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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHRISTINE BARRETT,** **Defendant and Appellant.**	Case No. S180612

Sixth Appellate District, Case No. H034154
Santa Clara County Superior Court, Case No. MH034663
The Honorable Mary Ann Grilli, Judge

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

Issues presented for Review 1

Introduction 1

Statement of the Case 3

Summary of Argument 7

Argument 10

I. No equal protection violation occurred 10

A. The mentally retarded prospectively subject to an MRPL commitment are not similarly situated to the mentally disordered subject to commitment under the LPS act 10

1. Federal and state case law treats the mentally disordered and the mentally retarded as distinct. 11

2. The Legislature appropriately chose to treat the mentally ill and mentally retarded as distinct classes with respect to advisement of jury rights. 13

B. Even if the mentally retarded and mentally ill are similarly situated with respect to jury advisement, no equal protection violation has occurred 16

1. The rational basis test applies 16

2. The lack of a requirement that the trial court advise of the right to a jury trial in proceedings under the MRPL meets even the strict scrutiny standard 19

II. Due process does not require an advisement of the right to a jury trial 20

1. Code of Civil Procedure Section 631 does not require advisement of the right to a jury trial in civil cases and the MRPL Is civil in nature. 21

TABLE OF CONTENTS
(continued)

Page

III. No express waiver of the jury trial right is required 27

IV. Error in failing to advise is not structural, and any error here is moot and harmless 29

A. The structural error claim respecting the lack of waiver is not fairly encompassed in the second question on review and the issue whether the asserted error was harmless is moot 29

B. The claimed errors are not structural 30

C. Any error was harmless in this case 32

Conclusion 35

TABLE OF AUTHORITIES

Page

CASES

Adams v. Commission on Judicial Performance
(1994) 8 Cal.4th 630 ..... 16, 17

Adoption of Kay C.
(1991) 228 Cal.App.3d 741 17

Arizona v. Fulminante
(1991) 499 U.S. 279 30

Batson v. Kentucky
(1986) 476 U.S. 79 31

Brecht v. Abrahamson
(1993) 507 U.S. 619 31

Chapman v. California
(1967) 386 U.S. 18 31

Cleburne v. Cleburne Living Center, Inc.
(1985) 473 U.S. 432 17

Conservatorship of Hofferber
(1980) 28 Cal.3d 161 16

Conservatorship of Ivey
(1986) 186 Cal.App.3d 1559 29

Conservatorship of Maldonado
(1985) 173 Cal.App.3d 144 ..... 22, 27

Conservatorship of Mary K.
(1991) 234 Cal.App.3d 265 28

Cooley v. Superior Court
(2002) 29 Cal.4th 7, 11, 14

Cramer v. Gillermina R.
(1981) 125 Cal.App.3d 380 ..... passim

Cramer v. Tyars
(1979) 23 Cal.3d .....passim

D'Amici v. Board of Medical Examiners
supra, 11 Cal.3d 1 17

Delaware v. Van Arsdall
(1986) 475 U.S. 673 31

Gideon v. Wainwright
(1963) 372 U.S. 335 30

Heller v. Doe
(1993) 509 U.S. 312 .....passim

Hubbart v. Superior Court
(1999) 19 Cal.4th 1138 1

In re Hop
(1981) 29 Cal.3d 82 .....14, 15

In re Krall
(1984) 151 Cal.App.3d 792 .....2, 13

In re Lemanuel C.
(2007) 41 Cal.4th 33 11

In re Smith
(2008) 42 Cal.4th 1251 .....16, 20

In re Violet C.
(1989) 213 Cal.App.3d 86 15

In re Watson
(1979) 91 Cal.App.3d 455 .....2, 32

Madden v. Kaiser Foundation Hospitals
(1976) 17 Cal.3d 699 .....21, 27

Marshall v. McMahon
(1993) 17 Cal.App.4th 1841 17

McKaskle v. Wiggins
(1984) 465 U.S. 168 30

Money v. Krall
(1982) 128 Cal.App.3d 378 .....passim

Neder v. United States
(1999) 527 U.S. 1 ..... 30, 31

O'Brien v. Superior Court
(1976) 61 Cal.App.3d 62 2

People v. Allen
(2008) 44 Cal.4th 843 26

People v. Alvas
(1990) 221 Cal.App.3d 1459 ..... passim

People v. Bailie
(2006) 144 Cal.App.4th 841 ..... 2, 11

People v. Buffington
(1999) 74 Cal.App.4th 1149 11

People v. Cosgrove
(2002) 100 Cal.App.4th 1266 ..... 31, 32

People v. Givan
(2007) 156 Cal.App.4th 405 23

People v. Harris
(1993) 14 Cal.App.4th 984 28

People v. Hurtado
(2002) 28 Cal.4th 1179 33

People v. Masterson
(1994) 8 Cal.4th 965 ..... 22, 28

People v. McKee
(2010) 47 Cal.4th 1172 ..... 11, 18, 19

People v. Montoya
(2001) 86 Cal.App.4th 825 ..... 22, 27

People v. Moore (Aug. 19, 2010, S174633) ___ Cal.4th ___ [2010 Cal. LEXIS 8100] 26

People v. Ngo
(1996) 14 Cal.4th 30 ..... 29, 33

People v. Otis
(1999) 70 Cal.App.4th 1174 22

People v. Otto
(2001) 26 Cal.4th 200 .....24, 26

People v. Powell
(2004) 114 Cal.App.4th 1153 23

People v. Quinn
(2001) 86 Cal.App.4th 1290 .....2, 11, 13

People v. Ramirez
(1979) 25 Cal.3d 260 26

People v. Rowell
(2005) 133 Cal.App.4th 447 23

People v. Saunders
(1993) 5 Cal.4th 580 7

People v. Slocum
(1975) 52 Cal.App.3d 867 3

People v. Superior Court (Howard)
(1999) 70 Cal.App.4th 136 22

People v. Sweeney
supra, 175 Cal.App.4th 210 .....15, 29

People v. Vera
(1997) 15 Cal.4th 269 28

People v. Watson
(1956) 46 Cal.2d 818 32

People v. Wiley
(1995) 9 Cal.4th 580 3

People v. Wilkinson
(2004) 33 Cal.4th 821 18

Romer v. Evans
(1996) 517 U.S. 620 17

Rose v. Clark
(1986) 478 U.S. 570 31

Schweiker v. Wilson
(1981) 450 U.S. 221 14

Sullivan v. Louisiana
(1993) 508 U.S. 275 31

Thompson v. Department of Corrections
(2001) 25 Cal.4th 117 3

Tumey v. Ohio
(1927) 273 U.S. 510 31

United States v. Carta
(D.Mass. 2007) 503 F.Supp.2d 405 18

United States v. Gonzalez-Lopez
(2006) 548 U.S. 140 30

United States v. Weed
(10th Cir. 2004) 389 F.3d 1060 17

Vasquez v. Hillery
(1986) 474 U.S. 254 31

Waller v. Georgia
(1984) 467 U.S. 39 31

Warden v. State Bar
(1999) 21 Cal.4th 628 14

STATUTES

Code of Civil Procedure
§22 22
§23 22
§ 631 ..... 21, 27
§ 631, subd. (d)(4) 8

Penal Code
§ 1001.21 ..... 10, 19, 24
§ 1026.5 23
§ 1367 ..... 22, 28
§ 2960 32
§ 2962 31
§ 2966 32
§ 2970 22

Welfare and Institutions Code
§ 6500 ..... passim
§ 4825 ..... 14, 15
§ 5000 7
§ 5002 7
§ 5150 ..... 7, 14
§ 5250 ..... 7, 14
§ 5260 7
§ 5300 ..... 7, 14
§ 5302 ..... 10, 32
§ 5303 10
§ 5350 ..... 7, 14, 22
§ 5260 14
§ 6500 1
§ 6502 1
§ 6600 22

