarly situated to mentally disordered offenders (MDO's) for the purpose of obtaining release from commitment, yet the latter remained subject to a commitment for only a

limited term. (*Id.* at pp. 1200–1203, 1207.) The Court rejected an argument by the People that differences in the definitions and treatment of SVP's and MDO's and the dangers posed by those groups rendered them dissimilar for equal protection analysis. (*Id.* at p. 1202.) The Supreme Court found persons committed under the different statutes were similarly situated for purposes of the conditions for release from their commitments. "All that the above passage demonstrates is the incontrovertible point that SVP's and MDO's do not share identical characteristics. But the identification of the above differences does not explain why one class should bear a substantially greater burden in obtaining release from commitment than the other." (*Ibid.*) It remanded the case for an evidentiary hearing on whether the disparate treatment was justified.[1]

Looking to the first prong of equal protection analysis, appellant argues that because LPS conservatees may be involuntarily confined in state hospitals as a result of their mental illness, they are similarly situated with NGI's. (Welf. & Inst. Code, § 5358, subd. (a)(2).) A number of cases have looked to *Hudec* and found that a rule allowing compelled testimony in cases involving commitments under the MDO or SVP laws may violate equal protection because SVP's and MDO's are similarly situated to NGI's for the purpose of compelled testimony. (*People v. Flint* (2018) 22 Cal.App.5th 983, 989–991 [SVP's similarly situated to NGI's; case remanded for evidentiary hearing on whether disparate treatment justified]; *People v. Alsafar* (2017) 8 Cal.App.5th 880, 887 [MDO's are similarly situated to NGI's; appeal dismissed as moot]; *People v. Field* (2016) 1 Cal.App.5th 174, 196–197 [SVP similarly situated to NGI for purposes of testimonial privilege; case

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[1] In *People v. McKee* (2012) 207 Cal.App.4th 1325, 1347, the court on remand upheld the electorate's reasons for treating SVP's more harshly than MDO's.

remanded for evidentiary hearing on justification for different treatment]; *Dunley*, *supra*, 247 Cal.App.4th at pp. 1450, 1453–1454, fn. 14 [MDO's are similarly situated to NGI's and SVP's for purposes of right of refusing to testify; appeal dismissed as moot]; *People v. Landau* (2016) 246 Cal.App.4th 850, 864–865 [determining that SVP's are similarly situated to NGI's and allowing parties to address on remand whether different treatment is justified]; *People v. Curlee* (2015) 237 Cal.App.4th 709, 715–717 [determining that SVP's are similarly situated to NGI's for purposes of the right of refusing to testify but remanding matter for an evidentiary hearing regarding whether the difference in treatment is justified].) The reasoning of these cases applies with equal force to LPS commitment proceedings, at least for the purpose of the testimonial privilege.

Although the LPS statute focuses on the prompt evaluation and treatment of persons with serious mental disorders without respect to their criminal activities (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 540), this does not change the nature of the confinement under its provisions and the resulting deprivation of liberty. "The extent to which liberty is at stake can be ascertained by reviewing exactly what awaits an individual subjected to a grave disability proceeding. When the establishment of a conservatorship is recommended, the court may appoint a temporary conservator who has the power to keep the individual in a treatment facility for up to six months pending the outcome of a trial on the issue of grave disability. ([Welf. & Inst. Code], §§ 5352.1, 5353.) If the individual is found to be 'gravely disabled,' the court then appoints a conservator and specifies the powers which the conservator will possess. ([Welf. & Inst. Code], §§ 5357, 5358.) One of the principal powers which the court may grant a conservator is the right to place a conservatee in an institution. Unlike a person who is

found to be imminently dangerous to others. . . , the person who is found to be gravely disabled can be involuntarily confined in a mental hospital for up to a year by his or her conservator, with the possibility of additional year-long extensions. ([Welf. & Inst. Code], §§ 5358, 5361.) The period of temporary conservatorship is not included in the one-year period. ([Welf. & Inst. Code], § 5361.) If the conservator petitions to reestablish an expiring conservatorship, the court may order the conservatee confined past the termination date until renewal proceedings are completed. ([Welf. & Inst. Code], § 5361.) In effect, these statutes assure in many cases an unbroken and indefinite period of state-sanctioned confinement. 'The theoretical maximum period of detention is *life* as successive petitions may be filed . . . .' " (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 223-224.)

