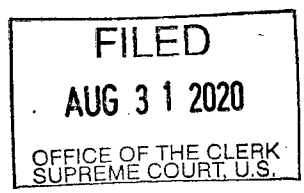
20-5694

No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____



MARC ANTHONY LOWELL ENDSLEY -- PETITIONER
(Your name)

vs.

CINDY BLACK, et al. -- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Marc Anthony Lowell Endsley
(Your Name)

Napa State Hospital, 2100 Napa-Vallejo Hwy.
(Address)

Napa, CA 94558-6293
(City, State, Zip Code)

(707) 252-9730/7276
(Phone Number)

QUESTION(S) PRESENTED

1. Whether persons involuntarily civilly detained as insanity acquittees are entitled to the due process protections constitutionally required for all other classes of persons involuntary civilly detained.

2. Whether persons involuntarily civilly detained as insanity acquittees can be subject to a program of conditional release and accorded lesser protection of constitutional rights than convicted criminals subject to supervised release.

3. Whether persons released from involuntarily civil confinement to court-ordered conditional release can be held in some other form of confinement (i.e., a "step-down" program) which is neither ordered by the court nor defined in the law.

4. Whether persons involuntarily civilly detained as insanity acquittees can be required to participate in a program of conditional release which has subjected them to "unconstitutional conditions" and retaliation.

5. Whether persons who no longer meet the criteria to be classified as insanity acquittees and who are placed on conditional release can be subject to recommitment to a State hospital as insanity acquittees without the due process procedures required in civil commitment proceedings.

6. Whether persons involuntarily civilly detained as insanity acquittees have a right to have the evaluations which form the bases for their court reports, which recommend either release or continued confinement, recorded as convicted criminals have a right to have their parole hearings recorded.

7. Whether the State's statutory scheme for continued confinement of persons involuntarily civilly detained as insanity acquittees can indefinitely withhold hearings and all associated due process procedures.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the Case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

MARC ANTHONY LOWELL ENDSLEY,
PETITIONER,

VS.

CINDY BLACK, PAM AHLIN, and GAVIN NEWSOM,
RESPONDENT(S).

The petitioner is Marc Anthony Lowell Endsley, a civilly detained insanity acquittee under the authority of the California Department of State Hospitals and confined at Napa State Hospital in Napa, California. The respondents are Cindy Black, petitioner's legal custodian; Pam Ahlin, the Director of the California Department of State Hospitals; and Gavin Newsom, Governor of the State of California.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[x] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix __C__ to the petition and

[ ] is reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the California Court of Appeal, Fourth District, Division Two appears at Appendix __A__ to the petition and

[ ] is reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[x] For cases from **state courts:**

The date on which the highest state court decided my case was 6-17-2020. A copy of that decision appears at Appendix C.

[x] A timely petition for rehearing was thereafter denied on the following date: 7-2-2020 and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment XIV to the United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Amendments are enforced by Title 28, Section 1257(a), United States Code:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Amendments are enforced by Title 42, Section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Amendments are enforced by Title 42, Section 12101(b)(4), United States Code:

> [The purpose of the ADA Amendments Act of 2008 is] to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

STATEMENT OF THE CASE

In 1997, petitioner was acquitted on grounds of insanity and committed for treatment of a mental illness pursuant to California Penal Code ("P.C.") §1026.

In May of 2015, petitioner filed a petition for a conditional outpatient hearing pursuant to P.C. §1026.2 (hereinafter "§1026.2 hearing"). P.C. §1026.2 is the State's statutory scheme for continued involuntary civil confinement of insanity acquittees. (All further references to the State's statutory scheme for continued confinement of insanity acquittees refer to this Section unless otherwise noted.) Through his §1026.2 petition, petitioner raised federal questions regarding the constitutionality of the statutory scheme and sought release. In contravention to California law, the Superior Court denied the §1026.2 hearing. Petitioner appealed, and the Court of Appeals found the denial of the hearing to be unconstitutional and contrary to law and remanded for a hearing. (People v. Endsley, (2016) 248 Cal.App.4th 110.) The Superior Court conducted a §1026.2 hearing between 5-8-2017 and 6-5-2017. However, due to the constitutional deficiencies in the statutory scheme, petitioner could not prevail. Petitioner filed a second appeal. The Court of Appeals held that petitioner's §1026.2 hearing failed to comply with due process and issued remittitur for a new hearing in October of 2018. (People v. Endsley, (2018) 28 Cal.App.5th 93.) In the intervening two years, the trial court has refused to provide petitioner a §1026.2 hearing and to otherwise comply with the remittitur order. Petitioner has filed two writs of mandate in the Court of Appeals asking the appellate court to order the trial court to comply with the remittitur order and provide the §1026.2 hearing. (Appellate Court Nos. E072764 and E073904, respectively.) Both writs of mandate were denied.

On 12-16-2019, petitioner filed a petition for writ of habeas corpus ("petition") restating the federal questions he has tried to raise through his §1026.2 petition, alleging he is and has been denied due process and equal protection rights under the U.S. Constitution through the State's statutory scheme, and that he no longer met the criteria for involuntary civil confinement. Each claim in the petition was clearly stated to be based on the Clauses of the U.S. Constitution and/or cited U.S. Supreme Court rulings for controlling authority. Thus, the federal questions

sought to be reviewed were clearly and unequivocally raised at the initial pleading stage in both the court of first instance and the court of appeal. The petition further alleged that (1) the specific rights denied have been mandated by both the United States Supreme Court and the California Supreme Court for any form of involuntary civil confinement to comply with the Due Process Clause of the U.S. Constitution; (2) those rights have been granted to all of California's other classes of civilly confined persons; (3) petitioner has attempted to raise the federal questions of denial of those rights through the State's statutory scheme since 2015; (4) the statutory scheme has been used to deny petitioner hearings on both the federal questions presented and on the issue of whether petitioner meets the criteria to be classified and subject to continued civil confinement as an insanity acquittee; and (5) this "injury in fact" under the State's statutory scheme gave petitioner standing to challenge the constitutionality of the statutory scheme via writ of habeas corpus.

