S211078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Case No. S211078

Plaintiff and Respondent,

Sixth Appellate District,
Case No. H037207

vs.

Santa Clara County
Superior Court No. BB304666

BRUCE LEE BLACKBURN,

Defendant and Appellant.

APPEAL FROM THE JUDGMENT OF THE

SUPERIOR COURT OF SANTA CLARA COUNTY

HONORABLE GILBERT T. BROWN, JUDGE

APPELLANT'S BRIEF ON THE MERITS

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under the Sixth District Appellate Program –
Independent Case System

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ISSUE PRESENTED

On August 14, 2013, this Court granted the petitions for review filed by BRUCE LEE BLACKBURN, defendant and appellant (appellant) and by the People of the State of California, plaintiff and respondent (respondent). In granting the petitions, the court limited review to a single question: "Did the trial court prejudicially err by failing to advise defendant of his right to a jury trial and obtain a personal waiver of that right?" On that same date, this Court granted review on this same issue in *People v. Tran* (S211329).[1]

Appellant's case involves person committed as a mentally disordered offender[2] (MDO). *Tran* involves a person found not guilty by reason of insanity[3] (NGI). In addition, in *Tran*, this Court granted review on the question of "Does the Court of Appeal have authority to declare a rule of procedure for the trial courts?" That issue was also raised in respondent's petition for review in this case, but review was not granted on that issue.

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[1] Pursuant to California Rule of Court Rule 8.200(a)(5), appellant joins in and adopts by reference all parts of the brief filed in *People v. Tran* to the extent those arguments are applicable to appellant's case.

[2] The provisions for MDO commitments are found at Penal Code section 2960 et. seq.

[3] Tran was committed persuant to Penal Code section 1026.5, following the

SUMMARY OF APPELLANT'S RESPONSE

Appellant believes that the trial court did prejudicially err both by failing to advise him of his right to a jury trial and by failing to obtain a personal wavier of that right. Respondent disagrees. Both parties disagree with the Court of Appeal which found that errors occurred, but they were not prejudicial.

Generally speaking, appellant believes that the statute, which explicitly requires the trial court to advise alleged MDOs of their right to a jury trial, means what it says. Likewise, because the statutory language explicitly requires a waiver of the right to a jury trial to be made by the "person" and not the person's attorney, appellant believes that a personal waiver is required – at least in his case – and that the presumption should be that a personal waiver is normally required in all cases. Respondent, on the other hand, contended that because the trial attorney is the "captain of the ship"[4] the attorney can make the jury trial decision without consultation with and over the objection of his client not withstanding the statutory language.

In addition, appellant believes that he has a direct constitutional right to a jury trial under Article I, Section 16 of the California Constitution as well as both a due process and equal protection right to a jury trial under the California and United States Constitution.

Respondent and the Court of Appeal believe that any possible error was harmless because appellant cannot show a reasonable probability of a more favorable outcome and, therefore, under the standards of *People v. Watson* (1956) 46 Cal.2d 818, any error is harmless. This standard of prejudice does not work in the context of this type of statutory and constitutional violation. A jury trial is, by itself, a more favorable outcome for an individual who wants a jury trial. Further, it assumes that the result of a jury trial will always

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expiration of his maximum prison term under his original commitment.

[4] Throughout its brief, respondent characterized appellant's trial attorney as the "captain of the ship." Respondent used that metaphor frequently to justify the attorney's authority over the jury trial decision. At times, respondent called into question appellant's ability to navigate or his authority to tell his attorney how to steer, while expressing dismay that the attorney would merely be a shipmate rather than the captain. At the risk of being accused of mutiny, this Court should focus on the statutory language not respondent's

be the same as a result of a court trial and, therefore, no errors would ever matter. Appellant disagrees.

STATEMENT OF THE CASE

Appellant accepts the statement of the case provided by respondent in its brief.

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metaphor.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO ADVISE APPELLANT OF HIS RIGHT TO A JURY TRIAL AND BY FAILING TO OBTAIN A PERSONAL WAIVER OF THAT RIGHT.

Under California Law, persons potentially subject to a civil commitment, including alleged MDOs, have a right to a jury trial. Further, the statute governing MDO procedures gives the decision as to whether or not to have a jury trial to the person potentially subject to the commitment himself – not to his attorney. Appellant believes that the statutory language should simply be interpreted to mean exactly what it says. Thus, Penal Code section 2972, subdivision (a), requires the trial court to "advise the person of his or her right to be represented by an attorney and at the right to a jury trial." Further, the subdivision mandates that "[t]he trial shall be by jury unless waived by both the person and the district attorney." Since neither the requirement that the court advise the alleged MDO of his right to a jury trial or the requirement that the jury trial must be waived by the alleged MDO himself is all ambiguous, therefore, the statute must be interpreted to mean actually what it says.

Respondent would have this relatively clear statutory language interpreted out of a existence by claiming that the advisement requirement does not matter when a person is represented by counsel because that attorney has the right to waive the jury trial over his client's objection. In support of this position, respondent repeatedly contended that because the attorney is the "captain of the ship," no error occurred.

Appellant believes that the statutory language means what it says and its requirements must be followed. The advisement requirement is just that – a requirement – not an option. Likewise, the language granting the decision on the jury trial waiver to the "person" means that the decision is to be made by the person – in this case appellant. This Court should reject respondent's argument and rule that the statute means what it actually says.

A. THE TRIAL COURT ERRED IN FAILING TO ADVISE APPELLANT OF HIS RIGHT TO A JURY TRIAL.

Penal Code section 2972, subdivision (a), explicitly requires the trial court to advise an alleged MDO of his right to be represented by an attorney and of his right to a jury trial. Respondent contends that the jury trial "advisement is part and parcel with being informed of the right to be represented by an attorney." (Respondent's Brief on the Merits, hereafter "RBOM" at 7.) Respondent cited no authority for its part and parcel theory. Appellant believes there is none.

There is simply no reason that the right to be represented by an attorney and the right to a jury trial should be conflated into one right. It is entirely possible for a person to be represented by an attorney at a court trial or to represent themselves in a jury trial. To the extent respondent seems to suggest that because the two rights are included in the same sentence to closely intertwined to be separated, they must be "part and parcel" of each other. There is no reason to take this assumption any more than one would assume that the freedom of religion, the freedom of speech, and freedom of the press are all "part and parcel" of each other because they are included in the same sentence of the First Amendment to the Constitution of the Untied States. Quite simply, the requirement that the court advise prospective MDO of his right to a jury trial is independent and separate from the requirement that the court advise him of his right to an attorney.

