IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLES HUDEC

Petitioner,

v.

SUPERIOR COURT OF ORANGE COUNTY,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA

Real Party in Interest.

No. S213003

Court of Appeal No. G047465

O.C. Sup. Ct. No. C-47710

ANSWER BRIEF ON THE MERITS

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

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ISSUE PRESENTED

Does Penal Code section 1026.5, subdivision (b)(7), give a person who was committed after being found not guilty of criminal charges by reason of insanity the right to refuse to testify in a proceeding to extend that civil commitment?

INTRODUCTION

In 1981, Charles Hudec (hereinafter Petitioner), a paranoid schizophrenic, killed his father after hearing voices that told him he had to commit the killing in order to please God and to avoid becoming a homosexual. (*Hudec v. Superior Court* (2013) 218 Cal.App.4th 311, 314 (*Hudec*).) During the proceedings, both sides stipulated Petitioner was not guilty by reason of insanity and he was thereafter committed to Patton State Hospital. (*Ibid.*) Additionally, the court modified the commitment order to

reflect that Petitioner was committed on a voluntary manslaughter charge instead of first degree murder. (*Ibid.*)

In March of 2012, the Orange County District Attorney's Office (hereinafter Real Party), filed the latest petition to extend Petitioner's commitment to Patton State Hospital pursuant to Penal Code section 1026.5.[1] (*Hudec, supra,* 218 Cal.App.4th at p. 314.) At the beginning of Petitioner's recommitment trial, Real Party filed an in limine motion seeking to compel Petitioner's testimony. (*Ibid.*) Over Petitioner's objection, Respondent Court granted Real Party's in limine motion. (*Ibid.*) Petitioner filed a writ of prohibition/mandate and the Court of Appeal granted said writ. (*Id.* at p. 327.) Afterwards, this Court granted Real Party's petition and asked the parties to address the above-referenced issue.

SUMMARY OF ARGUMENT

Petitioner contends that through the enactment of section 1026.5, subdivision (b)(7), the Legislature afforded him with the absolute right not to be called as a witness and not to testify at his recommitment trial. Specifically, Petitioner relies upon the plain meaning of section 1026.5, subdivision (b)(7)'s language, wherein it states in pertinent part that: "[t]he person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in

[1] All further references are to the Penal Code unless otherwise noted.

accordance with applicable constitutional guarantees." (Pen. Code, § 1026.5, subd. (b)(7).)

ARGUMENT

I.

Petitioner's Right Not to be Compelled to Testify Emanates From Penal Code Section 1026.5, Subdivision (b)(7).

The privilege against self-incrimination flows from the Fifth Amendment of the United States Constitution and article I, section 15 of the California Constitution and encompasses "two separate and distinct testimonial privileges." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 (*Cramer*).) In any proceeding, whether civil or criminal, "a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity. [Citation]." (*Ibid.*) Additionally, "[i]n a criminal matter a defendant has an absolute right not to be called as a witness and not to testify." (*Ibid.*)

Nevertheless, proceedings to extend the commitment of an individual pursuant to section 1026.5 are essentially civil in nature and are designed towards addressing treatment for the individual versus punishment. (*People v. Beard* (1985) 173 Cal.App.3d 1113, 1118; *People v. Williams* (1991) 233 Cal.App.3d 477, 485 (*Williams*).) Generally, "[t]he privilege of a criminal defendant not to testify has not been extended to civil committees." (*Joshua D. v. Superior Court* (2007) 157 Cal.App.4th

549, 555 (*Joshua D.*); *Allen v. Illinois* (1986) 478 U.S. 364, 374-375 [92 L.Ed.2d 296, 106 S.Ct. 2988,] [holding that proceedings pursuant to the Illinois Sexually Dangerous Persons Act, although similar to criminal proceedings, were essentially civil in nature. As such, the Fifth Amendment's privilege against self-incrimination did not apply].)

However, as this Court is aware, "[t]he absence of a constitutional privilege not to testify in civil commitment proceedings does not, of course, prevent the Legislature from affording that right by statute." (*Joshua D., supra,* 157 Cal.App.4th at p. 555; see also *Conservatorship of Bones* (1987) 189 Cal.App.3d 1010, 1017 (*Bones*) [stating that the legislature is entitled to enact declaratory legislation].) As such, in order to determine if Petitioner is correct, one needs only to look at the plain meaning of the language of the statute.

II.

Statutory Construction and Legislative Intent.

In construing a statute such as section 1026.5, specifically subdivision (b)(7), the court's task is to attempt to ascertain the intent of the Legislature. (*People v. Albillar* (2010) 51 Cal.4th 47, 54.) In doing so, the court first examines the words of the statute, viewing them in their statutory context and giving them their ordinary and usual meaning because the plain language of a statute is usually the most reliable indicator of the Legislature's intent. (*Id.* at p. 55.) If the language of the statute is

unambiguous, the plain meaning controls, and the court need not resort to principles of statutory construction or extrinsic sources to determine legislative intent. (*Ibid.*) On the contrary, if the words of the statute are ambiguous, the court "may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy." (*People v. Arias* (2008) 45 Cal.4th 169, 177.) Whenever possible, significance should be attributed to every word and phrase of a statute and the court must take caution to avoid a construction making some words surplusage. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1131.)

