IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLES HUDEC,	)	
	)	No. S213003
Petitioner,	)	
	)	Court of Appeal
vs.	)	No. G047465
	)	
SUPERIOR COURT OF ORANGE COUNTY,	)	(Superior Court Case No. C-47710)
	)	
Respondent,	)	
	)	
PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Real Party in Interest.	)	
	)	

REPLY BRIEF ON THE MERITS

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
THE HONORABLE KAZUHARU MAKINO, JUDGE PRESIDING

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INTRODUCTION

Defendant argues he can refuse to testify at his extended commitment hearing because Penal Code section 1026.5, subdivision (b)(7)'s (section 1026.5(b)(7)) plain language gives him every constitutional right for criminal proceedings. He is mistaken. The Court of Appeal consistently holds that section 1026.5(b)(7) does not include every constitutional right for criminal proceedings. Some constitutional rights, such as the right not to be tried while mentally incompetent and the double jeopardy bar, would undermine the very purpose and operation of the extended commitment procedure. The Legislature would never intend such absurd results. Section 1026.5(b)(7) does not include every constitutional right for criminal proceedings.

The issue then becomes whether section 1026.5(b)(7) should include the right to refuse to testify. It should not. The right to refuse to testify bears no relevant relationship to extended commitment proceedings. They are civil, not criminal. Their purpose is treatment, not punishment. This Court finds that, during the hearing, the person's testimony may be the most reliable proof and probative indicator of his present mental condition. It enhances the reliability of the outcome. Thus, in a variety of similar commitment proceedings, such as those for sexually violent predators and mentally disordered offenders, the person must testify if called.

There is no meaningful reason why the Legislature would let the jury observe those persons' testimony, but not the testimony of persons committed under section 1026.5. In every commitment proceeding, the Legislature has the same interest: to identify and treat persons who, because of a mental disorder, pose a danger to society. The Legislature wants section 1026.5 commitment proceedings to be as accurate and reliable as any other commitment proceeding. This best accomplishes the Legislature's desire to protect the public and treat the mentally ill. The right to refuse to testify would frustrate legislative intent and undermine section 1026.5's purpose. The trial court correctly ruled that defendant must testify during his Penal Code section 1026.5 commitment hearing.

ARGUMENT

A. PENAL CODE SECTION 1026.5(b)(7) DOES NOT INCLUDE EVERY CONSTITUTIONAL RIGHT FOR CRIMINAL PROCEEDINGS

1. The Court Of Appeal Consistently Holds That Penal Code Section 1026.5(b)(7)'s Language Does Not Include Every Constitutional Right

In our opening brief, we cited caselaw showing that for over 30 years the Court of Appeal consistently holds the language in section 1026.5(b)(7) does not confer every constitutional right for criminal proceedings upon extended commitment proceedings for persons found not guilty by reason of insanity (NGI extended commitment proceedings). Under the caselaw, the language in section 1026.5, subdivision (b)(7) "does not extend the protection of constitutional provisions which bear no relevant relationship to the proceedings. [Citation.]" (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 488; *People v. Henderson* (1981) 117 Cal.App.3d 740, 748 [construing identical language in former Welf. & Inst. Code, § 6316.2, subd. (e), repealed by Stats. 1981, ch. 928, § 2]; *People v. Angeletakis* (1992) 5 Cal.App.4th 963, 970; *People v. Powell* (2004) 114 Cal.App.4th 1153, 1157-1158; *People v. Haynie* (2004) 116 Cal.App.4th 1224, 1229-1230; *People v. Lopez* (2006) 137 Cal.App.4th 1099, 1113-1114.)

Defendant cites no contrary authority. He fails to cite a single case holding section 1026.5(b)(7)'s language includes every constitutional right for criminal proceedings. Nonetheless, he maintains section 1026.5(b)(7) is clear and this Court should apply its plain language without further consideration. According to defendant, to determine whether section 1026.5(b)(7) includes the right to refuse to testify, "one needs only to look at the plain meaning of the language of the statute." (Def. brief at p. 4.) Defendant is mistaken. His test is untenable. Applying section 1026.5(b)(7)'s language literally would lead to absurd results the Legislature would never intend.

2. Applying Penal Code Section 1026.5(b)(7) Literally Would Lead To Absurd Results The Legislature Would Never Intend

In our opening brief we cited the well-settled principle of statutory construction that a statute's plain language should not be interpreted literally if doing so would result in absurd consequences the Legislature does not intend. (Opening brief at p. 7, citing *Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1072.) Defendant agrees. He quotes this Court stating, "'[t]he literal meaning of the words of a statute may be disregarded to avoid absurd results .... [Citation.]'" (Def. brief at p. 5, quoting *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6.) Defendant fails, however, to explain how this Court could apply section1026.5(b)(7) literally

to include every constitutional right in NGI extended commitment proceedings without creating absurd and unworkable consequences.

For example, a "[C]riminal defendant [has] a constitutional right not to be tried while mentally incompetent. [Citations.]" (*Moore v. Superior Court* (2010) 50 Cal.4th 802, 818.) In *Moore*, this Court found application of this constitutional right to extended civil commitment proceedings under the Sexually Violent Predators Act (SVPA) would have deleterious consequences. (*Id.* at pp. 807-808.) The sexually violent predator (SVP) could avoid the extended commitment trial and

> [P]revent an SVP determination from being made *at all.* Such a scenario, which could often recur, would undermine the purpose and operation of the Act. The State could not confine and treat some of its most dangerous sex offenders under conditions targeting their disorders, and public safety could suffer as a result.

