IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Conservatorship of Eric B.	**S261812**
PUBLIC GUARDIAN OF CONTRA COSTA COUNTY, **Petitioner and Respondent,** **v.** **Eric B.,** **Objector and Appellant.**	First District Court of Appeal No. A157280 Contra Costa County Superior Court No. P18-01826

ERIC B.'s ANSWER TO THE AMICUS CURIAE BRIEF FILED IN SUPPORT OF THE PUBLIC GUARDIAN

On Review from the Decision of the Court of Appeal,
First Appellate District, Division Five

Appeal from the Judgment of the Superior Court
of the State of California for Contra Costa County,
Honorable Susanne M. Fenstermacher, Judge

JONATHAN SOGLIN
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Pursuant to California Rules of Court, rule 8.520(f)(7), Eric B. submits this answer to the brief filed by amici curiae California State Association of Counties (CSAC) and the California State Association of Public Administrators, Public Guardians, and Public Conservators (hereinafter "amici") on behalf of the Public Guardian of Contra Costa County.

ARGUMENT

I. Permitting the Public Guardian to Call Eric B. as a Witness Against Himself over His Objection Violated His State and Federal Constitutional Equal Protection Rights

Amici ask this Court to hold the Legislature may grant the right not to be compelled to testify to insanity acquittees facing extended commitment proceedings (NGIs) but withhold the same privilege from proposed LPS Act conservatees without violating the equal protection rights of the latter group. In support of this position, amici first assert that *Conservatorship of Bryan S.* (2019) 42 Cal.App.5th 197 (*Bryan S.*), which found the two groups were not similarly situated for this purpose, "embodies an appropriate balance of purpose of the LPS Act as protective proceedings for people who are severely mentally ill and affording protection of the same people against erroneous involuntary commitment for psychiatric treatment." (CSAC Amicus Brief 4.) Amici next decry the absence of any "showing that the Legislature enacted Penal Code section 1026.5, subdivision ([b])(7) with the expectation that it would be applied to LPS conservatorships." (CSAC Amicus Brief 6.) Amici then draw this Court's attention to two cases finding no constitutional right to refuse to testify in civil commitment proceedings: *Cramer v. Tyars* (1979) 23 Cal.3d 131 (*Cramer*) and *Conservatorship of Baber* (1984) 153 Cal.App.3d 542 (*Baber*). (CSAC Amicus Brief 6-9.) Lastly, amici insist that granting proposed LPS Act conservatees the right to refuse to testify would create

unworkable conflicts with Evidence Code section 940 and Code of Civil Procedure section 2032.020. (CSAC Amicus Brief 10-11.)

Amici's contentions are not persuasive.

At the outset, whether "the Legislature enacted Penal Code section 1026.5, subdivision ([b])(7) with the expectation that it would be applied to LPS conservatorships" (CSAC Amicus Brief 6) is irrelevant to Eric B.'s equal protection claim. The Legislature most assuredly did not draft this provision with its application to proposed LPS conservatees in mind. The pertinent questions now before this Court are whether these two groups are similarly situated with respect to compelled testimony and, if so, whether the failure to treat these two groups alike in this regard survives review under the strict scrutiny standard applicable to state and federal constitutional equal protection claims. That the Legislature did not intend for a statute to apply to two groups is not a defense to an equal protection claim. It is potentially the problem. If the two groups are similarly situated, even if the Legislature had a real (or conceivable) rational basis for depriving LPS conservatees a right accorded NGIs, that would not be enough to end the inquiry. "Under the strict scrutiny test, the state has the burden of establishing it has a compelling interest that justifies the law and that the distinctions, or disparate treatment, made by that law are necessary to further its purpose." (*People v. Field* (2016) 1 Cal.App.5th 174, 197.)

