IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLES HUDEC,	)	
	)	No. S213003
Petitioner,	)	
	)	Court of Appeal
vs.	)	No. G047465
	)	
SUPERIOR COURT OF ORANGE COUNTY,	)	(Superior Court Case No. C-47710)
	)	
Respondent,	)	
	)	
PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Real Party in Interest.	)	
	)	

OPENING BRIEF ON THE MERITS

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
THE HONORABLE KAZUHARU MAKINO, JUDGE PRESIDING

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ISSUE PRESENTED

Does Penal Code section 1026.5, subdivision (b)(7), give a person who was committed after being found not guilty of criminal charges by reason of insanity the right to refuse to testify in a proceeding to extend that civil commitment?

BACKGROUND

Defendant, a paranoid schizophrenic, killed his father in May 1981 after hearing voices telling him he had to commit the killing to please God and avoid becoming homosexual. (*Hudec v. Superior Court* (Jul. 26, 2013, G047465) ___ Cal.App.4th ___ [slip opn. at p. 2].)[1] The parties stipulated defendant was not guilty by reason of insanity and he was committed. (*Ibid.*)

[1] Further citations to the opinion will be to the slip opinion.

In March 2012, the People filed the latest petition to extend defendant's commitment to Patton Hospital under section Penal Code section 1026.5. (*Hudec v. Superior Court, supra,* G047465, slip opn. at p. 2.) The trial court granted the People's in limine motion to compel defendant's testimony at trial. (*Hudec v. Superior Court, supra,* G047465, slip opn. at pp. 2-3.) The Court of Appeal granted defendant's petition for a writ of prohibition or mandate. (*Id.* at p. 19.) This Court granted the People's petition for review.

ARGUMENT

A. PENAL CODE SECTION 1026.5, SUBDIVISION (B)(7) CODIFIES THE APPLICATION OF CONSTITUTIONAL PROCEDURAL RIGHTS MANDATED BY JUDICIAL DECISION

A defendant committed to a state hospital after being found not guilty by reason of insanity ("NGI") may not be kept in custody longer than the maximum state prison term applicable to the underlying offense. (Pen. Code, § 1026.5, subd. (a)(1).)[2] The district attorney may petition to extend the commitment where the person "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." (Pen. Code, § 1026.5, subd. (b)(1).)

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[2] All further statutory references are to the Penal Code unless otherwise noted.

Commitment proceedings under section 1026.5 are civil in nature, not criminal, and neither the federal nor the state constitutional right against self-incrimination applies to such proceedings. (*Allen v. Illinois* (1986) 478 U.S. 364, 374-375 [92 L.Ed.2d 296, 106 S.Ct. 2988]; *People v. Allen* (2008) 44 Cal.4th 843, 860; *Cramer v. Tyars* (1979) 23 Cal.3d 131, 134.) Section 1026.5, subdivision (b)(7) ("1026.5(b)(7)") provides, however:

> The person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees.

In our case, the court held section 1026.5(b)(7) confers upon the defendant the right to refuse to testify at his civil commitment proceeding. (*Hudec v. Superior Court, supra,* G047465, slip opn. at p. 14.) The court found section 1026.5(b)(7)'s language confers *all*

> "[*T*]*he* rights guaranteed under the federal and state constitutions *for criminal proceedings*, not "*some* of the rights," or "the due process rights required by judicial decision in commitment extension proceedings."

(*Hudec v. Superior Court, supra*, G047465, slip opn. at p. 15, emphasis in original.)

The court erred. Section 1026.5(b)(7) does not include "all" constitutional rights from criminal proceedings. Caselaw, common sense and legislative developments since section 1026.5(b)(7) was enacted show it

merely codifies the application of constitutional procedural rights mandated by judicial decision.

1. Court of Appeal Decisions Uniformly Hold Penal Code Section 1026.5(b)(7) Does Not Include "All" Constitutional Rights

In *People v. Lopez* (2006) 137 Cal.App.4th 1099, the court found that, in enacting section 1026.5, the Legislature did not intend to provide persons subject to civil commitment proceedings with a broad right to refuse to testify. (*Id.* at pp. 1113-1116.) Rather, as in civil proceedings generally, the person may invoke his right not to answer questions that might incriminate him in a future prosecution, but he may not refuse to testify. (*Id.* at p. 1107.)

