**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**PEOPLE OF THE STATE OF CALIFORNIA**

**Plaintiff and Respondent,** Case No. S211329

**vs.**

**DAWN QUANG TRAN,**

**Defendant and Appellant.**

_____/



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

# APPELLANT'S BRIEF ON THE MERITS

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## ISSUES PRESENTED FOR REVIEW

The Court granted petitions for review by both parties to address the following issue: Did the trial court prejudicially err by failing to advise defendant of his right of his right to a jury trial and obtain a personal waiver of that right, and does the court of appeal have authority to declare a rule of procedure for trial courts?

## STATEMENT OF THE CASE AND FACTS

On May 12, 1999, the court committed appellant to Napa State Hospital after he was found guilty, but not guilty by reason of insanity under Penal Code section 1026 for lewd and lascivious acts on a child under 14 years of age in violation of Pen. Code section 288. (CT 6.)

In the 1997 committing offense, a child's grandmother found Mr. Tran standing over a child whose pants and underwear were down. When Mr. Tran got on top of the child, the grandmother pushed him off. The child said that Mr. Tran had put something inside her. Mr. Tran, who felt guilty, took three bottles of sleep medication, and stabbed himself in the chest. (CT 6.)

This appeal comes from the court's fourth two-year commitment following a bench trial started without Mr. Tran personally waiving or being advise of the right to a jury trial.

At the court trial on the petition to extend Mr. Tran's commitment, Dr. Eric Khoury, a psychiatrist at Napa State Hospital, testified that Mr.

Tran suffered from bipolar disorder. (RT 8.) For his condition, Mr. Tran took olanzapine, an antipsychotic medication that was doing a pretty good job of controlling his symptoms. (RT 9-10.) Dr. Khoury said that Mr. Tran would need to take medication for the rest of his life, which raised some concern, because Mr. Tran felt he was cured. (RT 10.) However, Mr. Tran told Dr. Khoury that if he were prescribed medication, he would take it, as he had been doing. (RT 12.)

For the eight months that Dr. Khoury had treated him, Mr. Tran had not exhibited any symptoms, such as paranoia, delusions, or hallucinations. (RT 19.) While noting that Mr. Tran was in a controlled setting, Dr. Khoury said that if he stayed on his medication, as he had done, "it would be hard to say that he's a danger to the community in his current state." (RT 19.) And, Mr. Tran should be commended for the work he had done. (RT 20.)

At the time of trial the hospital was undertaking an evaluation of Mr. Tran for conditional release. (RT 13.) In January, approximately four months before the trial, Dr. Khoury did not believe that Mr. Tran was a substantial danger to the community. (RT 14.) Some unspecified concerns arose during the evaluation, which was not completed, but Dr. Khoury felt that Mr. Tran was moving in the right direction towards conditional release.

He was "doing very well" on the open ward. (RT 16.) He had expressed remorse for his behavior that led to his commitment. (RT 18.)

Mr. Tran testified that if he were released from the hospital, he would continue to seek psychiatric treatment and continue to take antipsychotic medication. (RT 25.) He recognized that he suffered from a mental illness that led to his crime and commitment. (RT 25.) And, because of that he would continue to take medication all his life. (RT 25.)

Although the court decided to commit Mr. Tran for another two years, it concluded "that it sounds to me like Mr. Tran is very close to Conrep" and looked forward to placing him on Conrep as soon as possible. (RT 29.)

On appeal, Mr. Tran argued that if a jury heard Dr. Khoury's testimony about the progress he was making, and considered Mr. Tran's testimony that he knew he had a mental illness and would continue to take his medication for the rest of his life, there was a reasonable probability of a different result. Thus, he was prejudiced by the trial court conducting a bench trial without a jury trial advisement and personal waiver.

## SUMMARY OF THE ARGUMENT

Penal Code section 1026.5, subdivisions (b)(3) and (4) require that the trial court must advise the person named in the petition of the right to a jury trial, and that waiver must be by both the person and the prosecuting attorney. (See *People v. Barrett* (2012) 54 Cal.4th 1081, 1110.) The plain

language of the statute means that on the record the trial court must advise a person found not guilty by reason of insanity ("NGI") of his right to a jury trial and must take an express personal waiver before it holds a court trial. Mr. Tran has those same rights under the state and federal due process clauses.

Here, the record does not show that the trial court ever advised Mr. Tran or took a personal waiver of his right to a jury trial. A settled statement says that Mr. Tran's attorney requested a court rather than a jury trial. Mr. Tran was not present. Nothing in the record shows that he knew about the jury trial right or that his attorney discussed it with him.

The statutory requirement for a jury trial advisement is mandatory. The obvious reason the Legislature required the advisement is to make sure the NGI knows about his or her right so that any waiver will be knowing and intelligent.

Because section 1026.5 consistently refers to the committee as the "person", the statute must mean Mr. Tran-not his attorney-when it says that the "person" must waive the jury trial right. If the Legislature wanted to give Mr. Tran's attorney authority to waive a jury trial, it could have done so by saying that Mr. Tran had the right to a jury trial unless his attorney and the district attorney waived it.

An involuntary commitment has a significant impact on the person. "Commitment for any purpose constitutes a significant deprivation of

liberty that requires due process protection." (*Foucha v. Louisiana* (1992) 504 U.S. 71,79; see also *Addington v. Texas* (1979) 441 U.S. 418, 425; *People v. Hurtado* (2002) 28 Cal.4th 1179, 1193.)

Given the substantial liberty interests and adverse social consequences of commitment, the right to chose the trier of fact is just as valuable to an NGI as it is to a criminal defendant.

To protect the jury trial rights of NGI committees and promote the plain meaning of the statute, the court of appeal held that if the court conducts a bench trial and the NGI does not personally waive the right to a jury, the record must show that the court advised the defendant of the right to a jury or, if the court is unable to do so, that the defendant is made aware of the right before counsel waives it. The record must also show that in waiving a jury trial, counsel acts at the defendant's direction or with his or her knowledge and consent or that there are circumstances supporting counsel's doubt concerning the defendant's capacity to determine what is in his or her own best interests.