Amici emphasize that *Cramer* and *Baber* both concluded individuals subject to civil commitment under schemes not necessarily related to criminal proceedings – including the LPS

Act in *Baber* – did not have "constitutional" rights to refuse to testify. (CSAC Amicus Brief 6-9.) However, neither *Cramer* nor *Baber* addressed an equal protection claim premised on the notion that a similarly situated class of people subject to civil commitment were afforded the right not to testify. *Cramer* addressed only whether the testimonial privileges found in the Fifth Amendment to the United States Constitution, Evidence Code section 930, or Evidence Code section 940 directly applied to civil commitment proceedings under Welfare and Institutions Code section 6500 et seq. (*Cramer*, *supra*, 23 Cal.3d at p. 137.) *Baber* limited its analysis to whether "the potential deprivation of the fundamental right to liberty" – which rings of a due process claim – "entitles potential conservatees to . . . the privilege not to testify in their own conservatorship trial." (*Baber*, *supra*, 153 Cal.App.3d at p. 548.)

Eric B. takes no issue with the conclusions reached in these cases and does not argue he has a direct statutory or constitutional right not to be compelled to testify. However, because neither *Cramer* nor *Baber* addressed an equal protection claim, they are of limited value. This Court has "repeatedly observed" that "cases are not authority for propositions not considered." (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 11, internal quotation marks omitted.) Nor can it be inferred that the absence of a direct constitutional right precludes its application via equal protection principles. To the contrary, "[d]ue process and equal protection protect different constitutional interests: due process affords individuals a

baseline of substantive and procedural rights, whereas equal protection safeguards against the arbitrary denial of benefits to a certain defined class of individuals, even when the due process clause does not require that such benefits be offered." (*People v. McKee* (2010) 47 Cal.4th 1172, 1207.)

Moreover, *Cramer*'s pronouncement – on which amici rely – that "[t]he extension of the privilege to an area outside the criminal justice system, in our view, would contravene both the language and purpose of the privilege" (*Cramer*, *supra*, 23 Cal.3d at p. 138; see CSAC Amicus Brief 7-8) paints with too broad a brush. As this Court emphasized more recently in *Hudec v. Superior Court* (2015) 60 Cal.4th 815 (*Hudec*), "[t]he right to not be compelled to testify against oneself is clearly and relevantly implicated when a person is called by the state to testify in a proceeding to recommit him or her[.]" (*Hudec*, *supra*, 60 Cal.4th at p. 830, internal quotation marks omitted.) "The right not to testify in a proceeding where one is a defendant is a right that *could* meaningfully apply in any type of adversarial proceeding, though only in criminal cases is it constitutionally guaranteed." (*Ibid*., emphasis in original.) *Hudec* also left no doubt that "the right not to testify does not take its very meaning from the criminal context, nor does applying it when the prosecution seeks to compel the respondent's testimony in an NGI commitment extension hearing present any logical difficulty." (*Ibid*.)

Amici suggest that applying the right not to testify when the county seeks to compel a person's testimony in an LPS Act conservatorship proceeding would present logical difficulties.

(CSAC Amicus Brief 10 [noting that *Hudec* examined whether construing Penal Code section 1026.5, subdivision (b)(7), to include the right not to testify would lead to absurd consequences].) According to amici, recognizing an equal protection right to be free from compelled testimony in LPS Act conservatorship proceedings would "readily conflict with . . . Evidence Code section 940." (CSAC Amicus Brief 10.) Evidence Code section 940 provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him." (Evid. Code, § 940.) Eric B. is at loss to understand how extending the right not to testify to LPS Act conservatorship proceedings would have any impact at all on the application of Evidence Code section 940, let alone lead to an absurd consequence, as even *Baber* acknowledges that its "holding does not, in any way, intimate that a prospective conservatee will be compelled to answer questions which may incriminate him in a criminal matter." (*Baber*, *supra*, 153 Cal.App.3d at p. 550.)

It appears the statement in *Cramer* – and not the privilege set forth in Evidence Code section 940 – that "no witness has a privilege to refuse to reveal to the trier of fact his physical or mental characteristics where they are relevant to the issues under consideration" is the true source of amici's objection. (*Cramer*, *supra*, 23 Cal.3d at p. 137; see CSAC Amicus Brief 10 [erroneously attributing this quotation from *Cramer* to Evidence Code section 940].) If LPS Act conservatees and NGIs are

similarly situated to one another for the purpose of the statutory privilege not to testify and the Public Guardian fails to establish a compelling need for the disparate treatment, then this rule described in *Cramer* must yield to the individual's equal protection right to avoid being compelled to testify at trial. (See, e.g., *Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 553 [explaining the "doctrine of constitutional supremacy"].)