Respondent argued that when a party is represented by counsel 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 admission." (RBOM at 7.) Appellant agrees that the advisement of a right to counsel would often be academic at that point. However, the mandatory advisement of the right to a jury trial would not be academic at that point. It would only become academic once the jury trial was actually held. Admittedly, if the party is not present, he cannot be advised of his right to a jury trial, but that

is exactly the problem. Santa Clara County was routinely appointing attorneys when the client was not present and never complying with the statutory requirement that the court advise the alleged MDO of his right to a jury trial.

Respondent cited two cases in support of its claim that the statutory advisement was moot. One of those citations was to *People v. Masterson* (1994) 8 Cal.4th 965, 971, with a "see" cite. The "see" cite indicates that the cited authority clearly supports but does not directly state the proposition given. In appellant's view this overstates the support *Masterson* offers to respondent's argument. In *Masterson*, this Court addressed the question of whether, in a competency trial, the defendant has the right to make certain decisions. This Court cited *People* v. *Hill* (1967) 67 Cal.2d 105, 114-115, where the defendant argued that the trial court was required, before conducting a court trial on competency, to advise him about the right to a jury trial. This Court disagreed finding that there was no duty for a judge to a defendant of his statutory rights when the defendant was represented by counsel.

In relying on that analysis, respondent overlooked the difference between competency proceedings and MDO proceedings as well as the difference between a statutory right and a statutory requirement that the court advise specifically requiring the court to advise the defendant of this specific right. Obviously, individuals involved in litigation have a number of statutory rights of which there is no obligation that they be advised by the trial court especially when they are represented by counsel. That says nothing about the circumstances where the statutory language explicitly requires an advisement.

Respondent also cited *Conservatorship of Mary K.* (1991) 234 Cal.App.3d 265, 271-272, with a "cf" reference. A "cf" cite refers to a situation where the cited authority states a proposition is different from the main proposition but sufficiently analogous to lend support. *Mary K.* does not support respondent's position in this case. At most, *Mary K.* stands for the proposition that in conservatorship proceedings, an attorney who is waiving the right to a jury trial with the permission of the client can also waive the advisement of statutory rights. In this case, of course, there was no explicit waiver of appellant's right to be advised of his right

to a jury trial nor was there any information to suggest that the attorney had advised appellant of that right. Moreover, in *Mary K.* the waiver was done with the consent of the client. In other words, the holding in *Mary K.* is entirely consistent with the ruling of the Court of Appeal in this case.

Moreover, the explicit statutory language renders respondent's position untenable. Penal Code section 2972, subdivision (a), after requiring the advisement of the right to a jury trial and the right to be represented by an attorney, specifically requires that "the attorney for the person shall be given a copy of the petition, and any supporting documents." Thus, the legislature, in drafting Penal Code section 2972, clearly could distinguish between the attorney and the person. Had the legislature intended the advisements to be unnecessary when the attorney was present, they simply could have required the person to be represented by an attorney. On the other hand, if the legislature intended that all references to the person be construed as references to the attorney, they could have drafted the statute without ever mentioning the attorney so that the presumption would be a rational one. By drafting a statute that included both references to the person and the attorney, the legislature made it clear that it could tell the two people apart and that references to one were not references to the other.

Thus, nothing in respondent's argument in any way supported its contention that the trial court was excused of its obligation to comply with the mandatory statutory requirement that it advise appellant of his right to a jury trial. Moreover, it is not clear why this requirement bothers respondent so much. The advisement would be a fairly straight forward advisement that could be given the first time the alleged MDO appeared in the trial court. The only possible way that any problems would arise out of this process is if the attorneys and the judge had already decided to go with a court trial and the defendant did not appear in court until the day of that court trial. At that point, it would be inconvenient if the defendant wanted a jury trial. Appellant acknowledges this inconvenience, but the existence of that inconvenience is dependant both upon the mistaken belief that the defendant should have no

input into the jury trial decision and on an apparent belief – at least in Santa Clara County – that inconvenience to the trial court and the attorneys is sufficient grounds to ignore the explicit requirements of a statute enacted by the legislature. Since neither belief is true, this Court should join the Court of Appeal and require the trial court to comply with the statutory advisement requirement.

B. THE TRIAL COURT ERRONEOUSLY PERMITTED APPELLANT'S ATTORNEY TO WAIVE HIS RIGHT TO A JURY TRIAL.

Although appellant could argue that the right to waive a jury trial in an MDO proceeding belongs solely to appellant as the person subject to the commitment, appellant believes that the resolution of this issue adopted by the Court of Appeal is a sensible one that is consistent with California law, including the specific language of the statute at issue in this case. Further, the process outlined by the Court of Appeal also has the advantage to being widely applicable to all types of civil commitments so that there need not be a separate and distinct rule for each and every type of civil commitment.

At its core, respondent's argument on this issue was simply that when a person is potentially subject to a civil commitment based upon some kind of mental disorder, there should be an irrebuttable presumption that the alleged existence of the mental disorder is enough to render the individual not competent to make his own decisions. Respondent reached that conclusion based upon its belief that any evidence of mental illness makes the presumption reasonable and allowing the question to be litigated in each individual case would be excessively burdensome on the system. On both points, respondent's analysis was wrong.

1. A Person Subject to a Civil Commitment Should Be Presumed to Be Competent to Decide Whether or Not They Want a Jury Trial.

In support of its position that persons –like appellant – who are potentially subject to civil commitment – should not be allowed to make their own decision as to whether or not they want a jury trial, respondent cited a number of cases including *Masterson*, *Barrett*,

People v. Montoya (2001) 86 Cal.App.4th 825, *People v. Otis* (1999) 70 Cal.App.4th 1174, *People v. Powell* (2004) 114 Cal.App.4th 1153, *People v. Givan* (2007) 156 Cal.App.4th 405, and *People v. Fisher* (2006) 136 Cal.App.4th 76. It is true that each of these cases ruled against the individual civil committee who wanted, on appeal, to assert his right to a jury trial. However, as the Court of Appeal's analysis demonstrated, those cases did not support respondent's belief that all prospective civil committees should be denied the right to decide whether or not they want a jury trial.

In both *Otis* and *Montoya*, the courts concluded that the legislature could not have intended to place the tactical decision of the jury trial in the hands of a person who might not be competent to determine their best interests. Both appellant and the Court of Appeal agree that the legislature did not intend to place this decision in the hands of a person who is not competent to make the decision. The difference is that neither appellant nor the Court of Appeal believed that the default presumption should be that every alleged MDO is incompetent.