The Superior Court denied the petition on the ground that petitioner was required raise the federal questions through a §1026.2 hearing even though the petition clearly stated that petitioner is subject to indefinite denial of said hearings. Petitioner refiled the petition in the Court of Appeals. The Court of Appeals denied the petition. On 4-13-2020, Petitioner filed a petition for review in the California Supreme Court. In the Answer and Supplemental Answer, the respondents (or "State") asserted that petitioner was required to exhaust his federal questions through a §1026.2 hearing and that the availability of that process foreclosed his petitions for either writ of habeas corpus or review. The State further asserted that there would be no further delays in petitioner's §1026.2 hearing and that he would receive a hearing on 6-25-2020. The California Supreme Court denied the petition for review on 6-17-2020. On 6-25-2020, petitioner did not receive a §1026.2 hearing, and neither his counsel of record nor the trial court have been in contact with him regarding that hearing or any future hearings. On 6-25-2020, petitioner filed a petition for rehearing in the State Supreme Court. On 7-2-2020, the petition for rehearing was denied.

REASONS FOR GRANTING THE PETITION

A. Conflicts with Decisions of Other Courts.

The courts below have held that insanity acquittees may be denied hearings, are not entitled to the due process protections mandated for involuntary civil confinement to comply with the Due Process Clause of the U.S. Constitution, and that this injury does not give insanity acquittees standing to petition for writ of habeas corpus. These holdings are directly contrary to the prior rulings of numerous courts, including the U.S. Supreme Court, the Ninth Circuit Court of Appeals, and even the State Supreme Court.

A.1. Petitioner's Continued Involuntary Civil Confinement Violates the Due Process and Equal Protection Clauses of the U.S. Constitution.

In Foucha v. Louisiana, (U.S. La. 1992) 504 U.S. 71 (Foucha), this Court defined the standards by which involuntary civil confinement may continue when a citizen is hospitalized due to an acquittal on grounds of insanity. Under Foucha, an insanity acquittee "may be held as long as he is both mentally ill and dangerous, but no longer". (Foucha, 504 U.S. at 77.)

In Hubbart v. Superior Court, (1999) 19 Cal.4th 1138 (Hubbart), the California Supreme Court analyzed both Foucha and Kansas v. Hendricks, (1997) 521 U.S. 346 (Hendricks) in relation to civil commitment of persons under California's Sexually Violent Predator statute ("SVP", Cal. Welfare & Institutions Code ("WIC") §6600, et seq.). Hubbart determined that whatever the diagnosed mental disorder may be, it must affect the volitional capacity of the individual. "According to [Hendricks], civil commitment is permissible as long as the triggering condition consists of 'a volitional impairment rendering [the person] dangerous beyond their control' ". (Hubbart, 19 Cal.4th at 1156, quoting Hendricks, 521 U.S. at 358.)

The California Supreme Court went on to define "volitional impairment" as a mental deficiency, disorder, or abnormality that causes a person to have "serious difficulty controlling his dangerous behavior". (In re Howard N., (2005) 35 Cal.4th 117, 135-36 (Howard).)

A.1.a Insanity Acquittees Are Denied A Professionally Adequate And Current Diagnosis To Justify Their Continued Confinement And Can Be Denied Release When Diagnosed In Full Remission.

Pursuant to the rulings of the United States and California Supreme Courts, a person must be suffering from a *current* mental disorder for involuntary civil confinement to comply with due process.

The "written report [of the examining doctors at the release hearing] stated that Foucha 'is presently in remission from mental illness....' " (Foucha, 504 U.S. 71, --.) "The [United States Supreme Court] noted that since there was no evidence or claim that Foucha was *presently* insane or mentally disturbed [at the time of the release hearing], the basis for confining Foucha as an insanity acquittee had 'disappeared' ". (Hubbart, 19 Cal.4th at 1159, quoting Foucha, 504 U.S. at 78 (emphasis added).)

The California Supreme Court ruled that for civil commitment of SVPs to be constitutional such a commitment must be based on a current mental disorder because "[u]nlike criminal cases or most civil cases where the facts are the facts and they don't change over time, mental condition can". (Albertson v. Superior Court, (2001) 107 Cal.Rptr.2d 381, 384 (Albertson).) According to the California Supreme Court, the interest in obtaining information concerning the individual's current mental state serves "to avoid committing a person who does not currently suffer from a qualifying mental disorder, and to support the commitment of a person who does suffer from a qualifying mental disorder". (*Idem*, at 386.) The due process concerns articulated for SVPs apply with equal force to insanity acquittees because a finding that a person meets the definition of an SVP is "the functional equivalent of the NGI acquittal". (People v. McKee, (2010) 47 Cal.4th 1172, 1191 (McKee).)

The State's diagnosis of petitioner's mental illness is based exclusively on his alleged mental condition at the time of his committing offense in 1995, with no evidence of a present mental disturbance. Such a diagnosis is inconsistent with the rulings of both the California and United States Supreme Courts and with generally accepted professional standards of care. Generally accepted professional standards of care, pursuant to the *Diagnostic and Statistical*

Manual of Mental Disorders- V ("DSM-V"), require that a patient's mental illness diagnosis be revised in a timely manner and be based on current symptomology.

