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**

Second Appellate District, Division Three No. B198550
Los Angeles County Superior Court, No. ZM008445
The Honorable Marcelita Haynes, Judge

Real Party's Opening Brief on the Merits

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARDELL MOORE,	) **No. S17463**
	)
Petitioner,	) (LASC No.
	) ZM008445)
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.	)
	)

ISSUES PRESENTED FOR REVIEW

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

STATEMENT OF THE CASE AND FACTS

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 Sexually Violent Predator Act[1] and ruled the due process rights of the SVP respondent (Moore) are 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 sought Review of that decision in a Petition which was granted on September 17, 2009. This brief is submitted on the merits in support of reversing that opinion.

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]

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1. Sexually Violent Predator Act, hereafter SVPA.

2. Penal Code Section 1368 refers to criminal actions which are pending. The term "actions" has consistently been interpreted to refer to

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 occur prior to judgment and sentence." (*Juarez v. Superior Court* (1987) 196 Cal.App.3d 928, 931 [242 Cal.Rptr. 192].) 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

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(continued . . .)
charges. (*In re Varnell* (2003) 30 Cal.4th 1132, 1137.)

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 clear language, section 1368 only applies if criminal charges are pending? Would he be returned to adjudicate the SVP petition if he regains his competency?

The finding by the court in *Moore* erroneously expands the holding beyond the rationale used by the Supreme Court in *People v. Allen* (2008) 44 Cal.4th 843. This Court concluded that the SVP had a right to testify at the SVP trial, however included in that analysis is a citation to *In Re Waite's Guardianship* (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 result in *Moore* attempts to create competency proceedings without consideration of the consequences to the SVP process or to the SVP himself. *Moore* attempts to create a canopy covering all SVP proceedings which distorts existing Penal Code section 1368 proceedings.

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 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. 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.

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.) 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].)

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 p. 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 present 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 a different level of security assurance. Conservatorship under the Lanterman-Petris-Short Act was designed for the "gravely disabled" and does not require a 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.)

In the *Terhune* case discussed above, the subject of the detention in that case was a man named Whitley who was due to be released on parole. A SVP petition was filed alleging him to be a Sexual Predator and dismissed. In an attempt to prevent his release, the Parole Board found him to be in violation of parole and maintained him in custody. The Court analyzed the comprehensive, exclusive legislative approach to addressing mental illness among inmates.

> In 1986, the Legislature enacted the mentally disordered offender law (MDO Law) (Pen. Code, § 2960 et seq.), which is intended to protect the public from certain prisoners with dangerous, treatable mental disorders and to provide treatment for those prisoners. (Pen. Code, § 2960; see People v. Superior Court (Myers) (1996) 50 Cal. App. 4th 826, 830 [58

Cal. Rptr. 2d 32].) As amended in 1989, the MDO Law requires certain mentally disordered prisoners who have committed specified violent crimes to submit to continued mental health treatment after their release on parole. A prospective parolee (a) who has a severe mental disorder that is not in remission or cannot be kept in remission without treatment, (b) whose disorder was a cause of or an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison, (c) who has been in treatment for the disorder for 90 days or more within the year before the prisoner's parole or release, and (d) who has been certified by a designated mental health professional to represent a substantial danger of physical harm to others by reason of his disorder, must be treated by the Department of Mental Health as a condition of parole. (Pen. Code, § 2962, subds. (a)-(d).) The treatment must be inpatient unless that Department certifies to the Board that the parolee can be safely and effectively treated as an outpatient. (Pen. Code, § 2964, subd. (a).)

The MDO Law affords the prisoner a number of procedural safeguards. For instance, the prisoner is entitled to an examination by two appointed independent mental health professionals and a hearing before the Board on whether he or she meets the requirements for mandatory treatment. The prisoner who disagrees with the Board's determination may petition for a civil hearing on the question, and is entitled to representation by appointed counsel and to a jury trial with a unanimous verdict based on proof beyond a reasonable doubt. (Pen. Code, § 2966, subds. (a), (b).) At the end of the prisoner's parole period, if the severe mental disorder is not in remission or cannot be kept in remission without treatment, the district attorney may petition for continued involuntary treatment. As with the initial commitment, the prisoner is entitled to a civil hearing on the question. (Pen. Code, §2970, 2972.)

