S174633

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARDELL MOORE, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent, THE PEOPLE, Real Party in Interest.	S174633 B198550 (Super. Ct. No.ZM008445)

PETITIONER'S ANSWER BRIEF ON THE MERITS

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

Albert J. Menaster,
Karen King,
Jack T. Weedin,
(State Bar No. 73086)
Deputy Public Defenders

Appellate Branch
320 West Temple Street, Room 590
Los Angeles, CA 90012
Telephone: (213) 974-3058
Fax No. (213) 626-3519

Attorneys for Petitioner

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

Petitioner, Ardell Moore, hereinafter "Petitioner," and through his attorney Michael P. Judge, Public Defender of Los Angeles County, hereby files his Answer Brief on the Merits.

SUMMARY

Welfare and Institutions Code[1/] sections 6600 et seq., The Sexually Violent Predator Act, hereinafter the "SVPA," effective January 1, 1996, provides for an indefinite commitments in a secure facility located on the

[1/] All statutory reference are to the Welfare and Institutions Code unless otherwise stated.

grounds of an institution under the jurisdiction of the Department of Corrections upon a finding that a person is a "'sexually violent predator' [which] means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§§ 6600, subd. (a); 6604.) The SVPA, a involuntary civil commitment statute, is subject to the most rigorous form of constitutional review, and the act is the be narrowly construed. (Hubbart v. Superior Court (1999) 19 Cal.4th 1138, 1153, fn. 20; Peters v. Superior Court (2000) 79 Cal.App.4th 845, 848.)

In order to sustain a commitment under the SVPA, the prosecution must prove beyond a reasonable doubt that:

1) The individual has been convicted of committing sexually violent offenses[2/] against one or more victims, and

2) The individual has a diagnosed mental disorder, and

[2/] An offense is "sexually violent. . . when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person." (Judicial Council Of California Criminal Jury Instruction, hereinafter, "CALCRIM," No. 3454.)

3) As a result of that diagnosed mental disorder,[3/] he or she is a danger to the health and safety of others because it is likely[4/] that he or she will engage in sexually violent predatory[5/] criminal behavior, and

4) It is necessary to keep him or her in custody in a secure facility to ensure the health and safety of others. (CALCRIM No. 3454.)

A commitment under the SVPA requires much more than mere proof of a prior conviction and the presence of a mental disorder. For example, the qualifying prior conviction must be "sexually violent," the "mental disorder" must affect a person's ability to control his emotions and behavior and predispose him or her to commit criminal sexual acts, and the sexually violent

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[3/] "The term diagnosed mental disorder includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others." (CALCRIM No. 3454.) The mental disorder must make it difficult, if not impossible, for the defendant to control his or her violent behavior. (Kansas v. Crane (2002) 534 U.S. 407 [151 L.Ed.2d 856; 122 S.Ct. 867].)

[4/] "A person is likely to engage in sexually violent predatory criminal behavior if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released into the community." (CALCRIM No. 3454.)

[5/] "Sexually violent criminal behavior is predatory if it is directed towards a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship as been established or promoted for the primary purpose of victimization." (CALCRIM No. 3454.) The future sexually violent criminal acts must be predatory in nature. (People v. Hurtado (2002) 28 Cal.4th 1179, 1186; accord Cooley v. Superior Court (2002) 29 Cal.4th 228, 243.)

criminal behavior must be predatory. These elements often cannot be gleaned from the record of conviction but must be proved though reliance on extrinsic evidence. In order for the prosecution to prove these elements, its experts are permitted to consider hearsay reports of prior bad acts that did not result in prosecution or conviction.[6/] (See discussion, post, § III.B.)

The SVPA does not contain any provisions addressing individuals who are incompetent–i.e., are unable to understand the nature of the proceedings and/or to assist counsel. (See In re Parker (1998) 60 Cal.App.4th 1453, 1466, "section 6602 [the SVPA] is not a model of clarity. . . .") "Furthermore, counsel for petitioner is unable to locate any California decisional law directly addressing competency to stand trial in cases filed pursuant to the SVPA.

ISSUE PRESENTED

[6/] For example, in the above-entitled case, Real Party and its experts are relying an arrests of petitioner which failed to result in convictions and alleged and uncharged "inappropriate sexual behavior" as well as numerous rule violations while in custody. (Pet. Writ of Mandate/Prohibition, Exh. J, Rpt. of Shoba Sreenivasan, Ph.D., at pp. 8-9, 13-14; Pet. Writ of Mandate/Prohibition, Exh. K, Rpt. of Elaine Finnberg, Ph.D., at pp. 13-21, 38-39.) Furthermore, these unadjudicated acts were utilized in the calculation of Petitioner's "risk assessment" utilizing the "Static 99," an key "actuarial tool" utilized by the prosecution to determine whether the individual is a danger to the health and safety of others because it is likely that he or she will engage in sexually violent predatory criminal behavior. (Pet. Writ of Mandate/Prohibition, Exh. J, Rpt. of Shoba Sreenivasan, Ph.D., at pp. 24-27; Pet. Writ of Mandate/Prohibition, Exh. K, Rpt. of Elaine Finnberg, Ph.D., at pp. 86-89.).

Can the trial in a commitment proceeding under the Sexually Violent Predator Act be held while the defendant is incompetent?

STATEMENT OF THE CASE AND FACTS

A. Proceedings in the Trial Court.

Petitioner is the defendant named in a petition to commit him as a sexually violent predator entitled "People v. Ardell Moore," case number ZM008445. (Pet. Writ of Mandate/Prohibition, Exh. A, "Petition for Commitment as a Sexually Violent Offender Pursuant to §§ 6600 et seq.," hereinafter "Petition.") The Petition, filed March 8, 2005, alleges that Petitioner was convicted of three "sexually violent offenses" in case numbers A614426 (1980) and A781190 (1987), has a diagnosed mental disorder, is a danger to the health and safety of others, and is predatory. (Pet. Writ of Mandate/Prohibition, Exh. A, Petition.)

Counsel for Petitioner filed a "Motion to Stay Proceedings. Provide Mental Health Treatment" which requested the respondent court to "initiate a competency evaluation and a stay of proceedings until the issue of competency can be determined." (Pet. Writ of Mandate/Prohibition, Exh. C, Competency Motion.) Counsel for Petitioner urged the court to initiate competency proceedings based upon the opinion of Dr. Vianne Castellano, who had been appointed by the respondent court pursuant to Evidence Code sections 730,

952, and 1017, that Petitioner "is not presently competent to participate in the evaluation procedures or in the actual testimony relating to his upcoming hearing. . . . [because] He is neither able to understand the nature and the purpose of the proceedings nor is he able to cooperate in a rational manner with is counsel or the psychological evaluators." (Pet. Writ of Mandate/Prohibition, Exh. C, Competency Motion, Attachment, Rpt. of Dr. Castellano, at pp. 1-2.)

On April 9, 2007, the respondent court denied Petitioner's Competency Motion because there is no statutory right to be competent under the SVPA and because the due process right of the defendant is outweighed by the need for public safety. (Pet. Writ of Mandate/Prohibition, Exh. F, Minute Order of April 9, 2004; Pet. Writ of Mandate/Prohibition, Exh. H, Reporter's Transcript of April 9, 2007, at pp. 2-9.)

B. Proceedings in the Court of Appeal.

On April 30, 2007, Petitioner sought relief from the trial court's ruling in the Court of Appeal, Second Appellate District. On June 4, 2009, Division Three of the Court of Appeal , Second Appellate District, granted a petition for peremptory writ of mandate in which it reversed the trial court's ruling holding "as a matter of constitutional due process, that a defendant cannot be subjected to trial as an alleged sexually violent predator while mentally incompetent."

(Moore v. Superior Court (2009) 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 773, rev. gtd.) The Court of Appeal's decision in Moore was grounded, in significant part, on its extensive analysis of due process last enunciated by this Court in People v. Allen (2008) 44 Cal.4th 843. The result of Moore's due process analysis vis-a-vis competency was that: "(1) the liberty interest at stake in an SVPA proceeding is significant; (2) proceeding with an SVPA trial against an incompetent defendant poses an unacceptable risk of an erroneous deprivation of liberty; (3) the governmental interest in protecting its citizens and treating sexually violent predators is not significantly burdened by providing for a competency determination in the SVPA context; and (4) the defendant's dignitary interest in presenting his side of the story is protected by ensuring the defendant is competent to stand trial." (Id., at pp. 773-774].)

MEMORANDUM OF POINTS AND AUTHORITIES

I

THE CONSTITUTIONAL RIGHT TO TESTIFY IN SVPA PROCEEDINGS IS PREDICATED ON THE EXISTENCE OF A COMPETENT DEFENDANT

In People v. Allen, supra, 44 Cal.4th 843, this Court unanimously held a defendant in a SVP proceeding "has a right under the California and federal Constitutions to testify despite counsel's decision that he or she should not testify." (People v. Allen, supra, 44 Cal.4th 843, 848.) The decision in Allen

solidifies petitioner's contention that a defendant in a SVPA proceeding has a due process right under the California and United States Constitutions to be competent to stand trial. Leastwise, a defendant who is unable to understand the nature of the proceedings or to assist counsel in the conduct of a defense in a rational manner would be precluded from exercising his or her constitutional right to testify.