The *Lopez* court cited *People v. Henderson* (1981) 117 Cal.App.3d 740, which considered the defendant's claim that he was entitled to the privilege against self-incrimination under former Welfare and Institutions Code section 6316.2, subdivision (e).

As in section 1026.5(b)(7), that section provided,

> The patient shall be entitled to the rights guaranteed under the Federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees.

(Former Welf. & Inst. Code, § 6316.2, subd. (e), repealed by Stats. 1981, ch. 982, § 2.)

In *Henderson*, the court concluded the language did "not extend the protection of the constitutional privileges against self-incrimination to testimonial communications which are not incriminatory." (*People v. Henderson, supra,* 117 Cal.App.3d 740, 748.) Instead, the Legislature merely intended to provide the constitutional protections mandated by judicial decision, i.e., the rights to proof beyond a reasonable doubt and a unanimous verdict, not additional rights such as the privilege against self-incrimination. (*Ibid.*)

The reasoning in *Henderson* was applied ten years later in *People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477. In that case, the court held the double jeopardy prohibitions of the federal and state constitutions do not apply to proceedings under section 1026.5(b)(7). (*People v. Superior Court (Williams), supra*, 233 Cal.App.3d 477, 488.) The court concluded section 1026.5(b)(7),

> [M]erely codifies the application of constitutional protections to extension hearings mandated by judicial decision. It does not extend the protection of constitutional provisions which bear no relevant relationship to the proceedings. [Citation.]

(*People v. Superior Court (Williams), supra*, 233 Cal.App.3d 477, 488.) The court reasoned that,

> [D]ouble jeopardy provisions ... have no meaningful application to extension proceedings [that] are civil in nature, are for the purpose of treatment, not punishment, and are not an adjudication of a criminal act or offense, ...

(*People v. Superior Court (Williams), supra*, 233 Cal.App.3d 477, 488.)

In *People v. Powell* (2004) 114 Cal.App.4th 1153, the court agreed with *Williams* that section 1026.5(b)(7) does not incorporate all constitutional procedural safeguards and held it did not include the right to personally waive jury trial applicable in criminal cases. (*People v. Powell, supra,* 114 Cal.App.4th 1153, 1158-1159.) Common sense dictates that an insane person "should not be able to veto the informed tactical decision of counsel [to waive jury]." (*Id.* at p. 1158.)

In *People v. Haynie* (2004) 116 Cal.App.4th 1224, the court agreed with *Williams* and *Powell* that section 1026.5(b)(7) does not include all possible constitutional rights. (*People v. Haynie, supra,* 116 Cal.App.4th 1224, 1229-1230.) *Haynie* agreed section 1026.5(b)(7) "does not extend the 'protection of constitutional provisions which bear no relevant relationship to the proceedings.'" (*Id.* at p. 1229.)[3]

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[3] The *Haynie* court, however, misunderstood this Court's decision in *Cramer v. Tyars* (1979) 23 Cal.3d 131 and held section 1026.5(b)(7) conferred upon the defendant the right to refuse to testify at his extended commitment hearing. (*People v. Haynie, supra,* 116 Cal.App.4th 1224, 1228-1230.) We discuss *Cramer's* application to our case in section B, below.

Our court's opinion runs contrary to *Lopez*, *Henderson*, *Williams*, *Powell*, and *Haynie*. Those courts correctly determined the language in section 1026.5(b)(7) codifies the application of constitutional rights mandated by judicial decision. It does not include "all" constitutional rights guaranteed in criminal proceedings.

2. The Lower Court's Interpretation of Penal Code Section 1026.5(b)(7) Would Lead to Absurd Results

Our court's opinion runs contrary to a settled principle of statutory construction; namely, a statute's plain language should not be applied where it would lead to absurd consequences. "[T]he fundamental goal of statutory interpretation is to ascertain and carry out the intent of the Legislature. [Citation.]" (*People v. Cruz* (1996) 13 Cal.4th 764, 782.) The Court first examines "the words of the statute[] giving them their usual and ordinary meaning. [Citations.]." (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.)

> "But '[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' [Citations.] Thus '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.] (*People v. Pieters* (1991) 52 Cal.3d 894, 898-899 ....)"

(*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1072, modifications in original.)

Our court's literal interpretation of section 1026.5(b)(7) would produce absurd consequences. In *Powell*, for example, the court noted the absurd consequences that would result from including the constitutional right to personally waive jury trial within section 1026.5(b)(7). "An insane person who is a 'substantial danger of physical harm to others' [citation] should not be able to veto the informed tactical decision of counsel." (*People v. Powell, supra,* 114 Cal.App.4th 1153, 1158.)

