In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **BRUCE LEE BLACKBURN,** **Defendant and Appellant.**

Case No. S211078

Sixth Appellate District, Case No. H037207
Santa Clara County Superior Court, Case No. BB304666
The Honorable Gilbert T. Brown, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

The Court granted petitions for review by both parties, deemed the People petitioners, and limited briefing and argument to the following question: "Did the trial court prejudicially err by failing to advise defendant of his right to jury trial and obtain a personal waiver of that right?"

INTRODUCTION

Since 2006, appellant Bruce Blackburn has been under commitment in Atascadero State Hospital as a mentally disordered offender (MDO). (Pen. Code §§ 2962, 2970, 2972,[1] further statutory citations are to this code unless otherwise specified).[2] He suffers a schizoaffective disorder, bipolar type, with paranoia and grandiose delusions. In a 2011 proceeding to extend the commitment, the trial court did not advise appellant of the right to jury trial, because counsel waived appellant's pretrial appearance, and the record is silent as to such an advisement by counsel. A settled statement reflects counsel waived a jury in chambers. The trial court extended the commitment after a forensic psychologist gave undisputed testimony that appellant's recent symptoms of mental disorder remain consistent with those at the time of his crimes.

Appellant appealed the absence of a trial court advisement of the right to jury trial and of a personal waiver of that right. The Court of Appeal held any error harmless. In this brief, we argue that a thoughtful and

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[1] Sections 2970 and 2972 are attached as an appendix.

[2] This Court in *Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061-1061, described the three phases of MDO commitment proceedings as consisting generally of the period of incarceration (§ 2964, 2966), parole (§ 2966, subd. (c)); and after termination of parole (§ 2970, 2972). This case involves the third phase of commitment.

consistent body of precedent not only demonstrates the absence of prejudice, but the absence of any error.

STATEMENT OF THE CASE

A. Trial Court Proceedings

In 2004, appellant was convicted of first degree burglary and false imprisonment. An 85-year-old victim had awoken in her home to find appellant lying naked on top of her, using his legs to restrain her, and pulling her hair to hold her down. (CT 1-2, 8.) The victim escaped. Police discovered appellant inside the home, sitting naked on the toilet, eating pork chops, and speaking incoherently. (CT 10; see Opn. 2, fn. 1.)

In 2006, the court committed appellant to Atascadero State Hospital as an MDO. (CT 2.) The court extended the commitment numerous times (§§ 2962, 2970, 2972). (CT 2.) In 2011, the district attorney filed another petition to extend the commitment. (CT 1-4.) The petition was supported by a letter and affidavit from Dr. Thomas Cahill, the Medical Director at Atascadero State Hospital, and a forensic report signed by two forensic psychologists and a senior psychiatrist supervisor. (CT 5-12.)

A settled statement in the record reflects that "'[i]t was the custom and practice of [the Honorable Gilbert T. Brown] to call the mental health calendar each Friday on the record. Prior to calling the calendar, all cases set were discussed in chambers.' [Appellant's] civil commitment was first called on April 6, 2011. At that time, counsel was appointed, and counsel waived [appellant's] presence because he was at Atascadero State Hospital. The case [was] called again on April 29, 2011, then May 13, and then June 3. At each hearing, counsel waived [appellant's] presence. 'On June 3, 2011, [defense counsel] stated in chambers that [appellant] was not willing to submit to an extension of his commitment to the Department of Mental Health and wanted a trial. He also stated that he, counsel, was requesting a

court trial rather than a jury trial. The People were in agreement with having a court trial.' Trial was set for July 19, 2011." (Opn. 4, some brackets added; see RT 16; CT 28.)

At the bench trial, clinical psychologist, Dr. Kevin Perry, testified. Appellant suffers from a severe mental disorder marked by paranoia, psychomotor agitation, impulsivity, thought disorganization, and grandiose and persecutory delusions. (CT 8-9.) Dr. Perry diagnosed appellant with schizoaffective disorder, bipolar type. (1 RT 4-8.) Appellant had expressed delusions that he was the "son of God" and that he could communicate with people across great distances through sound waves. (1 RT 8-9; see also written report at CT 9 [appellant believes he can be "beamed up" to the spaceship Enterprise].) Dr. Perry testified that appellant posed a risk to others based both on appellant's recently exhibited symptoms while committed, involving delusions, irrational thought processes, and impulsivity, and also on his history of violent behavior due to schizoaffective disorder. (1 RT 9-10.) Dr. Perry observed that appellant committed the qualifying criminal offense, a 2006 sexual assault of an elderly woman, while displaying "disorganized thoughts and bizarre behaviors." (1 RT 10.) The defense offered no evidence. At the conclusion of the bench trial, the superior court extended appellant's commitment to October 19, 2012. (1 RT 16; CT 28.)

B. Proceedings in the Court of Appeal

On appeal, appellant claimed the bench trial was error because the court did not advise him of his right to a jury trial and because the record did not reflect his personal waiver of the right to a jury trial. (Opn. 1, 4-5.) The Attorney General argued counsel has exclusive control over the decision to waive a jury even over the MDO's objection and that a personal waiver is not required. (Opn. 1, 5.)

