S174633 SUPREME COURT COPY COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARDELL MOORE,	) No. S________
	)
Petitioner,	) (COURT OF
	) APPEAL No.
v.	) B198550; LASC No.
	) ZM008445)
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,	)
Respondent.	)
PEOPLE OF THE STATE OF CALIFORNIA,	)
Real Party in Interest.	)

SUPREME COURT FILED JUL 14 2009

Original Proceedings
From The Los Angeles County Superior Court
Honorable Marcelita Haynes, Judge Presiding

PETITION FOR REVIEW

STEVE COOLEY
District Attorney of
Los Angeles County

IRENE WAKABAYASHI
State Bar No.132848
Head Deputy District Attorney

ROBERTA T. SCHWARTZ
State Bar No. 082732
Deputy District Attorneys
Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012
Telephone: (213) 974-1616

Attorneys for Real Party in Interest

TOPICAL INDEX

PETITION FOR REVIEW 1

ISSUES PRESENTED FOR REVIEW 2

APPROPRIATENESS OF REVIEW 2

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 3

I SVP PROCEDURES SHOULD NOT BE AFFECTED BY THE SUBJECT'S COMPETENCE 3

II MOORE'S RIGHT TO DUE PROCESS HAS NOT BEEN VIOLATED 9

III DETERMINATION OF THE SVP PETITION SHOULD NOT BE DELAYED BEHIND AN UNLEGISLATED COMPETENCY PROCEDURE 18

IV OTHER JUDRISDICTIONS HAVE UNANIMOUSLY DETERMINED THAT INCOMPETENT PERSONS CAN BE TRIED AND CIVILLY COMMITTED AS SEXUALLY VIOLENT PREDATORS 23

Massachusetts 23

Iowa 25

Texas 26

Missouri 27

CONCLUSION 28

TABLE OF AUTHORITIES

CASES	PAGES
Allen v. Illinois (1986) 478 U.S. 364	13, 14
Commonwealth v. Nieves (Mass. 2006) 446 Mass. 583	23, 24
Fisher v. Tex., (2005)546 U.S. 938[126 S. Ct. 428,163 L.Ed.2d 326	23, 26
Guardianship of Waite (1939) 14 Cal.2d 727	5
Hubbart v. Superior Court (1999)19 Cal 4th 1138	9, 15
In re Bye (1974) 12 Cal. 3d 96	12
In re Fisher (Texas 2005)164 S.W.3d 637	23, 26
In re Hop (1981) 29 Cal.3d 82	7
In re Kevin S. (2003) 113 Cal.App.4th 97	13
In re Qawi (2004) 32 Cal.4th 1	21
Jackson v. Indiana (1972) 406 U.S. 715 [92 S.Ct. 1845, 32 L.Ed.2d 455].)	20

James H. v. Superior Court
(1978) 77 Cal.App.3d 169 7

Kinder v. Missouri
(2004) 543 U.S. 979[125 S.Ct. 480, 160 L.Ed.2d 357] 23, 27

Moore v. Superior Court
(June 4, 2009 B198550) Cal.App.4th [2009 Cal. App. LEXIS 898] 4

Orozco v. Superior Court
(2004) 117 Cal.App.4th 170 18

People v. Allen
(2008) 44 Cal. 4th 843 5, 14, 16, 17, 19, 21, 22

People v. Amador
(1988) 200 Cal.App.3d 1449 14,15

People v. Calderon
(2004) 124 Cal.App.4th 80 7, 28

People v. Hubbart
(2001) 88 Cal.App.4th 1202 10, 11, 12

People v. Superior Court
(Butler) (2000) 83 Cal.App.4th 951 11

People v. Varnell
(2003) 30 Cal. 4th 1132 3

People v. Yartz
(2005) 37 Cal.4th 529 10, 13

State ex rel. Nixon v. Kinder
(Mo. 2003) 129 S.W.3d 5 23, 27

State v. Cubbage (In re Detention of Cubbage)
(Iowa 2003) 671 N.W.2d 442-445 23, 25, 26

Terhune v. Superior Court (1998) 65 Cal.App.4th 864 6

CODE AND STATUTES

California Rules of Court

Rules 8.516 1

Rules 8.500 1

Rules 8.500(b)(1) 2

Rules 8.500(b)(4) 2

Penal Code

Section 1026.5 13

Section 1170.12 12

Section 1368.1 18

Section 1369.1 21

Section 1368 3, 4, 6, 7, 9, 16

Welfare and Institutions Code

Section 202 12

Section 203 12

Section 602 7

Section 5008, subdivision (h)(1)(B) 5

Section 6600 2

Section 6600(a)(2)(F 25

Miscellanous

Iowa Code

Section 229A.7(1) 25

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARDELL MOORE,	) **No. S_______**
	)
Petitioner,	) (COURT OF
	) APPEAL No.
v.	) B198550; LASC No.
	) ZM008445)
SUPERIOR COURT OF THE STATE OF	)
CALIFORNIA FOR THE COUNTY OF	) **PETITION FOR**
LOS ANGELES,	) **REVIEW**
	)
Respondent.	)
	)
PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Real Party in Interest.	)
______________________________	)

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

THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in the above-entitled action, by their counsel, Steve Cooley, District Attorney of Los Angeles County, hereby petitions this Court for review of the attached opinion of the Court of Appeal, pursuant to California Rules of Court, rules 8.500 and 8.516, following the decision of the California Court of Appeal, Second Appellate District, Division Three. (Attachment 1-Opinion.) The Court of Appeal granted Petitioner's request to stay the SVP[1] proceedings. A Petition for Rehearing was not filed. Real Party

1. Sexually Violent Predator Act, hereafter SVP.

requests, pursuant to California Rules of Court, rules 8.500(b)(1) and (4) that the Court review the opinion

ISSUES PRESENTED FOR REVIEW

Whether the subject of an SVP petition must be competent for the proceedings? Whether the Court may fabricate a process for determination of competency in the SVP procedures?

APPROPRIATENESS OF REVIEW

After finding a due process deficiency in SVP proceedings which no other state with similar provisions has discovered, the Court of Appeal sidestepped the legislature and created a competency process with no time limits, no procedures, no funding, and no guidelines. The resulting uncertainty and confusion generated by the decision below on past and pending SVP cases merits resolution by this Court.

STATEMENT OF THE CASE AND FACTS

In 1981 Petitioner Moore was paroled after being convicted of forcible oral copulation in 1980. In 1987, Moore was convicted of kidnapping, forcible rape, forcible rape in concert and sentenced to 25 years in state prison.

Prior to Moore's scheduled release on parole, the People of the State of California filed a petition on March 8, 2005 pursuant to Welfare and Institutions Code section 6600 et seq. seeking commitment of Moore as a Sexually Violent Predator (SVP). (Petition for Writ of Mandate, Exhibit A, Petition, (hereafter SVP Petition).) On April 12, 2005, Moore was arraigned on the SVP Petition. (Petition for Writ of Mandate, Exhibit B.) Counsel for the petitioner filed a Competency Motion seeking to stay the proceedings for a determination of competency. (Petition for Writ of Mandate, Exhibit C.) The People opposed this motion in a written response.

On March 21, 2007, Judge Marcelita Haynes heard argument on the Competency Motion. (Petition for Writ of Mandate, Exhibit E.) On April 9, 2007, Judge Haynes denied the Competency Motion because there is no right to be competent under the SVPA (SVPA stands for Sexually Violent Predator Act.) and ruled the due process rights of the SVP respondent (Moore) is outweighed by the need for public safety. (Petition for Writ of Mandate, Exhibit F.)

Moore filed a Petition for a Writ of Mandate on April 30, 2007. Real Party filed a Response on June 8, 2007. An Opinion was issued by the Court of Appeal on June 4, 2009. Real Party is seeking Review of that decision.

ARGUMENT

I

SVP PROCEDURES SHOULD NOT BE AFFECTED BY THE SUBJECT'S COMPETENCE

There is no existing **statutory** authority mandating the suspension of the SVP process to evaluate Moore for competency. Penal Code section 1368 does not apply since no criminal charges are pending.[2] This distinction was recognized in *People v. Angeletakis* (1992) 5 Cal.App.4th 963 (hereafter *Angeletakis*).

> As a matter of statutory construction, the proceedings to determine competence to stand trial do not apply to commitment extension hearings. The provisions relating to the determination of competence to stand trial "are expressly limited in their application to criminal proceedings which

2. Penal Code Section 1368 refers to criminal actions which are pending. The term "actions" has consistently been interpreted to refer to charges. (*In re Varnell* (2003) 30 Cal.4th 1132, 1137.)

> occur prior to judgment and sentence." (*Juarez v. Superior Court* (1987) 196 Cal.App.3d 928, 931.) Section 1367 provides, "A person cannot be tried or adjudged to punishment while such person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." Section 1368 provides for the suspension of proceedings if, "during the pendency of an action and prior to judgment," the court or counsel suspects the defendant may be mentally incompetent. If the defendant is found to be so impaired, the proceedings are suspended until he becomes mentally competent. ([Pen. Code,] § 1370.) In the meantime, the defendant is committed to a mental health facility for treatment.

(*Id.* at p. 967.)

Moore v. Superior Court (2009) 174 Cal.App.4th 856 *(hereafter Moore)* was decided by Division 3 of this Court on June 4, 2009. Respectfully, the People contend that the Court in *Moore* reached the wrong conclusion on this issue. The Court in *Moore* directed the superior court below to stay the SVP proceedings and to hold a competency hearing without specifying the details of this new court-generated process which is to be appended to the SVPA. The guidelines and details of a competency hearing would traditionally be established by the Legislature. Would this new procedure be similar to a Penal Code section 1368 process where the underlying charges are suspended and a competency trial is conducted? If the subject is found incompetent, under what authority would he be held and for how long since by its language, section 1368 only applies if criminal charges are pending? Would he be returned to adjudicate the SVP petition if he regains his competency? *People v. Allen* (2008) 44 Cal.4th

843 concluded that the SVP had a right to testify at the SVP trial. However, included in that analysis is a citation to *Guardianship of Waite* (1939) 14 Cal.2d 727, 729–730 (hereafter *Waite*). *Waite* held that in a conservatorship proceeding, it was error to allow only expert testimony, and to preclude the individual who was the subject of the conservatorship proceeding from testifying. But, the subject of a conservatorship 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. In other words, the right to testify as mandated by *Allen* does not generate the right to be competent at an SVP hearing.

