S180612

IN THE SUPREME COURT

THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent

vs.

CHRISTINE BARRETT

Defendant and Appellant

REVIEW OF A DECISION OF THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT, CASE NO. H034154

SANTA CLARA SUPERIOR COURT NO. MH-034663
THE HONORABLE MARY ANN GRILLI, JUDGE PRESIDING

APPELLANT'S REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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APPELLANT'S REPLY BRIEF ON THE MERITS

Appellant's Reply Brief on the Merits is limited to the rebuttal of certain points in the Respondent's Answer Brief on the Merits ("Answer"). This limitation does not constitute a waiver of any issues raised in Appellant's Opening Brief. Appellant submits that the points in the Answer Brief to which no reply has been made herein have been full covered in Appellant's Opening Brief and that only those points requiring additional comment will be addressed in this Reply Brief.

ARGUMENT

I. INTRODUCTION: THE LANGUAGE OF DISABILITY

In the Respondent's Answer Brief on the Merits, the Attorney General states, "putting to one side whether the term "mentally retarded" should retain its place in California law, it has a long established meaning." (Answer at p. 10.) Appellant appreciates respondent's implicit recognition that there is an issue as to whether the term "mentally retarded" should retain its place in California law, and wishes to take this opportunity to address the use of language in case authority, including this case, with the hope that thoughtful use of language will tend to enhance rather than diminish the status of people with developmental and intellectual disabilities in this State.

Appellant recognizes that the Legislature has used the term "mentally retarded" in Welfare and Institutions Code 6500, and that in the past there has been a "generally accepted meaning of the term referring to subaverage intellectual functioning." (See e.g. *Money v. Krall* (1982) 128 Cal. App. 3d 378, 397.) However, the forefront organization known as the ARC, formerly named as an acronym for the "Association of Retarded Citizens," has disavowed the term "retarded" and now describes its mission as one that "promotes and protects the human rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes." (See www.thearc.org.)

Another core concept is "People First." This means that people with disabilities prefer to be known as "people" first and not as their disabilities. Under this concept, a person is not "the disabled" but rather a "person with disabilities." Similarly, a person with "mental retardation" is not "the

retarded" but a person with intellectual or cognitive disabilities. (See http://www.disabilityisnatural.com/images/PDF/pfl09.pdf.) Even if it is believed that the term "retardation" or "retarded" is necessary in a technical context, under the "people first" concept an individual would be referred to as a "person with mental retardation." (*Ibid.*)

For people in the disability community, the use of People First language is more than just politically correct speech but is a fundamentally important part of being treated as equals. Appellant recognizes that the statute under consideration in this case uses the term "mentally retarded" and this Honorable Court cannot alter that fact. However, it is respectfully requested that any opinion emanating in this case be written in a manner that does not unnecessarily perpetuate terms that objectify and diminish the status of people with disabilities.

II. LACK OF ADVISEMENT OF THE RIGHT TO A JURY TRIAL VIOLATED EQUAL PROTECTION

It is established that a person facing involuntary commitment due to developmental disability has the right to a jury trial based on principles of equal protection. In addressing this issue in *In re Hop* (1981) 29 Cal. 3d 82, 89, this Court began constitutional analysis of by citing Welfare and Institutions Code[1] section 4502, which provides in relevant part:

> Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the Federal Constitution and laws and the Constitutions and laws of the State of California.

This Court observed that the above enactment is "but a legislative

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[1]All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

reaffirmation of a firmly rooted and independent constitutional principle which assures that persons will not be deprived of due process or equal protection of law on the basis of developmental disability alone." (*Ibid.*) This Court concluded that equal protection requires that a person with a developmental disability facing commitment in a state institution is entitled to the same congeries of rights as other civilly committed people, including the right to a jury trial. (*Ibid.*)

The primary question in this case is simply whether the person has the right to be advised of the right to a jury trial; whether the right to be advised of the right to a jury trial part and parcel of the right to a jury trial which has already been established. Inexplicably, respondent says no.