On April 23, 2013, the Sixth District Court of Appeal rejected both parties' contentions, imposed a new supervisory rule of judicial procedure on trial courts, and affirmed the judgment, in a published decision. (Opn. 2, 33.) The court held that the Mentally Disordered Offender Act (§ 2960 et seq.) does not require an MDO's personal waiver of jury trial. (Opn. 7-11.) A contrary interpretation of the statutory language to exclude waivers by counsel, the court said, would lead to consequences that are "illogical and anomalous and therefore, to be avoided." (Opn. 9.)[3]

The court next found counsel's authority to waive jury trial is nonexclusive and qualified, requiring a demonstration that a waiver is executed "at the MDO's direction or with the MDO's knowledge and consent; and counsel can do so even over an MDO's objection when the circumstances cast reasonable doubt on the MDO's mental capacity to determine what is in his or her best interests." (Opn. 26.) The court found the record "silent concerning whether counsel discussed the jury issue with defendant, or if he did, whether defendant agreed to have a bench trial or wanted a jury trial instead." (Opn. 26-27.) Nonetheless, having found nothing in the record contradicted the presumption that counsel had advised appellant of his rights and, having found substantial evidence to support the commitment, the Court of Appeal held that any trial court error in failing to advise appellant and conduct a jury trial was harmless. (Opn. 27-30.)

To assure compliance with its interpretation of the statute, the Court of Appeal announced a new rule:

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[3] The Court of Appeal observed that the matter was technically moot as the challenged commitment period had expired. (Opn. 5.) Nonetheless, the court exercised its discretion to resolve the parties claims as to issues likely to reoccur and evade review, and because "the relevant published case law does not provide a clear, comprehensive, and definitive resolution of these claims." (Opn. 5.)

> [I]f the court conducts a bench trial and the MDO did not personally waive the right to a jury, the record must show that the court advised the MDO of the right to a jury or, if the court was unable to do so, that the MDO was made aware of the right *before* counsel waived it. The record must also show that in waiving a jury trial, counsel acted at the MDO's direction or with the MDO's knowledge and consent or that there were circumstances before the court that reasonably raised doubt concerning the defendant's capacity to determine what was in his or her own best interests.

(Opn. 31.) "At some point, . . . the court and parties must state on the record the facts establishing the MDO's awareness of the right to a jury and the validity of counsel's waiver. Alternatively, the record must contain an advisement and waiver form signed by the MDO." (Opn. 32, fn. omitted.)

One justice, concurring only in the judgment that no prejudicial error appeared, stated that he "can endorse the majority's rules as nonbinding, recommended practices to the extent they are helpful in avoiding unnecessary appeals but not as procedural rules controlling local courts." (Opn. 4 (conc. opn. of Elia, J.).)[4]

SUMMARY OF ARGUMENT

The right to a jury trial in civil commitment proceedings is statutory. The law has long and uniformly recognized that defense counsel, as "captain of the ship," may advise a defendant of this right and waive it on his or her behalf. A second proceeding to determine competency to waive jury is contrary to legislative intent as indicated by the threshold of mental impairment required in the petition triggering the proceedings.

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[4] The authority of the Court of Appeal to create such a rule is an additional issue presently before the Court in *People v. Tran*, S211329.

ARGUMENT

I. THE TRIAL COURT DID NOT PREJUDICIALLY ERR BY FAILING TO ADVISE DEFENDANT OF THE RIGHT TO JURY TRIAL AND OBTAIN A PERSONAL WAIVER OF THE RIGHT

In special proceedings to extend an MDO commitment, a defendant's attorney is "captain of the ship," in determining whether to waive a jury. Neither the trial court nor the appellate court can second-guess counsel's decision on a record that is silent as to the defendant's role in the decision.

Decisions by this Court and intermediate appellate courts repeatedly affirm defense counsel's authority to make this judgment in civil commitment cases. (*People v. Barrett* (2012) 54 Cal.4th 1081, 1102 (*Barrett*) [Welf. & Inst. § 6500, mental retardation]; *People v. Masterson* (1994) 8 Cal.4th 965, 969 (*Masterson*) [§ 1368, competency to stand trial]; *People v. Montoya* (2001) 86 Cal.App.4th 825, 829-830 (*Montoya*) [§ 2970, Mentally Disordered Offender (MDO)]; *People v. Otis* (1999) 70 Cal.App.4th 1174, 1177 [MDO]; *People v. Powell* (2004) 114 Cal.App.4th 1153, 1156 (*Powell*) [§ 1026.5, NGI]; *People v. Givan* (2007) 156 Cal.App.4th 405, 410-411 (*Givan*) [NGI]; *People v. Fisher* (2006) 136 Cal.App.4th 76, 81 [MDO].) The Legislature has done nothing that suggests its disagreement with these several holdings. The reasoning of these authorities is sound.

