

**FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
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**RECENT DEVELOPMENTS
IN MENTAL HEALTH
CIVIL COMMITMENT LAW**

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INTRODUCTION

There are many statutory schemes in California that provide for the civil commitment of individuals alleged to be dangerously mentally ill at various stages of criminal proceedings. Civil commitment laws most commonly encountered by indigent appellate defense attorneys are directed at adults deemed sexually violent predators and mentally disordered offenders as well as criminal defendants found not guilty by reason of insanity and incompetent to stand trial. In addition, California has adopted a parallel framework for the extended civil commitment of minors previously subjected to delinquency proceedings. Other civil commitment regimes, such as LPS Act conservatorships, do not necessarily require any connection to past or ongoing criminal proceedings.

Over the past few years, new voter initiatives, legislative enactments, and federal and state case law have substantially impacted California's various civil commitment schemes. These materials are intended to summarize those recent developments. These materials are not, however, intended to provide a general overview of the statutory civil commitment schemes themselves. Such an overview can be found in materials prepared by J. Bradley O'Connell in conjunction with his presentation at FDAP's 2006 seminar ("CALIFORNIA MENTAL HEALTH COMMITMENT REGIMENS: NGI, MDO, SVP") and can be found in the "Articles and Outlines" section of FDAP's website (www.fdap.org).

I. SEXUALLY VIOLENT PREDATOR (SVP) COMMITMENT

A. Prop 83 and SB 1128

In the fall of 2006, the SVP Act was amended twice: once by the Legislature (SB 1128) and once by the electorate (Prop 83). Here are the key civil commitment amendments to the SVP Act resulting from these enactments:

- ▶ In order to qualify as a sexually violent predator, the person need only have been convicted of a sexually violent offense against *one* or more victims (rather than two or more victims under the old law). (Welf. & Inst. Code, § 6600, subd. (a)(1).)
- ▶ A *single* juvenile adjudication that resulted in a Youth Authority/Department of Juvenile Justice commitment may now qualify as the sole required predicate sexually violent offense. (Welf. & Inst. Code, §§ 6600, subd. (a)(2)(H); 6600, subd. (g).)
- ▶ An enumerated offense may now qualify as a sexually violent offense if committed by “threatening to retaliate in the future against the victim or any other person.” (Welf. & Inst. Code, § 6600, subd. (b).)
- ▶ If the victim of the alleged predicate sexually violent offense is under 14 years old, the offense shall constitute a sexually violent offense, irrespective of whether the offense involved “substantial sexual conduct,” as defined in the former version of the SVP Act. (Welf. & Inst. Code, § 6600.1.)
- ▶ If found to be an SVP, the person shall now be committed for an *indeterminate term* (rather than a two-year term). (Welf. & Inst. Code, § 6604.)
- ▶ Because SVP commitments are now for an indeterminate term, periodic extended commitment trials are no longer required. As the law currently stands, an SVP may file a petition for unconditional release with or without the concurrence of the Director of Mental Health. The procedures are different depending on whether the Director of Mental Health concurs with the contentions set forth in the SVP’s petition for release:
 - ▶ If the Director of Mental Health determines that “the person’s condition has so changed that the person no longer meets the definition of a sexually violent predator” and concurs with the SVP’s petition for release, the trial

court shall hold a “show cause” hearing to assess whether probable cause exists to support the Director of Mental Health’s determination. (Welf. & Inst. Code, § 6605, subd. (b).) If the trial court finds probable cause to believe the SVP no longer meets the commitment criteria, a full hearing shall be set on whether unconditional discharge is appropriate. (Welf. & Inst. Code, § 6605, subd. (c).) At such a hearing, the SVP must be accorded all the constitutional protections to which he or she was entitled at the initial commitment proceeding, including the right to trial by jury, and the burden of proof remains on the state to prove beyond a reasonable doubt that the person still meets the definition of a sexually violent predator. (Welf. & Inst. Code, § 6605, subd. (d).) If the state meets its burden, the person remains under an indeterminate commitment. If the state fails to carry its burden, the person must be unconditionally discharged.

- ▶ If the Director of Mental Health does not concur that the SVP no longer meets the commitment criteria, the person may still file a petition for unconditional release without a favorable recommendation. (Welf. & Inst. Code, § 6608, subd. (a).) However, upon receipt of such a petition, “the court shall endeavor whenever possible to review the petition and determine if it is based on frivolous grounds and, if so, shall deny the petition without a hearing.” (Welf. & Inst. Code, § 6608, subd. (a).) Moreover, if a previous petition for unconditional release has been denied, the court shall deny the subsequent petition “unless it contains facts upon which a court could find that the condition of the committed person has so changed that a hearing was warranted.” (Welf. & Inst. Code, § 6608, subd. (a).) If the trial court sets a hearing on the petition for unconditional release, the burden of proof is on the SVP to establish by a preponderance of the evidence that he or she “would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community” (Welf. & Inst. Code, § 6608, subds. (d), (I).) If the SVP meets this burden, “the court shall order the committed person placed with an appropriate forensic conditional release program operated by the state for one year” for outpatient supervision and treatment. (Welf. & Inst. Code, § 6608, subd. (d).) After the SVP has spent one year as an outpatient, “the court shall hold a hearing to determine if the person should be unconditionally released from commitment on the basis that, by reason of a diagnosed mental disorder, he or she is not a danger to the health and safety of others in that it is not likely that he or she will engage in sexually violent criminal behavior.” (Welf. & Inst. Code, § 6608, subd. (d).) Again, the SVP has the burden of establishing these elements by a preponderance of

the evidence. (Welf. & Inst. Code, § 6608, subd. (I).) Importantly, “[t]he court shall not make this determination until the person has completed at least one year in the state-operated forensic conditional release program.” (Welf. & Inst. Code, § 6608, subd. (d).) In other words, SVPs do not have a right to a hearing on whether unconditional release is appropriate without first serving a year under outpatient supervision (unless the Director of Mental Health so recommends on the SVP’s behalf).

To date, the Courts of Appeal have only ruled on a small number of challenges to these recent amendments to the SVP Act. Of particular interest will be the inevitable decisions on the constitutionality of indeterminate terms of commitment and the shifting of the burden on to the SVP to obtain unconditional release without the support of the Director of Mental Health. These amendments eliminate key aspects of the law that were cited by both the United States and California Supreme Courts in upholding SVP civil commitment laws adopted by California and other states.

B. SB 1128 and Prop 83 Did Not Eliminate The Extended Commitment Framework

As noted above, Prop 83 eliminated the two-year commitment scheme and replaced it with a framework whereby the initial commitment would be for an indeterminate period of time, thus obviating the need for recommitment trials. In a strange oversight, however, SB 1128 and Prop 83 completely eliminated the SVP Act’s references to extended commitments. As a result, for those people committed as SVPs prior to the passage of SB 1128 and Prop 83, there no longer exists an explicit statutory mechanism to extend their commitments. Nevertheless, district attorneys have continued to bring recommitment petitions alleging that post-Prop 83 extensions should be for indeterminate terms. The SVPs facing these extended commitment petitions have, in turn, brought a bevy of dismissal motions, arguing that the framework’s omission of a recommitment scheme post-Prop 83 requires their release. Not surprisingly, three Courts of Appeal have recently decided the electorate and the Legislature did not intend, by this omission, for all SVPs committed prior to the adoption of SB 1128 and Prop 83 to be released.

- ▶ In *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, the Third District Court of Appeal held that “[b]y changing the terms of commitment under the SVPA from two-year terms to indefinite terms, the Legislature and then the voters demonstrated an intent to keep those found to be sexually violent predators (SVPs) committed until they no longer meet the definition of an SVP. From the very purpose of the amendment of the SVPA, a saving clause is implied. Under the implied saving clause, the superior court has jurisdiction to proceed on the

petitions to extend petitioners' commitments. Under the provisions of the SVPA, as amended by SB 1128 and by Proposition 83, the petitions to extend commitment are petitions for indefinite commitment."

- ▶ Similarly, in *People v. Shields* (2007) 155 Cal.App.4th 559, Division One of the Fourth District Court of Appeal rejected the SVP's assertion that "the court had no jurisdiction to find him to be an SVP and recommit him because [Welfare and Institution Code] section 6604's two-year commitment procedure has been eliminated and the amended SVP statute fails to expressly refer to persons already confined for two-year terms under former section 6604. We reject this contention because Shields's proposed statutory interpretation is contrary to the clear legislative intent."
- ▶ Finally, in *People v. Carroll* (2007, F051709), the Fifth District Court of Appeal reached the same result, noting that to hold otherwise would lead to "absurd consequences."

C. The Indeterminate Term Provisions Found in SB 1128 and Prop 83 May Be Applied Retroactively to SVPs Committed Prior to the Amendments' Adoption

Penal Code section 3, Code of Civil Procedure section 3, and Civil Code section 3 all provide that new enactments should not be applied retroactively unless expressly so declared.

- ▶ In *People v. Carroll* (2007, F051709), the district attorney filed an extended commitment petition before the SVP Act was amended to provide for indeterminate terms. Therefore, the commitment petition sought to impose a two-year commitment. By the time the commitment trial commenced several months later, the SVP Act had been amended to provide for indeterminate terms. At that time, the district attorney announced that an indeterminate term would be sought rather than the two-year term identified in the petition. After a court trial, the defendant was committed as an SVP for an indeterminate term. The Fifth District Court of Appeal concluded that the defendant waived any challenge to the amendment of the petition by failing to object. The Court of Appeal, however, also rejected the defendant's due process challenge to the adequacy of the notice he was given on the merits. In addition, the Court of Appeal held that because the petition was amended and the trial occurred after the indeterminate term provisions took effect, utilization of the newly-added indeterminate term provisions of the SVP Act did not constitute an impermissible retroactive application of the statute.

D. Sealed Juvenile Court Records May Not Be Used in SVP Proceedings

Welfare and Institutions Code section 781 sets forth a mechanism for the sealing of juvenile court records.

“Once the court has ordered the person’s [juvenile court] records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed.” (Welf. & Inst. Code, § 781, subd. (a).)

By the statutes own terms, sealed juvenile records may only be disclosed at the former ward’s request or by court order for use in defamation proceedings or to calculate automobile insurance rates. (Welf. & Inst. Code, § 781, subds. (b)-(c).)

- ▶ In *In re James H.* (2007) 154 Cal.App.4th 1078, the Board of Parole Hearings (BPH) petitioned the juvenile court to disclose an adult prisoner’s juvenile records that had been sealed pursuant to Welfare and Institutions Code section 781. BPH intended to use the sealed records to evaluate whether the person met the SVP civil commitment criteria. The juvenile court summarily granted BPH’s petition without holding a hearing. Division Three of the First District Court of Appeal reversed the order disclosing the prisoner’s juvenile court records. The Court of Appeal noted that Welfare and Institutions Code section 781 provides a brief, exhaustive list of situations in which sealed juvenile records may be disclosed that does not encompass use for SVP proceedings. Moreover, the Court of Appeal rejected the Attorney General’s argument that recent amendments to the SVP Act found in Prop 83 necessarily created an implied exception to Welfare and Institutions Code section 781 allowing the use of sealed juvenile court records in SVP proceedings.

E. Failure to Cooperate with the People’s Expert Evaluators

When the state initiates SVP proceedings, “the person shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of Mental Health. If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of Mental Health shall forward a request for a petition for commitment” (Welf. & Inst. Code, § 6601, subd. (d).)

- ▶ In *People v. Sumahit* (2005) 128 Cal.App.4th 347, the proposed SVP refused to be

interviewed by the People’s experts. The Third District Court of Appeal concluded that this refusal precluded him from challenging the sufficiency of the evidence that he currently lacked the ability to control his allegedly dangerous behavior, particularly in light of the fact that he fully cooperated with his own psychologist.

F. Expert Evaluation Qualifications

SVP evaluators “designated by the Director of Corrections or the Director of Mental Health for purposes of this section shall not be a state government employee, shall have at least five years of experience in the diagnosis and treatment of mental disorders, and shall include psychiatrists and licensed psychologists who have a doctoral degree in psychology.” (Welf. & Inst. Code, § 6601, subd. (g).)