There are good reasons not to apply such a default presumption. It is important to remember how someone gets to the point where they are potentially subject to a civil commitment as an MDO, NGI, or sexually violent predator (SVP). An NGI is a person who has been found guilty of a criminal offense, but then determined not to be guilty of that criminal offense because they were insane at the time they committed the offense. As a result of this judgment, they were committed to the state hospital where they remained for the full theoretical length of their prison sentence because, apparently, during that time they remained mentally ill or dangerous as a result of that mental illness. (Pen. Code sec. 1026.2, subd. (e).) When the maximum term of confinement arrived, and the authorities responsible for treating the person's mental illness decided that under Penal Code section 1026.5, subdivision (b), the person was still too mentally ill and too dangerous to be released and sought an extension of their commitment through the court system.

An MDO is a person who was found guilty of a crime. When the time came to release

him on parole, the authorities determined that the person suffered from a severe mental disorder which was a cause or aggravating factor of the crime and that the mental disorder was not in remission or could not be kept in remission without treatment and because of this mental disorder, the person represents a substantial danger of physical harm to others. As a result, the person is paroled to the state hospital. (Pen. Code secs. 2962 and 2666, subd. (a).) If the person disagrees with that determination, he can file a petition seeking review. (Pen. Code sec. 2966, subd. (b).) Further, in order to be recommitted under Penal Code sections 2970 and 2972, this condition must have remained in existence at the time the parole period expired. As a result, the treating authorities requested the district attorney to file a petition to further extend the commitment one year at a time.

Finally, an SVP is a person who was convicted of one or more sexually violent offense who at the time scheduled for release on parole, was determined to be suffering from a diagnosed mental disorder which predisposed him to the commission of sexually violent and predatory offenses and makes it likely that he will, in the future, commit more such offenses. As a result, the district attorney initiated proceedings under Welfare and Institutions Code section 6600, et. seq.

In all three commitment procedures, the people potentially subject to the commitment have something very important in common. They all managed to make their way through the criminal justice system without being found incompetent to stand trial under Penal Code section 1367, et. seq. Thus, as much as respondent wants this Court to simply assume that because appellant – and other prospective civil committees – are alleged to be mentally ill, they cannot be competent to make decisions, there is no support in the law for such a presumption. Instead, the very existence of the underlying criminal judgment was premised on the individual's competency to stand trial which included the individual's absolute right to decide whether or not he wanted a jury trial in his underlying criminal case.

Insanity and incompetency are two very distinct concepts. "A plea of not guilty by reason of insanity refers to the defendant's mental state at the time of the commission of the

crime, a mental state which is distinguishable from that which is required of the defendant before he may be allowed to stand trial." (*People v. Hofferber* (1977) 70 Cal.App.3d 265, 269.) While these two concepts may overlap, it cannot be assumed that they do. In a criminal trial, for example, one must be competent to stand trial in order to enter into a valid plea agreement of any kind, even one of not guilty by reason of insanity. Thus, "even if the defendant is suffering from the same mental disturbance with which he was afflicted at the time of the commission of the crime, he may still be competent to stand trial as long as he is able to understand the nature of the proceedings taken against him and is able to assist counsel in presenting a defense." (*Hofferber, supra*, 70 Cal.App.3d at 269.)

The same analysis is even more applicable to MDOs and SVPs. They progress through their criminal trial process without any finding that a mental illness played a role in their crime much less that it casts doubt on their competence to stand trial. In other words, each of these three types of prospective civil committees have, by definition and by constitutional rule, been established to be capable of understanding and asserting or waiving his right to a jury trial not withstanding any underlying mental illness – even one that renders him legally insane. Thus, respondent's belief that a prospective civil committee is automatically not mentally competent to make the jury trial determination is not supported by the facts or the law but is, instead, based upon a misunderstanding of mental illness and out-dated reasoning that flies in the face of the modern understanding of the mental illness. As the legislature noted in the context of the Lanterman-Petris-Short (LPS) Act Conservatorships: "No person may be presumed to be incompetent because he or she has been evaluated or treated for a mental disorder or chronic alcoholism regardless of such evaluation or treatment was voluntarily or involuntarily received." (Welf. & Inst. Code sec. 5331.)

Moreover, to the extent that respondent seeks one rule prohibiting all prospective civil committees from making the jury trial decision, that ignores the broad range of mental illnesses that can lead to civil commitment. MDOs can be committed based upon a variety of

diagnoses including: schizophrenia (*People v. Hannibal* (2007) 143 Cal.App.4th 1087), schizoaffective disorder (as in this case) and pedophilia. (*People v. Starr* (2000) 106 Cal.App.4th 102.) SVPs are normally committed based upon a diagnosis of pedophilia or paraphilia NOS. (See *People v. Landau* (2013) 214 Cal.App.4th 1; and *People v. McCloud* (2013) 213 Cal.App.4th 1076.) While some of these mental disorders can, indeed, affect an individual's ability to make an intelligent decision as to whether or not they want a jury trial, some of them clearly do not. Thus, for example, a person solely diagnosed with pedophilia or paraphila NOS would not suffer from a diminished mental capacity that would affect their competence. Likewise, some people suffering from schizophrenia or schizoaffective disorder only have their mental processes interfered with in certain respects and not in all respects. As appellant has noted above, whatever the circumstances of the mental disorder might theoretically be, persons subject to civil commitments have made it through their criminal proceedings without being found incompetent to stand trial.

Moreover, in *In re Qawi* (2004) 32 Cal.4th 1, 24-25, this Court determined that persons committed as MDOs are entitled to make their own decisions as to whether or not to accept medication so long as they are competent and not dangerous. Of course, the entire litigation process in *Qawi* would have been completely unnecessary if the mere status as an MDO was enough to establish incompetency. While, of course, the competency to make medical decisions and the competency to decide whether or not to have a jury trial are not identical, they certainly are similar.

Thus, the general presumption sought by respondent is simply not appropriate. Some MDOs have a mental disorder that does not impair their ability to make this decision. Some MDOs have a mental disorder which does potentially impair their ability to make this decision. However, given that all MDOs were competent to stand trial at the time of their initial conviction, there is no reason to presume that the individual's mental state has so deteriorated from the time of their criminal trial that they are always incompetent at the time of their civil commitment proceedings.