In *Powell*, the defendant was twice adjudged insane and state doctors had never indicated he had regained sanity. (*People v. Powell, supra,* 114 Cal.App.4th 1153, 1158.) The court questioned,

> Can such a person intelligently invoke or waive the right to jury trial? Is such a person competent to meaningfully understand who should make the determination of whether his commitment should be extended?

(*Ibid.*) The court concluded, "[c]ommon sense dictates that appellant should not be able to veto his attorney's decision to waive jury." (*Ibid.*; see also *People v. Haynie, supra,* 116 Cal.App.4th 1224, 1229-1230 [citing the *Powell* court's conclusion with approval].)

In *Williams,* the court explained that the double jeopardy bar has no meaningful application to extended commitment proceedings because such proceedings do not adjudicate a criminal offense. (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 488; see also *People v. Juarez* (1986) 184 Cal.App.3d 570, 575 [ex post facto principles have no meaningful application because extended commitment proceedings do not disadvantage defendant in the determination of his criminal guilt].)

In *Henderson* the court found a similar inapplicability concerning the privilege against self-incrimination. The court concluded admitting the patient's statements to hospital staff during routine therapy sessions or daily activity was not proscribed by the privilege against self-incrimination. (*People v. Henderson, supra,* 117 Cal.App.3d 740, 747-748; see also *People v. Beard* (1985) 173 Cal.App.3d 1113, 1118-1119 [privilege against self-incrimination did not apply to statements made during court-ordered psychiatric exams because there was no evidence the questions sought to elicit information that could subject the defendant to criminal prosecution].)

The court's decision in our case leaves no room for common sense. It would mandate absurdity. It is contrary to legislative intent.

3. Legislative Developments Show Penal Code Section 1026.5(b)(7) Codifies Only Those Constitutional Procedural Rights Mandated by Judicial Decision

"[S]ection 1026.5 was enacted in 1979 as emergency legislation in response to this Court's decision in *In re Moye* [(1978) 22 Cal.3d 457]. (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 487, footnote omitted.) Before *Moye*, persons could be held under section 1026 indefinitely. (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 487) In *Moye*, the Court found persons committed under section 1026 were similarly situated to mentally disordered sex offenders ("MDSO") held under Welfare and Institutions Code section 6316. (*In re Moye, supra,* 22 Cal.3d 457, 466.) Because MDSO's commitment terms were limited, this Court held section 1026's indefinite commitment period violated equal protection. (*Id.* at p. 467.) In response, the Legislature quickly added section 1026.5 to provide for a maximum term of commitment and a procedure to extend a defendant's commitment. (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 487.)

In so doing, the Legislature sought to overcome the equal protection problems noted in *Moye* and patterned section 1026.5 after the MDSO statutes. (*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1114.) In pertinent part, section 1026(b)(7) includes identical language to Welfare and Institutions Code section 6316.2, subdivision (e). (*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1114.)

This history is significant in light of the court's decision in *Henderson.* In April 1981, *Henderson* determined Welfare and Institutions Code section 6316.2, subdivision (e) does not include all constitutional rights. (*People v. Henderson, supra,* 117 Cal.App.3d 740, 747-748.) Rather, that section "codifies the application of constitutional protections to MDSO proceedings mandated by judicial decision [citations.]." (*Id.*, at p. 748.) Later that year, the Legislature repealed the MDSO statutes for future offenders – they would be handled under section 2684 – but left the procedures in place to govern those MDSO's convicted before the repeal. (*People v. Superior Court (Martin)* (1982) 132 Cal.App.3d 658, 662, citing Stats. 1981, ch. 928, §§ 3-4.) The

Legislature did not, however, amend Welfare and Institutions Code section 6316.2, subdivision (e) to countermand the court's interpretation in *Henderson*.[4] When

> "'[a] statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it.' .... [Citation.]"

(*People v. Meloney* (2003) 30 Cal.4th 1145, 1161.)

Section 1026.5 has a similar history. In 1991, *Williams* noted the relationship between section 1026.5 and the MDSO statutes and, citing *Henderson*, concluded identical language in section 1026.5(b)(7) "merely codifies the application of constitutional protections ... mandated by judicial decision." (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 488.)