Mr. Tran had a statutory, federal and state due process and equal protection right to a jury trial. By failing to advise Mr. Tran and taking a personal waiver on the record, the trial court deprived him of those rights, which substantially prejudiced him. And, the court of appeal properly acted within its inherent judicial authority when it required a clear record of the trial court protecting those fundamental rights.

## DISCUSSION

## I

## THE COMMITMENT MUST BE REVERSED BECAUSE APPELLANT WAS NOT ADVISED OF HIS RIGHT TO A JURY TRIAL, AND HE DID NOT PERSONALLY WAIVE A JURY TRIAL.

### A. The Court Violated Mr. Tran's Statutory Right to be Advised of a Jury Trial and to Have a Trial by Jury Unless He Personally Waived the Right on the Record.

#### 1. Penal Code section 1026.5, subdivision (b) Requires a Jury Trial Advisement and Express Personal Waiver Before the Court Can Hold a Bench Trial.

Before holding a bench trial, the trial court had a statutory duty to advise Mr. Tran and take his express personal waiver of the right to a jury trial.

Penal Code section 1026.5, subdivision (b)(3) provides in pertinent part that "the court shall advise the person named in the petition of the right to...a jury trial."

Penal Code section 1026.5, subdivision (b)(4) provides in pertinent part that "[t]he trial shall be by jury unless waived by both the person and the prosecuting attorney."

Also, Penal Code section 1026.5, subdivision (b)(7) provides in pertinent part that "[t]he person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings."

Where, as here, there is no ambiguity in the text of the statute, then the reviewing court must presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana* (2000) 25 Cal.4th 268, 272.)

"To determine legislative intent, a court begins with the words of the statute because they generally provide the most reliable indicator of legislative intent." (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 905.) "If it is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it. If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." (*Ibid.*) Further, any doubts or statutory ambiguities should be resolved in favor of securing the right to a jury trial. (*Grafton Partners v. Superior Court* (2005) 36 CaL.4th 944, 956, 958; *Maldanado v. Superior Court* (1984) 162 Cal.App.3d 1259, 1266-1267; *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654.)

The plain language of the statute requires that the trial court advise an NGI of the right to a jury and that before dispensing with a jury trial, the trial court must take an express personal waiver from the NGI.

The crux of Respondent's argument is that trial counsel, as "captain of the ship," had exclusive control over the decision whether to waive a jury, and once counsel decided to waive a jury, that mooted the court's

mandate to advise Mr. Tran of his jury trial right. The court of appeal properly rejected Respondent's claims.

Respondent relies on the general proposition that "in civil cases, an attorney has 'complete charge and supervision' to waive a jury" (*Zurich General Acc. & Liability Ins. Co. v. Kinsler* (1938) 12 Cal.3d 98, 105-106 [*Zurich*] ; see also *Shores Co. v. Iowa Chemical Co.* (1936) 222 Iowa 347 [268 N.W. 581] [*Iowa*].) However, neither *Zurich* nor *Iowa* dealt with a statute that expressly required a jury advisement and jury trial unless waived by the person. Further, those cases did not involve special proceedings like the involuntary commitment trial that implicated significant liberty and dignity interests here.

When Penal Code section 1026.5, subdivision (b) states that an NGI has the right to a jury trial "unless waived by both the person and the prosecuting attorney," the statute does not give counsel exclusive control over the waiver decision. The statute's waiver provision must be read together with the advisement requirement. (Opn., p. 21; citing *Los Angeles County Metropolitan Transp. Authority v. Alameda Produce Market LLC* (2011) 52 Cal..4th 1100, 1106-1107.) Together, the two provisions intend for NGIs to make the decision and expressly provide for them to do so.

Penal Code section 1026.5, subdivision (b) makes it clear that the right to a jury trial is personal to the NGI. When the Legislature said that the "person named in the petition" shall be told of the right of a jury trial

and the right can be waived only by the "person" and the district attorney, it unambiguously meant the person being committed. The attorney is not the person named in the petition. Obviously, the court is not advising the attorney of the right to an attorney.

And, in a similar vein, when the statute says that if the person is committed under the NGI Act that person shall be released on outpatient status if certain conditions are met, it is not the attorney who is being committed or released. Throughout the statute, the Legislature has consistently used the word "person" to refer to the defendant being committed.

The clear purpose of the required advisement is to inform the NGI of the right to a jury trial so he or she can decide whether to waive it. This Court explained that a jury advisement lets a person understand and control the decision to request a jury trial. (*People v. Barrett, supra,* 54 Cal.4th at p. 1109; see also *People v. Koonz* (2002) 27 Cal.4th 1041, 1071 [purpose of *Faretta* advisements is to ensure defendant makes a knowing and intelligent waiver of counsel.]

If the Legislature had intended to have the attorney control the decision whether to waive a jury trial, it could have easily conferred the right to a jury trial unless waived by "the person's attorney" just as it required waiver by the "prosecuting attorney".

And, if that had been the Legislature's intent, it would not have required an advisement. This interpretation would make the mandatory advisement meaningless and run contrary to long-standing rules of statutory construction. (Opn., p. 22; *McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110 [courts should avoid interpretation rendering part of the instrument surplusage].)

Furthermore, section 1026.5, subdivision (b)(7) provides in part that "[t]he person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings." This language encompasses the right to a jury trial only forfeited by a personal waiver. The California Constitution provides, in relevant part, that "[a] jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel." (Cal. Const., art. 1, §16; see also U.S. Const. amends. VI, XIV; *People v. Ames* (1975) 52 Cal.App.3d 389 [the defendant's silence will not be interpreted as consent to a waiver.])

The statute makes it clear that the trial court erred by failing to advise Mr. Tran of his right to a jury trial and by not taking his personal waiver in open court before holding a bench trial.

### 2. Mr. Tran was Capable of Understanding and Personally Deciding Whether to Exercise His Statutory and Constitutional Rights to a Jury Trial.

Respondent claims that because NGIs are incapable of acting in their best interests, they must act through their counsel. The court of appeal properly rejected this claim.

