S180612

IN THE SUPREME COURT

THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent

vs.

CHRISTINE BARRETT

Defendant and Appellant

REVIEW OF A DECISION OF THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT, CASE NO. H034154

SANTA CLARA SUPERIOR COURT NO. MH-034663
THE HONORABLE MARY ANN GRILLI, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner and Respondent vs. CHRISTINE BARRETT, Defendant and Appellant	No. S180612 Court of Appeal No. H034154 Superior Court No. MH034663

APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUES PRESENTED FOR REVIEW

Whether principles of due process and equal protection require the trial court to affirmatively advise a person facing commitment under Welfare and Institutions Code[1] section 6500 of his or her right to a jury trial and, if so, to obtain an express waiver of that right on the record.

2. Whether failure to advise a person of the right to a jury trial in an involuntary commitment proceeding is a structural error requiring reversal.

[1]All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

INTRODUCTION

Appellant is a client of a regional center[2] which is required under the Lanterman Act to provide services to people with developmental disabilities. However, a doctor from the regional center believed that a locked psychiatric facility was the least restrictive placement for her. Instead of pursuing an involuntary mental health commitment through the Lanterman-Petris-Short (LPS) Act (see section 5000 et seq.) which involves well-established procedural and due process protections, the prosecution bypassed these protections by seeking and obtaining a commitment under section 6500 which provides for commitment of people with mental retardation and has fewer protections. Appellant respectfully contends that she should not be deprived of the procedural and due process protections afforded other people who face involuntary civil commitment, especially when the commitment setting and treatment conditions are the same.

SUMMARY OF THE PROCEEDINGS

The District Attorney of Santa Clara County filed a Petition for Commitment under section 6500 et seq. against appellant Christine Barrett, alleging that she was a person who was mentally retarded and a danger to herself and others. (Opn. p. 2, CT 5-6.) The record did not show any

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[2]Under the Lanterman Developmental Disabilities Services Act, care for the developmentally disabled is provided by private contractors operating, among other services, residential care facilities. (Welf. & Inst. Code, sections 4500, 4620, subd. (b).) Under section 4512, subdivision (a), "developmental disability" means "a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual," and includes "mental retardation, cerebral palsy, epilepsy, and autism." The coordination of the delivery of such direct services is the responsibility of "private nonprofit community agencies" called "regional centers." (Welf. & Inst. Code, sections 4500, 4620, subd. (b).)

indication of a waiver of a jury trial, or an advisement of the right to a jury trial. (Opn. at p. 6.) The court found appellant to be mentally retarded and a danger to herself and others, and ordered her to be committed to the Department of Developmental Services for a period of one year, renewable indefinitely. (Opn. at p. 8, CT 21-23.) Appellant appealed. (CT 26.)

The Court of Appeal affirmed the commitment, departing from earlier appellate decisions holding that people facing commitment under section 6500 have due process and equal protection rights to advisement and of the right to a jury trial, and that failure to obtain a valid waiver requires reversal. (Opinion at p. 18, citing *People v. Alvas* (1990) 221 Cal. App. 3d 1459, 1463; *People v. Bailie* (2006) 144 Cal. App. 4th 841.) Review was granted by this Court.

SUMMARY OF THE FACTS

Evidence produced at hearing showed that appellant had been dually diagnosed with a psychiatric disorder and a developmental disability. (Opn. at p. 7, RT 29, 31.) Testimony was provided by Robert Thomas, Ph.D., a psychologist with the San Andreas Regional Center. (RT 7.) Appellant had received psychiatric diagnoses of psychosis not otherwise specified, bipolar disorder, schizoaffective disorder, and possible schizophrenia. (RT 31.) Dr. Thomas made no independent determination that appellant was mentally retarded, but assumed that she was based on the fact that she had been accepted for services at the regional center. (RT 29.) Based upon appellant's behavioral history, including that she was currently placed in a psychiatric unit, Dr. Thomas opined that she was a danger to herself or others. (RT 8-9.) Appellant's history included various alleged incidents of appellant becoming agitated, physically aggressive and verbally abusive.