Proceeding to trial with an incompetent defendant would significantly and negatively skew "an accurate factual determination concerning the defendant's status as a sexually violent predator." (People v. Allen, supra, 44 Cal.4th 843, 866.) Conversely, should the prosecution call an incompetent defendant as a witness during it's case-in-chief, the trier of fact would be unable to reliably ascertain beyond a reasonable doubt whether the defendant's underlying pathology is due to incompetence stemming from his or her mental illness or from a mental disorder that makes him or her "a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (See § 6600; People v. Leonard (2000) 78 Cal.App.4th 776, 790, a SVPA defendant does not have a "constitutional right to remain silent by: (1) allowing the psychologists who testified as expert witnesses to rely on material from interviews he gave under duress; and (2) allowing the district attorney to call him as a witness at trial.") Furthermore, the accuracy of the fact finding process would be compromised because an

incompetent SVP defendant would be psychologically and mentally incapable of telling "his or her version" of the story during the psychological exams, let alone at trial. (People v. Allen, supra, 44 Cal.4th 843, 866, the defendant will be unable to "communicate his or her version to and through the experts and counsel. . . . [and] the defendant's story may not reach the fact finder.")

Several quotations taken from the reports of mental health experts who have evaluated petitioner underscore the fundamental unfairness of prosecuting an individual who is incompetent and who is therefore unable to communicate his or her verison of the story to anyone. "He was significantly lacking in impulse control and unable to refrain from expressions of paranoia regarding the examiner and his attorney. Mr. Moore's poor stress tolerance and his diminished ability to respond during the interview was symptomatic of him being preoccupied with a fixed, paranoid delusional system to the exclusion of reality." (Pet. Writ of Mandate/Prohibition, Exh. C, Rpt. of Vianne Castellano, Ph.D., at p. 2.) "Mr. Moore evidenced tangential thought processes and loose associations. He talked in a pressured, agitated manner about a variety of unrelated topics. His speech content was infused with delusional material. Some of his responses were illogical and subsequent conclusions and inferential reasoning did not follow from the questions asked. He appeared to be preoccupied with a fixed and pervasive delusional system." (Id., at p. 3.) "Memory-Mr. Moore presented with a confused memory for both

past and present events. He was unable to remember recent or remote events in a logical or meaningful manner. His memory impairment was exacerbated by confused, disorganized thought processes." (Ibid.) "His speech was extremely loose, rambling, tangential, and difficult to redirect" and he was "clearly was unable to participate appropriately in the interview process." (Pet. Writ of Mandate/Prohibition, Exh. K, Rpt. of Elaine Finnberg, Ph.D., at p. 2.) "The respondent's mental state has been noted for periods of deterioration characterized by paranoia, responding to internal stimuli and a general lack of connection with reality." (Pet. Writ of Mandate/Prohibition, Exh. J, Rpt. of Shoba Sreenivasan, Ph.D., at p. 23.)

Real Party argues that "Allen does not generate a right to be competent at an SVP hearing" because "the subject of a conservatorship hearing does not have to be competent during the pendency of the civil trial adjudicating the conservatorship even though he/she has a right to testify" citing Guardianship of Waite (1939) 14 Cal.2d 727. (Real Party's Opening Brief on the Merits, hereinafter "Opening Brief on Merits," at pp. 7-8.) Allen's reference to Waite, which held a proposed conservatee has a right to testify, was not an integral part of this Court's decision but rather was only set forth as but one of several examples of an individual having the right to testify in a civil proceeding and did not analyze it in conjunction with competency. (People v. Allen, supra, 44 Cal.4th 843, 865.) Secondly, the SVPA, a "special proceeding of a civil

nature" (People v. Yartz (2005) 37 Cal.4th 529, 532), has different due process requirements than those required in a purely civil commitments, such as in conservatorship proceedings. "Allen recognizes that 'in every case' an SVPA defendant has the right, as a matter of constitutional due process, to testify and to present his side of the story. Mental competence is a prerequisite to the exercise of that due process right. Absent mental competence, a defendant cannot testify or participate meaningfully in the SVPA proceeding." (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 783, citations omitted.) Additionally, "[i]t is perspicuous why the issue of competency has generally not arisen in the context of conventional civil commitment. Indeed, in the old fashioned parens patriae civil commitment of acutely dangerous or gravely disabled individuals, it is dispositive that the subject of the proceeding is incompetent in some manner–substantially unable to control or care for themselves in the present moment. In such cases, postponing civil commitment until the person is competent would be preposterous." (The Case For A Threshold For Competency In Sexually Violent Predator Civil Commitment Proceedings, by Alan Abrams, M.D., J.D., Maheen Patel, M.D., Amy Muth, J.D., and Nesibe Soysal, M.D., 2007 American Journal Of Forensic Psychiatry, Vol. 28, Issue 3, hereinafter "Am. Journal Of Forensic Psychiatry," pp. 10-11.)

Real Party also asserts that Petitioner's argument is not logically consistent because he is trying to invoke due process requirements into the venue of civil commitments because due process permits trial on the issue of competency with a client is unable to understand the nature of the proceedings or assist his counsel. (Opening Brief on Merits, at pp. 10, 17.) By definition the issue in a competency proceeding is whether an individual is competent or incompetent, not whether an incompetent person is subject to a civil commitment under the SVPA. It would be an oxymoron if defendant had to be competent in order to pursue a competency determination pursuant to Penal Code section 1367 et seq. because if such were the law, there would be no competency proceeding. Real party's argument also falsely assumes that all persons with a mental disorder are by definition are unable to understand the nature of the proceedings and/or are unable to cooperate with counsel. Mental disorders which may qualify an individual for commitment under the SVPA, rarely render such individual incompetent to stand trial. For example, under the SVPA the mental disorder must specifically render the individual "a danger to the health and safety of others because it is likely that he or she will engage in sexually violent predatory criminal behavior" (§ 6600, subd. (a)(1)) which is not the case in competency proceedings that focuses on the defendant's "ability or inability to understand the nature of the criminal proceedings or

assist counsel in the conduct of a defense in a rational manner as a result of a mental disorder" (Pen. Code § 1369, subd. (a)).

Therefore, this Court's decision in Allen establishes that a defendant in a SVPA proceeding has a right under due process clauses of the California and United States Constitutions to be competent to stand trial as a implicit and necessary corollary to his or her right to testify. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (Mathews v. Eldridge (1976) 424 U.S. 319, 333 [47 L.Ed.2d 18, 96 S.Ct. 893].)

II

THE COURT HAS THE INHERENT POWER TO DETERMINE THE COMPETENCY OF AN INDIVIDUAL SUBJECT TO PROSECUTION UNDER THE SVPA

Real Party asserts because there is "no statutory authority mandating the suspension of the SVP process to evaluate. . . for competency," the court is without power to impose a requirement of competency. (Opening Brief on Merits, at p. 2.) The Court of Appeal's decision in Moore correctly laid to rest this erroneous contention.

The court in James H. v. Superior Court (1978) 77 Cal.App.3d 169, held "that in absence of any statutory procedures for so doing the juvenile

court has the inherent power to determine a minor's mental competence to understand the nature of the proceedings. . . and to assist counsel in a rational manner." (Id., at p.172.) The underlying principles announced in James H. are applicable to proceedings commenced under the SVPA. The fact that SVPA proceedings are civil in nature (People v. Yartz, supra, 37 Cal.4th 529, 532, proceedings under the SVPA are "special proceedings civil in nature") is irrelevant in the analysis of James H.'s holding and reasoning vis-a-vis the SVPA because juvenile delinquency proceedings are also civil proceedings (In re Kevin S. (2003) 113 Cal.App.4th 97, 106; Rinaker v. Superior Court (1998) 62 Cal.App.4th 155, 164). Similarly, proceedings to determine mental competence pursuant to Penal Code sections 1368 et seq. are a "special proceeding civil in nature." (People v. Stanley (1995) 10 Cal.4th 764, 807.)

"Courts have the inherent power to create new forms of procedure in particular pending cases. 'The. . . power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function.'" (James H. v. Superior Court, supra, 77 Cal.App.3d 169, 175, citation omitted.) The court in James H. also relied on Code of Civil Procedure sections 187, which provides courts with "'. . . all the means necessary to carry it['s jurisdiction] into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or

mode of proceeding may be adopted which may appear most conformable to the spirit of this code'" and also relied on People v. Jordan (1884) 65 Cal. 644, 646, which ruled that "'[i]n the absence of any rules of practice enacted by the legislative authority, it is competent for the courts of the State to establish an entire Code of procedure in civil cases. . . .'" (Ibid.)