In its argument, Respondent relies heavily on the case of *People v. Masterson* (1994) 8 Cal.4th 965. That case is distinguishable. *Masterson* involved a special proceeding to decide whether the defendant was competent to stand trial on criminal charges. (Pen. Code §§ 1368-1370.) This Court broadly concluded that in competency trials, counsel has exclusive control over the jury issue, basing its decision on "an examination of the nature of competency proceedings as well as the jury trial right at issue." (*Id.*, at p. 971.)

Raising the question "How can a person whose competence is in doubt make basic decisions regarding the conduct of a proceeding to determine that very question" (*Id.*, at p. 971), this Court concluded that the defendant is unable to act in his or her own best interests. And, for that reason, the defendant must act through counsel, who has exclusive control over the conduct of the proceedings, including the decision whether to waive a jury trial. The conclusion rests on the nature of competency proceedings.

In *Barrett, supra,* 54 Cal.4th 1081, this Court addressed the issue of whether counsel had exclusive control in a proceeding to commit a developmentally disabled person who is dangerous. (Welf. & Inst. Code § 6500.) Although this Court held that the constitution implied a statutory right to a jury trial (*Id.*, at pp. 1097, 1100), it relied on *Masterson* to find that counsel had exclusive control over whether to waive jury trial because of the nature of the proceedings.

However, the nature of the proceedings in *Barrett* and *Masterson* are very different from the NGI commitment extension trial at issue here. Also, the statutes at issue in *Barrett* and *Masterson* [Welfare and Institutions Code section 6500 et. seq. and Penal Code section 1368 et. seq.] are different, because the statutes at issue in those cases do not require an advisement and personal waiver of a jury trial, as Penal Code section 1026.5, subdivision (b) does in our case.

Developmental disability involves "'*significantly subaverage general intellectual functioning*" that never recedes and affects the ability to make basic decisions. (*People v. Barrett, supra,* 54 Cal.4th at p. 1100.) A mentally disabled person is not in a position to personally assert or waive the right to a jury trial. (*Id.*, at pp. 1104-1105.)

And, the purpose of a competency trial is to resolve actual doubt concerning the defendant's mental capacity to understand the proceedings and cooperate with counsel. (*People v. Lewis* (2008) 43 Cal.3d 415, 525.)

Once there is a doubt about defendant's competency, counsel has control over whether to waive a jury.

By contrast, an NGI extension trial does not involve a competency determination. The mental capacities of the persons in NGI proceedings, as in Lanterman-Petris-Short ("LPS") Act commitments, "do not necessarily imply incompetence or a reduced ability to understand, and make decisions about the conduct of the proceedings." (*Barrett, supra,* at p. 1109.)

There is no reason to assume that NGIs lack the ability to determine their own best interests. Those diagnosed with a mental disease have a different capacity to understand the jury advisement and make a rational decision. Mental illness may arise suddenly and for the first time in adulthood, and the need for treatment may be temporary, and the disorders may be intermittent or short-lived. "[M]any mentally ill persons retain the capacity to function in a competent manner." (*Id.*, at p. 1108-1109.)

Incompetency is very different from insanity. The fact that someone has a mental condition at the time of the crime does not mean that at the time of the trial he or she does not understand the nature of the proceedings and cannot assist counsel in preparing a defense. (See *People v. Hofferber* (1977) 70 Cal.App.3d 265, 269.)

"Competence is not a clinical, medical or psychiatric concept. It does not derive from our understanding of health, sickness, treatment, of persons as patients. Rather it relates to the world of law, to society's interest in deciding whether an individual should have certain rights (and obligations) relating to person, property, and relationships." (*In re Qwai* (2004) 32 Cal.4th 1.) This Court rejected the argument that mentally disordered offender ("MDO") defendants are not capable of making a reasoned decision regarding medication. There can be no assumption the defendant is incompetent simply because it is alleged he or she should be committed under the MDO or NGI Act.

Here, there is no evidence that Mr. Tran was incompetent to make the decision whether to exercise his right to a jury trial. In fact the opposite was true; the evidence showed he was competent. Mr. Tran was competent enough to stand trial in 1999, and since then he has received years of treatment that have greatly benefitted him. Dr Khoury said Mr. Tran was doing well on the open ward, and the hospital was considering his supervised release. His medication was helping. Dr. Khoury had not observed Mr. Tran exhibit symptoms of his condition. He had expressed remorse for his behavior. Dr. Khoury said that he should be commended for his progress, and was moving in the direction of conditional release.

### 3. The Cases Cited by Respondent for its Claim That an NGI Defendant Is Not Competent to Decide Whether to Waive a Jury Trial Are Distinguishable.

In addition to *Masterson,* Respondent relies upon *People v. Otis* (1999) 70 Cal.App.4th 1174 (*Otis*), *People v. Powell* (2004) 114 Cal.App.4th 1153 (*Powell*), *People v. Montoya* (2001) 86 Cal.App.4th 825 (*Montoya*), and *People v. Givan* (2007) 156 Cal.App.4th 405 (*Givan*) to support its erroneous claim that Mr. Tran was not competent to decide whether to exercise his right to a jury trial. The particular facts and issues distinguish these cases from ours.

For example, in *Otis,* the defendant was delusional and said he was being sexually assaulted by invisible police. The Court upheld counsel's jury waiver over the defendant's objection, concluding that the defendant was not capable of making a reasoned decision. (*Otis, supra,* 70 Cal.App.4th at 1175-1176.)

In *Montoya,* the defendant's mind was not functioning normally, and he, like the defendant in *Otis*, was not able to make a rational decision. (*Montoya, supra,* 86 Cal.App.4th at p. 831.)

*Powell* raises similar issues to our case, but *Powell's* facts distinguish it. There, the NGI objected to his counsel's waiver and demanded a jury trial. When the court denied his request, Powell became so argumentative, belligerent, and disruptive that he had to be removed from the courtroom.