An LPS conservatee thus faces an involuntary commitment similar to NGI's (and MDO's and SVP's) even if the reason behind that commitment is more benevolent. The reasons underlying an LPS commitment, while not identical to civil commitment schemes applicable to those who have been convicted of crimes, overlap with them. The primary purpose of NGI extension proceedings and MDO and SVP commitments is to protect the public from people found dangerous to others and who need treatment for a mental disorder, but an ancillary purpose is to provide mental health treatment for the disorder. (*Dunley*, *supra*, 247 Cal.App.4th at pp. 1448–1449; *Hudec*, *supra*, 60 Cal.4th 823 [NGI extension]; *In re Qawi* (2004) 32 Cal.4th 1, 9 [MDO]; *Curlee*, *supra*, 237 Cal.App.4th at p. 720 [SVP].) And, while an LPS conservatee need not be proved dangerous to the public in all circumstances, one purpose of the LPS Act is to "guarantee and protect public safety." (Welf. & Inst. Code, § 5001, subd. (c).) Indeed, one definition of "grave disability" for purposes of an LPS conservatorship requires that the

conservatee be found dangerous to others: a so-called Murphy conservatorship may be established under the LPS law when a person currently charged with "a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person," and for which probable cause has been found, has been found mentally incompetent but represents a substantial danger of physical harm to others by reason of the mental disease, defect or disorder. (Welf. & Inst. Code, § 5008, subd. (h)(1)(B); *People v. Karriker* (2007) 149 Cal.App.4th 763, 775; see Welf. & Inst. Code, § 5300, subds. (a)(1), (a)(2) & (a)(3) [confinement for up to 180 days under LPS Act upon showing that person "presents a demonstrated danger of inflicting substantial physical harm upon others"].)

Moreover, many of the same procedural protections apply in a trial to declare someone an LPS conservatee as apply in other proceedings to establish involuntary commitments. As with NGI extension proceedings, MDO proceedings, and SVP proceedings, a proceeding to declare a conservatorship under the LPS statute requires that the government bear the burden of proof beyond a reasonable doubt, and that the subject of the petition have the right to a jury trial and a unanimous verdict. (*Hudec, supra*, 60 Cal.4th 821–822, 828 [NGI extension]; *Conservatorship of John L.* (2010) 48 Cal.4th 131, 143 [LPS conservatorship]; *McKee, supra*, 47 Cal.4th at pp. 1201–1202 [describing MDO proceedings]; *Curlee, supra*, 237 Cal.App.4th at p. 719–720 [SVP proceedings].)[2] While we do not doubt that there are some purposes for which an LPS conservatee is dissimilar to those subject to involuntary commitments by reason of their criminal history and dangerousness, the public guardian has offered no compelling reason why

[2] In an initial trial on an insanity defense, the defendant has the burden of proof by a preponderance of the evidence of proving insanity. (*In re Franklin* (1972) 7 Cal.3d 126, 141.)

these procedural protections should not include the right against compelled testimony.

The public guardian argues against the conclusion that LPS conservatees are similarly situated to NGI's, SVP's and MDO's, pointing out that those other three groups are subject to their civil commitment only because they have been found guilty of committing a crime and currently pose a danger to others. (Pen Code, §§ 1026. subd. (a) [NGI plea requires court to first conduct trial on issue of guilt in which the defendant is conclusively presumed sane; only if defendant found guilty does case proceed to trial on sanity]; 2962, subd. (a) [mental health treatment given to MDO's as condition of parole]; Welf. & Inst. Code, § 6600, sub. (a) [SVP defined as "person who has been convicted of sexually violent offense"]; see *McKee*, *supra*, 47 Cal.4th 1209, fn. 11 [NGI's, SVP's and MDO's more closely resemble each other than LPS conservatees due to the determination that they have committed crimes].) The public guardian reasons that because these three groups share qualities that LPS conservatees do not, the latter group is not similarly situated with the others and equal protection principles are not offended, in compelling prospective LPS conservatees to testify.