The *Otis* court rejected a claim that the statutory language granting the right to make the jury trial decision to the "person" should be interpreted to mean what it says, because the *Otis* court claimed that the statutory language could not be interpreted "mechanically" by applying "rules of statutory construction to reach a result that is at odds with the intention of the legislature." (*Otis, supra*, 70 Cal.App.4th at 1176.) The *Otis* court did not actually review the legislative history to determine legislature intent. Instead, the court simply concluded that the legislature could not have intended that mentally incompetent people be treated as capable of deciding their own best interests, and, therefore, they were not the appropriate parties to decide whether the case would be tried before the court or a jury. This reasoning was flawed, at least if it was intended to refer to all alleged MDOs. In Otis, the court stated that the "Legislature must have contemplated that many persons, such as Otis, might not be sufficiently competent to determine their own best interest." (*Otis, supra*, 70 Cal.App.4th at 1177.) If this means that all alleged MDOs are not sufficiently competent to make their own decision it effectively assumes the result by implying incompetency in order to determine the lack of competency. On the other hand, it merely stands for a determination that Otis himself was not competent, then the Court of Appeals in the current case has correctly interpreted *Otis* and correctly decided that there is no general presumption of incompetency to make the jury trial decision on the part of alleged MDOs.

Penal Code section 2966, subdivision (b), allows a waiver of time for the hearing to be made by "petitioner or his or her counsel." Including this provision makes no sense if the statutory language referring to the waiver of a jury trial being made by the "person" actually refers to the trial attorney. In effect, the *Otis* court's interpretation of the statutory language means that the reference to the "person" in the context of the waiver of the jury trial means exactly the same thing as the reference to the "petitioner or his or her counsel" such that the words "or his or her counsel" were superfluous. The *Otis* defendant cited the well-recognized rule of statutory construction that an interpretation making some words surplusage should be avoided. (*Otis, supra*, 70 Cal.App.4th at 1176.) The court rejected this

rule of statutory construction out of the desire to fulfill its idea of the legislative intent and its belief that the legislature could not have intended alleged MDOs to "be sufficiently competent to determine their own best interests." (*Otis, supra*, 70 Cal.App.4th at 1176.)

The *Otis* court's reasoning was based upon a faulty perception of the likely legislative intent. Viewing the MDO statutes as a whole, the legislature expected that people alleged to be mentally disordered offenders would be able to "determine their own best interests." The alleged MDO decides whether to challenge the initial Board of Prison Terms finding. (Pen. Code sec. 2966, subd. (b).) That decision was not left to an attorney, nor was there an automatic judicial review of the Board's decision. If the legislature trusted alleged MDOs sufficiently to allow them to decide whether they wanted a trial, the Legislature must also trust them with a decision of much less importance – whether to have a jury trial.

The statutes also leave other decisions to the individual. Under Penal Code section 2964, subdivision (a), the individual decides whether to have a hearing before the Board of Prison Terms. Under Penal Code section 2964, subdivision (b), he decides whether to challenge a decision not to place him on outpatient treatment. Under Penal Code section 2966, subdivision (a), he has the option to request the appointment of two independent professional evaluators.

In *People v. Montoya* (2001) 86 Cal.App.4th 825, the court stated that "[t]he fact that the legislature gave him other personal rights within the statute does not lead us to conclude that he had to personally waive his right to a jury trial in a civil proceeding." (*Montoya, supra*, 86 Cal.App.4th at 831.) The problem with the *Montoya* court's analysis is that it misunderstood the argument. Certainly, the mere fact that the legislature gave an MDO defendant other personal rights does not mean that he automatically had a statutory right to personally waive his jury trial in this proceeding. Setting aside constitutional limitations, the legislature had the authority to apportion out the decision making process in an MDO case any way it wanted. It was free to assign some decisions to the attorney, some decisions to the defendant, and some decision to both or neither. That power, however, is completely

irrelevant to the analysis of the jury trial waiver issue. Instead, the relevance of the other rights given to the individual by the legislature is that they reflect a legislative acceptance of the individual's competence to make decisions. To the extent that *Otis*, *Montoya*, and the various other cases can be viewed as articulating a broad rule that all proposed civil committees need not enter a personal waiver of their jury trial right because there is irrebuttable presumption that they lack the competence to make this decision, that rule is not supported by reality, common sense, or the law.

2. The Process of Determining Appellant's Competency Would Not Be Burdensome.

Implicit, and explicit, in respondent's argument is its apparent belief that it would be tremendously burdensome to require the trial court to hold a completely unnecessary proceeding to determine an alleged MDOs competency to decide whether he wants a jury trial only to have that full-fledged trial be immediately followed by a second trial on the MDO case itself. Respondent's fears are unfounded.

The Court of Appeal's process for resolving this issue is quite simple and unlikely to be at all time consuming. The court simply stated that trial counsel can waive a jury trial "even over an MDO's objection when the circumstances cast reasonable doubt on the MDO's mental capacity to determine what is in his or her best interest." (Slip opin. at 6.) In other words, the Court of Appeal's process appears to be functionally identical to the process by which doubts about the criminal defendant's competency are initiated under Penal Code section 1367. The process of raising this doubt, in a criminal case involving nothing more than the trial attorney expressing a doubt on the record followed by the trial court agreeing and staying proceedings pending the resolution of the competency issue. If the trial attorney or the trial court in an MDO case has a reason to doubt the defendant's competency to make the jury trial decision that reason need only be presented in open court in order to fulfill the Court of Appeal's requirements. It appears unlikely that the Court of Appeal's rule would be at all burdensome to the trial court.

Nevertheless, respondent objected to the procedure claiming that "[t]he nuanced 'screening procedure' or the 'reasonable doubt' standard set forth by the Court of Appeal has no statutory authority." (RBOM at 14.) Respondent may be correct that the Court of Appeal cited no statutory authority for the procedures it created, but that alone does not render its decision improper. After all, appellate courts are supposed to fill in the blanks when incomplete statutes leave blanks that need to be filled in.

Moreover, respondent's argument on this issue is confused. Respondent claimed that the standard created by the Court of Appeal "would make threshold showing of a severe mental disorder not in remission, already required to support the commitment-extension petition, superfluous." (RBOM at 14, citing *Barrett*, *supra*, 54 Cal.4th at 1106.) The problem with relying on *Barrett* for this claim is that *Barrett*, as noted above, dealt with a "mentally retarded person" not a mentally ill person. The initial screening process will not be superfluous in an MDO case. In an MDO case, the screening process focuses on the existence of a severe mental disorder which renders the individual dangerous. This mental disorder must be one which had already, in effect, been determined not to render the individual incompetent to stand trial in his underlying criminal case. This screening process would never be rendered superfluous by a different and relatively straightforward process to resolve a different issue – an individual's competency to make a jury trial decision.

