In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DAWN QUANG TRAN,** **Defendant and Appellant.**

Case No. S211329

Sixth Appellate District, Case No. H036977
Santa Clara County Superior Court, Case No. 205026
The Honorable Gilbert T. Brown, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
CATHERINE A. RIVLIN
Supervising Deputy Attorney General
KAREN Z. BOVARNICK
Deputy Attorney General
State Bar No. 124162
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5550
Fax: (415) 703-1234
Email: Karen.Bovarnick@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

ISSUES PRESENTED

The Court granted petitions for review by both parties, deemed the People to be the petitioners, and limited the briefs 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, and does the Court of Appeal have authority to declare a rule of procedure for the trial courts?

INTRODUCTION

Defendant was found criminally insane and committed to the state mental hospital for treatment. Following a bench trial, the court extended the commitment based on a finding that he had not been restored to sanity. (Pen. Code, § 1026.5, subd. (b), further statutory citations are to this code.)

On appeal, defendant claimed a denial of the right to jury trial for lack of a record showing the court advised him of the right, and the trial court erred by accepting, as shown by a settled statement, a waiver of jury trial by defense counsel. The Court of Appeal found that counsel's waiver of defendant's presence at all pretrial hearings effectively prevented a direct judicial advisement, that defendant was inferably aware of the right to jury trial, that the record afforded no basis to find he wanted a jury trial or that counsel had overridden his wishes, that the controlling statute (§ 1026.5, subd. (b)(4)) does not preclude waiver of jury trial by counsel on behalf of an NGI, that record precluded finding counsel had exceeded the scope of his control over the jury waiver, and that a different result was not reasonably probable had the court given a direct advisement or conducted a jury trial.

Nonetheless, the court declared the combination in cases on its docket of opaque records, procedural rules, presumptions on appeal, and the harmless-error test frustrate the purpose of the statutory jury trial right and

the liberty and dignitary interests of NGI's to choose the trier of fact. The Court of Appeal announced a new prophylactic standard for execution of a jury waiver. It held the record of a bench trial in which defendant did not personally waive the right to jury trial must show that the defendant was advised of the right by the court, or else, if the court was unable to do so, that the defendant was made aware of the right before counsel waived it. Moreover, it announced a procedural rule applicable to waiver of a jury trial by counsel. The court directed that the record henceforth show that the waiver was executed at the direction of defendant, or with his or her knowledge and consent, or, if over a defendant's objection, that the circumstances support counsel's "doubt" concerning defendant's competency to determine what was in his or her best interests.

The court's novel procedural rule chisels into law misconceived dicta that truncates counsel's authority over statutory jury trial waivers in civil commitment proceedings. Long-settled law, embodied in decisions of this Court and the Courts of Appeal, holds that, as between counsel and client, defense counsel is "captain of the ship" in determining whether to waive jury trial under civil commitment statutes.

Having found no prejudicial error in the record, the Court of Appeal exhausted its authority, as an intermediate reviewing court, over the issue. Its view that ordinary rules of judicial review subvert an NGI's control of jury waiver in commitment proceedings is incorrect. Its justification of its new rule as a slight burden on trial courts that is clearly outweighed by the need to ensure an NGI's authority over jury trial waiver (through an on-the-record process that virtually invites litigation of the defendant's competency to exercise such authority) involves, by its nature, policy judgments and rulemaking authority outside the purview of the Court of Appeal.

STATEMENT OF THE CASE

Defendant, in his underwear with his penis exposed, lay down on a four-year-old girl, whose pants and underwear were pushed down. The girl later reported he had put something inside her. Defendant left the girl's home with three bottles of sleeping pills and stabbed himself in the chest. He claimed that the victim was a "beautiful adult angel," that he was "Jesus Christ," and that he stabbed himself to see if he would continue to live. He pleaded not guilty by reason of insanity (NGI) to a charge of lewd or lascivious act on a child under the age of 14 by means of force, violence, duress, menace or fear (§§ 288, subd. (b)(1), 1026). In 1999, he was committed to Napa State Hospital. (CT 6-8.) His commitment was extended three times—by written waiver in 2005, after a court trial in 2007 (Court of Appeal No. H031976), and after a jury trial in 2009 (Court of Appeal No. H034743) (§ 1026.5,[1] subd. (b)).[2]

This appeal concerns defendant's fourth commitment extension proceeding. (CT 24-26.) The district attorney filed the petition in April 2011. It included a letter and affidavit of the Acting Medical Director of Napa State Hospital seeking the extension, and a mental health report that discussed factors necessitating the extension. (CT 1-14.)

Defense counsel waived defendant's appearance for all pretrial proceedings, waived his right to a jury, and set the matter for a court trial. (CT 15, 17; Supp. CT 2.) At the trial, defendant's treating psychiatrist, Dr. Khoury, testified that defendant suffered from severe Bipolar Disorder, with psychotic episodes including visual and auditory hallucinations if not treated with medication. (1 RT 8-9, 19.) He also testified that defendant

---

[1] Section 1026.5 is attached as an appendix.