Because "[w]ithout any provision to ensure a defendant's right to be competent in SVPA proceedings, the Act would be unconstitutional" the "court has the power to fashion a remedy" based Code of Civil Procedure section 187 and James H. V. Superior Court, supra, 77 Cal.App.3d 169. (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 785-786, "It is 'beyond dispute that 'Courts have inherent power, as well as power under section 187 of the Code of Civil Procedure, to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council.' ' " (Citation and footnote omitted).) Specifically, the Court of ruled:

> "There, the court held due process demanded that a minor be afforded a competency hearing to determine whether he is a fit subject for the juvenile court, but 'the authors of the Juvenile Court Law... failed to provide any proceedings comparable to Penal Code sections 1367-1368.' Due to the need to protect the minor's right to due process, the James H. court invoked its inherent power, codified in Code of Civil Procedure section 187, to formulate a competency procedure. James H. stated: 'As the Supreme Court said in People v. Jordan [(1884)], 65 Cal. 644 at page 646 [4 P. 683],'[i]n the absence of any rules of practice enacted by the legislative authority, it is competent for the courts

> of this State to establish an entire Code of procedure in civil cases, and an entire system of procedure in criminal cases, ...' (See also Citizens Utilities Co. v. Superior Court, [supra, 59 Cal.2d at p.] 813 [31 Cal.Rptr. 316, 382 P.2d 356], recognizing the inherent power of courts to adopt ' 'any suitable method of practice ... if the procedure is not specified by statute or by rules adopted by the Judicial Council.' ')." (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 786, citations omitted.)

In an apparent attempt to distinguish James H., a case arising from the juvenile court, Real Party asserts the "analogizing of a SVP petition to a juvenile petition is misplaced." (Opening Brief on Merits, at p. 6.) While conceding that juvenile proceedings are civil (Welf. & Inst. Code §203), Real Party argues juvenile proceedings are distinguishable because they have been accorded "most of the rights commensurate with criminal prosecution." (Opening Brief on Merits, at p. 14.) Real Party failed to connect this argument with any authority that the conferring of these rights transmutes juvenile civil proceedings into criminal proceedings and ignored the fact that juvenile proceedings lack the key attribute of adult proceedings–i.e., the right to a trial by jury. Real Party also conveniently failed to acknowledge the fact that the SVPA itself accords individuals subject to commitment most of the rights commensurate with criminal proceedings. Specifically, section 6602 provides for probable cause hearings which this Court has analogized to preliminary hearings held in the criminal court (Cooley v. Superior Court (Marentez)

(2003) 29 Cal.4th 228), section 6603 provides for the right to counsel, the right to expert assistance, the right to discovery, trial by jury (a significant right not afforded to juveniles), and the right to a unanimous verdict, and section 6604 provides that the prosecution's burden of proof is beyond a reasonable doubt. "The circumstance that a commitment is civil rather than criminal scarcely mitigates the severity of the restraint upon the defendant's liberty." (People v. Allen, supra, 44 Cal.4th 843, 863.) Additionally, the rule in James H. does not rely upon the fact the proceedings were civil or criminal per se but rather relied on the power of the judiciary to promulgate procedural rules relying on Code of Civil Procedure 187 and People v. Jordan (1884) 65 Cal. 644. (James H. V. Superior Court, supra, 77 Cal.App.3d 169, 175.) Therefore, Real Party's purported attempt to distinguish James H. is without merit.

Real Party also complains about a lack of guidelines concerning the initiation of non-statutory competency procedure. (Opening Brief on Merits, at pp. 4-6.) Moore answers Real Party's complaint. "In view of the numerous similarities between proceedings under the SVPA and criminal prosecutions, we deem this an appropriate case for the exercise of our inherent power to look to Penal Code section 1367 et seq. in order to fill the gap in the SVPA, so as to enable the Act to function in a constitutional manner." (Moore v. Superior

Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 787; Also see James H. v. Superior Court, supra, 77 Cal.App.3d 169, 176-177, guidelines for competency proceedings can be borrowed and molded from Penal Code sections 1367, et seq. or from Dusky v. United States (1960) 362 U.S. 402 [4 L.Ed.2d 824, 80 S.Ct. 788]; also see Ca. Rules of Ct., Rule 5.645, "Mental Health or Condition of a Child.") The juvenile court certainly has not disintegrated because of the decision thirty-one years ago in James H., nor will the judicial process self-destruct due to the Moore decision.

Real party's reliance on People v. Angeletakis (1992) 5 Cal.App.4th 963, that there is no right to be mentally competent in a not guilty by reason of sanity commitment extension hearing held pursuant to Penal Code section 1026.5, subdivision (b), is also misplaced. (Opening Brief on Merits, at p. 3.) The Court of Appeal in Moore court addressed Real Party's citation to People v. Angeletakis, supra, 5 Cal.App.4th, as purported authority against the imposition of competency requirements by stating: "We recognize Angeletakis held due process does not include the right to be mentally competent during a commitment extension hearing under Penal Code section 1026.5. However, the instant case is governed by the Supreme Court's recent decision in Allen, which prescribed a four-part template for determining what process is due in

SVPA proceedings."[7/] (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 786, fn. 13, citation omitted.)

Angeletakis is also readily distinguishable. First, there is no indication in Angeletakis that the extension proceedings held pursuant to Penal Code section 1026.5 involved any "factual assertions" which "have neither been admitted through plea nor tested at trial." (See In re Commitment of Branch (Fla.App. 2004) 890 So.2d 322, 327-328, In re Commitment of Camper (Fla.App. 2006) 933 So.2d 1271, see discussion, post, §§ III.B., IV.) To the contrary, SVPA proceedings often present "factual assertions" which "have neither been admitted through plea nor tested at trial." Secondly, Angeletakis is distinguishable because sanity proceedings are criminal in nature whereas SVPA proceedings are civil in nature. The court in People v. Buffington (1990) 74 Cal.App.4th 1149, 1155, in its equal protection analysis, held that individuals subject to insanity and those subject to SVPA proceedings are not similarly situated. Finally, the due process ramifications of an insanity recommitment and a SVPA commitment are radically different given the fact

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[7/] Although, pursuant to Angeletakis a defendant does not have to be competent to stand trial in a not guilty by reason of insanity commitment extension hearing, the same defendant must have been competent to stand trial during the initial determination of whether he/she was insane at the time of the commission of the offense. (Pen. Code § 1026.) Therefore, in not guilty by reason of insanity proceedings there is a pre-existing judicial determination of mental status at a time when the defendant was competent.

that an insanity recommitment is for a duration of two years while a SVPA commitment is for an indeterminate term. (Pen. Code §1026.5, subd. (b)(8); §6604.)

Real Party inaccurately characterizes the holding in People v. Calderon (2004) 124 Cal.App.4th 80, stating in effect that it "indirectly addressed" the applicability of conservatorship vis-a-vis competency in SVPA proceedings. (Opening Brief on Merits, at pp. 6-7.) Competency was not in issue in Calderon. "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (Ginns v. Savage (1964) 61 Cal.2d 520, 524, fn. 2.) Instead, the Calderon court held that because only evidence of amenability to voluntary treatment is relevant at trial on the element of current dangerousness, evidence that a defendant would qualify for a conservatorship is irrelevant and inadmissible because it is a form of involuntary versus voluntary treatment. (People v. Calderon, supra, 124 Cal.App.4th 80, 90.) Real Party also quoted Calderon for the proposition that a conservatorship commitment would compromise public safety because the "'two schemes, SVPA and conservatorship, adopt different standards, serve different goals and afford the community a different level of security assistance.'" (Opening Brief on Merits, at pp. 7-8.) Initially, it should be

observed this quote is dicta and not controlling. (Mcguire v. Hibernia (1944) 23 Cal.2d 719, 730; In re Anthony S. (1992) 4 Cal.App.4th 1000, 1006, "Cases are not authority for propositions not considered.") Secondly, the basic premise of quote is erroneous–i.e., "[c]onservatorships under the Lanterman-Petris-Short Act was designed from the 'gravely disabled'. . ."–because it fails to recognize the separate definition of grave disability (§ 5350) from those individuals who fail to attain competency (§ 5008, subd. (h)(1)(B)). (People v. Calderon, supra, 124 Cal.App.4th 80, 90.) Murphy conservatorships, under the Lanterman-Petris-Short Act, are designed for individuals who fail to achieve competency during the course of their proceedings, or permanently incompetent defendants, and serve to protect the public as well as continue to treat the individual. (§ 5008, subd. (h)(1)(B); Pen. Code §§ 1370, subd. (c)(2); 5350, subd. (b)(2), see discussion of Murphy conservatorships and their applicability to individuals who fail to regain competency, post, § III.C.) Notably, Real Party does not assert that Murphy conservatorships fail to protect the public in commitments emanating from serious felony prosecutions, including murder.

Real Party also appears to argue that an individual subject to the SVPA should not be afforded more due process protection–i.e., the right to be competent–that the United States Supreme Court requires citing Allen v.

Illinois (1986) 478 U.S. 364 [106 S.Ct. 2988, 92 L.Ed.2d 296]. (Opening Brief on Merits, at p. 15.) The Court in Allen v. Illinois held that an individual subject to Illinois Sexually Dangerous Person's Act is not entitled to the privilege against self-incrimination and did not address the issue of competency. An "opinion is not authority for a proposition not therein considered." (Ginns v. Savage, supra, 61 Cal.2d 520, 524, fn. 2; Also see discussion of independent state grounds, post, § V.)

Therefore, the court has the inherent power and obligation to suspend proceedings in order to conduct a hearing into the question of the defendant's competence to stand trial in SVPA prosecutions.