Furthermore, in order to give true meaning to the words in question, the court must consider the statute as a whole, harmonizing the various elements by considering each clause and section in the context of the overall statutory framework. (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) Moreover, the court shall adopt a construction that best reflects the apparent intent of the Legislature, with a view to promoting the purpose of the statute and avoiding absurd consequences. (*Ibid.*) However, "[t]he literal meaning of the words of a statute may be disregarded to avoid absurd results .... [Citation.]" (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6; see also *Wells Fargo Bank v. Superior* Court (1991) 53 Cal.3d 1082, 1098.) As will be discussed further herein, "[t]his exception should be used most sparingly by the judiciary and only in extreme cases else [the court violates] the separation of powers principle of

government." (*Simon Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1698 (*Unzueta*); Cal. Const., art. III, § 3.)

Here, the language of section 1026.5, subdivision (b)(7) is clear. The statute states in pertinent part that: "[t]he person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees." (Pen. Code, § 1026.5, subd. (b)(7).) Application of the statute to Petitioner is not repugnant to the general purview of the act, and there is no compelling reason to disregard the plain language. The statute does not limit or qualify this guarantee in any way. Moreover, the statute does not state that the individual does not have the right not to be compelled to testify. Had the Legislature intended that said right did not apply, it could have simply expressed this intent in words because "the words the Legislature chooses are the best expression of its intent" and the court is bound by the plain meaning of said words. (*Joshua D., supra,* 157 Cal.App.4th at p. 560; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919 [a statute's "plain meaning controls" and nullifies the need to "resort to extrinsic sources to determine the Legislature's intent"].) Additionally, when this Court considers the statute as a whole, taking into account the overall statutory framework, it is clear that the Legislature was keenly aware that the process whereby an individual is recommitted is clearly adversarial in nature. As

such, the Legislature intended to afford Petitioner with the right not to be compelled to testify by including the above-referenced language in section 1026.5, subdivision (b)(7).

According to the statutory scheme, a person found not guilty of a felony offense by reason of insanity may not be kept in actual confinement for longer than the maximum state prison term for which the person could have been sentenced to. (Pen. Code, § 1026.5, subd. (a); *People v. Crosswhite* (2002) 101 Cal.App.4th 494, 501.) Nevertheless, at the end of the commitment period, the prosecution may petition the court to extend the commitment period if the individual, due to a mental disease, defect, or disorder represents a substantial danger of physical harm to others. (§ 1026.5, subd. (b)(1).) After the prosecution files said petition, the court must advise the individual named in the petition of the right to be represented by counsel and of the right to a jury trial. (§ 1026.5, subd. (b)(3).) The rules of discovery in criminal cases shall apply. (*Ibid.*) The court shall conduct a hearing on the petition for extended commitment and the trial shall be by a jury unless waived by both the individual and the prosecution. (§ 1026.5, subd. (b)(4).) The individual is entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings and all proceedings shall be in accordance with applicable constitutional guarantees. (§ 1026.5, subd. (b)(7).) If the individual is indigent, the County Public Defender shall be appointed. (*Ibid.*) The

appointment of psychologists or psychiatrists shall be made in accordance with this article, Penal Code and Evidence Code provisions that are applicable to criminal defendants who have entered pleas of not guilty by reason of insanity. (*Ibid.*) If the court or jury finds that the individual, by reason of mental disease, defect, or disorder represents a substantial danger of physical harm to others, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed. (§ 1026.5, subd. (b)(8).) Prior to termination of a commitment under this subdivision, subsequent petitions may be filed for recommitment to determine if the patient remains a person as described above. (§ 1026.5, subd. (b)(10).) Any commitment under this subdivision creates an affirmative obligation on the hospital or treatment facility to provide treatment for the underlying causes of the patient's mental disorder. (§ 1026.5, subd. (b)(11.)

Aside from the plain meaning of the statute, the Legislature has clearly evidenced its concerns for the individual who is potentially subject to a lifetime commitment in a locked state mental institution. Precedent has further enlightened the Legislature that the "actual consequences, not the label, of a proceeding determine whether fundamental rights are constitutionally mandated in that proceeding." (*Cramer, supra,* 23 Cal.3d at p. 145 (dis. opn. of Bird, J.).) "Commitment is incarceration against one's will, whether it is called 'criminal' or 'civil.' And our Constitution

guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty..." (*In re Gault* (1967) 387 U.S. 1, 50 [18 L.Ed.2d 527, 87 S.Ct. 1428].)