[2] The Court of Appeal took judicial notice of the prior proceedings. (Opn. 2, fn. 3)

had serious difficulty controlling his dangerous behavior as he lacked insight into his symptoms and did not appreciate the chronic nature of his mental illness. (1 RT 11-13.) Dr. Khoury testified that he had earlier believed defendant might be eligible for conditional release under supervision, i.e., "CONREP," but that the assessment process, including defendant's refusal to participate in a diagnostic test to evaluate his risk of violence, raised concerns about his readiness for release. (1 RT 13-14, 21-23.) Dr. Khoury characterized his determination to refer defendant for a two-year extension as a conservative decision, stating:

> [B]ut if I can add, I think one of the—one of the concerns that I have as a treating psychiatrist is that oftentimes with people who are in Mr. Tran's circumstance, when the two years comes down to be another two years and then some. And this is what kind of pushes me to really make a critical decision at these junctures where people contest their extension. A lot of my thinking is that, well, you know, are they—are they truly at risk in the community? Under supervision, obviously less so, in Mr. Tran's case, than without supervision.
>
> But I really weigh letting them out and erring on the side that they might return because of one reason or another versus keeping them in for two and even more years because the process is so slow. 'Cause I've seen a lot of people sit in the hospital for an awful long time.
>
> So in a sense I guess I'm saying that I—I perhaps am a little bit more pushing of the envelope when it comes to release because I don't want to conservatively keep people in the hospital and have them just sit there and languish.

(1 RT 15.)

Following the bench trial, defendant's civil commitment was extended for two years. (CT 19-22; Supp. CT 2.)

Defendant appealed, arguing principally that the trial court erred by failing to advise him of his right to jury trial, and that he was denied due process, equal protection, and a state constitutional right to jury trial by the

absence of a personal waiver of jury trial. (AOB 3-4.) The People responded that the statutory right to a jury trial can be waived by counsel on behalf of an NGI defendant, even over the committed person's objection, because, "as a rule counsel has exclusive control over whether to have a bench or jury trial" where the committed person has been declared not guilty by reason of insanity. (Opn. 2; RB 4-9.)

The Sixth District Court of Appeal rejected both parties' contentions. While affirming the judgment for lack of an affirmative showing of prejudicial error, it announced a new rule of judicial procedure for trial courts. (Opn. 2, 37.) Declaring the Legislature "contemplates that NGI's can make the decision [whether to waive a jury] and expressly provides for them to do so" (Opn. 21), the court found counsel is not in full control of a jury trial waiver in NGI extension proceedings (Opn. 22-23, 33 & fn. 17). A jury waiver, it found, can be asserted by counsel only at the NGI's direction, or with the NGI's knowledge and consent, and over the NGI's objection only when circumstances give counsel reason to doubt the NGI's competence to determine what is in his or her best interests. (Opn. 34.) As to the showing required to meet these conditions, the Court of Appeal announced a new rule:

> [I]f the court conducts a bench trial and the NGI did not personally waive the right to a jury, the record must show that the court advised the defendant of the right to a jury or, if the court was unable to do so, that the defendant 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 defendant's direction or with his or her knowledge and consent or that there were circumstances supporting counsel's doubt concerning the defendant's capacity to determine what was in his or her own best interests.

(Opn. 37.)

As to the form of proof, the Court of Appeal held that a trial court and the parties "must state on the record the facts establishing the NGI'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 NGI." (*Ibid.*)

Justice Elia concurred in the judgment, stating that it must be presumed on appeal that defendant gave counsel informed consent to waive a jury. (Opn. 1 (conc. opn. of Elia, J.).) Observing that the majority cited no case authority for an inherent power of a Court of Appeal to impose procedural rules on inferior courts and that the court is bound by the constitutional standard of reversible error regardless of adherence to its new rule in future cases, Justice Elia "endorse[d] the majority's rules as nonbinding, recommended practices to the extent they avoid unnecessary appeals but not as procedural rules controlling local courts." (Opn. 3 (conc. opn. of Elia, J.).)

SUMMARY OF ARGUMENT

The right to jury in civil commitment proceedings is statutory. The law has long 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.

The Court of Appeal exceeded its judicial authority in establishing new procedural requirements for a valid advisement and waiver. Its appellate authority was exhausted through the presumption of a valid advisement and waiver of the statutory right to jury trial in the proceedings below, and the absence of any prejudice. The rule of procedure promulgated by the Court of Appeal on inferior courts exceeds statutory requirements. The court lacked rulemaking authority as respects the record proceedings of trial courts advising defendants of statutory jury trial rights and taking counsel's waiver of jury trial.

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 NGI commitment, 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 Defendant Personally of the Right to Jury Trial

Consistent with the foregoing authorities and the dispositive portion of the Court of Appeal's opinion (Opn. 6),[3] the trial court did not err by

[3] "[W]here, as here, counsel waives a defendant's presence at all pretrial hearings, effectively preventing a direct judicial advisement before trial, the court may reasonably expect counsel to discuss all pertinent matters that will arise or that have arisen in pretrial hearings, including the (continued...)

failing to advise defendant of his right to jury trial. As a threshold matter, trial by jury is a "default" statutory right, unless affirmatively waived. (§ 1026.5, subd. (b)(4).) The advisement is part and parcel with being informed of the right to be represented by an attorney. Section 1026.5, subdivision (b)(3) reads: "When the petition is filed, the court shall advise the person named in the petition of the 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.*, *supra*, 234 Cal.App.3d at pp. 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 defendant of the statutory right to trial by jury. Section 1026.5, subdivision (b)(4) states: "The court shall conduct a hearing on the petition for extended commitment. The trial shall be by jury unless waived by both the person and the prosecuting attorney."

(...continued)
right to a jury trial and whether to have one. . . . 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., *Conservatorship of Mary K.* (1991) 234 Cal.App.3d 265, 272 (*Mary K.*) [where no evidence to the contrary, court may presume counsel discussed jury waiver with client before waiving on client's behalf].)" (Opn. 6.)

The controlling principles regarding waiver of jury trial 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*, the Court recognized that neither the state nor the federal Constitution requires a jury trial in special proceedings, 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—nearly identical to the authorizing language in section 1026.5, subdivision (b)(4)[4]—and found 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.) "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

---

[4] Section 2972 provides: "The trial shall be by jury unless waived by both the person and the *district* attorney." (§ 2972, italics added.) Section 1026.5 provides: "The trial shall be by jury unless waived by both the person and the *prosecuting* attorney." (§ 1026.5, subd. (b)(4), italics added.)