(*Id.* at p. 808, italics in original.) It would substantially impede "the strong governmental interest in protecting the public through the proper confinement and treatment of SVP's[] ...." (*Id.* at pp. 819-820.)

In addition, "substantial 'administrative burdens' and practical difficulties" would arise if the person could assert a constitutional right not to be tried while mentally incompetent. (*Moore v. Superior Court, supra,* 50 Cal.4th 802, 828.) Among other things, the lack of any statutory guidance

concerning how to handle SVP's who might successfully assert such a right would lead to "uncertainty" and caused "particularly troubling" concerns. (*Moore v. Superior Court, supra,* 50 Cal.4th 802, 828-829.)

The same "troubling" concerns would exist if the constitutional right not to be tried while mentally incompetent applied to NGI extended commitment proceedings. They are similar to SVP extended commitment proceedings. Both are civil in nature, not criminal. (*Allen v. Illinois* (1986) 478 U.S. 364, 374-375 [92 L.Ed.2d 296, 106 S.Ct. 2988]; *People v. Allen* (2008) 44 Cal.4th 843, 860; *Cramer v. Tyars* (1979) 23 Cal.3d 131, 134.) Their purpose is treatment, not punishment. (*In re Moye* (1978) 22 Cal.3d 457, 466; *People v. Allen, supra,* 44 Cal.4th 843, 860-861.)

For the same reasons discussed in *Moore*, the right to avoid trial while mentally incompetent would undermine Penal Code section 1026.5's purpose and operation. A person found not guilty by reason of insanity (NGI) could avoid trial indefinitely and prevent a determination concerning extended commitment from being made at all. Moreover, as with the SVP's, the Legislature provides no statutory guidance regarding how to handle an NGI that might be found mentally incompetent to stand trial. In fact, Penal Code

section 1026.5 specifies the extended commitment procedure is the "only" procedure under which an NGI can be committed longer than the maximum term of commitment for his offense or offenses. (Pen. Code, § 1026.5, subd. (b)(1).) Thus, a "mentally incompetent" NGI could argue he must be released because there would be no statutory authorization to continue his commitment. The constitutional right not to be tried while mentally incompetent flies in the face of the legislative intent underlying NGI extended commitment proceedings.

The Court of Appeal recognized this point in *People v. Angeletakis, supra,* 5 Cal.App.4th 963. There, the court rejected the defendant's claim that section 1026.5(b)(7)'s language included the right not be tried while mentally incompetent. (*People v. Angeletakis, supra,* 5 Cal.App.4th 963, 970.) The court agreed section 1026.5(b)(7) does not include all of the constitutional protections relating to criminal proceedings and determined application of the right not to be tried while mentally incompetent to NGI extended commitment proceedings would provide minimal protection to the person, but impose unwarranted "administrative burdens." (*Id.* at pp. 970-971.) Defendant fails to explain why the Legislature would mandate the application of an otherwise

inapplicable constitutional right to NGI extended commitment proceedings that would undermine their very purpose and operation and result in substantial administrative burdens.

Another constitutional right in criminal proceedings is the protection against double jeopardy. (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 484.) It precludes being prosecuted for the same offense after an acquittal or conviction and multiple prosecutions for the same offense. (*Ibid.*) In *Williams*, the court held section 1026.5(b)(7) does not include the constitutional right against double jeopardy. (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 488.) It bears no relevant relationship to NGI extended commitment proceedings. (*Ibid.*) The court in *Williams* reached the correct decision.

If applied to NGI extended commitment proceedings, the double jeopardy bar would threaten to undermine their purpose and procedure. It could bar future extended commitment hearings. It could bar repeated extended commitment hearings based upon the same "mental disease, defect, or disorder" that makes the NGI a "substantial danger of physical harm to others." (Pen. Code, § 1026.5, subd. (b)(1).) Again, defendant fails to explain

why the Legislature would mandate the application of the double jeopardy bar to NGI extended commitment proceedings when it would undermine the entire procedure.

Other constitutional rights for criminal proceedings would similarly lead to absurd results. For example, in *Powell*, the court held section 1026.5(b)(7) does not include the constitutional right to personally waive jury trial. (*People v. Powell, supra,* 114 Cal.App.4th 1153, 1158.) The court stated that common sense dictates "[a]n insane person who is a 'substantial danger of physical harm to others' [citation] should not be able to veto the informed tactical decision of counsel." (*Ibid.*; see also *People v. Juarez* (1986) 184 Cal.App.3d 570, 575 [ex post facto principles have no meaningful application to section 1026.5 extended civil commitment proceedings].)