To support its position, respondent cites *People v. Quinn* (2001) 86 Cal. App. 4th 1290 and *Cramer v. Gillermina R.* (1981) 125 Cal. App. 3d 380, 287, neither of which is persuasive authority. In *Quinn*, the court of appeal rejected the position that there needed to be causation between the person's mental retardation and dangerousness in order to justify involuntary commitment under section 6500. However, this case was decided prior to the decision of this Court in *In re Howard N.* (2005) 35 Cal. 4th 117, 131, which recognized that a finding of causation is required to justify confinement of allegedly dangerous individuals who have "mental or physical deficiency, disorder, or abnormality." In *People v. Bailie* (2006) 144 Cal. App, 4th 841, 849-850, the court of appeal determined that *Quinn* was unpersuasive authority because it was decided prior to *Howard N.* and failed to apply the requirement for people committed under section 6500. *Quinn* is also unpersuasive because, by holding that a person with "mental retardation" can be committed under section 6500 regardless of whether the alleged dangerousness is related to the alleged retardation, it appears to

ignore the requirement in section 4502 that "persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the Federal Constitution and laws and the Constitutions and laws of the State of California." The case of *Cramer v. Gillermina, supra,* 125 Cal. App. 3d 380, 387, was similarly flawed, which held that unlike people subject to commitment for a mental disorder, there was no requirement of a probable cause hearing to test the initial confinement simply "because they suffer from mental retardation, not mental illness."

Respondent cites *Heller v. Doe* (1993) 509 U.S. 312, in which the United States Supreme Court found no equal protection violation in a law which authorized the commitment of people with developmental disabilities based on clear and convincing evidence rather than proof beyond a reasonable doubt. (Answer at pp. 11-12.) *Heller* is limited in its application because it did not address the strict scrutiny standard since the issue had not been properly presented, and a sharply divided court found a rational basis for the distinction. (*Id.* at 318-319.) Here, strict scrutiny is an issue and we have abundant authority that establishes that people with developmental disabilities are "similarly situated" with people with mental disorders and disabilities (*In re Hop, supra*, 29 Cal. 3d 92-94, *People v. Sweeney* (2009) 175 Cal. App. 4th 210, 221, Welf. & Inst. Code § 4502), and involuntary treatment involves a "fundamental liberty interest" (*In re Hop, supra*, 29 Cal. 3d 82, 89, *In re Calhoun* (2004) 121 Cal. App. 4th 1315, 1353). "[P]ersonal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." (*Ibid.*, *People v. Olivas* (1976) 17 Cal.3d 236, 251.)

Furthermore, a key rationale employed by the *Heller* court to justify disparate treatment does not apply here. The Court found "[t]he prevailing

methods of treatment for the mentally retarded, as a general rule, are much less invasive than are those given the mentally ill. The mentally ill are subjected to medical and psychiatric treatment which my involve intrusive inquiries into the patient's innermost thought [citations] and use of psychiatric drugs [citations]." (*Id.* at 324-325.) However, as seen here, the California statute does not limit commitment under section 6500 et seq. to facilities that provide benign services for people with developmental disabilities, but is used to commit people for psychiatric treatment without the procedural protections afforded other people, simply because of the allegation of "mental retardation." (§6509, Health and Safety Code §1250.)

Respondent contends that the LPS Act contains an "express exclusion of 'mentally retarded persons' from its reach." (Answer at p. 7.) However, respondent is not correct. Section 5002, cited by respondent, simply provides that the LPS Act does not "repeal of modify laws relating to commitment of ... mentally retarded persons" among other groups, except as specifically provided. The LPS Act provides procedural protections pertaining to the commitment and treatment of people with alleged mental disorders. (See e.g., § 5150, 5250, 5300, 5350.) It does create a protection-free zone for people with mental disorders who also happen to have developmental disabilities. The case at bar is particularly ironic because section 6500 was used to get appellant involuntarily treated in a mental institution (RT 18-20, 52), but without the procedural protections afforded others because of the additional allegation of "mental retardation."

Even if the rational basis standard applied, there would be no justification for the disparate treatment. Since it is undisputed that there is a right to a jury trial, hiding ball from a person subject to section 6500 commitment would serve no valid purpose. Respondent justifies

withholding advisement of the right to a jury trial the basis that people with alleged "mental retardation must have "significantly subaverage general intellectual functioning." (Answer at pp. 13, 19.) Respondent overlooks the fact that it is cannot be presumed that the person has "mentally retardation" prior to a section 6500 the hearing which is necessary to establish that fact in the first place. Nonetheless, it is not rational to withhold an explicit advisement from a person who has subaverage intellectual functioning, any more than it makes sense to turn off the volume when addressing a person who is hard of hearing.