The finding by the court in *Moore* erroneously expands the holding beyond the rationale used by the Supreme Court in *People v. Allen.* The result in *Moore* attempts to create competency proceedings without consideration of the consequences to the SVP process or to the SVP himself.

What if competence cannot be restored in three years? Is the subject of the SVP to be released? If not, is he to be evaluated while still incompetent for conservatorship proceedings based on being a danger to others, the "Murphy" conservatorship? Assume for a moment that Moore is tried in a civil proceeding for a conservatorship under Welfare and Institutions Code section 5008, subd. (h)(1)(B); it is clear that he does not have to be competent for that proceeding yet details of his dangerousness and police reports will be presented to the court to decide whether he shall remain in custody. In that proceeding the SVP would have a right to testify as in *Waite, supra*, 14 Cal.2d 727, but he would not have a right to be competent during the proceedings. Further, if the respondent in the SVP case is incompetent but potentially no longer a SVP after the SVP petition is

filed, that determination should not be stalled; it is similar to a preliminary hearing being held to determine if there is probable cause to hold a defendant to answer on criminal charges before detaining him in a state hospital to stand trial on those charges. A trial on the SVP status may be resolved in favor of the SVP respondent who can then deal with conservatorship proceedings promptly without the SVP cloud on the horizon. Not all incompetent persons are dangerous; a favorable determination of SVP status could result in a non-custodial placement for the incompetent person.

Pursuant to what lawful authority would the SVP be detained since there is no statutory authority to hold him if the SVP proceedings are terminated and there are no new charges to file? Competency hearings pursuant to Penal Code section 1368 are **only** used in conjunction with pending criminal charges. (Pen. Code, § 1368.) The Courts do not have authority to fashion a statutory structure to detain and try individuals where there are no enabling statutes. Administrative agencies, such as state hospitals, could not be authorized to detain subjects without statutory authority.

> Administrative agencies have only the powers conferred on them, either expressly or impliedly, by the Constitution or by statute, and administrative actions exceeding those powers are void. (Citations.) To be valid, administrative action must be within the scope of authority conferred by the enabling statutes. (*Morris v. Williams* (1967) 67 Cal. 2d 733, 748.)

(*Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 872-873.)

If the subject of an SVP petition is detained in a state hospital without statutory authority, a writ of habeas corpus would be filed in the state or federal court challenging his confinement in a state hospital as an

unlawful detention. (*In re Hop* (1981) 29 Cal.3d 82.) The analogy to *James H. v. Superior Court* (1978) 77 Cal.App.3d 169 where the court appended competency proceedings to juvenile proceedings is misplaced. A juvenile facing criminal charges in a Petition filed pursuant to Welfare and Institutions Code section 602 can be lawfully detained pending resolution of the charges just as a criminal defendant facing criminal charges can be held pending section 1368 proceedings. The SVP subject is not facing any new charges, could not be detained pursuant to the SVPA if his petition is suspended and cannot come under the purview of section 1368, because there are no provisions for such procedures in a non-criminal case, with no statute of limitations or other time limitations found in section 1368.

The issue of competence in SVP proceedings is indirectly addressed in *People v. Calderon* (2004) 124 Cal.App.4th 80 (hereafter *Calderon*). In *Calderon*, the respondent suffered a severe brain injury which was diagnosed by the psychiatrists as the source of his sexually violent behavior and lack of cognitive abilities. (*Id.* at pp. 84-86.) Based upon these psychiatric findings, counsel for Calderon unsuccessfully attempted to admit evidence of amenability to alternative involuntary treatment pursuant to conservatorship proceedings. (*Id.* at pp. 88-91.) Based upon the record, counsel argued that Calderon was incompetent and/or in need of a conservatorship as opposed to civil commitment pursuant to the SVPA. (*Ibid.*) The Court of Appeal affirmed the trial court's decision, rejecting Calderon's argument. (*Id.* at p. 99.) The opinion analyzed the purpose of the SVP legislation.

> We also note the exclusion of the testimony properly carried out the legislative intent of the SVPA. The Legislature declared the purpose of the SVPA was to treat and confine to the custody of DMH a "small but extremely dangerous group

> of sexually violent predators," because they "are not safe to be at large and if released [at the conclusion of their prison terms, thus] represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence." (Stats. 1995, ch. 763, § 1, p. 5921.) They should "be confined [under the SVPA] and treated until ... it can be determined that they no longer represent a threat to society." (*Ibid.*) In *Ghilotti,* the California Supreme Court ruled in order to find someone an SVP it was not necessary that his risk of reoffending "be assessed at greater than 50 percent" because the "state has a compelling protective interest in the confinement and treatment" of such person and the "SVPA is narrowly tailored to achieve this compelling purpose." (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 924.)

(*Calderon, supra*, 124 Cal.App.4th at p. 90.)

The Court of Appeal also discussed the need to avoid diluting the SVPA by injecting inconsistent conservatorship litigation into the SVPA proceedings.

> If appellant were correct in replacing confinement under the SVPA with conservatorship pursuant to the Lanterman-Petris-Short Act, the protection of the community provided by the SVPA would be significantly compromised. The two schemes adopt different standards, serve different goals and afford the community different level of security assurance. Conservatorship under the Lanterman-Petris-Short Act was designed for the "gravely disabled" and does not require prior conviction. ([Welf. & Inst. Code,] § 5008, subd. (h).) The Lanterman-Petris-Short Act does not always mandate the maximum security confinement as does the SVPA. Also, pursuant to the Lanterman-Petris-Short Act, even if a conservatee is initially committed to a secure facility approved by court, the conservator may later transfer him to a less restrictive alternative placement without further court approval. ([Welf. & Inst. Code,] § 5358, subd. (c).) In other words, the conservatorship may be a less protective scheme for both appellant and the community.

> Therefore, the trial court properly excluded the testimony on the conservatorship to ensure the jury applied the SVPA in a way compliant with the legislative intent of public safety protection.

(*Calderon*, *supra*, 124 Cal.App.4th at pp. 90-91.)

II

MOORE'S RIGHT TO DUE PROCESS HAS NOT BEEN VIOLATED

In every Conservatorship proceeding under the Lanterman-Petris-Short Act, every Penal Code section 1368 competency hearing, many NGI trials, and many Mentally Disordered Offender (hereafter MDO) proceedings, liberty interests are being contested and the person in controversy is arguably incapable of participating meaningfully in the legal process. (*Angeletakis*, *supra*, 5 Cal.App.4th 963) The champion for protection of that person's 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.

> As explained above in the text, *Kansas v. Hendricks* (1997) 521 U.S. 346 [117 S.Ct. 2072, 138 L.Ed.2d 501], suggests a willingness on the part of the United States Supreme Court to accord substantial deference to involuntary civil commitment laws challenged under the federal Constitution. However, this court has traditionally subjected involuntary civil commitment statutes to the most rigorous form of constitutional review--an approach we follow in upholding the SVPA here. (See, e.g., *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 171, fn. 8 [167 Cal.Rptr. 854, 616 P.2d 836]; *People v. Saffell* (1979) 25 Cal.3d 223, 228 [157 Cal.Rptr. 897, 599 P.2d 92]; *In re Moye* (1978) 22 Cal.3d 457, 465 [149 Cal.Rptr. 491, 584 P.2d 1097].) The SVPA is narrowly focused on a select group of violent criminal offenders who commit particular forms of

> predatory sex acts against both adults and children, and who are incarcerated at the time commitment proceedings begin. Commitment as an SVP cannot occur unless it is proven, beyond a reasonable doubt, that the person currently suffers from a clinically diagnosed mental disorder, is dangerous and likely to continue committing such crimes if released into the community, and has been found to have sexually victimized at least two people in prior criminal proceedings. The problem targeted by the Act is acute, and the state interests-protection of the public and mental health treatment-are compelling. (Accord, *Conservatorship of Hofferber, supra*, 28 Cal.3d 161, 171 [upholding LPS conservatorships for criminal incompetents in light of "compelling interests in public safety and in humane treatment of the mentally disturbed"]; *People v. Saffell, supra*, 25 Cal.3d 223, 232-233 [upholding maximum-term provisions of MDSO Act in light of the "dual compelling state interest in providing effective treatment for those disposed to . . . criminal [sexual] acts, [and in] assuring the safety of the public"].)

(*Hubbart v. Superior Court*, *supra*, 19 Cal.4th at p. 1153.)

This Court has held that the SVPA is not punitive in purpose or effect. (*Hubbart v. Superior Court, supra,* 19 Cal.4th at pp. 1166-1167.) Further, the Supreme Court has also found that an SVP petition such as that filed against Moore is "a special proceeding of a civil nature … neither an action at law nor a suit in equity,…instead is a civil commitment proceeding commenced by petition *independently* of a pending action. [Citation.]" (*People v. Yartz* (2005) 37 Cal.4th 529, 536-537, italics added.)