In *Henderson*, the court held identical language in the extended civil commitment procedure for mentally disordered sex offenders (MDSO) did not include the privilege against self-incrimination when applied to the patient's statements to hospital staff during routine therapy sessions or daily activity. (*People v. Henderson, supra,* 117 Cal.App.3d 740, 747-748, citing Welf. & Inst. Code, § 6316.2, subd. (e).) Interaction with medical professionals is

important to provide proper treatment and accurately assess the patient's mental condition. Application of the privilege against self-incrimination to these interactions would undermine the purpose of the commitment procedure. (See, e.g., *People v. Beard* (1985) 173 Cal.App.3d 1113, 1118-1119 [privilege against self-incrimination did not apply to statements made during court-ordered psychiatric exams under section 1026.5 because privilege bears no relevant relationship to the proceedings and psychiatric exam is "often essential on the issue of dangerousness"].)

These cases show that interpreting section 1025.6(b)(7)'s plain language to include every constitutional right for criminal proceedings leads to absurd results the Legislature would never intend. Defendant fails to address this point or these cases.

Yet, throughout his brief, he urges this Court to apply section 1026.5(b)(7)'s plain language and find that it includes the right to refuse to testify.[1] At one point, he asserts there is no "compelling reason to disregard the plain language." (Def. brief at p. 6.) The cases cited above belie defendant's claim. As they show, there are many compelling reasons against simply applying section 1026.5(b)(7)'s plain language. It would produce absurd results that undermine the purpose and operation of NGI extended commitment proceedings.

To the extent defendant might argue the rights discussed in the cases above are designed for criminal law and have no application to NGI extended commitment proceedings, his claim would defeat his position. Defendant cannot have it both ways. He cannot on the one hand claim section 1026.5(b)(7)'s plain language is clear and mandates application of the right to refuse to testify, but on the other hand, claim other constitutional rights are excluded. If the right to refuse to testify is included under section

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[1] Defendant claims his position is "based upon precedent," but fails to cite any authority holding section 1026.5(b)(7)'s language includes every constitutional right for criminal proceedings. Even *People v. Haynie, supra,* 116 Cal.App.4th 1224, the case upon which defendant relies, undermines his position. (*Id.* at p. 1229 [agreeing section 1026.5(b)(7)'s language "does not extend the 'protection of constitutional provisions which bear no relevant relationship to the proceedings.'"].)

1026.5(b)(7)'s plain language, then every constitutional right for criminal proceedings is included. Defendant cannot parse the constitutional rights and say some are included under section 1026.5(b)(7)'s plain language but others are not. The absurd consequences discussed in the cases cited above show that defendant's "plain language" position is untenable.[2]

At one point, defendant says this Court should only look at section 1026.5(b)(7)'s plain language and disregard the consequences because, to do otherwise, would violate the separation of powers doctrine and make this Court a "super-legislature." Defendant is wrong. Defendant's claim – that he can refuse to testify under section 1026.5(b)(7)'s plain language – requires this Court to construe the statute. And, as both parties agree, this Court should not interpret the language in a manner that would lead to absurd results and frustrate legislative intent. Therefore, defendant cannot prevail by simply telling this Court to literally apply section 1026.5(b)(7)'s language and ignore the absurd consequences that would follow.

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[2] Defendant cannot claim the rights discussed in the cases cited above pertain only to criminal law and therefore should not be included within section 1026.5(b)(7)'s language. By its terms, section 1026.5(b)(7) refers to the constitutional rights for "criminal proceedings." Moreover, as explained further in section B, below, the right to refuse to testify is rooted in the criminal justice system and bears no relevant relationship to NGI extended commitment proceedings.

As the caselaw discussed above shows, defendant's "plain language" claim would lead to absurd consequences the Legislature would never intend. This Court should reject defendant's position. Section 1026.5(b)(7) does not include every constitutional right for criminal proceedings.

3. Both Prior Court of Appeal Decisions Considering The Right To Refuse To Testify Agree That Penal Code Section 1026.5(b)(7)'s Language Does Not Include Every Constitutional Right

Two Court of Appeal decisions considered the right to refuse to testify in NGI extended commitment proceedings prior to our case: *People v. Lopez, supra,* 137 Cal.App.4th 1099 and *People v. Haynie, supra,* 116 Cal.App.4th 1224. While they disagreed on that issue, both cases agreed the language in section 1026.5(b)(7) should not be read literally and does not include every constitutional right for criminal proceedings. (*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1113-1116; *People v. Haynie, supra,* 116 Cal.App.4th 1224, 1229-1230.)[3]

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[3] The courts disagreed on whether the right to refuse to testify bears a relevant relationship to NGI extended commitment proceedings. (*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1115-1116; *People v. Haynie, supra,* 116 Cal.App.4th 1224, 1230.) As we discuss in section B, below, the analysis in *Lopez* based upon this Court's decision in *Cramer*, is better reasoned and furthers the legislative intent underlying NGI extended commitment proceedings.

Defendant spends a great deal of his brief attacking *Lopez*. (Def. brief at pp. 16-27.)[4] His challenge does not help him. As discussed above, applying every constitutional right for criminal proceedings would lead to absurd results and undermine the purpose and operation of NGI extended commitment proceedings. On this point, both *Lopez* and *Haynie* agree. Defendant fails to address this point choosing instead to take issue with the historical circumstances upon which *Lopez* relied. Defendant fails to see the forest for the trees. To support his "plain language" position, defendant must explain how every constitutional right for criminal proceedings could be applied to NGI commitment proceedings without creating the unworkable and absurd consequences discussed in the previous section. He has not, and cannot, provide that explanation. His lengthy attack on *Lopez* is largely irrelevant and fails to address the fatal flaw in his position.

