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Case No. S261812

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

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CONSERVATORSHIP OF PERSON AND ESTATE OF ERIC B.

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PUBLIC GUARDIAN OF CONTRA COSTA COUNTY,
*Petitioner and Respondent,*

*v.*

ERIC B.,
*Objector and Appellant.*

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# [PROPOSED] AMICUS BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND THE CALIFORNIA STATE ASSOCIATION OF PUBLIC ADMINISTRATORS, PUBLIC GUARDIANS, AND PUBLIC CONSERVATORS IN SUPPORT OF PETITIONER AND RESPONDENT PUBLIC GUARDIAN OF CONTRA COSTA COUNTY

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First Appellate District, Division Five, Case No. A157280
Contra Costa Court, Case No. P18-01826
The Honorable Susanne M. Fenstermacher

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## I. INTRODUCTION

The application of Penal Code section 1026.5, subdivision (b)(7) to Lanterman-Petris-Short Act ("LPS Act") proceedings based on *Conservatorship of E.B.* (2020) 45 Cal.App.5th 986, should alarm this Court. There is a substantial body of decisional law under the LPS Act that has considered whether various protections from criminal procedure should be applied to proceedings under the LPS Act. Numerous courts have held that not all protections should be applied and, as a result, not all such protections have been adopted. These decisions required those courts to characterize and distinguish the nature of proceedings in light of the specific issue or claim being raised. The context matters. The reasoning in *E.B.* proceeds as if nothing in the existing jurisprudence is relevant to its analysis. It emerges, as it were, in a self-created vacuum free of any countervailing analysis or conflicting principles. Accordingly, the *E.B.* decision highlights the problem created with the introduction of procedural rights from the criminal context which are then extended into a noncriminal context.

This Court should follow the lower court's decision in *Conservatorship of Bryan S.* (2019) 42 Cal.App.5th 197. The *Bryan S.* analysis embodies an appropriate balance of purpose of the LPS Act as protective proceedings for people who are severely mentally ill and affording protection of the same people against erroneous involuntary commitment for psychiatric treatment.

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## II. LEGAL ARGUMENT

### A. The court in *Hudec v. Superior Court* recognized that context matters, and in this case the context illustrates the principle of Penal Code section 1026.5(b)(7) is not properly extended to proposed conservatees in LPS proceedings.

In *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 826, this Court made two observations that foreshadow sufficient grounds to depart from applying the statutory right not to testify in proceedings under the LPS Act. First, in a discussion of statutory interpretation, the Court reasoned that in "context, 'the' can be read as equivalent to 'all.'" (*Ibid.*) The court was looking to the context created by NGI commitment extension hearing. The court observed:

> Despite this apparent clarity, interpreting section 1026.5(b)(7) poses a degree of inherent difficulty. By its terms, **the statute in effect commands a translation or transposition of procedural rights from the criminal context to the noncriminal, contexts sufficiently different to raise a question of its interpretation.** That appellate courts have struggled to delineate the set of criminal trial rights the statute incorporates into a commitment extension hearing is not surprising.

(*Hudec, supra,* 60 Cal.4th at p. 826 (emphasis added).)

The Objector has seized the opportunity to argue that a specific Penal Code statute must be extended to proceedings under the LPS Act despite the fact that the contexts are substantially different. Moreover, footnote 2 in *Hudec* provides further support to reject the Objector's position.

> This court has not addressed the constitutional question as to commitment extension proceedings under section 1026.5. In *Cramer*, however, we held an intellectually disabled person (referred to, at the time, as a mentally retarded person) faced with commitment under Welfare and Institutions Code former section 6502 had no constitutional right not to be called as witness, because the

> essentially civil character of the proceedings, though he did have the right to refuse to answer potentially incriminating questions. (*Cramer*, *supra*, 23 Cal.3d at pp. 137-138.) The United States Supreme Court reached the same conclusion as those faced with commitment under the Illinois Sexually Dangerous Persons Act. (*Allen v. Illinois*, *supra*, 478 U.S. at pp. 368-375.) As far as the decisions reveal, the statutes at issue in *Cramer* and *Allen* did not contain provisions similar to section 1026.5(b)(7).

(*Hudec, supra,* 60 Cal.4th at p. 819.)

There has been no showing that the Legislature enacted Penal Code section 1026.5, subdivision (f)(7) with the expectation that it would be applied to LPS conservatorships. Instead, by its express language, it applies to a very specific set of cases involving mentally ill criminal defendants who, by virtue of their mental illness, cannot be prosecuted under the criminal law but yet pose a demonstrated element of dangerousness to the community. In reliance on a simplistic characterization, the Objector argues a mentally ill person, by virtue of mental illness and the deprivation of liberty, is similarly situated with a distinct class of criminal defendant. The development of the case law, however, illustrates the continuing need to enforce the distinctions in cases that invoke a continuum that ranges from criminal to civil and incorporating hybrid proceeds that lie in between those points.