The petitioner in *People v. Hubbart* (2001) 88 Cal.App.4th 1202, claimed that his SVPA commitment resulted from unlawful custody and therefore denied him due process. The Court of Appeal addressed Hubbart's argument by first emphasizing that due process pursuant to the SVPA is *not* measured by the rights granted a defendant in criminal

proceedings, but by the standard applied to civil proceedings and is thus tested considering the following "four factors: (1) "'private interest [which] will be affected by the official action;'" (2) "'the risk of an erroneous deprivation … through the procedures used;'" (3) "'the probable value, if any, of additional or substitute procedural safeguards;'" and (4) "'the … interest in informing individuals … of the action and in [allowing] them to present their side of the story.'"" (*People v. Hubbart, supra*, 88 Cal.App.4th at p. 1230, citing *People v. Superior Court (Butler)* (2000) 83 Cal.App.4th 951, 965, citations omitted.) The Court of Appeal in *Hubbart* noted that though the alleged SVP has a strong liberty interest, the government also has a strong interest in protecting the public from persons who are dangerous to others. (*People v. Hubbart, supra*, 88 Cal.App.4th at p. 1230.) The court declined to find that Hubbart's SVP commitment violated due process where the unlawful custody was the result of good faith error and where the SVPA itself provides numerous procedural safeguards. (*Ibid.*) The Court stated:

> We do not believe that an SVPA commitment resulting from unlawful custody violates due process where, as here, the unlawful custody was the result of a good faith error and where, as here, the SVP is provided with numerous procedural safeguards. A person in unlawful custody who is alleged to be an SVP still has all of the procedural safeguards that the SVPA provides in order to decrease the risk of an erroneous liberty deprivation. A petition for commitment may only be filed if two psychologists or psychiatrists concur that the person meets the criteria for commitment as an SVP. (Welf. & Inst. Code, § 6601, subd. (d).) Thereafter, the person has the right to a probable cause hearing. (Welf. & Inst. Code, § 6602, subd. (a).) Finally, the person has the right to trial by jury, at which the People must prove beyond a reasonable doubt that he or she is an SVP. (Welf. & Inst. Code, § 6603, subd. (a).) The person has the right to the assistance of

> counsel at both the probable cause hearing and at trial. (Welf. & Inst. Code, § 6602, subd. (a), 6603, subd. (a).) At trial, the person also has the right to retain experts and has access to all relevant medical and psychological reports. (Welf. & Inst. Code, § 6603, subd. (a).)
> In light of the procedural safeguards provided to a person alleged to be an SVP, we conclude there is no due process violation where the person was not in lawful custody at the time the petition was filed. (See *People v. Superior Court* (*Whitley*) (1999) 68 Cal.App.4th 1383, 1390.) We emphasize that, as explained above, the lawful custody must result from a good faith error rather than negligent or intentional wrongdoing.

(*People v. Hubbart, supra*, 88 Cal.App.4th at p. 1230.)

Due process is a flexible concept. The precise procedures necessary to prevent the arbitrary deprivation of a constitutionally protected interest vary "with the subject-matter and the necessities of the situation." (*In re Bye* (1974) 12 Cal.3d 96, 103, citations omitted.)

As discussed above, Petitioner's analogy comparing a SVP petition to a juvenile petition is misplaced. While the juvenile process is characterized as a civil proceeding (Welf. § Inst. Code, § 203), the Supreme Court has recognized the many criminal law characteristics of the juvenile system and has accorded juveniles most of the rights commensurate with a criminal prosecution. The minor or defendant is charged with a criminal offense and faces **punitive consequences** as part of the rehabilitative process. (Welf. § Inst. Code, § 202.) Unlike the subject of an SVP petition, the minor may be incarcerated in a custodial environment. Certain sustained petitions may be used as strikes many years later if the minor is convicted as an adult. (Pen. Code, § 1170.12.)

> While the precise impact of the Fourteenth Amendment due process clause in delinquency proceedings differs from that in

> the adult context, the United States Supreme Court has extended constitutional protections associated with criminal prosecutions to minors alleged to be juvenile delinquents, including notice of charges; right to confrontation and cross-examination; the privilege against self-incrimination (Citation); the standard of proof beyond a reasonable doubt (Citation); and double jeopardy. [Citation].

(In re Kevin S. (2003) 113 Cal.App.4th 97, 108.)

It is clear that a minor must be competent to assist his attorney in a juvenile adjudication. The minor has a right to testify or not, to assist his attorney in investigating potential defenses and determining which witnesses to subpoena. Because the minor is facing many of the same consequences as a criminal defendant, he has all the rights available to a criminal defendant except that of jury trial and bail. *(In re Kevin S, supra,* 113 Cal.App.4th at p. 108.)

Conversely, SVP proceedings most resemble the MDO proceedings pursuant to Penal Code section 1026.5. The SVP proceedings are "special proceedings civil in nature." (*People v. Yartz, supra*, 37 Cal.4th at p. 532.). The United States Supreme Court has repeatedly recognized similar SVP statutes as essentially civil in nature and has specifically distinguished SVP statutes from those governing juvenile adjudications. In *Allen v. Illinois* (1986) 478 U.S. 364 [106 S.Ct. 2988, 92 L.Ed.2d 296.], the Supreme Court also noted the differences between juvenile delinquency statutes and SVPA.

> The initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. **In the latter cases the basic issue is a straightforward factual question -- did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the**

> **factual aspects represent only the beginning of the inquiry**. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." (*Addington v. Texas* (1979) 441 U.S. 418, 429 [99 S.Ct. 1804, 60 L.Ed.2d 323] (emphasis in original).)
> While here the State must prove at least one act of sexual assault, that antecedent conduct is received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior. (*People v. Allen* (1985) 41 N.E.2d 690, 697.)

(Allen v. Illinois, *supra,* 478 U.S. at p. 371, bold font added.)

The opinion below failed to take note of the holding by the United States Supreme Court in *Allen v. Illinois* which determined that Illinois SVP proceedings (nearly identical to those in California) are "essentially civil in nature" and therefore Allen was not entitled to the privilege against self-incrimination in his SVP proceeding. Like the privilege against self incrimination, competency proceedings are limited to criminal prosecutions. (*Angeletakis*, *supra*, 5 Cal.App.4th at p. 963.) The opinion summarily dismissed the analysis in *Angeletakis* in footnote 13 of its opinion and claimed to follow guidelines set forth by this Court in *Allen, supra*, 44 Cal.4th at pp. 862-863.

Affording SVP respondents more due process protection than the United States Supreme Court requires is not well-taken. As discussed above, exactly which procedure is the Court below enacting to determine competency? In a perfect world, all petitioners would be able to understand the exact nature of all proceedings. However, due process protection does not mandate a perfect world even in criminal cases. A defendant is entitled to a fair trial, not necessarily a perfect trial. (*People v. Amador* (1988) 200

Cal.App.3d 1449.) Counsel for the Petitioner is perfectly capable of litigating the SVP requirements without the active participation of the SVP respondent just as he can admittedly litigate competency or conservatorship in a civil proceeding without the active participation of the potential ward.

> Here, as in the trial court and Court of Appeal, Hubbart invokes both the United States Constitution and parallel provisions of the California Constitution. On rare occasions, this court has, in construing other involuntary civil commitment statutes, reached a holding under the due process and equal protection clauses of the state Constitution regardless of whether the result was compelled as a matter of federal constitutional law. (*People v. Olivas* (1976) 17 Cal.3d 236, 246, 250-251 [131 Cal.Rptr. 55, 551 P.2d 375] [liberty interest implicated by extended Youth Authority commitment is "fundamental" for purposes of determining the appropriate standard of review]; *People v. Feagley* (1975) 14 Cal.3d 338, 349-350 & fn. 10 [121 Cal.Rptr. 509, 535 P.2d 373] [jury unanimity is required for commitment as MDSO under former § 6300 et seq.]; *People v. Burnick* (1975) 14 Cal.3d 306, 310, 322 [121 Cal.Rptr. 488, 535 P.2d 352] [proof beyond a reasonable doubt is required for commitment as MDSO].) However, we have never reached independent results under the state Constitution in addressing claims similar to those raised by Hubbart under the SVPA. Nor does either party maintain that such an approach is appropriate or required in this case. Indeed, while Hubbart has cited the United States Constitution and the California Constitution at all phases of this proceeding and in conjunction with each substantive claim, he relies on the same analysis and authorities in urging invalidation of the SVPA as a matter of both federal and state constitutional law. After careful review, we find the high court's analysis of federal due process and equal protection principles persuasive for purposes of the state Constitution. While we recognize our power and authority to construe the state Constitution independently (citation omitted), we find no pressing need to do so here.

(*Hubbart v. Superior Court, supra,* 19 Cal.4th at p. 1152.)

Invoking due process requirements mandated in criminal cases into the venue of civil commitments is not required here. Due process requirements for civil commitment proceedings differ from those in criminal prosecutions. Due process permits proceeding to trial with a client who is unable to understand the nature of the proceedings or assist his counsel in a Penal Code section 1368 trial or conservatorship trial. The benefits and protections of an attorney championing for the subject are equally present in the SVP situation.

In *People v. Allen,* this Court applied due process analysis in a procedural context.

> 'Once it is determined that [the guarantee of] due process applies, the question remains what process is due.' (Citation) We have identified 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. (Citations)

(People v. Allen, supra, 44 Cal.4th at pp. 862-863.)

The Supreme Court further observed in Footnote 14:

> Defendant does not distinguish between his rights under the federal and state Constitutions. "Although the state and federal Constitutions differ somewhat in determining when due process rights are triggered, once it has been concluded that a due process right exists we balance similar factors under both approaches to decide what process is due." *(In re*

> *Malinda S., supra,* 51 Cal.3d at p. 383, fn. omitted; see also *Hubbart, supra,* 19 Cal.4th at p. 1152, fn. 19 ["While we recognize our power and authority to construe the state Constitution independently [citation], we find no pressing need to do so here."].)
>
> We begin with the private interests at stake. As we noted in *Otto*, *supra,* 26 Cal.4th 200, "the private interests that will be affected by [a finding that the defendant continues to be a sexually violent predator] are the significant limitations on [the defendant's] liberty, the stigma of being classified as [a sexually violent predator], and subjection to unwanted treatment. [Citation.]" (*Id.* at p. 210.) The circumstance that a commitment is civil rather than criminal scarcely mitigates the severity of the restraint upon the defendant's liberty. [Citation.] "[T]he California Legislature has recognized that the interests involved in civil commitment proceedings are no less fundamental than those in criminal proceedings and that liberty is no less precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction." (*In re Gary W.* (1971) 5 Cal.3d 296, [96 Cal. Rptr. 1, 486 P.2d 1201] [holding that the right to trial by jury is a requirement of due process and equal protection in a proceeding to extend detention by the Youth Authority for treatment].) Thus, the first factor weighs heavily in favor of providing all reasonable procedures to prevent the erroneous deprivation of liberty interests.

(*People v. Allen*, *supra*, 44 Cal.4th at pp. 862-863.)

The Supreme Court went on to observe in footnote 15:

> To the extent Proposition 83 has increased the burden upon liberty interests by requiring only one predicate offense and imposing an indeterminate term of commitment, it has increased the weight of the first factor.