CONSTITUTIONAL PROVISIONS

California Constitution
Article I, § 7, subd. (a) 26
Article I, § 16 ..... 21, 27

COURT RULES

California Rules of Court
rule 8.520, subd. (b)(2)(B) 1
rule 8.520, subd. (b)(3) 29

ISSUES PRESENTED FOR REVIEW

Appellant's petition for review states the following issues (Cal. Rules of Court, rule 8.520(b)(2)(B)):

1. Whether a person with a developmental or intellectual disability is denied due process and equal protection of the law when denied a jury trial without a waiver and being advised of that right, on the question of whether she may be committed as "mentally retarded and a danger to herself and others" under Welfare and Institutions Code section 6500 et seq.[1]

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

INTRODUCTION

This case involves section 6500, et seq., the Mentally Retarded Persons Law (MRPL).[2] (See *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1171.) MRPL provides for the involuntary commitment of mentally retarded persons who are a danger to themselves or others. An interested party may petition for such a person's commitment to the State Department of Developmental Services for up to one year, and petitions can be filed to extend the commitment annually. (§§ 6500, 6502.)

MRPL does not expressly provide the right to a jury trial on the allegations of a petition. Nevertheless, the Courts of Appeal uniformly recognize a constitutional right to a jury determination of the statutory issues of dangerousness and mental retardation before an involuntary

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[1] Unless otherwise noted, all further statutory references are to the Welfare and Institutions Code.

[2] The term "mentally retarded person" is employed both by the MRPL and by parties and courts in those proceedings. No disrespect is intended.

commitment. (*Money v. Krall* (1982) 128 Cal.App.3d 378, 398; *In re Watson* (1979) 91 Cal.App.3d 455, 459-460; *O'Brien v. Superior Court* (1976) 61 Cal.App.3d 62, 68-69.)

However, appellate courts divide on the separate question whether the trial court has an affirmative duty to advise the person of that right and to obtain a personal waiver of the right in section 6500 proceedings. The Fourth and Fifth Districts have found the jury trial right arises only on the person's request. (*Money v. Krall, supra*, 128 Cal.App.3d at p. 398; *In re Watson, supra*, 91 Cal.App.3d at pp. 459-460; *O'Brien v. Superior Court, supra*, 61 Cal.App.3d at pp. 68-69.) The Third District requires an on-the-record advisement of the jury trial right by the trial court and an express waiver of the right. (*People v. Bailie* (2006) 144 Cal.App.4th 841, 846-847 [concluding advisement of jury trial right was required as a matter of equal protection]; *People v. Alvas* (1990) 221 Cal.App.3d 1459, 1463 [same, based on both due process and equal protection].) In this case, the Court of Appeal for the Sixth District rejected the Third District cases and held due process and equal protection rights do not compel an advisement or an express waiver of the jury trial right in MRPL proceedings.

In this brief, respondent asserts that the Fourth, Fifth and Sixth Districts reach the correct result on the issue and that consequently the Third District decisions should be disapproved. Even if this court were to disagree, however, respondent contends that any error in failing to advise appellant of her jury trial right or to obtain an express waiver was harmless.

Two procedural matters should be mentioned. First, the instant appeal is technically moot, as appellant's one-year MRPL commitment has expired. (*People v. Quinn* (2001) 86 Cal.App.4th 1290, 1293; *In re Krall* (1984) 151 Cal.App.3d 792, 794, fn. 2.) As to resolving the split among the Courts of Appeal discussed above, this court can resolve an otherwise moot case presenting important issues that are capable of repetition, yet evading

review. (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122.) While the first question on review avoids the mootness bar, the harmless error question does not.

Second, respondent received no ruling on its objection below of record insufficiency. (See *People v. Wiley* (1995) 9 Cal.4th 580, 592, fn. 7 [trial court judgment presumed correct; any error must be affirmatively shown]; *People v. Slocum* (1975) 52 Cal.App.3d 867, 879 [appellant's burden to furnish adequate record].) The objection concerns the absence of a reporter's transcript or settled record of proceedings on March 9, 2009, discussed *post*, raising a possibility that an express jury trial waiver may have been taken by the court at the hearing. This court may choose, as the Court of Appeal did, to affirm the case on the merits without a complete record. Alternatively, it may dismiss or remand for further proceedings if the record is deemed inadequate for review of one or more issues.

STATEMENT OF THE CASE

A petition filed by the district attorney on January 22, 2009, sought appellant's involuntary commitment under section 6500. (CT 5-6.) Attached to the petition was a management referral to the district attorney by Betty Crane, the Service Coordinator of the San Andreas Regional Center, which serves persons with developmental disabilities. (Typed Opn. at pp. 2-3.) The management referral requested that a section 6500 petition for commitment be filed by the district attorney in the prospective committee's case. (CT 5; RT 7.) Also attached to the petition was a report to the trial court by Robert Thomas, Ph.D., a Center psychologist. (Typed Opn. at p. 3.) It stated that appellant met the statutory requirements of section 6500. (Typed Opn. at p. 4.)

On March 9, 2009, the parties and a court reporter were present at a noticed hearing on a matter for 15 minutes that resulted in a continuance to

April 8, 2009. (CT 20.) The reporter filed a statement on appeal that "'[n]o proceedings were had,'" leading the Court of Appeal to conclude that no reported proceedings in the matter took place that day and that it lacked "the benefit of knowing what was actually said at the hearing or what led to the court's continuation of the noticed evidentiary hearing . . . ." (Typed Opn. at p. 6.)

On April 8, 2009, appellant's MRPL case was called and counsel made their appearances. The parties agreed the matter would take two hours or less to complete. There was no mention of a jury trial or of appellant's right to one. (RT 4.)

Dr. Thomas, the psychologist with the San Andreas Regional Center whose report was attached to the petition, testified as an expert qualified to render opinions in section 6500 proceedings. (RT 5-6.) He opined that appellant was moderately mentally retarded and was a danger to herself and others. (RT 8-9.)

Appellant lived with her parents until December 2001. Because of difficulties with behavior management (including aggressive and physically abusive behavior towards her parents), she was placed at Lomar, a "level 4-1" facility. A "level 4-1" facility provides a significant amount of supervision and a low staff-to-patient ratio. (RT 9-10.) At Lomar, appellant was supposed to be supervised at all times by a staff member. However, appellant went "AWOL" from Lomar at least once, which was problematic because when she went unmonitored in the community, she would threaten people and engage in self-destructive behavior. (RT 10-11.)

In late 2006, appellant was placed in an independent living situation. She moved into a condominium and was given the help of an aide, who monitored her behavior and helped her in independent living. (RT 9-11, 24.) Appellant did not do well in the placement. She became highly agitated, physically aggressive, and verbally abusive. (RT 11.) Over some

18 months, about 30 incident reports were filed regarding appellant, which generally documented episodes of her violent behavior. (RT 9, 12.) Incident reports are prepared every time a client does something inappropriate or dangerous. In many incidents, appellant's actions caused emergency teams to be called. Sometimes, the emergency teams were not able to calm appellant, and she needed to be hospitalized at a local psychiatric hospital. (RT 9.) Once, appellant picked up and threatened to throw an LCD television screen at a staff member. (RT 11.) Other times, appellant threw items though a glass window, endangering herself. Appellant physically attacked staff and hit them fairly frequently. (RT 12.)

Examples of incidents involving appellant include the following:

On September 10, 2008, appellant began breaking items in her condominium, including a dining room chair, after learning that her mother was coming to visit. When the mother arrived, appellant made aggressive moves towards her, requiring staff intervention. The police, who were called to assist staff, took appellant to an emergency psychiatric facility for an evaluation. (RT 15.)