Legislature intended to leave the decision on whether trial should be before the court or a jury in the hands of such a person." (*Id.* at pp. 830-831, internal quotation marks omitted.) 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 jury trial waiver in an NGI commitment proceeding directly. 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 NGI 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. (§ 1206.5, subd. (b)(1), (2); *Barrett, supra*, 54 Cal.4th at p. 1104.) In NGI commitment-extension proceedings, a mental health expert (e.g., the medical director of a defendant's state hospital or treatment facility, or local program director if treatment is outside a state hospital setting) must provide an opinion, supported by evaluations and relevant hospital records, as to whether a defendant represents a substantial danger of physical harm to others "by reason of a mental disease, defect, or disorder." (§1026.5, subd. (b)(1), (2); see *Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347, 355 [petition for MDO recommitment requires supporting mental health evaluations].) 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 NGI 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:

> "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 NGI'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 NGI 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 (§ 1026.5, subd.

(b)(2)). And the time frame of two-year recommitments for NGI's is likewise compact. The administrative burden of potential dual hearings is not only likely to be substantial, the lack of standards (and the fact that the severity of symptoms of a given NGI's mental disorder might vary hour to hour and day to day during trial) virtually guarantees extensive litigation over the degree of competency NGI's need to direct an attorney's decision whether to waive a jury.

Mental disease, defect, or disorder—linked, moreover, to serious difficulty in controlling dangerous behavior—is the central issue to be tried in special proceedings for involuntary civil commitment, and 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; *Powell*, *supra,* 114 Cal.App.4th at p. 1156; *People v. Bowers* (2006) 145 Cal.App.4th 870, 878 [elements for extending NGI commitment].) 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 nearly 13-year-old decision in *Montoya* 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.[5]

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 commitment. (*Powell*, *supra*, 114 Cal.App.4th at p. 1157 ["An extension trial . . . is civil in nature and directed to treatment, not punishment"]; see *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].) Section 1026.5, subdivisions (b)(5) and (6) set forth detailed requirements for housing a defendant pending trial that "to the greatest extent possible, minimize interference with the person's program of treatment," and that assure safety and compliance with the treatment program. Even upon release, the defendant must have a treatment plan. (§ 1602, subd. (b).) 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 degree of mental disease, defect, or 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-

---

[5] To prove the point, the Legislature last amended section 1026.5 and enacted or amended related commitment statutes in 1994, to contravene the holding in *People v. Gunderson* (1991) 228 Cal.App.3d 1292 and make clear that periods of outpatient treatment do not count toward a person's term of extended commitment. (Sen. Com. on Judiciary, Bill Analysis on Sen. Bill No. 39X (1993–1994 Ex.Sess.) Mar. 22, 2000, discussed in *People v. Morris* (2005) 126 Cal.App.4th 527, 546.)

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 he/she is 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, based on the extension petition, as one of "competence" per se, 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 below similarly concluded that an attorney's authority to waive jury trial would trump that of a defendant "when it reasonably appears that an MDO or NGI reasonably is incapable of determining whether a bench or jury trial is in his or her *best interests.*" (Opn. 32, italics added.) But that would require a separate court hearing, prior to trial, to establish that fact, rendering every such ruling reviewable on appeal presumably as a mixed question of fact and law.

The nuanced "screening procedure" demanded by the Court of Appeal lacks statutory authority. It makes the threshold showing already required

to support the commitment-extension petition superfluous. (*Barrett*, *supra*, 54 Cal.4th at p. 1106.) Moreover, a hearing to determine whether a defendant can act within his or her best interests further interrupts delivery to the defendant of the treatment regime and delays the trial proceedings, involving a far more burdensome procedure than a one-on-one discussion between client and counsel. And 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*, *supra*, 136 Cal.App.4th at p. 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].)

The underlying premise of the decision below is an assumption that something could be wrong with a trial attorney's waiver of a jury trial, and that something should be done about it. Yet, the assumption results in second guessing trial tactics of the person charged with promoting a defendant's best interest in trial with no hint in the record that the attorney rendered ineffective assistance in waiving a jury, or else it results in the court filling the legislative vacuum with new process the Constitution nowhere demands and the Legislature nowhere deems useful. (See *Angeletakis*, *supra*, 5 Cal.App.4th 963, 970 [due process does not include the right to be mentally competent during a commitment extension hearing].) The latter course was taken below. That is worse than second guessing the trial attorney because it systemically diverts counsel in NGI proceedings from deciding the best interests of the client with the specter of constantly litigating counsel's authority to decide at all. The Court of Appeal's imposed solution for a problem that arises from mere suspicion is contrary to ordinary rules of judicial review. (*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

As the Court of Appeal acknowledged, the NGI statute has long recognized the authority of the defendant's attorney to make an effective waiver of trial by jury. (Opn. 11-20.) The Legislature had good reason for its longstanding rule, because "interpreting the language to exclude waivers by counsel results in consequences that . . . are illogical and anomalous and therefore, to be avoided. (*People v. Martinez* (1995) 11 Cal.4th 434.)" (Opn. 14-15, 20.) Despite the illogicality and anomaly of rules excluding counsel's waiver, the Court of Appeal conceived that if the attorney alone can waive jury, the advisement requirement is superfluous. (Opn 21-22.) On that basis, it demoted counsel to midshipman, not captain, absent a prophylactic showing defendant has set course or cannot navigate. (Opn. 21-32.)

Its reasoning ignores that the advisement of jury 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. (§ 1026.5, subd. (b)(4).) There is *no* advisement required, however, to inform a defendant of the procedure for waiver. (§ 1026.5, subd. (b)(5).)