A. The Trial Court Did Not Prejudicially Err by Failing to Advise Appellant Personally of the Right to Jury Trial

Consistent with the foregoing authorities and the dispositive portion of the Court of Appeal's opinion (Opn. 27-28),[5] the trial court did not err by

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[5] "[W]hen counsel waives an MDO's presence, the court can reasonably expect counsel to discuss all pertinent matters that will arise or that have arisen in pretrial hearings, including the right to a jury trial and whether to have one. Indeed, '[l]ike all lawyers, the court-appointed (continued...)

failing to advise appellant of his right to jury trial. As a threshold matter, trial by jury is a "default" statutory right, unless affirmatively waived. (§ 2972, subd. (a).) The advisement is part and parcel with being informed of the right to be represented by an attorney. Section 2972, subdivision (a) reads: "The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial." Thus, when counsel is present at the first appearance, the trial court's failure to advise "the person" of the right to counsel and the default right of a jury trial makes the statutory advisement moot, rather than an error of omission. (See *Masterson, supra*, 8 Cal.4th at p. 971; cf. *Conservatorship of Mary K.* (1991) 234 Cal.App.3d 265, 271-272 [counsel may waive jury and right to inform proposed conservatee of nature, purpose and effect of conservatorship proceedings]; Bus. & Prof. Code § 6068, subd. (m).)

B. The Trial Court Did Not Prejudicially Err by Failing to Obtain a Personal Waiver of a Jury

These same principles establish that the trial court did not err by failing to obtain a personal waiver from appellant of the statutory right to trial by jury. Section 2972, subdivision (a) states, "The trial shall be by

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(...continued)
attorney is obligated to keep her client fully informed about the proceedings at hand, *to advise the client of his rights*, and to vigorously advocate on his behalf. [Citations.] The attorney must also refrain from any act or representation that misleads the court. (Bus. & Prof. Code, § 6068, subd. (d); Rules Prof. Conduct, rule 5-200(B).)' ([*Conservatorship of*] *John L.* [(2010)] 48 Cal.4th [131,] 151-152, italics added.) Absent a showing to the contrary, '[a] reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; *Conservatorship of Ivey* (1986) 186 Cal.App.3d 1559, 1566; e.g., *Mary K, supra,* 234 Cal.App.3d at p. 272 [where no evidence to the contrary, court presumed counsel discussed jury waiver with client before waiving on client's behalf].)" (Opn. 27-28, some brackets added and fn. omitted.)

jury unless waived by both the person and the district attorney." The controlling principles regarding waiver of jury in commitment and other proceedings in which a defendant's mental health is at issue were announced by this Court, nearly 20 years ago. *People v. Masterson* held that defense counsel could waive trial by 12 jurors in a trial-competency hearing, even over the client's objection. (*Masterson*, *supra*, 8 Cal.4th at p. 974.) In *Masterson*, this Court recognized that neither the state nor the federal Constitution requires a jury trial in a special proceeding, as distinct from the rights provided in a civil or criminal action. (*Id.* at p. 969.)

Seven years later, the Court of Appeal, in *Montoya*, applied this principle in an MDO commitment proceeding, and observed that a trial of a commitment extension petition encompasses an attorney's authority to waive jury trial. (*Montoya*, *supra*, 86 Cal.App.4th at p. 830.) The Court of Appeal analyzed the MDO statutory language in section 2972 authorizing the waiver and found that throughout the commitment scheme, the term "person" did not consistently refer to the defendant alone. (*Id.* at pp. 830-831.) Quoting *People v. Otis* (1999) 70 Cal.App.4th 1174, 1177, which reviewed an initial MDO determination under section 2966, subdivision (b), the Court of Appeal in *Montoya* said "the rules of statutory construction cannot be applied to reach a conclusion 'that is at odds with intention of the Legislature,'" to place the tactical decision of jury trial in the purview of the attorney. (*Id.* at p. 830-831.) "The Legislature must have contemplated that many persons . . . might not be sufficiently competent to determine their own best interests. There is no reason to believe the Legislature intended to leave the decision on whether trial should be before the court or a jury in the hands of such a person." (*Montoya*, *supra*, 86 Cal.App.4th at pp. 830-831.) Moreover, the state constitutional provision "that a jury trial in a criminal proceeding must be waived by 'the defendant and defendant's counsel' shows that the

Legislature knows how to make clear when a personal jury waiver is required. No such language is present in the disputed sentence of section 2972." (*Id* at p. 831.)

In *Powell*, the Court of Appeal addressed the issue of jury trial waiver in an NGI commitment proceeding. Consistent with earlier authorities, the court concluded that an NGI proceeding was "civil in nature and directed to treatment, not punishment," and that "[a]n insane person who is 'a substantial danger of physical harm to others' (§ 1026.5, subd. (b)(1)) should not be able to veto the informed tactical decision of counsel." (*Powell, supra*, 114 Cal.App.4th at pp. 1157-1158.)