(*Ibid.*)

III

DETERMINATION OF THE SVP PETITION SHOULD NOT BE DELAYED BEHIND AN UNLEGISLATED COMPETENCY PROCEDURE

The liberty interest should also be considered in light of the significant delay (unfortunately already extant in the existing SVP process) caused by court-generated competency processes. Recognizing that some SVP subjects may prevail at a trial due to adept examination of experts, incompetent subjects may languish for years with SVP petitions remaining unadjudicated that could have been resolved at an early stage. The SVP petition against Moore was filed in 2005. If one looks to the criminal process, it is recognized that adept defense challenges to the evidence presented at a preliminary hearing may result in baseless charges being dismissed despite the fact that the defendant is incompetent to assist. (Pen. Code §1368.1.)[3] There is a cognizable value in resolving these issues at the earliest point possible. As Justice Klein said in her concurring opinion in *Orozco v. Superior Court* (2004) 117 Cal.App.4th 170:

> The People and the trial court should not acquiesce in indefinite delay of the proceedings. Irrespective of a defendant's reluctance to proceed to trial on a recommitment petition, the People and the trial court have an obligation to ensure that there is a timely determination of probable cause on a recommitment petition, followed by a timely trial thereon.

(*Id.* at p. 182.)

---

3. Because the defendant faces criminal charges, he is entitled to a second preliminary hearing after restoration of competence.

Adopting the vague new procedure, as directed by the Court of Appeal below, intended to bypass the SVP law and detain SVP subjects pursuant to a new hastily improvised competency process, is in direct contravention of the legislative intent in enacting the SVPA.

With regard to the Second factor considered in *Allen*, the Supreme Court stated:

> Second, we consider the risk, in the absence of a right to testify, of an erroneous finding that the defendant is a sexually violent predator and the probable value, in reducing this risk, of allowing him or her to testify over the objection of counsel.

(People v. Allen, supra, 44 Cal.4th at p. 863.)

In this context, we are not considering the simple measure of allowing the SVP subject to testify, we are discussing generating a process which will delay the SVP trial for years. Would an incompetent SVP have to be housed separately from other SVP subjects or at a different hospital? Would ongoing treatment for an already committed SVP have to be stopped in favor of treatment to restore competency? It is possible that an individual may be incompetent to stand trial but would be harmed by disrupting SVP treatment. It is also axiomatic that delay does not enhance the fact finding process.

Furthermore, even in the context of criminal trials, the United States Supreme Court has determined that many proceedings can proceed even when the accused is incompetent.

> Both courts and commentators have noted the desirability of permitting some proceedings to go forward despite the defendant's incompetency. For instance, § 4.06 (3) of the Model Penal Code would permit an incompetent accused's attorney to contest any issue "susceptible of fair determination prior to trial and without the personal participation of the

> defendant." An alternative draft of § 4.06 (4) of the Model Penal Code would also permit an evidentiary hearing at which certain defenses, not including lack of criminal responsibility, could be raised by defense counsel on the basis of which the court might quash the indictment. Some States have statutory provisions permitting pretrial motions to be made or even allowing the incompetent defendant a trial at which to establish his innocence, without permitting a conviction. We do not read this Court's previous decisions to preclude the States from allowing, at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions through counsel. Of course, if the Indiana courts conclude that Jackson was almost certainly not capable of criminal responsibility when the offenses were committed, dismissal of the charges might be warranted. But even if this is not the case, Jackson may have other good defenses that could sustain dismissal or acquittal and that might now be asserted.

(*Jackson v. Indiana* (1972) 406 U.S. 715, 740-741 [92 S.Ct. 1845, 32 L.Ed.2d 455].)

Regarding the third due process factor, the Supreme Court in *Allen* stated:

> Third, we consider "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Otto, supra,* 26 Cal.4th at p. 210.) The government has a strong interest in protecting the public from sexually violent predators, and in providing treatment to these individuals. [Citation.] Because the defendant's 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. If, contrary to defense counsel's expectation, the defendant's testimony is credible and beneficial to the defendant, the prosecution may elect to

> present additional witnesses to rebut that testimony, and this may add to the government's burden.

(*People v. Allen, supra,* 44 Cal.4th at p. 866-867.)

In an ideal system, the SVP subject would be lucid and coherent and able to participate fully in the proceedings. This situation is unlike *People v. Allen* where the imposition on the government was inconsequential, merely a short interlude in the trial when Respondent had an opportunity to testify. The situation here is far different; the proceedings, which have often already become stale, will become exceedingly remote. There is already a backlog of incarcerated persons awaiting competency determinations and adding potentially sexually violent offenders into that housing situation would exacerbate the situation. (See Pen. Code, § 1369.1 (emergency legislation which attempted to ameliorate the backlog by allowing treatment in county jails).) This is not a criminal proceeding, thus factual determinations can be made fairly without the respondent being competent, much like *Angeletakis, supra,* 5 Cal.App.4th 963, as mentioned in *Moore*. The common sense approach in *Angeletakis* was not set aside by *People v. Allen.* The Government interest in the SVP proceedings and the burdens entailed by imposing competing proceedings is more akin to the government's interest in MDO proceedings than the right of an SVP subject to testify in the *Allen* case. MDO proceedings involve similar evidence for the trier of fact yet the MDO need not be competent for those proceedings which also require similar due process protections. (*In re Qawi* (2004) 32 Cal.4th 1.)

Finally, the Court in *People v. Allen* cited a fourth factor:

> Finally, we consider "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. [Citation.]" (*Otto, supra*, 26 Cal.4th at p. 210.) Considering the question of a defendant's right to self-representation in proceedings under the SVPA, the appellate court in *Fraser, supra*, 138 Cal.App.4th 1430, stated: "[t]he SVPA contains built-in procedural safeguards to protect the dignitary interest, which include the commencement of the proceedings by a petition supported by the concurring opinions of two psychologists (§ 6604.1, subd. (b)); the right to have access to relevant medical and psychological reports and records (§ 6603, subd. (a)); the right to retain experts to perform an examination (§ 6603, subd. (a)); the right to a probable cause hearing (§ 6602, subd. (a)); the right to a jury trial (§ 6604.1, subd. (b)); and the right to be present at the hearing (§ 6605, subd. (c)). The SVPA also provides for the right to counsel at section 6603, subdivision (a). Accordingly, self-representation is not necessary for a defendant to be informed about the SVPA proceeding or to preserve the ability to tell his or her side of the story, since these rights can be protected by counsel." (*Id.* at pp. 1448–1449.)

(*People v. Allen*, *supra*, 44 Cal.4th at p. 868.)

This factor weighs in Moore's favor and would satisfy our sense of justice; but it is neither determinative nor final on the due process question. MDO subjects have ample due process protection despite the fact that they may not be competent during the trial. All the factors should be considered which weigh in favor of allowing SVP trials where the Respondent is not deemed competent.

//

//

//

//

//

IV

OTHER JURISDICTIONS HAVE UNANIMOUSLY DETERMINED THAT INCOMPETENT PERSONS CAN BE TRIED AND CIVILLY COMMITTED AS SEXUALLY VIOLENT PREDATORS

There are four states that have addressed the identical issue that Moore alleges in his petition and those states have ruled against his position. The Supreme Courts of Texas, Iowa, and Massachusetts have ruled that an "incompetent" person can be tried and committed as a SVP. (*Commonwealth v. Nieves* (2006) 446 Mass. 583; *State v. Cubbage* (*In re Detention of Cubbage)* (2003) 671 N.W.2d at pp. 442-445; *In re Fisher* (2005)164 S.W.3d 637, *cert. den. Fisher v. Texas* (2005) 546 U.S. 938 [126 S.Ct. 428, 163 L.Ed.2d 326].) In Missouri, the Court of Appeals has also ruled that a person found to be incompetent could be subject to SVP proceedings. (*State ex rel. Nixon v. Kinder* (2003) 129 S.W.3d 5, *cert. den. Kinder v. Missouri* (2004) 543 U.S. 979 [125 S.Ct. 480, 160 L.Ed.2d 357].) Significantly, in each one of these states, it was held that there was no "right" to adjudicate the competency issue prior to the SVP trial and there was also no right to "stay [the SVP] proceedings." The rationale and analysis in each one of these SVP cases is relevant to this case and the conclusions of those courts should be adopted by this Court in reviewing the decision below.

A survey of some of the other states cases with similar SVP statutes reveals the following:

<u>Massachusetts</u>

The Supreme Court of Massachusetts held that due process

was not violated so long as the incompetent person who was committed as an SVP was represented by an attorney. (*Commonwealth v. Nieves, supra*, 446 Mass. at pp. 584-585.) The Supreme Court held that the judge may permit an incompetent person's attorney to invoke or waive various statutory rights, including the right to a jury trial. (*Id.* at p. 585.) The Supreme Court further held that Federal due process rights were not violated when a sexually dangerous person was restrained even if "treatment would be ineffective." (*Ibid.*) Furthermore, a guardian ad litem need not be appointed to assist in the exercise or waiver of substantive rights including whether the respondent should testify in his own behalf. (*Ibid.*)

The Massachusetts Supreme Court rejected the same violation of due process claim made by Petitioner *sub judice*. The balancing of the subject's "loss of liberty" that would be "total" with commitment for an "indeterminate period" was determined necessary to "yield" to the "Commonwealth's paramount interest in protecting its citizens." (*Id.* at p. *590-591*). "We see no reason why the public interest in committing sexually dangerous persons to the care of the treatment center must be thwarted by the fact that one who is sexually dangerous also happens to be incompetent." (*Id.* at p. 591.)

The Court found that the SVP's due process rights were protected and satisfied by "the appointment of counsel." (*Id.* at p. 591.) Those due process rights of "trial by jury", "retention of experts", obtaining "process to compel attendance of witnesses", the ability to "cross-examine witnesses" that testify at trial, and the opportunity of counsel to "present evidence in his defense" ensure the SVP's due process rights if they are "exercised by counsel where the defendant is incompetent to do so." (*Ibid.*)

Iowa

The Supreme Court of Iowa also concluded that the respondent "does not have a statutory right to be competent during the course of proceedings brought pursuant to SVPA." (*State v. Cubbage, supra,* 671 N.W.2d at pp. 442-445.)

> In many cases, a predicate requirement of competency would undermine the very proceedings instituted to protect the public and aid the respondent by focusing attention on the respondent's competence rather than his mental illness. This result would be contrary to the legislature's intent in establishing the SVPA.

(*Id.* at pp. 445-446, fn. 2.)