In upholding counsel's jury waiver, the court pointed out that the defendant had been found insane twice, medical staff had diagnosed him with paranoid schizophrenia, and there was no evidence he had regained his sanity. The court further noted that the defendant had a history of violence, believed certain people should be killed, and sought release to do so. (*Powell, supra,* 114 Cal.App.4th at 1158.) "On the day of the purported demand for jury, appellant was medicated, experiencing mood swings, and was so belligerent and disruptive that he had to be removed from the courtroom." (*Ibid.*)

And, *Givan* does not stand for the proposition that counsel exclusively controls the jury decision in every case. There, the NGI signed a declaration stating that he had discussed his rights and had agreed to an extension of his commitment. He requested that his attorney be allowed to appear and present his waiver. The Court held that Givan's express instructions to his attorney implicitly covered a knowing and intelligent jury waiver. (*Givan, supra,* 156 Cal.App.4th at pp. 409-411.)

*Powell's* description of the proposed NGI committee as "[a]n insane person who is 'a substantial danger of physical harm to others'" puts the cart before the horse. At the outset of the extended commitment hearing, there is merely an allegation set forth in the petition that the person is dangerous as a result of a mental disorder, but there is no presumption that the person meets those criteria before trial on the petition commences.

To the contrary, the fact that the People must prove beyond a reasonable doubt that the person is mentally ill works the opposite. Second, as noted above, even if there were a presumption of insanity or mental illness, there is certainly no presumption of incompetency to determine one's own best interest as *Powell* and *Otis* concluded.

This Court's analysis in *People v. Allen* (2008) 44 Cal.4th 843 is helpful. In that case, this Court held that a person being committed under the Sexually Violent Predators ("SVP") Act has a right to testify over his attorney's wishes. (*Id.*, at p. 869-870.) Like NGI patients, SVP patients are people who are considered a danger to others due to mental illness. (Welf. & Inst. Code § 6600, subd. (a)(1).) Notwithstanding the risk that some defendants might be incompetent to wisely make such a decision, the court concluded defendants in SVP cases normally had a due process right to make his or her own determination. (*See Allen, supra,* at pp. 869-870.)

In *In re Watson* (1979) 91 Cal.App.3d 455, the court held that a person in an LPS proceeding had a due process right to be present during the trial. (*Id.*, at pp. 460-462.) Because the patient did not waive her right to be present, the court erred. (*Id.*, at p. 462.) The court recognized that some patients might be too incompetent to attend or meaningfully participate in the proceedings. But "[i]f the person is so mentally retarded as to be unable to comprehend the advisal of the right to be present and other rights incident to a fair hearing, the record should affirmatively

reflect that fact. The determination of the person's ability to attend the hearing and/or of the ability to give an intelligent waiver of constitutional rights, including the right to be present, must be made by the trial judge based upon competent evidence." (*Ibid.*)

It cannot be assumed, as the Respondent does, that an NGI defendant lacks the capacity to exercise the right the Legislature provided.

In *Barrett,* this Court observed that an LPS committee could benefit from an advisement of his or her right to a jury trial. (*Barrett, supra,* 54 Cal.4th at p. 1108.) The obvious reason for the advisement is to let the LPS or NGI committee decide whether to waive a jury trial. This Court properly assumed for argument's sake that the LPS statute requires an express personal waiver. Since the LPS and NGI statutes have the same requirements, Mr. Tran had the same rights to an advisement and personal waiver of a jury trial.

### 4. A Simple Procedure That Will Not Burden The Court Exists to Resolve Any Doubt About An NGI's Competency.

If there is a doubt about whether an NGI defendant has the capacity to exercise the right to a jury trial, a simple procedure such as that used to appoint a guardian ad litem could be used. (Code Civ. Proc. § 372; see e.g. *In re James F.* (2008) 42 Cal.4th 901, 910-911 [appointment of guardian ad litem in dependency cases]; *In re Sara D.* (2001) 87 Cal.App.4th 661.)

For purposes of the civil commitment proceeding the guardian ad litem can be trial counsel.

The Attorney General envisions all kinds of complications and burdens on the trial court in arguing for giving counsel exclusive control over the exercise of NGI's statutory and constitutional right to a jury trial. But, these arguments are essentially scare tactics, easily avoided by using the simple procedure for appointing a guardian ad litem that already exists.

The court can hold a brief hearing and decide if the NGI is competent. This simple procedure will certainly not overburden the trial court, and protects the NGI's substantial liberty and dignity issues at stake in the commitment proceeding.

### 5. Because of the Fundamental Interests at Stake, it is Important to Protect the Statutory Requirements of an Advisement and Express Personal Waiver of a Jury Trial.

This Court has recognized that commitment proceedings "potentially involve a significant restraint on liberty." (*Barrett, supra,* 54 Cal.4th at p. 1109.) "[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (*Foucha v. Louisiana* (1992) 504 U.S. 71, 79.)

Also, this Court has "said that persons facing commitment have a '"dignitary interest"' in being informed of the '"nature, grounds, and consequences"' of the proceeding, and in presenting '"their side of the

story'" before a determination is made. [Citations.]" (*Barrett, supra,* at p. 1109.)

The liberty and dignity interests affected by involuntary commitment make the right to chose the trier of fact as valuable to an NGI as a criminal defendant. And, the Legislature found that right important enough to protect by requiring a judicial advisement and waiver by the person.

Given the statutory language and the due process interests at stake, Mr. Tran was entitled to be advised of and to personally waive a jury trial. Here, there was no advisement or personal waiver. Nor was there any evidence he was incompetent. On the contrary, he was faithfully taking his medication and "doing very well." He was being evaluated for supervised release. The trial court prejudicially erred by committing him without advising him and taking a personal waiver of his right to a jury trial.

### B. The Court Deprived Mr. Tran of his Due Process Right to a Jury Trial.

The court's failure to advise Mr. Tran of his right to a jury trial and the court proceeding to trial without a jury when there was no express personal waiver also violated due process. If hypothetically the Legislature amended the statute to no longer require a jury trial, deprivation of the right to jury would violate the Fourteenth Amendment. The deprivation of the right to a jury would violate the Fourteenth Amendment.

