IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARDELL MOORE, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent. PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	**No. S174633** 2nd Dist. No. B198550 (LASC No. ZM008445)

ORIGINAL PROCEEDINGS
FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE MARCELITA HAYNES, JUDGE

REAL PARTY'S REPLY BRIEF ON THE MERITS

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ISSUES PRESENTED FOR REVIEW

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

ARGUMENT

I

SVP PROCEDURES COMPLY WITH DUE PROCESS REQUIREMENTS

In the Answer Brief, Moore attempts to dismiss the inclusion of *Guardianship of Waite* (1939) 14 Cal.2d 727, 729–730 (hereafter *Waite*) in this Court's opinion in *People v. Allen* (2008) 44 Cal.4th 843, 865 by

stating this Court did not analyze *Waite* in conjunction with competency. *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. The inclusion of a case which held that a conservatee has the right to testify is logically inconsistent with Moore's position that it is an exercise in futility to give an incompetent person the right to testify. The right to testify as mandated by *Allen* does not generate the right to be competent at an SVP hearing.

The other distinction Moore attempts to draw is that the due process concerns are different in a conservatorship proceeding. This is a distinction without a difference. The right to testify is the same in all proceedings. If the right to testify is meaningful when the subject is in a conservatorship proceeding, it is meaningful in an SVP proceeding. Assume for a moment that Moore is tried in a civil proceeding for a conservatorship under Welfare and Institutions Code section 5008, subdivision (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 deciding 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.

What lawful authority would authorize detention of the SVP when 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.) Competency status is limited by the maximum confinement time the subject faces on the underlying charge he/she is facing. (Pen.Code. § 1370; *Jackson v. Indiana* (1972) 406 U.S. 715 [92 S. Ct. 1845, 32 L. Ed. 2d 435].)

In the Petitioner's Answer Brief, Petitioner again relied on an analogy to *James H. v. Superior Court* (1978) 77 Cal.App.3d 169 where the court appended competency proceedings to juvenile proceedings. This incorrect approach was addressed in a subsequent Court of Appeals opinion. In the case of *In re Patrick H.* (1997) 54 Cal.App.4th 1346, the Court completely rejected the reasoning of *James H* insofar as it improvised transferring one statutory criminal regimen to existing Juvenile statutes.

> To the extent the juvenile court continued its order that Patrick remain committed pursuant to Penal Code section 1370, it erred. In an adult proceeding, a finding of present incompetence results in an immediate suspension of the criminal proceedings and the next issue is simply whether the defendant should be confined in a state hospital or other facility or be placed on an outpatient status. (Pen. Code, § 1370, subd. (a)(1), (2).) But a finding of incompetence in a juvenile proceeding should not result in a confinement order or its equivalent. (In re Mary T., supra, 176 Cal.App.3d at p. 43.) In effect, a juvenile is not committed as incompetent to proceed with section 602 proceedings, but on a wholly independent basis and after wholly independent procedures. (In re Mary T., supra, at p. 44.) At the time of the May 20, 1996, order, Patrick had already spent six months at the state hospital under the guise of Penal Code section 1370 "for the purpose of being treated in order to regain his trial competency," notwithstanding the fact that the mental health experts and the court thought it unlikely he would ever reach the required level of competency. Once Patrick was found incompetent, the juvenile court should have referred him for an early evaluation for possible initiation of LPS civil commitment proceedings.

(See § 705, 6550; Pen. Code, § 4011.6.)

In re Patrick H. (1997) 54 Cal.App.4th 1346, 1359.)

The Court in *James H.* chose to ignore an existing statute which could have been used to address the issue of James' alleged incompetence[2] to proceed. California Welfare. & Institition Code Section 705 existed when *James H.* was decided and discussed by that Court.

> Whenever the court, before or during the hearing on the petition, is of the opinion that the minor is mentally disordered or if the court is in doubt concerning the mental health of any such person, the court may proceed as provided in Section 6550 of this code or Section 4011.6 of the Penal Code.

