S261812

IN THE SUPREME COURT OF CALIFORNIA

PUBLIC GUARDIAN OF CONTRA COSTA COUNTY,
Petitioner,

v.

E.B.,
Respondent.

AFTER A DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION FIVE, CASE NO. A157280
CONTRA COSTA SUPERIOR COURT, CASE NO. P18-01826
HONORABLE SUSANNE M. FENSTERMACHER, JUDGE • PHONE: (925) 608-1115

OPENING BRIEF ON THE MERITS

SHARON L. ANDERSON (BAR NO. 94814)
COUNTY COUNSEL
STEVEN RETTIG (BAR NO. 178447)
ASSISTANT COUNTY COUNSEL
*PATRICK L. HURLEY (BAR NO. 174438)
DEPUTY COUNTY COUNSEL
P.O. BOX 69
MARTINEZ, CALIFORNIA 94553-4681
(925) 655-2200 • FAX: (925) 655-2266
steven.rettig@cc.cccounty.us
patrick.hurley@cc.cccounty.us

ATTORNEYS FOR PETITIONER
PUBLIC GUARDIAN OF CONTRA COSTA COUNTY

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ISSUE PRESENTED

Does equal protection require that persons subject to a conservatorship under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5350) have the same right to invoke the statutory privilege not to testify as persons subject to involuntary commitments under Penal Code section 1026.5 after a finding of not guilty by reason of insanity?

INTRODUCTION

Lanterman-Petris-Short Act ("LPS Act") proceedings provide a procedure through which the State can care for people who cannot care for themselves due to mental illness. By contrast, not guilty by reason of insanity ("NGI") commitments arise from a charged criminal act and are primarily designed to "protect society from dangerous people." (*Conservatorship of E.B.* (2020) 45 Cal.App.5th 986, 1001 [259 Cal.Rptr.3d 281] [Burns, J., concurring].) Because of the stark difference in the goals of the two statutory schemes, LPS Act conservatees and NGIs are not similarly situated for the purposes of the right against compelled testimony at commitment hearings. Therefore, respondent E.B.'s equal protection claim fails.

The court below erred in finding that LPS conservatees and NGIs "are similarly situated for the purposes of requiring the state to justify" the disparate treatment in terms of the statutory privilege against compelled testimony. (*Id.* at p. 997.) This Court should reject that conclusion and adopt the holding in *Conservatorship of Bryan S.* (2019) 42 Cal.App.5th 190, 198 [255 Cal.Rptr.3d 195]) that "LPS Act conservatees are not similarly situated [to NGIs and] equal protection does not require that they be free from the compulsion to testify." (*Id.* at p. 198.)

NGIs are subject to commitment under Penal Code section 1026.5(b)(1) if they were charged with a felony, found to be not guilty by reason of insanity, and "represent a substantial danger of physical harm to others" because of a "mental disease, defect,

or disorder." (Pen. Code, § 1026.5(b)(1).) Moreover, before a person can be determined to be an NGI, they must be found to have committed the crime with which they were charged. (Pen. Code, § 1026.)

By contrast, only as a last resort, a person may be placed in an LPS conservatorship if he is "unable to provide for his or her basic personal needs for food, clothing, or shelter" because of "a mental health disorder." (Welf. & Inst. Code, § 5008(h)(1)(A).) The absence of a connection with the criminal justice system, among other dissimilarities, compels the conclusion that LPS Act conservatees and NGIs are not similarly situated with respect to the right to be free from compelled testimony. Even if they were, there are compelling reasons to allow the State to compel a potential LPS conservatee to testify at conservatorship proceedings.

STATEMENT OF THE CASE

Petitioner Office of the Public Guardian, as designee of the Director of the Contra Costa County Health Services Department, acting on a referral from San Jose Behavioral Health, filed a petition for the appointment of a conservator for respondent E.B. (Clerk's Transcript ["CT"] 004-010.) The conservatorship was sought based on information that E.B. was gravely disabled due to a mental disorder. (CT 004.)

The court ordered a temporary conservatorship. (CT 013-015.) A trial was then held on whether E.B. should be placed in a one-year conservatorship. Three witnesses testified at the conservatorship trial. 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 E.B. had diagnostic symptoms of schizophrenia and took several drugs to treat it. (Reporter's Transcript ["RT"] 66-67, 71-72.) According to Dr. Levin, E.B. had limited insight into his mental illness which made it difficult for him to cooperate with treatment. (RT 72-74.)