Further, petitioner was repeatedly diagnosed to be in "full remission" from mental illness in various hospital reports authored by Atascadero State Hospital ("Atascadero") between 2012 and 2016. Despite this, the State courts refused to order his release.

California's statutory scheme allows insanity acquittees to be subject to continued involuntary civil confinement without either evidence of a present mental disorder or a current mental illness diagnosis, contrary to the rulings of this Court and the State Supreme Court, and for the State to disregard the insanity acquittee's current mental state in formulating the acquittee's diagnosis, contrary to generally accepted professional standards of care.

A.1.b. Insanity Acquittees Are Denied Consideration of Whether They Suffer From A Volitional Impairment.

The California Supreme Court unanimously expressed that the definition of mental illness warranting involuntary civil confinement is primarily a legislative task, but "however the Legislature does or does not choose to define 'mental...deficiency, disorder, or abnormality,' due process principles require that the state demonstrate that the 'mental...deficiency, disorder, or abnormality' causes the person to have serious difficulty controlling his dangerous behavior". (Howard, 35 Cal.4th at 135-36.) "According to [Hendricks], civil commitment is permissible as long as the triggering condition consists of 'a volitional impairment rendering [the person] dangerous beyond their control' ". (Hubbart, 19 Cal.4th at 1156, quoting Hendricks, 521 U.S. at 358.) "[Foucha] is not inconsistent with the general due process principles set forth in [Hendricks]...." (Hubbart, 19 Cal.4th at 1161.)

California acknowledges the due process requirement that the State must demonstrate a volitional impairment in order to justify civil confinement for all classes of civil detainee except insanity acquittees *who have not reached their maximum term of commitment*. (California law calculates an insanity acquittee's maximum term of commitment as the *maximum* amount of time the acquittee could have been sentenced to prison, including all enhancements, had he/she been convicted. See P.C. §1026(e)(2); §1026.5(a).) Unanimous jury verdict required that a juvenile

has "serious difficulty controlling his or her dangerous behavior" to civilly confine juvenile upon expiration of juvenile sentence. (Howard; WIC §1801.5.) For civil confinement of SVPs to comply with due process, the SVP must suffer from a volitional impairment rendering the person dangerous beyond their control. (Hubbart, 19 Cal.4th at 1156; People v. Williams, (2003) 31 Cal.4th 757 (Williams).) To extend insanity acquittees beyond their maximum term of commitment there must be "substantial evidence" of serious difficulty controlling dangerous behavior. (People v. Galindo, (2006) 142 Cal.App.4th 531 (Galindo); People v. Sudar, (2007) 158 Cal.App.4th 655, 662-63 (Sudar); CALCRIM 3453 (court has a *sua sponte* duty to instruct on the constitutional requirement that the person has "a disorder that seriously impairs the ability to control his or her dangerous behavior", and the burden is on the State to prove beyond a reasonable doubt).)

According to the California Supreme Court, the identification of some differences "does not explain why one class should bear a substantially greater burden in obtaining release from commitment than the other". (McKee, 47 Cal.4th at 1203.)

The denial of the requirement of a volitional impairment solely to continued confinement of insanity acquittees who have not reached their maximum term of commitment violates the due process standards articulated by both the United States and California Supreme Courts, is for purposes of punishment, and serves no legitimate interest. "...There is simply no necessary correlation between the length of the acquittee's hypothetical criminal sentence and the length of time necessary for his recovery...." (Jones v. United States, (1983) 103 S.Ct. 3043, 3045 (Jones).) "A State...may of course imprison convicted criminals for the purpose of deterrence and retribution... Here, the State has no such punitive interest...." (Foucha, 504 U.S. at Part II of the opinion.) Commitment to a State hospital pursuant to an acquittal on grounds of insanity "is for purposes of treatment, not punishment". (In re Moye, (1978) 22 Cal.3d 457, 466 (Moye).)

California's statutory scheme for continued confinement of insanity acquittees who have not served their maximum, hypothetical criminal sentences is the State's only civil confinement scheme that denies consideration of a volitional impairment.

A.1.c. Insanity Acquittees Are Denied Consideration of Whether They Are Presently Dangerous.

California law allows the State to go back an indefinite period of time, or to rely entirely on an acquittee's committing offense, to prove an insanity acquittee's present dangerousness. This violates both due process and equal protection. People v. Gibson, (1988) 204 Cal.App.3d 1425, 1442 (Gibson) ("...There has been no showing [by the Legislature] that the complete elimination of proof of some degree of present dangerousness is necessary to protect the public"); *Idem*, at fn.16 ("Our Supreme Court has expressly rejected a permanent conclusive presumption of dangerousness [based on a prior criminal offense] because, inter alia, the passage of time by itself diminishes the validity of the presumption", citing Conservatorship of Hofferber, (1980) 28 Cal.3d 161, 177 (Hofferber)).

Demonstrable acts of dangerousness within a reasonable period are required for similarly situated classes of civil detainees. A criminal parolee civilly committed as a Mentally Disordered Offender ("MDO", P.C. §2960, et seq.) may only be committed for treatment if either he/she is not in remission or "if *during the year prior* to the question being before the Board of Parole Hearings or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another..., or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan...." (P.C. §2962(a)(3) (emphasis added).) The State's Lanterman-Petris-Short Act ("LPS", WIC §5000, et seq.) statute places a six year statute of limitations on demonstrable acts of dangerousness to support a 180-day commitment under WIC, Article 6, Postcertification Procedures For Imminently Dangerous Persons. "Demonstrated danger may be based on assessment of present mental condition, which is based upon a consideration of past behavior of the person *within six years prior* to the time the person attempted, inflicted, or threatened physical harm upon another, and other relevant evidence". (WIC §5300.5(c) (emphasis added).)