An especially persuasive State argument that the Iowa Supreme Court adopted was that the Legislature included in its definition of "sexually violent offense," a charge where the alleged predator was previously found "incompetent to stand trial or not guilty by reason of insanity." (*Id.* at p. 445.) The Iowa Legislature further specified that all constitutional rights available to defendants at criminal trials apply, "*...'other than the right not to be tried while incompetent,'*...." (*Id.* at p. 445, fn.1, quoting from Iowa Code section 229A.7(1).)

California similarly includes in the definition of a qualifying prior "sexually violent offense," one in which there was "[a] prior finding of not guilty by reason of insanity for an offense described in subdivision (b)." Thus, a qualifying predicate prior sexually violent offense may consist of a sexual crime in which the subject of the petition was deemed "insane" at the time of the commission of the prior crime. (Welf. & Inst. Code §6600(a)(2)(F)). As in the *Cubbage* case, the

California Legislature was aware that the SVP, once determined to be insane, could remain insane.

The Iowa Supreme Court also concluded that "the same concerns and concomitant protections that arise in a criminal case do not necessarily arise in the SVPA area." (*Id.* at p. 447 (citations omitted).)

The Iowa Supreme Court then concluded that the SVP "does not have a fundamental right to be competent during his SVPA proceedings." (*State v. Cubbage, supra,* 671 N.W.2d at p. 447.)

Texas

The Supreme Court of Texas also analyzed the issue of whether an incompetent individual can be tried and committed as a SVP and held *that competency was not required.* (*In re Fisher, supra,* 164 S.W.3d 637, *cert. den. Fisher v. Texas*, *supra,* 546 U.S. 938.) Although the Texas SVP statute does not provide for inpatient treatment, there are still criminal penalties imposed for violating the demanding conditions of "outpatient 'commitment,' involving intensive treatment and supervision." (*Id.* at p. 642.)

The Texas Supreme Court, relying on *Kansas v. Hendricks* (1997) 521 U.S. 346 [117 S.Ct. 2072, 138 L.Ed.2d 501], noted that "fourteen states have determined that their SVP civil commitment schemes are civil, not criminal." (*In re Fisher*, *supra*, 164 S.W.3d at pp. 645-646 [citations omitted].) The Texas Supreme Court ruled that its SVP statute was also "civil" and not "criminal." (*Id.* at p.646.)

The Texas Supreme Court concluded that the respondent was not entitled to a competency determination prior to his SVP trial. (*Id.* at p. 654.) The basis for this holding was that an SVP who may be incompetent to stand trial on criminal charges can nonetheless be civilly

committed. (*Id.* at p. 653). The Texas SVP statute also permitted using prior criminal conduct where the person "'is adjudged not guilty by reason of insanity of a sexually violent offense.'" (*Ibid.)* This portion of the statute illustrates that, like the California and Iowa legislatures, the Texas legislature "contemplated that not all alleged SVPs would be mentally competent." (*Ibid.)*

Missouri

The Missouri appellate court has ruled that a SVP does not need to be competent in order to assist counsel in his defense during a trial. "The very nature of civil commitments is that they commit for treatment those who pose a danger to themselves or others because they suffer from a mental disease or defect and are unable to comprehend reality or to respond to it rationally." (*State ex rel. Nixon v. Kinder, supra,* 129 S.W.3d 5, *cert. den. Kinder v. Missouri, supra,* 543 U.S. 979.) The Missouri Court of Appeals refused to extend the criminal case requirement of competency to the SVP civil commitment arena even though the Court recognized that there was a "significant deprivation of liberty that requires due process protection." (*Id.* at p. 10.)

The Court also rejected the defense argument that a civil commitment should be pursued under the "general civil commitment statutes rather than the sexually violent predator statutes" because this would "defeat the purpose of the sexually violent predator determination that a person determined to be a sexually violent predator needs specialized sexually violent predator treatment." (*Ibid.*) Pursuing a general civil commitment would "thwart the proper exercise of legislative authority for the health and welfare of the state's citizens but it would also jeopardize" the SVP's "receipt of proper rehabilitating

treatment." (*Ibid.*) The Petitioner's argument in the case at bar that he should be committed under a general civil commitment statute, instead of the SVP civil commitment statute, must also fail for the same reasons. This analysis is notably similar to the California Court of Appeal opinion on this issue.

> Therefore, the trial court properly excluded the testimony on the conservatorship to ensure the jury applied the SVPA in a way compliant with the legislative intent of public safety protection. We share the trial court's concern that the testimony, if admitted, might have confused and misled the jury. The jury might have found appellant not an SVP merely because appellant promised to participate in the involuntary conservatorship program, which promise is unrelated to the question presented to the jury.

(*People v. Calderon*, *supra,* 124 Cal.App.4th at p. 91.)

CONCLUSION

For the foregoing reasons, review should be granted.

Respectfully submitted,

STEVE COOLEY
District Attorney of
Los Angeles County

By

IRENE WAKABAYASHI
Head Deputy

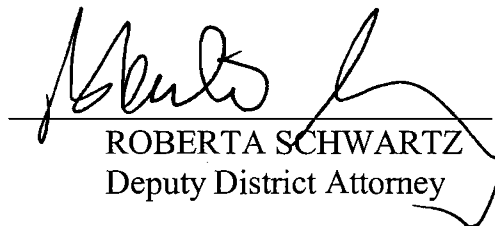
ROBERTA SCHWARTZ
Deputy District Attorney

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed (Petition for Review) is produced using 13-point Times scalable type including footnotes and contains approximately 8,133 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this petition.

Dated:



ROBERTA SCHWARTZ
Deputy District Attorney

Filed 6/4/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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

ORIGINAL PROCEEDINGS in mandate. Marcelita Haynes, Judge. Petition granted.

Michael P. Judge, Public Defender, Albert J. Menaster, Karen King and Jack T. Weedin, Deputy Public Defenders, for Petitioner.

Alan A. Abrams, Maheen Patel, American College of Forensic Psychiatry; Michael J. Aye; Norton & Melnik and Todd L. Melnik as Amicus Curiae on behalf of Petitioner, upon the request of the Court of Appeal.

No appearance for Respondent.

Steve Cooley, District Attorney, Phyllis Asayama and Roberta Schwartz, Deputy District Attorneys, for Real Party in Interest.

Ardell Moore (Moore), the defendant in a petition by the People to commit him as a sexually violent predator under the Sexually Violent Predator Act (SVPA or the Act) (Welf. & Inst. Code, § 6600 et seq.),[1] seeks a writ of mandate directing respondent superior court to initiate a competency evaluation and to stay the SVPA proceeding until the issue of his mental competency can be determined.

We grant Moore's petition. In this case of first impression in California, we hold, as a matter of constitutional due process, that a defendant cannot be subjected to trial as an alleged sexually violent predator while mentally incompetent. Our decision is based on the following factors: (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. (*People v. Allen* (2008) 44 Cal.4th 843, 862-863, 869-870 (*Allen*).)[2]

FACTUAL AND PROCEDURAL BACKGROUND

1. *Events leading up to the SVPA petition.*

In 1980, Moore was convicted of forcible oral copulation. He was paroled in 1981.

In 1987, Moore was convicted of kidnapping, forcible rape and forcible rape in concert and was sentenced to 25 years in state prison.

---

1 Statutory references are to the Welfare and Institutions Code except where otherwise designated.

2 Notwithstanding references herein to the masculine singular pronouns *his* or *he*, when not referring specifically to Moore, we use such terms generically to refer to either gender.

Prior to Moore's scheduled release on parole, the Director of the State Department of Mental Health designated two mental health professionals to evaluate Moore. They determined Moore has a diagnosed mental disorder such that he remains likely to engage in predatory sexual violence without custody and appropriate treatment.

On March 8, 2005, the People filed a petition for Moore's commitment as a sexually violent predator. The People alleged Moore was convicted of three sexually violent offenses in 1980 and 1987, that he has a diagnosed mental disorder, is a danger to the health and safety of others, and is predatory.

Moore was arraigned on April 12, 2005, and the public defender was appointed as counsel. On August 18, 2005, a probable cause hearing was held, at which time the trial court found Moore was likely to engage in sexually violent behavior if released. (§ 6602.) Moore has remained in custody during subsequent delays.

2. *The motion to stay the SVPA trial and to initiate competency proceedings.*

In February 2007, Moore's counsel filed a motion for an order initiating a competency evaluation and a stay of the SVPA trial pending a competency determination. The motion was supported by a letter from Vianne Castellano, Ph.D., who interviewed Moore on January 4 and January 11, 2007. Dr. Castellano opined "Mr. Moore is not presently competent to participate in the evaluation procedures or in the actual testimony relating to his upcoming [SVPA] hearing in March of 2007. He is neither able to understand the nature and the purpose of these proceedings nor is he able to cooperate in a rational manner with his counsel or the psychological evaluators."

The district attorney opposed the motion, contending there is no constitutional or statutory right to stay SVPA proceedings to litigate competency issues because an SVPA proceeding is civil in nature rather than punitive; accordingly, a defendant in an SVPA proceeding can be tried and committed even if that person is incompetent.

On April 9, 2007, the matter came on for hearing. Moore's counsel conceded the competency procedures of Penal Code section 1368 are inapplicable because an SVPA proceeding is civil in nature. However, Moore's counsel argued the court had the inherent power to fashion a judicial remedy to protect Moore's due process rights, pursuant to *James H. v. Superior Court* (1978) 77 Cal.App.3d 169 (*James H.*)[3]

After hearing arguments of counsel, the trial court denied Moore's motion to stay the SVPA proceeding and to initiate a competency hearing. The trial court recognized it possesses the inherent power to fashion a remedy but declined to do so because it concluded due process does not require a competency determination in SVPA proceedings. The trial court reasoned that even assuming Moore is incompetent, due process is not offended by proceeding with the SVPA trial where the defendant is represented by an attorney.

The trial court also quoted with approval from a Massachusetts case, to wit: "We see no reason why the public interest in committing sexually dangerous persons to the care of the treatment center must be thwarted by the fact that one who is sexually dangerous also happens to be incompetent." (*Com. v. Nieves* (Mass. 2006) 846 N.E.2d 379, 385 (*Nieves*).)