III

THE DUE PROCESS CLAUSES OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS REQUIRE INDIVIDUALS SUBJECT TO A SVPA COMMITMENT BE COMPETENT

The due process clauses of the federal and state Constitutions prohibit the commitment of an individual under the SVPA who are incompetent. (See U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, §§ 7, 15.) "Because civil commitment involves a significant deprivation of liberty, a defendant in an SVP proceeding is entitled to due process protections." (Foucha v. Louisiana (1992) 504 U.S. 71, 80 [112 S.Ct. 1780, 1785-1786, 118 L.Ed.2d

437].)" (People v. Otto (2001) 26 Cal.4th 200, 209.) A proper and fair balancing of the Malinda S./Otto factors, leads to the inescapable conclusion that due process requires that only individuals who are competent be subjected to proceedings held pursuant to the SVPA.

This Court in Allen conducted the four part balancing test set forth in In re Malinda S. (1990) 51 Cal.3d 368 and People v. Otto, supra, 26 Cal.4th 200. (People v. Allen, supra, 44 Cal.4th 843, 862-863.) The due process test in Allen comprises of "four relevant factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." (Id., at pp. 862-863.) This Court found that all four Malinda S./Otto factors were enhanced by a defendant's participation in the proceedings held under the SVP Act. Conversely, prosecutions under the SVP Act would be significantly diminished

by proceeding to trial with incompetent defendants who are unable to meaningfully participate in their defense.

A. Factor (1): The Private Interest That Will Be Affected by the Offical Action.

In Real Party's analysis of Allen's four pronged due process test, it states that prong one, the private interest affected by official action, will be thwarted by the imposition of a competency requirement because it would create "significant delay" which will in turn prevent the dismissal of baseless SVPA petitions. (Opening Brief on Merits, at p. 19.)

This argument is without merit because, akin to the availability of a preliminary examination in criminal cases (Pen. Code § 859b), two distinct probable cause hearings are available under the SVPA pursuant to sections 6601.5 and 6602.[8/] Indeed, Real Party's assertion also flies in the face of

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[8/] Section 6601.5 provides: "Upon filing of the petition and a request for review under this section, a judge of the superior court shall review the petition and determine whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. If the judge determines that the petition, on its face, supports a finding of probable cause, the judge shall order that the person be detained in a secure facility until a hearing can be completed pursuant to Section 6602. The probable cause hearing provided for in Section 6602 shall commence within 10 calendar days of the date of the order issued by the judge pursuant to this section." Section 6602, subdivision (a), provides, in relevant (continued...)

People v. Otto, supra, 26 Cal.4th 200, and People v. Allen, supra, 44 Cal.4th 843, analysis which hold the first factor "weighs heavily in favor of providing all reasonable procedures to prevent the erroneous deprivation of liberty interests" given "'the significant limitations on [the defendant's] liberty, the stigma of being classified as [a sexually violent predator], and subjection to unwanted treatment.' The circumstance that a commitment is civil rather than criminal scarcely mitigates the severity of the restraint upon the defendant's liberty." (People v. Allen, supra, 44 Cal.4th 843, 863. Citations omitted.) Because Proposition 83 "increased the burden upon liberty interests by requiring only one predicate offense and by imposing an indeterminate term of commitment, it has increased the weight of the first factor." (Id., at p. 863, fn. 15; also see Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 777-778, 780.)

Real Party raises the false claim that competency proceedings will cause the proceedings to become "stale." (Opening Brief on Merits, at p. 22.) Not only is this argument lack merit, it demonstrates a basic lack of understanding

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[8/](...continued)
part: "A judge of the superior court shall review the petition and shall determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. The person named in the petition shall be entitled to assistance of counsel at the probable cause hearing."

of the SVPA. The elements of a SVPA prosecution are: 1) The individual has been convicted of committing sexually violent offenses against one or more victims, 2) The individual has a diagnosed mental disorder, 3) As a result of that diagnosed mental disorder, he or she is a danger to the health and safety of others because it is likely that he or she will engage in sexually violent predatory criminal behavior, and 4) It is necessary to keep him or her in custody in a secure facility to ensure the health and safety of others. (Judicial Council Of California Criminal Jury Instruction, CALCRIM No. 3454.) Proof of the first element, conviction of sexually violent offenses, often involve underlying matters that are decades old.[9/] For example in the instant case, Petitioner's alleged sexually violent offenses date back to 1977 and 1981. (Pet. Writ of Mandate/Prohibition, Exh. A, Petition.) Proof of these offense are often presented through the use of documentary and hearsay evidence. (People v. Superior Court (Howard) (1999) 70 Cal.App.4th 136, 140; § 6600, subd. (a)(3).) Therefore, given the inherent age of alleged convictions and the methods of proof available, Real Party's assertion of staleness is not well taken. Regarding the remaining elements, the mental disorder in issue relates

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[9/] SVPA proceedings are not commenced until an individual has almost completed serving his/her maximum term of confinement on the criminal sentence or upon subsequent incarceration for a parole violation. (§ 6601, subd. (a).)

to the defendant's "current" mental disorder. (§ 6603, subd. (c)(1).) The presence of a "current" mental disorder is measured at the time of trial, not at an earlier point–e.g., at the time of conviction or the filing of the SVPA petition. (Bourquez v. Superior Court (2007) 156 Cal.App.4th 1275, 1288-1289.) "Updated evaluations" are readily obtainable by the parties as "necessary" in order to assess the defendant's "current" mental disorder. (§ 6603, subd. (c)(1).) The determination of the defendant's current mental state is assessed in light of whether it makes him/her a "danger to the health and safety of others because it is likely that he or she will engage in sexually violent predatory criminal behavior" requiring confinement in a "secure facility." Therefore, staleness is also a non-issue regarding proof of a "current" mental disorder.

B. Factor (2): The Risk of an Erroneous Deprivation of Such Interest Through the Procedures Used, and the Probable Value, If Any, of Additional or Substitute Procedural Safeguards

The second Allen factor, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, also heavily weighs in favor of Petitioner. The risk of erroneous deprivation is grave should a defendant in a SVP proceeding be forced to trial while incompetent. After an examination

of the evidentiary and procedural components involved in a trial conducted pursuant to the SVPA, the Court of Appeal in Moore held "proceeding with an SVPA trial against an incompetent defendant poses an unacceptable risk of an erroneous deprivation of liberty. The second factor weighs in favor of the added procedural safeguard of a pretrial inquiry into defendant's competence to stand trial." (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 782.) Significantly, "Allen recognizes that 'in every case' an SVPA defendant has the right, as a matter of constitutional due process, to testify and to present his side of the story. Mental competence is a prerequisite to the exercise of that due process right. Absent mental competence, a defendant cannot testify or participate meaningfully in the SVPA proceeding." (Id., at p. 783, citations omitted.)

Next, Real Party argues that there is no need for a competent client because "[t]he champion for protection of that persons' rights is an experienced attorney who will present psychiatric testimony and cross-examine the experts presented by the State as recognized by the California Supreme Court in Hubbart v. Superior Court (1999) 19 Cal.4th 1138." (Opening Brief on Merits, at pp. 10-11.) Initially, it is important to note that the decision in Hubbart did consider the issue of competency. (Ginns v. Savage, supra, 61

Cal.2d 520, 524, fn. 2, "an opinion is not authority for a proposition not therein considered.")

Representation by counsel, in and by itself, does not adequately safeguard an individual's right to due process. A defendant in SVPA proceedings has both a statutory and due process right to counsel just as in the case of juvenile offenders. (§ 6606; People v. Carmony (2002) 99 Cal.App.4th 317, 326; Carty v. Nelson (2005) 426 F.3d 1064, 1074; James H. v. Superior Court, supra, 77 Cal.App.3d 169, 173-174.) "Due process demands that a person constitutionally entitled to the right to effective counsel be afforded a hearing as to his competency to cooperate with that counsel." (James H. v. Superior Court, supra, 77 Cal.App.3d 169, 174, citing Kent v. United States (1966) 383 U.S. 541 [16 L.Ed.2d 84, 86 S.Ct. 1045], emphasis added; also see In re Kevin S. (2003) 113 Cal.App.4th 97, 115.) The "failure to afford a defendant a hearing on his present competency to cooperate with his attorney deprives a defendant of his constitutional right to a fair trial." (Id., at p. 175, citations omitted.) "If a person cannot effectively communicate or cooperate with his counsel that counsel rather obviously cannot be effective. 'Counsel cannot effectively represent a defendant who is unable to understand the proceedings or to rationally assist him.'" (Id., at p. 174, citations omitted; Golden v. State (Ark. 2000) 21 S.W.3d 801, 803, "Logically, this right to

counsel means little if the juvenile is unaware of the proceedings or unable to communicate with counsel due to a psychological or developmental disability"; Hale v. Superior Court (1975) 15 Cal.3d 221, "Counsel cannot effectively represent a defendant who is unable to understand the proceedings or to rationally assist him. (Chambers v. Municipal Court (1974) 43 Cal.App.3d 809, 813, 118 Cal.Rptr. 120.)".)

Real Party's assertion that an erroneous deprivation is forestalled because the defendant is represented by counsel and because the SVP Act contains sufficient safeguards is demonstrably fallacious under Allen's reasoning. (Opening Brief on Merits, at p. 16.) Just as representation by counsel and other procedural safeguards in Allen were not a substitute for the right of a defendant to testify on his own behalf, they are not a substitute for proceeding with an incompetent defendant.