(RT 11-12.) Appellant had reportedly thrown items through a glass window endangering herself by the broken glass. (RT 11-16.) In other incidents, appellant had reportedly scratched herself and threatened to physically harm staff. (RT 15-16.)

Dr. Thomas determined that a locked psychiatric facility was the least restrictive placement for appellant. (RT 18-19.) He believed that appellant had a serious issue controlling dangerous behavior because of mental retardation but acknowledged she also had received psychiatric diagnoses including bipolar disorder and schizoaffective disorder. (RT 18-20.) Dr. Thomas further acknowledged that rehabilitating people with mental retardation was not the primary focus of the facility being recommended for appellant. (RT 20, 52.)

Appellant testified she did not like being at the psychiatric facility because she did not have her freedom and did not have any friends there. (RT 55, 57.) She wanted to go back to a group home where she would have a roommate and good, fun activities. (RT 56.) She believed the medication was helping her to stay calm and that she would do well in another type of setting. (RT 58.)

ARGUMENT

I. EQUAL PROTECTION UNDER THE STATE AND FEDERAL CONSTITUTIONS REQUIRE THAT A PERSON FACING COMMITMENT UNDER SECTION 6500 BE ADVISED OF THE RIGHT TO A JURY TRIAL

A. Summary of Statutory Law

1. Section 6500 Proceedings

Section 6500 et seq. authorizes the involuntary commitment of an person who is "mentally retarded" and is a danger to himself or herself or others. The "alleged mentally retarded person" must be informed of the right to counsel. (Section 6500.) If the person cannot afford counsel, the court must appoint the public defender or other attorney to represent her. (*Ibid.*) Unless the Board of Supervisors designates County Counsel, allegations under section 6500 are brought by the District Attorney. (*Ibid.*) A request to the designated prosecutor to file a petition under section 6500 may be made by (a) a parent, guardian, conservator, or other person charged with the support of the person, (b) a probation officer, (c) the Youth Authority, (d) any person designated for that purpose by the judge of the court, (e) the Director of Corrections, or (f) the regional center director or his or her designee. (Section 6502.)

Once a petition is filed, the director or the regional center or that person's designee must be appointed to examine the person, and the report must contain a recommendation of a facility or facilities in which the alleged developmentally person may be placed. (Section 6504.5.) If the Court finds that the person is a danger to himself, herself or others, the court may make an order that the person be committed to the State Department of Developmental Services for suitable treatment and habitation services. (Section 6509.) Care and treatment may include placement in

state hospital, developmental center, or any other appropriate placement. (*Ibid.*) The commitment expires in one year but may be renewed indefinitely. (Section 6500.)

Although there is no express statutory right to a jury trial under section 6500, this Court has recognized that a person with a developmental disability who faces civil commitment has the right to a jury trial based on equal protection principles. (*In re Hop* (1981) 29 Cal. 3d 82, 93, see also *O'Brien v. Superior Court* (1976) 61, Cal. App. 3d 62, 68-69, *Regional Center of Orange v. King* (1978) 80 Cal. App. 3d 860, 861-862.)

2. Mental Health Commitment Proceedings

The Lanterman-Petris-Short Act provides for treatment and involuntary commitment of a person who may be a danger to self or others or gravely disabled on the basis of mental disorder. Under section 5150, a person may be taken into custody and for evaluation and treatment for 72 hours. If continued treatment is deemed necessary, a 14-day certification hold may be initiated under section 5250, and the person has the right to a certification review hearing under section 5254. At any time during this process, the person may also file a statutory petition for a writ of habeas corpus under section 5275. If additional commitment is considered necessary, there are further procedures depending on the basis for the extended commitment. A second 14 day certification period of intensive treatment may be obtained for a person who presents an imminent threat of taking his or her own life under section 5260. Under sections 5350 et seq., a year-long renewable conservatorship may be sought for a person who is gravely-disabled. A person who is a danger to others may be held for renewable periods of 180 days under sections 5300 et seq.