Over thirty-eight years ago, this Court reminded the Legislature and lower courts of the reality behind civil commitments when it said, "[l]et us not deceive ourselves as to the nature of that institution..."[2] because there can be no doubt that "commitment to a 'state hospital' results in a real deprivation of liberty." (*People v. Burnick* (1975) 14 Cal.3d 306, 319 (*Burnick*); *Humphrey v. Cady* (1972) 405 U.S. 504, 509 [31 L.Ed.2d 394, 402, 92 S.Ct. 1048] [individuals confined against their will for the treatment of a mental illness suffer a "massive curtailment of liberty"].)

As such, because the Legislature was keenly aware that the committee's liberty interest is at stake in section 1026.5 proceedings and that said proceedings are adversarial, the Legislature made it abundantly clear that the individual shall have the right to be represented by counsel and the right to a jury trial. (§ 1026.5, subd. (b)(3).) On the contrary, generally, indigent civil defendants have no such right to an appointed attorney. (*Hunt v. Hackett* (1973) 36 Cal.App.3d 134, 138.) The Court in *Hunt* further stated that:

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[2] The Court in *Burnick* was referring to Atascadero State Hospital. Nevertheless, whether it is Atascadero State Hospital or Patton State Hospital as in the present case, it makes no difference. The individual's loss of liberty at either institution is the same.

> The California Constitution (art. I, § 13) and the federal Constitution (6th Amend.) specifically provide for court-appointed counsel in criminal matters only. The constitutional safeguards applicable to criminal cases need not be met in all civil cases, but only in cases denominated as civil which are basically criminal in nature.

(*Id.* at. p. 137.)

Here, when this Court construes the statute as a whole, thereby harmonizing the various elements and considering each clause and section in the context of the overall statutory framework, it is clear that the Legislature intended to afford Petitioner with the right not to be compelled to testify.

III.

The Court of Appeal's Opinion that Petitioner Could Not be Compelled to Testify was Based Upon Precedent.

In reaching its opinion that Petitioner could not be compelled to testify at his recommitment trial, the Court of Appeal in *Hudec* relied upon precedent as set forth in *People v. Haynie* (2004) 116 Cal.App.4th 1224 (*Haynie*). In *Haynie*, the court was faced with the identical issue of whether the prosecution could compel the testimony of an individual who was facing recommitment pursuant to section 1026.5. Ultimately, the court concluded that section 1026.5, subdivision (b)(7) prohibited the prosecution from compelling the individual to testify at his recommitment trial. (*Id.* at p. 1230.) With regard to the plain meaning of section 1026.5, subdivision (b)(7), the court stated that:

> [T]he Legislature's words clearly and unambiguously state the person "is entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings." A defendant in a criminal matter has an absolute right not to be called as a witness and not to testify. (U.S. Const., 5th Amend.; Cal. Const., art I, § 15; Evid. Code, § 930.) Under the plain language of the statute, because Haynie is entitled to the same rights guaranteed to a criminal defendant, he should not have been compelled to testify in the prosecution's case at his commitment extension trial.

(*Id.* at p. 1228.)

Nevertheless, the court in *Haynie* agreed with prior decisions, which held that section 1026.5, subdivision (b)(7) did not extend constitutional rights that "bear no relevant relationship to the proceedings." (*Haynie, supra,* 116 Cal.App.4th at p. 1229; quoting *Williams, supra,* 233 Cal.App.3d at p. 488.) In other words, the court in *Haynie* was well aware of the "relevancy" aspect of the particular right in question afforded to the committee based upon its interpretation of section 1026.5, subdivision (b)(7), and that said interpretation must not lead to an absurd result.

Likewise, the court in *Hudec* agreed with *Haynie's* interpretation of section 1026.5, subdivision (b)(7) and it also recognized that "several courts had not applied all the constitutional rights guaranteed for criminal proceedings in section 1026.5 trials." (*Hudec, supra,* 218 Cal.App.4th at p. 316; *Williams, supra,* 233 Cal.App.3d at p. 488 ["double jeopardy provisions have no meaningful application to extension proceedings which are civil in nature, are for the purpose of treatment, not punishment, and are

not an adjudication of a criminal act or offense, [therefore, said provisions] are not applicable to extension proceedings by virtue of the language of the statute"]; *People v. Powell* (2004) 114 Cal.App.4th 1153, 1158 [common sense dictates that the Legislature would not have afforded an insane person with the constitutional right to personal waiver of a jury trial, thereby vetoing counsel's informed tactical decision to waive jury].)

Nevertheless, with regard to the relevancy aspect of the constitutional right not to be compelled to testify as afforded by the language of section 1026.5, subdivision (b)(7), the court in *Haynie* said:

> The right to not be compelled to testify against oneself is clearly and relevantly implicated when a person is called by the state to testify in a proceeding to recommit him or her even if what is said on the witness stand is not per se incriminating. By calling the person in its case-in-chief, the state is essentially saying that his or her testimony is necessary for the state to prove its case. We have no doubt that a committee so compelled to testify is prejudiced under these circumstances.