> "Because the testimony of a defendant typically will concern his or her conduct, this testimony may relate to information that is critical to the experts' testimony. Attorneys are not infallible in appraising their clients and in assessing the impression a client's testimony may have on a jury, or in evaluating the credibility of other witnesses. In some cases, the defendant's testimony may raise a reasonable doubt concerning the facts underlying the experts' opinions. Accordingly, in every case there exists a risk that allowing counsel to preclude the defendant from testifying will lead to an erroneous deprivation of rights. Guaranteeing the defendant a right to testify, even over counsel's objection, will mitigate this risk." (People v. Allen, supra, 44 Cal.4th 843, 866.) "The Court of Appeal concluded that 'defendant had

> ample opportunity to tell his version in the underlying criminal proceedings and during his psychological examinations, as well as through his attorney, cross-examination of witnesses, and presenting his own witnesses.' Defendant pleaded guilty to the charges in the underlying proceeding, and therefore did not present his story concerning the details surrounding the offenses. Although defendant could tell his story to the psychologists, this forum did not ensure that his story would reach the trier of fact." (Id., at p. 869, fn. 18.)

Without being afforded "effective" representation, the various procedural rights provided by the SVPA will be rendered ineffective. How can the right to a jury trial and the right to confront and cross-examine witnesses be effective when they are conducted in a void, without any meaningful opportunity to consult with one's client regarding the accuracy and validity of the evidence being offered by the prosecution? For example, a defendant in a Florida equivalent of a SVPA prosecution "has a due process right to challenge the factual assertions contained in the police reports and other documents that underlie an expert's opinion when those factual assertions have neither been admitted through a plea nor tested at trial. It follows that in order to meaningfully exercise that due process right, a Ryce Act respondent must be competent so that he or she may both testify on his or her own behalf and assist counsel in challenging the alleged facts. Otherwise, the due process right is simply illusory. . . . Instead, it is an incompetent respondent's inability to assist counsel in challenging the facts contained in those hearsay statements

that violates due process." (In re Commitment of Branch, supra, 890 So.2d 322, 327.)

Below are five examples where the fact finding process will be significantly compromised should SVPA trials be allowed to proceed with incompetent defendants, thereby preventing any effective challenge by the defendant and his or her counsel to the alleged facts presented by the prosecution:

1) In attempting to prove up their case in a SVPA proceeding, the prosecution may resort to the use of documentary and hearsay evidence. (§ 6600, subd. (a)(3).) Significantly, the admission of hearsay does not violate due process "because the defendant has the opportunity to challenge the evidence." (People v. Superior Court (Howard), supra, 70 Cal.App.4th 136, 140.)

2) The prosecution may also resort to evidence outside the record to prove the alleged offenses qualify as predicate prior convictions under the SVPA. (People v. Fulcher (2006) 136 Cal.App.4th 41, 47-48; People v. Superior Court (Howard), supra, 70 Cal.App.4th 136, 155.) Evidence outside the record may include victim testimony. (People v. Fulcher, supra, 136 Cal.App.4th 41, 49.) Furthermore, the SVPA requires proof beyond the mere fact of convictions–i.e., the People must prove that they are "sexually violent"

and are of such a nature that will cause the individual to engage in sexually violent and predatory criminal conduct if released. (People v. Superior Court (Howard), supra, 70 Cal.App.4th 136, 155, "evidence of prior convictions is required as partial proof that the defendant has committed sexually violent offenses. . . . The SVP Act provides that additional evidence, obtained from sources outside the conviction record, is admissible to prove sexually violent offenses. . . .")

3) SVPA elements often cannot be gleaned from the record of conviction but must be proved though reliance on extrinsic evidence. In order for the prosecution to prove these elements, its experts are permitted to consider hearsay reports of prior bad acts that did not result in prosecution or

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conviction.[10/] The prosecution may resort to the use of documentary and hearsay evidence at the probable cause hearing and trial. (§ 6600, subd. (a)(3).)

These constitutional mandates, as well as the rationale advanced in Branch and Camper, take on exponential significance and importance when unadjudicated charges and arrests are at issue. Defense Counsel is presented with an insurmountable disadvantage in defending against such evidence when representing an incompetent defendant who is unable to assist in his or her own defense and testify on his or her own behalf.[11/] Without the availability of a competent client there are very few alternative avenues available for

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[10/] For example, one of the diagnosis advanced by the prosecution experts in the instant case is Paraphilia NOS which requires "at least a six-month pattern of recurrent intense sexual urges/fantasies or behaviors involving non-consenting partners." (Pet. Writ of Mandate/Prohibition, Exh. J, Rpt. of Shoba Sreenivasan, Ph.D., at pp. 7-8.) The prosecution expert's reports in the instant case are replete with hearsay reports of prior bad acts that did not result in prosecution or conviction. (Pet. Writ of Mandate/Prohibition, Exhs. J & H, Rpts. of Shoba Sreenivasan, Ph.D. and Elaine Finnberg, Ph.D.) The requirement of recurrent history for a diagnosis of Paraphilia NOS is especially significant in light of the fact that section 6600 requires one sexually violent offense. In cases in which a defendant has only a single conviction for a sexually violent offense, experts would necessarily have to utilize hearsay reports of prior bad acts that did not result in prosecution or conviction in order to make a diagnosis of Paraphilia NOS.

[11/] See Amicus Curiae Brief in Support of Petitioner by Michael J. Aye, Amicus Curiae Letter in Support of Petitioner by Todd L. Melnik, and Amicus Brief in Support of Petitioner by Alan A. Abrams, M.D., J.D., filed at the invitation of the Court of Appeal in the above-entitled case.

defense counsel to investigate and challenge potentially highly "unreliable" and "prejudicial" evidence such as unadjudicated charges and arrests. Petitioner, who in the words of Dr. Castellano is "unable to remember recent or remote events in a logical or meaningful manner. . . [and whose] memory impairment is exacerbated by confused, disorganized thought processes" (Pet. Writ of Mandate/Prohibition, Exh. J, Rpt. of Vianne Castellano, Ph.D., at p. 3) and in the words of Dr. Sreenivasan suffers from "paranoia, responding to internal stimuli and a general lack of connection with reality" (Pet. Writ of Mandate/Prohibition, Exh. J, Rpt. of Shoba Sreenivasan, Ph.D., at pp. 7-8), is totally and utterly incapable of assisting counsel. He is incapable of supplying potential witnesses to support a defense such as alibi or self-defense, to "present his side of the story," or to even enter a simple denial. (See, e.g., People v. Superior Court (Howard), supra, 70 Cal.App.4th 136, 154-155, "due process is preserved under the SVP Act because the proceedings mandated by the Act are adequate to enable a defendant to challenge the People's documentary evidence. By doing so, the defendant has the opportunity to thoroughly present his side of the story. Moreover, hearsay statements are obviously vulnerable to challenge by defendant as arguably unreliable summaries of victim and witness interviews, and the defendant may rebut the

hearsay statements by providing his own version of the details underlying his offenses.")

4) Conversely, an individual alleged to come within the provisions of the SVPA must be allowed to introduce evidence to prove that the alleged offenses are not sexually violent and/or do not otherwise qualify under the SVPA. "The defendant has the same opportunity to challenge the hearsay evidence, whether it is contained in a psychological evaluation or in a probation report, and to cross-examine the People's witnesses, as well as to present his own rebuttal evidence." (People v. Superior Court (Howard), supra, 70 Cal.App.4th 136, 154, citation omitted.) "[D]ue process is preserved under the SVP Act because the proceedings mandated by the Act are adequate to enable a defendant to challenge the People's documentary evidence. By doing so, the defendant has the opportunity to thoroughly present his side of the story. Moreover, hearsay statements are obviously vulnerable to challenge by defendant as arguably unreliable summaries of victim and witness interviews, and the defendant may rebut the hearsay statements by providing his own version of the details underlying his offenses." (Id., at pp. 154-155.)

5) Similarly, an individual alleged to come within the provisions of the SVPA has the right to challenge the testimony of the prosecution's expert witnesses. "Any erroneous factual assumptions by the experts could be

addressed through cross-examination of the experts and by showing there was no evidence to support their conclusions." (People v. Fulcher, supra, 136 Cal.App.4th 41, 54.)

Real Party raises two straw man contentions regarding the second factor, protection against "erroneous findings": 1) trial will be delayed for years which would interfere with SVP treatment, and 2) that in criminal prosecutions some proceedings can proceed even when the accused is incompetent. (Opening Brief on Merits, at pp. 19-22.) What Real Party failed to acknowledge is that restoration of an individual to competency also inherently delays the underlying proceedings in criminal cases, including prosecutions for serious felonies including murder. However, on balance, the presence of a competent defendant is significantly more beneficial to the fact finding process:

> "Further Allen recognized 'the defendant's participation in the proceedings, through pretrial interviews and testimony at trial, generally enhances the reliability of the outcome. ...[If critical information, such as the details surrounding the commission of the predicate offenses, is questionable, 'a significant portion of the foundation of the resulting [sexually violent predator] finding is suspect.' [Citation.]] Because the testimony of a defendant typically will concern his or her conduct, this testimony may relate to information that is critical to the experts' testimony. Attorneys are not infallible in appraising their clients and in assessing the impression a client's testimony may have on a jury, or in evaluating the credibility of other witnesses. In some cases, the defendant's testimony may raise a reasonable

> doubt concerning the facts underlying the experts' opinions. Accordingly, in every case there exists a risk that allowing counsel to preclude the defendant from testifying will lead to an erroneous deprivation of rights.'"[12/] (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 782, fn. added; Am. Journal Of Forensic Psychiatry, p. 13, "Within the context of an SVP hearing specifically, it is intuitive that competence necessarily underlies an efficacious communication between the respondent and his counsel in order to explain or mitigate past acts, to disclose motives or unique mental states, and to propound plausible reasons why future recurrence is not likely.")