This Court recognized in *Hudec* that granting the right not to testify to NGIs would remove relevant information concerning the person's physical or mental characteristics from the trier of fact's consideration in a civil commitment case but did not conclude such a consequence would amount to an absurdity that would prevent application of the privilege. *Hudec* acknowledged the People's argument that "'the ability to hear and observe the person's testimony in a civil commitment hearing is particularly helpful' in determining his or her mental condition" and similar concerns expressed in *Cramer*, but this Court nevertheless went on to state: "Granting that trial accuracy considerations arguably support compelling a committee's testimony, other considerations could be viewed as militating against such compulsion[.]" (*Hudec*, *supra*, 60 Cal.4th at p. 830; see also *id*. at p. 829 ["Recognizing that NGI commitment extension respondents may refuse to testify will deprive the prosecution in some cases of desired evidence, but it will not as a general matter preclude [Penal Code] section 1026.5 extensions"].) As the Court of Appeal below explained: "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." (*Conservatorship of E.B.* (2020) 45 Cal.App.5th 986, 996; see also Eric B.'s Answer Brief on the Merits (ABM) 42-44.)

Amici also maintain that affording the right not to testify to proposed LPS Act conservatees would interfere with the county conservatorship agency's ability to secure a mental examination of the person, as authorized by Code of Civil Procedure 2032.20. (CSAC Amicus Brief 10-11.) First, it should be noted that this provision of the Civil Discovery Act applies to sexually violent predator (SVP) civil commitment proceedings as well (*People v. Landau* (2013) 214 Cal.App.4th 1, 25), and yet that did not stop the same reviewing court in the same person's subsequent appeal from holding that SVPs may have an equal protection right not to testify because they are similarly situated to NGIs (*People v. Landau* (2016) 246 Cal.App.4th 850, 864).

But more importantly, amici's arguments concerning the effect ruling in Eric B.'s favor would have on the county's right to secure a mental examination of a proposed conservatee misses the mark. *Hudec* did not decide whether Penal Code section 1026.5, subdivision (b)(7), incorporated *every* aspect of the Fifth Amendment privilege against self-incrimination into the extended insanity commitment scheme. The question before this Court in *Hudec* was more circumscribed. This Court addressed only whether "the individual facing extended commitment has the right to refuse *to take the witness stand*." (*Hudec*, *supra*, 60

Cal.4th at p. 818, emphasis added.)[1] *Hudec* did not hold that all evidence that would be subject to exclusion pursuant to the Fifth Amendment's privilege against self-incrimination in a criminal case is inadmissible at extended insanity commitment proceedings. (Cf. *Miranda v. Arizona* (1966) 384 U.S. 436, 467 ["the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves"].) It does not naturally flow from *Hudec*, for example, that an NGI must be given *Miranda* warnings before speaking to a member of their treatment team at the state hospital about non-incriminating conduct that might be used against them at an extended commitment trial. Nor would such advisements be necessary in the LPS Act conservatorship context should this court find an equal protection violation. Neither *Hudec* nor this case involves the wholesale importation of the Fifth Amendment privilege against self-incrimination into the civil commitment context.

Hudec was concerned only with the right not to be forced to testify against oneself in court, a right that implicates important personal autonomy and dignity interests above and beyond forbidding forced incrimination. (See ABM 45, discussing, inter

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[1] *Hudec* substantially relied on *People v. Haynie* (2004) 116 Cal.App.4th 1224 to arrive at its holding. It is thus useful look at how the issue was framed in that case as well: "The sole issue raised is novel – whether the privilege against self-incrimination bars the prosecution from questioning Haynie about his mental state *at the commitment extension hearing*." (*Id*. at p. 1226, emphasis added.)