(*Haynie, supra,* 116 Cal.App.4th at p. 1230.)

Similarly, the court in *Hudec* agreed with *Haynie* and stated that its interpretation of section 1026.5, subdivision (b)(7) "does not contravene any legislative intent apparent in the statute, nor does it lead to an absurd result or consequences the Legislature could not have intended." (*Hudec, supra,* 218 Cal.App.4th at p. 324.) However, Real Party contends that *Hudec's* interpretation of section 1026.5, subdivision (b)(7) in fact leads to

absurd results. What is abundantly clear is that "[a]bsurdity, like beauty, is in the eye of the beholder." (*Unzueta, supra,* 6 Cal.App.4th at p. 1698.)

Essentially, Real Party disagrees with *Hudec's* deference to the Legislature's role in enacting legislation and the court's adherence to their role in giving effect to the plain meaning of said legislation. However, "[w]here the Legislature has made a policy choice, using as here particularly clear and unambiguous language, [the court] may not second-guess its determination." (*Joshua D., supra,* 157 Cal.App.4th at p. 565.) By arguing "absurdity," Real Party is requesting this Court sit as a super-legislature and impose its will through judicial fiat. Nevertheless, this Court, like the lower courts in *Haynie* and *Hudec*, should exercise judicial restraint and stay its hand because the court's '"function is not to judge the wisdom of the statutes.' [Citations.]" (*Unzueta, supra,* 6 Cal.App.4th at p. 1700.) "Courts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature." (*Estate of Horman* (1971) 5 Cal.3d 62, 77.) As the *Unzueta* court noted, "[e]ach time the judiciary utilizes the 'absurd result' rule, a little piece is stripped from the written rule of law and confidence in legislative enactments is lessened." (*Unzueta, supra,* 6 Cal.App.4th at p. 1699.)

If this Court were to acquiesce to Real Party's contentions and reject the plain meaning of section 1026.5, subdivision (b)(7), it would contravene its "constitutional role, tread into the domain of a coequal

branch, and inject intolerable uncertainty into the drafting and law making process, since neither the Legislature nor the public could rely on a court to follow plain statutory language." (*Joshua D., supra,* 157 Cal.App.4th at p. 558.) Furthermore, the court in *Unzueta* acknowledged the teachings of retired brethren who voiced similar cautionary warnings that laws emanating from judicial fiat are wrong. Quoting from retired Justice Macklin Fleming, the *Unzueta* court stated:

> Judicial legislation is all wrong because it is ineffectual. Experience has shown, and if the past is an accurate guide it will continue to show, that legislatures are better equipped, better informed, possess greater sensitivity, and exercise a broader vision in making new law than do the courts.

(*Unzueta, supra,* 6 Cal.App.4th at p. 1699; Fleming, The Price of Perfect Justice (1974) ch. 13, p. 120.).)

Here, noting that Petitioner faced the prospect of a loss of liberty akin to and sometimes greater than individuals facing incarceration after a criminal trial, the court in *Hudec* stated:

> [T]he privilege not to testify reflects fundamental values and aspirations and a '"sense of fair play which dictates a "fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load ..." ...; [and] ... our respect for the inviolability of the human personality and the right of each individual "to a private enclave where he may lead a private life ..." ... ."' [Citations.]

(*Hudec, supra,* 218 Cal.App.4th at p. 324.)

As such, based upon a reading of *Haynie* and *Hudec*, it is clear that the Legislature, in enacting section 1026.5, subdivision (b)(7), intended to afford Petitioner with the constitutional right not to be compelled to testify. Furthermore, regardless of what this Court thinks about the wisdom of the Legislature's enactment of a statute, it should refrain from imposing what it "thinks best" [about section 1026.5, subdivision (b)(7) and] "leave that to the common will expressed by the government." (*Unzueta, supra,* 6 Cal.App.4th at p. 1700; quoting Hand, The Spirit of Liberty, (1952) at p. 109.)

IV.

Section 1026.5, Subdivision (b)(7) Doesn't Merely Codify the Application of Constitutional Procedural Rights Mandated by Judicial Decision.

Real Party contends that section 1026.5, subdivision (b)(7) merely codifies the application of constitutional procedural rights mandated by judicial decision. They are wrong. The court in *Haynie*, as well as *Hudec*, dispersed with this erroneous conclusion.

In *Haynie*, the court stated that it disagreed with the broad statement in *Williams* that the statutory language "merely codifies the application of constitutional protections to extension hearings mandated by judicial decision. [Citation.]" (*Haynie, supra,* 116 Cal.App.4th at p. 1230.) The *Haynie* court's reasoning was as follows:

> First, if the courts have granted rights to committees under case law, there is no need for the statutory declaration of rights – it is surplusage. Second, that conclusion supplants the legislative rights-inclusive language with a process whereby judges select which rights will apply. We prefer to leave it to the Legislature to be more specific as to which rights to apply if it does not intend that all rights apply. The fact the Legislature chose to spell out the rights of jury unanimity and the beyond a reasonable doubt burden of proof does not undermine our conclusion. Those standards are not expressly set forth in the Fifth or Sixth Amendment of the United States Constitution or under analogous California constitutional provisions. Thus, the Legislature may have perceived a need to specifically add those mandates. Finally, to the extent that case law holds that certain rights apply to extended-commitment proceedings under constitutional principles, those holdings do not prevent the Legislature from providing additional rights to civil committees.