This analysis also disposes of respondent's contention that "[t]he preliminary evidence required for MDO petitions is greater than the showing that justifies an assumption that a defendant is unable to act in his or her best interest in a section 6500 proceeding." (RBOM at 9.) The evidence may possibly be greater than the evidence necessary to trigger a Welfare and Institutions Code section 6500 proceeding, but it is evidence of a different issue. In a Section 6500 proceeding, the evidence is evidence of a direct mental deficiency which limits the person's ability to understand and comprehend many things including legal proceedings. On the other hand, in an MDO case, the evidence is focused on whether the person suffers from a mental illness that causes dangerousness.

Respondent cited *People v. Williams* (2013) 31 Cal.4th 757, 774, for the proposition that the legislature is "the primary arbiter of how the necessary mental disorder components of its civil commitment scheme" should be defined and described. (RBOM at 15.) This is certainly true, but completely irrelevant. The question of competency and the question of the existence of a severe mental disorder are distinct. Judicial actions related to the former question in no way impinge upon the legislative prerogative to define the latter. Thus, there is nothing in the Court of Appeal's ruling in any way redefines the nature of the mental disorder which is required for a person to be committed as an MDO.

Finally, respondent argued that requiring a defendant to have his competency determined in court "lends no dignity to the defendant." (RBOM at 15.) Appellant does not agree with respondent's view of his dignitary interest. Instead, appellant contends that there is a significant dignity interest in having your case decided by a jury rather than be a judge. From the perspective of someone in appellant's position, he is being locked up year after year by a process that appears to involve no one other than the people directly responsible for locking him up. A doctor from the hospital testifies against him, a district attorney, from the same agency that prosecuted him for his criminal offense, prosecutes him in this case, a government appointed and paid defense attorney purportedly represents him, and the decision is made by a government employee—the judge. Surely, it is clear that bringing twelve citizens into the process to exercise their independent judgment would reasonably be viewed by an alleged MDO as being an important part of the process and enhancing rather than detracting from his dignity.

In any case, whatever problems respondent might have with the Court of Appeal's procedure, there is a simple and straight forward procedure that has been enacted by the legislature which directly applies to appellant's situation. Under Code of Civil Procedure section 372, the trial court has the authority to appoint a guardian *ad litem* to represent an incompetent person.[5] Further, under Code of Civil Procedure section 373, subdivision (e),

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[5] In fact, arguably the appointment of a guardian *ad litem* was mandatory, and

the appointment can be made on the application of any party to the proceeding or by the court on its own motion. Under these provisions, the court could exercise its authority to appoint the trial attorney as appellant's guardian *ad litem* and proceed from there. Further, such an appointment would have the added benefit—at least in respondent's view—of restoring the trial attorney to his post as the "captain of the ship."

Nothing about the Code of Civil Procedure section 372, process appears to require any sort of formal long drawn-out evidentiary hearing. Instead, the process of appointing a guardian *ad litem* apparently requires simply that the court hold an informal hearing in which the party has the opportunity to explain why a guardian *ad litem* is not required. (*In re Daniel S.* (2004) 115 Cal.App.4th 903, 912.) The only limitation on the court's authority appears to be a requirement that the allegedly incompetent party be "properly brought before the court" in order to give the court the authority to appoint a guardian *ad litem*. (*Briggs v. Briggs* (1958) 160 Cal.App.2d 312, 318.)

Thus, whatever the merits of the system created by the Court of Appeal might be, the legislature has created a system that by its very terms directly applies to appellant's situation, is simple and straight forward to use, and is entirely consistent with the holding and analysis of the Court of Appeals. Given the existence of the system for appointing a guardian *ad litem* to represent an incompetent party in litigation, there can be no justification for failing to follow that procedure in appellant's case.

C. SUMMATION.

Not everyone who suffers from a severe mental disorder is incompetent to make his own decisions. For that matter, not everyone who is incompetent to make such decisions will suffer from a severe mental disorder. As a result, respondent's desired irrebuttable presumption that anyone alleged to be an MDO is incompetent to make a decision as to whether they want a jury trial is simply inconsistent with reality. Further, given the existence of these simple and straight forward guardian *ad litem* procedure found in Code of Civil

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appellant should have challeged the failure to comply with Code of Civil Procedures section

Procedures section 372, there is no reason not to require that an appropriate process be followed before an alleged MDO, or any other civil committee, is deprived of his statutory or constitutional right to a jury trial.

372.

II. APPELLANT HAD A CONSTITUTIONAL RIGHT TO A JURY TRIAL WHICH WAS VIOLATED BY THE PROCEDURES FOLLOWED IN THIS CASE.

In order to address this Court's question about the existence of prejudicial error, it is necessary to determine what kind of error occurred. In Argument I, above, appellant has established that statutory error occurred because he has a statutory right to a jury trial based upon the explicit language in the statute. However, appellant also has a constitutional right to a jury trial. Properly interpreted, appellant has a right to a jury trial under the California Constitution Article I, section 16, a violation of this right is per se reversible error. In the alternative, appellant also contends that he has a State and Federal due process right to a jury trial and an equal protection right to a jury trial that is co-extensive with the right to a jury trial in other civil commitment cases. Violations of these constitutional rights are reversible error under the standard of *Chapman v. California* (1967) 386 U.S. 18.

A. ARTICLE I, SECTION 16, RIGHT TO A JURY TRIAL.

Article I, section 16, of the California Constitution provides that "[t]rial by jury is inviolate right which shall be secured to all ...." Since appellant, quite clearly, fits in the category of all, he contends that his inviolate right has not properly been secured to him.

Appellant recognizes that it has long been accepted that "[t]he right to a trial by jury guaranteed by the Constitution is the right that is existed in common law at the time the Constitution was adopted." (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d. 283, 286-287.) Further, it is established that the scope of the right "is a purely historical question, a fact which is to be ascertained like any other social, political, or legal fact." (*One 1941 Chevrolet Coupe, supra,* 37 Cal.2d at 287.) Quite simply, it is appellant's position that it is time for this interpretation of the constitution to change.

Obviously, it is never easy to convince a court that the constitution has been misinterpreted for a long period of time or that an interpretation that may have been correct in the past should be accepted as wrong. However, such arguments can be made and have been accepted. In fact, relatively recently, this Court reached such a conclusion in *In re Marriage*

Cases (2008) 43 Cal.4th 757.[6] In finding that the California Constitution's right to marry was not, as long believed, limited to heterosexual couples, this Court recognized that "history alone is not invariably an appropriate guide to determining the meaning and scope of this fundamental constitutional guarantee." (*Marriage Cases, supra*, 43 Cal.4th at 781.) In support of this analysis, this Court cited *Perez v. Sharp* (1948) 32 Cal.2d 711, which overturned long standing California precedent and law prohibiting interracial marriages. In neither case was there any attempt to pretend that gay marriages or interracial marriages would have been constitutionally protected as of the time the California Constitution was enacted. Instead, these cases represented a recognition that times change and the interpretation of the constitution has to change with the times. So should it be in this case.