Article I, section 16 of the California Constitution provides that "Trial by jury is an inviolate right...A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute."

Under the California and United States Constitutions, no person may be deprived of life, liberty, or property without due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.) In *Barrett,* this Court recognized that "civil commitment for any purpose can affect liberty and other vital interests. (*Addington v. Texas* (1979) 441 U.S. 418, 425; *People v. Allen* (2008) 44 Cal.4th 843, 862.) Hence, due process safeguards apply..." (*Barrett, supra,* at p. 1109; see *Heller v. Doe* (1993) 509 U.S. 312, 33-333.) What due process is due depends on the nature and purpose of the challenged commitment. *(Id.,* at p. 1109.) To make this determination, the Courts consider the following factors: "(1) the various private interests at stake, (2) any competing state or public concerns, and (3) the potential risk of an erroneous or unreliable outcome. [Citations.]" (*Ibid.*)

With regards to the first factor, this Court acknowledged in *Barrett* that commitments involve a significant restraint on liberty, and persons facing commitments have a dignity interest in understanding the process and in telling their side of the story. These interests are significant enough to raise constitutional jury trial concerns in commitment cases.

*Barrett*, of course, dealt with the commitment of a developmentally disabled person, and in weighing the competing interests, this Court pointed out that such a person is not similarly situated to persons with mental illness facing LPS or NGI commitments. Unlike Mr. Tran, a person facing a Welfare and Institutions Code section 6500 commitment does not have the ability to understand and control procedural matters. By contrast, persons like Mr. Tran have the capacity to decide whether to exercise their jury trial rights and will benefit from the right to be advised and to decide whether to personal waive a jury. Thus, the competing interests in the first and second prongs of the due process test favor requiring an advisement and personal waiver guaranteed to Mr. Tran by statute.

There is no justification for dispensing with a jury to save money. The Legislature has already made a commitment to ensure jury trials in NGI cases. Mr. Tran was presumed competent at his original trial and since then no doubt has been raised about his competency. Further, if a doubt were raised, a simple procedure like the civil guardian ad litem process would expeditiously resolve doubt without burdening the court. As the court of appeal concluded here, any burden on the court will be slight and outweighed by the significant liberty and dignity interest protected by the statute.

And, as to the third prong of the test, the potential risk of an erroneous outcome in a case such as ours is unacceptable. As this Court

stated, "[t]he civil nature of...[the proceedings] is likewise an insufficient excuse for allowing a person to lose his liberty and good name at the hands of less than a unanimous jury." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 230.)

The Legislature clearly intended to protect his constitutional rights. Penal Code section 1026.5, subdivision (b)(7) gave Mr. Tran the rights guaranteed under the federal and state constitutions for criminal proceedings. This language encompasses the right to have a jury trial unless personally waived by the defendant in open court guaranteed by article 1, section 16 of the California Constitution.

Separate and apart from a right to a personal waiver, advisement of the right to a jury trial is important for several reasons. Such an advisement may have caused Mr. Tran to discuss his concerns about a jury trial with his attorney. Our record does not show that Mr. Tran's attorney ever told him about his right to a jury in this commitment extension proceeding. Also, an advisement respects Mr. Tran's understanding of who will make the decision that will shape his life. (*Barrett, supra,* 54 Cal.4th at p. 1119, Justice Liu, dissenting opinion.)

The requirement of an advisement and express personal waiver serves the same purpose as the requirement that the defendant expressly waive his or her constitutional rights before pleading guilty. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.) The

requirements, grounded in due process, ensure that the person comprehends and controls the decision whether to request a jury trial.

By holding a bench trial without the required advisement and waiver of the right to a jury trial, the trial court denied Mr. Tran due process.

### C. The Court Deprived Mr. Tran of his Right to a Jury Trial Under the Equal Protection Clause.

The court's failure to advise appellant of his right to a jury trial and the court proceeding to trial without a jury when there was no waiver also violated equal protection. Again, if hypothetically the Legislature amended the statute to no longer require a jury trial, deprivation of the right to jury would violate the Fourteenth Amendment. The deprivation of the right to a jury by the court in this case also violated the Fourteenth Amendment.

The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." (See also Cal. Const., art. I, § 7.)

The first step is to determine if appellant is similarly situated to others guaranteed the right to a jury trial. "There is always some difference between the two groups which a law treats in an unequal manner since an equal protection claim necessarily asserts that the law in some way distinguishes between the two groups. Thus, an equal protection claim cannot be resolved by simply observing that the members of group A have distinguishing characteristic X while the members of group B lack this

characteristic. The "similarly situated" prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.)

This Court's equal protection analysis in *Barrett* shows that NGIs and LPSs are similarly situated with regards to the right to an express jury trial advisement and an express personal waiver. Welfare and Institutions Code section 5302 gives LPS committees the right to an advisement of his or her right to demand a jury trial, which is similar to the advisement right of section 1026.5. Moreover, NGIs and LPSs are similarly situated with regards to their mental states at issue in the commitment proceedings. Since, as this Court noted, many mentally ill people are competent, "nothing compels the conclusion that such LPS Act patients will not benefit from the right to a statutory jury trial advisement..." (*Barrett, supra,* at p. 1109.) The same conclusion holds true for NGIs like Mr. Tran.

Since NGIs and LPSs are similarly situated, it follows that NGI's will benefit from, and equal protection gives NGIs the right to, a jury trial advisement.

The express advisement in Welfare and Institutions Code section 5302 is intended to ensure that LPS committees make an informed choice

about whether to exercise their right to request a jury trial. The same holds true for the advisement requirement of Penal Code section 1026.5. The reason for this advisement requirement is to make sure that a competent NGI or LPS can decide whether to have a jury trial. Logically, the right to personally waive a jury naturally follows from the right to an advisement. Since NGIs and LPSs are similarly situated for the purpose that an express jury trial advisement and an express personal waiver serve, equal protection dictates that they have the same rights.