(*Ibid.*)

Nevertheless, Real Party mistakenly relies on the court's ruling in *People v. Lopez* (2006) 137 Cal.App.4th 1099 (*Lopez*). *Lopez* dealt with an equal protection challenge raised by a mentally disordered offender (MDO) at his recommitment trial pursuant to section 2960 et seq. (*Id.* at pp. 1105-1106.) In *Lopez*, the appellant contended that individuals committed pursuant to section 1026.5 and Welfare and Institutions Code section 1801.5 (*In re Luis C.* (2004) 116 Cal.App.4th 1397 (*Luis C.*) could not be compelled to testify at their recommitment trials; therefore, appellant should not have been compelled to testify at his recommitment trial in 2000, and admission of his prior compelled testimony at his latest

recommitment trial subjected him to disparate treatment. (*Lopez, supra,* 137 Cal.App.4th at pp. 1105-1106.)

In enacting the statutory scheme for MDOs, the Legislature explicitly afforded the MDO with certain rights. Section 2972 provides the MDO with the right to a jury trial, to be assisted by the Public Defender if indigent, to a standard of proof beyond a reasonable doubt and jury unanimity. (*Lopez, supra,* 137 Cal.App.4th at p. 1101; see generally *In re Qawi* (2004) 32 Cal.4th 1, 9.) Nevertheless, the statutory scheme does not contain the same language found in section 1026.5, subdivision (b)(7). The *Lopez* court noted that "[t]he privilege of a criminal defendant not to testify has *not* been extended to civil committees." (*Lopez, supra,* 137 Cal.App.4th at p. 1106, *italics in original.*) However, *Lopez* was aware of the rulings in *Haynie* and *Luis C.* with regard to the constitutional right the Legislature afforded the respective committees by statute, but decided not to follow said decisions. (*Id.* at p. 1110.)

In a tortured analysis, the *Lopez* court managed to hold that when the Legislature expressly affords individuals the constitutional rights given to criminal defendants, it actually means it is not extending those rights. *Lopez* got to that point by relying primarily on two cases: *People v. Henderson* (1981) 117 Cal.App.3d 740 (*Henderson*) and *Bones, supra,* 189 Cal.App.3d 1010. Neither provided support for the court's holding.

The *Henderson* decision involved a mentally disordered sex offender (MDSO) who contended that admission into evidence of statements he made to hospital staff while involuntarily committed to a state hospital violated his statutory right (former Welfare and Institutions Code section 6316.2, subdivision (e)) to the constitutional privilege against self-incrimination. (*Henderson, supra,* 117 Cal.App.3d at p. 748.) In relying upon *Burnick*[3] and *People v. Feagley* (1975) 14 Cal.3d 338 (*Feagley*)[4], the court in *Henderson*, in what was arguably dicta, reasoned that former Welfare and Institutions Code section 6316.2, subdivision (e) simply "codifies the application of constitutional protections to MDSO proceedings mandated by judicial decision" (right to a unanimous jury and the beyond a reasonable doubt standard) and "[i]t does not extend the protection of the constitutional privileges against self-incrimination to testimonial communications which are not incriminatory." (*Henderson, supra,* 117 Cal.App.3d at p. 748.)

In its analysis, the court began by noting that the precise Fifth Amendment privilege at issue would prohibit the use of "any disclosures which the witness may reasonably apprehend could be used in a criminal

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[3] Holding that due process required the prosecution prove the MDSO allegations by a standard of proof beyond a reasonable doubt. (*Burnick, supra,* 14 Cal.3d at p. 332.)

[4] Holding that due process required a unanimous jury verdict for the MDSO when tried by a jury and that confining an MDSO to prison when the MDSO has been deemed unamenable to treatment constituted cruel and unusual punishment. (*Feagley, supra,* 14 Cal.3d at p. 342.)

prosecution or which could lead to other evidence that might so be used." (*Henderson*, *supra*, 117 Cal.App.3d at p. 746, italics and internal quotations omitted.) It is noteworthy that the court did not address the separate and distinct privilege of an individual's right not to be called as a witness. That right—the right not to be compelled to testify in court—is of course the right at issue both in this case and in *Lopez*. It was not at issue in *Henderson* and "[i]n the federal system no less than in California, cases are not authority for propositions not considered." (*Burnick, supra,* 14 Cal.3d at p. 317; see *In re Tartar* (1959) 52 Cal.2d 250, 258; *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7 ["[i]t is axiomatic that cases are not authority for propositions not considered"].)