The Court of Appeal read *Barrett* and *Masterson* narrowly, to apply to 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. 27, 30.) This 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 Court of Appeal relied on *In re Qawi* (2004) 32 Cal.4th 1, *People v. Wolozon* (1982) 138 Cal.App.3d 456, and *People v. Williams* (2003) 110 Cal.App.4th 1577, as authority that a "mental disorder does not categorically render one incapable of determining what is in his or her own best interests." (Opn. 31.) But those cases involved 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,"—a right far more intimately tied to the defendant personally than a tactical trial decision whether to waive a jury. (*In re Qawi*, *supra*, 32 Cal.4th at p. 15.) *Wolozon* and *Williams* involved the right of self-representation, which necessitated determining the defendant's capacity to act in his or her best interest because the right at issue necessarily placed the attorney and client at odds. (*Wolozon*, *supra*, 138 Cal.App.3d at p. 461; *Williams*, *supra*, 110 Cal.App.4th at p. 1591.) Waiver of counsel, moreover, has far greater consequences than waiver of jury trial. (*Fisher*, *supra*, 136 Cal.App.4th at p. 81; cf. *Indiana v. Edwards*, *supra*, 554 U.S. at p. 174.) Indeed, the court in *Fisher*, after finding no abuse of discretion in allowing an MDO defendant to self-represent, observed: "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. Assuming Error, It Was Not Prejudicial

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

Here, the evidence was overwhelming, and defendant's testimony, moreover, only lent credence to the expert testimony supporting continued commitment. (1 RT 8-23, 25, 27-29.) As the Court of Appeal acknowledged, "had the court ordered his presence at a pretrial hearing and directly advised him on the record of his right to jury trial," it was not reasonably probable that defendant would have obtained a more favorable result. (Opn. 8.)

II. THE COURT OF APPEAL LACKS AUTHORITY TO DECLARE A RULE OF PROCEDURE FOR THE TRIAL COURTS

Existing rules of appellate review are respectful of the statutory right to jury trial in NGI commitment proceedings, obviating the need for a new set of trial procedures. The Court of Appeal exceeded its authority in fashioning, a new rule of procedure for state trial courts. It sought to promulgate its rule despite finding neither prejudice nor any substantive conduct violating the governing statute in the case before it. (Opn. 35-37.) The rule amounts to an improper advisory opinion where the factual record is inadequate to support it. (*People v. Guerra* (1984) 37 Cal.3d 385, 429.) Because the rule rests upon dicta limiting counsel's authority over jury waiver, it arguably would lack binding authority as precedent. (See *People*

v. Gregg (1970) 5 Cal.App.3d 502, 506 [stare decisis doctrine does not apply to dictum]; cf. *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 957 [invalidating local rule in asbestos matters "generally unnecessary and incorrect under settled statewide principles"].)

Notably, the court's rationale for its rule does not arise from particulars of this case. Rather, it is prompted by its docket of cases with a silent or "opaque record,"[6] from its likening of special proceedings in civil cases to criminal ones based on dignity and liberty interests of the mentally disordered subject to involuntary commitment, and, most significantly, from its concerns that binding "procedural rules," "presumptions on appeal," and "the harmless-error test" conceal the details and prevent oversight of procedures in these cases by a reviewing court. (Opn. 35-37.)

Assuming for the sake of argument, the Court of Appeal were correct in finding that attorney's authority over jury waiver is subordinate to or even coextensive with that of the NGI defendant, its distrust of the proceedings below or of traditional procedures for review, with admittedly no cognizable basis for suspicion, is not a source of authority for promulgating new procedural rules of oversight. The Court of Appeal's distrust of trial court proceedings in unnamed appeals and of review procedures governing those cases affords this Court little insight into the legal authority for its rule. Moreover, if, as the Court of Appeal indicates, the combined circumstances suspected to produce undetected error just as consistently fail to produce prejudice, that triggers the question of whether there is error, not the answer of a new procedure with clear potential for yet

---

[6] These unnamed cases are outside the record of this appeal, and the Court of Appeal has referred to *no* case where an attorney's jury waiver was prejudicial error. (*People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1, 743; *People v. Sakarias* (2000) 22 Cal.4th 596, 635-636.)

more harmless error.[7] Under the circumstances presented here, the court's new rule addresses a phantom problem of unseen error that only results in a new kind of procedural error going forward.

"The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Cal. Const. art. VI, § 1.) Our Constitution places the judiciary's rule-making authority with the Judicial Council, directing that "[t]he rules adopted shall not be inconsistent with statute." (Cal. Const. art. VI, § 6, subd. (d); Gov. Code § 68070; *Albermont Petroleum, Limited v. Cunningham* (1960) 186 Cal.App.2d 84, 89 [rule-making field mostly occupied by the Judicial Council].)

The source for *inherent* judicial powers is generally described as the authority derived from a court's duty to exercise jurisdiction as set forth in Code of Civil Procedure section 187. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 879-82, 882-883; *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 175; *People v. Jordan* (1884) 65 Cal. 644, 646; *Tide Water Associated Oil Co. v. Superior Court of Los Angeles County* (1955) 43 Cal.2d 815, 825-826; see 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, § 185, p. 262.)[8] At the trial level, courts "possess a constitutionally

---

[7] Indeed, implicit waivers, have been upheld in the context of civil commitment proceedings. (*Givan*, supra, 156 Cal.App.4th at p. 411 [NGI proceedings]; see *In re Conservatorship of John L.* (2010) 48 Cal.4th 131, 154-156 [LPS proceeding].) An explicit waiver is required when the right at issue is constitutional, rather than statutory as it is here. (Cf. *People v. French* (2008) 43 Cal.4th 36, 47.)