The concept that depriving an incompetent SVP defendant of treatment during the process of restoration of competency (Opening Brief on Merits, at pp. 21-22) is a farce. "[A]ttempting to curb the compulsively lurid behaviors of an SVP that precipitate within the matrix of a florid psychosis or severe cognitive impairment would likely prove futile. This realization is further buttressed by the fact that, aside from pharmacological intervention (i.e., anti-androgen pharmacotherapy [chemical castration]), the preponderance of all other currently available treatments for SVPs find their provenance in rational, goal-directed, even insightful, cognition. . . . Clearly, enlisting such therapies in the service of individuals lacking the cognitive capacity to truly benefit from

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[12/] The discussion in Moore contains an extensive analysis of the different phases involved in a SVPA trial and the importance of having a competent defendant to assist his/her attorney and in his/her defense during these phases. (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 780-782.)

them would prove not only inefficacious but also uneconomical." (Am. Journal Of Forensic Psychiatry, pp. 15-16.)

Significantly, SVPA treatment programs are not designed or equipped to treat incompetent individuals. For example, psychotropic and antipsychotic medications maybe involuntarily administered to incompetent individuals which cannot generally be administered to individuals serving a commitment under the SVPA. (Pen. Code § 1370, subd. (a)(2)(B)(iii); In re Calhoun (2004) 121 Cal.App.4th 1315.)

The treatment program for individuals subject to the SVPA is not intended or designed for the restoration of competency. Rather, the program in place at Patton State Hospital is designed to provide treatment mentally incompetent individuals. The SVPA treatment program, the "Sex Offender Treatment Program," hereinafter "SOCP," is an intellectual and interactive program designed to give the participants the tools and training to avoid re-offending. (California Department of Mental Health, http://www.dmh.cahwnet.gov/SOCP/faqs.asp. The SOCP consists of a comprehensive five phase cognitive-behavioral treatment program for sex offenders. Phase I is called Treatment Readiness phase which consists of an education overview of the treatment program. Phase II is called the Skills Acquisition and involves the participants to identify significant events that led

to past sexual offending, to identify thinking errors that led to past sexual offending, and identify the consequences of sexual offending on the victims of sexual abuse. Participants must complete an autobiography that helps them identify situations and risks that may lead to future sexual offenses and must participate in additional groups which include Human Sexuality and Interpersonal Skills. Phase III is called Skills Application which requires the participants to apply coping responses to previously identified high-risk situations and to participate in advanced levels of identifying thinking error that contributed to their sexual crimes, improve their ability to recognize the consequences of sexual abuse on victims, and to use journaling to become more aware of other factors that could lead to reoffense. Phase IV is called Transitions which serves as an opportunity for participants to begin focusing on transitioning from a hospital environment to the Conditional Release Program ("CONREP"). Phase V is consists of actual participation in a CONREP treatment program which is located in the community of the participant's county of commitment. (California Department of Mental Health, http://www.dmh.cahwnet.gov/SOCP/faqs.asp.)

Compare the treatment for mentally incompetent individuals offered at Patton State Hospital: Program IV: "Consists of four treatment units for adult male and female Individuals at the intermediate care level. The majority of the

Individuals have been committed as mentally incompetent to stand trial due to a mental disorder. These Individuals have been designated by the court to be in need of forensic treatment in a secure environment to regain their competency to stand trial." Program VI: "Consists of the Admissions Suite, a processing center for all Individuals coming into the facility. Here, they are initially assessed and assigned to an appropriate unit for continued assessment and treatment. Two co-ed and two all male acute psychiatric units receive Individuals from the Admission Suite and are designed to introduce the Individual to the forensic mental health system, provide a comprehensive assessment/evaluation, and involve the Individuals in short-term treatment prior to their transfer to an intermediate care unit." Program VII: "Treats Individuals committed to Patton under section 1370 of the penal code. Individuals are transferred to Program VII units after a period in Program VI acute care units. These four units include two coed and two all male. The treatment goal is to restore Individuals to trial competency prior to their maximum commitment date (the date after which an Individual must be returned to court, whether competent or incompetent). Additionally, all units have LPS and Murphy Conservatee Individuals who were not found competent prior to their maximum date as a PC 1370 and are being prepared for a less

secure environment." (California Department of Mental Health, http://www.dmh.ca.gov/Statehospitals/Patton/TreatmentProg.asp)

Real Party's additional concern that some proceedings such as suggested by the Model Penal Code (Opening Brief on Merits, at p. 21), which permits "an incompetent accused's attorney to contest any issue 'susceptible of fair determination prior to trial and without the personal participation of the defendant,'" is a non-issue because of the availability of probable cause hearings under the SVPA as provided by sections 6601.5 and 6602, discussed ante, Section II.

Therefore, the conduction of a SVPA prosecution with an incompetent defendant will prevent any meaningful challenge or defense to the prosecution's evidence, thereby rendering the SVPA's procedural safeguards nothing more than some hollow words on a piece of paper.

C. Factor (3): The Government's Interest, Including the Function Involved and the Fiscal and Administrative Burdens That the Additional or Substitute Procedural Requirement Would Entail

The third Allen factor, the government's interest, also weighs in the Petitoner's favor because his or her "participation in the proceedings through his or her testimony at trial generally enhances the reliability of the outcome, the recognition of a right to testify over the objection of counsel may serve the

government's interest in securing an accurate factual determination concerning the defendant's status as a sexually violent predator." (People v. Allen, supra, 44 Cal.4th 843, 866.) Should a SVP defendant be forced to trial while incompetent, he or she would be unable to testify on his or her behalf which will undermine "the reliability of the outcome" and distort "an accurate factual determination.

The Court of Appeal in Moore ruled that although "[t]he government has a strong interest in protecting the public from sexually violent predators, and in providing treatment to these individuals, but the government also has an "interest in securing an accurate factual determination concerning the defendant's status as a sexually violent predator." (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 783.) In support of its ruling, the Court of Appeal in Moore court reasoned:

> "The fiscal and administrative burden associated with a competency determination before an SVPA trial is not significant, and in any event would not justify deprivation of a defendant's right to be competent and to participate in the SVPA proceeding. Recognizing a defendant's right to a competency determination will lengthen the proceedings 'only in that subset of cases' in which defense counsel or the court has reason to believe the defendant may be incompetent to stand trial. [¶] Further, assuming arguendo the defendant is found to be incompetent to stand trial, the defendant would remain confined in a state hospital or other treatment facility that will promote the defendant's restoration to mental competence. (See discussion, § 5, post.) Therefore, irrespective of whether a

> defendant is civilly committed as a sexually violent predator, or committed for treatment pending restoration to competence, the fiscal burden to the state remains essentially the same." (Ibid., citations omitted.)

The government's interest and the express purpose of the SVPA is to protect the public from those who are dangerous and mentally ill. The imposition of the requirement that individuals be competent does not detract from this interest. An individual who is found to be incompetent is not subject to release. It defies all logic and common sense why public safety is not placed at risk by a finding that a defendant accused of murder and/or other violent felonies, but is when it comes to a defendant subject to a civil SVPA prosecution.

Indeed, an incompetent individual is subject to treatment and hospitalization in a state hospital within a secured perimeter or locked and controlled treatment facility which the court determines will protect public safety. (Pen. Code §1370, subds. (a)(1)(B)(iii)[13/] and (a)(1)(B)(iv)(D).)[14/] If

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[13/] Penal Code section 1370, subdivision (a)(1)(B)(iii) provides: "If the action against the defendant who has been found mentally incompetent is on a complaint charging a felony offense specified in Section 290 and the defendant has been denied bail pursuant to subdivision (b) of Section 12 of Article I of the California Constitution because the court has found, based upon clear and convincing evidence, a substantial likelihood that the person's release would result in great bodily harm to others, the court shall order that the defendant be delivered by the sheriff to a state hospital for the care and (continued...)

the individual fails to regain his or her competency after three years, conservatorship proceedings must be commenced, often pursuant to section 5008, subdivision (h)(1)(B),[15/] commonly called "Murphy" conservatorships. (Also see Pen. Code §1370, subd. (c)(2)[16/]; Conservatorship of Hofferber (190)

[13/](...continued)
treatment of the mentally disordered unless the court makes specific findings on the record that an alternative placement would provide more appropriate treatment for the defendant and would not pose a danger to the health and safety of others."