Having thus framed the issue, the *Henderson* court explained that the appellant's specific out of court statements were not barred by the privilege against self-incrimination because the statements could not incriminate him as he "had already been convicted of the underlying offense and obviously could not again be subjected to prosecution for the same crime." (*Henderson*, *supra*, 117 Cal.App.3d at p. 746.) Accordingly, the court held that the admission of the statements made to hospital staff during "routine therapy sessions or daily activity related to the treatment regime in the hospital setting is not proscribed by the constitutional privileges against self-incrimination." (*Id.* at p. 748.)

Despite the fact that *Henderson* concerned itself almost entirely with the admissibility of out of court, testimonial hearsay statements under a now-defunct statutory scheme and never provided any analysis regarding the right not be called as a witness, the *Lopez* court relied on *Henderson* for the nonliteral proposition that statutory language conferring rights available to criminal defendants did not include the right against self-incrimination. (*Lopez*, *supra*, 137 Cal.App.4th at p. 1115.) *Lopez* relied on *Henderson* and *Henderson* relied upon *Burnick* and *Feagley*, "but neither case suggested the rights discussed in those cases (proof beyond a reasonable doubt, unanimous verdict, cruel or unusual punishment) should be the only ones available to persons subject to extended commitment." (*Hudec, supra,* 218 Cal.App.4th at p. 325.)

In *Bones*, the court concerned itself with the right against self-incrimination during an involuntary commitment proceeding under the Lanterman-Petris-Short Act (LPS). (Welf. & Inst. Code, § 5000 et seq.) At his trial, appellant was called to testify. (*Bones, supra,* 189 Cal.3d at p. 1014.) On appeal, he argued that Welfare and Institutions Code section 5303 provided him the rights given to defendants in criminal proceedings, which would necessarily include the right not to be called as a witness. (*Id.* at pp. 1014-1015.) At the time, the statute provided that LPS proceedings shall be conducted "in accordance with the constitutional guarantees of due process of law and the procedures required under Section 13 of Article I of

the Constitution of the State of California." (*Id.* at p. 1016.) When Welfare and Institutions Code section 5303 was enacted, the cited constitutional section provided for the right to due process, the prohibition against double jeopardy and the privilege against self-incrimination. (*Ibid.*) However, thirteen years prior to *Bones*, article I, section 13 was repealed and its rights were scattered throughout other sections. (*Ibid.*) The right not to be compelled to testify and double jeopardy were moved to article 1, section 15, while the due process clause was moved to article 1, section 7. (*Ibid.*)

The *Bones* court assumed that this language in Welfare and Institutions section 5303 was simply "declaratory" and gave individuals subject to a trial under the LPS Act only due process protections and not those rights provided to criminal defendants. For this proposition, the *Bones* court relied entirely on a footnote in *Burnick,* which simply stated, without any analysis, that the Legislature's reference to article I, section 13 was simply a reference to the state's due process clause. (*Bones, supra,* 189 Cal.App.3d at p. 1016; *Burnick, supra,* 14 Cal.3d at p. 314, fn. 5.) Nevertheless, *Burnick* dealt with the burden of proof in MDSO proceedings (proof beyond a reasonable doubt) and not with the right not to be compelled to testify. As such, "[t]he footnote in *Burnick* simply pointed out where the due process and burden of proof provisions were currently located in the state Constitution." (*Hudec, supra,* 218 Cal.App.4th at p. 326.)

Accordingly, *Lopez's* reliance on *Henderson* and *Bones* was entirely misplaced. This is plainly apparent in what can only be characterized as the lynchpin of the *Lopez* opinion:

> *Burnick*, as interpreted in *Bones*, therefore affects our analysis in the following way: The Supreme Court in *Burnick apparently concluded* that, despite the Legislature's reference in Welfare and Institutions Code section 5303 to "the procedures required under" the part of the constitution containing the right not to testify, the Legislature did not intend that a potential LPS committee have the right not to testify. Rather, the Legislature meant only to afford the committee the rights guaranteed by due process, i.e., the rights to proof beyond a reasonable doubt and a unanimous jury. [¶] If that conclusion is correct, then it is reasonable also to conclude the Legislature acted with the same intent in enacting section 1026.5(b)(7).

(*Lopez*, *supra*, 137 Cal.App.4th at p. 1113, *italics added.*) The lynchpin is the court's assumption that the Legislative intent would be the same for any commitment scheme, notwithstanding the nature of the commitment, the time of its inception or, most importantly, the plain language employed by the Legislature. As noted in *Hudec*, "[t]he conclusion in *Bones* on which *Lopez* relies is weak fodder compared to the 'plain commonsense meaning of the language used by the Legislature.' [Citation.]" (*Hudec, supra,* 218 Cal.App.4th at p. 326.) For the *Lopez* court to assume that the Legislature acted in lockstep in creating and amending each and every civil commitment scheme, despite their varied histories and language, is nonsense. To then use such an assumption to hold that the Legislature's

grant of criminal procedure rights to section 1026.5 committees did not actually provide committees such rights simply compounds the error.