alia, *Griffin v. California* (1965) 380 U.S. 609, 613.) As the instant matter involves solely a challenge to the failure to apply the limited rule announced in *Hudec* to LPS Act conservatorship proceedings, declaring an equal protection right to refuse to testify would not necessarily have any impact on the county's ability to obtain a mental examination of a prospective LPS Act conservatee.[2]

Finally, contrary to the position staked out by amici, *Bryan S.* does not "embod[y] an appropriate balance of purpose of the LPS Act as protective proceedings for people who are severely mentally ill and affording protection of the same people against erroneous involuntary commitment for psychiatric treatment." (CSAC Amicus Brief 4.) *Bryan S.* rests on two flawed premises: (1) *Cramer*'s assertion that the right not to testify has no logical application in civil commitment proceedings (*Bryan S.*, *supra*, 42 Cal.App.5th at p. 197) and (2) the notion that the availability of less restrictive placement options – including in the home of a friend or family member – for LPS Act conservatees means the liberty interest at stake is less substantial than what NGIs face,

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[2] Even without the proposed conservatee's testimony, the trier of fact will have access to multiple sources of information concerning the person's mental state. (See Welf. & Inst. Code, § 5008.2 [permitting the introduction of evidence, including, but not limited to, "evidence presented by persons who have provided, or are providing, mental health or related support services to the patient, the patient's medical records as presented to the court, including psychiatric records, or evidence voluntarily presented by family members, the patient, or any other person designated by the patient"].)

thus rendering the two groups not similarly situated (*id*. at pp. 196-197).

Eric B. has already rebutted the first of these two defects found in *Bryan S.* above by demonstrating this statement found in *Cramer* cannot be reconciled with *Hudec*'s recognition that the right not to testify can meaningfully and logically apply to civil commitment proceedings. As for the second problem with *Bryan S.*'s reasoning, the amicus curiae brief and supporting declarations filed by Disability Rights California (DRC) et al. in support of Eric B. demonstrate that even if the LPS Act technically contemplates the placement of gravely disabled conservatees in the homes of friends and family members, in actuality, such placements almost never happen. (DRC Amicus Brief 27-36; DRC Motion for Judicial Notice, Exhibit E.) This real-world practice is not surprising. For example, if, after presiding over an LPS Act conservatorship bench trial, a court were of the opinion the person could meet their basic personal needs for survival by residing in the home of a family member or friend, the court would find the person *not* gravely disabled in accordance with section Welfare and Institutions Code section 5350, subdivision (e)(1). (See Welf. & Inst. Code, § 5350, subdivision (e)(1) ["a person is not 'gravely disabled' if that person 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"].) Thus, it is difficult to imagine under what factual predicate a trial court would find someone gravely

disabled but place them in a residential setting under the care of willing and able family members or friends.

As explained in Eric B.'s answer brief on the merits, it was the Court below – not *Bryan S.* – that struck the right balance between the aims of the LPS Act and the dignity and liberty interests of proposed conservatees. (ABM 54-60.)

CONCLUSION

For the reasons set forth above, in Eric B.'s answer brief on the merits, and in the amicus curiae brief filed by DRC et al., this Court should affirm the Court of Appeal's holding that (1) proposed LPS conservatees are similarly situated to NGIs with respect to the right not to be compelled to testify and (2) the Public Guardian has yet to justify this disparate treatment under the strict scrutiny standard. Unless and until the Public Guardian – or another governmental agency in another case – demonstrates that compelled testimony is necessary to accomplish the purposes of the LPS Act, this practice must come to an end statewide.

Dated: May 7, 2021

Respectfully submitted,

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/s/ Jeremy Price
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Staff Attorney

Attorneys for Eric B.

CERTIFICATE OF WORD COUNT

Counsel for Eric B. hereby certifies that this brief consists of **2,822** words (excluding cover page information, tables, proof of service, signature blocks, and this certificate), according to the word count of the computer word-processing program. (Cal. Rules of Court, rule 8.520(c)(1).)

Dated: May 7, 2021

/s/ Jeremy Price
JEREMY PRICE
Staff Attorney

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Contra Costa County Superior Court
725 Court Street
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Eric B.
(Appellant)

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 7, 2021, at Oakland, California.

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STATE OF CALIFORNIA
Supreme Court of California

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