In *Cramer v. Tyars* (1979) 23 Cal.3d 131, this Court held that an intellectually disabled person ('mentally retarded' in the language that was prevalent at the time) subject to involuntary civil commitment proceedings did not have a constitutional right to refuse to be called as witness in a civil proceeding. (*Id.* at pp. 137-138.) This Court noted that a defendant in a criminal matter has an absolute right to be called as a witness and

not to testify. (*Ibid.*) This Court also cited Evidence Code section 940 for the rule that, in any proceeding, civil or criminal, a witness had the right to decline to answer questions that may tend to incriminate him in criminal activity. (*Ibid.*) But – foreshadowing its holding – this Court stated at the outset that "no witness has a privilege to refuse to reveal to the trier of fact his physical or mental characteristics where they are relevant to the issues under consideration." (*Ibid.*)

This Court analyzed the nature of commitment proceedings and reasoned that such a proceeding is essentially civil in nature, not merely as a label, but as an important aspect in the analysis. The Court applied four factors in its analysis: (1) the commitment proceeding is not initiated or necessarily related to any criminal acts; (2) the limited one-year duration; (3) the procedures for annual renewals are the same procedures used to establish the original commitment; and (4) the petitioner could be a parent, a person designated by the court, or a public prosecutor. (*Cramer, supra*, 23 Cal.3d at p. 137.) Proceedings under the LPS Act are also accurately characterized by the first three factors. As to the fourth factor, an initial petition under the LPS Act can only be filed by a public official under Welfare and Institutions Code section 5352; thereafter a member of the public, such as a relative or a friend may be appointed the conservator of the person and subsequently file petitions for reappointment. (Welf. & Inst. Code, § 5350; Prob. Code, § 1820.)

This Court refused to extend the application of the privilege not to testify outside of the criminal justice system. "The extension of the privilege to an area outside the criminal justice system, in our view, would contravene both the language and purpose of

the privilege." (*Cramer, supra*, 23 Cal.3d at p. 138.) This Court explained the practical side of its decision as follows:

> We conclude that, while appellant could not be questioned about matters that would tend to incriminate him, he was subject to call as a witness and could be required to respond to nondiscriminatory questioning which may have revealed his mental condition to the jury, whose duty it was to determine whether he was mentally retarded. Reason and common sense suggest that it appropriate under such circumstances 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. The receipt of such 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. (See, *People v. Ellis* (1966) 65 Cal.2d 529, 533-534 [55 Cal.Rptr. 385, 421 P.2d 393] [voice identification not within with privilege against self-incrimination].) Similarly, a defendant even in a criminal proceeding may be required to give "real or physical" evidence in contrast to "communications or testimony" in the sense of disclosing knowledge. Thus, a criminal defendant may be asked to stand, wear clothing, hold items, or speak words. (*People v. Ellis, supra*, at pp. 533-534; *People v. Sims* (1976) 64 Cal.App. 3d 544, 552 [134 Cal.Rptr. 566].) It was proper for the jury to have the benefit of its own observations of Tyars's responses, both in manner and content, to the court's questions.

(*Cramer, supra,* 23 Cal.3d at p. 139.)

*Cramer* established the foundation for the case in the LPS context. The rule that a proposed conservatee cannot refuse to testify at his own conservatorship trial emerged from *Conservatorship of Baber* (1984) 153 Cal.App.3d 542. In *Baber*, the appellate court rejected the appellant's reliance on the similarities between a civil conservatorship proceeding and a criminal trial. (*Ibid.*) The *Baber* court cited *Cramer* and incorporated its wording at the foundation for its own opinion:

> The commitment is not initiated in response, or necessarily related, to any criminal acts; it is of limited duration, expiring at the end of one year . . . The sole state interest, legislatively expressed, is the custodial care, diagnosis, treatment and