Additionally, *Lopez's* historical rationale for deviating from the plain meaning of the statute, based upon the holding of *In re Moye* (1978) 22 Cal.3d 457 (*Moye*), does not pass scrutiny. In *Moye*, this Court held that the Legislature's treatment of individuals acquitted by reason of insanity and the subsequent indefinite commitment of said individuals past their maximum possible prison confinement, in comparison to the less onerous civil commitment procedures for MDSOs, created an equal protection violation. (*Id.* at p. 465.) As such, fearing the imminent release of individuals that were confined to state hospitals based upon their acquittal by reason of insanity who still posed a danger to the public, the Legislature quickly enacted section 1026.5 and its language, in many respects, parroted the statutory language that dealt with the extended commitments of MDSOs.

Shortly after section 1026.5's enactment, specifically subdivision (b)(7), the *Henderson* court ruled that Welfare and Institutions Code section 6316.2, subdivision (e) merely intended to provide constitutional protections mandated by judicial decision (i.e., unanimous jury and proof beyond a reasonable doubt) and not the right against self-incrimination. (*Henderson, supra,* 117 Cal.App.3d at p. 748.) Thus, *Lopez* concluded that by using the same language in the above-referenced statute, the Legislature

acted with the same intent. (*Lopez, supra,* 137 Cal.App.4th at pp. 1114-1115.) Nevertheless, as the court in *Hudec* correctly noted:

> While it is plausible the Legislature added section 1026.5 in 1979 in response to *Moye* and intended to conform the procedures for the extension of commitment of individuals acquitted by reason of insanity with commitment procedures for MDSOs, nothing suggests the Legislature intended by the use of similar language in both statutes (patient or person "shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings") to limit the rights in either proceeding to the due-process-based rights of proof beyond a reasonable doubt and a unanimous verdict.

(*Hudec, supra,* 218 Cal.App.4th at p. 324.) Therefore, given the historical significance of *Burnick* and *Feagley*, "it is implausible the Legislature intended to guarantee only those rights expressly at issue in *Burnick* and *Feagley*." (*Id.* at p. 325.)

Additionally, after this Court's decision in *Moye* on October 17, 1978, and before the Legislature enacted section 1026.5 on September 28, 1979, this Court rendered its opinion in *Cramer* on January 12, 1979. The issue in *Cramer* was whether a mentally disabled individual who was the subject of a petition for civil commitment pursuant to Welfare and Institutions Code section 6502 could be compelled to testify at his commitment hearing. (*Cramer, supra,* 23 Cal.3d at p. 134.) Over a spirited and rational dissent by Chief Justice Bird and Justice Newman, this Court concluded that the individual may be compelled to testify. (*Ibid.*)

The Court in *Cramer* noted the statutory scheme for the commitment of mentally disabled committees was contained in Welfare and Institutions Code sections 6500-6512 and the Court identified the various rights that the Legislature afforded to the committees. (*Cramer, supra,* 23 Cal.3d at pp. 134-135.) Specifically, the trial court appointed a public defender, granted the committee's request for a jury trial, allowed for thirteen peremptory challenges, required that the state prove the petition beyond a reasonable doubt and that the jury's verdict be unanimous. (*Id.* at p. 135.) However, absent from said rights was the right not to be compelled to testify pursuant to the Fifth Amendment of the United States Constitution, article I, section 15 of the California Constitution or California Evidence Code section 930.

In reaching its conclusion that the committee could be compelled to testify, the Court noted that the proceeding was civil in nature and "not initiated in response, or necessarily related, to any criminal acts." (*Cramer, supra,* 23 Cal.3d 137.) As such, the above-referenced constitutional and statutory rights were not applicable to the civil commitment proceeding. (*Id.* at p. 139.) Nevertheless, even though appellant could be compelled to testify, he "like any other individual in any proceeding, civil or criminal, ... could not be required to give evidence which would tend to incriminate him in any criminal activity and which could subject him to criminal prosecution." (*Id.* at p. 138.)

As previously noted, approximately nine months after the Court's ruling in *Cramer*, the Legislature enacted section 1026.5. Therefore, it's reasonable to infer that the Legislature, cognizant of the Court's ruling in *Cramer*, and understanding that 1026.5 proceedings originate from criminal filings, intended to afford not guilty by reason of insanity committees the right not to be compelled to testify at their recommitment proceedings when it enacted section 1026.5, subdivision (b)(7). '"The Legislature is presumed to know the existing law and have in mind its previous enactments when legislating on a particular subject.' [Citation.]" (*Unzueta, supra,* 6 Cal.App.4th at pp. 1697-1698.) Understanding that the above-referenced constitutional right is generally not applicable in civil commitment proceedings, the Legislature, in its broad discretion, and by the plain meaning of the words it used, enacted a statutory right, intended for the benefit of the section 1026.5 committee.