On September 24, 2008, appellant punched holes in the wall. When offered medication, appellant twice threw a glass bowl at the dining room window and shattered it. (RT 14-15.)

On December 10, 2008, appellant became verbally abusive, destroyed property, scratched her face, and threatened to physically harm staff members. She did not want to attend an appointment for a mental health review. Staff called 911. Appellant was taken to an emergency psychiatric unit. (RT 15-16.)

On January 18, 2009, appellant became agitated and attempted physical aggression towards the staff after returning from church with her parents. A staff member called 911. Appellant was again transported to an emergency psychiatric unit. (RT 14.)

On January 22, 2009, appellant was asked to help with a task as part of a group. Appellant announced that she had changed her name, began to curse, and called a staff member an inappropriate name. When the staff member admonished her, appellant threatened to get a knife. Appellant was taken to a quiet area, but she went into the bathroom and scratched her arm. (RT 13.)

Dr. Thomas opined that due to her mental retardation, appellant had serious difficulty controlling her dangerous behavior. He concluded that a locked psychiatric facility was the least restrictive placement for her. (RT 18-19.)

Appellant testified on her own behalf. (RT 54.) Appellant did not want to be placed at a psychiatric facility because it restricted her freedom. She wanted to be placed at a group home. (RT 55-57.) Appellant believed that her medication was helping her. (RT 58.)

On April 8, 2009, the court found that appellant was mentally retarded and a danger to herself and others pursuant to section 6500. The court ordered appellant committed to the Department of Developmental Services for one year. (RT 66-67; CT 21-23.)

The Court of Appeal affirmed the order of commitment in an opinion subsequently ordered by it to be published. It rejected appellant's argument that the court's failure to advise her or to obtain from her an express waiver of the right to jury trial violated her due process and equal protection rights. (Typed Opn. at pp. 13-21.) The court also held that if error occurred, it was harmless. (Typed Opn. at pp. 21-23.)

This court granted appellant's petition for review.

SUMMARY OF ARGUMENT

Appellant mischaracterizes her case as one where the "prosecution bypassed" greater procedural due process protections available to her under the Lanterman-Petris-Short Act (LPS Act) (§ 5000 et seq.),[3] by seeking and obtaining her involuntary commitment for mental retardation under MRPL (§ 6500 et seq.), a statutory scheme that "has fewer protections." (AOB 2.) The state constantly makes individualized decisions involving delivery of mental health resources to severely disabled persons under a variety of civil commitments. It does not make those decisions from omniscience about whether or not a potential committee may or may not elect to waive a jury trial right. Filing decisions on civil commitment matters reflect the application of case management and psychomedical expertise, exemplified by the reports attached to the petition in this case. In turn, those decisions reflect substantive medical-legal principles, such as the LPS Act's express exclusion of "mentally retarded persons" from its reach (§ 5002).

Procedural bypass is not the point of these decisions, and particularly not here: appellant had the right to a jury, but she failed to assert it. It was an effective waiver.[4] No equal protection violation occurs from disparate

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[3] "The LPS Act is a comprehensive scheme designed to address a variety of circumstances in which a member of the general population may need to be evaluated or treated for different lengths of time. (§ 5150 [short-term emergency evaluation]; § 5250 [intensive 14-day treatment]; § 5300 [180-day commitment for the imminently dangerous]; § 5260 [extended commitment for the suicidal]; § 5350 [30-day temporary conservatorship or one year conservatorship for the gravely disabled].)" (*Cooley v. Superior Court*, *supra*, 29 Cal.4th at p. 253.)

[4] A "waiver" is of course the "intentional relinquishment or abandonment of a known right," whereas forfeiture is the "failure to make the timely assertion of a right." (See, e.g., *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) For simplicity, we use the term "waiver" to refer both to the personal waiver of the right, as well as the failure to assert the

(continued...)

treatment of the mentally retarded and mentally disordered regarding jury trial advisements. Mental retardation by definition is not mental illness but subaverage general intellectual functioning. The Legislature properly conceives the mentally disabled subjected to MRPL proceedings as intellectually and functionally unable to benefit significantly from an advisement of jury trial rights by the court. For purposes of waiver, the Legislature can view mentally disabled persons under MRPL as not similarly situated to mentally disordered persons, who display the full range of intellectual and adaptive function despite mental disease or defect.

If the mentally retarded and mentally disordered were deemed similarly situated for purposes of jury trial waiver, the disparity in the treatment of the two groups is measured under the rational relationship test. The mentally retarded are not a "suspect class." Nor does a proposed committee have a "fundamental" interest in being advised by the trial court of his or her jury trial rights. Even were strict scrutiny applied, the absence in MRPL proceedings of a trial court advisement of the right to a jury trial, like that provided to commitment proceedings for the mentally disordered, does not violate equal protection. This difference in treatment of the mentally retarded and the mentally disordered is necessary to further the state's compelling interest in protecting the public and providing specialized health and management services to the subclass of mentally retarded so severely disabled as to present a danger to themselves and others falling within section 6500. To require jury trial advisements in MRPL proceedings would impair the state's ability to deliver treatment

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(...continued)
right in a timely and specific manner. (See also Code Civ. Proc., § 631, subd. (d)(4) [providing that "party waives trial by jury" by failing to demand one].)

because significant financial burdens and delays result from competency hearings, as well as for additional jury trials that may become needed.

Nor does the failure to advise proposed committees under section 6500 of the right to a jury trial violate due process. This court has recognized that commitment under the MRPL is essentially civil in nature. California courts are in near consensus that criminal procedural safeguards do not apply to the right to trial by jury in civil commitment proceedings. Moreover, the requirement that a trial court advise a potential committee regarding jury trial rights is not a fundamental interest, especially since the person's interests are protected in MRPL proceedings by counsel who must competently advise the potential committee of such rights. An advisement (or lack thereof) regarding jury trial rights is unrelated to the reliability of the determinations made under section 6500, undermining the argument that due process requires such advisement.

Similarly, a personal waiver by a potential committee of the jury trial right is not constitutionally compelled. MRPL proceedings are civil in nature and the California Code of Civil Procedure provides that a jury trial may be waived by failure to request one. Virtually all courts that have considered the waiver issue in the context of civil commitment statutes conclude that civil waiver principles apply.

Finally, any error in failing to advise a potential committee of the jury trial right is not structural. The error has no bearing on the reliability of the fact-finding process, and does not necessarily render a trial fundamentally unfair. Appellant's trial was fair.

ARGUMENT

I. NO EQUAL PROTECTION VIOLATION OCCURRED

A. The Mentally Retarded Prospectively Subject to an MRPL Commitment Are Not Similarly Situated to the Mentally Disordered Subject to Commitment under the LPS Act

Putting to one side whether the term "mentally retarded" should retain its place in California law, it has a long-established meaning. In *Money v. Krall*, *supra*, 128 Cal.App.3d 378, the court noted that "mental retardation" has long had a generally accepted technical meaning "refer[ing] to significantly subaverage general intellectual functioning existing concurrently with defects in adaptive behavior" and appearing in the "developmental period." (*Id.* at p. 397.) In adopting this definition for purposes of section 6500, the court noted in *In re Krall*, *supra*, 151 Cal.App.3d 792, that it was equivalent to the definition of "retarded" used in determining eligibility for diversion from misdemeanor criminal prosecution. (*Id.* at p. 796; Pen. Code, § 1001.21.)

With respect to jury trial waiver, the mentally retarded prospectively facing involuntary commitment under the MRPL (§ 6500) are not similarly situated to the mentally disordered facing involuntary commitment under the LPS Act (§ 5000 et seq.). Between these groups, only prospective LPS committees are advised by the court of the right to a jury trial, but neither the LPS Act nor the MRLP requires an express waiver of the right. (§§ 5302, 5303.)