It is an "incontrovertible point" that NGI's, SVP's and MDO's do not share identical characteristics with LPS conservatees, who have not necessarily been convicted of a crime or found to be dangerous. (*McKee*, *supra*, 47 Cal.4th at p. 1203.) Because of these differences, it is permissible to treat persons subject to other types of commitments differently from LPS conservatees in some respects. (See *In re Smith* (2008) 42 Cal.4th 1251, 1267–1268 [because SVP's currently in prison, they may be committed based on finding of mental disorder that makes them likely to engage in sexually violent criminal behavior, even though those not in prison can be subject to a

long-term civil commitment under the LPS Act only if gravely disabled]; *People v. Cooley* (2002) 29 Cal.4th 228, 252–254 [LPS conservatee and SVP's not similarly situated for purposes of probable cause hearing].) But this is not dispositive in determining whether the groups are similarly situated *for purposes of the testimonial privilege.* Case law has recognized that criminality and dangerousness may be the basis for adopting different types of civil commitments, but it has also recognized "consideration of prior criminal conduct as a basis for distinguishing among dangerous persons must be reasonable." (*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 173, fn. 10 [upholding law enacting Murphy conservatorship, which must be construed to include requirement that by reason of mental disease, defect or disorder, person represents a substantial danger to others, against argument that statute denies equal protection because incompetence to stand trial bears no rational relationship to "grave disability" as term was then defined under LPS Act].) It is not a reasonable distinction to say that individuals who have not engaged in criminal conduct can be required to testify against themselves in a trial to determine whether they might be committed against their will when a person whose commitment is linked to his criminal conduct can elect to remain silent. At least, the nature of the commitment requires a finding that the groups are similarly situated for purposes of requiring the state to justify this disparate treatment.

The primary benefit of allowing compelled testimony in a case involving involuntary commitments is that it produces a more accurate verdict by allowing the trier of fact to observe firsthand the demeanor of the person the state seeks to commit. (See *Hudec*, *supra*, 60 Cal,4th a p. 830; *Cramer*, *supra*, 23 Cal.3d at p. 139.) This interest in an accurate verdict exists in all involuntary commitment schemes—indeed, it might be argued that the

interest is even greater when the mental illness results in the person being a danger to others.

We emphasize that the constitutional right with which we are concerned is equal protection, not the right against compelled testimony. We in no way suggest that the constitution would preclude an LPS conservatee from taking the stand under protest. But the state has determined to extend the privilege against self-incrimination to persons subject to an NGI extension proceeding, and SVP's and MDO's have been deemed by the courts to be similarly situated. "MDO, NGI, and LPS proceedings have the same underlying goal—protecting the public and treating severely mentally ill persons. [Citations.] In the LPS context, ' "[t]he destruction of an individual's personal freedoms effected by civil commitment is scarcely less total than that effected by confinement in a penitentiary." ' [Citation.] '[T]he gravely disabled person for whom a conservatorship has been established faces the loss of many other liberties in addition to the loss of his or her freedom from physical restraint.' [Citation.] 'Indeed, a conservatee may be subjected to greater control of his or her life than one convicted of a crime.' " (*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 383; see also *Conservatorship of Kevin A.* (2015) 240 Cal.App.4th 1241, 1249–1250 [right to jury trial must be personally waived by prospective LPS conservatee unless he or she is incompetent to waive right].)

Another division of this court recently rejected the argument that LPS conservatees are similarly situated to NGI's for purposes of the testimonial privilege. (*Bryan S.*, *supra*, 42 Cal.App.5th at p. 195.) The court acknowledged that LPS conservatees, like NGI's, SVP's and MDO's, "are subject to involuntary civil commitment as a result of their mental health." (*Id.* at p. 196.) But it concluded that LPS conservatees were different from

NGI's, SVP's and MDO's because they need not have been found guilty of a crime or be a danger to others to be committed. (*Ibid.*) This distinction was fatal to the claim that LPS conservatees are similarly situated. "As our Supreme Court has explained, there is 'no similarity between the aims and objectives of the [LPS Act] and those of the criminal law. . . . "The commitment is not initiated in response, or necessarily related, to any criminal acts." ' [Citations.] Again, the purpose of civil commitments for NGI's, SVP's, and MDO's is to protect the public from people who have been found to be dangerous to others and who need treatment for a mental disorder. [Citation.] By contrast, the primary purposes of the LPS Act are to provide prompt evaluation and treatment of persons with mental health disorders; to provide such people with individualized treatment, supervision, and placement services; and to encourage the use of all resources to accomplish these objectives. [Citations.] 'We cannot overemphasize the importance of recognizing that a prospective conservatee is not a criminal defendant but, in many cases, a person in dire need of the state's assistance." ' " (*Id.* at p. 197.)