On a different note, Real Party further contends, as did *Lopez*, that two years after the court's decision in *Williams, supra,* 233 Cal.App.3d at p. 488 (holding that double jeopardy provisions are not applicable to recommitment proceedings and that section 1026.5, subdivision (b)(7) "merely codifies the application of constitutional protections to extension hearings mandated by judicial decision"), the Legislature amended section 1026.5 "without modifying its language to overrule *Williams* or to state explicitly that the NGI committee has the criminal defendant's right not to

testify." (*Lopez, supra,* 137 Cal.App.4th at p. 1115.) As such, because the statute had been construed by judicial decision and said construction was "'not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it.' [Citations.]" (*People v. Meloney* (2003) 30 Cal.4th 1145, 1161, citations omitted in original.)

However, as correctly noted in *Hudec*:

> *Williams*, however, involved double jeopardy, not testimonial privileges. That the Legislature amended the statute in a manner that had nothing to do with jeopardy or a right not to testify, but rather to overrule the determination in *People v. Gunderson* (1991) 228 Cal.App.3d 1292 [279 Cal.Rptr. 494] that time spent in outpatient status must count towards an MDSO's extended commitment, is of little import here.

(*Hudec, supra,* 218 Cal.App.4th at p. 326.) It is the above-referenced historical and policy arguments that *Lopez* relied upon "with scant attention to the statutory language" in reaching its erroneous conclusion. (*Id.* at p. 323.)

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CONCLUSION

In *Unzueta*, the court proposed a question posited by Judge Learned Hand over forty years ago. "How far is a judge free in rendering a decision?" (*Unzueta, supra,* 6 Cal.App.4th at p. 1692, quoting Hand, The Spirit of Liberty (1952).) Judge Learned Hand, a staunch advocate of judicial restraint as it relates to statutory interpretation, did not answer the question, but put the judicial dilemma in perspective by saying:

> So you will see that a judge is in a contradictory position; he is pulled by two opposite forces. On the one hand he must not enforce whatever he thinks best; he must leave that to the common will expressed by the government. On the other, he must try as best he can to put into concrete form what that will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed. Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves. And so, while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. Perhaps it is also fair to ask that before the judges are blamed they shall be given the credit of having tried to do their best. Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand.

(*Unzueta, supra,* 6 Cal.App.4th at p. 1692; quoting Hand, The Spirit of Liberty (1952) at pp. 109-110.) Here, this Court faces that very same dilemma that Judge Hand posited and must now decide whether to follow the letter of the law as it relates to statutory construction in interpreting the plain meaning of section 1026.5, subdivision (b)(7), or whether to step outside its common role and to legislate from the bench.

For the foregoing reasons, Petitioner respectfully requests this Court adhere to the principles of statutory construction, to deny Real Party's petition, and to uphold the Court of Appeal's ruling.

Dated: January 22, 2014

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CERTIFICATE OF WORD COUNT

In compliance with California Rules of Court, rules 8.204(c) the undersigned hereby certifies that this brief has been prepared using 13 point Times New Roman typeface. In its entirety, petitioner's **Answer Brief On The Merits** consists of 6,700 words as counted by Microsoft Word version 2010 word processing program, up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 22, 2014.

Christopher D. McGibbons

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE

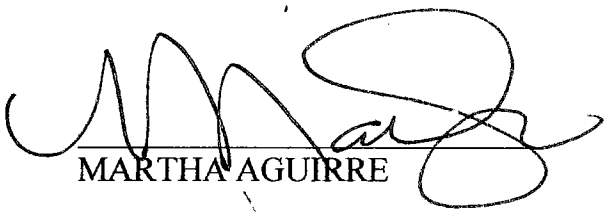
RE: HUDEC vs. SUPERIOR COURT
SUPREME COURT CASE NO. S213003; COA CASE NO. G047465; SUPERIOR COURT CASE NUMBER C-47710

I am a citizen of the United States; I am over the age of eighteen years and not a party to the within entitled action; my business address is: Office of the Public Defender, County of Orange, 14 Civic Center Plaza, Santa Ana, California 92701.

On January 22, 2014, I served the within **ANSWER BRIEF ON THE MERITS** on the interested parties in said action by placing a true copy thereof enclosed in a sealed envelope, in the United States mail at Santa Ana, California, that same day, in the ordinary course of business, postage thereon fully prepaid, addressed as follows:

The Supreme Court Of The State Of California Attn: Clerk Of The Court 350 Mcallister Street San Francisco, CA 94102	Office Of The District Attorney, Orange County Attn: Brian Fitzpatrick Law & Motion 401 Civic Center Drive West Santa Ana, CA 92701
Superior Court Of Orange County Central Justice Center Attn: Hon. Kazuharu Makino, Dept C-62 700 Civic Center Drive West Santa Ana, CA 92701	Court Of Appeal, Fourth Appellate District, Division Three 601 W. Santa Ana Blvd. Santa Ana, CA 92701

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 22, 2014, at Santa Ana, California.



MARTHA AGUIRRE