In *Barrett*, this Court affirmed the "controlling principles" in *Masterson* in the context of a commitment under Welfare and Institutions Code section 6500, et seq. (hereafter section 6500). (*Barrett, supra*, 54 Cal.4th at p. 1100.) The primary principle was that "when the preliminary evidence is sufficient to trigger a mental competence hearing, 'it should be assumed that [the defendant] is unable to act in his own best interests. In such circumstances counsel must be free to act even contrary to the express desires of his client." (*Id.* at p. 1102, internal quotation marks omitted.) This Court observed that "no section 6500 proceeding is brought or pursued in an evidentiary vacuum or without competent support," and observed that such proceedings are triggered by "a responsible and interested party," who provides specific information in a verified petition. (*Id.* at p. 1104.) The preliminary showing in *Barrett* was sufficient to place mental competency in issue since, like the required showing for an NGI petition, it was supported by the recommendation of the defendant's treating facility director and included assessments, evaluations, and reports. (*Ibid.*)

The preliminary evidence required for MDO petitions is greater than the showing that justifies an assumption a defendant is unable to act in his or her own best interests in a section 6500 proceeding. (§ 2970 ; *Barrett*,

supra, 54 Cal.4th at p. 1104.) In MDO commitment-extension proceedings, a mental health expert or person in charge of the MDO's treatment facility—i.e., "the medical director of the state hospital which is treating the parolee, or the community program director in charge of the parolee's outpatient program, or the Secretary of the Department of Corrections and Rehabilitation"[6]—must provide affidavits and a "written evaluation" regarding whether the defendant suffers a severe mental disorder that is not in remission or cannot be kept in remission without treatment. (§2970; *Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347, 355 [MDO-recommitment petition requires supporting mental health evaluations]; *People v. Marchman* (2006) 145 Cal.App.4th 79, 89 [MDO-recommitment petition requires written evaluation of director of facility or program providing treatment]; but see *People v. Williams* (1999) 77 Cal.App.4th 436, fn. 11 [lack of expert declaration supporting petition not jurisdictional defect, not statutory requirement, and in any event, was waived].) By contrast, in a section 6500 proceeding, the "responsible and interested party" providing the preliminary evidence can be a "parent, conservator, correctional or probation official," as well as a regional center director. (*Barrett, supra*, 54 Cal.4th at p. 1104; see Welf. & Inst. Code, § 6502, subds. (a)-(f).) Since the threshold showing for an MDO petition is grounded not only in factually supported allegations, but in the expertise of mental health professionals, the "key point," about preliminary evidence persuasive in *Masterson* resonates even more strongly here:

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[6] An MDO may be transferred to the Department of Corrections and Rehabilitation when it provides better conditions of custodial security for treatment. (Welf. & Inst. § 7301; e.g., *People v. Gram* (2012) 202 Cal.App.4th 1125, 1142 [MDO confinement for purposes of treatment, not punishment].)

> "The sole purpose of a competency proceeding is to determine the defendant's present mental competence, i.e., whether the defendant is able to understand the nature of the criminal proceedings and to assist counsel in a rational manner. [Citations.] Because of this, the defendant necessarily plays a lesser personal role in the proceeding than in a trial of guilt. How can a person whose competence is in doubt make basic decisions regarding the conduct of a proceeding to determine that very question?" (*Masterson*, *supra*, 8 Cal.4th 965, 971.)

(*Barrett*, *supra*, 54 Cal.4th at p. 1101.)

In *Barrett*, this Court was unpersuaded by the defendant's argument that a range of cognitive impairment might distinguish one who lacks competence for trial as in *Masterson* from one who suffers mental deficiencies under section 6500. (*Barrett*, *supra*, 54 Cal.4th at p. 1106.) This Court found no basis to conclude the Legislature intended to impose, in effect, two separate proceedings on competency—one for a court to determine the scope of defense counsel's authority over jury trial issues, and a second for either a judge or jury to determine "whether the person is so mentally retarded and dangerous as to warrant commitment." (*Ibid.*; *People v. Angeletakis* (1992) 5 Cal.App.4th 963, 970 [due process does not include the right to be mentally competent during a commitment extension hearing].)

On a related point with equal relevance to the present case, the Court recognized: "[W]hen assessing competing due process concerns, courts are not blind to the "'administrative burdens'" and "practical difficulties" of demanding new procedures. [Citations.] No statute guides the screening procedure suggested here, including the standards of mental retardation that might apply at each phase. To the extent significant overlap exists, we are reluctant to require duplicative hearings in the context of the compact timeframe in which one-year commitments, and recommitments, occur." (*Barrett*, *supra*, 54 Cal.4th at p. 1106.)

Neither is there any statute that guides a screening procedure for an MDO's competency to decide a jury trial waiver such as the Court of Appeal envisioned in this case. Indeed, as just discussed in relation to a section 6500 hearing, the preliminary evidence required to trigger a hearing on extension of an MDO commitment is not based on a layperson's "doubt" of competence (§1368), but rather on assessments, evaluations, and reports of mental health experts involved in a defendant's treatment (§ 2970; 2972, subd. (f); Welf. & Inst. § 7301; *Gram*, *supra*, 202 Cal.App.4th at p. 1142; *Cuccia*, *supra*, 153 Cal.App.4th at p. 355; *Marchman*, *supra*, 145 Cal.App.4th at p. 89.)