(Cal. Wel. & Inst. Code § 705.)

This does not detract from the principle that juveniles must be competent during their proceedings. However, both Moore and the Court below erred in assuming that one statutory scheme can be superimposed on another without the legislature's answers to the many questions left unanswered in the opinion below. When the legislature labors to resolve problems addressed by proposed comprehensive legislation, committees conduct hearings and a lengthy research process ensues. The Courts do not have the resources to conduct independent investigations into the impact of legislative alternatives. There has been no input in these discussions from the Department of Mental Health or impartial psychiatric experts subject to questions from legislators. The Juvenile Courts do address competency

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2. Part of the difficulty with the facts of James H. is that the trial court had conflicting information as to the minor's competence from the two experts and did not declare a doubt as to the minor's mental competence.

issues but not by requisitioning codes developed for the adult offenders. (*In re Patrick H.* (1997) 54 Cal. App.4th 1346.)

II

THE DECISION BELOW USURPED LEGISLATIVE AUTHORITY AND CREATED A MIRE OF UNRESOLVED PROBLEMS

Moore skirts the question in his Answer Brief as to how long an incompetent SVP can be detained and treated for his incompetency. Can he be detained for six months, two years, or thirty years? Without pending underlying charges which provide the basis for the limitations in section 1368 proceedings, how long can the SVP be detained without restoring competency? If the SVP is being held without statutory guidelines or authority, a writ of habeas corpus would be forthcoming challenging that detention without statutory authority.

Moore's attempt to justify the decision below by suggesting that incompetent SVP subjects could be held in the same manner as incompetent criminal defendants is facially defective. On pp. 44-48 of the Answer Brief on the merits, Moore cites established law which provides for continued hospitalization of *defendants who were charged* with felonies involving death, great bodily injury, or a serious threat to the physical well-being of another, the indictment or information has not been dismissed and the person was found to be incompetent to stand trial. (Pen. Code § 5008, subdivision (h)(1)(B).) By definition, **no** SVP subject will fit this criteria, since the SVP does not face new charges nor can even be classified as a defendant. It would not require even an experienced attorney to challenge detention when the SVP subject clearly does not fit the definition. A writ of habeas corpus challenging detention, where the petitioner does not fit any of

the criteria allowing him to be deprived of his liberty, would have to be answered by a concession.

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.)

III

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

Much of Moore's brief references purported authorities outside the record to argue the mutual exclusivity of treatment for incompetence and the behavior modification required for sexually violent predators.

The interjection of some common sense reduces those imagined barriers. An incompetent SVP subject can also learn the need to control impulses while he is being restored to competency. Just because the current system allegedly treats the two processes as mutually exclusive does not mean that they are. The benefits to an SVP subject who never regains competency but learns impulse control could make a difference in whether they are deemed to be too dangerous to be released to a less structured

setting.

Further, if the respondent in the SVP case is incompetent but potentially no longer an 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.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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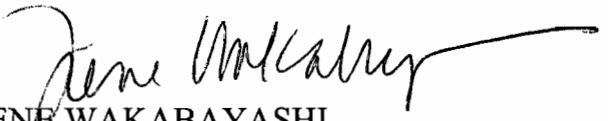
By 

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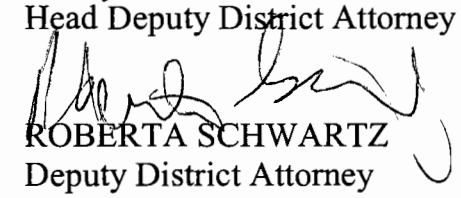

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed (Reply Brief on the Merits) is produced using 13-point New Times Roman type including footnotes and contains approximately 2,093 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: December 7, 2009

ROBERTA SCHWARTZ
Deputy District Attorney

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 attached document **Real Party's Reply Brief on the Merits** 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:

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

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Executed on December 7, 2009, at Los Angeles, California.

BRENDA COLEMAN