[8] Code of Civil Procedure section 187 states:

> When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable

(continued...)

conferred, inherent authority to 'create new forms of procedures' in the gaps left unaddressed by statutes and the rules of court." (*People v. Lujan* (2012) 211 Cal.App.4th 1499, 1507.)

Inherent judicial power, however is limited. (*People v Municipal Court* (*Runyan*) (1978) 20 Cal.3d 523, 528; *Rutherford*, *supra*, 16 Cal.4th at pp. 967-968.) "[T]he courts should only exercise those common law powers which are not otherwise repugnant to or inconsistent with our Constitution and statutes; inherent powers should never be exercised in such a manner as to nullify existing legislation or frustrate legitimate legislative policy." (*Runyan*, *supra*, 20 Cal.3d at p. 528, internal quotation marks omitted.)

Even when a judicially established procedure presents no overt conflict with statute, a court's exercise of inherent power must nonetheless serve the purpose of existing legislation. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 110 ["prison-delivery rule" applies to civil appeals filed by a prisoner]; *Citizens Utilities Co. of Cal. v. Superior Court* (1963) 59 Cal.2d 805, 812-813 [proper exercise of inherent power to set date for determining compensation value in inverse condemnation of local public utility]; *Tide Water Associated Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 825-826 [permitting cross-complaints in action to enjoin waste of gas]; *People v. Avila* (2011) 191 Cal.App.4th 717, 722 [approving single competency hearing for three cases involving same defendant]; *Albermont Petroleum, Limited v. Cunningham*, *supra*, 186 Cal.App.2d at p. 93 [local procedural rule precluding untimely evidence in opposition to summary judgment motion contrary to the spirit of the statute].) Rather than

---

(...continued)

> process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

determine whether a judicial procedure is diametrically opposed to or cannot be given concurrent effect within a statutory scheme, "a court must determine the Legislature's intent behind the statutory scheme that the rule was intended to implement and measure the rule's consistency with that intent." (*California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 24-26 [striking rule of court requiring electronic recordings since Legislature had rejected this procedure and provided for shorthand transcription in some instances].)

A court overreaches its inherent judicial authority by exercising powers reserved to the Legislature when it promulgates rules that do more than bridge a gap within the existing statutory scheme. "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Code Civ. Proc., § 1858.) "Where adequate recourse under existing rules and procedures may exist, the concept of inherent judicial powers does not substitute for it nor extend it." (*Talley v. Valuation Counselors Group, Inc.* (2010) 191 Cal.App.4th 132, 152 [no power to revive dismissed action].) "[E]ven where a court has inherent authority over an area where the Legislature has not acted, this does not authorize its issuing orders against defendants by fiat or without any valid showing to justify the need for the order." (*People v. Ponce* (2009) 173 Cal.App.4th 378, 384 [absent showing of necessity, no basis to impose protective order preventing contact with robbery victim].)

The exercise of inherent power to address a pending issue, rather than a possible or speculative one, allows a precise determination that a court's actions serve an intended purpose within the boundaries of a statutory scheme. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19

Cal.4th 1182, 1195.) And "[i]t is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered. [Citation.] An appellate decision is not authority for everything said in the court's opinion but only for the points actually involved and actually decided." (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155, internal quotation marks omitted.)

Here, the Court of Appeal found neither prejudicial error in the advisement of the jury trial right nor in the waiver of a jury by defense counsel. (Opn 6-8, 16-20, 35.) With no basis to question the procedure below, the appellate court speculated a procedural problem in the inferior courts needed solving (as judged from its docket of "opaque" records), and announced a new rule that all but invites litigation over a new form of procedural trial error. (Opn. 35-37.) In so doing, the Court of Appeal acted outside the scope of inherent judicial authority and invaded the province of the Legislature. (*Topa Insurance Co. v. Fireman's Fund Insurance. Companies* (1995) 39 Cal.App.4th 1331, 1345 (*Topa*).) In *Topa*, the Court of Appeal held that there was no statutory right of contribution between excess insurers under a good faith settlement as they were neither joint-tortfeasors nor co-obligors as required by statute. (*Topa*, *supra*, 39 Cal.App.4th at p. 1341.) The Court of Appeal also found it lacked inherent authority to expand the scope of the contribution bar based on legislative intent to foster settlement of disputes, for two reasons. First, "evaluation of the policy considerations . . . is, in our view, a function more appropriate to the Legislature than to the courts," and second, there was "adequate recourse under existing rules and procedures." (*Id.* at p. 1345.)

Similarly, in *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 101-102, this Court held that the availability of an extraordinary writ to challenge the government's response to a Public Records Act (PRA)

request was sufficient recourse to provide appellate review after an extensive examination of the development of constitutional, statutory, and case law on the scope of appellate jurisdiction. (*Powers*, *supra*, 10 Cal.4th at p. 110.) Likewise, in *People v. Uribe* (2011) 199 Cal.App.4th 836, 883, the Court of Appeal did not exercise inherent judicial power to order dismissal as a sanction for prosecutorial misconduct involving false testimony in the absence of prejudice showing the defendant did not receive a fair trial. "The court's inherent power arises from necessity where, in the absence of any previously established procedural rule, *rights would be lost or the court would be unable to function.*" (*Id.* at p. 882, italics added and internal quotation marks omitted.) Exercise of inherent judicial powers was unnecessary as "the prosecutorial misconduct did not have an "effect . . . on a fair resolution of the case" [citation], there were other, less extreme, sanctions available to address the harm, and the dismissal order precluded the People from pursuing the prosecution to its conclusion on the merits." (*Id.* at p. 883.) In other words, with no prejudice, or rather, with adequate recourse to solve the problem, there is no "gap" the judiciary needs to fill. Absent such circumstances, judicial policy preferences forming the "cure" of a new procedural rule raise a new problem, namely, judicial encroachment on the power of the Legislature. (*Runyan*, *supra*, 20 Cal.3d at p. 528.)