- ▶ After the two evaluators originally appointed to evaluate the proposed SVP in *In re Wright* (2005) 128 Cal.App.4th 663 did not agree as to whether the defendant met the commitment criteria, the trial court appointed two more experts pursuant to Welfare and Institutions Code section 6601. It was unclear in this case if one of the secondary experts appointed to evaluate the defendant possessed a doctoral degree in psychology, as required by Welfare and Institutions Code section 6601, subdivision (g). Division One of the Fourth District Court of Appeal assumed the appointment of this evaluator violated the applicable statute but deemed the error harmless.

G. No Right to Have Counsel Present at Court-Ordered Updated Mental Health Evaluation

“If the attorney petitioning for commitment under this article determines that updated evaluations are necessary in order to properly present the case for commitment, the attorney may request the State Department of Mental Health to perform updated evaluations.” (Welf. & Inst. Code, § 6603, subd. (c)(1).)

- ▶ In *People v. Burns* (2005) 128 Cal.App.4th 794, the trial court ordered the proposed SVP to submit to *updated* mental health evaluations by two experts. The trial court denied the defendant’s request to have counsel present at the new evaluations. Division Five of the First District Court of Appeal affirmed, finding that neither the law nor public policy supported the defendant’s argument that he had a constitutional right to the presence of counsel at an updated mental health evaluation interview.

- ▶ It had previously been held that proposed SVPs do not have the right to have counsel present at their *initial* psychological interviews. (*People v. Carmony* (2002) 99 Cal.App.4th 317.)

H. Confidentiality of Psychological Evaluations

A psychotherapy “patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist” (Evid. Code, § 1014.)

However, “[t]here is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition.” (Evid. Code, § 1017, subd. (a).)

- ▶ In *People v. Angulo* (2005) 129 Cal.App.4th 1349, Division Two of the Fourth District Court of Appeal rejected the indigent SVP-defendant’s contention that he had a due process right to keep confidential the fruits of the evaluations conducted by experts appointed on his behalf. Similarly, the Court of Appeal held that the psychotherapist-patient privilege codified at Evidence Code sections 1014 and 1017 did not permit an alleged SVP to refuse to disclose the fruits of an evaluation conducted by an expert appointed on his behalf. In particular, Evidence Code section 1017 does not apply to SVP proceedings because they are not criminal proceedings; rather, they are special proceedings of a civil nature.

I. Expert Witnesses and Bias

- ▶ In *People v. Buffington* (2007) 152 Cal.App.4th 446, the defense called a psychologist who testified that in his opinion the defendant was able to control his sexually dangerous behavior. In an effort to show the defense-psychologist’s bias or prejudice, the People cross-examined him about the facts of three other SVP cases in which he had testified and his opinion that those defendants were not SVPs. The Third District Court of Appeal held that the facts of the three other SVP cases and the psychologist’s opinion in those cases were not relevant to show his bias or prejudice. However, the Court of Appeal found the erroneous admission of this line of questioning non-prejudicial.

J. Crawford and Hearsay

- ▶ *People v. Angulo* (2005) 129 Cal.App.4th 1349 also held that the Sixth Amendment confrontation rights articulated in *Crawford v. Washington* (2004) 541 U.S. 36, barring the introduction of testimonial hearsay of an unavailable declarant without a prior opportunity for cross-examination, do not apply to SVP proceedings, which are civil in nature.
- ▶ In *People v. Fulcher* (2006) 136 Cal.App.4th 41, another panel of Division Two of the Fourth District Court of Appeal also concluded that the Sixth Amendment right to confrontation does not extend to SVP commitment proceedings. However, although defendants in civil SVP proceedings do not have a Sixth Amendment right of confrontation, they do have a due process right to confrontation rooted in fundamental principle of fairness and decency. (See *People v. Otto* (2001) 26 Cal.4th 200, 214 [setting forth the due process test applicable to SVP proceedings].)
- ▶ In *People v. Carlin* (2007) 150 Cal.App.4th 322, one of the People’s investigators interviewed the victim from one of the alleged SVP’s prior sexual offenses that had occurred nearly a decade earlier. The trial court then permitted the investigator to testify as to what the victim told him about the incident, as memorialized in his report. The victim did not testify. The Sixth District Court of Appeal concluded that the use the hearsay statements in the investigator’s reports to prove the substantial sexual conduct element prejudicially violated appellant’s due process rights. In particular, the Court of Appeal found that the circumstances surrounding the statements made approximately 10 years after the events in question did not support their reliability.

K. Collateral Estoppel: the People’s Use of Factual Findings Made at Prior SVP Commitment Trials

The state may not invoke collateral estoppel to prevent the relitigation of factual findings made a prior SVP commitment proceedings concerning the SVP’s mental health or dangerousness.

- ▶ In *People v. Munoz* (2005) 129 Cal.App.4th 421, Division One of the Fourth District Court of Appeal addressed the appropriateness of admitting evidence concerning the defendant’s prior SVP commitments at an extension trial. The Court of Appeal first noted that an SVP extension hearing is not a review hearing. Therefore, “except in a limited sense, the petitioner cannot rely on findings made

at earlier SVP hearings to shape the issues or prove SVP status in a current hearing.” According to the Court of Appeal, “[w]hile it is proper, when relevant, to take judicial notice of the prior *finding*, it is improper to take notice of the truth of that finding. [Citations.] Thus, if there is some *legal* consequence of the fact of a prior SVP finding, a trier of fact may take judicial notice of it. However, the factual truth of any prior determination that the defendant then had a mental disorder and was as a result dangerous is not the proper subject of judicial notice.” Because the focus of all SVP proceedings - both initial and extended commitment hearings - is the defendant’s *current* mental health and dangerousness, the prior finding has no res judicata effect. Furthermore, admission of evidence concerning the truth of the prior SVP finding runs the risk that the trier of fact would impermissibly approach its role as one of determining whether anything had changed since the person’s prior SVP proceeding.

However, the state may invoke collateral estoppel to bar the defendant from relitigating the issue of whether he had been convicted of the requisite qualifying prior conviction(s).

- ▶ In *People v. Lopez* (2006) 146 Cal.App.4th 1263, the trial court granted the People’s *in limine* motion seeking to bar the defendant from litigating the issue of whether he had been convicted of the requisite qualifying prior convictions on the ground that the jury had decided the identical issue during the defendant’s previous SVP commitment trial. The trial court then instructed the jury that the court had determined that the defendant had suffered the requisite qualifying prior convictions and they jury was not to decide the issue. The jury found the defendant to be an SVP. The Sixth District Court of Appeal concluded that the doctrine of collateral estoppel may be applied to the issue of whether an SVP defendant has been convicted of a sexually violent offense without violating due process. In addition, the Court of Appeal held that the jury instruction noted above did not amount to an improper directed verdict.

L. Determining Whether a Prior Out-of-State Conviction Amounts to a Qualifying Offense under the SVP Act

For purposes of the SVP Act, a conviction for a sexually violent offense includes “[a] prior conviction in another jurisdiction for an offense that includes all of the elements of an offense described in subdivision (b).” (Welf. & Inst. Code, § 6600, subd. (a)(2)(c).) Subdivision (b) lists the California offenses that meet the prior qualifying conviction requirement.

- ▶ In *People v. Whitney* (2005) 129 Cal.App.4th 1287, the Fifth District Court of

Appeal examined whether the defendant's prior Texas conviction for indecency with a child amounted to a valid predicate offense. The Texas statute at the heart of the defendant's conviction criminalized conduct with children up to age 17, while the corresponding California offense applied only to conduct toward children under the age of 14 years old. Here, the record unambiguously indicated that the defendant's Texas victims were nine years old. The Court of Appeal held that trial courts may look beyond the bare elements of an offense to determine whether it meets the criteria of a prior qualifying offense under the SVP Act. As a result, the Court of Appeal found that the defendant's prior Texas convictions constituted valid qualifying offenses under the SVP Act.

M. Determining Whether a Prior Conviction Constitutes a Qualifying Offense under the SVP Act Is Not Limited to Documents Contained in the Record

Welfare and Institutions Code section 6600, subdivision (a)(3), provides in relevant part: "The existence of any prior convictions may be shown with documentary evidence."

- ▶ In *People v. Fulcher* (2006) 136 Cal.App.4th 41, Division Two of the Fourth District Court of Appeal held that Welfare and Institutions Code section 6600, subdivision (a)(3), does not limit the determination whether a prior conviction constitutes a sexually violent offense to proof by documentary evidence. Witness testimony may be necessary to establish that a prior conviction amounted to a sexually violent offense. "Since a violation of Penal Code section 288, subdivision (a) (nonforcible lewd acts) [footnote] is one of the enumerated offenses that may qualify as a predicate offense . . ., proof of the elements of the offense or evidence contained solely within the 'record of conviction' may be insufficient to establish the offense qualifies as a sexually violent offense or that the offense involved substantial sexual conduct. Unlike a [Penal Code] section 288(b) offense (forcible lewd acts), force and duress are not required elements of a section 288(a) offense. Substantial sexual conduct also is not required." If this determination were limited to documentary evidence, "a section 288(a) offense would never qualify when the defendant pled guilty or no contest prior to the preliminary hearing, and often would not qualify even if evidence was limited to the elements or record of conviction of a section 288(a) offense."

N. Conviction by No Contest Plea May Serve as Prior Qualifying Offense

Penal Code section 1016, subdivision (3), provides that a conviction following a no contest plea "may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based."

- ▶ In *People v. Yartz* (2005) 37 Cal.4th 529, the California Supreme Court held that the defendant's 1978 child molestation conviction following a no contest plea may be used as a prior conviction to support his SVP commitment, notwithstanding Penal Code section 1016, subdivision (3). According to the Supreme Court, an SVP civil commitment proceeding is not a "civil suit" within the meaning of Penal Code section 1016, subdivision (3). Rather, SVP proceedings are special proceedings that are civil in nature.

O. Waiver of Statutory Right to Trial by Jury

Both the alleged SVP and the state have a right to demand a jury trial in an SVP proceeding. (Welf. & Inst. Code, § 6603, subds. (a)-(b).)

- ▶ In *People v. Rowell* (2005) 133 Cal.App.4th 447, the Third District Court of Appeal concluded that the right to trial by jury in an SVP proceeding is a creature of statute and not constitutionally required. Therefore, the Court of Appeal held that a defendant's personal waiver of a jury trial in an SVP proceeding is not required, and a trial court may properly accept defense counsel's declaration that the defendant wanted a court trial instead of a jury trial.

P. Right to Testify over Objection of Defense Counsel?

- ▶ In *People v. Allen* (formerly published at 144 Cal.App.4th 1132), Division Two of the Fourth District Court of Appeal held that in an SVP jury trial the defendant has no constitutional right to testify over the objection of his attorney because SVP proceedings are special proceedings of a civil nature and his attorney could waive his right to testify on the ground doing so would be harmful to his defense. The California Supreme Court granted review in this case (S148949), and briefing in that court was completed in July 2007.

Q. Right to Self-Representation?

- ▶ In *People v. Willoughby* (2006) 138 Cal.App.4th 1430, the Sixth District Court of Appeal held that SVP defendants do not have a Sixth Amendment or a due process right to self-representation. The Court of Appeal declined to address whether SVP defendants have a common law or statutory right to self-representation, because it determined that even if the defendant had such a right in this case, the denial of his motion to represent himself was non-prejudicial.

R. Prosecutorial Misconduct

- ▶ In *People v. Shazier* (formerly published at 139 Cal.App.4th 294), the Sixth District Court of Appeal held that the prosecutor committed prejudicial misconduct by informing the jury of the consequences of finding the defendant to be an SVP. The California Supreme Court granted review in this case behind *People v. Lopez* (S143615), which was argued and submitted on November 6, 2007.