Dr. Levin believed E.B. was gravely disabled and had a major psychiatric illness. (RT 74-75.) He testified that E.B. would not be able to provide himself with food and shelter, and had been unable to do so in the past. Dr. Levin's testimony did not include any description or opinion about violent or criminal behavior by E.B. in the past, nor did he suggest it was likely that E.B. might engage in such behavior in the future. (RT 58-82.)

James Grey, a licensed marriage and family therapist, previously worked with E.B. as a mental health specialist and was later assigned to E.B.'s case as deputy conservator for the Public Guardian. (RT 102-104.) Grey testified regarding E.B.'s history of medication non-compliance as well as failing to negotiate checks written for his benefit. (RT 106-109.)

Grey visited E.B. in a locked mental health rehabilitation center and found him to be guarded and paranoid, with an extremely flat affect, and a disorganized thought process. (RT 116-117.) Grey's testimony did not include any description of violent or criminal behavior by E.B. in the past, nor did he suggest that it was likely that E.B. might engage in such behavior in the future.

Finally, over objection, E.B. was called as a witness by the Public Guardian. E.B.'s testimony was disorganized and, at times, incoherent. He knew that he had been staying in "board and care" and, before that, had been in a mental health unit but did not appear to understand why he was there. (RT 85-89.) He testified that he had a "mental health" and took medication for it but also testified that he did not understand why he was taking the medication and knew when he did not need it. (RT 90-92.) He testified that he would "rely on the conservatorship" to pay for food if he was released. (RT 95.) Nothing about his testimony related to violent or criminal acts, nor was he asked any questions that could incriminate him.

The jury found E.B. was gravely disabled due to a mental disorder. (CT 106.) The trial court placed E.B. in a one-year conservatorship and found that his current placement in a mental health rehabilitation facility was the least restrictive and most appropriate placement. (RT 156.)

E.B. appealed the judgment to the First District Court of Appeal. His sole contention on appeal was 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." (*Conservatorship of E.B.*, 45 Cal.App.5th at p. 988.).

After full briefing, Division Five of the First District held that LPS conservatees are similarly situated to NGIs and individuals subject to other involuntary civil commitments for purposes of the right against compelled testimony. (*Id.* at p. 986.)

Division Five expressly rejected the holding of Division One of the same court in *Conservatorship of Bryan S.* (*Id.* at p. 997.) This Court granted the Public Guardian's petition for review.

LEGAL ARGUMENT

I. LPS ACT CONSERVATEES ARE NOT SIMILARLY SITUATED WITH NGIs AS IT RELATES TO THE PRIVILEGE AGAINST COMPELLED TESTIMONY

E.B.'s appeal of the conservatorship judgment was based solely on the argument that equal protection required that LPS Act conservatees be afforded the statutory right against compelled testimony given to NGIs. However, LPS Act conservatees and NGIs are not similarly situated for the purposes of a statutory right given to NGIs to refuse to testify in commitment hearings. LPS Act proceedings 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. NGI proceedings are primarily designed to protect society from dangerous people who were charged with crimes. Potential LPS Act conservatees do not have an equal protection right to refuse to testify at conservatorship hearings.

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 [104 Cal.Rptr.3d 427, 223 P.3d 566].) 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 [188 Cal.Rptr.3d 421], quoting *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155 [88 Cal.Rptr.2d 696].) "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 [144 Cal.Rptr.3d 661, 281 P.3d 753].)

1. *Purpose of LPS Conservatorships and NGI Commitments are Different*

The purpose of the LPS conservatorship sought for E.B. was to provide individualized treatment, supervision, and placement for him because he was gravely disabled due to a mental illness. (Welf. & Inst. Code, § 5350.1.) For LPS Act conservatorships, "[t]he state's purpose is solely one of remedial treatment; it seeks neither retribution nor protection of society -- the government's primary interests in criminal prosecutions. 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 [152 Cal.Rptr. 425, 590 P.2d 1] (citations omitted).)

An LPS Act conservatorship "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* (1984) 153 Cal.App.3d 542, 549 [200 Cal.Rptr. 262], quoting *Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793].)