Assuming the ongoing validity of the *Heller* case, California is not bound to follow the federal standard. (*Riese v. St. Mary's Hospital and Medical Center* (1987) 209 Cal. App. 3d 1303, 1321.) The United States Supreme Court has stated, in the context of the very issue before us, that state law may provide greater substantive and procedural rights than federal law and, if so, is determinative. (*Ibid.*, citing *Mills v. Rogers* (1982) 457 U.S. 291, 299-300.) California, by recognizing that "[p]ersons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the Federal Constitution and laws and the Constitutions and laws of the State of California" (§ 4502, *In re Hop, supra,* 29 Cal. 3d 82, 89), has decisively forged a direction of inclusion and equal treatment for people with developmental disabilities. Withholding information about the right to a jury trial from people who face involuntary commitment under section 6500 undermines that purpose.

III. DUE PROCESS REQUIRES NOTICE OF THE RIGHT TO A JURY TRIAL

The United States Supreme Court and this Court have repeatedly recognized that civil commitment constitutes a significant deprivation of liberty that requires due process protections. (See e.g. *Addington v. Texas* (1979) 441 U.S. 418, 425; *In re Gault* (1967) 387 U.S. 1, 50, *People v. Hurtado* (2002) 28 Cal.4th 1179, *Conservatorship of Roulet* (1979) 23 Cal. 3d 219, 225.) In *Roulet, supra*, 23 Cal. 3d 219, 235, this Court held that the due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict by applied in conservatorship proceedings under the LPS Act. In *In re Hop, supra*, 29 Cal. 3d 82, 89, this Court followed the reasoning of *Roulet* and stated that "any confinement in a state hospital for the developmentally disabled must invoke the same standard."

Respondent does not contest the right to a jury trial under section 6500. (Answer at p. 21.) However, respondent contends that there is no "ancillary" right to be advised of the right to a jury trial, because such proceedings are "civil" and seeks to apply the procedures generally applicable in civil proceedings, where personal liberty is not necessarily at stake. (*Ibid.*) Countering this type of simplistic approach, the court of appeal in *Alvas* emphasized that both state and federal authority

> makes clear that the focus is on the resultant deprivation of liberty, rather than upon the procedural mechanism, be it designated civil or criminal, used in achieving that result. We think it is beyond dispute that the right to a jury trial in adult involuntary commitment proceedings is a right of constitutional dimension. Where "a constitutional right exists, it must be observed unless waived and . . . a wavier implies, among other things, a knowledge that the right existed." [Citations]. Consequently, a defendant proceeded

against under section 6500 must be advised of his right to a jury trial.

(*People v. Alvas* (1990) 221 Cal. App. 3d 1459, 1464-1465.)

Respondent cites a number of California authorities that have declined to extend various criminal safeguards in the context of some civil commitment proceedings. For example, respondent cites *People v. Masterson* (1994) 8 Cal. 4th 965, 967-972, in which this Court held that a criminal defendant involved in proceedings to determine competence to stand trial did not have the right to an on-the-record advisement of the right to a jury trial, and that counsel could waive a jury trial over the person's objections. (Answer at p. 22.) However, *Masterson* is highly distinguishable. The purpose of competency proceedings is to protect a criminal defendant whose mental condition is such that he or she does not have the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing a defense. (*Drope v. Missouri* (1975) 420 U.S. 162 , *People v. Kelly* (1992) 1 Cal. 4th 495, 544.) Although the risk of erroneous civil commitment is a factor to consider, it must be weighed against the person's ultimate right to a fair criminal trial. It was in this context that the *Masterson* court found fewer ancillary rights pertaining to the right to a jury trial in competency proceedings. (*People v. Masterson, supra,* 8 Cal. 4th 965, 967-972.)

Furthermore, a person committed based on a finding of incompetence may not be committed indefinitely. If the person has not been restored to competence within three years, longer commitment can only be obtained through conservatorship under specific provisions of the Lanterman-Petris-Short Act, by which the person unquestionably has the right to advisement of the right to a jury trial. (Penal Code §§1370, subd.

(c)(1), 1370.1, subd. (c)(1), Welf. & Inst. Code §§ 5008 (h)(1)(b), 5350.) It does not make sense or comport with due process to afford fewer rights to people who have not been charged with a crime but made subject to indefinitely renewable commitment under section 6500.

Respondent also cites cases that apply to mentally disorder offenders (MDOs) under Penal Code sections 2960 et seq. which are also distinguishable and are questionable authority in light of recent decisional law. In *People v. Otis* (1999) 70 Cal. App. 4th 1174, the court of appeal held that a person subject to MDO commitment did not have the right to make a personal waiver of a jury trial and that the person's counsel could waive the right over the person's objections. The statute in question provides in relevant part that "the trial shall be by jury unless waived by both the person and the district attorney." (§2966.) The *Otis* court rejected the defendant's contention that the use of the word "person" in the statute indicated a legislative intent that the right must be exercised "personally" because it differed from the phrasing in the California Constitution which states that waiver of a jury in a criminal case must be made "be the defendant and defendant's counsel." (*Otis, supra*, 70 Cal. App. 3d at 1176, citing Cal. Const. Art 1, § 16.) In *People v. Montoya* (2001) 86 Cal. App. 4th 825, 830-833, the court of appeal followed *Otis* and held there was no right to make a personal waiver of the right to a jury trial in MDO extension proceedings under 2972.