The existence of a severe mental disorder not in remission or which cannot be kept in remission without treatment—linked, moreover, to representing a substantial danger of physical harm to others—is the central issue to be tried in special proceedings under the MDO Act. (§§ 2970, 2972, subds. (c), (e).) No trial occurs without there being substantial basis for finding such a condition. That fact ultimately compels the conclusion that the attorney is captain of the ship in determining whether to waive a jury. (*Barrett*, *supra*, 54 Cal.4th at p. 1106; *Masterson*, *supra*, 8 Cal.4th at p. 969; *Montoya*, *supra*, 86 Cal.App.4th at p. 830-831; *Otis*, *supra*, 70 Cal.App.4th at p. 1177; see *People v. Putnam* (2004) 115 Cal.App.4th 575, 581-582 [MDO jury instruction defining severe mental disorder sufficient to show "substantially impaired capacity to control behavior"]; *People v. Nelson* (2012) 209 Cal.App.4th 698, 706 [elements for MDO recommitment].) Indeed, this tactical choice is under the attorney's authority in civil matters generally. (*Montoya*, *supra*, 86 Cal.App.4th at p. 829; *Otis*, *supra*, 70 Cal.App.4th at p. 1176; *Zurich General Acc. & Liability Ins. Co. v. Kinsler* (1938) 12 Cal.2d 98, 105, disapproved on other grounds by *Fracasse v. Brent* (1972) 6 Cal.3d 784; see Code of Civ. Proc. § 631.)

In the nearly 20 years since *Masterson*, its progeny have included the 13-year-old decisions in *Montoya* and *Otis*, and the 10 year-old-decision in *Powell* involving an NGI commitment. Throughout that time, the Legislature has not seen fit to alter the repeated and consistent statutory interpretation deeming the attorney to be captain. Nor has it created any procedure for a trial court to determine if a defendant, whose mental disorder requiring continued treatment is the reason for the trial and who it is assumed is unable to determine his or her own best interests, can nevertheless tell counsel how to steer.

Procedures that serve the best interests of the mentally impaired comport with the Legislature's primary concern about effective treatment of individuals pending a determination of their continued extension. (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061 ["The MDO Act has the dual purpose of protecting the public while treating severely mentally ill offenders"]; *People v. Robinson* (1998) 63 Cal.App.4th 348, 352 [twin objectives of MDO scheme are protection of public and mental-health treatment of offender].) Requiring a pretrial proceeding to make a determination of the defendant's mental status, similar if not precisely identical to that which comprises the ultimate issue at trial, i.e., the nature, severity and effect of a mental disorder, in order to configure the degree of counsel's authority in the trial, does not serve this legislative objective.

There is no reason to assume that a defendant's counsel at trial does not act in the best interests of a defendant, and indeed, all presumptions are contrary. (Evid. Code § 664; *Montoya*, *supra*, 86 Cal.App.4th at pp. 830-831; *Fisher*, *supra*, 136 Cal.App.4th at p. 81; *People v. Rucker* (1960) 186 Cal.App.2d 342, 346 ["presumption exists that an attorney has performed his duty in protecting his client's interest"]; *Angeletakis*, *supra*, 5 Cal.App.4th at pp. 970-971 [NGI defendant not entitled to suspension of commitment proceedings under § 1368 as adequately protected by

competent counsel and other procedural safeguards].) "[I]n the absence of evidence to the contrary, the court must assume counsel is competent. [Citation.]" (*Conservatorship of Mary K.*, *supra*, 234 Cal.App.3d at p. 272.) Even on a silent record, a reviewing court under most circumstances can infer counsel was competent. As this Court noted in *People v. Mendoza-Tello* (1997) 15 Cal.4th 264, "[w]e have repeatedly stressed that if the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim on appeal must be rejected." (*Id.* at p. 266, internal quotation and edit marks omitted.)

Rather than characterizing a defendant's impairment as one of "competence" per se, based on the extension petition, this Court, in *Barrett* and *Masterson*, focused on a defendant's inability to act in his or her own "best interests." (*Barrett*, *supra*, 54 Cal.4th at p. 1103; *Masterson*, *supra*, 8 Cal.4th at p. 971.) The Court of Appeal similarly concluded that an attorney's authority to waive jury would trump that of a defendant "when the circumstances cast reasonable doubt on the MDO's mental capacity to determine what is in his or her best interests." (Opn. 26.) But it would require a separate hearing, prior to trial, to establish the fact. (Opn. 31-32 & fn. 14.)

The nuanced "screening procedure" or the "reasonable doubt" standard set forth by the Court of Appeal has no statutory authority. It would make the threshold showing of a severe mental disorder not in remission, already required to support the commitment-extension petition, superfluous. (*Barrett*, *supra*, 54 Cal.4th at p. 1106.) As this Court observed in *People v. Williams* regarding commitments under the Sexually Violent Predators Act (SVPA) to define dangerous mental condition, "[I]n this nuanced area, the *Legislature* is the primary arbiter of how the

necessary mental-disorder component of its civil commitment scheme shall be defined and described." (*People v. Williams* (2003) 31 Cal.4th 757, 774; *Putnam*, *supra*, 115 Cal.App.4th at p. 582, fn. 3 ["This concern applies equally to the statutory scheme governing MDO commitments"].)