> protection of persons who are unable to take care of themselves and who for their own well-being and the safety of others cannot be left adrift in the community. [§ 5001]. **The commitment may not be reasonably deemed punishment either in its design or purpose. It is not analogous to criminal proceedings**." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793].)
>
> The California Supreme Court has recognized the significant interest in liberty threatened by conservatorship proceedings. (*Conservatorship of Roulet* (1979) 23 Cal. 3d 219 [152 Cal.Rptr. 425, 590 P. 2d 1].) Yet, after carefully considering the purpose behind such proceedings and the safeguards provided against unnecessary commitment, it has concluded that the best interests of the potential conservatee would not be served by allowing him to engage in obfuscatory tactics. Indeed, the court has stressed again and again the importance of ascertaining the true state of respondent's disability in conservatorship proceedings. **To this end, it has held that certain principles governing criminal trials are applicable and others are not.**
>
> In *Conservatorship of Roulet, supra,* the court held that respondents in conservatorship trials are entitled to a unanimous jury verdict and to a standard of proof beyond a reasonable doubt. The court believed that the application of this standard would "ensure the correctness of the eventual verdict." (*Id*. at pp. 233-234.) Yet, the subject of commitment proceedings for mentally retarted persons may not refuse to testify (*Cramer v. Tyars, supra,* 23 Cal. 3d 131), despite the significant liberty interest at stake. In addition, the Second District Court of Appeal has ruled that a proposed conservatee is not entitled to a warning that incriminating evidence derived from his interview with a forensic psychiatrist will be used against him in a conservatorship proceeding. (*Conservatorship of Mitchell* (1981) 114 Cal.App. 3d 606 [170 Cal.Rptr. 759].) **This court, itself, has held that the rationale behind *Miranda* does not compel its use in commitment proceedings for mentally retarded persons.** (*Cramer v. Shay* (1979) 94 Cal.App. 3d 242, 245 [156 Cal.Rptr. 303].)

(*Conservatorship of Baber*, *supra*, 153 Cal.App.3d at p. 549 (emphasis added).)

In the present case, the context is critical. The contexts are "sufficiently different" as described in *Conservatorship of Bryan S.* (2019) 42 Cal.App.5th 197, to raise a question and to bar the extension of the right to refuse to testify into proceedings under the LPS Act.

The court in *Hudec* made a second observation that looked to whether recognizing the extension of the statutory right would result in absurd consequences. "We may, of course, reject a literal statutory construction where it would result in absurd consequences the Legislature could not have intended. [Citations omitted.] Where a right applicable in criminal proceedings cannot be logically provided within the framework of an NGI commitment extension hearing, we might infer that the Legislature could not have meant for Penal section 1026.5(b)(7) to encompass it." (*Hudec, supra,* 60 Cal.4th 15 at p. 828.) Application of a proposed conservatee's right to refuse to testify can be readily extended to Evidence Code section 940, which holds that "no witness has a privilege to refuse to reveal to the trier of fact his physical or mental characteristics where they are relevant to the issues under consideration." (*Cramer, supra,* 23 Cal.3d at p. 137.) Application of the right to refuse to testify could be readily conflict with this preexisting rule under Evidence Code section 940.

A similar problem would be immediately created regarding California Code of Civil Procedure section 2032.020, which authorizes the court to permit discovery of a person's mental condition. The Code of Civil Procedure section 2032.020 provides, in pertinent part, as follows:

> (a) Any party may obtain discovery, subject to restrictions set forth in Chapter 5 (commencing with Section 2019.010), by means of a physical or mental examination of (1) a party to the action, (2) an agent of any party, or (3) a natural person in the custody or under the legal control of a party, in any action in which the mental or physical condition (including blood group) of that party or other person is in controversy in the action.

. . . .

> (c)(1) A mental examination conducted under this chapter shall be performed only by a licensed physician, or by a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders.

Applicable case law has recognized the application of this discovery tool in cases under the LPS Act. (See, *Conservatorship of G. H.* (2014) 227 Cal.App.4th 1435, 174.) Adoption of the right to refuse to testify for a mentally ill person could have adverse consequences under this provision of the Code of Civil Procedure

## III. CONCLUSION

The right to refuse to testify should not be extended to proceedings under the LPS Act. Application of this Court's holding in *Hudec v. Superior Court* (2015) 60 Cal.4th 815, does not support the claim that proposed conservatees in proceedings under the LPS Act should have a right not to testify. The issue presented does not lend itself to reductionist reasoning or conclusory argument. Both flaws permeate E.B.'s Equal Protection – specifically, the "substantially similar" element – and revealed in focus on the mental health diagnosis as the single most important common denominator shared by conservatorship proceedings under the LPS Act and commitment extension proceedings pursuant to Penal Code section 1026.5 for criminal defendants who are Not Guilty by Reason of Insanity ("NGI"). Objector's analysis begins with a specific statutory law, grounded in criminal law and procedure, and stretches its embrace to the LPS Act. To ensure a proper "fit" in these otherwise separate domains, mental illness becomes an outcome-determinative factor, sidelining a range of other issues and distinctions that are implicated in this case.

Extending the privilege not to testify in LPS proceedings also threatens the potential application to other settings in which the person with a mental illness could assert the privilege.

For all these reasons, this Court should reject Objector's argument, and instead adopt the holding of *Conservatorship of Bryan S.* (2019) 42 Cal.App.5th 197.

Dated: April 9, 2021

Respectfully submitted,

/s/

By ______________________________

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9th day of April, 2021 in Sacramento, California.

Respectfully submitted,

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By: ________________________
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