There are several problems with the Court of Appeal's announcement of a new procedural rule in this instance. At the outset, as discussed in Section I.B., *ante*, the theoretical predicate for the rule conflicts with the controlling principles of the law on jury waivers in commitment proceedings. (*Barrett*, *supra*, 54 Cal.4th at pp. 1100-1101; *Masterson*, *supra*, 8 Cal.4th at p. 969.) The rule undermines defense counsel's position as "captain of the ship" and thereby violates legislative policy. (See *Rutherford*, *supra*, 16 Cal.4th at p. 968 [theoretical predicate for local rule

of burden-shifting in asbestos cases erroneous]; *Trope v. Katz* (1995) 11 Cal.4th 274, 287 [precedent cannot be overruled in dictum as it would abrogate earlier rules].)

Even assuming such defendants properly ought to be at the helm, the court exceeded its judicial authority by prescribing, prospectively, a specific procedure in a case that begs the error, i.e., a matter in which the Court of Appeal determined defendant lacked navigational competency without using the procedure it claims is needed. (Opn. 6-8, 16-20, 35.) Thus, there was "adequate recourse," (*Topa*, *supra*, 39 Cal.App.4th at p. 1345), the ability to exercise jurisdiction on review (*Powers*, *supra*, 10 Cal.4th at p. 110), or another available "remedy," (*Uribe*, *supra*, 199 Cal.App.4th at p. 883), to resolve the issue without need to "legislate" a new and superfluous procedure to address and create errors for another day. (See *Knoller*, *supra*, 41 Cal.4th at pp. 154-155 [dicta lacks authoritative force].) The Court of Appeal's observation that it "continually see[s] appeals from MDO and NGI commitment orders" with an attorney waiver and a silent record as to the defendant's role in the procedure does not demonstrate error or that the proceedings were unfair.

Its remedy, moreover, of a new rule of procedure binding on trial courts statewide undermines the statutory mandate of the Judicial Council to develop and implement uniform rules throughout the state. (Gov. Code, § 68070; Cal. Rules of Court, rules 10.1(b)(4) [constitutional authority to improve administration of justice by adopting rules of practice and procedure], 10.13 [duties of Rules and Projects Committee], 10.20(c) ["The council will establish uniform statewide practices and procedures where appropriate to achieve equal access to justice through California"]; see *People v. Wright* (1982) 30 Cal.3d 705, 709, 712-714 [legislative authority properly delegated to Judicial Council which has expertise and establishes and serves interest in uniformity]; *Schmier v. Supreme Court* (2000) 78

Cal.App.4th 703, 710-711 [Rule 976 regarding publication of opinions promotes uniformity].) In upholding the Judicial Council's authority, delegated by the Legislature, to define aggravating and mitigating circumstances considered in sentencing, this Court observed that "[t]he Judicial Council because of its membership including justices and judges who have extensive experience in determining sentences is uniquely situated to implement the legislative policy. [Citation.] In the circumstances, it would be questionable, if not unwise, to reject the experience and qualifications of the agency and insist that the Legislature impose the detailed criteria when it chose to adopt the new method of sentencing." (*Wright, supra*, 30 Cal.3d at pp. 713-714.)[9]

So too, it is questionable, if not unwise, for the Court of Appeal, in a case not involving prejudicial error, to set forth dicta encompassing a disputed view of jury waiver in a nonconstitutional context, and to promulgate a new procedural rule to implement its policy views of the paramount goals in providing a statutory jury trial right. Not only does that action exceed inherent judicial authority as an effort to convert an advisory opinion into binding precedent, it bypasses the arm of the courts, the

---

[9] In contrast to intermediate reviewing courts, the Supreme Court is particularly suited to use its inherent authority to establish uniform procedures involving questions of appellate review. (*In re Roberts* (2005) 36 Cal.4th 575, 595 [inherent authority to require habeas petition challenging denial of parole to be filed with superior court in county of conviction notwithstanding transfer of custody to a different venue]; see *People v. Kelly* (2006) 40 Cal.4th 106, 110 [directing Courts of Appeal to include in *Wende* opinions description of facts, procedural history, crimes, and punishment to facilitate any additional review]; *In re Podesto* (1976) 15 Cal.3d 921, 938 [prospective requirement that trial courts provide brief statement of reason supporting denial of release pending appeal sufficient to permit meaningful review].)

Judicial Council, that the Legislature relies on to analyze and resolve structural gaps to which this Court can call attention as a potentially suitable area for rulemaking.

This is not to say a reviewing court, in interpreting legislative intent, may never provide guidance that anticipates a problem more global than in the case presented. (See, e.g., *People v. Gwillim* (1990) 223 Cal.App.3d 1254, 1270-1271 [cautioning about practical risks inherent in prosecutor's lawful demand for police-officer statements provided in parallel internal investigation under grant of immunity].) But an appellate court's creation of a statewide procedure not compelled by the case under review typically encroaches on legislative powers since violation of the procedure itself creates error or an arguably appealable issue for review. (*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.) Nor is it sensible for a reviewing court to assert a new procedural rule to satisfy paramount legislative goals when noncompliance with the rule would almost invariably be harmless under controlling legal principles applicable in the case before it and in future cases.