California's statutory scheme places no such statute of limitations on demonstrable acts of dangerousness for insanity acquittees and can find dangerousness solely on the basis of their

committing offense, regardless of how much time has passed.

A.1.d. Insanity Acquittees Are Denied Timely Release Upon A Successful Petition For Release.

California law stipulates that should an insanity acquittee prevail on a §1026.2 petition, the community program director or a designee "shall make the necessary placement arrangements, and, within 21 days after receiving notice of the court finding, the person shall be placed in the community in accordance with the treatment and supervision plan...." (P.C. §1026.2(h).)

However, once a court finds that an insanity acquittee is entitled to release under P.C. §1026.2, the acquittee often continues to languish in confinement in a State hospital for months or even years. The State justifies this by saying that there are insufficient available bed spaces in it's *mandatory* conditional release program (ConReP) to accommodate persons waiting to be released.

In Foucha, this Court said nothing about insanity acquittees' due process right to release being contingent upon whether the State *chooses* to spend the money to provide sufficient outpatient resources. In fact, Foucha does not authorize release to be *conditional* at all once the acquittee is no longer either mentally ill or dangerous.

To continue to confine an insanity acquittee in a State hospital after the acquittee has secured a judicial determination that he/she does not meet the criteria for such involuntary civil confinement on the grounds that there are not enough State-mandated outpatient housing facilities, is analogous to continuing to incarcerate a convicted criminal in prison after he has served his entire sentence because the State mandates he go to a half-way house but *chooses* not to provide enough half-way houses.

California's statutory scheme mandates that insanity acquittees who prevail on a §1026.2 petition for conditional release be released within 21 days. Failure of the State to provide sufficient mandatory conditional release resources to comply with its own laws should not be considered "good cause" for the State's continued confinement of insanity acquittees who can no longer be so classified.

A.2 The State's Conditional Release Program Accords Insanity Acquittees Less Constitutional Rights Than Those Accorded To Prisoners Granted Supervised Release In Violation of the Due Process Clause of the U.S. Constitution.

As a prerequisite to release, an insanity acquittee must be placed in "an appropriate forensic conditional release program" ("conditional release"). Solely for insanity acquittees who have not served their maximum term of commitment, conditional release is mandatory. (P.C. §1026.2(e); §1026.3.) Conditional release services are exclusively facilitated by the California Conditional Release Program ("ConReP"). To be accepted into ConReP, an insanity acquittee must agree to terms and conditions of conditional release which greatly infringe upon his/her significant liberty interests, are impermissibly vague, are overbroad, and are more restrictive than conditions for supervised release of convicted criminals, i.e., parole.

This Court has never authorized a State to demand that a person involuntarily civilly confined must agree to any form of conditional release or to waive his or her constitutional rights as a prerequisite to release once the person is no longer either mentally ill or dangerous. (Foucha, supra, 504 U.S. 71.)

Assuming arguendo that such conditional release is constitutional, under the Due Process Clause, the terms and conditions of a civil detainee's conditional release cannot accord the detainee less constitutional rights than those accorded to convicted criminals granted supervised release because persons "who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish". (Youngberg v. Romeo, (1982) 457 U.S. 307, 321-22 (Youngberg), citing Estelle v. Gamble, (1976) 429 U.S. 97, 104.) "It follows logically, then, that the rights afforded prisoners set a floor for those that must be afforded [those civilly detained]...." (Hydrick v. Hunter, (9th Cir. 2007) 500 F.3d 978, 989 (Hydrick), citing Youngberg, 457 U.S. at 322 (generalization added); Sharp v. Weston, (9th Cir. 2000) 233 F.3d 1166, 1172.)

The constitutional protections accorded to convicted criminals granted supervised release are clearly defined: (1) a condition of supervised release must be reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the

condition must involve no greater deprivation of liberty than is reasonably necessary given the needs to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) where conditions of supervised release implicate a particularly significant liberty interest, the court must support its decision to impose the condition on the record with record evidence that the condition is necessary and involves no greater deprivation of liberty than is reasonably necessary; and (4) the condition cannot be impermissibly vague in violation of the requirements of due process, or overbroad, restricting more of the defendant's liberty than necessary. (See generally, 18 U.S.C. §3583 and §3553; U.S. v. Edgin, (C.A. 10 (Okla.) 1996) 92 F.3d 1044, 1048 (Edgin); U.S. v. Wolf Child, (C.A. 9 (Mont.) 2012) 699 F.3d 1082, 1090 (Wolf Child).) It is wholly within the power of the court to approve or alter the terms and conditions of such supervised release. (U.S. v. Scott, (C.A.7 (Ill.) 2003) 316 F.3d 733, 736 (Scott); Edgin, 92 F.3d at 1048; Wolf Child, 699 F.3d at 1090.) Additionally, a person has the right to challenge the conditions of supervised release prior to release. (U.S. v. Loy, (C.A.3 (PA.) 2001) 237 F.3d 251 (Loy).)

California's statutory scheme allows for its mandatory conditional release program to require insanity acquittees to agree to numerous terms and conditions which infringe upon their significant liberty interests; are impermissibly vague; are overbroad; are completely unrelated to the nature and circumstances of their committing offenses; and are not reasonably related to the goals of deterrence to criminal conduct, protection of the public, medical or psychiatric care, or any form of treatment. Under California law, if an insanity acquittee refuses to agree to these terms and conditions, they can be subject to indefinite, continued civil confinement regardless of whether or not they are mentally ill, dangerous, or suffer from a volitional impairment.