Involuntary civil commitment of a mentally disordered inmate may also be sought under the Lanterman-Petris-Short Act (LPS Act) (Welf. & Inst. Code, § 5000 et seq.). The LPS Act establishes procedures for the involuntary treatment of persons, who, by reason of a mental disorder, are dangerous to

> others or to themselves, or who are gravely disabled. Such persons may be taken into custody for 72-hour treatment (Welf. & Inst. Code, § 5150), detained for treatment for an additional 14 days (Welf. & Inst. Code, § 5250, 5256.6), and confined for up to 180 days of additional treatment, provided certain findings are made and procedures followed. When a petition is filed seeking that extended commitment, the individual is entitled to a jury trial and representation by appointed counsel. (Welf. & Inst. Code, § 5300- 5303.1.) The confinement may be extended for another 180 days by means of a further petition. (Welf. & Inst. Code, § 5304.)
>
> The MDO Law itself makes reference to the LPS Act as an option, stating, "Before releasing any inmate or terminating supervision of any parolee who is a danger to self or others, or gravely disabled as a result of mental disorder and who does not come within the provisions of Section 2962, the Director of Corrections may, upon probable cause, place, or cause to be placed, the person in a state hospital pursuant to the Lanterman-Petris-Short Act . . . ." (Pen. Code, § 2974.)
>
> Finally, a third statutory scheme dealing specifically with potentially dangerous mentally ill inmates in need of treatment is the SVP Act, which we have already described in considerable detail.

(*Terhune v. Superior Court, supra*, 65 Cal.App.4th at 876-878.)

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 2960 et seq. 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.

> "[T]he 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." *Id.*, 441 U.S. at 429 (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. 107 Ill. 2d, at 105, 89 Ill.Dec. at 954, 481 N. E. 2d, at 697.

(Allen v. Illinois, supra, 478 U.S. at p. 367, emphasis 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. (*People v. 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 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.*)

The other due process factors are discussed below.

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 an SVP 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)

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?

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3. Because the defendant faces criminal charges, he is entitled to a

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 ay 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 continue 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.

(continued . . .)
second preliminary hearing after restoration of competence.

(*Jackson v. Indiana* (1972) 406 U.S. 715, 740-741 [92 S.Ct. 1845, 32 L.Ed.2d 435].)

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 pp. 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 create an even greater backlog. (See Pen. Code, §

1369.1, emergency legislation which attempted to ameliorate the backlog by allowing treatment in county jails.) As in the case of *People v. Angeletakis* (1992) 5 Cal.App.4th 963, which was mentioned in *Moore*, this is not a criminal proceeding, Factual determinations can be made fairly without the respondent being competent. The common sense approach in *Angeletakis* was not discarded 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 not determinative or 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. If the incompetent person is deemed to qualify as an SVP, he could receive concurrent treatment for incompetence and the sexual disorder since there is no basis to believe the treatments are mutually exclusive. If competency is restored, the SVP will not have suffered the interruption of treatment for the sexual disorder and the ultimate outcome of conditional release can be attained. (Welf. & Inst. Code, §§ 6606, subdivision (a) and 6607.)

IV

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

There are five states that have addressed the identical issue that Moore alleges in his petition and those states have ruled against his position in published decisions. The Supreme Courts of Texas, Iowa, and Massachusetts have ruled that an "incompetent" person can be tried and committed as an SVP. (*Commonwealth v. Nieves* (Mass. 2006) 846 N.E.2d 379; *In re Detention of Cubbage* (Iowa 2003) 671 N.W.2d 442,

443-445; *In re Commitment of Fisher* (Tex. 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 and Washington, 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* (Mo.App. 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 and *State v. Ransleben* (Wa.App. 2006) 144 P.3d 397.) 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. Several other states' SVP statutes specifically include incompetent persons whose guilt was never adjudicated.

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

Massachusetts

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*, 846 N.E.2d at pp. 381-382.) 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. (*Ibid.*) 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." (*Commonwealth v. Nieves*, *supra*, 846 N.E.2d at p. 385.) "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." (*Ibid.*)

The Court found that the SVP's due process rights were protected and satisfied by "the appointment of counsel." (*Commonwealth v. Nieves*, *supra*, 846 N.E.2d at p. 385.) 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." (*Id.* at p. 386.)