S. Probable Cause Hearing must Be Held Before the SVP Trial

According to Welfare and Institutions Code section 6602, the trial court must hold a probable cause hearing prior to holding a trial on the SVP petition.

- ▶ In *People v. Hayes* (2006) 137 Cal.App.4th 34, the trial court did not hold the mandatory probable cause hearing until the jury was deliberating on the SVP petition at the end of the defendant's trial. Division One of the First District Court of Appeal concluded that under the SVP Act the probable cause hearing is a necessary prerequisite (not an accompaniment or an afterthought) to trial. Therefore, the trial court erred in conducting the probable cause hearing at the end of the trial on the petition. However, relying on *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, which governs the determination of how and when errors committed at a criminal preliminary hearing merit reversal, the Court of Appeal deemed the error harmless.

T. Effect of Reversal of Conviction That Led to the Initiation of SVP Proceedings

Welfare and Institutions Code section 6601, subdivision (a)(2), provides that an SVP petition "shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law."

- ▶ In *In re Smith* (formerly published at 141 Cal.App.4th 217), the petitioner was convicted of failing to register as a sex offender. While review of his conviction was pending in the California Supreme Court, he was evaluated for SVP commitment and the district attorney filed an SVP petition. Several months later, the California Supreme Court reversed his conviction for failure to register on instructional grounds, and the district attorney elected not to refile charges against him. Nevertheless, the district attorney sought to move forward with the newly initiated SVP proceedings. Petitioner then filed a petition for a writ of habeas corpus objecting to the trial court conducting any proceedings on the SVP petition. Division Seven of the Second District Court of appeal denied the writ, holding that

the reversal of the petitioner's conviction does not preclude the trial court from continuing with SVP proceedings that had already begun. In support of this position, the Court of Appeal cited Welfare and Institutions Code section 6601, subdivision (a)(2), and concluded that the petitioner's custody was unlawful but effectuated in good faith. The California Supreme Court granted review in this case (S108291), and oral argument was held on January 9, 2008.

U. Civil Dismissal Statute Not Applicable to SVP Proceedings

Code of Civil Procedure section 583.310 provides that a trial must commence within five years once the action has been filed. Furthermore, pursuant to Code of Civil Procedure section 583.320, if a new trial is granted because of a reversal or mistrial, the trial should commence within three years of the reversal or mistrial.

- ▶ In *People v. Evans* (2005) 132 Cal.App.4th 950, in 1999, a jury was unable to reach a verdict on an SVP petition filed in 1998. In 2003, the defendant moved to dismiss the petition under the civil dismissal statutes discussed above. The trial court denied the motion. Division Four of the First District Court of Appeal affirmed, holding that the civil dismissal statutes do not apply to SVP proceedings. First, the Court of Appeal noted that SVP proceedings are "special proceedings" and not civil actions. By the civil dismissal statutes' own terms, they do not apply to special proceedings. Second, the Court of Appeal concluded that application of the civil dismissal statutes to SVP proceedings would be inconsistent with public policy and the intent of the SVP Act.

V. Civil Discovery Act

Under the Civil Discovery Act: "Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter . . ." (Code Civ. Proc., § 2017.010.)

- ▶ In *People v. Dixon* (2007) 148 Cal.App.4th 414, the trial court denied the defendant's mid-trial request to order the People to disclose the prosecution victim witnesses' contact information. Division Two of the Fourth District Court of Appeal agreed that ordinarily such a request should be granted in an SVP proceeding but held that the defendant did not bring the motion pre-trial as required under the Civil Discovery Act and did not cite the specific statutory provision under which he was seeking such disclosure. Therefore, the Court of Appeal affirmed the denial of the defendant's request for discovery.

Under the Civil Discovery Act: “Any party may obtain discovery by . . . [r]equests for admissions.” (Code Civ. Proc., § 2019.010, subd. (e).)

- ▶ In *Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, the trial court permitted the People to propound requests for admissions to the defendant in accordance with the Civil Discovery Act. Division Three of the Fourth District Court of Appeal granted the defendant’s writ petition, holding that requests for admissions may not be propounded in SVP proceedings because their use would eviscerate the SVP Act’s requirement that the People prove its case beyond a reasonable doubt. According to the Court of Appeal, to relieve the state of this burden would violate the defendant’s due process rights.

W. Castration

- ▶ In *People v. Flores* (2006) 144 Cal.App.4th 625, the defendant voluntarily underwent chemical and surgical castration. At trial on the recommitment petition, the People’s experts conceded that the actuarial risk instrument on which they relied (the Static-99) did not account for castration. Nevertheless, the People’s experts opined that the defendant still met the recommitment criteria, and the jury agreed. The Fifth District Court of Appeal held the evidence sufficient to find that the defendant was likely to reoffend, notwithstanding the fact that he had been castrated.

X. Outpatient Treatment - Petition for Conditional Release

Welfare and Institutions Code section 6608 permits SVPs to file a petition for conditional release for outpatient status without the recommendation or concurrence of state officials. “The court shall hold a hearing to determine whether the person committed would be a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior due to his or her diagnosed mental disorder if under supervision and treatment in the community. If the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community, the court shall order the committed person placed with an appropriate forensic conditional release program operated by the state for one year. A substantial portion of the state-operated forensic conditional release program shall include outpatient supervision and treatment.” (Welf. & Inst. Code, § 6608, subd. (d).)

- ▶ In *People v. Rasmuson* (2006) 145 Cal.App.4th 1487, the trial court denied an

SVP's petition for conditional release for outpatient treatment pursuant to Welfare and Institutions Code section 6608. As a threshold matter, Division Two of the Second District Court of Appeal held that the substantial evidence standard of review applies to appeals from the denial of a petition for conditional release. On the merits, the Court of Appeal concluded that the trial court's denial was not supported by substantial evidence.

Y. Public Access to SVP Proceedings

- ▶ In *People v. Dixon* (2007) 148 Cal.App.4th 414, the trial court granted the media's request to televise or videotape the SVP proceedings. Division Two of the Fourth District Court of Appeal agreed with the defendant that the press does not have a constitutional right to have a camera in the courtroom and that the trial court failed to consider adequately the factors set forth in California Rules of Court, rule 1.150(e)(1). Nevertheless, the Court of Appeal found the trial court's erroneous media access ruling harmless because it did not deny him a fair trial in violation of his due process rights.

Z. Forced Medication

- ▶ In *In re Calhoun* (2004) 121 Cal.App.4th 1315, Division Six of the Second District Court of Appeal concluded that the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits the involuntary medication of a competent SVP with antipsychotic drugs in the absence of an emergency only when such treatment is in the SVP's medical interest.

II. MENTALLY DISORDERED OFFENDER (MDO) COMMITMENT

A. **Untimely Filed Extended Commitment Petitions**

Penal Code section 2972, which governs the MDO recommitment procedure, provides: “prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether” the patient continues to meet the statutory commitment criteria. (Pen. Code, § 2972, subd. (e).)

- ▶ In *People v. Allen* (2007) 42 Cal.4th 91, the California Supreme Court decided the following question: “does the trial court have authority to extend an MDO’s commitment if the petition is filed *after* the prior commitment has terminated?” *Allen* answered this question in the negative and held that the MDO statute imposed a mandatory requirement that a recommitment petition must be filed before the termination of the prior commitment. The People’s failure to comply with this mandatory filing deadline deprives the trial court of jurisdiction and requires dismissal of the extended commitment petition. Dismissal, however, does not automatically entitle the patient to release, as he or she may still be subject to an LPS Act conservatorship pursuant to Welfare and Institutions Code section 5000 et seq.

B. **Untimely Held Extended Commitment Trial**

Pursuant to Penal Code section 2972, subdivision (a), trial on an extended commitment petition “shall commence no later than 30 calendar days” before the time the MDO would have been released, “unless the time is waived by the person or unless good cause is shown.” Unlike the mandatory deadline for filing an extended commitment petition discussed in *Allen*, however, the 30-day trial deadline is directory. (*People v. Noble* (2002) 100 Cal.App.4th 184, 188.)

- ▶ In *People v. Cobb* (2007) 157 Cal.App.4th 393, Division Two of the Fourth District Court of Appeal rejected an MDO’s contention that his right to due process was violated because trial on the commitment petition did not begin until after he was due to be released. According to the Court of Appeal, because the MDO had notice and an opportunity to be heard at the time of the *initial* commitment, his continued detention past his release date did not offend due process. Essentially, the Court of Appeal determined that because there had *already* been a determination that he was an MDO, and the purpose of the extended commitment trial was simply to prove that he *still* met the commitment criteria, it was constitutionally permissible to keep him confined until the end of

the trial after his statutorily contemplated release date. In addition, the Court of Appeal concluded that the MDO in this case was unable to demonstrate actual prejudice sufficient to merit dismissal of the petition on due process grounds.

C. Outpatient Treatment

MDOs may serve all or part fo their commitment as an outpatient under the supervision of the Conditional Release Program (CONREP). (Pen. Code, § 2972, subd. (d).) Time spent as an outpatient, however, does not count toward the MDO's maximum term of commitment. (Pen Code, § 2972, subd. (c).)

- ▶ In *People v. Morris* (2005), 126 Cal.App.4th 527, the MDO was placed on outpatient status. The district attorney did not file an extended commitment petition until just after his one-year commitment was originally set to expire. The trial court granted the MDO's motion to dismiss the extended commitment petition as untimely. Division One of the Fourth District Court of Appeal, however, reversed and reinstated the extended commitment petition. Relying on Penal Code section 2972, the Court of Appeal noted that because the MDO did not receive (and was not entitled to) credits toward his maximum term of commitment while an outpatient, the deadline for filing an extended commitment petition had not actually passed. The People must file an extended commitment petition before the MDO has served one year in custody. The MDO in *Morris* had not yet served a year as an inpatient at the time the extended commitment petition was filed.

- ▶ In *People v. May* (2007) 155 Cal.App.4th 350, following a bench trial, the trial court recommitted the MDO to the state hospital for another year. At the conclusion of the trial, the MDO asked the court to conditionally release him for outpatient treatment. The trial court denied the request. On appeal, the MDO contended that the trial court did not realize it had the authority - pursuant to Penal Code section 2972, subdivision (d) - to place him in an outpatient treatment program. The Attorney General argued that conditional release for outpatient treatment may only be initiated in separate proceedings pursuant to Penal Code sections 1603 and 1604. Division Three of the First District Court of Appeal agreed with the MDO that Penal Code section 2972, subdivision (d), authorized the trial court to order an MDO conditionally released for outpatient treatment at the conclusion of an MDO extended commitment trial without holding a separate hearing specifically devoted to outpatient release issues.

D. District Attorney May Not File Initial or Extended Commitment Petitions Without Written Evaluation from the Medical Director Stating That the Person’s Mental Disorder Is Not (or Cannot Be Kept) in Remission

“[I]f the prisoner’s severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee . . . shall submit to the district attorney of the county . . . of commitment, his or her written evaluation on remission.” (Pen. Code, § 2970.)

“The district attorney may then file a petition with the superior court for continued involuntary treatment for one year.” (Pen. Code, § 2970.)

- ▶ In *People v. Garcia* (2005) 127 Cal.App.4th 558, while receiving treatment as an MDO as part of his parole, the medical director of the state hospital sent a letter to the district attorney advising that the patient’s mental disorder was in remission and that an initial commitment was not being sought. Nevertheless, the district attorney filed an initial commitment petition, and the parolee was committed as an MDO following a jury trial. Division Two of the Fourth District Court of Appeal concluded the district attorney lacked the authority to file an *initial* commitment petition without a written evaluation from the medical director of the state hospital opining that the MDO’s severe mental disorder is not in remission and cannot be kept in remission without involuntary treatment.
- ▶ In *People v. Marchman* (2006) 145 Cal.App.4th 78, the Third District Court of Appeal reached a similar conclusion and held that the district attorney lacked the authority to file an *extended* commitment petition without a written evaluation from the medical director of the state hospital opining that the MDO’s severe mental disorder is not in remission and cannot be kept in remission without involuntary treatment. (See also *Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347 [where Division Six of the Second District Court of Appeal reached the same result].)