Section 5302 provides that at the time of filing a petition for postcertification treatment, the court must be advised of the right to be represented by an attorney and of his right to demand a jury trial. The court must assist the person in finding an attorney, or if necessary, appoint an attorney if the person is unable to obtain counsel. Section 5302, requires that the court conduct the proceedings "in accordance with constitutional guarantees of due process of law and the procedures required under Section 13 of Article 1 of the Constitution of the State of California."[3]

B. Equal Protection Requires that A Person Facing Commitment Under Section 6500 Must be Advised of the Right to a Jury Trial

The Equal Protection Clause of the Fourteenth Amendment "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." (*City of Cleburne, Texas, et al. v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439 ("*Cleburne*"), quoting *Plyler v. Doe* (1982) 457 U.S. 202, 217.) The right to Equal Protection is also guaranteed by the California Constitution, Article I, section 7. This Court has held that "[t]he concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive

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[3]Probate Code section 1825, subdivision (g), which is incorporated into conservatorship proceedings under section 5350, also requires the court to advise the person that "the proposed conservatee has the right to oppose the proceeding, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal counsel if the proposed conservatee so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel."

like treatment." (*In re Gary W.* (1971) 5 Cal. 3d 296, 303.)

1. People Committed Under Section 6500 are Similarly Situated to Those Committed Due to Mental Disorders

The first prerequisite to a meritorious claim under the equal protection clause is "a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*Cooley v. Superior Court* (*Marentez*) (2002) 29 Cal.4th 228, 253 ("*Marentez*"), quoting *In re Eric J.* (1979) 25 Cal. 3d 522, 530.) The initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." (*Ibid.*, citing *People v. Gibson* (1988) 204 Cal. App. 3d 1425, 1438.)

In *In re Hop, supra*, 29 Cal. 3d 82, 92, this Court considered the rights of a person with a developmental disability who was placed in a state hospital and stated "[n]o other class of adults similarly situated and in need of protective custody may lawfully be placed in a state hospital without a knowing and intelligent waiver of rights, or a request, or a judicial determination that placement is appropriate" (citing *In re Gary W., supra*, 5 Cal. 3d 296, 304-305). This Court compared Hop's situation to that of a proposed conservatee under the Lanterman-Petris-Short Act, and concluded, "[a]s such she is entitled to the same congeries of rights including the right to a jury trial on demand." (*Id.* at 93.)

In *People v. Alvas* (1990) 221 Cal. App. 3d 1459, 1462-1464, the Court of Appeal, Third Appellate District, made a similar finding while determining whether a person's commitment pursuant to a court trial under section 6500 without an advisement and waiver of the right to a jury trial violated Equal Protection. The court stated:

> [W]e cannot conceive of any rational distinction to be made between the class of persons who due to mental disorder constitute a danger or are gravely disabled and the class of persons who pose a similar danger because of their mental retardation. . . . As to each class, liberty of its members is put at risk through no apparent fault of their own, but solely because of mental deficiencies beyond their control."

(*Id.* at 1464.) Similarly, the Court of Appeal, Fourth Appellate District, Division Two has found that for the purpose of Equal Protection "mentally retarded people who have been found incompetent" are similarly situated with "mentally ill people who have been found incompetent." (*People v. Sweeney* (2009) 175 Cal. App. 4th 210, 219.)