There can be no doubt that the time of the enactment of the California Constitution, mentally disordered offenders were not afforded a right to a jury trial under the common law. This was, in part, due to the fact that there was no such thing as MDOs under the common law. MDOs are a statutory creation of a far more recent time. That fact alone should not be determinative of the existence of a right to a jury trial. Under current California law, virtually any financial dispute gives the parties a constitutional right to a jury trial yet a dispute such as this in which a person is being confined against their will with a significant stigma attached to that confinement is viewed as not including a constitutional right to a jury trial. This seems wrong. While MDO cases are not currently viewed as criminal in nature such that the United States constitutional right to a jury trial in criminal cases does not apply, that should not be the end of the analysis. The infringement upon an individual's interests and rights that arises out of civil commitment proceedings greatly exceeds the interference with the individual that arises out of a simple lawsuit for money. Moreover, in many ways the adverse consequences of MDO commitment greatly exceed those of a criminal

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[6] Appellant recognizes that not withstanding the current legality of gay marriage in California, this case was subsequently overturned by a voter initiative amending the Constitution, The existence of that initiative does not, of course, in any way impinge upon the validity of this Court's constitutional analysis.

commitment. Generally speaking, a criminal sentence is for a fixed term, and when it is over it is over. An MDO commitment although nominally lasting only for a year, can, and often does, last much longer. Appellant's MDO commitment has already lasted over seven years. Further, because of the way California's appellate system works, each of his appeals will normally take more longer then the commitment itself leading to a constant risk – admittedly one that did not arise in this specific case – of an appeal not even being addressed on its merits based upon mootness. Under such circumstances, the right to a jury trial becomes even more significant.

The United States Supreme Court has long recognized the importance of jury trials in order to protect citizens against the powers of the government. As the court stated in *Duncan v. Louisiana* (1968) 391 U.S. 145, 155-156:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power-a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States. (Footnote omitted.)

The importance of protecting against arbitrary government actions and government oppression is this just as necessary as when an individual is confined against his will for being mentally ill and dangerous as it is in the typical criminal case.

The fact that, in 1850, it was possible to detain individuals for mental illnesses without the protections that are granted now does not mean that those protections should not now have constitutional status. The fact that the legislature has chosen to provide jury trial rights for all of California's civil commitment procedures is not a reason to pretend that the right to a jury trial in such cases does not have constitutional importance. It is, instead, a modern recognition of that very importance. This Court should recognize that the long standing provisions limiting the right to a jury trial in California to the right it has existed in 1850 is simply no longer an appropriate understanding of the California Constitution. Instead, this Court should recognize that the constitutional right to a jury trial – just like the constitutional right to marry -- has evolved over the years.

B. APPELLANT HAS A DUE PROCESS RIGHT TO A JURY TRIAL.

The Courts have long recognized that civil commitment proceedings are subject to due process safeguards. (*People v. Barrett* (2012) 54 Cal.4th 1081, 1098-1099; *Addington v. Texas* (1979) 441 U.S. 418, 420-427; *Heller v. Doe* (1993) 509 U.S. 312, 330-333.) In analyzing these due process concerns, this Court has stated that it must weigh various factors effected by the disputed factor and that "[d]istilled, these considerations involve (1) the various private interests at stake, (2) any competing state or public concerns, and (3) the potential risk of erroneous or unreliable outcome." (*Barrett, supra*, 54 Cal.4th at 1099.) However, many civil commitment due process cases have recognized a fourth relevant factor "the dignitary interest in informing individuals of the nature, grounds, and consequences of the

action and enabling them to present their side of the story before responsible government official." (*People v. Otto* (2001) 26 Cal.4th 200, 210.) An analysis of these four factors weighs in favor of a finding that appellant's due process rights were violated both by the failure to advise him of his right to a jury trial and by the fact that the jury trial was waived without his cooperation, knowledge, or consent.

The private interest that is at stake is obviously a very important one. This proceeding permitted the State to confine appellant against his will for a year. Further, a successful confinement in this proceeding was necessary predicate to subsequent one-year confinements which could extend into the future indefinitely. This factor weighs strongly in appellant's favor.

The government's interest, on the other hand, in opposing both the advisement of the right to the jury trial and appellant's right to make his own decision is minimal, if not non-existent. In fact, since the legislature has already determined that there should be jury trials in MDO cases, the real question here is not the government's abstract interest in whether or not to have a jury trial but whether given the statutory determination that the jury trial should exist, the government has a legitimate interest in dispensing both with the jury trial and the mandatory advisement of that right. There can be no legitimate interest in the government in not advising appellant of his right to a jury trial. The advisement would only take a few moments of court time. Appellant is at a loss as to see any legitimate government interest in not spending those few moments.

Appellant acknowledges that – as a general rule – jury trials are more expensive and time consuming than court trials. Therefore, dispensing with appellant's jury trial would save the government some money. On the other hand, the problem with analyzing the problem on that basis is that it proves too much. The government, from a fiscal perspective, will always have an interest in dispensing with court proceedings and simply allowing decisions to be made by a governmental agent.

Of course, the government's only interest is not fiscal. The government also has an interest in treating its citizens fairly when it seeks to take away their liberty. The government also has a related, but distinct interest in being seen by all its citizens in following the proper procedures and doing things the right way. By using the jury, the government brings society as a whole into the commitment process. Instead of a system where three governmental employees – the judge, the prosecutor, and the defense attorney – work together to deprive an individual of his right to be heard by a jury before he is locked up for a yet another year, granting a jury trial fulfills the government's interest should be in being seen to do the right thing.

No doubt, respondent believes that there is no increase risk of a wrongful result by depriving appellant of his jury trial because there is nothing inherently reliable about a jury verdict as opposed to a decision made by a judge. Appellant disagrees but, even if that assertion were true, it misses the point. Juries have different perspectives from judges. Juries reflect the viewpoint of a cross-section of a community and apply their common sense to reach a verdict in accordance with the law as given by a judge. The judge, on the other hand, is an elected official deeply imbedded in the legal system. While that certainly gives them a greater knowledge of the applicable law than the average person, it also gives them a different and potential political interest. Certainly, for example, a judge might feel that he will suffer no political problems by extending the confinement of an allegedly dangerous person but might face political problems if he released such a person and something went wrong. Jurors, on the other hand, face no such direct political consequences and can, instead, simply follow the law as it is given to them.