Nor does the Court of Appeal have inherent power to chart new paths of appellate oversight by reason of "the similar liberty and dignity interests implicated in an involuntary commitment" making "the right to choose the trier of fact . . . no less valuable to an NGI than it is to a criminal defendant." (Opn. 36.) The right to jury trial in a criminal action flows directly from the Constitution. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 16; *People v. Ramos* (1997) 15 Cal.4th 1133, 1154.) By contrast, the jury right in commitment cases is *statutory*. (*Montoya*, *supra*, 86 Cal.App.4th 4th at p. 830.) Thus, judicial power over jury rights is confined to interpreting legislative intent which, as shown in Argument I, *ante*, makes defense counsel "captain of the ship." (*California Court Reporters Assn.*, *supra*, 39 Cal.App.4th at p. 22; *Barrett*, *supra*, 54 Cal.4th at pp. 1100-1101;

Masterson, *supra*, 8 Cal.4th at p. 969; cf. *Franchise Tax Bd. v. Superior Court* (2011) 51 Cal.4th 1006, 1017-1018 [comparing statutory and common law source for jury trial rights in tax payer proceedings].)

Moreover, the "liberty and dignity interests" of a defendant who disputes involuntary treatment of mental disorder do not logically counterbalance rational lines drawn by the Legislature that limit (or that sometimes exclude) procedural rights guaranteed to an accused in a criminal case. As shown, the Legislature draws the balance in authorizing civil commitment schemes, whereas the Constitution ordains the balance in authorizing punishment for crime. The Legislature differently weighs liberty and dignity interests with some frequency in the civil commitment context. (See, e.g., *People v. Lopez* (2006) 137 Cal.App.4th 1099, 1113-1114 [right of NGI not to testify is limited]; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1081 [right of MDO not to testify is limited]; *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1411 [no presumption of innocence]; *People v. Angeletakis*, *supra*, 5 Cal.App.4th at p. 967 [no right to competency during trial]; *People v. Superior Court* (*Williams*) (1991) 233 Cal.App.3d 477, 484-488 [double jeopardy inapplicable after nonsuit granted in NGI extension proceeding] *People v. Juarez* (1986) 184 Cal.App.3d 570, 575 [recommitment procedure could not disadvantage defendant in a determination of criminal guilt, hence, amendment could not, by definition, be an ex post facto violation]; but see *People v. Haynie* (2004) 116 Cal.App.4th 1224, 1230 [§ 1026.5, subd. (b)(7) imports privilege against self-incrimination and prevents People from calling insanity acquitee in a commitment extension hearing].)[10] The need is for a

[10] Whether an NGI defendant can refuse to testify at an extended commitment trial is a question pending before this Court in another case. (*Hudec v. Superior Court*, review granted Oct. 2. 2013, S213003.)

speedy, effective, and medically-appropriate system for litigating involuntary commitment to, or retention in, treatment facilities, not judicially-ordained respect of procedure for its own sake. That is an appropriate legislative goal and the penultimate interest of both parties.

The Court of Appeal lacked power to require trial courts to provide a statement of facts on the record establishing an NGI's awareness of the right to a jury trial and the validity of counsel's waiver of a jury trial, or otherwise to require the record in every case to contain an advisement and waiver form signed by the NGI.

The Court of Appeal acted in excess of its judicial authority in mandating a new judicial procedure of its own devise as a prophylactic means of reviewing waivers of jury trial in civil commitment proceedings. Its supervisory rule of court procedure should be disapproved.

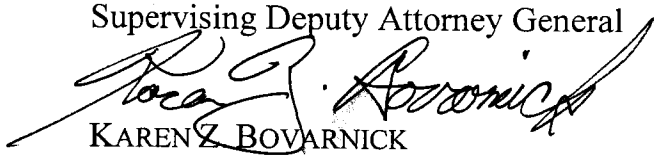
CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: October 15, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
CATHERINE A. RIVLIN
Supervising Deputy Attorney General



KAREN Z. BOVARNICK
Deputy Attorney General
Attorneys for Respondent

SF2013206118/40790020.doc

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 8,749 words.

Dated: October 15, 2013

KAMALA D. HARRIS
Attorney General of California

KAREN Z. BOVARNICK
Deputy Attorney General
Attorneys for Respondent

APPENDIX

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 2. Of Criminal Procedure (Refs & Annos)
Title 6. Pleadings and Proceedings Before Trial (Refs & Annos)
Chapter 4. Plea (Refs & Annos)

West's Ann.Cal.Penal Code § 1026.5

§ 1026.5. Maximum term of commitment; facilities for temporary detention

Currentness

(a)(1) In the case of any person committed to a state hospital or other treatment facility pursuant to Section 1026 or placed on outpatient status pursuant to Section 1604, who committed a felony on or after July 1, 1977, the court shall state in the commitment order the maximum term of commitment, and the person may not be kept in actual custody longer than the maximum term of commitment, except as provided in this section. For the purposes of this section, "maximum term of commitment" shall mean the longest term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted, including the upper term of the base offense and any additional terms for enhancements and consecutive sentences which could have been imposed less any applicable credits as defined by Section 2900.5, and disregarding any credits which could have been earned pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3.

(2) In the case of a person confined in a state hospital or other treatment facility pursuant to Section 1026 or placed on outpatient status pursuant to Section 1604, who committed a felony prior to July 1, 1977, and who could have been sentenced under Section 1168 or 1170 if the offense was committed after July 1, 1977, the Board of Prison Terms shall determine the maximum term of commitment which could have been imposed under paragraph (1), and the person may not be kept in actual custody longer than the maximum term of commitment, except as provided in subdivision (b). The time limits of this section are not jurisdictional.