E. Remission

To be committed as an MDO, the People must prove beyond a reasonable doubt that the person has a severe mental disorder that is not in remission or cannot be kept in remission without involuntary treatment. (Pen. Code, § 2970.) A person is not in remission if he or she has been physically violent (except in self-defense) during the year preceding the MDO trial. (Pen. Code, § 2962, subd. (a).)

- ▶ In *People v. Burroughs* (2005) 131 Cal.App.4th 1401, Division Six of the Second District Court of Appeal held that if an MDO has been physically violent during the year period before a recommitment determination is made, the trial court is automatically required to find that he or she is not in remission. The Court of Appeal concluded that its holding did not amount to an unconstitutional mandatory presumption.

F. Forced Medication

- ▶ In *In re Qawi* (2004) 32 Cal.4th 1, the California Supreme Court held that in a nonemergency situation an MDO can only be compelled to be treated with antipsychotic medication if determined by a court to be incompetent to refuse medical treatment or to be a danger to others within the meaning of Welfare and Institutions Code section 5300.

G. Untimely Challenge to Initial Commitment Criteria

- ▶ In *People v. Merfield* (2007) 147 Cal.App.4th 1071, a prisoner waived his right to a hearing on whether he suffered from a severe mental disorder and should be treated by the Department of Mental Health as a condition of his parole. After his initial commitment expired, he filed a petition challenging the determination that he qualified as an MDO. Division Six of the Second District Court of Appeal held that by waiting until his initial commitment had already expired, the MDO waived his right to contest his mental state at the time of the commission of the underlying offense.

H. Qualifying Prior Offenses

To meet the initial MDO commitment criteria, the prisoner must have committed an enumerated qualifying prior offense or a non-enumerated offense in which the prisoner “used force or violence,” threatened another with the use of violence, or “caused serious bodily injury.” (Pen. Code, § 2962, subd. (e).)

- ▶ In *People v. Green* (2006) 142 Cal.App.4th 907, Division Six of the Second District Court of Appeal concluded that the prisoner’s felony vandalism conviction did not meet the definition of a prior qualifying offense. The Court of Appeal concluded that Penal Code section 2962, subdivision (e), did not apply to the use of force against property or inanimate objects absent a showing that the manner in which the offense was committed involved the use of force or violence, a threat of the use of violence, or the causation of serious bodily injury.

- ▶ In *People v. Kortesmaki* (2007) 156 Cal.App.4th 922, Division Six of the Second District Court of Appeal concluded that the prisoner's conviction of possessing flammable or combustible materials with intent to set fire to property did amount to a qualifying prior offense because the actual commission of the offense involved an implied threat to use force or violence against another person.

I. 90-Day Treatment Regimen

According to Penal Code section 2962, subdivision (d)(1), an initial MDO commitment may not be established unless "the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day."

- ▶ In *People v. Martin* (2005) 127 Cal.App.4th 970, the defendant had received treatment for several months while in the county jail before his criminal trial. After conviction, he was sentenced to a state prison term but received less than 90 days treatment while in the state's custody before an MDO petition was filed. Nevertheless, Division Six of the Second District Court of Appeal concluded that a prisoner's pre-trial inpatient treatment at the county jail counted toward the 90-day treatment criterion necessary for an MDO commitment.

J. Hearsay

- ▶ In *People v. Martin* (2005) 127 Cal.App.4th 970, the prosecution proved the prior qualifying offense element - in particular, the force or violence criterion - by an expert witness' reference to the description of the offense contained in the probation report. Finding no error, Division Six of the Second District Court of Appeal noted that although a probation report is itself hearsay and is not admissible, an expert witness may rely on reliable hearsay materials in formulating an opinion. Therefore, the Court of Appeal concluded that a qualified mental health professional may render an opinion on the force or violence criterion and may rely on the probation report from the underlying case in formulating that opinion.
- ▶ In *People v. Dodd* (2005) 133 Cal.App.4th 1564, several expert witnesses relied on a parole report that the prisoner molested a young girl, and all of the experts considered this incident essential to their pedophilia diagnoses. Division Six of the Second District Court of Appeal reiterated the legal principles discussed in *Martin*, *supra*, but found the reference to the molestation contained in the parole report in this case amounted to unreliable hearsay. The Court of Appeal concluded that the

brief and conjectural reference to the molestation in the parole report failed to establish the occurrence of the incident with sufficient reliability to be considered by the experts in forming their opinions. As a result, the trial court abused its discretion in ruling that the experts could consider that incident in forming their opinions. Without consideration of the incident mentioned in the parole report, there was no substantial evidence to support the finding that the prisoner suffered from pedophilia.

K. Use of Physical Restraints During Trial

- ▶ In *People v. Fisher* (2006) 136 Cal.App.4th 76, Division Six of the Second District Court of Appeal held that the rules attendant to shackling in a criminal proceeding apply to MDO proceedings. On the facts of this case, however, the Court of Appeal concluded that (1) the MDO forfeited his appellate challenge by failing to object in the trial court and (2) the use of restraints was justified by the trial court's finding that the MDO posed an escape risk.

L. Self-Representation

- ▶ In *People v. Hannibal* (2006) 143 Cal.App.4th 1087, Division Six of the Second District Court of Appeal held that MDOs do not have a constitutional right to represent themselves because of the civil nature of the proceedings. The Court of Appeal also concluded that the trial court did not abuse its discretion in denying the MDO his statutory right to represent himself because his request was not unequivocal and he failed to fully appreciate the complexity of the legal issues in his case.

M. Privilege Against Self-Incrimination

- ▶ In *People v. Lopez* (2006) 137 Cal.App.4th 1099, Division Two of the Fourth District Court of Appeal held that the federal constitutional privilege against self-incrimination applicable to criminal trial did not apply to MDO proceedings, which are civil in nature. In reaching this conclusion, the Court of Appeal expressly disagreed with *People v. Haynie* (2004) 116 Cal.App.4th 1224, 1230 [finding such a right in proceedings to extend insanity acquittee commitments] and *In re Luis C.* (2004) 116 Cal.App.4th 1397, 1403 [finding such a right in juvenile extended commitment proceedings]. Finding no right not to testify under those commitment schemes, the Court of Appeal then concluded that denying the right to MDOs would not violate equal protection principles.

N. Plea Bargains

- ▶ In *People v. Renfro* (2005) 125 Cal.App.4th 223, a criminal defendant entered into a plea bargain whereby he would plead guilty with the understanding that the ensuing conviction could not later be used as a prior qualifying offense in subsequent MDO proceedings. Nevertheless, that conviction was in fact used to establish the prior qualifying offense criterion at a future MDO trial, after which the prisoner was committed as an MDO. Division Six of the Second District Court of Appeal affirmed the MDO commitment, holding that the provision in the prisoner's plea bargain preventing the use of his conviction as the qualifying offense for commitment as an MDO was not a proper subject for a plea agreement and may not be enforced by specific performance. Application of the MDO law is not a discretionary element of sentencing that the prosecution or the trial court may include in a negotiated plea to criminal charges.

III. NOT GUILTY BY REASON OF INSANITY (NGI) COMMITMENT

A. Untimely Filed Extended Commitment Petitions

An individual found not guilty by reason of insanity of a felony may not be committed to a state hospital for a period of time any greater than “the longest term of imprisonment which could have been imposed for the offense or offenses for which the person was convicted.” (Pen. Code, § 1026.5, subd. (a)(1).) However, the person’s commitment may be extended for an additional two years if the individual “by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others.” (Pen. Code, § 1026.5, subds. (b)(1) & (b)(8).)

Penal Code section 1026.5, subdivision (b), sets forth a detailed set of deadlines for extending an insanity acquittee’s commitment beyond the maximum term. If the district attorney elects to file an petition extended commitment petition, it must be filed “no later than 90 days before the expiration of the original commitment unless good cause is shown.” (Pen. Code, § 1026.5, subd. (b)(2).) In addition, trial on the petition must “commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown.” (Pen. Code, § 1026.5, subd. (b)(4).)

Despite the inclusion of these deadlines, “[t]he time limits” set forth in Penal Code section 1026.5, by the statute’s own terms, “are not jurisdictional.” (Pen. Code, § 1026.5, subd. (a)(2).) Nevertheless, the fact that a statutory deadline is directory does not leave the proposed committee without remedy when the government fails to comply with it. “Although the time requirements of section 1026.5 are not jurisdictional, considerations of due process require an inquiry into whether the defendant was harmed by the violation of the statutory time requirements.” (*In re Johns* (1981) 119 Cal.App.3d 577, 581.)

Courts presented with a due process challenge to directory statutory deadline violations should conduct “a balancing of any prejudicial effect of the delay against the justification for the delay.” (*Ibid.*) In order to gain dismissal of the petition on due process grounds, “it is incumbent upon the defendant to show circumstances of actual prejudice.” (*Ibid.*)

The question of how to measure actual prejudice in the case of an untimely filed NGI extended commitment petition has recently been the subject of two conflicting published opinions and is currently pending before the California Supreme Court in *People v. Price* (S151207).

- ▶ In *People v. Mitchell* (2005) 127 Cal.App.4th 936, the prosecutor filed an NGI

extended commitment petition 76 days late, and the insanity acquittee was not brought before the trial court until 9 days before his statutory release date. The trial court denied the proposed committee's dismissal motion and granted a number of continuances so that he could prepare a defense. Approximately six months after the expiration of the insanity acquittee's maximum term of commitment, following a bench trial, the trial court issued an order extending his commitment for an additional two years. Division Three of the First District Court of Appeal held that the insanity acquittee's due process rights were not violated by the untimely filed extended commitment petition and affirmed the denial of his dismissal motion. *Mitchell* concluded that the insanity acquittee was not "denied a fair hearing or given insufficient opportunity to prepare for the trial which ultimately produced the commitment order now on appeal." The Court of Appeal refused to find actual prejudice in the fact that the insanity acquittee could not have received a fair trial had it been held prior to the expiration of his maximum term of commitment.

- ▶ Division Five of the First District Court of Appeal reached the opposite result in *Price*, which involved an almost identical factual situation to *Mitchell*. In *Price*, the Court of Appeal concluded that as a result of the untimely filing of the extended commitment petition so close to the expiration of the insanity acquittee's maximum term of commitment, he was "forced to choose between proceeding to trial without adequate preparation, or remaining in custody past the date on which he normally would be released."

The essential difference between *Mitchell* and *Price* is the point at which actual prejudice should be measured. According to *Mitchell*, an insanity acquittee cannot demonstrate actual prejudice unless the person can demonstrate that the ensuing trial was rendered fundamentally unfair as a direct result of the late-filed petition. *Price*, on the other hand, focuses on whether the proposed committee could have been afforded a fair trial had it been held prior to his statutorily contemplated release date.

Thus, the question before the Supreme Court is: "Whether, contrary to *People v. Mitchell* (2005) 127 Cal.App.4th 936, the untimely filing of a petition to extend an insanity commitment (Pen. Code, § 1026.5) denies due process on a theory the defendant establishes actual prejudice by being 'forced to choose between proceeding to trial without adequate preparation, or remaining in custody past the date on which he normally would be released.'"

B. The "Control" Element

In *In re Howard N.* (2005) 35 Cal.4th 117, the California Supreme Court held that in order to comport with federal due process principles the extended commitment scheme for minor wards (Welf. & Inst. Code, § 1800, et seq.) must be construed to require proof that the person under commitment has serious difficulty controlling dangerous behavior.