Moreover, a jury verdict is distinctly different from a verdict reached by a judge. If the United States Supreme Court has determined, admittedly in a jury context, that a judge can never direct the verdict for a defendant no matter how overwhelming the evidence. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277.) This

determination was not based upon a finding that juries were more reliable than judges in criminal cases but on a determination that a verdict needed to be rendered by the proper entity. In other words, a verdict is less reliable as a matter of law when the wrong entity reaches that verdict.

Finally, the dignitary interest is, in appellant's view, paramount. At the very least, appellant's dignitary interest in being informed of his right to a jury trial is significant. Further, if appellant, or any other defendant in his position, want the chance to tell their story not just to a judge but to a jury to which they are, at the very least, statutorily entitled, the deprivation of that interest certainly impinges upon the defendant's dignity. To such an individual, a system wherein the decision to extend their commitment year after year is made by a single government employee with the assistance of two other government employees cannot possibly seem fair.

Respondent has argued – albeit in a somewhat different context – that requiring a separate hearing to determine a defendant's mental competence "lends no dignity to the defendant" because it demands "the parade of his or her mental deficits in court twice." (RBOM at 15.) The problem, of course, with this analysis is that it focuses on the wrong dignitary issue. The goal of appellant, and other people in his situation – at least the ones who dispute the continuation of their commitment, is to get released not spare themselves some minor in court embarrassment. While, undoubtedly, appellant and other MDOs would prefer not to have their mental health issues aired in public, that decision has already been taken from them by the State's decision to pursue the commitment. There is no significant additional loss of dignity involved in litigating the right to a jury trial to its fullest and then getting a hearing before a jury.

Taken as a whole, the four part due process analysis strongly weighs in favor of a finding that appellant had a due process right both to be advised of his right to a jury trial and to have that jury trial unless he himself chose to waive it or unless he was properly found not competent to make that decision on his own behalf.

C. APPELLANT'S EQUAL PROTECTION RIGHT TO A JURY TRIAL.

Because the other various forms of civil committees such as NGIs and SVPs have a statutory right to a jury trial, appellant would also have an equal protection right to a jury trial if the statute did not already provide him with this right. As a result, this equal protection analysis may seem somewhat pointless. However, that would not quite be correct because the appellant in *People v. Tran* (S211329) has argued for an entitlement to a jury trial based upon specific statutory language that is present in the NGI commitment scheme but not the MDO commitment scheme. In particular, the NGI commitment scheme states that "[t]he 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." (Pen. Code. Sec. 1026.5, subd. (b)(7).) If this Court accepts that argument and finds that Tran had a right to make his own decision on whether or not to have a jury trial because criminal defendant's have an absolute right to make that decision, then appellant contends that under equal protection principles he too is entitled to that very same right.

Under the holding of this Court in *People v. McKee* (2010) 47 Cal.4th 1172, MDOs, SVPs, and NGIs are similarly situated for many equal protection purposes. As this Court stated in *McKee*, courts "have used equal protection clause to place civil commitment statues to ensure that a particular group of civil committees is not unfairly or arbitrarily subject to greater burden. (*McKee, surpa*, 47 Cal.4th at 1199.) In particular, in *Baxtron v. Herold* (1996) 383 U.S. 107, the Supreme Court determined that a State violated equal protection when it gives a jury trial right to some civil committees and not others. The United States Supreme Court reached a similar conclusion in *Humphrey v. Cady* (1972) 405 U.S. 504 and *Foucha v. Louisiana* (1991) 504 U.S. 71. Likewise this Court determined that a jury trial must

be afforded on equal protection grounds to a former youth authority committee who was subject to civil commitment after reaching the age of 21. (*In re Gary W.* (1971) 5 Cal.3d 296, 307-308.) There is simply no logical reason to assert that an MDO should be in some way less entitled to a jury trial than an NGI.

If, indeed, appellant is similarly situated to an NGI for the purposes of his right to a jury trial, then there could be no justification for any disparate treatment. Therefore, appellant should not receive a less favorable ruling from this Court based upon any distinctions between his status as an MDO and Mr. Tran's status as an NGI.

III. THE TRIAL COURT'S FAILURE TO ADVISE APPELLANT OF HIS RIGHT TO A JURY TRIAL AND THE DEPRIVATION OF THAT RIGHT CONSTITUTED REVERSIBLE ERROR.

The appropriate standard of prejudice to be applied depends on the type of error this Court determines was made. If, as appellant contends, appellant has a direct constitutional right to a jury trial under the California Constitution, the failure to grant that right is reversible per se. On the other hand, if appellant's right to a jury trial is constitutional as a due process or equal protection right, then the prejudice standard is the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. Finally, if the error is purely a state statutory error it is normally evaluated under the reasonable probability of a more favorable outcome standard of *People v. Watson* (1956) 46 Cal.2d 818. Of course, it is appellant's position that no matter what standard of error is applied, the error in this case was prejudicial and reversible.

A. ARTICLE I, SECTION 16, ERROR.

Under California law, "[t]he denial of a trial by jury to one constitutionally entitled thereto constitutes a miscarriage of justice and requires reversal of the judgment." (*One 1941 Chevrolet Coupe, supra,* 37 Cal.2d at 300.) More recent cases include functionally identical language. (*Collins Development Co. v. D.J. Plastering Inc.* (2008) 81 Cal.App.4th 771, 778; *Munoz v. Silva* (2013) 216 Cal.App.4th Supp. 11.) Therefore, if this Court accepts appellant's argument on this issue, reversal is mandatory.

B. THE ERROR WAS PREJUDICIAL.

Appellant's claim that the error is prejudicial and requires reversal under either *Chapman* or *Watson* is premised not on appellant being able to prove that a jury would have ruled in his favor. Such proof is inherently impossible to obtain. In fact, the Court of Appeal recognized this problem in its harmless error analysis when, after

acknowledging the statutory right to a jury trial and the advisement of that right, it stated "the purpose of these mandates is frustrated and an MDO's right to a jury trial is undermined when together a silent record, general procedural rules and presumptions on appeal, and the harmless-error test permitting reviewing courts to affirm a commitment and say, in essence, we need not know, and it does not matter whether the MDO was advised or whether a jury trial was validly waived. Rather, compliance with the statutory mandates matters even when there is overwhelming evidence to support a commitment order and the failure to comply with the statute can be deemed harmless error." (Slip opin. at 31.)