Moreover, a hearing to determine whether a defendant can "determine what is within his or her best interests" lends no dignity to the defendant, adds an additional court appearance for the defendant, and further delays the proceedings imposing a much greater burden than a one-on-one discussion between client and counsel. No offsetting dignitary interest is accorded to a defendant by demanding the parade of his or her mental deficits in court twice. (See *People v. Fisher* (2006) 136 Cal.App.4th 76, 78 [defendant's "candid admissions" that he lived in "la la land" and was "crazy," his waiver of right to counsel and insistence on self-representation, "and his sorry performance at trial sealed his fate with the jury"]; cf. *Indiana v. Edwards* (2008) 554 U.S. 164, 176-177 [defendant lacking mental capacity to conduct defense has no right of self-representation].) Indeed, the Court of Appeal implicitly acknowledged as much, when it stated, "We observe that the court's custom and practice of obtaining waivers from counsel in chambers off the record may well be based on the view that counsel has exclusive authority. *If counsel does,* then the court's practice represents [a] practical, efficient and convenient way to resolve the jury issue." (Opn. 12, fn. 5, italics added.)

Challenging the attorney's waiver, or requiring a showing of impairment if the attorney and a defendant disagree, with no hint that the attorney has rendered ineffective assistance, puts a reviewing court (and a defendant's appellate counsel) in the role of second guessing, from afar, the trial tactics of the person charged with promoting a defendant's best interest. (*Angeletakis*, *supra*, 5 Cal.App.4th 963, 970 [due process does not include the right to be mentally competent during a commitment extension

hearing].) This kind of suspicion is beyond a scope of review focused on demonstrated error. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549 [record must affirmatively demonstrate error and judgment on appeal is presumed correct].)

C. An Attorney's Authority to Waive Jury in Proceedings to Extend a Civil Commitment is Unqualified

The Court of Appeal below acknowledged that attorney waiver has been long recognized in the statutory language, and with good reasons, since "interpreting the language to exclude waivers by counsel results in consequences that, in our view, are illogical and anomalous and therefore, to be avoided. (*People v. Martinez* (1995) 11 Cal.4th 434.)" (Opn. 9.)

The appellate court also recognized that "for a variety of reasons, MDOs being treated in state hospitals often choose not to appear until the day of trial, courts do not automatically order them transported to court for every pretrial hearing, and counsel routinely waive the defendant's presence at those hearings that often involve technical, procedural, and scheduling matters. Such was the case here. Given these practical and logistical issues, counsel must be able to act on the MDO's behalf in his or her absence." (Opn. 9-10.)

Rather than "captain," however, the decision below relegates counsel to a mere "shipmate," by requiring a prophylactic showing that the defendant set the course, or else that the defendant cannot navigate. (Opn. 12-14.) The Court of Appeal held that if the attorney alone can waive jury, then the advisement requirement is superfluous. (Opn 12-13.) That analysis ignores that the advisement of the jury trial right is part and parcel with advisement of counsel, an equally superfluous advisement when a defendant's attorney makes the first appearance. Indeed, the advisement is limited to informing an unrepresented defendant of the right to jury, and *no*

advisement is required to inform a defendant of the procedure for waiver. (§ 2972, subd. (a).)

The Court of Appeal read *Barrett* and *Masterson* narrowly, to apply to types of commitment proceedings, i.e., incompetency and mental retardation, in which "it is reasonable to categorically assume that such defendants lack the capacity to make a rational decision about jury trial." (Opn. 18-19, 20.) The court said that "[t]he proceeding in *Barrett* did not involve a determination of competency but whether a mentally retarded person is dangerous," and that MDO proceedings, too, have this limited determination since "competency," refers only to trial competency since this was the determination in *Masterson.* (Opn. 19.) The premise that trial is limited to the element of dangerousness is incorrect. The prosecutor has the burden of proving whether a defendant has or had a severe mental disorder as an element. (§ 2972; CALCRIM No. 3457; *Putnam*, *supra*, 115 Cal.App.4th at p. 582.)

Moreover, the definition of *severe* mental disorder, mirrored as an element in CALCRIM No. 3457, involves mental impairment:

> The term "severe mental disorder" means an illness or disease or condition that *substantially impairs the person's thought, perception of reality, emotional process, or judgment*; or which *grossly impairs behavior*; or that demonstrates *evidence of an acute brain syndrome* for which prompt remission, in the absence of treatment, is unlikely. The term "severe mental disorder" as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances.

(Pen. Code, § 2962, subd. (a)(2), italics added.)

More significant, the Court of Appeal's analysis ignores the broader reasoning of *Barrett*, which found that the threshold showing of mental impairment in the petition, and the absence of statutory guidelines for, and the administrative burdens imposed by, "second screening" for competence

justify applying the controlling principles in *Masterson* to commitment proceedings generally. (*Barrett, supra*, 54 Cal.4th at p. 1104, 1106.) This focus on the defendant's "best interests" over categorical competency requires an attorney at the helm to make decisions about trial tactics. (See *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 861 [juvenile may be found incompetent to stand trial based upon developmental immaturity without finding of mental disorder or developmental disability].)