A.3 The State Has A Policy or Practice of Placing Insanity Acquittees Into Alternative Forms of Confinement Which Are Neither Court-Ordered Nor Defined In The Law In Violation of the Due Process Clause of the U.S. Constitution.

It is a policy or practice of the State to place insanity acquittees who have been judicially ordered to conditional release pursuant to its statutory scheme into what are sometimes called

"step-down" programs prior to placing those patients into the custody of the court-ordered, conditional release program. These step-down programs are nowhere defined in the law, and detain people without any statutory authority.

Although the State may legitimately confine persons both criminally and civilly, that confinement must be defined in the law to comply with due process. When a person pleads or is committed on grounds of insanity, those processes are defined in the law. (P.C. §1027 and §1026, respectively.) When that person petitions for release, that process is defined in the law as well (P.C. §1026.2), and stipulates release to an "appropriate forensic conditional release program". (P.C. §1026.2(e).)

The step-down programs referenced above are not defined in the law as part of an "appropriate forensic conditional release program". Rather, these programs exist outside the definition of the law, and thus detain people without statutory authority to do so. These programs, which are not part of the conditional release program which the patient was ordered to, have the power to ignore the terms and conditions of the patient's conditional release contract, ignore the patient's constitutional rights, and revoke the patient's conditional release for refusing to comply. For example, one such program, Northstar (now closed), subjected its patients to: forced, uncompensated, daily labor; mandatory "treatment" which served no legitimate, therapeutic interest; forced, daily walks in over 95 degree heat; group punishment for rule infractions by individual patients; not allowing patients to have personal property which they owned while hospitalized, expecting patients to dispose of it if they had nowhere to send it; etc.

This policy is analogous to a convicted criminal being released to court-ordered parole, but after being released from prison and prior to being placed on parole, the parolee is shuttled-off to someone's house where the parolee must spend the next six months performing all manner of unpaid labor and menial tasks, and if he refuses to comply, his "parole" is revoked and he is returned to prison.

California law nowhere authorizes nor defines the step-down programs referred to above, and thus insanity acquittees are forced to participate in a program of false imprisonment and slave-labor as a prerequisite to release from involuntary civil confinement.

A.4 Insanity Acquittees Are Subject To Retaliation And Unconstitutional Conditions By The California Conditional Release Program In Violation of the Due Process Clause of the U.S. Constitution.

California law mandates only insanity acquittees who have not served their maximum term of commitment are required to participate in an "appropriate forensic conditional release program" as part of the release process. (P.C. §1026.2(e).) This conditional release is exclusively facilitated through the California Conditional Release Program ("ConReP").

Petitioner's prior conditional release to ConReP (from approximately May to December of 2012) was revoked when ConReP informed petitioner that he could not play video-games which ConReP did not approve of and, *although he complied*, petitioner informed ConReP that he was going to take legal action against ConReP for violating his First Amendment rights. (This Court held that video-games qualify for First Amendment protection in Brown v. Entertainment Merchants Ass'n, (2011) 131 S.Ct. 2729.) ConReP then moved for petitioner's revocation saying that petitioner made a "threat". Court transcripts of petitioner's revocation hearing show that petitioner made no statement which met the definition of a "threat" under any law including P.C. §422.

Since petitioner's revocation, ConReP interviewers have repeatedly informed petitioner that ConReP will not accept him until and unless he agrees to terms and conditions abridging his constitutional rights and agrees to not file lawsuits against ConReP. Petitioner has refused to agree, and ConReP has retaliated by refusing to accept him despite the fact that petitioner has been reported to be in "full remission" from mental illness in various hospital reports.

The State cannot compel an individual to choose between exercising his or her First Amendment rights and participating in an otherwise available program. (Thomas v. Review Bd., (1981) 450 U.S. 707, 716.) Such a compulsion is an "unconstitutional condition", which is a demand that a person give up a constitutional right in return for some benefit. "The reason why such retaliation offends the constitution is that it threatens to inhibit exercise of the protected right... Retaliation is thus akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit". (Crawford-El v. Britton, (1998) 523 U.S. 574, 588 n.10.)

California's statutory scheme mandates insanity acquittees participate in a conditional release program which has a history of retaliating against them and subjecting them to unconstitutional conditions.

A.5 Insanity Acquittees Are Subject To Revocation of Conditional Release And Recommitment Without The Due Process Procedures Required For Civil Commitment In Violation of the Due Process Clause of the U.S. Constitution.

California law includes provisions for the conditional or unconditional release of persons involuntarily civilly confined. Solely for insanity acquittees who have not served their maximum term of commitment, conditional release is mandatory. (P.C. §1026.2(e); §1026.3.) Under California law, for an insanity acquittee to be conditionally released, the burden is entirely on the acquittee to prove by a preponderance of the evidence in a judicial proceeding that he/she is either not mentally ill or dangerous. Thus, to be conditionally released, the acquittee must prove that he or she no longer meets the criteria to be classified as an insanity acquittee. However, acquittees placed on conditional release are subject to revocation of conditional release and recommitment *as insanity acquittees* without any of the due process procedures required in civil commitment proceedings.

In Foucha, this Court ruled that once an insanity acquittee no longer meets the criteria to be classified as an insanity acquittee, he cannot be held as such. "The [High Court] noted that since there was no evidence or claim that Foucha was presently insane or mentally disturbed, the basis for confining Foucha as an insanity acquittee had 'disappeared' ". (Hubbart, 19 Cal.4th at 1159, quoting Foucha, 504 U.S. at 78.)