"'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.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the

law challenged.'" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253; *In re Lemanuel C.* (2007) 41 Cal.4th 33, 48 [persons committed under the state's various civil commitment statutes are not similarly situated in all respects].) "In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws." (*People v. McKee* (2010) 47 Cal.4th 1172, 1202; *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155 [if the persons are not similarly situated for purposes of the law, then the equal protection claim necessarily fails].)

1. Federal and state case law treats the mentally disordered and the mentally retarded as distinct.

Appellant relies on *People v. Alvas*, *supra*, 221 Cal.App.3d at pages 1462-1464, in which the Third District found no rational distinction between mentally disordered persons subject to the LPS Act and mentally retarded persons subject to the MRPL. (AOB 8-9.) It held persons subject to the MRPL have the same right of advisement as persons subject to the LPS Act. (*People v. Alvas*, *supra*, 221 Cal.App.3d at pp. 1463-1464; accord, *People v. Bailie*, *supra*, 144 Cal.App.4th at pp. 846-847 [following *Alvas*].) *Alvas*'s conclusion is incorrect. This court should adopt the contrary conclusions reached in *Cramer v. Gillermina R.* (1981) 125 Cal.App.3d 380, 387, *People v. Quinn*, *supra*, 86 Cal.App.4th at pages 1294-1295, and the opinion of the Sixth District in this case and hold that the two classes are not similarly situated.

Heller v. Doe (1993) 509 U.S. 312 upheld Kentucky's involuntary commitment statutes, which established commitment procedures for those with mental retardation different from those with mental disorders. In Kentucky, the burden of proof with respect to mental retardation is lower (clear and convincing) than for mental disorders (beyond a reasonable

doubt). Although the differing procedures made it easier to commit those with mental retardation, the court found no equal protection violation. (*Heller v. Doe*, *supra*, 509 U.S. at pp. 322-330.) The high court recognized that "[t]he law has long treated" the mentally disordered and the mentally retarded "as distinct," which "suggests that there is a commonsense distinction between the mentally retarded and the mentally ill." (*Id.* at pp. 326-327.) "[M]ental retardation is a developmental disability that becomes apparent before adulthood." (*Id.* at p. 321.) It "results in 'deficits or impairments in adaptive functioning,' that is to say, 'the person's effectiveness in areas such as social skills, communication, and daily living skills, and how well the person meets the standards of personal independence and social responsibility expected of his or her age by his or her cultural group." (*Id.* at p. 329.) By definition "mental retardation is a learning disability and training impairment rather than an illness" and is not subject to the medical treatment available to the mentally ill. (*Id.* at p. 325, internal quotation and edit marks omitted.)

California decisions also uphold different treatment of persons with mental retardation and those with mental disorders under the LPS Act. Division Two of the Fourth District Court of Appeal in *Cramer v. Gillermina R.* (1981) 125 Cal.App.3d 380, 387, found that the mentally retarded are not similarly situated to the mentally ill. *Cramer* denied suit by a group of persons committed under section 6500 who claimed equal protection forbade denying the mentally retarded a probable cause hearing provided to the mentally ill in the LPS Act. (*Id.* at p. 386.)

> '[T]here is no question that mental illness and mental retardation are separate and distinct conditions which require different treatment and/or habilitation.' [Citations.] 'Mental retardation is an impairment in learning capacity and adaptive behavior . . . . Mental retardation is not an illness to be treated with drugs and therapies which have been developed for the mentally and emotionally ill.' [Citation.] . . . The Legislature has recognized

> this factual distinction and created a coherent scheme for treating mental illness [the LPS Act] and a different scheme for treating mental retardation (§ 6500 et seq.). These schemes are not unconstitutional on equal protection grounds because the classifications are based on accepted factual and medical differences between the mentally retarded and mentally ill.

(*Id.* at pp. 387-388.) Division Six of the Second Appellate District followed *Cramer* in *People v. Quinn*, *supra*, 86 Cal.App.4th at pages 1294-1295, which held that the two groups are not similarly situated and that a rational basis exists for different treatment respecting whether section 6500 requires a causal connection between mental retardation and dangerousness.

A person subject to commitment as mentally retarded not only must be dangerous to themselves and others, they must have "significantly subaverage general intellectual functioning." (*In re Krall*, *supra*, 151 Cal.App.3d at p. 797; *Money v. Krall*, *supra*, 128 Cal.App.3d at p. 397.) That distinction between the mentally ill and the mentally retarded compels the conclusion that the two groups are not similarly situated for purposes of requirements regarding jury trial advisement. The Legislature can view such an advisement to a class that by definition has seriously impaired intellectual capacity as unnecessary, even though it does requires the court to provide that advisement to prospective committees suffering mental disorders.

2. The Legislature appropriately chose to treat the mentally ill and mentally retarded as distinct classes with respect to advisement of jury rights.

The MRPL and the LPS Act exist for distinctly different purposes. The LPS Act provides for evaluation and treatment of the mentally ill in a wide range of circumstances. The MRPL targets a much more narrow class of persons who are a danger to themselves or others because of mental retardation. The focus and length of LPS Act treatment vary widely, as different members of the general population require evaluation and

treatment for differing periods. (§§ 5150, 5250, 5260, 5300, 5350; see *Cooley v. Superior Court*, *supra*, 29 Cal.4th at p. 253.) By contrast, MRPL subjects all receive a one-year commitment, consistent with the more uniform definition of mental retardation and the permanent nature of the condition, regardless of treatment and medication. Thus, persons committed under the two schemes are not similarly situated either for purposes of entry into the respective commitment systems or for purposes of the treatment they receive while in those systems.

Even if appellant is correct that *some* mentally retarded persons in MRPL proceedings might be capable of understanding a jury trial advisement and competent to personally waive a jury trial (AOB at 9, 11-13), proposed committees under the MRPL remain dissimilarly situated to proposed committees under the LPS Act *as a class*. Legislative classifications are frequently inexact. A classification does not offend the Constitution merely because it is "is not made with mathematical nicety or because in practice it results in some inequity." (*Schweiker v. Wilson* (1981) 450 U.S. 221, 234; see also *Warden v. State Bar* (1999) 21 Cal.4th 628, 647-649 [holding state's mandatory continuing legal education program will not be struck down due to "imperfect" classification that might be "to some extent both underinclusive and overinclusive"].)

Appellant's reliance on this court's decision in *In re Hop* (1981) 29 Cal.3d 82 for her argument is misplaced. (AOB 8.) *Hop* held that the statutory scheme (§ 4825) authorizing the placement of "non-protesting" developmentally disabled adults in state hospitals for an indefinite time did not satisfy due process and equal protection rights. (*Hop*, at p. 86.) The prospective committee was entitled to a "judicial hearing on . . . whether, because of developmental disability she is gravely disabled or a danger to herself or others and whether placement in a state hospital is warranted." (*Id.* at p. 93.) The court analogized the committee's situation to that of

"proposed conservatees under the [LPS] Act" and reasoned that she was "entitled to the same congeries of rights including the right to a jury trial on demand [citations] and to the application of the standard of proof beyond a reasonable doubt [citations]." (*Ibid.*) As reflected by the phrase "jury trial on demand" rather than "jury trial unless expressly and knowingly waived," the court did not consider there whether proposed committees under the MRPL are similarly situated to persons under the LPS Act for purposes of jury trial advisement and waiver. (See *Cramer v. Gillermina R.*, *supra*, 125 Cal.App.3d at p. 393 ["[A]ll that *Hop* held was that a developmentally disabled person initially committed by her mother under section 4825 is entitled to a judicial hearing to test the basis for the commitment"]; *In re Violet C.* (1989) 213 Cal.App.3d 86, 94 [*Hop* did not "create a new nonstatutory involuntary judicial commitment" procedure].)