In every scheme for a commitment for mental health purposes, there is a right to a jury trial. This Court catalogued the different statutory requirements for nine commitment procedures. (*Barrett, supra,* at p. 1110.) Some have the same statutory rights to an advisement and personal waiver guaranteed by Penal Code section 1026.5, subdivision (b). The commitment schemes with the same requirements include Welfare and Institutions Code section 1801.5 proceedings to detain disordered and dangerous persons upon discharge from the juvenile system, LPS proceedings, and MDO proceedings under Penal Code section 2972, subdivisions (a) and (e).

At the very least, those under the NGI system are similarly situated with those under the LPS, juvenile, and MDO commitment extension systems. Under those schemes, each defendant has violated criminal laws, leading to incarceration, and is being confined longer than he or she would

have been under the Penal Code due to a mental illnesses making him or her a danger to others. And, each defendant has the right to an advisement and personal waiver of a jury trial. Equal protection dictates that Mr. Tran has the same rights.

"The next step in analyzing an equal protection challenge is a determination of the appropriate standard of review" (*Nguyen, supra,* 54 Cal.App.4th at p. 715.) When laws distinguish people according to suspect classifications or serve to deprive a class of people of fundamental rights, the court employs a strict scrutiny test. (*Heller v. Doe* (1993) 509 U.S. 312, 319.) The United States Supreme Court has recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty . . . . " (*Addington, supra,* 441 U.S. at p. 425.) Thus, strict scrutiny is the appropriate standard against which to measure claims of disparate treatment in civil commitment. (*In re Moye* (1978) 22 Cal.3d 457, 465.) "[W]hether the state has a compelling reason which justifies the law and whether the distinctions drawn by the law are necessary to further that purpose." (*Nguyen, supra,* at p. 716.)

Under any test, the equal protection clause requires any disparate treatment to further the state's interest. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective

gives substance to the Equal Protection Clause . . . . " (*Romer v. Evans* (1996) 517 U.S. 620, 632.)

There is no legitimate state interest for depriving NGIs the same advisement and personal waiver rights as this Court properly assumed that LPS committees have, especially since the Legislature has determined there should be jury trials in NGI cases unless there is an express waiver. (Pen. Code, § 1026.5, subd. (b).)

The United States Supreme Court has held that when there existed two different schemes for committing a person, when he or she is "deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other," it violates the equal protection clause. (*Humphrey v. Cady* (1972) 405 U.S. 504, 512.) Appellant cannot be deprived of a jury trial because the state chose to commit under the NGI Act and not under any of the other civil commitment schemes that require advisement and waiver.

Thus, in addition to a statutory right, NGI defendants have a state and federal constitutional right under the Equal Protection Clause to a jury trial.

### D. Error was Prejudicial Because Deprivation of a Right to a Jury Automatically Requires Reversal and Because a Reasonable Jury Could have Concluded the Petition was not True.

#### 1. Deprivation of a jury trial requires reversal.

Denial of the state constitutional right to a jury trial automatically requires reversal. (*People v. Ernst* (1994) 8 Cal.4th 441, 448.) "It long has been established that the denial of the right to a jury trial constitutes a ' "structural defect[]" in the judicial proceedings' that, by its nature, results in such a 'miscarriage of justice.' " (*Id.* at p. 449.)

The same applies to civil cases. (*Cohill v. Nationwide Auto Serv.* (1993) 16 Cal.App.4th 696, 702.) There, the plaintiff requested a jury trial, but the court erroneously deemed the right to jury waived because of the lack of a proper demand. (*Id.* at p. 699.) After a court trial, judgment was entered for the defendant. (*Ibid.*) The court of appeal found the deprivation of the right to a jury was error because there was not a waiver as prescribed by statute. (*Id.* at pp.- 701-702.) The error automatically requires reversal. (*Id.* at p. 702; accord, *Heim v. Houston* (1976) 60 Cal.App.3d 770, 774.) Here, there was no waiver in a manner permitted by statute. Thus, reversal is required.

The state supreme court said that when an error infringes on a fundamental liberty interest, reversal is required unless it was harmless beyond a reasonable doubt. (*People v. Hurtado* (2002) 28 Cal.4th 1179,

1194; see *Chapman v. California* (1967) 386 U.S. 18, 24.) In that case, incorrectly instructing the jury of the elements of a commitment under the Sexually Violent Predators Act needed to be reviewed under *Chapman.* (*Ibid.*; accord *In re Howard N.* (2005) 35 Cal.4th 117, 137 [omitted an element to the jury in a commitment under Welf. & Inst. Code, § 1800].) Here, the error was not misinstructing the jury but dispensing with the jury altogether. In *Barrett,* this Court noted the involuntary commitment implicates significant fundamental interests protected by the statute's advisement and waiver requirements. In *People v. Fisher* (2009) 172 Cal.App.4th 1006 (*Fisher II*), the court found it was error for counsel to waive defendant's right to be present in an MDO trial and reviewed the error under the *Chapman* standard. (*Id.* at pp. 1014-1015.)

Nevertheless, some courts have reviewed the deprivation of the right to a jury in a civil commitment proceeding as state error. (See e.g., *Cosgrove* (2002) 100 Cal.App.4th 1266, 1274; *Montoya, supra,* 86 Cal.App.4th at pp. 831-832.) The courts in those cases failed to consider the federal constitutional arguments raised here.

Article I, section 16 of the California Constitution gives a jury trial right to civil litigants to the extent the right existed in common law. Courts have said that the deprivation of a statutory right to a jury trial in a civil case must be prejudicial under the test in *People v. Watson* (1956) 46

Cal.2d 818. (*People v. Wilen* (2008) 165 Cal.App.4th 270; *People v. Roswell* (2005) 133 Cal.App.4th 447, 454.)

However, *Wilen* and *Roswell* are distinguishable on their facts and issues. *Wilen* dealt with restitution, which the federal authorities have held is not the sort of punishment to which the 6th Amendment applies. (See *U.S. v. Milkiewicz* (1st. Cir. 2006) 470 F.3d 390, 403, fn. 24.) And, *Roswell* involved an SVP proceeding. Welfare and Institutions Code section 6603 requires an SVP to demand a jury, unlike our case where the statute requires a jury trial unless there is an advisement and personal waiver. In *Roswell* the defendant initially demanded a jury trial, but counsel filed a declaration under penalty of perjury stating that he had talked to defendant and defendant wanted to waive a jury trial. Roswell never contended that counsel's declaration was false.