- ▶ Since *Howard N.* was decided, a number of Courts of Appeal have addressed whether this “control” element also applies to NGI extended commitment proceedings. The First, Third, and Fifth Districts have all concluded that due process compels such a finding at NGI extended commitment proceedings. (*People v. Zapisek* (2007) 144 Cal.App.4th 1151 [First District]; *People v. Galindo* (2006) 142 Cal.App.4th 531 [Third District]; *People v. Bowers* (2006) 145 Cal.App.4th 870 [Fifth District].)
- ▶ Because *Zapisek*, *Galindo*, and *Bowers* all involved court trials, none of them offered the occasion to determine whether a corresponding instructional duty in a jury trial existed as well. To date, only Division Two of the First District Court of Appeal has issued a published opinion addressing the question of whether instruction on this element is required in a jury trial. In *People v. Sudar* (A115464), the Court of Appeal concluded that “the trial court erred in failing to instruct the jury pursuant to *Howard N.*” that it had to find the insanity acquittee had ““at the very least, serious difficulty controlling his potentially dangerous behavior.”” *Sudar* also concluded that failure to instruct on the “control” element is subject to the *Chapman* federal constitutional harmless error standard on appeal.

C. Waiver of Personal Appearance and Trial by Jury

- ▶ In *People v. Givan* (2007) 156 Cal.App.4th 405, the insanity acquittee’s defense attorney informed the trial court that his client waived his right to a trial on the extended commitment petition and agreed to a two-year extension. The insanity acquittee was not present in court at the time of this waiver but provided the court with a declaration consistent with his attorney’s oral waiver before it was accepted by the trial court. The Fifth District Court of Appeal acknowledged that the defendant’s personal appearance would be required in order for such a waiver of his trial rights to be valid in a felony criminal proceeding. However, relying on the civil nature of an NGI extended commitment trial and the absence of any statutory requirement of a personal appearance to waive one’s rights, the Court of Appeal declined to impose such a requirement in this context. Addressing the validity of the insanity acquittee’s waiver of his jury right, the Court of Appeal noted that the right to trial by jury at a civil extended commitment hearing is statutory and not constitutional. Accordingly, due process does not forbid an insanity acquittee’s

attorney from entering a valid jury waiver without a personal waiver made by the defendant in open court.

D. Use of Physical Restraints During Trial

- ▶ In *People v. Vance* (2006) 141 Cal.App.4th 1104, the Third District Court of Appeal rejected the Attorney General's contention that criminal law jurisprudence regarding shackling should not be extended to NGI extended commitment hearings because they are civil in nature. An insanity acquittee may not be shackled during an extended commitment jury trial unless the People establish that there is a manifest need for such restraints.

E. Outpatient Treatment

Insanity acquittees are eligible for conditional release for outpatient treatment and supervision if "the director of the state hospital or other treatment facility to which the person has been committed advises the court that the defendant will not be a danger to the health and safety of others while on outpatient status, and will benefit from such outpatient status." (Pen. Code, § 1602, subd. (a)(1).)

In addition, the community program director must make the same recommendation and identify an appropriate program of supervision and treatment. (Pen. Code, § 1602, subd. (a)(2).)

At the ensuing hearing on the appropriateness of outpatient status, the insanity acquittee has the burden of proving that he or she is no longer mentally ill or dangerous. (*People v. Sword* (1994) 29 Cal.App.4th 614, 624.)

Trial courts are not required to follow expert witness recommendations, even unanimous ones, in favor of conditional release for outpatient treatment. (*People v. Sword* (1994) 29 Cal.App.4th 614, 629.)

Denial of outpatient status is reviewed for abuse of discretion. (*People v. Sword* (1994) 29 Cal.App.4th 614, 619, fn. 2, 626.)

- ▶ In *People v. Cross* (2005) 127 Cal.App.4th 63, the medical director of the state hospital recommended that an insanity acquittee be conditionally released for outpatient treatment. Several expert witnesses unanimously testified that the person could be safely and effectively treated under outpatient supervision in the community. The district attorney did not present any evidence at all at the hearing.

Nevertheless, the trial court denied the request for outpatient treatment. The Second District Court of Appeal concluded that the trial court abused its discretion and reversed the denial of the insanity acquittee's request for outpatient status. The Court of Appeal was unpersuaded by the trial court's reliance on the insanity acquittee's age. Noting that he was 79 years old, the Court of Appeal found the individual's age to cut in favor of conditional release. In addition, the Court of Appeal took issue with the trial court's reliance on the persistence of the insanity acquittee's mental illness, noting that mental illness alone does not justify civil commitment and the evidence suggested that he would not be dangerous while on his medications (which he took voluntarily). Lastly, the Court of Appeal took issue with the doubts expressed by the trial court regarding the structure of the program and the facility where he would be supervised.

IV. INCOMPETENT TO STAND TRIAL COMMITMENT

A. Forced Medication

In *Sell v. United States* (2003) 539 U.S. 166, the United States Supreme Court held that federal due process principles require the following four findings prior to authorizing the involuntary administration of antipsychotic medication for sole purpose of rendering a criminal defendant competent to stand trial: (1) important governmental interests are at stake; (2) administration of the drugs is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense; (3) any alternative, less intrusive treatments are unlikely to achieve substantially the same results; and (4) administration of the drugs is medically appropriate, i.e., in the patient's best medical interest in light of his medical condition.

Sell also cautioned against ordering the involuntary administration of antipsychotic medications to render a defendant competent to stand trial without first considering alternative grounds, such as dangerousness or an incapacity on the part of the defendant to make competent decisions regarding medical treatment.

In response to *Sell*, the California Legislature amended Penal Code section 1370 to permit the involuntary administration of antipsychotic medication on trial competency grounds only if: "The people have charged the defendant with a serious crime against the person or property; involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial; the medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner; less intrusive treatments are unlikely to have substantially the same results; and antipsychotic medication is in the patient's best medical interest in light of his or her medical condition." (Pen. Code, § 1370, subd. (a)(2)(B)(ii)(III).)

In addition, the Legislature codified *Sell*'s preference for basing forced medication orders on grounds other than rendering an individual competent to stand trial, such as dangerousness or incapacity to make decisions regarding antipsychotic medications. (Pen. Code, § 1370, subd. (a)(2)(B)(iii).)

- ▶ In *People v. O'Dell* (2005) 126 Cal.App.4th 562, the Third District Court of Appeal was the first California appellate court to address the sufficiency of the required evidentiary showing under the new forced medication law. As a threshold matter, the Court of Appeal concluded that insufficiency claims should be

reviewed under the substantial evidence standard. *O'Dell* then proceeded to find the order at issue in that case defective in a number of ways. First, the Court of Appeal considered whether there was substantial evidence that important government interests were at stake. Other than acknowledging the government's legitimate interest in achieving a speedy and public resolution of the charges against the defendant, the trial court did not consider the facts or any special circumstances of the defendant's case. "Such a limited review of the governmental interests at stake," the court concluded, "provided insufficient evidence to satisfy the first factor in *Sell*." Second, *O'Dell* found that because the hospital never specified the condition it was proposing to treat or the actual antipsychotic medication it was proposing to administer, the evidence was insufficient to support the trial court's conclusion that treatment with antipsychotic medication was substantially likely to restore the defendant to competency. Third, the People introduced a letter from the state hospital in order to meet the requirement of showing that there were no alternatives to antipsychotic medication that would produce substantially similar results. The letter baldly stated: "[T]here are no alternatives, less intrusive methods that are likely to achieve the same results." The Court of Appeal found hospital's letter, "unsubstantiated by facts relating to any alternatives," insufficient evidence to support the trial court's finding. Finally, *O'Dell* found insufficient evidence that administering antipsychotic medication would be in the defendant's best medical interest because the hospital never identified the medication it proposed to administer and the condition that medication would treat.

- ▶ In *Carter v. Superior Court* (2006) 141 Cal.App.4th 992, the Second District Court of Appeal confronted a forced medication order similarly deficient to the one at issue in *O'Dell*. The only governmental interest identified by the trial court in the *Carter* was "bringing the defendant to trial." *Carter* found such a limited review of the governmental interests at stake to provide insufficient evidence to satisfy the first factor in *Sell*. With respect to the requirement that less intrusive alternatives to the involuntary administration of antipsychotic medication must be considered, *Carter* found insufficient the conclusory statement of the People's expert witness that "[l]ess intrusive treatments are unlikely to have substantially the same results as medication." Alternative treatments were not described, nor was there any explanation of what results might be expected from such treatments or why those results, while perhaps not the "same," would not be sufficient to satisfy the government's interests.
- ▶ In *People v. McDuffie* (2006) 144 Cal.App.4th 880, after finding the defendant incompetent to stand trial, the trial court issued an order authorizing the

involuntary administration of antipsychotic medication for the sole purpose of rendering him competent to stand trial. Division Two of the First District Court of Appeal held that the record did not contain substantial evidence that it was “substantially likely” that the involuntary administration of antipsychotic medication would render the defendant competent to stand trial. Specifically, the Court of Appeal held that evidence that an incompetent criminal defendant has no better than a fifty or sixty percent chance of being restored to competency does not amount to substantial evidence of a “substantial likelihood.” Therefore, the Court of Appeal reversed the order authorizing the involuntary administration of antipsychotic medications.

- ▶ In *U.S. v. Hernandez-Vasquez* (9th Cir. 2007) 506 F.3d 811, the Ninth Circuit acknowledged the tension between the specificity required of forced medication orders issued on competency grounds and the problems associated with judicial efforts to micromanage the decisions of medical professionals. Nevertheless, the Ninth Circuit concluded that “a *Sell* order must provide some limitations on the specific medications that may be administered and the maximum dosages and duration of treatment. At a minimum, to pass muster under *Sell*, the district court’s order must identify: (1) the specific medication or range of medications that the treating physicians are permitted to use in their treatment of the defendant, (2) the maximum dosages that may be administered, and (3) the duration of time that involuntary treatment of the defendant may continue before the treating physicians must report back to the court on the defendant’s mental condition and progress.” Such an order, the Ninth Circuit determined, would meet the treatment specificity demanded by *Sell* while leaving medical professionals “enough discretion to act quickly to respond to changes in the defendant’s condition.”

B. Availability of Immediate Outpatient Treatment

According to Penal Code section 1601, subdivision (a): “In the case of any person charged with and found incompetent on a charge of . . . a violation of [Penal Code] Section 288 . . . outpatient status under this title shall not be available until that person has actually been confined in a state hospital or other facility for 180 days or more”

However, Penal Code section 1370, subdivision (a)(1)(B)(ii), provides: “if the action against the defendant who has been found mentally incompetent is on a complaint charging a felony offense specified in Section 290, the prosecutor shall determine whether the defendant previously has been found mentally incompetent to stand trial pursuant to this chapter on a charge of a Section 290 offense, or whether the defendant is currently the subject of a pending Section 1368 proceeding arising out of a charge of a

Section 290 offense. If either determination is made, the prosecutor shall so notify the court and defendant in writing. After this notification, and opportunity for hearing, the court shall order that the defendant be delivered by the sheriff to a state hospital or other secure treatment facility for the care and treatment of the mentally disordered unless the court makes specific findings on the record that an alternative placement would provide more appropriate treatment for the defendant and would not pose a danger to the health and safety of others.”

- ▶ In *People v. Superior Court (Lopez)* (2005) 125 Cal.App.4th 1558, the defendant was found incompetent to stand trial on three counts of child molestation in violation of Penal Code section 288, subdivision (a). After holding a contested placement hearing, the trial court issued an order directing that the defendant be placed in an alternative setting to inpatient treatment. The Third District Court of Appeal concluded that the trial court did not have the authority to impose an alternative placement such as outpatient treatment. Even though the offense prohibited by Penal Code section 288, subdivision (a), is one of the ones set forth in Penal Code section 290, the Third District Court of Appeal concluded that Penal Code section 1370, subdivision (a)(1)(B)(ii), did not apply because: (1) there was nothing in the record to indicate that the defendant was previously found incompetent to stand trial on an offense listed in Penal Code section 290 and (2) the defendant was not then the subject of other competency proceedings. Because the defendant’s case was not governed by Penal Code section 1370, subdivision (a)(1)(B)(ii), outpatient placement was prohibited by Penal Code section 1601, subdivision (a).