As expressed in the Act itself, its goals 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 [53 Cal.Rptr.3d 856, 150 P.3d 738], quoting *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1009 [36 Cal.Rptr.2d 40, 884 P.2d 988].) 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." (*Id.* at p. 540.)

In light of the focus of the LPS Act, its proceedings are designed to ascertain "the true state of respondent's disability." (*Conservatorship of Baber*, 153 Cal.App.3d. at p. 549.) "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.)

At issue in the trial court below was whether E.B. was "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 disorder, 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 food, clothing, or shelter. (Welf. & Inst. Code, § 5008(h)(1)(A).) Danger and public protection are not at issue in E.B.'s case.

NGI proceedings are different. A commitment hearing for an NGI is generally sought when the person was charged with a felony and "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." (Pen. Code, § 1026.5(b)(1).) NGI commitments are primarily designed to "protect society from dangerous people." (*Conservatorship of E.B.*, 45 Cal.App.5th at p. 1001 [Burns, J., concurring].)

Courts that have compared NGI commitments to other civil commitment schemes have recognized that central goal. For instance, in *Curlee*, *supra*, 237 Cal.App.4th 709, relying primarily on *McKee*, 47 Cal.4th 1172, found Sexually Violent Predators ("SVP") and NGIs similarly situated because "[b]oth groups have

committed a criminal act and have been found to suffer from a mental condition that might present a danger to others." (*Curlee*, 237 Cal.App.4th at p. 720, citing *In re Moye* (1978) 22 Cal.3d 457, 464 [149 Cal.Rptr.491, 584 P.2d 1097], superseded by statute as stated in *People v. Bennett* (1982) 131 Cal.App.3d 488, 493 [182 Cal.Rptr. 473].) The court also relied on the fact that, "[t]he purpose of the [SVP and NGI] 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." (*Id.*)

In *People v. Dunley* (2016) 247 Cal.App.4th 1438 [203 Cal.Rptr.3d 335], the court found persons subject to involuntary commitment proceedings pursuant to the Mentally Disordered Offenders Act (Pen. Code, § 2960 et seq.) ("MDOs") were similarly situated to NGIs for the purposes of the right against compelled testimony. (*Id.* at p. 1450.)

The *Dunley* court relied primarily on the holding in *McKee*, specifically this Court's discussion that SVPs and MDOs were similarly situated as it related to indefinite commitments because both classes of offenders have been found "to suffer from mental disorders that render them dangerous to others," and "have been convicted of a serious or violent felony." (*Id.* at p. 1448, quoting *McKee*, 47 Cal.4th at p. 1203.)

This Court previously recognized that "the Legislature may make reasonable distinctions between its civil commitment statutes based on a showing 'that those who are reasonably determined to represent a greater danger may be treated differently from the general population.' [Citation.] A prior

adjudication of criminal conduct is a reasonable proxy for greater danger to the public and may therefore serve as a basis for treating civil committees subject to such an adjudication differently from the general class of individuals subject to civil commitment." (*McKee, supra*, 47 Cal.4th at p. 1204, quoting *In re Smith* (2008) 42 Cal.4th 1251, 1266 [73 Cal.Rptr.3d 469, 178 P.3d 446].)

The *Conservatorship of Bryan S.* court, after considering the holdings of *Curlee* and *Dunley*, concluded that NGIs and LPS conservatees were not similarly situated because LPS conservatorship proceedings do not arise from criminal charges and the purpose of civil commitment for NGIs is different because its goal is to "protect the public from people who have been found to be dangerous to others[.]" (42 Cal.App.5th at p. 197.) The court also relied on the statement by the court in *Conservatorship of Baber* that "[w]e 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.)

2. *NGI Commitments are More Closely Related to Criminal Proceedings Than LPS Act Conservatorships*

NGIs and LPS Act conservatees are also not similarly situated because a commitment hearing for an NGI is more closely related to a criminal hearing than a conservatorship hearing under the LPS Act.

For instance, Penal Code section 1026.5(b)(3) provides that the "rules of discovery in criminal cases shall apply" to an NGI commitment extension hearing. A petition to extend the commitment of an NGI is brought by the "prosecuting attorney." (Pen. Code, § 1026.5(b)(2).) And, under certain circumstances, the NGI may be held in county jail pending the commitment extension hearing. (Id., § 1026.5(b)(6).)