Even under the state standard, reversal would be required if there was a "miscarriage of justice." Here, there is a reasonable probability of a different result. This was a very close case. A jury could well have considered these favorable facts and ruled against further involuntary commitment.

Mr. Tran was diligently taking his prescribed medication. Dr. Khoury said that his medication was doing a pretty good job of controlling Mr. Tran's symptoms. (RT 9.) In fact during the entire eight months Dr. Khoury treated him, Mr. Tran did not exhibit any symptoms. (RT 19.)

He was doing well on the open ward. (RT 16.) He had expressed remorse for his behavior that led to his commitment. (RT 18.) Dr. Khoury felt that he should be commended for the efforts he had made. (RT 20.)

Dr. Khoury said that if Mr. Tran stayed on his medication, "it would be hard to say that he's a danger to the community." (RT 19.) Mr. Tran testified that if he were released from the hospital, he would continue to take his medication. He knew he suffered from a mental illness that led to his crime and commitment, and he would have to take medication for the rest of his life. (RT 25.)

The hospital was in the process of evaluating Mr. Tran for supervised release. Although the evaluation was not completed, Dr. Khoury felt that he was moving in the right direction for conditional release. Apparently, the court agreed, saying that it sounded like Mr. Tran was very close to conditional release. (RT 29.)

This evidence showed that he did not need to be locked up. He understood the need to keep taking his medication for the rest of his life. It was merely a matter of finding an appropriate out-patient program.

A rational jury could have concluded from the facts that the prosecution did not carry its burden of proving beyond a reasonable doubt that he was dangerous. The error was not harmless even under the state standard.

### 2. Failure to advise appellant of the right to a jury trial requires reversal.

The failure to advise appellant of the right to a jury trial also requires reversal of the judgment. The failure to advise deprived him of his right to a trial by jury as guaranteed by the state constitution right to a jury trial, as well as state and federal due process and equal protection. For the same reasons stated above, the error automatically requires reversal.

Even if prejudice must be shown, it was reasonable probable that had appellant been properly advised, there would have been a jury trial. An advisement protects the right to a jury trial by ensuring that the person understands his rights and that there is a knowing and voluntary waiver.

The decision to waive is a critical stage in a proceeding. (Cf. *Argersinger v. Hamlin* (1972) 407 U.S. 25, 37; *White v. Maryland* (1963) 373 U.S. 59, 90.) It is thus contemplated the decision would require input from the client. The court of appeal pointed out that the obvious reason for advising the person is to ensure that he or she knows about the right to a jury trial and can make a knowing and intelligent decision whether to exercise that right. Without an advisement, the jury trial right is meaningless.

There is a reasonable probability that if appellant had been advised of his right to a jury, no waiver would have occurred. The case was close. He was competent, remorseful, and compliant. There was no overriding

reason for trial counsel to choose a court trial over the objections of the client. There was thus "more than an abstract possibility" appellant would have prevailed on counsel to exercise the right to a jury trial. As discussed above, there was a reasonable probability of a different result had there been a jury trial.

The judgment extending commitment must be reversed.

## II

## THE COURT OF APPEAL HAD THE INHERENT JUDICIAL AUTHORITY TO INTERPRET THE STATUTE AND TO PROMOTE AND PROTECT MR. TRAN'S STATUTORY AND CONSTITUTIONAL JURY TRIAL RIGHTS.

Here, the court of appeal rejected Respondent's claim that counsel had exclusive control over the decision to waive jury trial as "captain of the ship", and concluded "that under subdivision (b)(4) counsel may waive a jury at an NGI's direction, with an NGI's knowledge and consent, or, as in *Powell*, on behalf of an incompetent NGI.

The waiver provision must be read with the advisement provision. The dictate that the trial court advise the person named in the petition of the right to a jury trial imposes a mandatory duty on the court. "It reflects a legislative intent to judicially ensure that 'the person' knows that he or she has the right to a jury trial." (Opn., at p. 21.) The obvious reason for requiring the court to advise the NGI of the right to a jury is so that he or she can chose to waive it.

In reaching its decision the court of appeal stressed the significant liberty and dignity issues affected by an involuntary commitment. Given those interests the Court found that the right to choose the trier of fact is no less valuable to an NGI than it is to a criminal defendant. And, the Legislature considered that right valuable enough that it required a jury trial advisement and a valid waiver by the person.

In the court of appeal's view the purpose of the statute "is frustrated and the statutory right to a jury trial is undermined when together, an opaque record, the procedural rules and presumptions on appeal, and harmless-error test not only permit a reviewing court to say, in essence, that we need not know and it does not matter, whether the NGI was aware of the right to a jury trial or whether the right was validly waived." (Opn., at p. 36.)

The record in our case is a perfect example of the type of opaque record that frustrates the statutory advisement and waiver mandates. Both the clerk's and the reporter's transcript were completely silent on both waiver and advisement. According to a settled statement, counsel waived a jury trial off the record, but nothing in the record shows that Mr. Tran was ever advised of his right to a jury trial before counsel waived it. There was no doubt raised about his competency to exercise the decision whether to waive a jury.

To protect the purpose of the mandates, the court of appeal ordered that the record must show that the trial court complied with the mandates of the statute. The court of appeal held "that if the court conducts a bench trial and the NGI did not personally waive the right to jury, the record must show that the court advised the defendant of the right to a jury or, if the court was unable to do so, that the defendant was made aware of the right *before* counsel waived it. The record must also show that in waiving a jury trial, counsel acted at the defendant's direction or with his or her knowledge and consent or that there were circumstances supporting counsel's doubt concerning the defendant's capacity to determine what was in his or her own best interests." (Opn., at p. 37.)

What the court of appeal did was simply interpret statutes and constitutional principles, and state what should be on the record. The court acted well within its inherent judicial authority. Under *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455, the holding of a court of appeal is binding on all superior courts.