In the case at bar, the Court of Appeal concluded there was support for disparate treatment of persons with mental retardation and persons subject to the LPS Act due to perceived differences in cognitive abilities. (Opinion at p. 21.) The court focused on the notion that people with "mental retardation" have significant subaverage general intellectual functioning and limited cognitive abilities not subject to treatment. (Opn. at pp. 20-21, citing *Cramer v. Gillermina R.* (1981) 125 Cal. App, 3d 380, *Heller v. Doe* (1993) 509 U.S. 312.) The court appears to assume that all people with developmental and intellectual abilities possess no cognitive ability to comprehend a jury advisement, and this assumption is without support. However, even a mild degree of "retardation" has been found sufficient to justify commitment under section 6500. (See *e.g., Money v. Krall* (1982) 128 Cal. App. 3d 372.)

Thus, people who face involuntary civil commitment through section 6500 proceedings are similarly situated to people subject to civil commitment through the LPS Act on the basis of a mental disorder, for the purposes of being advised of the right to a jury trial.

2. Strict Scrutiny Applies

"A law is subject to strict scrutiny if it targets a suspect class or burdens the exercise of a fundamental right." (*United States v. Hancock* (2000) 231 F.3d 557, 565, citing *Heller v. Doe* (1993) 509 U.S. 312, 319, see also *Clark v. Jeter* (1988) 486 U.S. 456, 461, The United States Supreme Court has repeatedly determined that civil commitment to an institution necessarily entails a "massive curtailment of liberty" affecting "fundamental rights" which include the "right to bodily integrity." (*Humphrey v. Cady* (1972) 405 U.S. 504, 509 *Baxstrom v. Herold* (1966) 383 U.S. 107, 113, *Parham v. J.R.* (1979) 442 U.S. 584, 626.) California Courts have recognized that "[s]trict scrutiny is the appropriate standard against which to measure claims of disparate treatment in civil commitment." (*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 171, fn. 8; *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1217; *People v. Green* (2000) 79 Cal.App.4th 921, 924.) "Accordingly, the state must establish both that it has a 'compelling interest' which justifies the challenged procedure and that the distinctions drawn by the procedure are necessary to further that interest." (*In re Moye* (1978) 22 Cal.3d 457, 465.) However, even under the less stringent rational basis test, there is no justification for treating people alleged to be mentally retarded differently than those subject to involuntary commitment for mental disorder.

3. There is No Justification for Disparate Treatment of People Subject to Commitment Under Section 6500.

In *In re Hop, supra*, 29 Cal. 3d. 82, 93, this Court stated:

> In justifying disparate treatment of the developmentally disabled, we are unable to substitute for constitutional

> safeguards the admitted good intent both of the state and of those treating the developmentally disabled. . . . Neither the benevolent intent of the Legislature, nor the force of the legislative directive mandating the least restrictive placements for the developmentally disabled (see e.g. §§ 4418.5, 4502, 6509) renders constitutional the legislative scheme which denies them the procedural safeguards of a hearing which is uniformly extended to other potential wards.
>
> Similarly, the Court of Appeal in *Alvas* stated:
>
> [N]o compelling reason exists for the disparate treatment in involuntary commitments between the two classes by providing those alleged to come within the LPS Act with the procedural safeguard of advisement of the right to a jury trial while denying it to those defendants charged with dangerous mental retardation. We conclude that equal protection requires that a defendant in a section 6500 proceeding be advised of his right to a jury trial.

(*People v. Alvas, supra*, 221 Cal. App. 3d 1459, 1464.)

If there is no justification for denying a person with alleged dangerous due to "mental retardation" the right to a jury trial, is stands to reason that there is no justification for disparate treatment in terms of being *advised* of the right to a jury trial.

The Court of Appeal in the instant case concluded there was support for different treatment of persons with mental retardation and persons subject to the LPS Act because of limitations in their cognitive abilities. (Opinion at p. 21.) Unfortunately, the Court of Appeal's beliefs are outdated and do not reflect the significant strides of people identified as having intellectual and developmental disabilities. A recent publication of the United States Equal Employment Opportunity Commission (EEOC) noted that intellectual disabilities will "vary in degree and effect from person to person, just as individual capabilities vary considerably among

people who do not have an intellectual disability." (EEOC, Questions and Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (2008), p. 1.)[4]