---

[3] In *James H.*, a petition was filed alleging a minor, age 17, had committed forcible rape. (*James H., supra,* 77 Cal.App.3d at p. 172.) *James H.* held a minor is entitled, as a matter of due process, to a competency hearing in a proceeding to determine whether the minor is a fit and proper subject for the juvenile court. However, the juvenile statutory scheme failed to provide for a hearing comparable to Penal Code sections 1367-1368. (*James H.,* at pp. 174-175.) Having recognized a competency hearing was required by due process, *James H.* invoked the inherent power of the court to hold such a hearing, relying on the court's "inherent powers to formulate procedures which have not yet attained legislative approval." (*James H.,* at pp. 175-176.)

3. *Moore's petition for a writ of mandate.*

On April 30, 2007, Moore filed the instant petition for writ of mandate. In the petition, Moore seeks the issuance of a peremptory writ directing the trial court to vacate its previous order and to enter a new and different order requiring the trial court to initiate competency proceedings.

On May 9, 2007, this court issued a stay of the SVPA proceedings, and requested the People to file a response to the petition. On July 3, 2007, this court issued an order to show cause. Following oral argument, we deferred submission in order to allow for supplemental briefing, including amicus briefing, and to await the Supreme Court's recent decision in *Allen, supra,* 44 Cal.4th 843.

CONTENTIONS

Moore contends: the trial court has the inherent power to determine the competency of an individual subject to prosecution under the SVPA; and the due process clauses of the United States and California Constitutions require that individuals subject to an SVPA commitment be competent.

DISCUSSION

1. *Overview of statutory scheme.*

The SVPA was enacted to identify incarcerated individuals who suffer from mental disorders that predispose them to commit violent criminal sexual acts, and to confine and treat such individuals until it is determined they no longer present a threat to society. (*Allen, supra,* 44 Cal.4th at p. 857.)

At the time the People filed the underlying petition to commit Moore as a sexually violent predator, in 2005, the SVPA defined a sexually violent predator as "a person who has been convicted of a sexually violent offense against two 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." (Former § 6600, subd. (a)(1), as amended by Stats. 2000, ch. 643, § 1.)[4]

The "process for confining an individual pursuant to the SVPA begins when the Secretary of the Department of Corrections and Rehabilitation determines that an individual in the custody of the department may be a sexually violent predator, and the secretary refers the individual to the State Department of Mental Health for an evaluation. If two evaluators concur that the individual meets the statutory criteria of a sexually violent predator, the Director of Mental Health shall request the county in which the person was convicted of the offense for which he or she is incarcerated to file a petition for commitment under the SVPA. (§ 6601.)" (*Allen, supra*, 44 Cal.4th at pp. 857-858.)

If "the trial court determines that the petition establishes '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 court shall order a trial to determine whether the person is a sexually violent predator. (§§ 6601.5, 6602.) The individual 'shall be entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports.' (§ 6603, subd. (a).) If the individual is indigent, the court shall appoint counsel and assist the individual in obtaining an expert evaluation and expert assistance at trial. (*Ibid.*)
To secure the individual's commitment, the district attorney must prove beyond a reasonable doubt that the person is a sexually violent predator. (§ 6604.) When a jury decides the case, its verdict must be unanimous. (§ 6603, subd. (f).)" (*Allen, supra,* 44 Cal.4th at p. 858.)

---

4 The SVPA was amended in various respects by Proposition 83, The Sexual Predator Punishment and Control Act: Jessica's Law (hereinafter, Proposition 83), which was approved by the voters at the General Election in November 2006. Proposition 83, inter alia, amended the definition of a sexually violent predator to include individuals who have been convicted of a sexually violent offense against *one* or more victims. (§ 6600, subd. (a)(1).)

At the time the People filed the underlying petition to commit Moore as a sexually violent predator, the SVPA provided: "If the court or jury determines that the person is a sexually violent predator, the person shall be committed for two years to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health . . . ." (Former § 6604, as amended by Stats. 2000, ch. 420, § 3.)[5]

2. *Because civil commitment involves a significant deprivation of liberty, a defendant in SVPA proceedings is entitled to due process protections; four relevant factors determine what process is due.*

Allen, a unanimous decision authored by the Chief Justice, clarifies the due process protections applicable to SVPA proceedings. There, the issue presented was whether a defendant in a sexually violent predator proceeding has a state or federal constitutional right to testify over the objection of his counsel. (*Allen, supra*, 44 Cal.4th at p. 848.) Although a defendant in a *criminal* proceeding has a right to testify over the objection of counsel, because a proceeding to commit an individual as a sexually violent predator is *civil* in nature, the right of a criminal defendant to testify over the objection of counsel does not extend to an individual who is the subject of a civil commitment proceeding under the SVPA. (*Id.* at p. 862.)

Allen continued, "Our conclusion that the right of a criminal defendant to testify over the objection of . . . counsel does not extend to an individual who is the subject of a [civil] proceeding under the SVPA does not end our analysis. 'Because civil commitment involves a significant deprivation of liberty, a defendant in an SVP[A] proceeding is entitled to due process protections. (*Foucha v. Louisiana* (1992) 504 U.S. 71, 80 [112 S.Ct. 1780, 118 L.Ed.2d 437].)' ([*People v.*] *Otto* [(2001]) 26 Cal.4th [200,] 209 . . . .)" (*Allen, supra*, 44 Cal.4th at p. 862; accord *People v. Thomas* (1977) 19 Cal.3d 630, 638 ["because involuntary commitment is incarceration against one's will

---

5 Proposition 83 amended section 6604 to provide that "the person shall be committed for *an indeterminate term* to the custody of the State Department of Mental Health for appropriate treatment and confinement . . . ." (§ 6604, italics added.)

regardless of whether it is called 'civil' or 'criminal' (*In re Gault* (1967) 387 U.S. 1, 50 [18 L.Ed.2d 527, 558, 87 S.Ct. 1428]), the choice of standard of proof implicates due process considerations which must be resolved by focusing not on the theoretical nature of the proceedings but rather on the actual consequences of commitment to the individual"].)

" ' "Once it is determined that [the guarantee of] due process applies, the question remains what process is due." (*Morrisey v. Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593, 33 L.Ed.2d 484].) We have identified 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. ([*In re*] *Malinda S.* [(1990)] 51 Cal.3d [368,] 383 [272 Cal.Rptr. 787, 795 P.2d 1244].)' (*Otto, supra,* 26 Cal.4th at p. 210.)" (*Allen, supra*, 44 Cal.4th at pp. 862-863.)

Allen began with the private interests at stake. "As we noted in *Otto, supra*, 26 Cal.4th 200, 'the private interests that will be affected by [a finding that the defendant continues to be a sexually violent predator] are the significant limitations on [the defendant's] liberty, the stigma of being classified as [a sexually violent predator], and subjection to unwanted treatment. [Citation.]' (*Id.* at p. 210.) The circumstance that a commitment is civil rather than criminal scarcely mitigates the severity of the restraint upon the defendant's liberty. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 223-227, 152 Cal.Rptr. 425, 590 P.2d 1.)" (*Allen, supra,* 44 Cal.4th at p. 863.)

Allen also observed, "[t]o the extent Proposition 83 has increased the burden upon liberty interests by requiring only one predicate offense and imposing an indeterminate term of commitment, it has increased the weight of the first factor." (*Allen, supra,* 44 Cal.4th at p. 863, fn. 15.) Thus, "the first factor weighs heavily in favor of providing all reasonable procedures to prevent the erroneous deprivation of liberty interests." (*Id.* at p. 863.)

Second, *Allen* considered "the risk, in the absence of a right to testify, of an erroneous finding that the defendant is a sexually violent predator and the probable value, in reducing this risk, of allowing him or her to testify over the objection of counsel." (*Allen, supra*, 44 Cal.4th at p. 863.) In approaching the issue, *Allen* "consider[ed] *generally whether allowing a defendant in a proceeding under the SVPA to testify over the objection of his or her counsel may aid the defendant in preventing the erroneous deprivation of liberty interests, rather than whether the right would aid the particular defendant before us*." (*Allen, supra,* 44 Cal.4th at p. 865, italics added.) Absent "the objection of defendant's counsel, defendant would have been permitted to testify to the extent his testimony was admissible and sufficiently relevant. . . . *[T]he defendant's participation in the proceedings, through pretrial interviews and testimony at trial, generally enhances the reliability of the outcome*. Moreover, . . . *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.* Guaranteeing the defendant a right to testify, even over counsel's objection, will mitigate this risk. The potential consequence of the

defendant's testimony being harmful to his or her case does not justify a rule that would bar a defendant from testifying absent the concurrence of his or her counsel. For these reasons, we conclude the second factor weighs in favor of allowing the defendant to testify over the objection of counsel." (*Allen, supra*, 44 Cal.4th at p. 865-866, fn. omitted.)

Third, *Allen* "consider[ed] 'the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' [Citation.] The government has a strong interest in protecting the public from sexually violent predators, and in providing treatment to these individuals. [Citations.] Because the defendant's 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." (*Allen, supra*, 44 Cal.4th at p. 866.)

Allen observed, "[t]he fiscal and administrative burdens associated with a right to testify over counsel's objection are de minimis. . . . [T]he defendant generally has a right to testify in such proceedings, subject to the rules of evidence and procedure. Therefore, recognizing a right of the defendant to testify against the advice of counsel will lengthen the proceedings only in that subset of cases in which the defendant's counsel determines not to call the defendant to testify and the defendant decides to reject counsel's advice and insists upon his or her right to testify. The added expense of receiving the defendant's testimony in those relatively few cases is of course no reason to deny the defendant a right to testify." (*Allen, supra*, 44 Cal.4th at p. 867.)

Finally, *Allen* "considered '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. [Citation.]' " (*Allen, supra*, 44 Cal.4th at p. 868.)

Allen reasoned: "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. The circumstance that the defendant may fare better by remaining silent at trial does not negate the dignitary interest in being heard. The government has no interest in assuming a paternal role to prevent a defendant from pursuing a strategically misguided path in a proceeding under the SVPA. 'The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." [Citation.]' (*Mathews v. Eldridge* [(1976)] 424 U.S. [319,] 333.) Because denial of a right to testify over the objection of counsel would impair the defendant's ability to be heard, we conclude that the fourth factor weighs in favor of allowing the defendant to testify against the advice of counsel." (*Allen, supra*, 44 Cal.4th at p. 869, italics added.)