While NGI's, SVP's and MDO's may have been found guilty of a crime, the purpose underlying those civil commitment schemes is not punishment, but treatment for a mental health condition. (*People v. Endsley* (2018) 28 Cal.App.5th 93, 100–101 [NGI commitment is for purposes of treatment, not punishment]; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1177–1179 [SVP Act does not impose "punishment"]; *People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826, 839 [MDO law "not punishment"].) LPS conservatees may have a different criminal history than NGI's, MDO's, and SVP's, but at root, like those groups, they are committed against their will for mental health treatment—possibly for the rest of their lives. As counsel for

appellant aptly put it at oral argument, before they are asked to be "agents of their own incarceration," the state should be required to justify its decision to treat LPS conservatees differently with respect to compelled testimony.

Turning to the second prong of the equal protection analysis, the public guardian made no showing that appellant's compelled testimony was any more necessary in the proceeding to declare appellant an LPS conservatee than it would have been in other types of civil commitment proceedings. We do not suggest the public guardian could not make such a showing, only that such a showing has not been made as of yet. (See *McKee*, *supra*, 47 Cal.4th at p. 1207; *Curlee*, *supra*, 237 Cal.App.4th at pp. 721–722.) The concurring opinion's thoughtful discussion of the differences between the LPS Act and other civil commitment schemes raises points which are certainly relevant to whether the state has justified its disparate treatment of LPS conservatees.

B. *Harmless Error*

In determining whether the case should be remanded to ascertain whether the disparate treatment of LPS conservatees is justified, we must also address the issue of prejudice. (*Curlee*, *supra*, 237 Cal.App.4th at pp. 722–723.) The public guardian contends that even if appellant should not have been compelled to testify, the error was harmless. This argument requires us to determine which standard of prejudice applies—the harmless-beyond-a-reasonable doubt standard applicable to federal constitutional errors under *Chapman v. California* (1967) 386 U.S. 18, 24, or the less-stringent miscarriage-of-justice/reasonable-probability-of-a-different-result standard applicable to state law errors under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Blackburn* (2015) 61 Cal.4th 1113, 1132; *People v. Aranda* (2012) 55 Cal.4th 342, 354.)

As the public guardian notes, in *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1094 (*Walker*), the court stated that the standard of harmless error in conservatorship proceedings was the harmless-beyond-a-reasonable-doubt standard of *Chapman*. (See also *Conservatorship of Early* (1983) 35 Cal.3d 244, 255.) *Walker* involved an erroneous instruction regarding the elements necessary to impose a conservatorship (*Walker* at p. 1092), and in our view should not be read for the broad proposition that all errors in conservatorship proceedings should be measured under this standard. After all, the *Watson* standard applies to errors of state law in criminal trials; we do not believe an LPS conservatee is entitled to a higher standard of prejudice than a criminal defendant for a comparable error. Additionally, an NGI who challenged the admission of compelled testimony under *Hudec*, which involved a statutory right against compelled testimony, would presumably have the error evaluated under the *Watson* standard; we do not believe a higher standard should be used to evaluate an equal protection claim predicated on the same statutory right. (See *People v. Epps* (2001) 25 Cal.4th 19, 29 [denial of defendant's statutory right to jury trial on prior conviction reviewed under *Watson* standard]; *People v. Barrett* (2012) 54 Cal.4th 1081, 1150–1151 (Liu, J., concurring and dissenting) [*Watson* standard applies to federal equal protection claim based on denial of state statutory right].)