The legislature recognized the quasi-criminal nature of NGI proceedings by expressly making the "rights guaranteed under the federal and State Constitutions for criminal proceedings" available to NGIs. (Pen. Code, § 1026.5(b)(7).)

The court below recognized that the statutory scheme for NGIs shares "a common purpose with criminal law -- protecting the public from dangerous people who would otherwise be released from state prisons or hospitals." (*Conservatorship of E.B.*, 45 Cal.App.5th at p. 1003.)

Similar markers of a similarity to criminal proceedings are not as prevalent in conservatorship hearings under the LPS Act. Courts have recognized that "certain 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, 611-12 [43 Cal.Rptr.3d 427], citing *Conservatorship of Baber*, 153 Cal.App.3d. at p. 550; *Conservatorship of Susan T.*, 8 Cal.4th at p. 1020.)

The petition for a conservatorship in this case was brought by the County's Public Guardian, part of the Health Services Department, not a prosecuting attorney. A petition for an LPS Act conservatorship can also be sought by a psychiatrist, family member, or any interested person or friend of the potential conservatee. (Welf. & Instit. Code, § 5350; Prob. Code, § 1820.)

LPS Act conservatees are required to be housed in the least restrictive settings. (Welf. & Inst. Code, § 5358(a)(1)(A),(c)(1).) No part of the LPS Act authorizes a potential conservatee to be held in county jail pending a hearing on the conservatorship.

The legislature chose to make the rights guaranteed for criminal defendants expressly applicable to NGIs. There is no similar provision in the LPS Act. This Court has recognized that "the 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. . . ." (*In re Smith*, *supra*, 42 Cal.4th at p. 1266.)

3. *The Prospect of Unduly Restrictive or Prolonged LPS Commitments is Mitigated by the Protections Provided by the Act*

LPS Act conservatorships are also unlike NGI commitments in terms of the protections in place for people placed into conservatorships under the Act. Unlike NGIs, 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 Act 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.]) NGIs are not appointed a conservator to meet their ongoing needs for treatment or to manage their care and finances.

In LPS Act conservatorship 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 Section 5358(a)(1)(A), NGI committees are often initially placed at the California Department of State Hospitals. (Pen. Code, §§ 1601, 1026.) LPS conservators may step a conservatee down to a less restrictive placement without court approval (Welf. & Inst. Code, §5358), while NGI committees are subject to a court supervised conditional release program. (Pen. Code, §1026.2.)

In *Conservatorship of E.B.*, the court below was persuaded by the fact that, under certain circumstances, LPS conservatees may be subjected to a series of involuntary commitments through serial one-year conservatorships. According to the court below,

the "theoretical maximum period of detention is life. . . ." (45 Cal.App.5th at 994, quoting *Roulet*, *supra*, 23 Cal.3d at p. 223–224.)

While true in theory, it is equally true that 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." (*Conservatorship of Susan T.*, 8 Cal.4th at p. 1018-19.)

The LPS Act has been described as a "Magna Carta for the Mentally Ill" and this Court has recognized that the Act "scrupulously protect[s]" the rights of persons who are involuntarily detained pursuant to its provisions. (*Thorn v. Superior Court* (1970) 1 Cal.3d 666, 668 [83 Cal.Rptr. 600, 464 P.2d 56].)

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.)

An NGI commitment pursuant to Penal Code section 1026.5 is for a period of two years beyond the maximum term of commitment for the offense charged, double the time period for an LPS Act conservatorship. (Pen. Code, § 1026.5(b)(8); Welf. & Instit. Code, § 5361.)

Moreover, a person with a mental illness is not gravely disabled -- and therefore not subject to involuntary commitment -- if he can "survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter." (Welf. & Inst. Code, § 5350(e)(1).) The LPS Act requires that family members be given notice of the conservatorship trial. (Id., § 5350.2.)

Even when a conservatorship is imposed, the LPS Act has provisions designed to ensure that it continues only as long as necessary and will be terminated if the conservatee is no longer gravely disabled. For instance, within 10 days after the conservatorship is established, a treatment plan must be created for the conservatee. If the goals of that treatment plan are met and the person is no longer gravely disabled, the "conservatorship shall be terminated by the court." (Welf. & Inst. Code, § 5352.6.)