In any event, his criticisms of the circumstances cited in *Lopez* are unfounded. For example, the *Lopez* court cited the decision in *Williams* wherein the court held section 1026.5(b)(7) should not be read to include every constitutional right for criminal proceedings. (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 488 [double jeopardy bar does not apply under section 1026.5(b)(7)].) *Lopez* notes that *Williams'* nonliteral

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[4] Defendant does not attack the *Haynie* court's similar conclusion.

reading of section 1026.5(b)(7) is supported by the *Henderson* court's nonliteral reading of identical language in the extended civil commitment proceedings for MDSO's. (*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1115.) The NGI extended commitment procedure is patterned after the MDSO commitment procedure. (*Id.* at pp. 1114-1115; *People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 487-488.)[5] Thus, *Henderson* supports the conclusion that section 1026.5(b)(7) should not be read literally to apply every constitutional right.

Defendant notes that *Henderson* considered the privilege against self-incrimination as applied to statements made to hospital staff, not the right to refuse to testify at the extended commitment hearing. Defendant misses the point. Regardless of the constitutional right involved, *Henderson* concluded identical language in the MDSO procedure should not be read literally to

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[5] Defendant speculates that perhaps the Legislature enacted section 1026.5 to specifically give NGI committees the right to refuse to testify in response to this Court's decision in *Cramer v. Tyars, supra,* 23 Cal.3d 131. (Def. brief at pp. 25-26.) He is mistaken. The Court of Appeal consistently states section 1026.5 was enacted as emergency legislation in response to the equal protection problem with the MDSO commitment procedure identified by this Court in *In re Moye, supra,* 22 Cal.3d 457. (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 487 [as noted in footnote 5, the court took judicial notice of section 1026.5's legislative history]; *People v. Lopez, supra,* 137 Cal.App.4th 1099, 1114; *People v. Poggi* (1980) 107 Cal.App.3d 581, 591, fn. 9; *People v. Superior Court (Martin)* (1982) 132 Cal.App.3d 658, 660.) For this reason, section 1026.5 was patterned after the MDSO procedure.

include every constitutional right for criminal proceedings. This supports the same conclusion with respect to section 1026.5(b)(7) reached in *Williams*.[6]

The *Lopez* court also found support in *Conservatorship of Bones* (1987) 189 Cal.App.3d 1010. In *Bones*, the court held Welfare and Institutions Code section 5303 does not include the right to refuse to testify. (*Conservatorship of Bones, supra,* 189 Cal.App.3d 1010, 1016-1017.) Welfare and Institutions Code section 5303 states the commitment proceedings shall be conducted

> "[I]n accordance with constitutional guarantees of due process of law and the procedure required under Section 13 of Article I of the Constitution of the State of California."

(*Conservatorship of Bones, supra,* 189 Cal.App.3d 1010, 1016.) At the time Welfare and Institutions Code section 5303 was enacted, article I, section 13 of the California Constitution included the constitutional protections in criminal proceedings as well as due process rights. (*Conservatorship of Bones, supra,* 189 Cal.App.3d 1010, 1016.) In 1974, section 13 was repealed and the

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[6] Defendant also claims the MDSO procedure is "a now-defunct statutory scheme." (Def. brief at p. 20.) Not so. As this Court observed in *Baker v. Superior Court* (1984) 35 Cal.3d 663, in 1981, the Legislature repealed the MDSO laws for future offenders, but wanted persons already committed under its provisions to continue to be governed by those procedures. (*Id.* at p. 667.)

due process clause was placed in article I, section 7 while the criminal procedural rights were placed in article I, section 15. (*Conservatorship of Bones, supra,* 189 Cal.App.3d 1010, 1016.)

In *People v. Burnick* (1975) 14 Cal.3d 306, this Court subsequently indicated Welfare and Institutions Code section 5303's language referred to the due process rights in article I, section 7, not the criminal procedure rights in article I, section 15. (*People v. Burnick, supra,* 14 Cal.3d 306, 314, fn. 5.) Thus, *Bones* concluded the language in Welfare and Institutions Code section 5303 should not be read literally "to import the whole of constitutional criminal procedure into postcertification proceedings." (*Conservatorship of Bones, supra,* 189 Cal.App.3d 1010, 1016.)

Defendant claims the *Lopez* court's reliance on *Bones* and *Burnick* was misplaced because those courts interpreted language in a different civil commitment procedure – the Lanterman-Petris-Short Act (LPSA). Defendant fails to explain, however, why that would make any difference in determining whether the Legislature intends that every constitutional right for criminal proceedings be applied in civil commitment proceedings. This Court noted the imperfect fit between rights in criminal proceedings and rights in civil commitment proceedings in *In re Conservatorship of Person of John L.* (2010) 48 Cal.4th 131. This Court stated,

> "[T]he analogy between criminal proceedings and proceedings under the LPS Act is imperfect at best and ... not all of the safeguards required in the former are appropriate to the latter." [Citations.]

(*In re Conservatorship of Person of John L., supra,* 48 Cal.4th 131, 151, first omission in original.)