Allen concluded: "In summary, (1) the private interests at stake in an SVPA proceeding are significant; (2) there is a risk counsel may misjudge the effect the defendant's testimony will have upon the finder of fact, and allowing the defendant to testify over the objection of counsel will mitigate the risk of an erroneous deprivation of the defendant's liberty interests that might result from counsel's misjudgment; (3) as a general matter, the government's interest in protecting its citizens and treating sexually violent predators pursuant to an efficient procedure is not significantly burdened by allowing such testimony – and, in any event, this burden would not justify deprivation of the defendant's right to testify; and (4) the defendant's dignitary interest in presenting his or her side of the story is protected by allowing the defendant to testify despite counsel's judgment that such testimony will be detrimental. Therefore, we conclude that the balancing test set forth above establishes that the defendant in a sexually violent predator proceeding has a right under the due process clauses of the federal and state Constitutions

to testify, in accordance with the rules of evidence and procedure, over the objection of counsel." (*Allen, supra*, 44 Cal.4th at pp. 869-870.)

3. *Application of the four Allen factors ineluctably lead to the conclusion a defendant in SVPA proceedings has a due process right not to be subjected to trial while incompetent.*

It has long been established that a mentally incompetent *criminal defendant* cannot be tried while incompetent.[6] However, the right of a criminal defendant not to stand trial while incompetent does not compel the conclusion that a defendant in a *civil* SVPA proceeding has a due process right not to be subjected to trial while incompetent. Rather, pursuant to the four factors articulated in *Allen,* we examine whether due process prohibits a defendant from standing trial as an alleged sexually violent predator while incompetent.

a. *Defendant's liberty interest.*

We begin with the private interests at stake. The private interests that will be affected by a finding a defendant is a sexually violent predator are the significant limitations on the defendant's liberty, the stigma of being classified as a sexually violent predator, and subjection to unwanted treatment. (*Allen, supra*, 44 Cal.4th at p. 863.) Irrespective of the fact a commitment under the SVPA is labeled civil rather than criminal, the defendant's liberty is severely curtailed. (*Ibid.*) Proposition 83 has magnified the liberty interest by requiring only one predicate offense and imposing an

---

6 Penal Code section 1368 has been on the books since 1872. It was derived from an 1851 California statute, Criminal Practice Act section 584 (Stats. 1851, ch. 29, § 584, p. 277), which read: " 'When an indictment is called for trial, or upon conviction, the defendant is brought up for judgment, if a doubt shall arise as to the sanity of the defendant, the court shall order the question to be submitted to the regular jury, or may order a jury to be summoned . . . to inquire into the fact.' " (See legislative history, Deering's Ann. Pen. Code (1961 ed.) foll. § 1368, pp. 733-734.) Section 1368 codifies the common law rule precluding the trial of an incompetent defendant. (Competence to Stand Trial (1974) 62 Cal. L.Rev. 495, 496, fn. 4.) As stated in Blackstone, "*In criminal cases*, . . . idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities, no, not even for treason itself." (2 Cooley's Blackstone (4th ed. 1899) p. 1230, italics added.)

indeterminate term of commitment. (*Id.* at p. 863, fn. 15.) Thus, here as in *Allen*, "the first factor weighs heavily in favor of providing all reasonable procedures to prevent the erroneous deprivation of liberty interests." (*Id.* at p. 863.)

b. *Risk of proceeding to trial with mentally incompetent defendant and benefit of additional procedural safeguard.*

Second, we consider the risk, in the absence of a right to be competent in SVPA proceedings, and the probable value of the additional procedural safeguard of a competency evaluation before an SVPA trial. (*Allen, supra*, 44 Cal.4th at p. 863.) The inquiry is whether the proposed procedural safeguard may generally "aid the defendant in preventing the erroneous deprivation of liberty interests, *rather than whether the right would aid the particular defendant before us*." (*Id.* at p. 865, italics added.)

By way of background, the presentation at an SVPA trial occurs in several phases. First, there are the prior convictions,[7] as well as prior unadjudicated charges, unadjudicated arrests and other areas of misbehavior or misconduct, including prison conduct. Next, there is scrutiny of the underlying psychological diagnoses, based on the defendant's history and interviews with state psychologists. The third general area pertains to treatment, both prior to SVPA proceedings and thereafter, the defendant's testimony regarding his prior conduct, his attempts to better himself, his relapse prevention plan, plans upon release and his amenability to treatment on a voluntary basis. Participation by a defendant in each of these areas may be crucial.

In the initial phase of the trial, the People present foundational evidence of the prior sex offenses in detail, so that the jury knows the facts on which the experts are

---

7 Section 6600 states in relevant part at subdivision (a)(3): "Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, *but shall not be the sole basis for the determination.* The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health." (Italics added.)

basing their opinions. When the defendant is called to testify, the facts are reiterated and the defendant is questioned by the People to admit all the details and asked if he were aroused by his conduct. Additionally, issues may arise with an incompetent defendant when the People introduce evidence of prior unadjudicated charges and arrests that have never been tested in court and are recorded solely in crime reports. [8] Such evidence may be left unconfronted by an incompetent defendant and by defense counsel, who may have no way of knowing whether the information is true.

The next phase of the trial pertains to the presence of a "diagnosed mental disorder" that would qualify the defendant for commitment as a sexually violent predator. (§ 6600, subd. (c).)[9] An incompetent defendant will have no opportunity to discuss his prior behavior and motivating reasons for such behavior with the state's evaluator or with a defense expert, or be able to explain to a jury why the state expert's rationale for the

---

8 The Florida courts have recognized that in proceedings under the Ryce Act, Florida's equivalent of the SVPA, a defendant has a due process right to be competent so as to be able to consult with counsel and to testify on his own behalf in cases in which the state relies on hearsay reports of prior bad acts that did not result in prosecution or conviction to establish its case. *In re Commitment of Branch* (Fla.App. 2004) 890 So.2d 322 (*Branch*) held "when 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 [defendant] 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 [defendant's] prior uncharged bad acts, the [defendant] 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." (*Id* at p. 328, italics added.) *Branch* held the lower court abused its discretion in denying a motion for continuance of the proceeding until the defendant was competent to testify and assist his counsel. (*Id.* at p. 329; accord *In re Commitment of Camper* (Fla.App. 2006) 933 So.2d 1271, 1275 ["the 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."].)

9 Section 6600 states in relevant part at subdivision (c): " 'Diagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others."

diagnosis and volitional impairment is not justified. A defendant who is incompetent is at a great disadvantage, as he cannot meaningfully testify in his own behalf, cannot cooperate with his own counsel, nor assist his defense experts in understanding the basis for his behavior or provide evidence to rebut an evaluator's potentially erroneous conclusion.

The subsequent phase of the trial pertains to treatment, both before and after commitment. An incompetent defendant may be unable to share his knowledge and understanding of what he has learned, which is important to the evaulators' assessment to determine if the defendant is "likely" to reoffend and to engage in sexually violent criminal behavior. (§ 6600, subd. (a)(1).) Further, when a defendant testifies, what he has learned and how he will conduct himself in the future will be of keen interest to the jury and will weigh heavily on a decision to commit him as a sexually violent predator.

For these reasons, 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.

We recognize Florida has taken a somewhat different approach. There, the right to be competent in a sexually violent predator proceeding hinges on the nature of the State's evidentiary showing. In those cases in which the State's experts choose to rely on unchallenged hearsay to establish the defendant's prior uncharged bad acts, the defendant has a right to be competent so that he can exercise his due process right to challenge the facts underlying that hearsay evidence. (*Branch, supra*, 890 So.2d at p. 328.)

However, in *Allen*, our Supreme Court rejected such a case-by-case approach. To reiterate, *Allen* "consider[ed] *generally* whether allowing a defendant in a proceeding under the SVPA to testify over the objection of his or her counsel may aid the defendant in preventing the erroneous deprivation of liberty interests, *rather than whether the right would aid the particular defendant before us*." (*Allen, supra,* 44 Cal.4th at p. 865, italics added.)

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.* Guaranteeing the defendant a right to testify, even over counsel's objection, will mitigate this risk." (*Allen, supra*, 44 Cal.4th at p. 865-866, italics added, fn. omitted.)

Allen's discussion with respect to the crucial role of a defendant's testimony in an SVPA proceeding illustrates the need for an SVPA defendant to be competent to consult with counsel and to participate in the proceeding. For example, a defendant's testimony may call into question the foundational details of the circumstances surrounding the commission of the predicate offenses, and may raise doubt concerning the facts underlying the experts' opinions. (*Allen, supra,* 44 Cal.4th at p. 866.) The Florida approach requires defense counsel to anticipate in advance the extent of a client's participation at trial. However, "[a]ttorneys 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." (*Ibid.*) Therefore, proceeding to trial with an incompetent defendant poses a risk of an "erroneous deprivation of rights." (*Ibid.*)

Further, *Allen* recognizes that "in every case" (*Allen, supra*, 44 Cal.4th at p. 866), an SVPA defendant has the right, as a matter of constitutional due process, to testify and to present his side of the story. (*Id.* at pp. 869-870.) 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.

For these reasons, the second factor in *Allen* weights in favor of providing for a pretrial inquiry into defendant's competence to stand trial in an SVPA proceeding.

c. *Fiscal and administrative burden of the additional procedural safeguard.*

Next, we consider the government's interest and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (*Allen, supra,* 44 Cal.4th at p. 866.)

The 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." (*Allen, supra*, 44 Cal.4th at p. 866.)

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. (See *Allen, supra*, 44 Cal.4th at pp. 867, 869.) Recognizing a defendant's right to a competency determination will lengthen the proceedings "only in that subset of cases" (*id.* at p. 867) 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.

Accordingly, the government's interest would not be significantly burdened by the additional procedural safeguard of a competency determination in SVPA proceedings.

d. *Defendant's dignitary interest.*

Finally, we consider the dignitary interest is ensuring that an incompetent defendant not be subjected to trial under the SVPA. A mentally incompetent defendant may be unable to testify or to consult with counsel. Such a defendant would lack the ability to discuss his prior conduct, dispute facts, discuss future plans and relapse prevention techniques, challenge hearsay evidence or erroneous factual assumptions of the prosecution's expert witnesses. In short, the defendant would be "*relegate[d] . . . to the role of a mere spectator*, with no power to affect the outcome." (*Allen, supra,* 44 Cal.4th at p. 869, italics added.)