Appellant also mistakenly relies on *People v. Sweeney*, *supra*, 175 Cal.App.4th 210, as support for her claim that the mentally retarded are similarly situated to the mentally ill. (AOB 9.) *Sweeney* opines that mentally retarded people who have been found incompetent in a prior criminal proceeding where they had been charged with a felony involving death, great bodily injury, or an act which poses a serious threat of bodily harm to another person, are similarly situated with mentally ill persons who had been found incompetent in a prior criminal proceeding where they had been charged with a felony death, great bodily harm, or a serious threat to the physical well-being of another person. (*Id.* at p. 219.) The analysis does not involve whether mentally retarded and mentally ill persons who have not been found incompetent are similarly situated for purposes of the advisement of jury trial rights.

Appellant's equal protection claim fails at the outset, as the mentally retarded and the mentally ill are not similarly situated for purposes of requirements of jury trial advisement and waiver.

B. Even if the Mentally Retarded and Mentally Ill Are Similarly Situated With Respect to Jury Advisement, No Equal Protection Violation Has Occurred

Even were those committed under the MRPL and the LPS Act similarly situated, the statutes' differences regarding jury trial advisement do not violate equal protection.

> The state has compelling interests in public safety and in humane treatment of the mentally disturbed. [Citations.] It may adopt more than one procedure for isolating, treating, and restraining dangerous persons; and differences will be upheld if justified. [Citations.] Variation of the length and conditions of confinement, depending on degrees of danger reasonably perceived as to special classes of persons, is a valid exercise of power.

(*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 172, fn. omitted.)

1. The rational basis test applies

The statutory classification regarding jury advisement should be considered under the rational basis test.

> "'In resolving equal protection issues, the United States Supreme Court has used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. Classifications based on gender are subject to an intermediate level of review. But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose.' (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.)"

(*In re Smith* (2008) 42 Cal.4th 1251, 1262-1263.)

"The strict scrutiny standard of review applies only if a legislative classification involves a suspect classification or significantly infringes upon a fundamental right. [Citation.]" (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 659.) Under the strict scrutiny standard, the state bears the burden of establishing not only that it has a

compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose. (*D'Amici v. Board of Medical Examiners*, *supra*, 11 Cal.3d 1, 17.) But if no suspect classification or fundamental right is involved, the reviewing court applies the rational basis test: whether the challenged classifications are "rationally related to a legitimate governmental purpose." (*Adams v. Commission on Judicial Performance*, *supra*, 8 Cal.4th at p. 660; *Romer v. Evans* (1996) 517 U.S. 620, 631.).

It is undisputed that mentally retarded persons are not a "suspect classification" for purposes of equal protection analysis. (See *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 446 ["To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must [only] be rationally related to a legitimate governmental purpose"]; *Marshall v. McMahon* (1993) 17 Cal.App.4th 1841, 1851 [although persons with mental retardation have immutable disabilities, they are not a suspect class deserving of heightened protection for equal protection purposes]; *Adoption of Kay C.* (1991) 228 Cal.App.3d 741, 753-754 [classifications based on developmental disability or mental illness are not suspect].)

The issue then, is whether the statutory distinctions concerning advisement of the right to a jury trial in the MRPL and the LPS Act significantly infringe a fundamental right triggering strict scrutiny review. The United States Supreme Court has not clearly articulated the standard to be applied in equal protection challenges to involuntary commitment statutes. (*Heller v. Doe*, *supra*, 509 U.S. 312.) However, other courts have interpreted federal law not to require strict scrutiny. (See *United States v. Weed* (10th Cir. 2004) 389 F.3d 1060, 1071 [concluding a federal statute governing commitment of insanity acquittees implicated neither a fundamental right nor a suspect class and applying rational basis review];

United States v. Carta (D.Mass. 2007) 503 F.Supp.2d 405, 408 [applying rational basis review to unequal classification that restricted liberty through confinement of the sexually dangerous].)

In *People v. McKee*, *supra*, 47 Cal.4th 1172, this court applied strict scrutiny to review the disparate treatment afforded under the Sexually Violent Predators Act (which provides for indefinite commitment) and the Mentally Disordered Offenders Act (which does not). The court remanded to provide an opportunity for the state to justify the differential treatment. (*Id.* at p. 1184.) *McKee* made clear that although the court applied a strict scrutiny standard to the classification affecting the committee's liberty interests, it was not holding that every detail of every civil commitment program is subject to strict scrutiny. (*People v. McKee*, *supra*, 47 Cal.4th at p. 1210, fn. 13.)

Similarly, in *People v. Wilkinson* (2004) 33 Cal.4th 821, this court declined to apply strict scrutiny whenever a statutory classification authorizes different sentences for comparable crimes, despite the implication of the right to "personal liberty" of the affected individuals. (*Id.* at p. 837.) Although *Wilkinson* was a criminal case and involved a criminal classification, it "teaches us that we cannot simply say that a classification is subject to strict scrutiny merely because it touches on personal liberty." (*People v. McKee*, *supra*, 47 Cal.4th at p. 1223 (dis. opn. of Chin, J.).)

Here, the classification at issue is not appellant's *right* to a jury trial. It is only whether the trial court was required to *advise* her of that right. The classification is contextually imbedded in the fact that the prospective committee had counsel who is expected to advise the client competently about her rights. To say that a person has a fundamental interest in being expressly advised of her right to a jury trial, especially in a case such as this where there is a right to appointed counsel, "trivializes the concept of what

is fundamental." (See *People v. McKee*, *supra*, 47 Cal.4th at p. 1223 (dis. opn. of Chin, J.).)

For all these reasons, the rational basis test applies.

2. The lack of a requirement that the trial court advise of the right to a jury trial in proceedings under the MRPL meets even the strict scrutiny standard

The Court of Appeal correctly concluded that "there is a sufficient rational basis to require a jury-trial advisement in LPS Act commitment proceedings but not in section 6500 proceedings." (Typed Opn. at p. 18.) Given the differences between persons with mental retardation and those with mental illness (discussed in Argument I.A.), particularly as they relate to cognitive abilities, it is not irrational to afford mentally ill persons facing commitment more due process in the form of an affirmative advisement of the jury trial right. (Typed Opn. at p. 21.)

A person subject to commitment as dangerous to herself and others due to mental retardation must have "significantly subaverage general intellectual functioning." (*Money v. Krall*, *supra*, 128 Cal.App.3d at p. 397; Pen. Code, § 1001.21) The Legislature could certainly conceive that having the court provide information to a class that by definition has seriously impaired intellectual capacity was not necessary, even if the court were required to provide the information to the mentally ill, especially where, as under the MRPL, there is a right to appointment of counsel. (§ 6500.)

Indeed, even under the strict scrutiny standard, the difference in cognitive ability of the mentally retarded and the mentally ill as a class makes their disparate treatment regarding jury advisement necessary to further a compelling state interest. The distinction avoids the necessity of competency hearings in cases brought under the MRPL to determine whether the proposed committee understands the right to a jury trial and is

competent to waive that right.[5] The administrative and financial burden of such competency hearings would limit the ability of the state to pursue section 6500 proceedings. Given that proposed committees by definition have "significantly subaverage general intellectual functioning" (*Money v. Krall*, *supra*, 128 Cal.App.3d at p. 397), competency hearings would be required in the majority (if not all) of section 6500 cases. Given that a section 6500 commitment is for only one year, hearings would be required annually in many of them. Of course to the extent the advisement resulted in additional jury trials, further delay and expense in delivering needed services would result. As such, the distinction furthers the state's compelling interest in "protecting the general public, other patients, and the institutional personnel, from physical harm" and is necessary to further that interest. (See *Cramer v. Tyars*, *supra*, 23 Cal.3d at p. 147 [identifying compelling state interest underlying section 6500 proceedings]; *In re Smith*, *supra*, 42 Cal.4th at pp. 1262-1263 [articulating strict scrutiny standard].)