Indeed, applying the whole panoply of constitutional rights for criminal proceedings to LPSA commitment proceedings would cause the same absurd consequences discussed above with respect to NGI commitment proceedings. Thus, this Court's reading of Welfare and Institutions Code section 5303's language supports *Lopez's* conclusion that section 1026.5(b)(7) should not be read literally to include every constitutional right for criminal proceedings. The *Lopez* court properly considered the decisions in *Bones* and *Burnick.*

The *Lopez* court also noted deficiencies in *Haynie*. Unlike *Lopez*, the *Haynie* court failed to discuss the history surrounding section 1026.5. In addition, the *Haynie* opinion is internally contradictory. On the one hand, the court stated section 1026.5(b)(7)'s language was clear and mandated the application of all constitutional rights for criminal proceedings, including the right to refuse to testify. (*People v. Haynie, supra,* 116 Cal.App.4th 1224, 1228.) On the other hand, the *Haynie* court agreed with *Williams* that section

1026.5(b)(7)'s language "does not extend the 'protection of constitutional provisions which bear no relevant relationship to the proceedings.'" (*People v. Haynie, supra,* 116 Cal.App.4th 1224, 1229, quoting *People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 488.) The *Lopez* court noted *Haynie's* internal contradiction stating, "even *Haynie* did not truly interpret section 1026.5(b)(7) literally." (*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1115.)[7]

In sum, the circumstances discussed in *Lopez* support the court's conclusion that section 1026.5(b)(7)'s language does not literally confer all constitutional rights for criminal proceedings upon NGI extended commitment proceedings. In this conclusion, both *Lopez* and *Haynie*, agree.

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[7] In addition, *Haynie* does not support defendant's claim that this Court should refrain from construing section 1026.5(b)(7) and leave it to the Legislature to sort out the absurd consequences that would flow from a literal application. As noted above, *Haynie* concluded section 1026.5(b)(7) does not include every constitutional right and analyzed whether it should include the right to refuse to testify. *Haynie's* reference to the Legislature providing more specificity concerning which rights are included under section 1206.5(b)(7) had nothing to do with whether section 1026.5(b)(7) includes every constitutional right for criminal proceedings. Instead, *Haynie* made the reference to explain why that court disagreed with *Williams'* statement that section 1026.5(b)(7) "'merely codifies the application of constitutional protections to extension hearings mandated by judicial decision.'" (*People v. Haynie, supra,* 116 Cal.App.4th 1224, 1230, citation omitted.)

The *Lopez* court then considered whether the right to refuse to testify should be applied to NGI extended commitment proceedings. Relying upon this Court's decision in *Cramer*, and the nature and purposes of NGI commitment proceedings, *Lopez* determined the right to refuse to testify does not apply in NGI extended commitment proceedings. (*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1116.) The court reached the correct conclusion. We explain why in the following section.

B. PENAL CODE SECTION 1026.5(b)(7) DOES NOT INCLUDE THE RIGHT TO REFUSE TO TESTIFY

Having shown section 1026.5(b)(7) does not include every constitutional right for criminal proceedings, the remaining issue is: whether section 1026.5(b)(7) includes the right to refuse to testify at the extended commitment hearing. To decide this issue, this Court should determine whether the right to refuse to testify bears a relevant relationship to NGI extended commitment proceedings.

This "relevant relationship" test has been employed in the Court of Appeal for many years. (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 488; *People v. Henderson, supra,* 117 Cal.App.3d 740, 748 [construing identical language in former Welf. & Inst. Code, § 6316.2, subd. (e); *People v. Angeletakis, supra,* 5 Cal.App.4th 963, 970; *People v. Powell, supra,* 114 Cal.App.4th 1153, 1157-1158; *People v. Haynie, supra,* 116 Cal.App.4th 1224, 1229-1230; *People v. Lopez, supra,* 137 Cal.App.4th 1099, 1113-1114.) This test properly balances the Legislature's strong interest in protecting the public from, and providing treatment for, dangerous patients who suffer from mental disorders while also ensuring a fair and reliable commitment procedure.

Under this test, section 1026.5(b)(7) does not include the right to refuse to testify. It bears no relevant relationship to NGI extended commitment proceedings. On the contrary, the right to refuse to testify would frustrate legislative intent and undermine the purpose of section 1026.5's commitment procedure.

Like other civil commitment procedures, the purpose of the NGI commitment procedure is treatment, not punishment. (*In re Moye, supra,* 22 Cal.3d 457, 466; *People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 485.) The Legislature desires to identify persons who,

because "of a mental disease, defect, or disorder represent[] a substantial danger of physical harm to others." (Pen. Code, § 1026.5, subd. (b)(1).) "[C]onfining [these] person[s] ... in a state hospital serves to protect society from [their] unreasonable acts and impulses, ..." (*Department of Developmental Services v. Ladd* (1990) 224 Cal.App.3d 128, 137.) It also

> [S]erves the patient by providing a setting for delivering treatment and services which may assist him or her towards mental health. The primary purpose of the state hospital system is to provide for the care, treatment and education of its mentally disordered patients. [Citations.]

(*Ibid.*) In many cases, the person is "in dire need of the state's assistance." (*People v. Superior Court (Williams), supra,*233 Cal.App.3d 477, 486.)