The Court of Appeal's resolution to this chronic problem was to issue a rule for future cases requiring the trial court and the parties to make an appropriate record establishing the propriety of a bench trial. The Court's authority to even issue this rule is under challenged by respondent although review was only granted on the issue in *Tran*. That being said, however, appellant submits that analyzing the error in this way and attempting to rectify it in future cases is a flawed approach. Initially, appellant notes that even if the Court of Appeal's rule is adopted and imposed by this Court, the harmless error analysis used by the Court of Appeal in this case and favored by respondent would mean that this rule would never need to be followed. While appellant cannot and does not contend that no court would ever follow this new rule, appellant does believe that many courts will not, especially given the failure of the courts to follow the already existing statute requiring them to advise alleged MDOs of their right to a jury trial. To put it another way, our overburdened trial courts, may be tempted to take a shortcut to avoid what they perceive as unnecessary procedures.

In any case, it is appellant's position that he was prejudiced under both *Chapman* and *Watson* because the more favorable outcome to which he was entitled and that would have occurred absent the error was the jury trial itself. Jury trials are

not just a means to resolve disputes. They are a fundamental right in and of themselves. Individuals involuntarily subject to the authority of the State can and do believe that successfully asserting their right to be heard by a jury of their peers is in and of itself a more successful outcome than a court trial.

In *Sullivan v. Louisiana* (1993) 508 U.S. 275, the Supreme Court considered the application of harmless error analysis under *Chapman* to a defendant who is convicted following a jury trial at which the jury was given an inadequate jury instruction for finding reasonable doubt. The court needed to decide whether or not under *Chapman*, it would analyze the evidence presented in the case in order to determine whether the error was harmless beyond a reasonable doubt. The court found that it could not do so.

Specifically, the court stated that, under *Chapman*, "[c]onsistnet with the jury-trial guarantee, the question instructs the reviewing court to consider is not what affect the constitutional error might generally be expected to be have upon a reasonable jury, but rather what effect it had upon the guilty verdict on the case at hand." (*Sullivan, supra*, 508 U.S. at 279.) Putting it another way, the court stated that "[t]he inquiry, in other words, is not whether, in a trial that occurred with out the error a guilty verdict would surely have been rendered, but whether the guilty verdict in *this* trial was surely unattributable to the error. That must be so, because through hypothesizing a guilty verdict was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." (*Sullivan, supra*, 508 U.S. at 279.)

Applying that analysis to appellant's case it is clear that error occurred under *Chapman*. The harmless error analysis used by the Court of Appeal did, in fact, limit the evidence presented in this case and determine that verdict finding that appellant was an MDO would surely have been rendered in a trial that occurred without any error. It did not, and could not, find that the verdict actually rendered in appellant's

case was unattributable to the error because, of course, just as in *Sullivan*, the verdict that was rendered in this case – a verdict rendered by a judge not a jury – was directly attributable to their erroneous deprival of the appellant's right to a jury trial.

While it is true that *Sullivan* dealt with the Sixth Amendment right to a jury trial rather than a due process right to a jury trial, *Chapman* standard of error is identical in both cases and, presuming this court finds that appellant had a due process right to a jury trial, identical to the right of which appellant was deprived.

Moreover, the same analysis results under the *Watson* standard. The question under *Watson* in determining whether there was a reasonable probability of a more favorable outcome should look not at the same result would inevitably occurred had appellant received a jury trial – a proposition with which appellant does not agree in any case – but whether the verdict in this case was attributable to the error. Obviously, there is a reasonable probability that appellant would have achieved a more favorable result if he had actually received a jury trial because, under the logic of *Sullivan*, there is nothing to analyze in assessing the judgment actually reached in this case. Under Article VI, Section 13, of the California Constitution, reversal is not available unless the "the error complained of has resulted in a miscarriage of justice." Depriving appellant his right to a jury trial – given the *Sullivan* analysis – is a miscarriage of justice.

In addition, the failure to advise appellant of his right of a jury deprived appellant of the opportunity to consult with his trial attorney and persuade that attorney that a jury trial would be best. Appellant is at a loss as to how any process of prejudice analysis could possibly address the harmful effects of that interference in the process. Certainly, it will never be possible to determine from an appellate record whether an individual defendant would have been successful in persuading his attorney to request a jury trial.

If the prejudice analysis is concluded under the *Chapman* harmless beyond a

reasonable doubt standard, there is nothing in the record that proves that a jury trial would have inevitably resulted in the same result. Instead, such a finding could only be based upon a speculation that a trial in front of a jury would have been conducted in exactly the same way as the trial was in this case. Yet, this is the very same type of analysis that the Supreme Court in *Sullivan* determined cannot and should not be done. Moreover, by their very nature, jury trials tend to result in evidence being presented in a more comprehensible and detailed fashion. As a result, it is impossible to guess as to how the jury trial would have differed from a court trial. For this reason, appellant maintains that he has demonstrated that he suffered prejudicial error from the trial court's failure to advise him of his right to a jury trial and the trial court's erroneous decision to permit his attorney to waive his right to a jury trial absent appellant's consent or evidence that appellant was not competent to make the decision.

CONCLUSION

For the reasons discussed above, this Court should find that the trial court prejudicially erred by failing to advise appellant both of his right to a jury trial and by permitting his trial attorney to waive appellant's right to a jury trial without appellant's consent.

Respectfully submitted,

RUDY KRAFT
Attorney for Appellant

S211078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Case No. S211078

Plaintiff and Respondent,

Sixth Appellate District,
Case No. H037207

vs.

Santa Clara County
Superior Court No. BB304666

BRUCE LEE BLACKBURN,

Defendant and Appellant.

CERTIFICATE OF WORD COUNT

I, RUDY KRAFT, declare as follows:

I am the attorney for BRUCE LEE BLACKBURN in this matter. This Appellant's Brief on the Merits was prepared using Microsoft Word 2010. According to that program's word count feature, this Brief contains 11,071 words.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 30, 2013, at San Luis Obispo, California.

RUDY KRAFT

DECLARATION OF SERVICE BY MAIL

I, RUDY KRAFT, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is P.O. Box 1677, San Luis Obispo, California 93406-1677.

On December 30, 2013, I served the attached APPELLANT'S BRIEF ON THE MERITS by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, by sealing and depositing said envelope in the United States mail at San Luis Obispo, California with postage thereon fully prepaid. There is delivery service by United States mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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RUDY KRAFT