[14/] Penal Code section 1370, subdivision (a)(1)(B)(iv)(D), provides: "A defendant charged with a violent felony may not be delivered to a state hospital or treatment facility pursuant to this subdivision unless the state hospital or treatment facility has a secured perimeter or a locked and controlled treatment facility, and the judge determines that the public safety will be protected."

[15/] Section 5008, subdivision (h)(1)(B), provides: "For purposes of Article 1 (commencing with Section 5150), Article 2 (commencing with Section 5200), and Article 4 (commencing with Section 5250) of Chapter 2, and for the purposes of Chapter 3 (commencing with Section 5350), 'gravely disabled' means either of the following: [¶] . . . [¶] (B) A condition in which a person, has been found mentally incompetent under Section 1370 of the Penal Code and all of the following facts exists: [¶] (I) The indictment or information pending against the defendant at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person. [¶] (ii) The indictment or information has not been dismissed. [¶] (iii) As a result of mental disorder, the person is unable to understand the nature and purpose of the proceedings, taken against him or her and to assist counsel in the conduct of his or her defense in a rational manner."

[16/] Penal Code section 1370, subdivision (c)(2), provides: "Whenever any defendant is returned to the court pursuant to paragraph (1) or (2) of subdivision (b) or paragraph (1) of this subdivision and it appears to the court that the defendant is gravely disabled, as defined in subparagraph (B) of (continued...)

28 Cal.3d 161, 171, 173, in upholding the commitment of permanently incompetent individuals the Supreme Court stated "compelling interests in public safety and humane treatment of the mentally disturbed" justifies the "separate treatment of permanently incompetent criminal defendants formally charged with violent felonies.") The court must take into consideration the protection of the public when placing a conservatee into a treatment facility. (§ 5320, subd. (c)(2).)

Permanently incompetent criminal defendants are placed on mental health conservatorships using different criteria than are used to establish mental health conservatorships for all other mentally ill people. To establish a mental health conservatorship, the individual must be gravely disabled. (§5350.) For non-permanently incompetent criminal defendants, "gravely

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[16/](...continued)
paragraph (1) of subdivision (h) of Section 5008 of the Welfare and Institutions Code, the court shall order the conservatorship investigator of the county of commitment of the defendant to initiate conservatorship proceedings for the defendant pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code. Any hearings required in the conservatorship proceedings shall be held in the superior court in the county that ordered the commitment. The court shall transmit a copy of the order directing initiation of conservatorship proceedings to the community program director or a designee, the sheriff and the district attorney of the county in which criminal charges are pending, and the defendant's counsel of record. The court shall notify the community program director or a designee, the sheriff and district attorney of the county in which criminal charges are pending, and the defendant's counsel of record of the outcome of the conservatorship proceedings."

disabled" is defined as "a condition in which a person as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter." (§5008, subd. (h)(1)(A).) However, for permanently incompetent criminal defendants, "gravely disabled" is defined as a condition in which the person has been found mentally incompetent to stand trial; the indictment or information charges a felony involving death, great bodily injury, or a serious threat to the physical well-being of another; the indictment or information has not been dismissed; and the person is incompetent to stand trial. (§5008, subd. (h)(1)(B).) Unlike other conservatees who, by law, must be placed in the least restrictive placement, (§5358, subd. (a)(1)(A)) permanently incompetent criminal defendant conservatees, by law, must be placed in a facility "that achieves the purposes of treatment of the conservatee and protection of the public." (§5358, subd. (a)(1)(B).)[17/] Permanently incompetent defendant conservatees may be subjected to involuntary inpatient commitment, including hospitalization in a government institution. (§5358,

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[17/] Section 5358, subdivision (a)(1)(B), provides: "When order by the court after the hearing required by this section, a conservator appointed pursuant to this chapter shall place his or her conservatee as follows: [¶] . . . (B) For a conservatee who is gravely disabled as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008, in a placement that achieves the purposes of treatment of the conservatee and the protection of the public."

subd. (a)(2).)[18/] Other conservatees may be transferred by their conservators to alternative placements without any hearing or court approval. (§5358, subd. (d)(1).) Permanently incompetent criminal defendant conservatees may not be transferred by their conservators to alternative placements unless written notice of the proposed change of placement is provided to the court and to others designated by the statute and by the court to receive notice. (§5358, subd. (d)(2).)[19/] If any person receiving such notice objects to the proposed transfer, transfer may not occur without a hearing and court approval. (Ibid.) Court approval may only be given if the conservator proves that a less restrictive alternative placement does not pose a threat to the safety of the public, the

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[18/] Section 5358, subdivision (a)(2), provides in relevant part: "The placement may include a medical, psychiatric, nursing, or other state-licensed facility, or a state hospital, county hospital, hospital operated by the Regents of the University of California, a United States government hospital, or other nonmedical facility approved by the State Department of Mental Health or an agency accredited by the State Department of Mental Health . . . ."

[19/] Section 5358, subdivision (d)(2), provides: "For a conservatee who is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008, the conservator may not transfer his or her conservatee without providing written notice of the proposed change of placement and the reason therefor to the court, the conservatee's attorney, the county patient's rights advocate, the district attorney of the county that made the commitment, and any other persons designated by the court to receive notice. If any person designated to receive notice objects to the proposed transfer within 10 days after receiving notice, the matter shall be set for a further hearing and court approval. The notification and hearing is not required for the transfer of persons between state hospitals."

permanently incompetent criminal defendant, or to any other individual. (§5358, subd. (d)(3).)[20/]

Additionally, the Legislature would be free to enact additional provisions to protect public safety if it felt such legislation was warranted.

In an expression of altruistic concern, Real Party worries about what injustices would occur to an individual who is subject to a SVPA prosecution and who is incompetent but who might not be adjudicated to be a SVP is the matter was allowed to proceed to trial. (Opening Brief on Merits, at p. 19.) This argument lacks merit based on the following reasons: 1) an individual who is incompetent cannot receive a fair trial (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771), 2) should the prosecution entertain a reasonable doubt as to the individual's culpability under the SVPA it may move to dismiss the petition, 3) a person subject to the SVPA has available two pre-trial opportunities to contest his/her culpability at probable cause hearings (§§ 6601.5 and 6602, see discussion post, § II), and 4) the same concern can be argued in criminal prosecutions–i.e., a person who may be found innocent at trial is also subject to competency proceedings.

[20/] Section 5358, subdivision (d)(3), provides: "At a hearing where the conservator is seeking placement to a less restrictive alternative placement pursuant to paragraph (2), the placement shall not be approved where it is determined by a preponderance of the evidence that the placement poses a threat to the safety of the public, the conservatee, or any other individual."

In another expression of altruistic concern, Real Party worries that because a "SVP subject is not facing any new charges, [he/she] could not be detained pursuant to the SVP Act if the petition is suspended. . . ." (Opening Brief on Merits, at p. .5) This argument also lacks merit because the Moore decision ruled that the court is "to look to Penal Code section 1367 et seq. In order to fill the gave in the SVPA , so as to enable the Act to function in a constitutional manner." (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 787.) Just as juvenile's can be detained after James H., so may individuals subject to the SVPA be detained after Moore.

D. Factor (4): The Dignitary Interest in Informing Individuals of the Nature, Grounds, and Consequences of the Action and in Enabling Them to Present Their Side of the Story Before a Responsible Government Official.

The fourth Allen factor, the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official, also weighs in the Petitioner's favor. Forcing an incompetent defendant to trail would render his or her participation therein superfluous and being no more important than a potted plant. Real Party concedes this factor in favor of Petitioner. (Opening Brief on Merits, at p. 24.)

When a SVPA defendant is encumbered by incompetency, the defendant's ability to present his or her side of the story is significantly impaired. "Although it is true, as the Court of Appeal noted, that a defendant generally can communicate his or her version to and through the experts and counsel and through other witnesses, these means all involve a filtering process before the story reaches the finder of fact. In a case in which the experts do not believe the defendant and in which counsel concludes the defendant's testimony will have a negative impact on the outcome, the defendant's story may not reach the fact finder." (People v. Allen, supra, 44 Cal.4th 843. 868.) "Because a defendant in a proceeding under the SVPA has no right to represent himself or herself and no privilege against self-incrimination, denial of a right to testify over the objection of counsel might relegate the defendant to the role of a mere spectator, with no power to attempt to affect the outcome. The defendant might be both forced to testify as to matters the prosecution seeks to establish, and prevented from testifying as to matters the defendant seeks to establish, or might be ignored." (Id., at p. 869.)

E. Conclusion.

When the four factors set forth in Otto are fairly balanced, it is clear that Petitioner's due process rights overwhelmingly outweigh the interest of

the government and are essential in order to preserve the fact finding process. Otherwise, there is a risk "[t]hat distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence.'" (Kansas v. Crane (2002) 534 U.S. 407, 412 [151 L.Ed.2d 856, 122 S.Ct. 867], citing Kansas v. Hendricks (1997) 521 U.S. 346, 360 [138 L.Ed.2d 501, 117 S.Ct. 2072] (Kennedy, J., concurring).)

IV

REAL PARTY'S RELIANCE ON FOREIGN AUTHORITY IS UNWARRANTED

Real party cited several out-of-state decision's regarding the applicability to competency determinations to their constitutional and statutory schemes. (Opening Brief on Merits, at pp. 23-24.) Real party's reliance on out-of-state authority is not well taken based upon the following analysis.