C. *Marsden* Motion While Criminal Proceedings Suspended

- ▶ In *People v. Solorzano* (2005) 126 Cal.App.4th 1063, defense counsel declared a doubt as to defendant’s competency. The trial court then suspended criminal proceedings and ordered psychological evaluations. At the ensuing competency hearing, the defendant informed the court that he wished to “fire” his attorney. The trial court refused to conduct a *Marsden* hearing and proceeded to find the defendant competent to stand trial. On a subsequent date, after criminal proceedings were reinstated, the defendant asked for and the trial court held a *Marsden* hearing. The trial court denied the defendant’s request to substitute new counsel. A jury later convicted the defendant of a number of serious offenses. The Fifth District Court of Appeal reversed the defendant’s convictions on account of the trial court’s failure to hold the initial request for a *Marsden* hearing while criminal proceedings were suspended. Even after criminal proceedings have been suspended in order to conduct a competency hearing, the Sixth Amendment

imposes a mandatory duty to hold a hearing on the *Marsden* motion before adjudicating the defendant's competency. The Court of Appeal rejected the Attorney General's contention that the error in not holding the first *Marsden* hearing was cured by the holding of a later one.

D. Use of Statements from Court-Ordered Competency Evaluation at Trial

In general, the Fifth Amendment privilege against self-incrimination applies to competency examinations. (*Estelle v. Smith* (1981) 451 U.S. 454.) "In California, the 'protection . . . afforded by application of the Fifth Amendment is in fact provided by a judicially declared rule of immunity applicable to all persons whose competency to stand trial is determined at a [Penal Code] section 1368 hearing.'" (*People v. Jablonski* (2006) 37 Cal.4th 774, 802, quoting *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 496.) "[B]ecause a defendant may not invoke his right against compelled self-incrimination in a competency examination, 'neither the statements of [the defendant] to the psychiatrists appointed under [Penal Code] section 1369 nor the fruits of such statements may be used in trial of the issue of [the defendant's] guilt, under either the plea of not guilty or that of not guilty by reason of insanity.'" (*People v. Jablonski* (2006) 37 Cal.4th 774, 802, quoting *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 470.) These cases make it clear that the fruits of a competency evaluation may not be offered against a criminal defendant as part of the prosecution's case-in-chief.

- ▶ In *People v. Pokovich* (2006) 39 Cal.4th 1240, the California Supreme Court addressed the following question: "May a testifying defendant be impeached at trial with statements made before trial to mental health professionals during a court-ordered examination to determine the defendant's mental competency to stand trial?" The Supreme Court answered this question in the negative, concluding that such impeachment violates the federal Constitution's Fifth Amendment privilege against self-incrimination.

E. Actual Custody and Conduct Credits

Penal Code section 2900.5, subdivision (b), provides that "credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted."

The California Supreme Court has interpreted this statute to mean that "where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1193-1194.)

Penal Code section 4019 provides for a system of conduct credits whereby “a term of six days will be deemed to have been served for every four days spent in actual custody.”

- ▶ In *People v. Callahan* (2006) 144 Cal.App.4th 678, while confined at the state hospital as an insanity acquittee, the defendant was charged with battery upon a hospital guard. At the ensuing criminal proceedings he was found incompetent to stand trial and committed for a period not to exceed three years, as prescribed by the relevant competency statutes. The trial court awarded him actual custody and conduct credits for time served for his pretrial confinement. Division One of the First District Court of Appeal reversed both credit awards. With respect to actual custody credits, the Court of Appeal noted that “[r]egardless of the pretrial confinement on the new criminal charge of battery, defendant would have continued to suffer deprivation of his liberty because of the ongoing insanity commitment. He would not have been freed ‘but for’ his inability to post bail on the criminal charge.” As for conduct credits, the Court of Appeal concluded that credits for good behavior are inconsistent with the therapeutic goals of treating a defendant so that his competency can be restored, a goal that would be hindered if “‘mere institutional good behavior and participation automatically reduced the therapy period.’”

F. Trial Courts must Hold a Competency Hearing and Appoint Counsel after Declaring a Doubt as to the Defendant’s Competency

According to Penal Code section 1368, subdivision (a), “If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel.”

Penal Code section 1368, subdivision (b), further states: “If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant’s mental competence is to be determined in a hearing”

The competency standard is the same whether the question is competency to stand trial or competency to waive counsel and represent oneself. (*Godinez v. Moran* (1993) 509 U.S. 389, 399-400.)

- ▶ In *People v. Jenan* (2007) 148 Cal.App.4th 1144, two brothers jointly tried at a

preliminary hearing waived their right to counsel and agreed to represent themselves. On more than one occasion, the trial court expressed a doubt as to the defendants' competency to stand trial and asked them questions directed at discovering their level of competency. The Fifth District Court of Appeal concluded that the doubt as to mental competence that arose in the trial court's mind at the preliminary hearing imposed on the court the duty to appoint counsel to represent the brothers as set forth in Penal Code section 1368, subdivision (a). In addition, the trial court committed reversible error by failing to hold a competency hearing in accordance with Penal Code section 1368, subdivision (b).

- ▶ In *People v. Robinson* (2007) 151 Cal.App.4th 606, the Third District Court of Appeal reached a similar result. In *Robinson*, the trial court declared a doubt as to the defendant's competency while he was representing himself. The trial court, however, permitted the defendant to represent himself at the ensuing competency hearing, at which he was found competent to stand trial. Because the competency standard is the same whether the question is competency to stand trial or competency to waive counsel and represent oneself, the Court of Appeal concluded that the trial court should not have permitted the defendant to proceed without counsel once it declared a doubt as to his competency to stand trial. Whenever a trial court makes a formal order suspending criminal proceedings for a competency hearing, the court must appoint counsel to represent the defendant. The Court of Appeal therefore reversed and remanded for a retrospective competency hearing.

G. Changed Circumstances

- ▶ In *People v. Kaplan* (2007) 149 Cal.App.4th 372, the defendant was found competent to stand trial. Nine months later, after the defendant jumped off the second level of the jail, defense counsel declared anew a doubt as to the defendant's trial competency. The trial court refused to hold a competency hearing, finding insufficient evidence of changed circumstances. Division Three of the Fourth District Court of Appeal disagreed and held that "upon the presentation of substantial evidence showing a substantial change of circumstances or new evidence giving rise to a serious doubt about the validity of the original competency finding, regardless of the presence of conflicting evidence, the trial court must hold a subsequent competency hearing."

H. Procedures When There Is No Substantial Likelihood That the Defendant Will Regain Mental Competence in the Foreseeable Future

If a criminal defendant is found incompetent to stand trial, the trial court must suspend criminal proceedings and commit the individual to a state hospital until he or she regains competency. (Pen. Code, § 1370, subd. (a)(1)(B)(I).) However, a criminal defendant may not be committed to a state hospital for the sole purpose of restoring competency for more than three years or for a period greater than the maximum term of confinement for the underlying offense(s), whichever is less. (Pen. Code, § 1370, subd. (c)(1)(A).) At the end of the applicable maximum term of commitment, if the defendant has not been restored to competency, he or she must be returned to the original committing court. (Pen. Code, § 1370, subd. (c)(1)(A).)

If either the maximum commitment term has expired, or the medical director of the state hospital determines “there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future,” the trial court must either release the defendant or initiate appropriate alternative commitment proceedings under the LPS Act. (Pen. Code, § 1370, subd. (b)(1); see also *In re Davis* (1973) 8 Cal.3d 798, 807.)

“Whenever any defendant is returned to the court” because the medical director of the state hospital has determined there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future “and it appears to the court that the defendant is gravely disabled, as defined in [the LPS Act], the court shall order the conservatorship investigator of the county of commitment of the defendant to initiate conservatorship proceedings for the defendant pursuant to [the LPS Act].” (Pen. Code, § 1370, subd. (c)(2).)

- ▶ In *People v. Karriker* (2007) 149 Cal.App.4th 763, the defendant was found incompetent to stand trial and committed to the state hospital. The state hospital subsequently informed the trial court that there was no substantial likelihood that the defendant would regain mental competence in the foreseeable future. Pursuant to Penal Code section 1370, subdivision (c)(2), the trial court referred the matter to the county conservatorship investigator, who determined that the defendant did not meet the conservatorship criteria and declined to file an LPS conservatorship petition. The trial court then issued an order directing the county to file a conservatorship petition. Division Three of the First District Court of Appeal reversed, holding that Penal Code section 1370, subdivision (c)(2), does not authorize the trial court to compel the county to file a conservatorship petition. Rather, Penal Code section 1370, subdivision (c)(2), only authorizes the court to refer the matter for an investigation as to whether the filing of such a petition would be appropriate, a determination exclusively vested in the county conservatorship investigation agency. In sum, the Court of Appeal observed: “Penal Code section 1370 explicitly contemplates that some defendants charged

with felonies will be released if they are not restored to competency within the allowable time period. As explained above, an LPS conservatorship is not a catch-all for all incompetent defendants.”

I. Appointment of Expert Evaluators

After a doubt is declared regarding the defendant’s competency, “[t]he court shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant.” (Pen. Code, § 1369, subd. (a), emphasis added.)

However, “[i]n any case where the defendant or the defendant’s counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof.” (Pen. Code, § 1369, subd. (a), emphasis added.)

- ▶ In *People v. Robinson* (2007) 151 Cal.App.4th 606, the defendant declared a doubt as to his own competency, and the trial court appointed a single expert to evaluate him. The Third District Court of Appeal concluded that the trial court did not err by not appointing two experts. The requirement of appointing two experts - set forth in Penal Code section 1369, subdivision (a) - is only triggered when the defendant or his counsel informs the court that he is not seeking a finding of incompetence.

J. Certificate of Probable Cause

- ▶ In *People v. Oglesby* (G037796, Jan. 7, 2008), the defendant pled guilty to a number of charges and was sentenced to six years in state prison pursuant to a plea bargain. He filed a notice of appeal, but the trial court denied his request for a certificate of probable cause. The defendant then filed an amended notice of appeal purporting to contest his sentence on the ground that the trial court failed to sua sponte hold a competency hearing before sentencing. Division Three of the Fourth District Court of Appeal rejected the Attorney General’s contention that the defendant’s failure to obtain a certificate of probable cause barred appellate consideration of the issue identified in his amended notice of appeal. The issue of the defendant’s competency was raised by counsel after the defendant entered his plea. Thus, his challenge to the trial court’s refusal to hold a post-plea, pre-sentencing competency hearing was not an attempt to set aside his plea or the bargained-for sentence. As such, no certificate of probable cause was required for the Court of Appeal to reach this issue. On the merits, however, the Court of Appeal rejected the defendant’s argument that the trial court abused its discretion

in failing to suspend proceedings for a competency determination before sentencing.

**V. CIVIL COMMITMENT OF DELINQUENT WARDS:
THE EXTENDED DETENTION ACT (EDA)**

A. General Information on the EDA (Welf. & Inst. Code, § 1800 et seq.)

Extended Commitment Petition

“Whenever the Division of Juvenile Facilities determines that the discharge of a [ward in custody pursuant to a CYA/DJJ commitment] would be physically dangerous to the public because of the person’s mental or physical deficiency, disorder, or abnormality that causes the person to have serious difficulty controlling his or her dangerous behavior, the division . . . shall request the prosecuting attorney to petition the committing court for an order directing that the person remain subject to the control of the division beyond that time.” (Welf. & Inst. Code, § 1800, subd. (a))

Probable Cause Hearing

“If a petition is filed with the court for an order as provided in Section 1800 and, upon review, the court determines that the petition, on its face, supports a finding of probable cause, the court shall order that a hearing be held . . . within 10 calendar days . . . unless the person named in the petition waives this time.” (Welf. & Inst. Code, § 1801, subd. (a).)

“At the probable cause hearing, the court shall receive evidence and determine whether there is probable cause to believe that discharge of the person would be physically dangerous to the public because of his or her mental or physical deficiency, disorder, or abnormality which causes the person to have serious difficulty controlling his or her dangerous behavior.” (Welf. & Inst. Code, § 1801, subd. (b).)