> "The [High Court] next observed that assuming Foucha could no longer be held as an insanity acquittee consistent with [Jones v. United States, (1983) 463 U.S. 354], his continued confinement was 'improper absent a determination in civil commitment proceedings of current mental illness and dangerousness.' ([Foucha, 504 U.S. at 78].) The court concluded that this standard had not been met in proceedings leading to Foucha's recommitment, because clear and convincing evidence of a mental disorder had not been introduced. '[I]ndeed, the State does not claim that Foucha is now mentally ill.' ([Foucha, 504 U.S. at 80].)"
>
> (Hubbart, 19 Cal.4th at 1160.)

According to this Court, once it has been shown that an insanity acquittee can no longer

be so classified, the acquittee becomes entitled to the same due process required in general civil commitment proceedings in order to justify his or her recommitment and continued confinement.

As stated in the petition, petitioner was conditionally released in the early part of 2012, and subsequently revoked and recommitted in December of 2012. Petitioner's conditional release was a judicial determination that petitioner had proven by a preponderance of the evidence that he could no longer be classified as an insanity acquittee. For the State to revoke petitioner's conditional release and recommit him, "the State was required to afford the protections constitutionally required in a civil commitment proceeding." (Foucha, 504 U.S. at Part II of the opinion, citing Jackson v. Indiana, (1972) 406 U.S. 715; Baxstrom v. Herold, (1966) 383 U.S. 107, 111-12.)

According to the Supreme Court of the State of California, following Foucha and Hendricks, for any form of involuntary civil confinement to comply with due process (1) the person must have a mental disorder; (2) the person must be a danger to others due to that mental disorder; and (3) the State must "demonstrate that the 'mental...deficiency, disorder, or abnormality' causes the person to have serious difficulty controlling his dangerous behavior". (Howard, (2005) 35 Cal.4th at 135-36; Hubbart, 19 Cal.4th at 1156.) These are the due process requirements necessary under California law for general civil commitment proceedings.

Under California's statutory scheme, the State need prove nothing to revoke and recommit a person as an insanity acquittee. P.C. §1608 (a revocation hearing can be mandated by the "outpatient treatment supervisor" based solely on the opinion that the person "requires extended inpatient treatment or refuses to accept further outpatient treatment and supervision"). Under P.C. §1608, no evidence or allegation of current mental disorder, dangerousness, or volitional impairment is required to support recommitment proceedings, or is even to be considered at the revocation hearing.

At petitioner's revocation hearing, it was only alleged that petitioner made a "threat" as the grounds for his recommitment. At the revocation hearing, no claim was made that petitioner was mentally disordered or that he was suffering from a volitional impairment, and the court made no inquiry as to either.

Assuming arguendo that petitioner did make a threat, that could only be construed to establish dangerousness. Under Foucha, this is not enough for recommitment and continued confinement of a "sane acquittee". Foucha held that it violated due process and equal protection for the State to claim "that it may continue to confine Foucha, who is not now considered to be mentally ill, solely because he is deemed dangerous...." (Foucha, 504 U.S. at Part III of the opinion.)

This Court went on to define the proper due process procedures for alleged criminal acts, such as criminal threats, of insanity acquittees who can no longer be classified as insane. "[I]f Foucha committed criminal acts..., the State does not explain why its interest would not be vindicated by the ordinary criminal processes...and other permissible ways of dealing with patterns of criminal conduct... Had they been employed against Foucha..., there is little doubt that if then sane he could have been convicted and incarcerated in the usual way". (Foucha, 504 U.S. at Part II of the opinion.)

California's statutory scheme allows for any person who has been conditionally released to be recommitted to a State hospital without a finding of a mental disorder, dangerousness, or a volitional impairment. This statutory scheme is fundamentally at odds with the prior rulings of this Court, and, in petitioner's case, has caused his unlawful and continuing confinement since December of 2012.

A.6 The Evaluations Which Form The Bases Of Insanity Acquittees' Court Reports Are Not Recorded In Violation of the Due Process Clause of the U.S. Constitution.

California law stipulates that once a person is acquitted on grounds of insanity and committed to a State hospital, "the medical director of the facility shall, at six-month intervals, submit a report in writing to the court and the community program director...setting forth the status and progress of the [acquittee]". (P.C. §1026(f).) It is also the policy of the California Conditional Release Program ("ConReP") to submit reports to the court concerning the acquittee's progress at least every six-months. (ConReP Policy and Procedure Manual, Section 1310.5.) Neither petitioner's semiannual hospital conferences (commonly called "staffings") nor

his semiannual ConReP interviews are recorded. These staffings and interviews (hereinafter collectively "evaluations") form the bases for the court reports mentioned above. The failure to record these evaluations violates due process and petitioner's right to preserve and present evidence.

The necessity to record these evaluations for the relevant due process principles involved is undiminished regardless of whether or not these evaluations are considered adversarial.

The courts have long recognized that recording prisoners' parole hearings is required as a matter of due process. To comply with due process, California law contains statutes for the recording of prisoners' Board of Prison Terms ("BPT") hearings. P.C. §3042(b) ("The Board of Prison Terms shall record all those hearings and transcribe recordings of those hearings within 30 days of any hearing. Those transcripts, including the transcripts of all prior hearings, shall be filed and maintained in the office of the Board of Prison Terms and shall be made available to the public no later than 30 days from the date of the hearing....") P.C. §3041.5(a)(4) ("The prisoner and any person described in subdivision (b) of Section 3043 shall be permitted to request and receive a stenographic record of all proceedings").