During the one-year conservatorship, 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." (Welf. & Instit. Code, § 5364.) The conservatee is entitled to appointed counsel on rehearing. (Id., § 5365.)

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 the 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. [Citations.]" (*Conservatorship of Ben C.*, 40 Cal.4th at p. 542.) These protections further the goal of the LPS Act to care for a person who is gravely disabled while ensuring that the care provided by State is only given when absolutely necessary and only for as long as necessary.

As discussed above, the main concern of the lower court was the fact that LPS Act conservatees could be subjected to serial one-year conservatorships. (*Conservatorship of E.B.*, 45 Cal.App.5th at p. 994.) That concern does not account for the various procedural and substantive safeguards in 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.

An NGI may petition the court for a finding that he has regained his sanity. However, such a petition can only be filed after the person has been committed for at least six months. (Penal Code, § 1026.2(d).) Moreover, at such a hearing, the NGI must establish by a preponderance of the evidence that he would not be "a danger to the health and safety of others, due to mental defect, disease, or disorder, if under supervision and treatment in the community." (Pen. Code, § 1026.2(e) & (k).)

If the NGI were to prevail in that hearing, he would not be released immediately. Instead, he would be placed in an "appropriate forensic conditional release program for one year." (Pen. Code, § 1026.2(e).) Then, after a year in the outpatient program, the court would hold a hearing on the issue of the restoration of the NGI's sanity. At that hearing, the NGI would again bear the burden of proving that he "is no longer a danger to the health and safety of others, due to mental defect, disease, or disorder." (Pen. Code, § 1026.2(e).)

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 that determination to the court and the court must terminate the conservatorship. (Welf. & Inst. Code, § 5352.6)

There is no similar affirmative requirement on the part of a person involved in the commitment of an NGI. Instead, the medical director of the facility where the NGI is committed may file an application for restoration of sanity. (Pen. Code, § 1026.2(a.) These additional differentiations from NGIs support

the conclusion that an LPS conservatee may be compelled to testify at trial.

4. LPS Act Conservatees Retain the Right Against Self-Incrimination

It is important to remember that, even without the statutory right to refuse to be called as a witness, E.B. retained his Fifth Amendment right to refuse to testify "regarding any criminal conduct in which he might have been engaged or about any other matter which would tend to implicate him in criminal activity." (*Cramer*, 23 Cal.3d at p. 138.)

5. Conclusion

Based on the foregoing, the Court should adopt the holding in *Conservatorship of Bryan S.* and find that NGIs and LPS Act conservatees are not similarly situated for the purposes of the testimonial privilege. The primary goal of the NGI commitment proceedings is to protect the public from dangerous persons. The goal of an LPS Act conservatorship is to ensure that a gravely disabled person receives the appropriate, and least restrictive, care for their disability. NGIs were found to have committed criminal acts. No such finding is necessary for an LPS Act conservatorship. The Legislature has expressed an intent to treat NGI commitment proceedings like a criminal proceeding in many respects that are absent from the LPS Act.

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II. EVEN IF LPS CONSERVATEES AND NGIs WERE SIMILARLY SITUATED, THE STATE HAS A COMPELLING INTEREST FOR DIFFERENTIAL TREATMENT

If two groups are similarly situated, the second prong in the equal protection analysis 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." (*Conservatorship of E.B.*, 45 Cal.App.5th at p. 992, quoting *People v. Shields* (2011) 199 Cal.App.4th 323, 333 [131 Cal.Rptr.3d 82].)

Even assuming LPS conservatees are similarly situated and that the strict scrutiny test applies, the Court should find that the Public Guardian -- the government -- has a compelling interest justifying the compelled testimony of potential conservatees like E.B. in LPS Act conservatorship proceedings. The disparate treatment of LPS Act 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.*) "Reason and common sense suggest that it is appropriate under such circumstances that a jury be permitted fully to observe the person sought to be committed, and to hear him speak and respond in order that it may make an informed judgment as to the level of his mental and intellectual functioning." (*Cramer*, 23 Cal.3d. at p. 139.)

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. The trier of fact should hear directly from the potential conservatee on the issue of his plan for food, clothing and shelter to be able to effectively decide whether he is gravely disabled. Depriving the trier of fact of that critical evidence would frustrate the main goal of the LPS Act. "[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.)