> [T]wo years after *Williams* was decided, the Legislature amended section 1026.5 without modifying its language to overrule *Williams* or to state explicitly that an NGI committee has the criminal defendant's privilege not to testify.

(*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1115.) It must be presumed

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[4] Senate Bill 278, which effected this change, was introduced on February 12, 1981. (Sen. Bill No. 278 (1981-1982 Reg. Sess.) as introduced Feb. 12, 1981.) As it worked its way through the Senate and the Assembly between April 20, 1981 and its approval by the Governor on September 27, 1981, it was read, amended and re-read multiple times. (Sen. Bill No. 278, approved by Governor, Sept. 27, 1981, Sen. Final Hist. (1981-1982 Reg. Sess.) p. 197.)

the Legislature approves of the judicial construction. (*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1115, citing *People v. Meloney, supra,* 30 Cal.4th 1145, 1161.)

The history of Welfare and Institutions Code section 1801.5 further shows the Legislature's acceptance of the judicial construction of section 1026.5(b)(7). Welfare and Institutions Code section 1800 et seq. governs minors' extended commitment to the California Youth Authority. (*In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1499.) In part, Welfare and Institutions Code section 1801.5 provides "[t]he person shall be entitled to *all* rights guaranteed under the federal and state constitutions in criminal proceedings." (Welf. & Inst. Code, § 1801.5, emphasis added.)

In *Anthony C.*, the court contrasted Welfare and Institutions Code section 1801.5 with the MDSO statute and section 1026.5(b)(7). (*In re Anthony C., supra,* 138 Cal.App.4th 1493, 1512-1513.) The court noted that Welfare and Institutions Code section 1801.5 differs from the other statutes in that the Legislature included the word "all" in Welfare and Institutions Code section 1801.5. (*In re Anthony C., supra,* 138 Cal.App.4th 1493, 1513.) The court also noted that when the Legislature added the pertinent language to Welfare and Institutions Code section 1801.5 in 1984,

> [T]he Legislature was not writing on a blank slate. The language in former section 6316.2, subdivision (e), [the MDSO statute], had been in effect for over five years and had been construed by *Henderson* three years earlier.

(*In re Anthony C., supra,* 138 Cal.App.4th 1493, 1513.) In addition, "[t]he same language was used in section 1026.5 when it was added to the Penal Code in 1979. [Citation.]" (*In re Anthony C., supra,* 138 Cal.App.4th 1493, 1513.)

In light of this history, the court concluded,

> Had the Legislature intended to grant the same constitutional rights in section 1801.5 as it granted in former section 6316.2 and Penal Code section 1026.5, it would have used the same language.

(*In re Anthony C., supra,* 138 Cal.App.4th 1493, 1513; see also *Joshua D. v. Superior Court* (2007) 157 Cal.App.4th 549, 561 [distinguishing the judicial interpretations in *Henderson* and *Williams*, and their progeny, because neither the MDSO statute, nor section 1026.5(b)(7), "included the word 'all,' and that makes all the difference[]"].)

In other words, the Legislature did not intend to include "all" constitutional rights in section 1026.5(b)(7) when it granted civil committees "the rights guaranteed under the federal and State Constitutions for criminal proceedings." This language merely codifies the application of constitutional procedural rights mandated by judicial decision.

B. THE RIGHT NOT TO TESTIFY BEARS NO RELEVANT RELATIONSHIP TO PENAL CODE SECTION 1026.5's COMMITMENT PROCEEDINGS

Having shown section 1026.5(b)(7) does not include all constitutional rights for criminal proceedings, the remaining issue is whether it includes the right to refuse to testify. In *Williams*, the court determined section 1026.5 "does not extend the protection of constitutional provisions which bear no relevant relationship to the proceedings. [Citation.]" (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 488.) The courts in *Lopez* and *Haynie* agreed. (*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1115; *People v. Haynie, supra,* 116 Cal.App.4th 1224, 1229.)

The court in *Lopez* relied upon this Court's decision in *Cramer* to conclude the right to refuse to testify bears no relevant relationship to civil commitment proceedings under section 1026.5. (*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1115.) The court's reliance upon *Cramer* was sound.