Trial

Jury Right: “If a trial is ordered pursuant to Section 1801, the trial shall be by jury unless the right to a jury trial is personally waived by the person, after he or she has been fully advised of the constitutional rights being waived, and by the prosecuting attorney, in which case trial shall be by the court.” (Welf. & Inst. Code, § 1801.5.)

Required Findings: “The court shall submit to the jury, or, at a court trial, the court shall answer, the question: Is the person physically dangerous to the public because of his or her mental or physical deficiency, disorder, or abnormality which causes the person to have serious difficulty controlling his or her dangerous behavior?” (Welf. & Inst. Code, §

1801.5.)

Constitutional Rights: “The person shall be entitled to all rights guaranteed under the federal and state constitutions in criminal proceedings. A unanimous jury verdict shall be required in any jury trial.” (Welf. & Inst. Code, § 1801.5.)

Standard of Proof: “As to either a court or a jury trial, the standard of proof shall be that of proof beyond a reasonable doubt.” (Welf. & Inst. Code, § 1801.5.)

Length of Commitment

Extended commitments are for two years, but new petitions may be filed to extend two-year commitments indefinitely. (Welf. & Inst. Code, § 1802.)

B. The “Control” Element

At a delinquent ward extended commitment proceeding, “The court shall submit to the jury, or, at a court trial, the court shall answer, the question: Is the person physically dangerous to the public because of his or her mental or physical deficiency, disorder, or abnormality which causes the person to have serious difficulty controlling his or her dangerous behavior?” (Welf. & Inst. Code, § 1801.5.)

- ▶ In *In re Howard N.* (2005) 35 Cal.4th 117, the California Supreme Court held that in order to comport with federal due process principles the extended commitment scheme for minor wards (Welf. & Inst. Code, § 1800, et seq.) must be construed to require proof that the person under commitment has serious difficulty controlling dangerous behavior. (Note: while the current version of Welfare and Institutions Code section 1801.5 accounts for the “control” element, the version of the statute in place when *Howard N.* was decided did not.) The Supreme Court then found the absence of a jury instruction conveying this requirement to be prejudicial because there was no testimony establishing that the minor’s mental disorder caused him to have serious difficulty controlling his sexually deviant behavior.
- ▶ In *In re Anthony C.* (2006) 138 Cal.App.4th 1493, the Third District Court of Appeal reversed a juvenile extended commitment order for insufficient evidence of a serious difficulty controlling dangerous behavior. The prosecution’s doctor testified only that the minor posed a “moderate” risk and that his impulsivity could be controlled with medication the minor took voluntarily. In addition, the minor’s past offenses were crimes of opportunity, not crimes of compulsion. While the Court of Appeal acknowledged that the minor continued to have certain fantasies,

there was no evidence that the minor acted out on those fantasies in any inappropriate manner during his confinement. The minor's failure to act out while confined may not have affirmatively established that he had impulse control, but, at the very least, it left an evidentiary gap whether he lacked control.

- ▶ In *In re Brian J.* (2007) 150 Cal.App.4th 97, Division Two of the Fourth District Court of Appeal rejected a challenge to the sufficiency of the evidence that the minor had serious difficulty controlling dangerous behavior. Here, one of the prosecution experts prepared a formal risk assessment that demonstrated a substantial risk of recidivism and the minor had a history of acting out on his fantasies while under confinement.

C. Substantive Due Process

The SVP Act requires a showing that the person “has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” (Welf. & Inst. Code, § 6600, subd. (a)(1).)

In *People v. Roberge* (2003) 29 Cal.4th 979, 988, the California Supreme Court construed the term “likely,” as used above, to mean “a substantial danger, that is, a serious and well-founded risk” of re-offending.

In *In re Michael H.* (2005) 128 Cal.App.4th 1074, the Fifth District Court of Appeal concluded that in order to comport with the federal due process principles the EDA, like the SVP Act, must also be construed to require proof of “a serious and well-founded risk of reoffense.”

- ▶ In *In re Lemanuel C.* (2007) 41 Cal.4th 33, the California Supreme Court explicitly disapproved of *Michael H.*, holding that the EDA need not be construed to require proof of “a serious and well-founded risk of reoffense” in order to pass constitutional muster.

D. Equal Protection

- ▶ In *In re Brian J.* (2007) 150 Cal.App.4th 97, Division Two of the Fourth District Court of Appeal rejected the committee's equal protection challenge, in which he alleged that, unlike the SVP and MDO civil commitment schemes, the EDA provided less procedural protections, subjected him to broader commitment criteria, failed to require treatment, and imposed more punitive conditions.

- ▶ In *In re Lemanuel C.* (2007) 41 Cal.4th 33, the California Supreme Court concluded that persons committed under the EDA are not necessarily similarly situated to SVPs and MDOs for the purposes of challenging the commitment criteria, in particular the dangerousness element.

E. Double Jeopardy

Welfare and Institutions Code section 1801.5 mandates that minors subjected to extended commitment proceedings “shall be entitled to all rights guaranteed under the federal and state constitutions.”

Welfare and Institutions Code section 1803 provides that “[t]he appellate court may affirm the order of the lower court, or modify it, or reverse it and order the appellant to be discharged.”

- ▶ In *In re Anthony C.* (2006) 138 Cal.App.4th 1493, the Third District Court of Appeal reversed the order extending the minor’s commitment for insufficient evidence. The Court of Appeal then construed Welfare and Institutions Code sections 1801.5 and 1803 in concert to hold that “having reversed the commitment order for failure of proof, principles of double jeopardy require that we direct respondent to discharge [the minor] from civil confinement.”

F. Privilege Against Self-Incrimination

At trial on an EDA commitment petition, “[t]he person shall be entitled to all rights guaranteed under the federal and state constitutions in criminal proceedings.” (Welf. & Inst. Code, § 1801.5.)

- ▶ In *Joshua D. v. Superior Court* (2007) 157 Cal.App.4th 549, the district attorney filed a commitment petition pursuant to the EDA. The district attorney called Joshua to testify at the probable cause hearing. Joshua objected, but the juvenile court ordered him to testify. The instant writ proceedings ensued. Division Three of the Fourth District Court of Appeal concluded that the Fifth Amendment privilege against self-incrimination did not apply and that Joshua did not have a constitutional right to avoid testifying at EDA commitment proceedings. However, the Court of Appeal held that the former ward does have a statutory right not to testify, because the EDA expressly provides that “[t]he person shall be entitled to all rights guaranteed under the federal and state constitutions in criminal proceedings.” (Welf. & Inst. Code, section 1801.5.) In reaching this conclusion,

the Court of Appeal joined *In re Luis C.* (2004) 116 Cal.App.4th 1397 [where the Fifth District Court of Appeal reached the same result] and disagreed with *People v. Lopez* (2006) 137 Cal.App.4th 1099 [where Division Two of the Fourth District Court of Appeal reached the opposite result]. Finally, the Court of Appeal concluded that the statutory right not to testify applies at both the probable cause hearing and the ensuing trial.

G. Conditional Release for Outpatient Treatment

Welfare and Institutions Code section 1766, subdivision (a)(1), authorizes the Board of Parole Hearings to “[p]ermit the ward his or her liberty under supervision and upon conditions it believes are best designed for the protection of the public.”

- ▶ In *In re Schmidt* (2006) 143 Cal.App.4th 694, a former ward (now an adult) committed pursuant to Welfare and Institutions Code section 1800 et seq. filed a petition for a writ of habeas corpus seeking parole. The Sixth District Court of Appeal concluded that the Department of Juvenile Justice (former CYA) did not have the authority to release a person subject to such a commitment on parole. However, the Court of Appeal concluded Welfare and Institutions Code section 1766, subdivision (a)(1), authorizes conditional release for outpatient treatment, even though the extended commitment scheme does not specifically include any procedures governing conditional release of committed wards for outpatient treatment. In reaching this conclusion, the Court of Appeal noted that it was consistent with SVP, MDO, NGI, and incompetent to stand trial commitment regimes, all of which permit conditional release for outpatient treatment. The Court of Appeal also invited the Legislature to enact new laws governing the appropriate procedures for the conditional release of committed wards.

VI. LANTERMAN-PETRIS SHORT (LPS) ACT CONSERVATORSHIPS

A. General Information on the LPS Act (Welf. & Inst. Code, § 5000 et seq.)

“A conservator . . . may be appointed for any person who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism.” (Welf. & Inst. Code, § 5350.)

LPS conservators possess civil commitment powers in that they have the authority to place LPS conservatees in “a medical, psychiatric, nursing, or other state-licensed facility, or a state hospital, county hospital, hospital operated by the Regents of the University of California, a United States government hospital, or other nonmedical facility approved by the State Department of Mental Health or an agency accredited by the State Department of Mental Health, or in addition to any of the foregoing, in cases of chronic alcoholism, to a county alcoholic treatment center.” (Welf. & Inst. Code, § 5358, subd. (a)(2).)

An LPS Act conservatorship automatically terminates after one year, but the conservator may petition for reappointment prior to its expiration. (Welf. & Inst. Code, § 5361.)

The LPS Act defines “gravely disabled” in three ways, the most common being: “a condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter.” (Welf. & Inst. Code, § 5008, subd. (h)(1)(A).) The two other less common definitions of gravely disabled involve criminal defendants found incompetent to stand trial (see Welf. & Inst. Code, § 5008, subd. (h)(1)(B)) and chronic alcoholics (Welf. & Inst. Code, § 5008, subd. (h)(2)).

To establish a conservatorship, the county conservatorship agency must prove beyond a reasonable doubt that the proposed conservatee is gravely disabled. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225.)

The proposed conservatee has a statutory right to a trial by jury at the initial conservatorship proceedings as well as at future reappointment proceedings. (Welf. & Inst. Code, § 5008, subd. (d); cf *Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144, 147 [no constitutional right to trial by jury at LPS Act conservatorship proceedings].)

B. No Right to Self-Representation

“The court shall appoint the public defender or other attorney for the conservatee or proposed conservatee . . .” (Welf. & Inst. Code, § 5365.)

- ▶ In *Conservatorship of Joel E.* (2005) 132 Cal.App.4th 429, the Third District Court

of Appeal concluded that proposed conservatees have neither a constitutional nor a statutory right to self-representation at conservatorship trials. The Court of Appeal reasoned that the Sixth Amendment right to self-representation applies only to criminal proceedings and the statutory right to counsel does not carry a corresponding right to self-representation.

C. Capacity to Refuse or Consent to Electroconvulsive Treatment

Persons committed under the LPS Act have the right “[t]o refuse convulsive treatment including, but not limited to, any electroconvulsive treatment” (Welf. & Inst. Code, § 5325, subd. (f).)

Electroconvulsive treatment may only be administered if the conservatee provides written informed consent. (Welf. & Inst. Code, § 5326.7, subd. (d).)

“If either the attending physician or the [conservatee’s] attorney believes that the patient does not have the capacity to give a written informed consent, then a petition shall be filed in superior court to determine the patient’s capacity to give written informed consent. The court shall hold an evidentiary hearing after giving appropriate notice to the patient, and within three judicial days after the petition is filed. At such hearing the patient shall be present and represented by legal counsel.” (Welf. & Inst. Code, § 5326.7, subd. (f).)

“No person may be presumed to be incompetent because he or she has been evaluated or treated for mental disorder” (Welf. & Inst. Code, § 5331.)

“A person confined shall not be deemed incapable of refusal solely by virtue of being diagnosed as a mentally ill, disordered, abnormal, or mentally defective person.” (Welf. & Inst. Code, § 5326.5, subd. (d).)