Accordingly, the difference between the MRPL and the LPS Act regarding the requirement of a jury trial advisement survives any standard of review and does not violate equal protection.

II. DUE PROCESS DOES NOT REQUIRE AN ADVISEMENT OF THE RIGHT TO A JURY TRIAL

Appellant asserts the right to due process requires the trial court to advise a prospective committee under section 6500 of the right to a jury trial. Not so. As the Sixth District held in rejecting appellant's due process claim, "in light of modern jurisprudence determining that defendants in a broad array of civil commitment contexts are not entitled to the full panoply

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[5] The court in *Alvas* anticipated the need for such hearings noting that "[i]f the person is so mentally retarded as to be unable to comprehend the advisal . . . the record should affirmatively reflect that fact." (*People v. Alvas*, *supra*, 221 Cal.App.3d at p. 1465.)

of rights afforded in criminal cases, there is no entitlement to be advised of the right to trial by jury in section 6500 proceedings absent the Legislature saying so." (Typed Opn. at p. 13.)

1. Code of Civil Procedure Section 631 Does Not Require Advisement of the Right to a Jury Trial in Civil Cases and the MRPL Is Civil in Nature.

This court has not determined whether proposed committees under section 6500 have the right to a jury trial. However, the general consensus of the courts that have addressed the issue have found such a right. (See *Money v. Krall*, *supra*, 128 Cal.App.3d at p. 398.) This jury trial right is not contested here. Assuming a constitutional basis exists for the right to a jury trial in section 6500 proceedings, it does not follow that ancillary criminal rules, such as the right to an on-the-record advisement or waiver of jury trial, apply to those proceedings.

The California Constitution provides that in criminal cases a jury waiver requires "consent of both parties expressed in open court by the defendant and the defendant's counsel." (Cal. Const., art. I, § 16.) By contrast, in civil cases "a jury may be waived by the consent of the parties expressed as prescribed by statute." (Cal. Const., art. I, § 16.) Code of Civil Procedure section 631 provides that a jury may be waived "by failing to announce that a jury is required, at the time the cause is first set for trial . . . ." Thus, neither an advisement nor an express waiver of the right to a jury trial is required in civil cases. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 713, fn. 12.)

In *Cramer v. Tyars* (1979) 23 Cal.3d 131, this court found that commitment under the MRPL "must be deemed essentially civil in

nature."[6] Accordingly, the court held that (unlike a criminal defendant) a defendant in an MRPL proceeding lacks the absolute rights not to be called as a witness and not to testify. (*Id.* at p. 137.) The court noted that the MRPL commitment is of limited duration, may be initiated by any interested party, is solely intended to provide for the care and treatment of persons subject to the MRPL, and "may not reasonably be deemed punishment either in its design or purpose. It is not analogous to criminal proceedings." (*Ibid.*)

Cramer did not address the right of an MRPL defendant to a jury trial. However, as noted by the Sixth District in this case, there is a near consensus among the California courts that have addressed the right to trial by jury in other civil commitment contexts that except as provided by statute, criminal safeguards do not apply. (Typed Opn. at p. 15, citing *Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144, 147 [no express, personal waiver of jury by proposed conservatee required in LPS Act conservatorship proceedings under § 5350 that could result in involuntary detention and placement]; *People v. Montoya* (2001) 86 Cal.App.4th 825, 830-831 [no personal, express waiver of jury required in mentally disordered offender (MDO) commitment proceedings under Pen. Code, § 2970]; *People v. Otis* (1999) 70 Cal.App.4th 1174, 1176-1177 [same]; *People v. Masterson* (1994) 8 Cal.4th 965, 967-972 [counsel in competency proceedings under Pen. Code, § 1367 et seq. may waive right to jury trial over defendant's objection and court need not advise of the right]; *People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, 148 [defendant in sexually violent predators act proceedings under § 6600 et

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[6] Although generally civil in nature, commitment proceedings are special proceedings because they are neither actions at law nor suits in equity. (Code Civ. Proc., §§ 22 & 23.)

seq. not entitled to express, personal waiver of jury trial]; *People v. Rowell* (2005) 133 Cal.App.4th 447, 451-454 [same]; *People v. Powell* (2004) 114 Cal.App.4th 1153, 1157-1158 [in not guilty by reason of insanity commitment extension proceedings under Pen. Code, § 1026.5, counsel may waive jury over defendant's objection]; *People v. Givan* (2007) 156 Cal.App.4th 405, 409-411 [personal waiver of right to a jury trial not required in civil extension proceeding for insane person and person may not veto attorney's tactical choice for court trial].)

The reasoning of these cases is consistent with this court's evaluation of due process rights in the context of civil commitment proceedings.

In civil commitment proceedings, this court has identified three factors that must be balanced to determine whether a particular procedure or absence of a procedure violates due process: (1) "the private interest at stake"; (2) "the state or public interests"; and (3) "the risk that the procedure or its absence will lead to erroneous decisions." (*Conservatorship of John L.* (2010) 48 Cal.4th 131, 150 [balancing these factors to conclude that due process did not require proposed conservatee under the LPS Act to personally waive his presence at the hearing on the petition]; see also *Heller v. Doe*, *supra*, 509 U.S. at pp. 330-331 [weighing these factors in determining due process requirements].)

Here, the balancing of these factors supports the conclusion that the advisement of the right to a jury trial is not required in proceedings under the MRPL.

First, the private interest affected by a proceeding under the MRPL indisputably involves significant limitations on the committee's liberty as it can result in a one-year involuntary commitment to a mental institution. (§ 6500.) However, as discussed in Argument I.B.1., not all aspects of civil commitment procedure implicate a fundamental liberty interest. Trial court advice to a prospective committee of a jury trial right lacks a fundamental

impact that other procedures may have on the reliability or outcomes of such proceedings. This is especially true for proceedings in which the proposed committee's interests are protected by appointment of counsel, as they are in MRPL proceedings. (See *Conservatorship of John L.*, *supra*, 48 Cal.4th at p. 156 [reaffirming the longstanding presumption that counsel fully communicates with the proposed conservatee about the entire proceeding].) This first factor weighs against requiring the trial court, as a matter of due process, to advise of the jury trial right.

Second, the state or public interest at issue weighs against the requirement of a jury trial advisement. Under this factor, this court considers "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*People v. Otto* (2001) 26 Cal.4th 200, 214-215.) It is undisputed that the government has a strong interest in "protecting the general public, other patients, and the institutional personnel, from physical harm" and in providing treatment to these individuals. (*Cramer v. Tyars*, *supra*, 23 Cal.3d at p. 147; see also *Heller v. Doe*, *supra*, 509 U.S. at p. 332 [""the state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable . . . to care for themselves,' as well as 'authority under its police power to protect the community' from any dangerous mentally retarded persons"].) To require the advisement of the right to a jury trial (and the personal waiver of that right) in all proceedings under the MRPL would impose a significant fiscal and administrative burden on the government's ability to protect these interests. Because, by definition, mentally retarded persons have "significantly subaverage general intellectual functioning" (*Money v. Krall*, *supra*, 128 Cal.App.3d at p. 397; Pen. Code, § 1001.21), before a proposed committee could be found to have been properly advised of the jury trial right and a valid waiver of the jury trial right could be obtained, a

competency hearing would be required in many if not all cases to determine whether the proposed committee could understand this right and knowingly and intelligently waive it. The court in *Alvas* acknowledged this likelihood, but understated its significance, finding only that "[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 at p. 1465.) This would impose a significant burden on the state, which would be required to hold minitrials before the court on the *level* of retardation to determine whether to advise the proposed committee of his or her jury trial right before the trial at which the proposed committee's level of retardation would again have to be determined, as well as the other requirements for a section 6500 commitment. And because section 6500 commitments are limited to one-year terms, this odd double trial would need to be repeated annually. The fiscal and administrative impact of such a requirement would be significant, yet yield very little benefit. Accordingly, the second factor strongly weighs against requiring a jury trial advisement by the trial court.