In *Cramer*, this Court held there is no constitutional right not to testify at a civil commitment proceeding for a mentally impaired person. (*Cramer v. Tyars, supra*, 23 Cal.3d 131, 137.) The right not to testify was designed "to assure that the *criminal* justice system remains accusatorial, not inquisitorial. [Citations.]" (*Id.* at pp. 137-138, emphasis in original.) It bears no relevant relationship to civil commitment proceedings. (*Ibid.*)[5] Applying the privilege to a civil commitment proceeding "would contravene both the language and purpose of the privilege." (*Cramer v. Tyars, supra*, 23 Cal.3d 131, 138.)[6]

On the other hand, the ability to hear and observe the person's testimony in a civil commitment hearing is particularly helpful.

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[5] The defendant, of course, maintains his right not to give evidence that would tend to incriminate him in any criminal activity and which could subject him to criminal prosecution. (*Cramer v. Tyars, supra,* 23 Cal.3d 131, 138.)

[6] Seven years after this Court's statement in *Cramer*, the United States Supreme Court echoed a similar opinion in *Allen*. The court reiterated that "[t]he privilege against self-incrimination ... is not designed to enhance the reliability of the factfinding determination; ...." (*Allen v. Illinois, supra,* 478 U.S. 364, 375, citation omitted.) The court also noted

> [T]he State takes the quite plausible view that denying the evaluating psychiatrist the opportunity to question persons alleged to be sexually dangerous would *decrease* the reliability of a finding of sexual dangerousness.

(*Id.* at pp. 374-375, emphasis in original.)

> Reason and common sense suggest that it is appropriate ... that a jury be permitted fully to observe the person sought to be committed, and to hear him speak and respond in order that it may make an informed judgment as to the level of his mental and intellectual functioning.

(*Cramer v. Tyars, supra,* 23 Cal.3d 131, 139.)

> Observation of
>
> [S]uch evidence may be analogized to the disclosure of physical as opposed to testimonial evidence and may in fact be the most reliable proof and probative indicator of the person's present mental condition. [Citations.]

(*Cramer v. Tyars, supra,* 23 Cal.3d 131, 139.)

The same is true in our case. A person's mental condition is squarely at issue in extended commitment proceedings under section 1026.5. The jury or judge must decide whether the person "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." (Pen. Code, § 1026.5, subd. (b)(1).) They should be permitted to fully observe him, and to hear him speak and respond to questions. Such observations constitute reliable proof and a probative indicator of his present mental condition. The trial court correctly determined section 1026.5(b)(7) does not include the right to refuse to testify during the civil commitment proceeding.

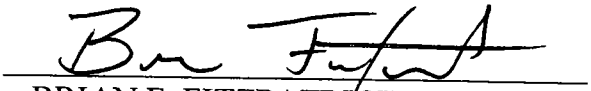
CONCLUSION

For the foregoing reasons, the People respectfully request this Court reverse the Court of Appeal's order granting defendant's petition for a writ of mandate/prohibition and direct the Court of Appeal to issue a new order denying said petition.

Dated this 22nd day of November, 2013.

Respectfully submitted,

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

BY: 

BRIAN F. FITZPATRICK
DEPUTY DISTRICT ATTORNEY

CERTIFICATE OF WORD COUNT

[California Rules of Court, Rule 8.204(c)]

The text of the Opening Brief on the Merits consists of 3,360 words as counted by the word-processing program used to generate this brief.

Dated this 22nd day of November, 2013.

Respectfully submitted,

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

BY: _____
BRIAN F. FITZPATRICK
DEPUTY DISTRICT ATTORNEY

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

RE: PEOPLE vs. CHARLES HUDEC
SUPREME COURT CASE NO. S213003; DCA COURT CASE NO. G047465
SUPERIOR COURT CASE NO. C-47710

I am a citizen of the United States; I am over the age of eighteen years and not a party to the within entitled action; my business address is: Office of the District Attorney, County of Orange, 401 Civic Center Drive West Santa Ana, California 92701.

On, November 22, 2013, I served the within **OPENING BRIEF ON THE MERITS** on interested parties in said action by placing a true copy thereof enclosed in a sealed envelope, in the United States mail at Santa Ana, California, that same day, in the ordinary course of business, postage thereon fully prepaid, addressed as follows:

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DISTRICT COURT OF APPEAL
FOURTH APPELLATE DISTRICT,
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ORANGE COUNTY SUPERIOR COURT
CENTRAL JUSTICE CENTER
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I declare under penalty of perjury that the foregoing is true and correct.
Executed on November 22, 2013, at Santa Ana, California.

Lisa Gomez
ATTORNEY CLERK II