In fixing a term under this section, the board shall utilize the upper term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted, increased by any additional terms which could have been imposed based on matters which were found to be true in the committing court. However, if at least two of the members of the board after reviewing the person's file determine that a longer term should be imposed for the reasons specified in Section 1170.2, a longer term may be imposed following the procedures and guidelines set forth in Section 1170.2, except that any hearings deemed necessary by the board shall be held within 90 days of September 28, 1979. Within 90 days of the date the person is received by the state hospital or other treatment facility, or of September 28, 1979, whichever is later, the Board of Prison Terms shall provide each person with the determination of the person's maximum term of commitment or shall notify the person that a hearing will be scheduled to determine the term.

Within 20 days following the determination of the maximum term of commitment the board shall provide the person, the prosecuting attorney, the committing court, and the state hospital or other treatment facility with a written statement setting forth the maximum term of commitment, the calculations, and any materials considered in determining the maximum term.

(3) In the case of a person committed to a state hospital or other treatment facility pursuant to Section 1026 or placed on outpatient status pursuant to Section 1604 who committed a misdemeanor, the maximum term of commitment shall be the longest term of county jail confinement which could have been imposed for the offense or offenses which the person was

found to have committed, and the person may not be kept in actual custody longer than this maximum term.

(4) Nothing in this subdivision limits the power of any state hospital or other treatment facility or of the committing court to release the person, conditionally or otherwise, for any period of time allowed by any other provision of law.

(b)(1) A person may be committed beyond the term prescribed by subdivision (a) only under the procedure set forth in this subdivision and only if the person has been committed under Section 1026 for a felony and by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others.

(2) Not later than 180 days prior to the termination of the maximum term of commitment prescribed in subdivision (a), the medical director of a state hospital in which the person is being treated, or the medical director of the person's treatment facility or the local program director, if the person is being treated outside a state hospital setting, shall submit to the prosecuting attorney his or her opinion as to whether or not the patient is a person described in paragraph (1). If requested by the prosecuting attorney, the opinion shall be accompanied by supporting evaluations and relevant hospital records. The prosecuting attorney may then file a petition for extended commitment in the superior court which issued the original commitment. The petition shall be filed no later than 90 days before the expiration of the original commitment unless good cause is shown. The petition shall state the reasons for the extended commitment, with accompanying affidavits specifying the factual basis for believing that the person meets each of the requirements set forth in paragraph (1).

(3) When the petition is filed, the court shall advise the person named in the petition of the right to be represented by an attorney and of the right to a jury trial. The rules of discovery in criminal cases shall apply. If the person is being treated in a state hospital when the petition is filed, the court shall notify the community program director of the petition and the hearing date.

(4) The court shall conduct a hearing on the petition for extended commitment. The trial shall be by jury unless waived by both the person and the prosecuting attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless that time is waived by the person or unless good cause is shown.

(5) Pending the hearing, the medical director or person in charge of the facility in which the person is confined shall prepare a summary of the person's programs of treatment and shall forward the summary to the community program director or a designee, and to the court. The community program director or a designee shall review the summary and shall designate a facility within a reasonable distance from the court in which the person may be detained pending the hearing on the petition for extended commitment. The facility so designated shall continue the program of treatment, shall provide adequate security, and shall, to the greatest extent possible, minimize interference with the person's program of treatment.

(6) A designated facility need not be approved for 72-hour treatment and evaluation pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code). However, a county jail may not be designated unless the services specified in paragraph (5) are provided and accommodations are provided which ensure both the safety of the person and the safety of the general population of the jail. If there is evidence that the treatment program is not being complied with or accommodations have not been provided which ensure both the safety of the committed person and the safety of the general population of the jail, the court shall order the person transferred to an appropriate facility or make any other appropriate order, including continuance of the proceedings.

(7) The person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees. The state shall be represented by the district attorney who shall notify the Attorney General in writing that a case has been referred under this section. If the person is indigent, the county public defender or State Public Defender shall be appointed. The State Public Defender may provide for

representation of the person in any manner authorized by Section 15402 of the Government Code. Appointment of necessary psychologists or psychiatrists shall be made in accordance with this article and Penal Code and Evidence Code provisions applicable to criminal defendants who have entered pleas of not guilty by reason of insanity.

(8) If the court or jury finds that the patient is a person described in paragraph (1), the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed. This commitment shall be for an additional period of two years from the date of termination of the previous commitment, and the person may not be kept in actual custody longer than two years unless another extension of commitment is obtained in accordance with the provisions of this subdivision. 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.

(9) A person committed under this subdivision shall be eligible for release to outpatient status pursuant to the provisions of Title 15 (commencing with Section 1600) of Part 2.

(10) Prior to termination of a commitment under this subdivision, a petition for recommitment may be filed to determine whether the patient remains a person described in paragraph (1). The recommitment proceeding shall be conducted in accordance with the provisions of this subdivision.

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

Credits

(Added by Stats.1979, c. 1114, p. 4051, § 3, eff. Sept. 28, 1979. Amended by Stats.1980, c. 547, p. 1507, § 6; Stats.1980, c. 1117, p. 3592, § 6.1; Stats.1982, c. 650, p. 2664, § 1, eff. Aug. 27, 1982; Stats.1984, c. 1488, § 5; Stats.1985, c. 1232, § 3.5, eff. Sept. 30, 1985; Stats.1991, c. 183 (A.B.1014), § 2; Stats.1993-94, 1st Ex.Sess., c. 9 (S.B.39), § 1.)

Notes of Decisions (180)

West's Ann. Cal. Penal Code § 1026.5, CA PENAL § 1026.5

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

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Tran** No.: **S211329**

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:

Carl A. Gonser
Attorney at Law
P. O. Box 151317
San Rafael, CA 94915-1317

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

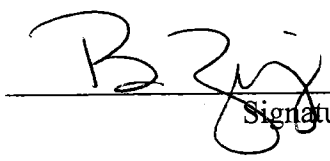
The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

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

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

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

SF2013206118
40790918.doc