The distinction, in *Barrett* moreover, between defendants who suffer mental retardation under section 6500 from defendants under the Lanterman-Petris-Short (LPS) Act (Welf. & Inst. Code, § 5000 et seq.), for purposes of equal protection, does not lend support to the Court of Appeal's conclusion that mental retardation as categorical impairment is distinct from the mental disorder affecting the competency of an MDO. (Opn. 20-22.) As a threshold matter, this Court did not "address the circumstances under which a 180-day LPS Act candidate may, either acting alone or through counsel, properly waive a jury trial and submit to a court trial under section 5303"; rather, it assumed, for argument's sake, that the waiver rights were the same. (*Barrett, supra*, 54 Cal.4th at p. 1108.) Next, in contrast to the required "severe mental disorder," not in remission, that must afflict an MDO, this Court noted that "[t]he LPS Act process itself assumes that the need for treatment may be temporary, and that disabling mental disorders may be intermittent or short-lived," placing an MDO impairment "categorically" closer to that of mental retardation. (*Ibid.*) Notwithstanding this analysis, this Court rejected the premise that different statutory procedures in each commitment scheme stem from categorical differences between mental disorders, or a legislative intention to differentiate levels of competency:

> But an equal protection violation does not occur merely because different statutory procedures have been included in different civil commitment schemes. [Citation.] Nothing compels the state "to choose between attacking every aspect of a problem or not attacking the problem at all." [Citation.] Far from having to "solve all related ills at once" [citation], the Legislature has "broad discretion" to proceed in an incremental and uneven manner without necessarily engaging in arbitrary and unlawful discrimination.

(*Barrett*, *supra*, 54 Cal.4th at p. 1110.)

Moreover, the Court of Appeal's reliance on *In re Qawi* (2004) 32 Cal.4th 1 and, *People v. Williams* (2003) 110 Cal.App.4th 1577, to show that a "mental disorder does not categorically render one incapable of determining what is in his or her own best interests" (Opn. 22), is misguided. Those cases involve different rights with different implications. *In re Qawi* concerned an MDO defendant's right to refuse antipsychotic medication involving "[t]he basic constitutional and common law right to privacy and bodily integrity,"—rights more intimate than a tactical trial decision whether to waive jury. (*In re Qawi*, *supra*, 32 Cal.4th at p. 15.) In *Williams*, involving the right of self-representation, a court was required to determine defendant's capacity to act in his or her best interest because the right at issue necessarily placed the attorney and client at odds. (*Williams*, *supra*, 110 Cal.App.4th at p. 1591; see *People v. Wolozon* (1982) 138 Cal.App.3d 456, 461 [NGI].) Waiver of counsel, moreover, has far greater consequences than waiver of jury. (*Fisher*, *supra*, 136 Cal.App.4th at p. 81; Cf. *Indiana v. Edwards*, *supra*, 554 U.S. at p. 174.) Indeed, as the Court of Appeal observed in *Fisher*, after finding no abuse of discretion in allowing an MDO defendant to self-represent, "The instant case could serve as a paradigm for why a person with a severe mental disorder should *not* be allowed to veto his attorney's decision to waive jury, waive the right to

counsel, and insist on self-representation." (*Fisher*, *supra*, 136 Cal.App.4th at p. 81, italics added.)

D. Any Error Was Nonprejudicial

Assuming error by the trial court either in failing to given an advisement of the right to jury trial or taking a waiver of that right, a different result is not reasonably probable in light of the undisputed evidence presented. (*People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1276-1277; see *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Since the statutory right to jury trial in civil commitment proceedings is not compelled by the federal Constitution, the standard for assessing prejudice is the *Watson* standard. (See *People v. Epps* (2001) 25 Cal.4th 19, 29.)

Here, the evidence consisted of the testimony of Dr. Perry. That evidence was overwhelming and without dispute. (RT 5-15.) As the Court of Appeal acknowledged, "we do not consider it reasonably possible, let alone reasonably probable, that defendant would have obtained a more favorable result had the court expressly advised him and conducted a jury trial." (Opn. 30.)

CONCLUSION

Accordingly, respondent respectfully requests the judgment be affirmed.

Dated: October 15, 2013

Respectfully submitted,

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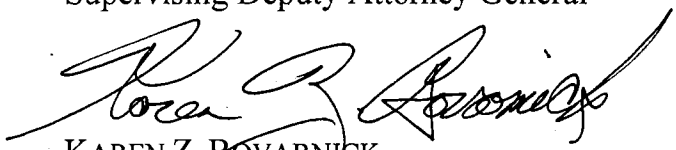

KAREN Z. BOVARNICK
Deputy Attorney General
Attorneys for Respondent

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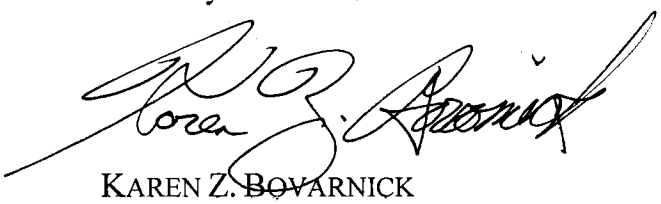
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 5,727 words.