The EEOC cautions that "[p]eople should not make generalizations about the needs of persons with intellectual disabilities" and recognizes that such individuals should not be excluded because of "persistent, but unfounded myths, fears and stereotypes." (*Id.* at pp. 1-2.) According to the American Association of Intellectual and Developmental Disabilities (AAIDD), "People with intellectual and/or developmental developmental disabilities have the same right to self- determination as all people," although they "have not had the opportunity or the support to control choices and decisions about important aspects of their lives." (Self-Determination Policy Statement of the AAIDD.)[5] It is the result of this lack of opportunity and not the lack of ability that "they are often overprotected and involuntarily segregated." (*Ibid.*)

There may be some individuals who would be unable due to disability to comprehend and act upon the information contained in an

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[4]According to the EEOC, "[a]n individual is considered to have an intellectual disability when: (1) the person's intellectual functioning level (IQ) is below 70-75; (2) the person has significant limitations in adaptive skill areas as expressed in conceptual, social, and practical adaptive skills; and (3) the disability originated before the age of 18.(5) "Adaptive skill areas" refers to basic skills needed for everyday life. They include communication, self-care, home living, social skills, leisure, health and safety, self-direction, functional academics (reading, writing, basic math), and work." (EEOC: Questions and Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (2008), p. 1; http://www.eeoc.gov/facts/intellectual_ disabilities.html.)

[5]The AAIDD, formerly known as the American Association on Mental Retardation (AAMR), has a website at http://www.aamr.org/content_163.cfm?navID=31.

advisement of the right to a jury trial. The *Alvas* court addressed this contingency stating, "[i]f the person is so mentally retarded as to be unable to comprehend the advisal of the right [to a jury trial], the record should affirmatively reflect that fact . . . [with that determination being] made by the trial judge based on competent evidence." (*People v. Alvas, supra*, 221 Cal. App. 3d 1459, 1465, quoting *In re Watson* (1979) 91 Cal. App. 3d 455, 462.) However, there is no justification for depriving *all* people identified with having an intellectual or developmental disability from the opportunity to learn of the right to a jury trial, and to act on the information in accordance with their individual abilities.

Based on all the above, a classification of people subject to commitment under section 6500 denying them the right to be advised of the right to a jury trial is without justification and violates the Equal Protection Clauses of the federal and state constitutions. (U.S. Const. Amend. XIV, Cal. Const. Art. 1, secs. 7, 15.)

II. DUE PROCESS REQUIRES THAT A PERSON FACING INVOLUNTARY COMMITMENT UNDER SECTION 6500 BE ADVISED OF THE RIGHT TO A JURY TRIAL

Under the California and federal constitutions, no person may be deprived of 'life, liberty, or property without due process of law,' as assured by both the federal Constitution (U.S. Const., Amends. V, XIV, Cal. Const., art. I, §§ 7, 15.) The United States Supreme Court and this Honorable Court have repeatedly recognized that civil commitment constitutes a significant deprivation of liberty that requires due process protections. (See e.g. *Addington v. Texas* (1979) 441 U.S. 418, 425; *In re Gault* (1967) 387 U.S. 1, 50, *People v. Hurtado* (2002) 28 Cal.4th 1179, *Conservatorship of Roulet* (1979) 23 Cal. 3d 219, 225.) The destruction of an individual's

personal freedoms effected by civil commitment is "scarcely less total than that effected by confinement in a penitentiary," and entails a "massive curtailment of liberty" in the constitutional sense.'" (*Ibid.*) "It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" (*In re Gault, supra,* 387 U.S. 1, 50.)