The final factor to consider is "the risk that the procedure or its absence will lead to erroneous decisions." This factor also weighs against the finding that due process requires a jury trial advisement. Advisement (or lack thereof) regarding jury trial rights is unrelated to the reliability of determinations made under section 6500. (*People v. Alvas*, *supra*, 221 Cal.App.3d at p. 1466 [the failure to advise a defendant of his or her right to a jury trial has "no bearing on the reliability of the fact-finding process"].) Moreover, as noted, proposed committees under section 6500 have a right to appointed counsel, the right to a jury trial, the right to be present, and the right to a determination not only that they are mentally

retarded and a danger to themselves or others, but also that their dangerousness is caused by their mental retardation. Adding a requirement that the trial court advise them of their jury trial right would in no way increase the reliability of the fact-finding process in these cases. This third factor also weighs against requiring the trial court to advise of the jury right.

This court has used a four-part balancing test to consider what process is due to a civil committee under the due process clause of article I, section 7, subdivision (a), of the California Constitution. In addition to the three factors discussed above, that test considers "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." (*People v. Moore* (Aug. 19, 2010, S174633) ___ Cal.4th ___ [2010 Cal. LEXIS 8100] [using the four-part test in rejecting claim that due process requires mental competency of persons undergoing commitment as a sexually violent predator]; see also *People v. Allen* (2008) 44 Cal.4th 843, 862-863 [using four-part test]; *People v. Otto*, *supra*, 26 Cal.4th at p. 210 [same].)[7] Here, consideration of such "dignitary interest" does not advance appellant's due process claim. Requiring the trial court to inform proposed committees under the MRPL of the right to a jury trial is unrelated to informing the proposed committee about the "nature, grounds, and consequences of the action" or to telling his or her side of the story. These dignitary interests are, moreover, protected by the proposed committee's right to counsel under the MRPL.

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[7] The state test appears to have originated in *People v. Ramirez* (1979) 25 Cal.3d 260, 269 (plur. opn. by Mosk, J.); accord, *id.* at pp. 278-279 (conc. and dis. opn. of Bird, C. J.).

Accordingly, considered as a whole, application of the balancing test set forth above establishes that requiring a jury trial advisement by the trial court is not mandated by the due process clause of the federal or state Constitutions.

For all these reasons, due process does not require advisement of the right to a jury trial in MRPL proceedings, which as this court recognized in *Cramer v. Tyars*, *supra*, 23 Cal.3d at page 137, are civil in nature.

III. NO EXPRESS WAIVER OF THE JURY TRIAL RIGHT IS REQUIRED

Appellant asserts that a personal waiver of the right to a jury trial is required in proceedings under the MRPL. Even if equal protection or due process rights compel a court to advise proposed committees under section 6500 of the jury trial right, express waiver of that right is not compelled and should not be required.

As noted, unlike in criminal cases, in civil cases "a jury may be waived by the consent of the parties expressed as prescribed by statute." (Cal. Const., art. I, § 16.) Code of Civil Procedure section 631 provides that a jury may be waived "by failing to announce that a jury is required, at the time the cause is first set for trial . . . ." Thus, neither an advisement nor an express waiver of the right to a jury trial is required in civil cases. (*Madden v. Kaiser Foundation Hospitals*, *supra*, 17 Cal.3d at p. 713, fn. 12.)

Virtually all courts that have considered the waiver issue in the context of other civil commitment statutes conclude that civil and not criminal waiver principles apply. (See *Conservatorship of Maldonado*, *supra*, 173 Cal.App.3d at p. 148 ["Civil procedural law determines whether an individual has waived the right to a jury trial in a conservatorship proceeding," under the LPS Act and counsel's waiver was sufficient under Code of Civil Procedure section 631]; *People v. Montoya*, *supra*, 86

Cal.App.4th at pp. 829-831 [holding that personal waiver of jury trial is not required in MDO proceeding, and noting that the Legislature presumably contemplated many persons subject to the MDO law might not be competent to determine their own best interests, including whether to demand a jury trial]; *People v. Masterson*, *supra*, 8 Cal.4th at p. 967 [holding that counsel may waive a client's right to a jury trial in a Penal Code section 1367 competency proceeding, even over the client's objection, and noting that because the competency of the defendant is in question at such a proceeding, it makes no sense to grant the defendant authority to make basic decisions regarding the conduct of the proceedings]; *People v. Harris* (1993) 14 Cal.App.4th 984, 991-992 [accord]; *Conservatorship of Mary K.* (1991) 234 Cal.App.3d 265, 271-272 [holding in LPS Act proceeding, counsel may waive both the right to advisement and the jury trial itself];[8] see also *People v. Vera* (1997) 15 Cal.4th 269, 273 [jury trial right as to truth of prior conviction allegation is not of constitutional dimension and may be waived by counsel].)

These cases are consistent with the general presumption, recently reaffirmed by this court in *Conservatorship of John L.*, *supra*, 48 Cal.4th 131, 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." (*Id.* at p. 156.) Citing three cases where the record suggested that counsel had failed to live up to this presumption, appellant argues that this presumption is invalid. (AOB 19.) Not so. The decisions support the general rule in that they arose in situations in which the presumption was rebutted. They do not, however,

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[8] Appellant argues *Conservatorship of Mary K.* should be disapproved. (AOB 18.) The opinion, however, is consistent with the general jurisprudence cited above, holding that the personal waiver of a jury trial in civil commitment proceedings is not constitutionally required.

provide a basis to abandon the long-standing principle that an attorney admitted to the California Bar is presumptively competent. (See *People v. Ngo* (1996) 14 Cal.4th 30, 37; *Conservatorship of Ivey* (1986) 186 Cal.App.3d 1559, 1566 [in the absence of evidence to the contrary, the court must assume counsel is competent and fully communicates with the proposed conservatee about the entire proceeding].)

IV. ERROR IN FAILING TO ADVISE IS NOT STRUCTURAL, AND ANY ERROR HERE IS MOOT AND HARMLESS

Even if the trial court should have advised appellant of her jury trial right and/or obtained a personal waiver, reversal is not warranted.

A. The Structural Error Claim Respecting the Lack of Waiver Is Not Fairly Encompassed in the Second Question on Review and the Issue Whether the Asserted Error Was Harmless Is Moot

Appellant's argument asserts both the lack of an advisement and a personal waiver as structural errors. The petition for review presents the structural error issue only in relation to the failure to advise appellant of the jury trial right. The structural error question accepted for review does not encompass personal waiver. (Cal. Rules of Court, rule 8.520(b)(3).)

This court need not determine whether the asserted error was harmless, because the order of commitment is moot. As observed in the Introduction, the first issue raised by appellant involves matters of public interest that are likely to reoccur yet normally evade review. The same cannot be said of the harmless error question, which is case specific and would be of little value in future cases. (See *People v. Sweeney*, *supra*, 175 Cal.App.4th at p. 225 [declining to conduct harmless error analysis in section 6500 case despite finding due process violation].)