Dated: October 15, 2013

KAMALA D. HARRIS
Attorney General of California



KAREN Z. BOVARNICK
Deputy Attorney General
Attorneys for Respondent

APPENDIX

KeyCite Red Flag - Severe Negative Treatment
Enacted Legislation**Amended by** 2013 Cal. Legis. Serv. Ch. 705 (A.B. 610) (WEST),

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 3. Of Imprisonment and the Death Penalty (Refs & Annos)
Title 1. Imprisonment of Male Prisoners in State Prisons (Refs & Annos)
Chapter 7. Execution of Sentences of Imprisonment (Refs & Annos)
Article 4. Disposition of Mentally Disordered Prisoners Upon Discharge (Refs & Annos)

West's Ann.Cal.Penal Code § 2970

§ 2970. Evaluation on remission where severe mental disorder is not in, or cannot be kept in, remission

Effective: June 27, 2012

Currentness

Not later than 180 days prior to the termination of parole, or release from prison if the prisoner refused to agree to treatment as a condition of parole as required by Section 2962, unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, or the community program director in charge of the parolee's outpatient program, or the Secretary of the Department of Corrections and Rehabilitation, shall submit to the district attorney of the county in which the parolee is receiving outpatient treatment, or for those in prison or in a state mental hospital, the district attorney of the county of commitment, his or her written evaluation on remission. If requested by the district attorney, the written evaluation shall be accompanied by supporting affidavits.

The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole, has been continuously provided by the State Department of State Hospitals either in a state hospital or in an outpatient program. The petition shall also specify that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others.

Credits

(Added by Stats.1985, c. 1418, § 1, operative July 1, 1986. Amended by Stats.1986, c. 858, § 6; Stats.1988, c. 657, § 2; Stats.1988, c. 658, § 2; Stats.1989, c. 228, § 3, eff. July 27, 1989; Stats.1991, c. 435 (A.B.655), § 4; Stats.2012, c. 24 (A.B.1470), § 39, eff. June 27, 2012.)

Notes of Decisions (63)

West's Ann. Cal. Penal Code § 2970, CA PENAL § 2970
Current with urgency legislation through Ch. 526, except Ch. 352, of 2013 Reg.Sess., all 2013-2014 1st Ex.Sess. laws, and Res. Ch. 123

End of Document

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 3. Of Imprisonment and the Death Penalty (Refs & Annos)
Title 1. Imprisonment of Male Prisoners in State Prisons (Refs & Annos)
Chapter 7. Execution of Sentences of Imprisonment (Refs & Annos)
Article 4. Disposition of Mentally Disordered Prisoners Upon Discharge (Refs & Annos)

West's Ann.Cal.Penal Code § 2972

§ 2972. Hearing on petition for continued treatment; jury trial; order; petition for recommitment; rights of patient; modification by regulations

Effective: June 27, 2012

Currentness

(a) The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. The attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable.

The standard of proof under this section shall be proof beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the person and the district attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.

(b) The people shall be represented by the district attorney. If the person is indigent, the county public defender shall be appointed.

(c) If the court or jury finds that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of State Hospitals if the person was in prison. The commitment shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970. Time spent on outpatient status, except when placed in a locked facility at the direction of the outpatient supervisor, shall not count as actual custody and shall not be credited toward the person's maximum term of commitment or toward the person's term of extended commitment.

(d) A person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Except as provided in this subdivision, the provisions of Title 15 (commencing with Section 1600) of Part 2, shall apply to persons placed on outpatient status pursuant to this paragraph. The standard for revocation under Section 1609 shall be that the person cannot be safely and effectively treated on an outpatient basis.

(e) Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others. The

recommitment proceeding shall be conducted in accordance with the provisions of this section.

(f) Any commitment under this article places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

(g) Except as provided in this subdivision, the person committed shall be considered to be an involuntary mental health patient and he or she shall be entitled to those rights set forth in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code. Commencing January 1, 1986, the State Department of Mental Health, or its successor, the State Department of State Hospitals, may adopt regulations to modify those rights as is necessary in order to provide for the reasonable security of the inpatient facility in which the patient is being held. This subdivision and the regulations adopted pursuant thereto shall become operative on January 1, 1987, except that regulations may be adopted prior to that date.

Credits

(Added by Stats.1986, c. 858, § 7. Amended by Stats.1987, c. 687, § 9; Stats.1989, c. 228, § 4, eff. July 27, 1989; Stats.2000, c. 324 (A.B.1881), § 3; Stats.2012, c. 24 (A.B.1470), § 40, eff. June 27, 2012.)

Notes of Decisions (124)

West's Ann. Cal. Penal Code § 2972, CA PENAL § 2972
Current with urgency legislation through Ch. 526, except Ch. 352, of 2013 Reg.Sess., all 2013-2014 1st Ex.Sess. laws, and Res. Ch. 123

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Blackburn**
No.: **S211078**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On October 15, 2013, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope 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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Attorney at Law
P.O. Box 1677
San Luis Obispo, CA 93406-1677

The Honorable Gilbert T. Brown
Judge
Santa Clara County Superior Court
Hall of Justice (East Wing)
190 West Hedding Street
San Jose, CA 95110-1706

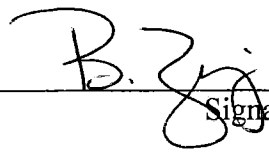
The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

Sixth District Appellate Program
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050

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 October 15, 2013, at San Francisco, California.

B. Zuniga
Declarant



Signature

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