But even under the more demanding *Chapman* standard, the error was harmless. Appellant's own testimony was not essential for the public guardian to prove its case (cf. *People v. Haynie* (2004) 116 Cal.App.4th 1224, 1230), because it had two other witnesses who were familiar with appellant and painted a vivid picture of someone who was unable to care for himself left to his own devices due to his mental illness. Dr. Levin evaluated appellant

on behalf of the public guardian and assessed appellant as suffering from a grave disability based on his review of the medical records, his interactions with appellant, and his discussions with appellant's treating psychiatrist. James Grey was a deputy conservator who had been assigned to appellant's case since 2017 and had contact with appellant since 2016. Even if the jurors had not observed appellant's demeanor on the stand, they would have known that appellant was diagnosed as a schizophrenic; that he was on three medications for his mental illness, one of which required careful and regular white blood cell count monitoring; that he had been recently hospitalized for his mental illness; that when living on his own he had engaged in behavior that was not merely aberrant, but put his housing situation at risk; that he was reluctant to participate in treatment and sometimes missed appointments when he was living on his own; that he had limited insight into his mental health condition; and that he did not consistently take his medication or fully comply with his treatment unless required to do so. (See *Walker*, *supra*, 196 Cal.App.3d at 1094 [instructional error harmless beyond a reasonable doubt when "as a matter of law no jury could find [LPS conservatee], on his own or with family help, capable of meeting his basic needs for food, clothing or shelter"].)

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

I concur.

SIMONS, Acting P. J.

Burns, J., Concurring.

I agree with my colleagues' conclusions on prejudice and concur in the disposition. As to the equal protection issue, I agree with my colleagues' conclusion that the public guardian has not justified the Legislature's decision to grant a testimonial privilege in some civil commitment schemes but withhold it in actions under the Lanterman-Petris-Short (LPS) Act. I write separately to highlight relevant differences between the groups but ultimately conclude that proposed LPS conservatees are similarly situated for equal protection purposes.

A.

California has no fewer than nine involuntary civil commitment schemes. (*People v. Barrett* (2012) 54 Cal.4th 1081, 1093 (*Barrett*).) Most of them apply to persons accused or convicted of a crime, including persons found not guilty by reason of insanity (NGIs; Pen. Code, § 1026, subd. (a)); prisoners whose parole is conditioned on mental health treatment (called mentally disordered offenders or MDOs; see *id.*, § 2962, subd. (a)(1)); and sexually violent predators (SVPs; Welf. & Inst. Code, § 6600 et seq.) [1] (*Barrett, supra,* 54 Cal.4th at pp. 1093-1094.)

Two commitment schemes apply to people who need not have any connection to the criminal justice system; one of those is the LPS Act (§ 5000 et seq.). (*Barrett, supra,* 54 Cal.4th at p. 1118 (conc. & dis. opn. of Liu, J.).) The LPS Act serves the state's interest, as *parens patrie*, in caring for citizens who are unable to care for themselves. (*In re Qawi* (2004) 32 Cal.4th 1, 15.) Enacted in 1967, the LPS Act " 'established the most progressive . . . commitment procedures in the country.' " (*Id.* at p. 17). It was intended, in part, to "end[] the inappropriate and indefinite commitment of the mentally

[1] Undesignated statutory references are to the Welfare and Institutions Code .

ill." (§ 5001, subd. (a); *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1009 (*Susan T.*).)

Accordingly, the LPS Act is "designed to ensure that conservatorship proceedings are brought as a last resort, when voluntary treatment has been refused and the temporary involuntary treatment provisions of the act have been exhausted. Each level of treatment decreases the likelihood a conservatorship proceeding will be necessary." (*Susan T., supra*, 8 Cal.4th at pp. 1018-1019.) Involuntary commitments are thus limited to incremental periods of increasingly longer duration—a 72-hour detention for evaluation and treatment (§ 5150, subd. (a)), which may be extended by 14 days if the person is suicidal (§ 5250) and, in some counties, by another 30 days for intensive treatment. (§ 5270.15, subd. (a).) If a jury finds a person to be "gravely disabled" and unwilling to accept voluntary treatment, a court may appoint a conservator for up to one year. (§ 5350.) Gravely disabled means that, as a result of a mental health disorder, the person is unable to provide for food, clothing, or shelter. (§ 5008, subd. (h)(1)(a).) A conservatorship may be avoided entirely if the person can survive with the assistance of friends or family. (§ 5350, subd. (e)(1).)