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." (*In re Detention of Cubbage*, *supra*, 671 N.W.2d at pp. 443-445.)

> 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 p. 445, 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." (*In re Detention of Cubbage*, *supra*, 671 N.W.2d at p. 445 fn. 1.) 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, original italics, quoting from Iowa Code § 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)." (Welf. & Inst. Code, § 6600, subd. (a)(2)(F) .) 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. (*Ibid.*) As in the *Cubbage* case, the California Legislature was aware that the SVP, once determined to be insane, could continue to 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. [Citations.]" (*In re Detention of Cubbage*, *supra*, 671 N.W.2d at p. 447.)

The Iowa Supreme Court then concluded that the SVP "does not have a fundamental right to be competent during his SVPA

proceedings." (*In re Detention of Cubbage*, *supra*, 671 N.W.2d at p. 447.)

Texas

The state Supreme Court of Texas also analyzed the issue of whether an incompetent individual can be tried and committed as an SVP and held *that competency was not required.* (*In re Commitment of Fisher*, *supra*, 164 S.W.3d 637.) 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. [Citations.]" (*In re Commitment of Fisher*, *supra*, 164 S.W.3d at pp. 645-646.) The Texas Supreme Court ruled that its SVP statute was also "civil" and not "criminal."

The Texas Supreme Court concluded that the respondent was not entitled to a competency determination prior to his SVP trial. (*In re Commitment of Fisher*, *supra*, 164 S.W.3d 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 an 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.) 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.'[Citation.]" (*Id.* at p. 9.)

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." (*State ex rel. Nixon v. Kinder*, *supra*, 129 S.W.3d at p. 10.) 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.)

Washington

The Washington Court of Appeal analyzed their SVP statutes in the face of a Constitutional challenge by noting that the legislative intent specifically included all the Constitutional rights except for the right to be competent while tried in SVP proceedings. (*State v. Ransleben* (Wa.App. 2006) 144 P.3d 397.) Ransleben was the subject of a petition filed by the state pursuant to the Washington SVP act. (*Id.* at p. 398.) The psychiatrist appointed to examine Ransleben found him to be extremely uncooperative and noncommunicative. (*Ibid.*) He was diagnosed with pedophilia, mentally disorder not otherwise specified due to head trauma and seizure disorder, alcohol dependence, cocaine abuse, marijuana abuse, and borderline intellectual functioning to mild mental retardation. The state alleged that Ransleben was incompetent. (*Ibid.*) Ransleben was completely incapable of communicating with the court or his attorney. His attorney appealed his commitment alleging that he was deprived of effective assistance of counsel. The Court determined that there was no violation of his due process in finding him to be an SVP. (*Id.* at p. 400.)

California's SVP statutes do not specifically include

incompetent persons but the issue is peripherally addressed in California Welfare and Institutions Code section 6606, subdivision (b).

> (b) Amenability to treatment is not required for a finding that any person is a person described in Section 6600, nor is it required for treatment of that person. Treatment does not mean that the treatment be successful or potentially successful, nor does it mean that the person must recognize his or her problem and willingly participate in the treatment program.

(Welf. § Inst. Code, §6606, subd. (b).)

This section would encompass incompetent persons like Ransleben and Moore who might not be able to participate meaningfully in SVP treatment.

Kansas, Arizona, Virginia, New Jersey and South Carolina

In Kansas persons deemed incompetent to stand trial for sexually violent offenses, who are due to be released, may qualify as Sexually Violent Persons.[4] Presumably, since they are still incompetent

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4. 59-29a03. Same; notice of release of sexually violent predator by agency with jurisdiction to attorney general and multidisciplinary team, time, contents; immunity from liability; establishing a multidisciplinary team; appointment of a prosecutor's review committee; assessment of person; provisions of section are not jurisdictional.

(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in K.S.A. 59-29a02 and amendments thereto, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection (d), 90 days prior to:

(1) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense, except that in the case of

when the petition is filed and processed, they will be likely be incompetent when they are tried in the SVP context. The Kansas legislature, by including incompetents in the SVP statute clearly recognized that incompetent sexual offenders cannot be held indefinitely and must receive treatment for their dangerous disorder. The statute also recognizes that potential victims merit protection from these individuals. There have been no reported cases in Kansas challenging this portion of the section as a due process violation.