This Court has often recognized the "inherent powers of the court...to ensure the orderly administration of justice." (*Hays v. Superior Court* (1940) 16 Cal.2d 260, 264; see also *Bank of America v. Superior Court* (1942) 20 Cal.2d 697, 702; *Millholen v. Riley* (1930) 211 Cal .29, 33-34.) And, in criminal cases, this Court has acknowledged "the inherent power of every court to develop rules of procedure aimed at facilitating the

administration of criminal justice and promoting the orderly ascertainment of the truth." (*Joe Z. v. Superior Court* (1970) 3 Cal.3d 797, 801-802; *Powell v. Superior Court* (1957) 48 Cal.2d 704, 708.)

Some of the court's inherent power are set by statute, but since the inherent powers of the courts come from the Constitution, they are not confined or dependent on statute. (*Cal. Const., art. II, §3; id., art. VI, §1; Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-267; *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 287-288.) And, a court's inherent powers are wide. (*People v. Angelo* (1998) 65 Cal.App.4th 1242, 1248.) One of the court's inherent powers, protected by the constitution, is to control and conduct its business so that the rights of the litigants are safeguarded. This judicial power is necessary to enforce rights and redress wrongs. (*Ibid.*)

Respondent argues that no court can make such a ruling without the Judicial Council properly enacting a rule of court. But, this Court has done the same thing in cases such as *In re Tahl* (1969) 1 Cal.3d 122 and *People v. Howard* (1992) 1 Cal.4th 1132. In *Tahl* this Court decided that the holding of *Boykin v. Alabama* (1969) 395 U.S. 238 should be interpreted to require that "each of the three rights mentioned--self-incrimination, confrontation, and jury trial--must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea." (*Tahl, supra,* 1 Cal.3d at p. 132.) Five years later this Court extended *Tahl's*

express admonition and waiver requirements to cases in which the defendant admits a prior conviction for sentencing purposes. (*In re Yurko* (1974) 10 Cal.3d 857.)

In *Howard,* this Court exercised its supervisory powers and continued to require that trial courts expressly advise defendants on the record of their *Boykin/Tahl* rights. Errors in advisement and waiver of those rights would be subject to the federal test. This Court explained that explicit waivers are "the only means of assuring that the judge leaves a record adequate for review. [Citation.]" (*People v. Howard, supra,* 1 Cal.4th at p. 1179.)

In emphasizing the continued requirement for explicit waivers and admonitions, this Court reaffirmed its caveat in *Tahl* that trial courts "'would be well advised to err on the side of caution and employ the time necessary to explain adequately and to obtain express waivers of the rights involved. At stake is the protection of both the accused and the People, the latter by assurance that an otherwise sound conviction will not fall due to an inadequate record.'" (*People v. Howard, supra,* 1 Cal.4th at 1179, quoting *Tahl, supra,* 1 Cal.3d at p. 132.)

Respondent concedes that the court of appeal has the constitutional power to "create new forms of procedure" (*People v. Lujan* (2012) 211 Cal.App.4th 1499, 1507) and to interpret and serve the purpose of existing legislation. (See Respondent's Brief, p. 22 and cases cited there.)

The court of appeal merely interpreted the plain language of sections 1026.5, subdivisions (b)(3) and (4), and properly concluded that the requirement that the court advise the person named in the petition of his or her right to a jury trial unless waived by the person must be read together. The Legislature imposed a mandatory duty on the trial court to advise the NGI for the obvious reason that he or she must know about her right to make an intelligent and knowing decision whether to waive it. The court of appeal promoted the purpose behind these mandates and protected the statutory right to a jury trial by requiring the trial courts to make a clear record to ensure that an NGI is aware of the right to a jury trial and that he properly waives it. This was well within the Court's inherent powers, as even the precedent cited in Respondent's Brief makes clear.

Respondent argues that the court of appeal's ruling undercuts counsel's position as "captain of the ship", but as this Court pointed out in *Barrett*, persons with mental disorders like NGIs and LPS candidates are not presumed incompetent and may well benefit from the statutory right to decide whether to waive a jury trial. And, as argued at length before, and properly decided by the court of appeal, competent NGIs must know about their right to a jury and decide whether to have a jury decide their fate.

Respondent is correct that the ruling here is dicta because the holding was that there was no prejudicial error. However, the court of

appeal did the same thing as this Court wisely did in *Howard* and *Tahl.* It found error and explained what was needed to avoid error. As in *Howard* and *Tahl,* the requirement of appropriate advisements and waivers will ensure that an otherwise sound result does not fall to an inadequate record.

The court's ruling accommodated and aided the lower courts. Understanding that a live advisement from the court to the defendant might be impractical because the patient is often not transported until needed, it permitted a procedure to be on the record to show the defendant was properly advised of and waived jury, or was incompetent to decide, without requiring him to appear in court. To require strict compliance with the statute when a substitute process might be appropriate, if it is clearly indicated by the record, made good public policy in fulfilling the legislative purpose while not overly burdening the courts and the Department of State Hospitals.

In fact requiring a clear and explicit record will impose little, if any, burden on the court and the parties. The importance that the Legislature attached to an NGI's right to a jury trial and the statutory requirements designed to protect it clearly outweigh any slight burden that may result

## CONCLUSION

For the reasons set forth above, the order granting Respondent's petition and extending Mr. Tran's NGI commitment for another two years should be reversed.

Dated: 12/12/13

Respectfully submitted:

Carl A. Gonser

## CERTIFICATE OF COUNSEL

CG I certify that this Petition for Review contains 9,734 words in Windows 7.

Dated: December 12, 2013

CARL A. GONSER
Attorney for Appellant,
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## PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is P O Box 151317, San Rafael, CA 94915-1317. On the date shown below, I served the within ***APPELLANT'S BRIEF*** to the following parties hereinafter named by:

> Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Rafael, California, addressed as follows:

**SEE ATTACHED CERTIFICATE OF SERVICE BY MAIL**

I declare under penalty of perjury the foregoing is true and correct. Executed this 13 day of December, 2013, at San Rafael, California.

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