The majority correctly recognizes the LPS Act may be invoked in several different situations, including when mentally ill persons are found to be dangerous to others. (See §§ 5008, subd. (h)(1)(B), 5150, subd. (a) [72-hour hold for a person who is "a danger to others, or to himself or herself"], 5300 [short-term confinement of dangerous persons], 5350, subd. (a)(2); *People v. Karriker* (2007) 149 Cal.App.4th 763, 775 [discussing Murphy conservatorships, which are intended to protect society from " 'dangerous individuals who are not subject to criminal prosecution' "].) Accordingly, one general purpose of the LPS Act is to protect public safety. (§ 5001, subd. (c).)

Under the part of the LPS Act at issue here, however, there is no requirement to show that appellant is dangerous or has been convicted or accused of a crime. Rather, appellant's conservatorship is grounded in a mental health disorder that leaves him unable to care for himself. (§§ 5008, subd. (h)(1)(A), 5350.)

In contrast, the involuntary commitment schemes that apply to persons accused or convicted of crimes are primarily intended to protect society from dangerous people. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1203, 1206-1207 (*McKee*)[commitment of NGIs, SVPs, or MDOs requires proof of danger to others]; *Conservatorship of Bryan S.* (2019) 42 Cal.App.5th 190, 196-197.) After a person found not guilty by reason of insanity has been committed to a state hospital for the maximum term, a prosecutor may extend the commitment if a jury finds the person "represents a substantial danger of physical harm to others" because of a mental disorder. (Pen. Code, § 1026.5, subds. (b)(1), (b)(3).) Similarly, MDOs are violent criminals who have mental disorders that make them a danger to others. (Pen. Code, § 2962.) SVPs are " 'a small but extremely dangerous group of sexually violent predators' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253) with mental disorders that predispose them to commit sexual crimes. (§ 6600, subd. (c).)

B.

The testimonial privilege at issue here was originally part of a package of criminal procedures that the Legislature imported into sex offender commitment proceedings to address due process concerns. Our Supreme Court likened involuntary commitment proceedings for mentally disordered sex offenders (the predecessor to SVPs) to criminal trials, but without adequate due process safeguards. (*People v. Burnick* (1975) 14 Cal.3d 306,

318-324; *People v. Feagley* (1975) 14 Cal.3d 338, 349-352 (*Feagley*).) In response, the Legislature amended the commitment scheme to add safeguards from criminal proceedings. (See *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 821 (*Hudec*); see also, *id.* at p. 827.) In addition to granting criminal discovery procedures, a right to counsel, and a right to jury trial, the Legislature provided: " 'The patient shall be entitled to the rights guaranteed under the Federal and State Constitutions for criminal proceedings.' " (*Id.* at p. 821, quoting Welf. and Inst. Code, former § 6316.2, subd. (e), added by Stats. 1977, ch. 164, § 3, at pp. 634-636, italics omitted.)

Two years later, in the wake of a Supreme Court decision holding that NGIs are similarly situated to mentally disordered sex offenders for confinement duration purposes (*In re Moye* (1978) 22 Cal.3d 457, 467, superseded by statute as stated in *People v. Bennett* (1982) 131 Cal.App.3d 488, 493), the Legislature again borrowed from criminal procedure by enacting similar reforms to the NGI scheme. (*Hudec*, *supra*, 60 Cal.4th at p. 821.) The reform package included the same provision for "rights guaranteed under the federal and State constitutions for criminal proceedings." (Pen. Code, § 1026.5, subd. (b)(7); *Hudec, supra*, at pp. 821-822, italics omitted.)

In *Hudec*, our Supreme Court held that the plain language of this statute provides NGIs in civil commitment extension hearings the rights "constitutionally enjoyed by criminal defendants," which includes "the right to refuse to testify in the prosecution's case-in-chief." (*Hudec, supra,* 60 Cal.4th at p. 826.) The *Hudec* court conceded a testimonial privilege may arguably undermine the state's interest in an accurate result, but, on the other hand, the Legislature's decision to require the prosecution to " 'shoulder the entire load' " may be viewed as striking a fair balance between the state

and the NGI. (*Id.* at p. 830.) The Legislature made a policy choice, and, absent a constitutional problem, the courts cannot "reweigh the competing considerations." (*Ibid.*)

C.