We conclude the defendant's dignitary interest can be protected only if the defendant is mentally competent, so that the defendant is duly "inform[ed] . . . of the nature, grounds, and consequences of the action [and is able] to present [his] side of the story" to the trier of fact. (*Allen, supra*, 44 Cal.4th at p. 862.)

e. *Conclusion.*

In sum, (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.

4. *Contrary authority in other jurisdictions, without benefit of Allen's sensitivity to due process concerns, is of no assistance.*

Courts in four states – Massachusetts, Iowa, Missouri and Texas – which have been confronted with the same issue as this court all have concluded a defendant is *not* entitled to a competency determination before being tried as an alleged sexually violent

predator.[10] Those 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, supra*, 44 Cal.4th at p. 862.) *Allen* reflects the nominally civil nomenclature is only the beginning of the constitutional analysis.

Briefly, in *Nieves,* cited by the trial court herein, the Massachusetts Supreme Judicial Court rejected the contention that trial of an alleged incompetent defendant as a sexual predator would violate due process. (*Nieves, supra,* 846 N.E.2d at p. 385.)

In *In re Detention of Cubbage* (Iowa 2003) 671 N.W.2d 442, the Iowa Supreme Court concluded a defendant does not have a constitutional right to be competent during the course of sexually violent predator proceedings, emphasizing "the SVPA involves the potential *civil commitment* of a *respondent* alleged to be a sexually violent predator." (*Id.* at p. 447.)

Similarly, in *State ex rel. Nixon v. Kinder* (Mo. 2003) 129 S.W.3d 5, the Missouri Court of Appeals held due process does not require a defendant be competent to stand trial as a sexually violent predator, in that "*[c]ivil commitment* for sexually violent predator treatment shares no parallel with the determination of lack of competency . . . in criminal trials." (*Id.* at pp. 9-10, italics added.)

Likewise, in *In re Commitment of Fisher* (Tex. 2005) 164 S.W.3d 637 (cert. den.) the Texas Supreme Court held that because the sexually violent predator statute is *civil* rather than criminal in nature, one who may be incompetent to stand trial on criminal charges can nonetheless be civilly committed as a sexually violent predator. (*Id.* at p. 653.)

In *Allen*, our Supreme Court recognized: "The circumstance that a commitment is civil rather than criminal scarcely mitigates the severity of the restraint upon the

---

10 As noted in footnote 8, *ante*, Florida has recognized a defendant in a sexually violent predator commitment proceeding has a due process right to be competent in limited circumstances.

defendant's liberty. [Citation.]" (*Allen, supra,* 44 Cal.4th at p. 863.) *Allen* prescribed a four-part template for determining what due process protections are applicable in California SVPA proceedings. (*Id.* at pp. 862-863.) Therefore, out-of-state decisions which are grounded on the premise that sexually violent predator commitment proceedings are deemed civil in nature are of no assistance here.

5. *Courts have inherent power to fill the gap in the SVPA statutory scheme by providing for a competency determination in order to effectuate the Act so as to safeguard public safety and at the same time satisfy due process concerns.*

Given the dictates of *Allen, supra*, 44 Cal.4th 843, we are compelled to conclude the defendant in an SVPA proceeding has a constitutional due process right to a competency determination before an SVPA trial. Unfortunately, the Act (§ 6600 et seq.), unlike the Penal Code (Pen. Code, § 1367 et seq.),[11] lacks any procedures for an inquiry into the mental competence of a defendant. Without any provision to ensure a defendant's right to be competent in SVPA proceedings, the Act would be unconstitutional as applied to Moore.

Notwithstanding the SVPA's lack of a competency provision, this court has the power to fashion a remedy. It is "beyond dispute that 'Courts have inherent power, as

---

[11] Penal Code section 1368, pertaining to criminal proceedings, states in pertinent part: "(a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. . . . [¶] (b) *If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing* which is held pursuant to Sections 1368.1 and 1369." (Italics added.) If the defendant "is found mentally competent, the criminal process shall resume, the trial on the offense charged shall proceed, and judgment may be pronounced." (Pen. Code, § 1370, subd. (a)(1)(A.) If the defendant "is found mentally incompetent, *the trial or judgment shall be suspended until the person becomes mentally competent.* [¶] (i) In the meantime, the court shall order that the mentally incompetent defendant be delivered by the sheriff to a state hospital for the care and treatment of the mentally disordered . . . ." (§ 1370, subd. (a)(1)(B), italics added.)

well as power under section 187 of the Code of Civil Procedure,[12] 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.' " (*Citizens Utilities Co. v. Superior Court* (1963) 59 Cal.2d 805, 812-813.)

James H. is on point. 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." (*James H., supra*, 77 Cal.App.3d at pp. 174-175.) 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. (*Id.* at pp. 175-176.) *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." ')." (*James H., supra,* 77 Cal.App.3d at p. 175; see, e.g. *Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1199 [Code Civ. Proc., § 36 only provided for *trial setting preference* based on medical condition; this court exercised its inherent power to grant calendar preference on appeal].)

We are mindful the provisions of Penal Code section 1367 et seq., relating to the determination of competence to stand trial, "are expressly limited in their application to

---

12 Code of Civil Procedure section 187 states: "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it 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.*" (Italics added.)

criminal proceedings which occur prior to judgment and sentence." (*Juarez v. Superior Court* (1987) 196 Cal.App.3d 928, 931; accord *People v. Angeletakis* (1992) 5 Cal.App.4th 963, 967 (*Angeletakis*).)[13] However, the numerous commonalities between SVPA proceedings and criminal prosecutions warrant resort to the Penal Code for guidance.

An SVPA commitment "unquestionably involves a deprivation of liberty, and a lasting stigma . . . ." (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1194 (*Hurtado*).) Civil " 'commitment to a mental hospital, despite its civil label, threatens a person's liberty and dignity on as massive a scale as that traditionally associated with *criminal prosecutions*.' " (*Id.* at p. 1193, italics added.) "Although the SVPA is a civil proceeding, its procedures have many of the trappings of a *criminal proceeding*. The probable cause hearing . . . (§ 6602) is one example. In addition, the defendant is entitled to appointed counsel (§ 6603, subd. (a)), the trier of fact must find the defendant to be a sexually violent predator *beyond a reasonable doubt* (§ 6604), and a jury verdict must be *unanimous* (§ 6603, subd. (d) [now subd. (f)]). [¶] In sum, proceedings under the SVPA, in common with proceedings under other civil commitment statutes, are civil proceedings with consequences comparable to a *criminal conviction* – involuntary commitment, often for an indefinite or renewable period[[14]], with associated damage to the defendant's name and reputation." (*Id.* at p. 1192, certain italics added.) [15] [16]

---

13 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. (*Angeletakis, supra,* 5 Cal.App.4th at pp. 969-971.) 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. (*Allen, supra*, 44 Cal.4th at pp. 862-863.)

14 As noted in footnote 5, *ante*, the SVPA now provides for commitment for an indeterminate term.

15 *Hurtado, supra*, 28 Cal.4th 1179, involved a claim of instructional error in an SVPA proceeding. Because an SVPA commitment involves a deprivation of liberty, *Hurtado* applied the rigorous *Chapman* standard of prejudice (*Chapman v. California*

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. We do so in order to preserve the constitutionality of the SVPA by securing the due process right of an alleged sexually violent predator to be competent at trial, and at the same time safeguarding public safety by preventing the premature release of a potentially dangerous individual.

Therefore, on remand the trial court is directed to conduct a hearing into Moore's competence to stand trial as an alleged sexually violent predator. In the event the trial court determines Moore is not presently competent to stand trial, the court shall order Moore held in a state hospital for the care and treatment of the mentally disordered until such time as he is restored to competence.

(1967) 386 U.S. 18, 24 [17 L.Ed.2d 705] to conclude "the trial court's instructional error was harmless beyond a reasonable doubt." (*Hurtado,* at p. 1195.)

16 The following discussion from *People v. Moore* (1968) 69 Cal.2d 674, pointing out the similarities between the narcotic addict commitment statutes and criminal proceedings, is also instructive: "Although the commitment procedures set up by the narcotic addict statutes are civil in nature [citation], it is clear that the proceeding has some of the features pertinent to a *criminal case* in view of the facts that the state is the defendant's opponent, that the proceeding is commenced on petition of the district attorney (Welf. & Inst. Code, §§ 3100, 3100.6), that the defendant is entitled to be present at the hearing and to be represented by counsel at all stages of the proceeding (Welf. & Inst. Code, § 3104), that if he is financially unable to employ counsel he is entitled to appointed counsel (Welf. & Inst. Code, § 3104) and that his liberty is at stake. On the basis of these considerations, we have recognized the *criminal features* of the proceeding and held that persons involuntarily committed to the program have the right to a free transcript on appeal, a rule ordinarily applied in *criminal cases.* [Citation.]" (*Id.* at p. 681, italics added, overruled on other grounds by *People v. Thomas, supra,* 19 Cal.3d at p. 641, fn. 8.)

DISPOSITION

The order to show cause is discharged. The petition for writ of mandate is granted. Let a peremptory writ of mandate issue directing respondent superior court to: vacate its order denying Moore's motion to stay the SVPA proceeding and to initiate a competency hearing; and to conduct further proceedings not inconsistent with this opinion.

CERTIFIED FOR PUBLICATION

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.

DECLARATION OF SERVICE BY MAIL

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the **(PETITION FOR REVIEW)** by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed as follows:

HONORABLE MARCELITA V. HAYNES
Judge of the Superior Court
Department 83
429 Bauchet Street
Los Angeles, CA 90012

Clerk, Court of Appeals
Second Appellate District
300 South Spring Street
Los Angeles, CA 90013

PAMELA C. HAMANAKA
Sr. Assistant Attorney General
Attorney General's Office
300 South Spring Street
Los Angeles, CA 90013

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

JACK WEEDIN, Public Defender
320 West Temple Street, Rm. 590
Los Angeles, CA 90012-3266
Attorney for Ardell Moore

ATTN: ALBERT J. MENASTER, Head Appellate Division

Executed on July 14, 2009, at Los Angeles, California.

BRENDA COLEMAN