The ability to hear and observe the person's testimony in a civil commitment hearing is particularly helpful. The person's mental condition is squarely at issue and

> Reason and common sense suggest that it is appropriate ... that a jury be permitted fully to observe the person sought to be committed, and to hear him speak and respond in order that it may make an informed judgment as to the level of his mental and intellectual functioning.

(*Cramer v. Tyars, supra,* 23 Cal.3d 131, 139.)

Observation of

> [S]uch evidence may be analogized to the disclosure of physical as opposed to testimonial evidence and may in fact be the most reliable proof and probative indicator of the person's present mental condition. [Citations.]

(*Cramer v. Tyars, supra,* 23 Cal.3d 131, 139.)

Thus, in *Cramer*, this Court concluded "[i]t was proper for the jury to have the benefit of its own observations of [the person's] responses, both in manner and content, to the court's questions." (*Cramer v. Tyars, supra,* 23 Cal.3d 131, 139.)

This Court reiterated a similar point in *People v. Allen, supra,* 44 Cal.4th 843. In that case, this Court found an SVP has the right to testify during an extended commitment hearing over his counsel's objection. (*Id.* at p. 870.) The person's testimony at the civil commitment proceeding "generally greatly enhances the reliability of the outcome. [Fn. omitted.]" (*Id.* at p. 865.)

For this reason, the right to refuse to testify at the NGI extended commitment proceeding would undermine the factfinder's ability to evaluate the person's mental condition and determine whether the person represents a danger of physical harm. It would frustrate the legislative intent of identifying whether the person needs further treatment, for his or her own benefit, as well as to protect society.

This Court discussed these concerns in *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005. In that case, this Court determined the exclusionary rule should not apply to commitment proceedings under the LPSA. (*Id.* at p. 1020.) This Court reiterated,

> "[t]he exclusion of relevant evidence, even if gathered in violation of the proposed conservatee's privacy rights, could seriously inhibit the ability of the trier of fact to come to any rational conclusion about the conservatee's actual mental condition, with potentially severe consequences."

(*Ibid.*, modification in original.)

The same concerns exist in our case. There is no meaningful reason why the Legislature would prevent the jury from fully observing the person sought to be committed and hear him speak and respond so they could make an informed judgment concerning his mental functioning. There is no meaningful reason why the Legislature would exclude perhaps the most reliable proof and probative indicator of the person's present mental condition. There is no meaningful reason why the Legislature would inhibit the ability of the trier of fact to come to a rational conclusion about the person's actual mental condition. The right to refuse to testify at NGI extended commitment proceedings would undermine their purpose, reduce their reliability, and frustrate the Legislature's intent. It bears no relevant relationship to the proceeding.

Defendant argues otherwise. None of his claims, however, provides any meaningful reason why the Legislature would apply the right to refuse to testify to NGI commitment proceedings. They are based upon concerns relating exclusively to the criminal justice system that have no application to NGI civil commitment proceedings.

For example, defendant recites a quote from the Court of Appeal's opinion in our case wherein the court indicates the privilege not to testify reflects "fundamental values" and a sense of "fair play" that require the government to "shoulder the entire load." (Def. brief at p. 14.) The Court of Appeal quoted from the United States Supreme Court opinion in *Murphy v. Waterfront Com'n of New York Harbor* (1964) 378 U.S. 52 [12 L.Ed.2d 678, 84 S.Ct. 1594]. Both defendant and the Court of Appeal, however, omit the portions of the court's statement in *Murphy* referring to criminal law and its policies.

In *Murphy*, the court stated the privilege against self incrimination

> [R]eflects many of our fundamental values and most noble aspirations: our unwillingness to subject those *suspected of crime* to the cruel trilemma of self-accusation, perjury or contempt; our preference for an *accusatorial rather than inquisitorial system of criminal justice*; our fear that *self-incriminating* statements will be elicited by inhumane treatment and abuses[]

(*Murphy v. Waterfront Com'n of New York Harbor, supra,* 378 U.S. 52. 55, emphasis added.)

None of the concerns discussed in *Murphy* has any application to NGI extended commitment proceedings. NGI extended commitment proceedings do not involve persons suspected of crime. They are civil in nature and "directed to treatment and not punishment. [Citation.]" (*People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 485.) The "recommitment proceedings are not directed to the prosecution of an individual for an act or offense[.]" (*Ibid.*) The person is "'[n]ot threatened with penal treatment[]'" and "[n]o criminal adjudication is involved." (*Ibid.*)

Moreover, civil commitment proceedings do not share the criminal justice system's interest in remaining accusatorial rather than inquisitorial. After noting the historic purpose of the right not testify was to keep the criminal justice system "accusatorial," this Court stated,

> The extension of the privilege to an area outside the criminal justice system, in our view, would contravene both the language and the purpose of the privilege.

(*Cramer v. Tyars, supra,* 23 Cal.3d 131, 138.)