Equal protection ensures that the government does not treat one group of people unfairly in comparison with other groups with similar characteristics. (*Barrett*, *supra*, 54 Cal.4th at p. 1107.) The initial question is not whether they are similar in all respects but whether they are similarly situated " 'for purposes of the law challenged.' " (*McKee*, *supra*, 47 Cal.4th at p. 1202.)

Our Supreme Court has repeatedly stated that the Legislature has latitude to create different rules for civil commitments of people who are dangerous or in prison for criminal conduct. (See *In re Smith* (2008) 42 Cal.4th 1251, 1266-1268; *Cooley v. Superior Court*, *supra*, 29 Cal.4th at pp. 253-254; *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 171-173 (*Hofferber*.) "[T]he Legislature may make reasonable distinctions between its civil commitment statutes based on a showing that the persons are not similarly situated, meaning that those who are reasonably determined to represent a greater danger may be treated differently from the general population." (*Smith*, *supra*, 42 Cal.4th at p. 1266.) Two differences between the commitment schemes at issue merit discussion.

First, the testimonial privilege is broadly consistent with the quasi-criminal purpose and process of civil commitments for NGIs, MDOs, and SVPs. The statutory schemes share a common purpose with criminal law—protecting the public from dangerous people who would otherwise be released from state prisons or hospitals. (See *Feagley*, *supra*, 14 Cal.3d at p. 361.) To achieve that purpose, the Legislature created a civil proceeding modeled in

many respects on criminal trials. To ensure due process, the Legislature granted the offender due process rights adapted from criminal proceedings, including a testimonial privilege, along with other features such as criminal discovery rules. (Pen. Code, § 1026.5, subd. (b)(1) and (b)(3); *Hudec, supra*, 60 Cal.4th at pp. 820-822, 827 [noting legislative intent to grant " ' [a]ll rights that apply in criminal trials' "].) Extension of the testimonial privilege is consistent with the criminal model that the Legislature adopted in these commitment schemes. (Evid. Code, § 930 [a criminal defendant has a right to refuse to testify].)

The Legislature structured LPS proceedings differently—less like a criminal trial—to serve different purposes. The government's primary interest is not public safety; there is no accusation that appellant is dangerous. The government is primarily serving its interest as *parens patrie* to care for people who cannot care for themselves. (*In re Qawi, supra*, 32 Cal.4th at p. 15.) The LPS Act is designed to *avoid* commitment wherever possible. (*Susan T., supra*, 8 Cal.4th at pp. 1018-1019; see, e.g., §§ 5350, subd. (e)(1) [a person may not be deemed gravely disabled if friends or family can safely help them]; 5354 [officer conducting conservatorship investigation "shall recommend conservatorship to the court only if no suitable alternatives are available"].) Its goals include protecting the mentally ill *from* criminal victimization (§ 5001, subd. (g)) "and from the myriad forms of suffering endured by those unable to care for themselves." (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 540 (*Ben C.*).) In this context, there is no obvious reason to depart from the general rule in civil cases that no party may refuse to be a witness. (Evid. Code, § 911, subdiv. (a).)

Second, a testimonial privilege serves a similar function in both NGI proceedings and criminal proceedings. The prosecutor is attempting to prove

that the person "represents a substantial danger of physical harm to others" (Pen. Code, § 1026.5, subd. (b)(1)), which is effectively an allegation that the person is likely to commit violent crimes. Given the social stigma of branding a person both mentally impaired and a danger to society, it is reasonable for the Legislature to provide a corresponding protection like the testimonial privilege, even when the constitution does not require it. (See *Cramer v. Tyars* (1979) 23 Cal.3d 131, 137-138 [historical purpose of testimonial privilege is to assure that the criminal justice system remains accusatorial]; *Hofferber*, *supra*, 28 Cal.3d at p. 173 [Legislature may determine that dangerous criminals should be "subject to the trauma and stigma of longer-term confinement" unlike other violent persons].) Indeed, the Legislature adopted the testimonial privilege in response to Supreme Court decisions that likened these kinds of commitments to criminal prosecutions. (See *Hudec*, *supra*, 60 Cal.4th at pp. 820-821, 827.)