In *Conservatorship of Roulet, supra*, 23 Cal. 3d 219, 235, this Court held that the due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict by applied in conservatorship proceedings under the LPS Act. In *In re Hop, supra*, 29 Cal. 3d 82, 89, this Court followed the reasoning of *Roulet* and stated that "any confinement in a state hospital for the developmentally disabled must invoke the same standard." In *People v. Alvas, supra*, 221 Cal. App. 3d 1459, 1464-1465, the court of appeal echoed these principles in concluding that Due Process requires that a person subject to commitment under section 6500 must be informed of the right to a jury trial. The court observed state and federal authority

> makes clear that the focus is on the resultant deprivation of liberty, rather than upon the procedural mechanism, be it designated civil or criminal, used in achieving that result. We think it is beyond dispute that the right to a jury trial in adult involuntary commitment proceedings is a right of constitutional dimension. Where "a constitutional right exists, it must be observed unless waived and . . . a wavier implies, among other things, a knowledge that the right existed." [Citations]. Consequently, a defendant proceeded against under section 6500 must be advised of his right to a jury trial.

In *Conservatorship of John L.* (2010) 48 Cal. 4th 131, this Court addressed the issue of Due Process in the context of involuntary commitment under conservatorship pursuant to the LPS Act. The specific

issue in *John L.* was whether an attorney for a proposed conservatee may communicate to the court the person's lack of willingness to attend the proceedings and waive the person's presence without requiring the individual to make personal waiver in open court. (*Id.* at 139.) Applying the Due Process clause in this context, this Court considered the private interests at stake, the state and public interests, and the risk that the procedure or its absence will lead to erroneous decisions. (*Id.* at 150.) Application of the same factors in the case at bar compels the conclusion that Due Process requires that a person facing commitment under sections 6500 must be advised of the right to a jury trial before the person can be denied that right.

As for the first factor, the *John L.* court stated, "[t]here can be no doubt that '[t]he liberty interests at stake in [an LPS] conservatorship proceeding are significant." (*Conservatorship of John L., supra,* 48 Cal. 4th at 150.) Similarly, for people facing commitment under section 6500, there is no doubt that the liberty interests are significant. The case at bar especially demonstrates this fact because the facility where appellant was placed under sections 6509, was a mental institution.

The next factor this Court considered was the public interest weighed against the significant private interests. (*Conservatorship of John L., supra,* 48 Cal. 4th at 151.) Applying this factor, this Court determined that several layers of protections had been built into the system to vigilantly guard against erroneous conclusions, including a "carefully calibrated series of temporary detentions for evaluation and treatment" before the person could be subject to year-long commitment. (*Ibid.*, quoting *Conservatorship of Ben C.* (2007) 40 Cal. 4th 529, 537.) In contrast, there are no similar layers of calibrated protections involved in commitment under section 6500.

Even more significantly, this Court cited numerous notice requirements involved in LPS conservatorship cases, including the specific requirement that the person be advised of the right to demand a jury trial. (*Id.* at 32.)

Finally, in *John L.*, this Court considered the risk of erroneous decisions based on the absence of a personal, in-court waiver of the right to be present when the attorney has made representations that he person did not wish to attend the hearing. In finding no Due Process violation, this Court considered the fact that the person in LPS proceedings have the pre-hearing notice. (*Conservatorship of John L.*, supra, 48 Cal. 4th 131, 154.) Here, it is the very absence of the pre-hearing notice of the right to a jury trial that is the issue. A "cornerstone" of the structure of due process of law is that the adjudication of a significant right must be "preceded by notice and opportunity for hearing appropriate to the nature of the case." (*Mullane v. Central Hanover Bank & Tr. Co.* (1950) 339 U.S. 306, 313.) The *Alvas* court correctly determined that where "a constitutional right exits, it must be observed unless waived and . . . a waiver implies, among other things, a *knowledge* that the right existed." (*People v. Alvas, supra,* 221 Cal. App. 3d 1459, 1465 (emphasis added). The reasoning of *Alvas* is sound and should be followed.

This Court has not always applied every criminal procedural protection in proceedings involving involuntary commitment. (See i.e., *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005 [exclusionary rule inapplicable in LPS conservatorship proceedings]; *Conservatorship of Ben C.*, (2007) 40 Cal.4th 529, 538 [declining to require *Anders/Wende* procedures in LPS conservatorship appeals].) However, knowledge of the right to a jury trial goes to the very heart of due process. The decision of the Court of Appeal must therefore be reversed.