Petitioner has a due process right to have these evaluations recorded because "the rights afforded prisoners set a floor for those that must be afforded [those civilly committed]". (Hydrick, 500 F.3d at 989, citing Youngberg, 457 U.S. at 322 (generalization added).) "Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish". (Youngberg, 457 U.S. at 321-22.)

As stated in the petition, ConReP interviewers have repeatedly stated to petitioner that until he agrees to terms and conditions which abridge his constitutional rights and to not file lawsuits against ConReP to advocate those rights, ConReP will not accept him regardless of whether or not he is mentally ill or dangerous.

As stated in the petition, various hospital reports continue to use petitioner's alleged mental condition at the time of his committing offense in 1995 to justify both petitioner's diagnosis of a current mental disorder and his continued confinement. Petitioner has repeatedly

questioned the validity of his diagnosis as being inconsistent with generally accepted professional standards of care and the diagnostic criteria in the DSM-V. Hospital employees have willfully ignored generally accepted professional standards of care in order to perpetuate petitioner's diagnosis of continuing mental illness.

None of the above statements are reflected in any of petitioner's court reports, and, because these evaluations are not recorded, petitioner has no way to preserve the evidence of this or to present it to the court.

California's statutory scheme denies insanity acquittees the recording of their evaluations and thereby denies them the constitutional protections accorded convicted criminals, denies their constitutional rights to preserve and present evidence, prevents them from proving that they are subject to unconstitutional conditions and diagnoses that are not consistent with generally accepted professional standards of care as the grounds for their continued confinement, perpetuates their unlawful confinement, and violates the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

A.7 California's Statutory Scheme Allows For Indefinite Denial Of An Insanity Acquittee's Hearing And All Related Procedures In Violation of the Due Process Clause of the U.S. Constitution.

California's P.C. §1026.2 statutory scheme contains no due process or speedy trial guarantees that the §1026.2 hearing will be held in a timely manner or not delayed without good cause, and it is statutorily within the power of the court to withhold the hearing indefinitely.

Petitioner's Constitutional right to Due Process (Cal. Constitution, Art. 1, §§ 7 and 15; U.S. Constitution, Fifth and Fourteenth Amendments) entitles petitioner to a full judicial hearing on the question of his suitability for release. (People v. Soiu, (2003) 106 Cal.App.4th 1191 (Soiu); In re Reyes, (1984) 161 Cal.App.3d 656 (Reyes); People v. Endsley, (2016) 248 Cal.App.4th 110 (Endsley I).) This includes all associated rights -- viz., to be present at the hearing, to the assistance of counsel, to cross-examine adverse witnesses, to present evidence on his own behalf, to court-appointment of an independent expert evaluator where petitioner is indigent, and to be housed in an appropriate facility during the hearing. (See generally, In re

Franklin, (1972) 7 Cal.3d 126 (Franklin); People v. Tilbury, (1991) 54 Cal.3d 56 (Tilbury); In re Jones, (1986) 260 Cal.App.2d 906; People v. Endsley, (2018) 28 Cal.App.5th 93 (Endsley II).)

Petitioner has been proceeding under P.C. §1026.2 since May of 2015, and has consistently been denied hearings and related due process rights, thus perpetuating his unlawful confinement.

California law provides due process protections for timely hearings in relation to all of the State's other civil confinement schemes. Parolees civilly confined as MDOs are entitled to a court hearing "within 60 calendar days". (P.C. §2966(b).) Persons civilly confined under the State's LPS Act as Imminently Dangerous Persons, are entitled to a hearing "within four judicial days of the filing of the petition...." (WIC §5303.) Juveniles civilly confined upon expiration of a juvenile sentence are entitled to a jury trial "not less than four days nor more than 30 days from the date of the order for trial...." (WIC §1801.5.) Extension proceedings for insanity acquittees who are nearing their maximum term of commitment stipulate a jury trial "no later than 30 calendar days prior to the time the person would otherwise have been release,....) (P.C. §1026.5(b)(4).) In felony criminal cases, a person charged with a criminal offense is entitled to a hearing within 60 days of the filing of a remittitur. (P.C. §1382.) Civil commitment proceedings for SVPs have been held must comply with due process, and where those proceedings had been denied for an exaggerated period of time, the SVP was entitled to immediate and unconditional release. (People v. Vasquez, (2nd Dist. 2018) 27 Cal.App.5th 36.) By contrast, insanity acquittees have no statutory guarantee that they will ever receive a hearing.

The Ninth Circuit Court of Appeals specifically held that where a California insanity acquittee were subject to "injury in fact" under California's P.C. §1026.2, that acquittee would have standing to challenge the constitutionality of that scheme through writ of habeas corpus. (Hartman v. Summers, (9th Cir. 1997) 120 F.3d 157 (Hartman).) Such is the case at bar.

Petitioner has attempted to raise his federal questions and seek release through the statutory scheme for 5 years, and the State courts have refused to hear him. Petitioner then sought relief through writ of habeas corpus. The courts below held that the injury of complete denial of hearings does not give petitioner standing to utilize writ of habeas corpus, and that he

must somehow exhaust the P.C. §1026.2 scheme even though the State courts have refused to give him hearings. Young v. Weston, (C.A.9 (Wash.) 1999) 192 F.3d 870, 874 ("...[Young] repeatedly attempted to present to the state courts evidence of the conditions of his confinement and the quality of treatment at the Special Commitment Center. The fact that the state courts refused to receive this evidence does not render Young's claims unexhausted").