Given that an LPS conservatorship concerns a person's ability to provide for her food, clothing and shelter, she must be asked about her plan regarding those issues to determine if she is gravely disabled. A person that cannot provide for her 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 her testimony as to what occurred; there may be no other witness to her 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 her demeanor to determine her ability to achieve the basic necessities of life and well-being.

The goals of the LPS Act would be frustrated if a potential LPS Act conservatee were able to withhold reliable and probative evidence of her mental condition from the trier of fact. If the conservatee's circumstances have changed and she is no longer gravely disabled -- in that she is willing to accept meaningful treatment, has gained insight into her mental illness and has a feasible plan to provide for her 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.

In fact, in *Cramer*, this Court found that the testimony of a person whose mental condition was at issue in a commitment hearing "may in fact be the most reliable and probative indicator of the person's present mental condition." (*Cramer*, 23 Cal.3d. at p. 139 [holding dangerous mentally retarded persons were not similarly situated with developmentally disabled persons subject to civil commitments].)

Similarly, in *Conservatorship of Susan T.*, the Court noted that "the most relevant evidence of that disability will be derived primarily from the patient." (8 Cal.4th at p. 1019.) Allowing potentially the best evidence of a person's need for assistance to be excluded from an LPS Act conservatorship hearing would frustrate the main goal of the act -- provide help to those in need because of a mental disease.

The court below described forcing LPS Act conservatees to testify in commitment hearings required them to become "the agents of their own incarceration." (*Conservatorship of E.B.*, 45 Cal.App.5th at p. 997.) However poetic that phrase, it is meaningless to the analysis here because it assumes that an LPS Act conservatee's testimony could only be detrimental when the focus of LPS Act conservatorship proceedings is to help someone who is gravely disabled and avoid a conservatorship for someone who isn't. The point of calling a potential conservatee is not to force them to provide negative testimony designed to lead to their involuntary commitment, but to accurately assess the nature and scope of their mental disability, if any, and determine the appropriate level of treatment needed to treat that disability.

A potential conservatee who testifies at the commitment hearing may do much to convince the trier of fact that he can care for his own needs, including food, clothing, shelter, and medical care. In fact, respondent's closing argument relied on E.B.'s testimony that he knew where to obtain his medication and would take it. (RT 139.) Respondent also relied on E.B.'s testimony that he wanted to be independent and would take advantage of services available for him to achieve that goal. (RT 139-142.) Absent that evidence, the only evidence presented at the trial was from medical professionals opining that E.B. was gravely disabled.

In sum, the State has a compelling interest in requiring a potential LPS conservatee to testify at a conservatorship hearing. That compelling interest provides ample justification for maintaining the right to call the potential LPS conservatee as a

witness in a conservatorship trial. The Court should reject E.B.'s equal protection claim relating to the testimonial privilege even if the Court finds NGIs and LPS Act conservatees to be similarly situated for the purposes of that privilege.

CONCLUSION

The Court should overturn the court below and find that LPS Act conservatorship proceedings for persons gravely disabled under section 5008(h)(1)(A) are not similarly situated to NGI commitments for the purpose of the NGI statutory testimonial privilege, or find that the State has a compelling interest in requiring the testimony of potential LPS Act conservatees.

September 23, 2020

SHARON A. ANDERSON
COUNTY COUNSEL
PATRICK L. HURLEY
DEPUTY COUNTY COUNSEL

/s/
Attorneys for Petitioner
PUBLIC GUARDIAN OF CONTRA COSTA COUNTY

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Re: In re Conservatorship of E.B., Public Guardian of Contra Costa County, Petitioner v. E.B.., Respondent No. S261812

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Oakland, CA 94612
(E-served via True filing:
jprice@fdap.org

Camden Polischuk, Esq
County Counsel
P.O. Box 118
Santa Ana, CA 92702
(E-served via True
filing: camden.polischuk
@coco.ocgov.com)

Contra Costa County,
Superior Court of Walnut Creek
Attn: Julie Winn
P.O. Box 911
Martinez, CA 94553
(E-served via Microsoft Outlook:
jwinn@contracosta.courts.ca.gov)

Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94107
(E-served via True Filing)

Jeffrey Landau, Esq.
Contra Costa Public Defender
800 Ferry Street
Martinez, CA 94553
(E-served via Mircosoft Outlook:Jeffrey.Landau@pd.cccounty.us)

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