- ▶ In *Conservatorship of Pamela J.* (2005) 133 Cal.App.4th 807, after a hearing at which the conservatee was not present, the trial court found that the conservatee did not have the capacity to give written informed consent to electroconvulsive treatment (ECT). Division One of the Fourth District Court of Appeal concluded that a trial court may not make the ultimate determination of a conservatee’s incapacity to give written informed consent for ECT without the conservatee’s presence. At the outset, the Court of Appeal noted that “[i]n general, with regard to decisions affecting the medical treatment of patients under the LPS, incompetence in making such decisions may not be presumed solely on the basis of their hospitalization.” The Court of Appeal then concluded that conducting a

hearing on whether the conservatee has the capacity to provide informed consent to ECT in the conservatee's absence violates both Welfare and Institutions Code section 5326.7 and the conservatee's due process right to be heard. After concluding this federal constitutional error was not harmless beyond a reasonable doubt, the Court of Appeal reversed the order finding the conservatee did not have the capacity to provide written informed consent.

D. Special Disabilities

Pursuant to Welfare and Institutions Code section 5357, the conservatorship agency must recommend for or against imposition of the following special disabilities:

- ▶ The privilege of possessing a license to operate a motor vehicle
- ▶ The right to enter into all or certain types of contracts
- ▶ The right to vote
- ▶ The right to refuse or consent to treatment
- ▶ The right to possess firearms

If a person is found gravely disabled and a conservatorship is established, the conservatee does not forfeit legal rights or suffer legal disabilities merely by virtue of the establishment of the conservatorship. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1578.)

On appeal, the imposition of any special disabilities must be supported by substantial evidence. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1578.)

- ▶ In *Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604, after a jury found the proposed conservatee to be gravely disabled within the meaning of the LPS Act, the court accepted a stipulated judgment submitted by both parties' attorneys concerning the imposition of special disabilities. The trial court did so without first consulting the conservatee regarding the consequences of the agreement or obtaining his on-the-record consent. Division One of the Fourth District Court of Appeal concluded that a trial court may not accept a stipulated judgment on these issues without first consulting the conservatee and obtaining his express consent on the record. The procedure adopted by the trial court violated the conservatee's procedural due process rights.

- ▶ In *Conservatorship of Tian L.* (2007) 149 Cal.App.4th 1022, at reappointment proceedings, the proposed conservatee’s attorney signed an affidavit attesting to her client’s agreement to reestablishment of her conservatorship without a hearing. On appeal, the conservatee argued that the stipulation only applied to reestablishment of the conservatorship and not to the proposed special disabilities. The conservatee relied on *Christopher A.*, discussed above. Division One of the Fourth District Court of Appeal distinguished *Christopher A.*, where there was no evidence in the record that the proposed conservatee consented to the terms of the stipulation, and concluded that the instant stipulation did not violate the conservatee’s procedural due process rights.
- ▶ In *Conservatorship of Amanda B.* (2007) 149 Cal.App.4th 342, the trial court’s final conservatorship order authorized the conservator to make medical decisions unrelated to her grave disability. Division One of the Fourth District Court of Appeal concluded that this portion of the order was supported by substantial evidence, as the evidence indicated that the conservatee was unsure whether she had diabetes, believed that if she had diabetes it might go away, and had a history of non-compliance with her medications when not under a conservatorship.

F. Placement Determination

- ▶ In *Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604, after a jury found the proposed conservatee to be gravely disabled within the meaning of the LPS Act, the court accepted a stipulated judgment submitted by both parties’ attorneys concerning the proper placement of the conservatee. The trial court did so without first consulting the conservatee regarding the consequences of the agreement or obtaining his on-the-record consent. Division One of the Fourth District Court of Appeal concluded that a trial court may not accept a stipulated judgment on these issues without first consulting the conservatee and obtaining his express consent on the record. The procedure adopted by the trial court violated the conservatee’s procedural due process rights. The Court of Appeal concluded that the attorney’s signed affidavit provided an adequate safeguard.
- ▶ In *Conservatorship of Tian L.* (2007) 149 Cal.App.4th 1022, at reappointment proceedings, the proposed conservatee’s attorney signed an affidavit attesting to her client’s agreement to reestablishment of her conservatorship without a hearing. On appeal, the conservatee argued that the stipulation only applied to reestablishment of the conservatorship and not to the proposed placement. The conservatee relied on *Christopher A.*, discussed above. Division One of the Fourth

District Court of Appeal distinguished *Christopher A.*, where there was no evidence in the record that the proposed conservatee consented to the terms of the stipulation, and concluded that the instant stipulation did not violate the conservatee’s procedural due process rights. The Court of Appeal concluded that the attorney’s signed affidavit provided an adequate safeguard.

F. Least Restrictive Placement

The LPS Act mandates placement in the least restrictive alternative.

“For a conservatee who is gravely disabled, as defined in subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008,” the conservator must place him or her “in the least restrictive alternative placement, *as designated by the court.*” (Welf. & Inst. Code, § 5358, subd. (a)(1), emphasis added.)

- ▶ In *Conservatorship of Amanda B.* (2007) 149 Cal.App.4th 342, when the trial court issued the final conservatorship order, the court set the conservatee’s level of placement as a “Locked Facility or Board and Care.” Division One of the Fourth District Court of Appeal concluded that by leaving the choice of the level of placement to the discretion of the conservator, the trial court failed to carry out its duty to determine the least restrictive placement. Therefore, the Court of Appeal reversed the ambiguous disjunctive designation of the least restrictive placement and remanded for the trial court to determine the appropriate level of placement rather than offer two options from which the conservator may choose.

G. No *Wende* Review in LPS Conservatorship Cases

In a criminal case, when appellate counsel files a brief that sets forth a summary of the proceedings and facts with citations to the transcript but raises no specific issues, the Court of Appeal must conduct a review of the entire record to determine whether the record reveals any issues that would, if resolved favorably to the appellant, result in reversal or modification of the judgment. (*People v. Wende* (1979) 25 Cal.3d 436, 441-442.)

- ▶ In *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, the California Supreme Court concluded that *Wende* procedures were inapplicable to LPS Act conservatorship appeals. However, according to *Ben C.*, “[i]f appointed counsel in a conservatorship appeal finds no arguable issues, counsel need not and should not file a motion to withdraw. Instead, counsel should (1) inform the court he or she has found no arguable issues to be pursued on appeal; and (2) file a brief setting

out the applicable facts and the law.” In addition, “[t]he conservatee is to be provided a copy of the brief and informed of the right to file a supplemental brief.” Moreover, even though dismissal of the appeal does not violate the California Constitution, the Court of Appeal has the discretion to “retain the appeal” and address any appellate issues that merit discussion.

Since *Ben C.* was decided, Courts of Appeal around the state have, for the most part, continued to conduct *Wende* reviews in appeals from other civil commitment orders, such as SVP, MDO, and NGI commitments. For more information on how to handle a civil commitment appeal in which there do not appear to be any arguable appellate issues, panel attorneys should contact their appellate project buddies for advice and/or sample briefing.

H. “Murphy” Conservatorships

As noted above, the LPS Act defines “gravely disabled” in three ways.

For incompetent criminal defendants not likely to be restored to competency, the LPS Act sets forth the following definition of “gravely disabled” known as a “Murphy” conservatorship: “a person, [who] has been found mentally incompetent under Section 1370 of the Penal Code and all of the following facts exist:

- ▶ (i) The indictment or information pending against the defendant at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person.
- ▶ (ii) The indictment or information has not been dismissed.
- ▶ (iii) As a result of mental disorder, the person is unable to understand the nature and purpose of the proceedings taken against him or her and to assist counsel in the conduct of his or her defense in a rational manner.”

(Welf. & Inst. Code, § 5008, subd. (h)(1)(B).)

If the medical director of the state hospital determines “there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future,” the trial court must either release the defendant or initiate appropriate alternative commitment proceedings under the LPS Act. (Pen. Code, § 1370, subd. (b)(1); see also *In re Davis* (1973) 8 Cal.3d 798, 807.)

“Whenever any defendant is returned to the court” because the medical director of the state hospital has determined there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future “and it appears to the court that the defendant is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008 of the Welfare and Institutions Code, the court shall order the conservatorship investigator of the county of commitment of the defendant to initiate conservatorship proceedings for the defendant pursuant to [the LPS Act].” (Pen. Code, § 1370, subd. (c)(2).)

- ▶ In *People v. Karriker* (2007) 149 Cal.App.4th 763, the defendant was found incompetent to stand trial and committed to the state hospital. The state hospital subsequently informed the trial court that there was no substantial likelihood that the defendant would regain mental competence in the foreseeable future. Pursuant to Penal Code section 1370, subdivision (c)(2), the trial court referred the matter to the county conservatorship investigator, who determined that the defendant did not meet the conservatorship criteria and declined to file an LPS conservatorship petition. The trial court then issued an order directing the county to file a conservatorship petition. Division Three of the First District Court of Appeal reversed, holding that Penal Code section 1370, subdivision (c)(2), does not authorize the trial court to compel the county to file a conservatorship petition. Rather, Penal Code section 1370, subdivision (c)(2), only authorizes the court to refer the matter for an investigation as to whether the filing of such a petition would be appropriate, a determination exclusively vested in the county conservatorship investigation agency. In sum, the Court of Appeal observed: “Penal Code section 1370 explicitly contemplates that some defendants charged with felonies will be released if they are not restored to competency within the allowable time period. As explained above, an LPS conservatorship is not a catch-all for all incompetent defendants.”

I. LPS Conservatorship Following Dismissal of Other Types of Civil Commitment Petitions

- ▶ In *People v. Allen* (2007) 42 Cal.4th 91, the California Supreme Court ordered the dismissal of an MDO extended commitment petition not filed until after the prior commitment had terminated. However, the Supreme Court concluded that dismissal of the MDO petition does not automatically entitle the patient to release, as he or she may still be subject to an LPS conservatorship. (See also *People v. Hill* (1982) 134 Cal.App.3d 1055 [dismissing an NGI extended commitment petition but leaving open the possibility of an LPS Act commitment].)

J. Right to Be Present At Hearing

Probate Code section 1825 requires the proposed conservatee's presence at a conservatorship trial unless certain conditions exist.

Prior to the establishment of a conservatorship, the court shall inform the proposed conservatee of all of the following:

- ▶ The nature and purpose of the proceeding.
- ▶ The establishment of a conservatorship is a legal adjudication of the conservatee's inability properly to provide for the conservatee's personal needs or to manage the conservatee's own financial resources, or both, depending on the allegations made and the determinations requested in the petition, and the effect of such an adjudication on the conservatee's basic rights.
- ▶ The proposed conservatee may be disqualified from voting if not capable of completing an affidavit of voter registration.
- ▶ The identity of the proposed conservator.
- ▶ The nature and effect on the conservatee's basic rights of certain orders requested
- ▶ The proposed conservatee has the right to oppose the proceeding, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal counsel if the proposed conservatee so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel.

(Prob. Code, § 1828, subd. (a).)

In addition, the court must consult the proposed conservatee to determine the proposed conservatee's opinion concerning all of the following:

- ▶ The establishment of the conservatorship.
- ▶ The appointment of the proposed conservator.

(Prob. Code, § 1828, subd. (b).)

Such personal advisements and consultation are not required only where both of the

following conditions are satisfied:

- ▶ The proposed conservatee is absent from the hearing and is not required to attend the hearing under the provisions of Probate Code section 1825, subdivision (a).
- ▶ Any showing required by Probate Code section 1825 has been made.

(Prob. Code, § 1828, subd. (c).)

- ▶ In *Conservatorship of John L.* (formerly published at 154 Cal.App.4th 1090), appointed counsel informed the trial court that the proposed conservatee did not wish to contest the appointment of a conservator and did not wish to be present at the hearing. Previously, the Conservatorship Investigation Report had indicated that the proposed conservatee opposed the appointment of a conservator. Division One of the Fourth District Court of Appeal acknowledged that proposed conservatees have both a statutory and constitutional due process right to be present at LPS hearings. However, the Court of Appeal held that appointed counsel may communicate a proposed conservatee's waiver of his or her right, and an effective waiver will be inferred by virtue of counsel's authority to act on his or her client's behalf with the client's consent. The Court of Appeal concluded that the unsworn statement offered by the proposed conservatee's attorney was sufficient to establish that the proposed conservatee waived his right to be present. The California Supreme Court granted review in this case on December 12, 2007. (See S157151.)

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