Otis and *Montoya* are distinguishable from the case at bar because the cases do not involve the right to be informed of jury trial rights and the statutes in both cases require advisement of the right to a jury trial. (Pen. Code §§ 2966, 2972.) Furthermore, in light of this Court's recent decision in *Conservatorship of John L.* (2010) 48 Cal. 4th 131, the notion that counsel

may waive the right to a jury trial over the person's objection is no longer valid. In *John L.*, this Court considered whether Due Process requires a personal, in-court waiver of the right to be present at an LPS conservatorship proceedings, when the attorney has made representations that the person did not wish to attend the hearing. (*Id.* at 154.) The appellant in *John L.* did not deny that he had informed his attorney that he did not wish to attend the hearing and that he did not contest the proposed LPS conservatorship. (*Ibid.*) This Court noted that it would be a serious violation of the Business and Professional Code and the State Bar Rules of Professional Conduct for an attorney to misrepresent the wishes of a client. (*Id.* at 155.) This Court concluded,

> the Code of Civil Procedure provides that an attorney "shall have authority" to "bind [her] client in any of the steps of an action or proceeding by [her] agreement ... entered upon the minutes of the Court." (Code Civ. Proc., § 283, subd. 1.) That is exactly what happened here. John told his appointed attorney he did not contest the proposed conservatorship and did not want to attend the hearing. The attorney then informed the court of John's position, which was duly entered upon the court minutes. No more was necessary [citations].

(*Ibid.*) *John L.* demonstrates an express, personal waiver of a procedural right transmitted to the court through counsel. To the extent that *Otis* and *Montoya* suggest that the right to a jury trial may be waived by counsel over the objection of the person or without the person's consent, these cases should be disapproved.

In arguing that Due Process does not require that a person subject to commitment under section 6500 be advised of the right to a jury trial respondent also contends that such a requirement would place a significant burden on the state because it would require the courts to conduct mini trials on the issue of whether the person would understand such an

advisement. (Answer at p. 25.) However, requiring advisement in all cases would obviate the need for such laborious proceedings. The prospect that some individuals may not be able to understand the right to a jury trial due to either a mental disorder or developmental disability, does not justify depriving an entire class of the opportunity to learn of the right and to act within the scope of the person's ability.

IV. AN EXPRESS WAIVER IS REQUIRED

Appellant stands on the analysis contained in the Opening Brief on the Merits, and makes the following, additional observation. In *Conservatorship of John L., supra,* 48 Cal. 4th 131, 154-155, this Court held that a person in an LPS conservatorship proceeding could waive the right to be present through counsel. This holding does not obviate the requirement of a personal waiver. It would be anomalous to require a person to come to court involuntarily to make a personal waiver of the right to come to court. On the other hand, if a person is present at a commitment proceeding and has been properly advised of the right to a jury trial, there is no justification to deprive the person from personally expressing any waiver of the right to a jury trial. Unlike civil proceedings in general, where personal liberty is not at stake, "the minimum state standards for jury trial waiver in civil cases are not determinative. (*People v. Bailie, supra*, 114 Cal. App. 4th 841, 846.)

CONCLUSION

For all the reasons stated above, and for all the reasons expressed in the Opening Brief on the Merits, the decision of the Court of Appeal must be reversed.

October 12, 2010

Respectfully submitted,

/s/

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CERTIFICATE OF WORD COUNT

I hereby certify that the Appellant's Reply Brief on the Merits contains 3378 words according to the word count of the WordPerfect computer program used to prepare the document.

Dated: October 12, 2010

/s/

JEAN MATULIS
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PROOF OF SERVICE BY MAIL

People v. Christine Barrett No. S180612
California Court of Appeal, Sixth Appellate District, No. H034154
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I am over eighteen years old, not a party to this action, and a member of the State Bar of California. My business address is P.O. Box 1237, Cambria, CA 93428. On October 12, 2010, I served the following:

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I declare under penalty of perjury under the laws of California that the foregoing is true and correct. Executed at Cambria, CA on October 12, 2010.

/s/
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