B. The Claimed Errors Are Not Structural

Arizona v. Fulminante (1991) 499 U.S. 279 (*Fulminante*) divided constitutional error into two classes: "'trial error'" which "occurred during the presentation of the case to the jury," the effect of which may "be quantitatively assessed in the context of other evidence presented in order to determine whether [the error was] harmless beyond a reasonable doubt" (*id.* at pp. 307-308), and "structural defects," which "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds" and are not "simply an error in the trial process itself" (*id.* at pp. 309-310). Structural errors "'infect the entire trial process,' [citation], and 'necessarily render a trial fundamentally unfair,' [citation]. Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' [Citation.]" (*Neder v. United States* (1999) 527 U.S. 1, 8-9 (*Neder*).)

Because it is difficult or impossible to assess the prejudicial effect of structural error on the ultimate fairness of the trial (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, fn. 4 (*Gonzalez-Lopez*)), such errors "defy analysis by 'harmless error' standards." (*Fulminante*, *supra,* 499 U.S. at pp. 309-310.) An error may also qualify as structural where prejudice is essentially irrelevant to safeguarding the constitutional right at issue, such as where the defendant is denied his right to self-representation. (*Gonzalez-Lopez*, *supra*, at p. 149, fn. 4.)

Included in the list of "structural defects" are the total deprivation of the right to counsel at trial (*Gideon v. Wainwright* (1963) 372 U.S. 335), the denial of the right of self-representation (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177-178, n. 8), the denial of the right to counsel of choice (*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 152), the denial of the right to a

public trial (*Waller v. Georgia* (1984) 467 U.S. 39, 49, fn. 9), the denial of the right to an impartial judge (*Tumey v. Ohio* (1927) 273 U.S. 510), the existence of racial discrimination in the selection of the grand jury (*Vasquez v. Hillery* (1986) 474 U.S. 254) or the petit jury (see *Batson v. Kentucky* (1986) 476 U.S. 79, 100), and the denial of the right to trial by jury by giving a defective reasonable doubt instruction (*Sullivan v. Louisiana* (1993) 508 U.S. 275). (See also *Neder*, *supra*, 527 U.S. at p. 8 [listing structural error cases].)

By contrast, most violations of established constitutional rights are not per se reversible. (See *Rose v. Clark* (1986) 478 U.S. 570, 579 ["if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis"], overruled on another ground in *Brecht v. Abrahamson* (1993) 507 U.S. 619, 637; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 ["Since *Chapman* [*v. California* (1967) 386 U.S. 18], we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"]; *People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1276 [holding failure to provide jury trial harmless in the commitment proceeding of a mentally disordered offender under Penal Code § 2962].)

Any failure to make an advisement of a jury trial right or to obtain an express waiver in the noncriminal context of an MRPL proceeding also does not compel automatic reversal. Any jury trial advisement or waiver errors do not make it impossible to review the record and do not render the trial fundamentally unfair. The failure to advise a defendant of his or her right to a jury trial has "no bearing on the reliability of the fact-finding process." (*People v. Alvas*, *supra*, 221 Cal.App.3d at p. 1466.)

C. Any Error Was Harmless in this Case

In the civil context, the harmless error test announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 is used to review asserted deprivations of statutory rights. (See *People v. Cosgrove*, *supra*, 100 Cal.App.4th at p. 1276 [applying *Watson* to deprivation of MDO's statutory right to jury].) In *Cosgrove*, the trial court granted the People's motion for a directed verdict finding the defendant to be an MDO under Penal Code section 2960. The defendant had requested a jury trial and, under Penal Code section 2966, was entitled to a jury trial unless waived by both parties. On appeal, the court concluded that the error was harmless under *Watson.* (*People v. Cosgrove*, *supra*, 100 Cal.App.4th at p. 1276.)

If the court were to find that a jury trial advisement was required under equal protection principles, then the *Watson* standard applies to that error. The rules regarding waiver and advisement of a jury trial would apply in section 6500 cases under that scenario because they are statutorily granted, not because the federal Constitution would compel a finding of error even in the absence of statute. Thus, if potential committees in section 6500 cases must be advised of the jury trial right by reason of the fact that the Legislature chose to provide such an advisement to mentally ill persons in LPS Act proceedings, then the requirement is rooted in the statutory provisions of the LPS Act (§ 5302), not in the federal Constitution, and *Watson* applies.[9]

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[9] We recognize that the Sixth District assessed the asserted error under the *Chapman* standard based on its finding that the claimed error "was of a constitutional rather than statutory dimension." (Typed Opn. at p. 22.) However, this statement was made without analysis and failed to look behind the asserted constitutional claims to recognize that the right to a jury trial advisement under the LPS Act was statutory.

By contrast, if the court were to find that a jury trial advisement was required as a matter of federal due process, the *Chapman* standard would apply. (See *People v. Hurtado* (2002) 28 Cal.4th 1179, 1194 [applying *Chapman* test to review federal constitutional error in civil commitment proceeding].) However, even if the asserted errors were of federal constitutional magnitude, the errors are harmless.

There is nothing in the record that indicates appellant and counsel would have chosen to proceed with a jury trial if appellant had been advised of the right to do so. Indeed, appellant's counsel at the section 6500 proceedings presumably advised her that she had the right to a jury trial. (See *People v. Ngo*, *supra*, 14 Cal.4th at p. 37; *Conservatorship of Ivey*, *supra*, 186 Cal.App.3d at p. 1566.) The trial court's failure to repeat this advisement was harmless for this reason alone. Moreover, there is no indication that the lack of advisement or the lack of a jury contributed to the verdict in this case. The trial consisted of the uncontroverted testimony of an expert who opined that appellant met the statutory criteria for commitment under section 6500. Appellant put forth no evidence that contradicted the opinion of the expert, and cast no doubt on his conclusions. To the contrary, appellant's testimony only expressed her preference to be placed in a group home.

Appellant insists that causation was a "key issue" in the case. (AOB 21.) However, the Court of Appeal properly rejected this assertion, finding that "there was undisputed evidence, as the trial court found, that [appellant's] mental retardation is *a* substantial factor in her inability to control her dangerous behavior." (Typed Opn. at p. 23.) In full, concluding that any asserted error was harmless, the Court of Appeal wrote:

> There was no dispute that [appellant] is a person with mental retardation. And, given her recent history, as documented in the reports attached to the petition for commitment and the testimony of Robert Thomas, there was substantial evidence that

> she is a danger to herself or others, even though there was no evidence that anyone, as yet, had suffered actual and serious physical injury as a result of her behavior. She regularly assaulted others and engaged in self-mutilation and suicidal ideation. And though [appellant] disputes it, there was undisputed evidence, as the trial court found, that her mental retardation is *a* substantial factor in her inability to control her dangerous behavior. Thomas specifically opined that because of her mental retardation, she has difficulty controlling her dangerous behavior as "she lacks the ability to understand the complexity of her disorder and the need for treatment." Although he also testified that because of her dual diagnosis, it would be difficult to "differentiate what behavior [was] attributed to what particular disorder," this is not inconsistent with her mental retardation being *a* substantial factor in her inability to control her dangerousness.

(Typed Opn. at pp. 22-23.) As such, the record reveals no basis on which a jury trial could have resulted in a different outcome for appellant.

Thus, the trial court's alleged failure to advise appellant of her right to a jury trial was harmless beyond a reasonable doubt, as was any alleged error regarding the denial of appellant's right to a jury trial.

CONCLUSION

Respondent respectfully requests that the judgment of the Court of Appeal be affirmed.

Dated: August 30, 2010

Respectfully submitted,

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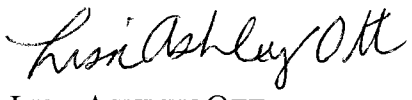

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 10,233 words.

Dated: August 30, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Christine Barrett**
No.: **S180612**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 30, 2010, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 30, 2010, at San Francisco, California.

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