III. AN EXPRESS WAIVER OF THE RIGHT TO A JURY TRIAL IS REQUIRED

In *People v. Bailie* (2006) 144 Cal. App. 4th 841, 845-846, the court of appeal addressed the issue of whether notice and express waiver were necessary to dispense with a jury trial in section 6500 proceedings. In doing so, the court cited *In re Gary W., supra*, 5 Cal. 3d 296, and *People v. Alvas, supra,* 221 Cal. App. 3d 1459, 1465, observing that "the focus is on the resultant deprivation of liberty, rather than upon the procedural mechanism, be it designated civil or criminal, used in achieving that result. In *Bailie,* County Counsel argued that because the case was civil, Code of Civil Procedure section 631, subdivision (d)(4) applied, which provides that a jury may be waived "[b]y failing to announce that a jury is required, at the time the cause is first set for trial." (*People v. Bailie, supra,* 144 Cal. App. 4th 841, 846.) Rejecting this argument, court stated that to the extent the right to notice of a jury trial rests on the federal equal protection clause which "proscribes the 'disparate treatment in involuntary commitments between the two classes [LPS commitments and section 6500 commitments]' the minimum state standards for jury trial waiver in civil cases are not determinative." (*Ibid.*, quoting *Alvas, supra*, at 1464.)

Section 5300, et seq., which authorizes extended commitment of people who may be dangerous due to a mental disorder requires that the court conduct the proceedings "in accordance with constitutional guarantees of due process of law and the procedures required under Section 13 of Article 1 of the Constitution of the State of California." (Section 5302.) It is well-established that due process requires voluntary and intelligent waiver of the right to trial by jury. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243 and footnote 5; *In re Tahl* (1969) 1 Cal. 3d 122, 132.) People

subject to commitment under section 6500 are similarly situated to those committed under the LPS Act through section 5300, and therefore, the same protection is necessary.

There may be situations in which a person is so disabled that the person cannot comprehend a jury advisement or act on it intelligently. The *Alvas* court provides sound guidance in such a contingency, stating: "[i]f the person is so mentally retarded as to be unable to comprehend the advisal of the right [to a jury trial], the record should affirmatively reflect that fact . . . [with that determination being] made by the trial judge based on competent evidence." (*People v. Alvas, supra*, 221 Cal. App. 3d 1459, 1465, quoting *In re Watson* (1979) 91 Cal. App. 3d 455, 462.) Then, and only then, should the matter of waiver be assumed by counsel on the person's behalf.

In *Conservatorship of Mary K.* (1991) 234 Cal. App. 3d 265, 271-272, the court of appeal upheld an order appointing a LPS conservator after the person's counsel waived both a jury trial and the court's advisement to the person of the right to a jury trial under in Probate Code section 1828, without a personal, explicit waiver by the person. The *Mary K.* decision is not sound and should be overruled. Section 1828, subdivision (a) provides in relevant part: "the court shall inform the proposed conservatee all of the following: . . . (6) [t]he proposed conservatee has the right to oppose the proceeding, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal counsel if the proposed conservatee so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel." Given that it is the "court" who must inform the "proposed conservatee" of the right to a jury trial among other rights including the right to choose counsel, it defies logic as well as the plain language of the statute and the person's constitutional rights to

allow anyone, including an attorney, to dispense with an advisement specifically intended for the person.