California courts are not bound by decisions in other jurisdictions. (Gentis v. Safeguard Business Systems, Inc. (1998) 60 Cal.App.4th 1294, 1307; US Ecology, Inc. v. State (2005) 129 Cal.App.4th 887, 905.) "Where the law of this state is uncertain, the decision of a court of last resort of another state, though not binding as authority, is persuasive, especially in the construction of a statute similar to the one involved in the instant decision. However, if the reasoning of a sister state decision on a statutory provision is

unsound, the California courts will not follow it, even though the language and context of the local statute are identical." (Acco Contractors, Inc. v. McNamara & Peepe Lumber Co. (1976) 63 Cal.App.3d 292, 296, citations omitted.)

The out-of-state decision relied upon by the respondent court and Real Party are not persuasive and should not be followed because the law in California is not uncertain and the reasoning in those decisions is "unsound" as applied to the statutes and due process protections afforded by California's Constitution and statutory schemes. The law in California regarding the availability of competency proceedings in civil proceedings has previously been decided in the affirmative in James H. v. Superior Court, supra, 77 Cal.App.3d 169. (See discussion, ante, § II.) The decision in James H. is rooted in the protections afforded by the due process clauses of both the United States and California Constitutions and by California statutory provisions.

The due process clause contained in the California Constitution affords greater protections than its counterpart in the United States Constitution.[21/]

[21/] The doctrine of "independent state grounds" has been limited in criminal and juvenile cases by voter initiative. (Proposition 8, The Victims' Bill of Rights, added Ca. Const., Art. I, § 28, providing that relevant evidence is admissible in criminal proceedings unless required to be excluded on federal (continued...)

"The California Constitution is a document of independent force, and the state Supreme Court is the ultimate interpreter of the meaning of that document. Hence, while state courts must enforce the minimum federal constitutional standards as interpreted by the U.S. Supreme Court, they remain free to interpret state constitutional provisions, including those similar to or the same as federal constitutional provisions, in a manner that will grant additional protection. Authoritative construction of the California Constitution is left to the Supreme Court, 'informed but untrammeled by the United States Supreme Court's reading of parallel federal provisions.'" (Reynolds v. Superior Court (1974) 12 Cal.3d 834, 842.) The court in Ryan v. California Interscholastic Federation-San Diego Section (2001) 94 Cal.App.4th 1048, 1069, ruled "procedural due process under the California Constitution is 'much more inclusive' and protects a broader range of interests than under the federal Constitution. . . ."

[21/](...continued)
constitutional grounds and by Proposition 115, The Crime Victims' Justice Reform, amended Ca. Const., Art. I, § 24, providing the California Constitution shall not be construed to afford greater rights to criminal defendants and minors in juvenile proceedings than those afforded by the Constitution of the United States.) Because proceedings under the SVPA are civil, these limitations are expressly inapplicable and the doctrine of "independent state grounds" remains constitutionally viable in SVPA proceedings.

The reasoning embodied in the out-of-state decisions is "unsound" given the United States and California Constitutional requirements that the right to counsel includes the right to "effective" counsel. (See discussion, ante, § III.B.) Second, because "factual assertions" which "have neither been admitted through a plea or tested at trial" are relevant and admissible in a California SVPA prosecution (See discussion, ante, § III.B.) Third, the out-of-state conclusion that the availability of competency proceedings would endanger public safety is also unsound given California's statutory provisions pertaining to competency which provide for the protection of the public while steps are taken to restore an individual's competency. (See discussion, ante, § III.C.; Pen. Code § 1370; § 5320.) It defies all logic and common sense why public safety is not placed at risk by a finding that a defendant accused of murder and/or other violent felonies, but is when it comes to a defendant subject to a civil SVPA prosecution. Thus, the Court of Appeal in Moore ruled, "[t]hose decisions are predicated on the nominally civil nature of sexually violent predator proceedings. However, Allen expressly rejected the civil/criminal dichotomy as a basis for disposing of an alleged sexually violent predator's constitutional claims. Allen reflects the nominally civil nomenclature is only the beginning of the constitutional analysis." (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 784.)

Significantly, the Branch court ruled that the decisions In re Detention of Cubbage (Iowa 2003) 671 N.W.2d 442, and State ex rel. Nixon v. Kinder (Mo.App. 2002) 129 S.W.3d 5, were unsound because "neither case analyzed the situation in which the State relies solely on hearsay to establish prior bad acts rather than relying on the fact of prior convictions to support the commitment. . ." and "[b]ecause these cases did not address the issue before us, we find them inapplicable to our analysis." (In re Commitment of Branch, supra, 890 So.2d 322, 327, 328.) "[W]hen the State relies on evidence of prior bad acts supported solely by unchallenged and untested factual allegations to establish any element of its case, the respondent has a due process right to be competent so that he or she may consult with counsel and testify on his or her own behalf. Thus, if the State's experts choose to rely on unchallenged hearsay to establish the respondent's prior uncharged bad acts, the respondent has a right to be competent so that he or she can exercise his or her due process right to challenge the facts underlying that hearsay evidence."[22/] (Ibid.) The same analysis and rational also applies equally to the other out-of-state cases relied upon by the respondent court and Real Party.

[22/] The Court of Appeal in Moore rejected Florida's "case-by-case" approach because People v. Allen, supra 44 Cal.4th 843, 865, rejection of a case-by-case approach. (Moore v. Superior Court, supra, 174 Cal.App.4th 856, 94 Cal.Rptr.3d 771, 782.)

Florida's courts have determined that procedural due process does require the participation of competent defendant in SVP proceedings. (In re Commitment of Branch, supra, 890 So.2d 322.) Florida's, like California's, SVP commitment scheme is civil in nature and does not itself contain any provision concerning a defendant's right to be competent during the proceedings. (Id., at pp. 323, 326.) Notwithstanding the nature of the commitment scheme, the Branch court ruled that a defendant in a SVPA prosecution "has a due process right to challenge the factual assertions contained in the police reports and other documents that underlie an expert's opinion when those factual assertions have neither been admitted through a plea nor tested at trial. It follows that in order to meaningfully exercise that due process right, a Ryce Act [Florida's equivalent to the SVPA] respondent must be competent so that he or she may both testify on his or her own behalf and assist counsel in challenging the alleged facts. Otherwise, the due process right is simply illusory. We emphasize that it is not the admission of hearsay that thwarts a Ryce Act respondent's due process rights; indeed, this court has held that section 394.9155(5), allowing hearsay to be admitted against a Ryce Act respondent, satisfies due process. Instead, it is an incompetent respondent's inability to assist counsel in challenging the facts contained in those hearsay statements that violates due process." (Id., at p. 327, citations

omitted; accord, In re Commitment of Camper, supra, 933 So.2d 1271, 1275, "[t]he rationale of Branch applies to not only the untested hearsay evidence that was presented but also to the testimony at trial concerning untested factual allegations.")

Therefore, the reasoning contained in the out-of-state authority cited by real party from Massachusetts, Iowa, Texas, Missouri, and Washington is unsound and not persuasive given the protections afforded by the California Constitution, existing California law set forth in James H., supra, 77 Cal.App.3d 169, and because "factual assertions" which "have neither been admitted through a plea or tested at trial" are relevant and admissible in a California SVPA prosecution

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CONCLUSION

Petitioner is entitled to a proper resolution of the issues presented to the Court of Appeal, based upon application of correct legal principles to the record and arguments presented to the trial court. This court should affirm the Court of Appeal's decision.

Respectfully submitted,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

Albert J. Menaster,
Karen King,
Jack T. Weedin,
Deputy Public Defenders

By: 

Jack T. Weedin
Deputy Public Defender

Attorneys for Petitioner

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to the California Rules of Court, the PETITIONER'S ANSWER BRIEF ON THE MERITS in this action contains 13,831 words. Counsel relies on the word count of the WordPerfect X3 program used to prepare this brief.

JACK WEEDIN
Deputy Public Defender

DECLARATION OF SERVICE

I, the undersigned, declare:

I am over eighteen years of age, and not a party to the within cause; my business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012; that on November 16, 2009, I served a copy of the within PETITIONER'S ANSWER BRIEF ON THE MERITS on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage fully prepaid in the United States Mail in the County of Los Angeles, California, addressed as follows:

ATTORNEY GENERAL
STATE OF CALIFORNIA
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

PRESIDING JUDGE
SUPERIOR COURT
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

ALAN A. ABRAMS, M.D., J.D.
1400 EAST CAPITOL STREET
NE, WASHINGTON DC 20003

MICHAEL AYE, ESQ.
117 J. STREET, SUITE 202
SACRAMENTO, CA 95814-2212

TODD MELNIK, ESQ.
NORTON & MELNIK
20920 WARNER CENTER LANE, SUITE B
WOODLAND HILLS, CA 91367

CLERK, CALIFORNIA COURT OF APPEAL
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

I further declare that I served the above referred-to document by hand delivering a copy thereof addressed to:

STEVE COOLEY, DISTRICT ATTORNEY
APPELLATE DIVISION
320 WEST TEMPLE STREET, SUITE 540
LOS ANGELES, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 16, 2009, at Los Angeles, California.

ALICIA A. ALBURO