

## Compelled Testimony and Conservatorship Hearings

**Anna Sofine, MD**

*Fellow in Forensic Psychiatry*

**Joseph Simpson, MD**

*Clinical Associate Professor (Voluntary)*

*Department of Psychiatry and Behavioral Sciences  
Keck School of Medicine of University of Southern  
California*

*Los Angeles, CA*

### Should Statutory Privilege against Compelled Testimony Be Extended to Potential Conservatee

DOI: 10.29158/JAAPL.230004-23

**Key words:** conservatorship; right to remain silent; civil commitment; not guilty by reason of insanity; equal protection

In *Public Guardian of Contra Costa County v. Eric B.*, 508 P.3d 1099 (Cal. 2022), the California Supreme Court considered if the right not to give compelled testimony, which is statutorily provided in not guilty by reason of insanity (NGI) commitment extension proceedings, should also apply in mental health conservatorship hearings on the basis of the Equal Protection clause of the 14th Amendment. The court ruled that the appeal was moot because the one-year conservatorship had expired. But, the court said that if the case were to have moved forward, they would have considered that persons committed after an NGI adjudication and potential conservatees are similar enough to justify further analysis and require the government to provide justification for why the principle of equal protection should not apply.

#### Facts of the Case

Eric B. had a history of mental health treatment, poor compliance, and difficulty obtaining food and clothing. An evaluating psychiatrist found that he met criteria for grave disability related to schizophrenia. The Public Guardian petitioned for a mental health conservatorship. Eric B. requested a jury trial, at which he was called to testify by the Public Guardian. He made illogical statements and was unable to provide a

feasible plan for where he would live and how he would support himself if not conserved.

The jury found Eric B. gravely disabled and appointed the Public Guardian as conservator. Eric B. filed an appeal challenging the order that had compelled his testimony. He argued that, because the right not to give compelled testimony is provided in NGI extension cases, the Equal Protection clause should similarly afford the right under conservatorship hearings.

The court of appeals ruled that conservatees are similarly situated to those who plead NGI in this context, however, it found that the error in compelling the appellant's testimony was harmless. Because the court of appeals' opinion diverged from a prior holding in *Conservatorship of Bryan S. (Bryan S.)*, 255 Cal. Rptr. 3d 195 (Cal. Ct. App. 2019), the California Supreme Court agreed to hear the case to resolve the conflict.

#### Rulings and Reasoning

The California Supreme Court concluded that because Eric B.'s conservatorship had expired, the appeal was moot. But, because an important topic was raised that would likely arise again in the future, the appeal was considered. The court reviewed the state's differential treatment of insanity acquittees and conservatees regarding statutory privilege against compelled testimony and affirmed the court of appeals' position on *Bryan S.* The court found that potential conservatees and NGI's are sufficiently similar for the application of the Equal Protection clause, requiring the government to justify their disparate treatment.

In NGI commitments, a person found NGI may be committed to a state hospital for a length of time no longer than the maximum criminal sentence. Thereafter, the district attorney may petition to extend the commitment by two years (renewable), but must show that the person "represents a substantial danger of physical harm to others because of a mental disease, defect, or disorder" (*Eric B.*, p 1104). California statutes require that NGI extension hearings comply with state and federal constitutional rights provided to criminal defendants, including the right not to give compelled testimony.

In contrast to NGI commitments, which occur in a criminal context, the state legislature created a civil commitment procedure for involuntary mental health treatment when there has been no criminal

offense committed. When a treatment professional determines that a person meets criteria for grave disability and is unable or unwilling to receive treatment, the public guardian may petition for a one-year conservatorship. This may be renewed for one-year terms upon subsequent petitions. Although various due process rights have been extended in this context, the courts have recognized that this proceeding is civil, not criminal, as the purpose is treatment and not punishment. Because their trial is civil, conservatees do not have the right under the U.S. Constitution not to be compelled to testify.

Given the differences between criminal and civil procedures, Eric B. did not argue that he should have the right to remain silent under the Fifth Amendment. Instead, he argued that he should have a statutory right not to testify, the same as that provided by California law for NGI extension proceedings.

There is no statutory right against compelled testimony in California's law establishing proceedings for mental health conservatorships. He argued that equal protection requires that commitment proceedings do not unfairly treat one group compared with another. To see if equal protection principles apply in a specific case, the court must consider a two-pronged analysis. The first prong determines whether two groups are similarly situated for the purpose of the specific law under consideration. The court in *Bryan S.* had found that they are not similarly situated because conservatorship proceedings do not originate from a criminal case and there exists a possibility for placement outside of a hospital setting. The court of appeals in Eric B.'s case disagreed, declaring that the two groups are in fact similarly situated because both have potential for indefinite confinement, and both are subject to commitment for mental health and public safety reasons. The California Supreme Court agreed with the court of appeals' ruling, given that a large proportion of mental health conservatees face physical confinement and the loss of many rights. They concluded that conservatorships and NGI extensions have a goal of treatment, not punishment, and both have a significant loss of liberty at stake. Although they do have significant differences, the two groups are similarly situated with respect to testimonial privilege, such that the government is required to justify differential treatment.

The California Supreme Court also reviewed the trial court's decision in *Eric B.*, which hinged on the

importance of the trier of fact being able to observe the potential conservatee, even if this requires compelled testimony. The state's highest court considered that conservatees are not subject to criminal proceedings, but noted that NGI extension hearings are civil, and only determine whether commitment criteria have been met. The court concluded that the two groups are sufficiently similar with respect to testimonial privilege to satisfy the first prong; thus, the second prong must then be examined.

The second prong of the equal protection analysis determines whether the unequal treatment of two similar groups is justified. The lower courts did not reach this second prong, so, the court noted, the arguments here have not been well-developed. Typically, the trial court would rely on the Public Guardian to justify differential treatment. The California Supreme Court concluded that a remand was not appropriate in this case and that the second prong should be evaluated in a future case.

#### Discussion

In the case of *Eric B.*, the California Supreme Court considered whether the right not to be compelled to testify, which applies in NGI extension proceedings, should also apply in mental health conservatorship hearings. Although the court found the case moot and did not grant relief to Eric B., it held that NGI acquittees and potential conservatees are similarly situated, and, in future cases, the government could be required to demonstrate why the two groups should be treated differently in terms of the right not to be compelled to testify.

This case has important implications for persons with mental illness who are involved in conservatorship proceedings. In future cases, if the government cannot meet its burden to demonstrate why the classes of persons should be treated differently, or the legislature does not intervene, it means that persons will no longer be required to testify in their conservatorship hearings. There is risk that the courts will not hear from these individuals, who are believed by their treatment providers and the government to be unable to care for themselves. If we consider that the purpose of such hearings is not for confinement, but rather for the treatment of a gravely disabled person, then such a ruling would arguably create a higher barrier for these individuals to receive the help and care they need.