In *Conservatorship of Roulet, supra*, 23 Cal. 3d 219, 235, this Court took into account a variety factors in determining the procedural protections necessary in LPS commitment proceedings. Those factors included the factfinder's deference to psychiatric testimony and "the paternalistic attitude of some appointed counsel." (*Ibid.*) The *Roulet* court cited a study which suggested that [t]he lawyers did not consider themselves advocates in an adversary process in which conservatorship was to be avoided." (*Ibid.*) It has been over thirty years since *Roulet* was decided, and this Court in *John L.* recently stated in that in the absence of any contrary indication, the superior court may assume that an attorney is competent and fully communicates with the proposed conservatee about the entire proceeding. (*In re John L., supra*, 48 Cal. 4th 131, 156.) However, there are some indications that concerns the *Roulet* court had about some attitudes of counsel representing people in commitment proceedings may still be valid.

In *People v. Wilkinson* (June 9, 2020) 2010 Cal. App. Lexis 857, the court of appeal found it necessary to reverse a commitment under section 6500, because counsel had waived the person's presence without indication he had even spoken to her about it. In *People v. Fisher* (2009) 172 Cal. App. 4th 1006, 1011, counsel allowed the trial court to hear the testimony of the state's witnesses in an involuntary medication hearing without the person being present, in violation of the person's right to Due Process. In *Conservatorship of Christopher A.* (2006) 139 Cal. App. 4th 604, 612-613, an attorney stipulated to a judgment establishing an LPS conservatorship without any indication on the record that the person consented to the terms of the judgment. For these reasons, it is crucial that strict protections of a

person's right to advisement of the right to a jury trial and to personally exercise that right in civil commitment hearing be upheld.

IV. FAILURE TO ADVISE A PERSON OF THE RIGHT TO A JURY TRIAL ON THE ISSUE OF INVOLUNTARY COMMITMENT AND PROCEEDING WITHOUT A WAIVER IS A STRUCTURAL ERROR REQUIRING REVERSAL.

The Court of Appeal determined that even if appellant was constitutionally entitled to a jury trial advisement and to expressly and personally waive that right, the error was not structural and any error was harmless. (Opinion at p. 21.) The Court was not correct. In *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308, the United States Supreme court described "trial errors" as those that occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt." By contrast, "structural errors" are "structural defects in the constitution of the trial mechanism . . . affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Id.* at pp. 309-310.) Structural errors are reversible per se because their effect cannot be "'quantitatively assessed' [citation] by a comparison to other evidence admitted at trial." (*People v. Flood* (1998) 18 Cal.4th. 470, 510, (conc.opn.Werdegar, J.).) Because appellant was denied her right to a right to a jury trial, derived from constitutional principles, the judgment is reversible per se.

Furthermore, even if harmless error analysis applied, reversal would be required because as addressed in the recent *Sweeney* decision, in order to commit a person under section 6500, it must be proven, among other things,

that "the person ... has serious difficulty in controlling his behavior *because* of the mental retardation" and that Due Process requires that these elements be determined by a jury. (*People v. Sweeney, supra*, 175 Cal. App. 4th 210, 225-226 (emphasis added).) The question of causation was a key issue in this case, and although the court ultimately rejected arguments that appellant was not dangerous due to "mental retardation," this key issue was not undisputed and should have been determined by a jury. (RT 61-67.)

CONCLUSION

For all the reasons stated above, appellant respectfully requests that the decision of the Court of Appeal be reversed.

Dated: June 28, 2010

Respectfully submitted,

/s/

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CHRISTINE BARRETT

CERTIFICATE OF WORD COUNT

I hereby certify that the Appellant's Opening Brief on the Merits contains 5771 words according to the word count of the WordPerfect computer program used to prepare the document.

Dated: June 28, 2010

JEAN MATULIS
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PROOF OF SERVICE BY MAIL

People v. Christine Barrett No. S180612
California Court of Appeal, Sixth Appellate District, No. H034154
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I am over eighteen years old, not a party to this action, and a member of the State Bar of California. My business address is P.O. Box 1237, Cambria, CA 93428. On June 28, 2010, I served the following:

Appellant's Opening Brief on the Merits

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I declare under penalty of perjury under the laws of California that the foregoing is true and correct. Executed at Cambria, CA on June 28, 2010.

/S/
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