Nor does it implicate the "fundamental fairness" of the civil commitment procedure. Courts hold the right to refuse to testify does not apply in a variety of civil commitment proceedings similar to NGI commitment proceedings. (*Cramer v. Tyars, supra,* 23 Cal.3d 131, 137-138 [Welf. & Inst. Code, § 6500 et seq.]; *People v. Leonard* (2000) 78 Cal.App.4th 776, 793 [SVPA]; *People v. Merfeld* (1997) 57 Cal.App.4th 1440, 1446-1447 [MDOA]; *People v. Whelchel* (1967) 255 Cal.App.2d 455, 460-461 [civil narcotics commitment]; *Conservatorship of Bones, supra,* 189 Cal.App.3d 1010, 1016 [LPSA].) Defendant fails to explain why the right to refuse to testify would be needed to preserve "fairness" in NGI commitment proceedings, but not these other similar commitment proceedings.

Finally, calling the person to testify at his NGI extended commitment proceeding does not implicate the concern that self-incriminating statements will be elicited by inhumane treatment and abuses. In *Cramer*, this Court explained that while a person may be called to testify at his extended civil commitment hearing, he could not be required

> [T]o testify regarding any *criminal* conduct in which he might have engaged or about any other matter which would tend to implicate him in *criminal* activity.

(*Cramer v. Tyars, supra,* 23 Cal.3d 131, 138, emphasis added.) Thus, the person retains the privilege against self incrimination.

Defendant also relies upon *Haynie*. (Def. brief at p. 12.) In *Haynie*, the court found the right to refuse to testify was "relevantly implicated" when a person must testify at his NGI extended commitment proceeding even if he retains the privilege against self-incrimination. (*People v. Haynie, supra,* 116 Cal.App.4th 1224, 1230.) *Haynie* stated,

> By calling the person in its case-in-chief, the state is essentially saying that his or her testimony is necessary for the state to prove its case. We have no doubt that a committee so compelled to testify is prejudiced under these circumstances.

(*Ibid.*)

Haynie's position is flawed. First, the court applied the wrong test. The court considered whether the right to refuse to testify was "implicated" when the state called an NGI committee to testify. Of course the right is "implicated," but that does not show the right bears any relevant relationship to the civil commitment proceedings. Moreover, *Haynie's* conjecture concerning whether the state "needs" the person to testify in any particular case is irrelevant to the inquiry. *Haynie's* speculation is also belied by the facts in *Cramer*. There, although the state called the person to testify at his

civil commitment proceeding, this Court observed that the testimony of two medical experts and a psychiatric technician "established beyond question that [the person] was a danger to himself and others." (*Cramer v. Tyars, supra,* 23 Cal.3d 131, 139.)

Moreover, there is no concern that prosecutors will petition for extended commitments without having any evidence and simply call the person to testify hoping to produce evidence. Section 1026.5(b)(2) requires the prosecuting attorney to state in the petition the reasons for the extended commitment "with accompanying affidavits specifying the factual basis for believing that the person meets each of the requirements [for extended commitment]." (Pen. Code, § 1026.5, subd. (b)(2).) Thus, the prosecuting attorney must have sufficient evidence to proceed before any testimony by the person at the NGI extended commitment hearing. *Haynie* provides no basis on which to find the right to refuse to testify bears any relevant relationship to NGI extended commitment proceedings.

Defendant claims the Legislature intends that the right to refuse to testify apply at NGI extended commitment proceedings because the process is "adversarial" and the person's "liberty" interest is at stake. Defendant cites no authority for his claim that the right to refuse to testify should apply when a process is adversarial. As noted above, the privilege against self-incrimination

assures that the "criminal justice system" remain "accusatorial." It has nothing to do with whether a process is "adversarial." Moreover, as noted above, persons must testify in a variety of other civil commitment proceedings that are similarly "adversarial."

Defendant also fails to cite any authority showing the Legislature would intend the NGI committee to have the right to refuse to testify because his or her "liberty" may be restricted. The caselaw he cites is inapposite. For example, his reference to *In re Gault* (1967) 387 U.S. 1 [18 L.Ed.2d 527, 87 S.Ct. 1428] is misplaced because that case concerned a juvenile's "commitment" to a state institution as a result of "delinquency," not a person's commitment for medical treatment under a civil, extended commitment procedure. (*Id.,* 387 U.S. at pp. 49-50; see also *In re Jose C.* (2009) 45 Cal.4th 534, 542 [wardship proceedings have been characterized as de facto criminal].)

The other case defendant cites, *Hunt v. Hackett* (1973) 36 Cal.App.3d 134, was not an extended commitment case either. The court's statement that the constitutional safeguards applicable to criminal cases do not apply to all civil cases, but only those which are basically "'criminal in nature,'" has no

relevancy to civil commitment proceedings. Extended commitment proceedings are civil in nature. (*In re Scott* (2003) 29 Cal.4th 783, 815; *Cramer v. Tyars, supra,* 23 Cal.3d 131, 137-138; *Conservatorship of Bones, supra,* 189 Cal.App.3d 1010, 1015-1016; *People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 485 [extended commitment procedure under section 1026.5 is civil in nature].) As this Court stated with respect to the LPSA, "'We find no similarity between the aims and objectives of the [LPSA] and those of the criminal law....' [Citation.]" (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538.)