South Carolina's SVP statutes also include persons who were charged with violent sexual offenses, found to be incompetent, and face release due to the expiration of the maximum confinement time without regaining competency. (S.C. Code Ann. §§ 44-48-30, 44-48-40.) Similarly, there have been no reported cases in South Carolina challenging this portion of the section as a due process violation.

Virginia and Arizona have similar statutes which have not been challenged. (Va. Code Ann. § 37.2-900 and A.R.S. § 36-3702.) These four states require persons who were never competent to stand trial on the underlying charges to be subject to civil commitment.

One state, New Jersey, has more explicit requirements for

(continued . . .)
persons who are returned to prison for no more than 90 days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison;

(2) release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to K.S.A. 22-3305 and amendments thereto;
(K.S.A. § 59-29a03.)

individuals whose guilt on the underlying offenses were never adjudicated.

> If a person who has been civilly committed based upon a determination that the person lacked mental competence to stand trial pursuant to N.J.S.2C:4-6 is about to be released, and the person's involuntary commitment is sought pursuant to this act, the court shall first hear evidence and determine whether the person did commit the act charged.
>
> a. The rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to a defendant at a criminal trial, other than the right to a trial by jury and the right not to be tried while incompetent, shall apply.
>
> b. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act charged, the extent to which the person's lack of mental competence affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on the person's own behalf, the extent to which the evidence could be reconstructed without the assistance of the **person** and the strength of the prosecution's case.
>
> c. If, after the conclusion of the hearing on this issue, the court finds beyond a reasonable doubt that the person did commit the act charged, the court shall enter a final order, appealable by the person, on that issue and may proceed to consider whether the should be committed pursuant to this act.

(N.J. Stat. § 30:4-27.33.)

Florida

The Court in *Moore* discarded a more nuanced approach to due process analysis in SVP adjudications and simply found no person should be subject to SVP proceedings while incompetent, even if they were competent at the earlier trial and fully able to litigate the underlying charges. Other states have addressed the concerns of due process without

fabricating a canopy of competency proceedings to cover all incompetent SVP defendants. Florida courts made an attempt to draw this distinction in two cases and held that there is no due process right to be competent in a post-conviction civil commitment hearing as long as the state is not relying on untested facts and evidence.

> Like defendants in postconviction proceedings, respondents in Ryce Act proceedings have no due process right to be competent when the State's evidence supporting commitment is entirely of record. However, 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 respondent has a due process right to be competent so that he or she may consult with counsel and testify on his or her own behalf.

(Camper v. State (In re Commitment of Camper) (Fla. Dist. Ct. App. 2d Dist. 2006) 933 So. 2d 1271; See also *Branch v. State (In re Commitment of Branch)* (Fla. Dist. Ct. App. 2d Dist. 2004) 890 So. 2d 322.)

In this case, the Court in *Moore* has fabricated an entire new civil commitment process in an attempt to expand due process protections beyond that required by the Constitution.

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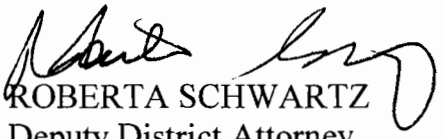
CONCLUSION

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

Respectfully submitted,

STEVE COOLEY
District Attorney of
Los Angeles County

By 
IRENE WAKABAYASHI
Head Deputy District Attorney


ROBERTA SCHWARTZ
Deputy District Attorney

Attorneys for Real Party in Interest

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed **Real Party's Opening Brief on the Merits** is produced using 13-point Times scalable type including footnotes and contains approximately 9,928 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this petition.

Dated: October 16, 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 **Real Party's Opening 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:

HONORABLE MARCELITA V. HAYNES, JUDGE
of the Los Angeles County Superior Court
Metropolitan - Department 61
1945 S. Hill Street
Los Angeles, CA 90007

PAMELA C. HAMANAKA
Senior Assistant Attorney General
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Los Angeles, CA 90013

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

JACK WEEDIN, Public Defender
590 Hall of Records
320 West Temple Street
Los Angeles, CA 90012-3266

ATTN: ALBERT J. MENASTER, Head, Appellate Division

Executed on October 16, 2009, at Los Angeles, California.

PATRICIA L. FACER