California's statutory scheme for continued confinement of insanity acquittees is the State's only civil confinement scheme that can deny a civil detainee's due process right to a hearing and to raise federal questions regarding the constitutionality of their commitment. This scheme has been used to this effect against petitioner for 5 years. The courts below then held that petitioner has no recourse available to him other than the statutory scheme in question; effectively converting his insanity acquittal into a life sentence without the possibility of review.

B. Importance of the Questions Presented.

This case presents a number of fundamental questions concerning interpretation of this Court's prior decisions. The questions presented are of great public importance because they affect the operations of the mental health systems in all 50 states, the District of Columbia, and hundreds of city and county mental health facilities. Congress, through the Americans with Disabilities Act ("ADA"), has recognized the persistent problem of discrimination that civilly detained persons have faced in the denial of their civil rights. 42 U.S.C. §12101(a)(4) ("unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination"). In view of the importance of litigation concerning discrimination against civilly detained persons, and the difficulties those persons have in pursuing legal recourse to redress such discrimination, guidance on the questions is of great importance because it affects the ability of civilly detained, U.S. citizens throughout the nation to receive hearings consistent with the constitutional guarantees of due process and equal protection, and which may otherwise result in the denial of fundamental rights, being subjected to harsher conditions of confinement than convicted criminals, and the remainder of

their lives in psychiatric hospitals without due process.

The importance of the issues is enhanced by the fact that the courts below have issued rulings directly contrary to the holdings of this Court, the Ninth Circuit Court of Appeals, and even the State Supreme Court. In Foucha, supra, this Court made numerous findings regarding the constitutionality of continued civil confinement of insanity acquittees after the initial finding of insanity is passed, including right to release after the acquittee is no longer mentally ill (Foucha, 504 U.S. at 77), and that continued confinement after the person can no longer be classified as an insanity acquittee must comply with general civil commitment proceedings. (*Idem* at 78.) In Hendricks, supra, this Court determined that civil commitment complies with due process only so long as the triggering condition involves "a volitional impairment rendering [the person] dangerous beyond their control". (Hendricks, 521 U.S. at 358.) In Howard, supra, the State Supreme Court, following Hendricks, held that for any form of involuntary civil confinement to comply with due process, the person must "have serious difficulty controlling his dangerous behavior". (Howard, 35 Cal.4th at 135-36.) In Hubbart, supra, the State Supreme Court held that Foucha is not inconsistent with the due process principles articulated in Hendricks. (Hubbart, 19 Cal.4th at 1161.) In Hartman, the Ninth Circuit specifically held that an insanity acquittee suffering "injury in fact" under California's P.C. §1026.2 statutory scheme would have standing to challenge that scheme via writ of habeas corpus.

The courts below have issued rulings contrary to all of this precedent. The courts below have ruled that the State may create a single civil confinement scheme, distinguished from all other civil confinement schemes, that does not have to comply with the precedent of either this Court or even the State's own Supreme Court, and that may indefinitely withhold hearings. In short, the State has created a civil confinement scheme that need not comply with any form of due process and which cannot be reviewed. The lower courts' justification for this is apparent: insanity acquittees who have not served their entire criminal sentence do not deserve due process. A close reading of the case reveals that almost all of the constitutional violations complained of -- viz., lack of requirement of a current mental disorder or a volitional impairment, denial of timely release, conditional release without the constitutional protections

accorded to convicted criminals, forms of custody not defined in the law, recommitment without due process proceedings, and denial of hearings -- evaporate once the insanity acquittee has served his entire *criminal* sentence. Such denial of due process constitutes civil confinement used to exact a criminal penalty, and is directly contrary to two prior rulings of this Court. "...There is simply no necessary correlation between the length of the acquittee's hypothetical criminal sentence and the length of time necessary for his recovery...." (Jones, 103 S.Ct. 3043 at 3045.) "A State, pursuant to its police power, may of course imprison convicted criminals for the purpose of deterrence and retribution... Here, the State has no such punitive interest. As Foucha was not convicted, he may not be punished...." (Foucha, 504 U.S. at Part II of the opinion.)

Intended or not, the courts below have tacitly authorized involuntary civil confinement that withholds all due process, including hearings, and that cannot be held to constitutional scrutiny. In petitioner's case, this is for the remainder of his life. The High Court should be stirred to ask itself: "What is the nature of civil confinement? Is it to function as an alternative form of retribution absent a criminal conviction? Why does one civil confinement scheme withhold due process protections until the detainee has served his entire criminal sentence?" The answers to these questions make it clear that the State's civil confinement scheme for insanity acquittees is intended to punish and withhold release from insanity acquittees and to perpetuate their recommitment without due process. The next question The Court should ask is: "Why has the State refused to give hearings and to hear the federal questions?" The courts below have ruled that the federal questions petitioner has tried to raise must be raised through the statutory scheme in question. The courts then simply refused to give petitioner the hearing; the statutory scheme does not require that they actually provide it. The touchstone of due process is the protection of the individual against arbitrary governmental action. The constitutional mechanism we have to effect that protection is the right of court access. Without that right, no protection exists. The statutory scheme in question, singularly of all the State's civil confinement schemes, denies that right by omission. Thus, thousands of insanity acquittees can be and are detained without constitutionally sufficient process, and when a patient comes along who is sane enough to challenge the constitutional infirmity of the statutory scheme, the State can simply refuse to

give them any hearing at all. Thus, is the statutory scheme insulated from review. The High Court should correct the State's position that it may both withhold due process rights guaranteed by this Court to civilly detained persons, and deny to those persons hearings regarding the denial of those rights and their continuing confinement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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