Moreover, in *Kansas v. Hendricks* (1997) 521 U.S. 346 [138 L.Ed.2d 501, 117 S.Ct. 2072], the United States Supreme Court distinguished the restraint of the mentally ill in civil commitment proceedings from the punishment restraint in criminal law. "The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective .... [Citation.]" (*Id.* at p. 363.) Thus, "the confinement of 'mentally unstable individuals who present a danger to the public' [is] one classic example of nonpunitive detention. [Citation.]" (*Ibid.* [involuntary confinement under Kansas's Sexually Violent Predator Act not being punitive, double jeopardy and ex post facto principles held inapplicable].) The fact that the person may be restrained for treatment

following the extended commitment hearing does not mean the person should have the right to refuse to testify.

If that were true, the Legislature would have mandated the right to refuse to testify in every civil commitment procedure. As the caselaw cited above, shows, such is not the case. In this respect, the extended commitment procedures for MDO's and SVP's are particularly noteworthy. After enacting the NGI extended commitment procedure in 1979, the Legislature enacted similar civil commitment procedures for MDO's and SVP's in 1986 and 1995, respectively. (Stats. 1979, ch. 1114, § 3, p. 4051; Pen. Code, § 2972; Stats. 1986, ch. 858, § 7; Welf. & Inst. Code, § 6600, et seq.; Stats. 1995, ch. 763, § 3.) All three commitment proceedings share similar legislative purposes. In each, the Legislature desires to identify individuals, who by reason of a mental disorder, present a danger to society and provide treatment until they no longer pose a threat. (*In re Moye, supra,* 22 Cal.3d 457, 466 [NGI]; *People v. Superior Court (Williams), supra,* 233 Cal.App.3d 477, 485 [NGI]; *In re Qawi* (2004) 32 Cal.4th 1, 9 [MDO]; *People v. Allen, supra,* 44 Cal.4th 843, 857 [SVP].)

Yet, the Legislature did not include the right to refuse to testify in either the MDOA or the SVPA. Both MDO's and SVP's must testify if called. (*People v. Lopez, supra,* 137 Cal.App.4th 1099, 1107 [MDO]; *People v. Leonard, supra,* 78 Cal.App.4th 776, 792-793 [SVP].) This belies defendant's claim that the Legislature must intend that the right to refuse to testify apply at NGI extended commitment proceedings because they are "adversarial" and involve a "liberty" interest. Proceedings under the MDOA and SVPA share those same characteristics but the Legislature did not include the right to refuse to testify in either proceeding. Defendant fails to explain why the Legislature would mandate the right to refuse to testify in NGI extended commitment proceedings, but not in MDO or SVP extended commitment proceedings, which share similar characteristics and purposes.

None of defendant's claims has anything to do with the purpose of NGI extended commitment proceedings or the underlying legislative intent. None of defendant's claims would further the Legislature's intent to protect the public by identifying and treating dangerous patients suffering from mental disorders. None of defendant's claims involves enhancing the reliability of the

outcome. On the contrary, the right to refuse to testify under the "Fifth Amendment is not designed to enhance the reliability of the factfinding determination; it stands in the Constitution for entirely independent reasons. [Citation.]" (*Allen v. Illinois, supra,* 478 U.S. 364, 375.)

Thus, none of the reasons underlying the right to refuse to testify bears any relevant relationship to NGI extended commitment proceedings. The Legislature wants to protect the public and provide needed treatment to dangerous patients suffering from mental disorders. The opportunity to fully observe the patient and hear him speak may be the most reliable proof and probative indicator of his mental condition. It greatly enhances the proceeding's reliability. The right to refuse to testify would frustrate legislative intent and undermine section 1026.5's purpose. As in similar civil commitment proceedings, the right to refuse to testify does not apply to NGI extended commitment proceedings.

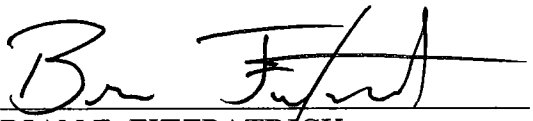
CONCLUSION

For the foregoing reasons, the People respectfully request this Court reverse the Court of Appeal's order granting defendant's petition for a writ of mandate/prohibition and direct the Court of Appeal to issue a new order denying said petition.

Dated this 7th day of February, 2014.

Respectfully submitted,

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

BY: 

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CERTIFICATE OF WORD COUNT

[California Rules of Court, Rule 8.520(c)(1)]

The text of the Reply Brief on the Merits consists of 6,929 words as counted by the word-processing program used to generate this brief.

Dated this 7th day of February, 2014.

Respectfully submitted,

TONY RACKAUCKAS, DISTRICT ATTORNEY
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PROOF OF SERVICE BY MAIL

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) ss
COUNTY OF ORANGE)

RE: PEOPLE vs. CHARLES HUDEC
SUPREME COURT CASE NO. S213003; DCA COURT CASE NO. G047465
SUPERIOR COURT CASE NO. C-47710

I am a citizen of the United States; I am over the age of eighteen years and not a party to the within entitled action; my business address is: Office of the District Attorney, County of Orange, 401 Civic Center Drive West Santa Ana, California 92701.

On, February 7, 2014, I served the within **REPLY BRIEF ON THE MERITS** on interested parties in said action by placing a true copy thereof enclosed in a sealed envelope, in the United States mail at Santa Ana, California, that same day, in the ordinary course of business, postage thereon fully prepaid, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on February 7, 2014, at Santa Ana, California.

R Franco
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