The need for this sort of counterweight in an LPS proceeding is less obvious. The LPS process is notably different. It begins with a series of short-term efforts to treat and evaluate the patient prior to a potential one-year conservatorship. (*Ben C., supra,* 40 Cal.4th at p. 541.) Rather than a prosecutor, a public guardian (or other designated county official) brings an action for a conservatorship, which may lead to a comprehensive investigation, followed by a report to the court of all available alternatives to conservatorship. (§§ 5351, 5352, 5354.) The LPS Act also includes additional safeguards to minimize the intrusion on a person's liberty that the other groups do not have, including a right to petition for rehearing every six months to establish that the patient is no longer disabled (§ 5364), a right to contest the terms of a commitment and any rights denied the patient (§ 5358.3), and a right to the least intrusive placement option. (§ 5358,

subd. (a)(1)(A).) The "panoply of safeguards" makes an LPS proceeding "qualitatively different" than a criminal trial by keeping the focus primarily on the conservatee's current needs and progress. (*Ben C.*, *supra*, 40 Cal.4th at p. 543 [rejecting due process and equal protection arguments for *Anders/Wende* review in appeals from LPS proceedings].) And while I do not doubt the potential stigma associated with being adjudged unable to care for oneself due to mental illness (see *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 228-229), it is surely worse to be adjudged both mentally ill *and* a danger to society.

D.

Notwithstanding the fact that there are relevant differences between the groups, the public guardian has not demonstrated that they merit treating the groups differently.

A testimonial privilege is a fundamental departure from the normal rules of civil procedure (see Evid. Code, § 911, subd. (a)), and it could be a valuable tool in any case—civil or criminal—where a party deems it advantageous to decline to testify. The fact that extension of the privilege to NGI proceedings make sense for various reasons, as explained above, is largely due to the Legislature's policy decision to import criminal safeguards into NGI proceedings. But that does not necessarily mean it is *fair* to grant this valuable privilege to one group and not the other. Similarly, although NGIs may face *greater* social stigma than LPS conservatees, it is still a problem that they both face. The differences do not explain why one group should have an advantage that the other does not. (*McKee*, *supra*, 47 Cal.4th at p. 1203.) For that reason, despite the presence of relevant differences, the groups are similarly situated for equal protection purposes. (*Ibid.*)

I agree with the majority that, even if appellant should not have been compelled to testify, he has not demonstrated prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836;]; *Barrett, supra,* 54 Cal.4th at pp. 1150-1151 (conc. & dis. opn. of Liu, J.).) Thus, we need not remand for the trial court to determine whether differential treatment of proposed LPS conservatees is justified. In future cases, however, the government should be prepared to justify the disparate treatment under the second prong of the equal protection analysis. It may be able to show, for example, that there is a greater need for the proposed conservatee's testimony in LPS proceedings because, in NGI commitment extension proceedings, the government has had more time to observe the person and to gather evidence while he or she has been committed. The record here is insufficient to make that sort of conclusion.

BURNS, J.

A157280

A157280 / Public Guardian of Contra Costa County v. E.B.

Trial Court:Superior Court of Contra Costa

Trial Judge: Honorable Susanne M. Fenstermacher

Counsel: Sharon L. Anderson, County Counsel, Nina Dong, Deputy County Counsel for Petitioner and Respondent.

By Appointment of the First District Court of Appeal under the First District Appellate Project, Jeremy T. Price and Jonathan Soglin for Defendant and Appellant.

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(**Code Civ. Proc. §§** 1012, 1013a, 2015.5; **F R Civ P** 5(b))

Re: In re conservatorship of E.B., Public Guardian of Contra Costa County, Petitioner and Respondent, v. E.B.., Objector **and Appellant** No. **A157280**

I declare that my business address is the County Counsel's Office of Contra Costa County, Administration Building, P.O. Box 69, Martinez, CA 94553-0116; that I am a citizen of the United States, over 18 years of age, employed by the County of Contra Costa and not a party to the within action; and, that I am readily familiar with the County Counsel's office business practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of the County Counsel's office business practice the document described below will be deposited with the United States Postal Service on the same date that it is sealed and placed at the County Counsel's office with fully prepaid postage thereon.

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Contra Costa County Counsel

Law Firm