CALIFORNIA COURT OF APPEAL

THIRD APPELLATE DISTRICT

Case No. C091173

FOLSOM POLICE DEPARTMENT and CITY OF FOLSOM,

Appellants,

vs.

MARK COLEMAN,

Respondent.

On Review From an Order After Judgment

Sacramento County Superior Court | Case No. 34-2019-20000415

Hon. Stephen Acquisto

RESPONDENT'S BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL THIRD APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: C091173
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: George M. Lee (SBN 172982) FIRM NAME: SEILER EPSTEIN LLP STREET ADDRESS: 275 Battery Street, Suite 1600 CITY: San Francisco STATE: CA ZIP CODE: 94111 TELEPHONE NO.: (415) 979-0500 FAX NO.: E-MAIL ADDRESS: gml@seilerepstein.com ATTORNEY FOR (*name*): Respondent MARK COLEMAN	SUPERIOR COURT CASE NUMBER: 34-2019-20000415
APPELLANT/ PETITIONER: FOLSOM POLICE DEPARTMENT, et al. RESPONDENT/ REAL PARTY IN INTEREST: MARK COLEMAN	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Respondent Mark Coleman

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

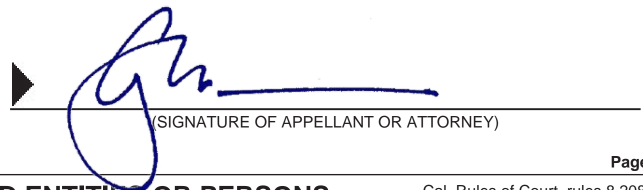
	Full name of interested entity or person	**Nature of interest (*Explain*):**
(1)	Mark Coleman	Respondent
(2)	Cynthia Coleman	Respondent's wife
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 17, 2020

George M. Lee (SBN 172982)
(TYPE OR PRINT NAME)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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Over one year ago, Respondent Mark Coleman made a single, sarcastic comment borne out of frustration, in an all-too human moment. He regretted the comment immediately. However, for that solitary remark, Appellants Folsom Police Department and the City of Folsom ("Appellants") continue their efforts to permanently confiscate a valuable and prized collection of firearms which has been in Respondent's family, even though he is not prohibited from owning firearms.

Arguably, the police were right to question him. It is debatable whether the police should have detained him. And debatable still whether he should have been assessed for his mental health. But when that assessment by a medical professional determined that Respondent was indeed, *not* a danger to himself or to others, the doctor correctly judged that he should not be held for further evaluation and treatment. That should have been the end of these proceedings, yet Appellants attempted to substitute their judgment for that of a medical professional in petitioning the trial court to permanently deprive Respondent of his firearms.

The trial court here correctly applied both the holding and reasoning of *City of San Diego v. Kevin B.* (2004) 118 Cal.App.4th 933. As to the holding, *Kevin B.* held that no permanent deprivation could occur in the absence of both an assessment required by Welf. & Inst. Code § 5151 and, upon admission to a mental health facility, the evaluation required by section 5150. 118 Cal.App.4th at 942. Appellants mistake "assessment" and "evaluation" as having the same meaning, when, in the context of these statutes, they do not. Since Respondent was never admitted for evaluation, under *Kevin B.*, the confiscatory provisions of Welf. & Inst. Code § 8102(c) did not apply. This is further supported by the underlying reasoning in *Kevin B.*, as the court stated that principles of due process and fairness

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required any confiscation to be tied to both assessment and evaluation by trained medical professionals, i.e., after an actual admission to a facility.

And even if the trial court erred in not considering the testimony of the officers who detained Respondent, that error was harmless, as their declarations – which the City had offered in lieu of their live testimony – were clearly insufficient to justify the City's burden. The officers' declarations had no foundation for training in mental health or evaluations, bore no qualified opinion as to the state of Respondent's health three months after their encounter, nor did Appellants even address the ultimate question of *how* return of those firearms "would be likely to result in endangering the person or others" under Welf. & Inst. Code § 8102(c). Indeed, the medical records which Appellants also submitted only supported Respondent's position that he did not meet the criteria for an involuntary § 5150 evaluation because he was not a danger to himself or to others. Any alleged error in failing to consider the testimony of the officers in the form as offered was harmless, as exclusion of that evidence did not operate to prejudice Appellants, nor did it result in a miscarriage of justice.

For the reasons that follow, the trial court's decision and judgment denying the petition below should be affirmed.

II. STATEMENT OF FACTS

On July 16, 2019, Respondent had a counseling appointment at a clinic in Roseville, to further his attempts to improve his communication skills with this wife. He previously had a counselling session at the Folsom clinic where he resided at the time, but on the day of this appointment, he arrived to find out that it was at another location in Roseville.

Annoyed with the inconvenience, Respondent made an off-hand, frustrated, and sarcastic comment. According to the police report upon

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which the petition relied, an employee of the counselling group alleged that he made a comment along the lines of, “Well, I guess I will go shoot myself in the head.” (JA023; JA052, ¶ 4.) However, according to the medical records, taken contemporaneously with his detention, what he actually said was more along the lines of, “this is why people shoot themselves.” (JA100.)

Whatever the comment was, however, the clinic employee made a report to the Folsom Police Department. (JA023.) The Folsom Police Department dispatched Officer Lasater, who made an initial traffic stop (JA033, ¶¶ 7-8), and with the assistance of Officers Airoso and Maslak, Respondent was taken into custody without resistance or incident. (JA033-34, ¶¶ 9-10; JA023.)

Respondent has no criminal history, and in fact, has a permit to carry a concealed weapon (CCW). Based upon this fact, however, the Folsom Police Department determined that he “had the means to carry out his [suicide] threat” (JA024; JA034, ¶ 13), and accordingly took steps to seize the firearm that he carried (JA054, ¶ 16), as well as twenty-five other firearms that were registered to both Respondent and his wife. (JA055, ¶ 20; JA058-59, 061.) Respondent’s family had collected firearms for many years. (JA100.)

Respondent was taken to Mercy Hospital of Folsom, where he was assessed for an involuntary commitment pursuant to Welf. & Inst. Code § 5150. (JA054, ¶ 19; JA061.)

At the time of his initial assessment by Dr. Vasileios Panagopoulos, Respondent admitted that he had made a “‘stupid’ comment, which he regrets profoundly.” (JA100.) However, after consultation with both Respondent and his wife, Dr. Panagopoulos’s assessment was that he had made that comment out of frustration, and that he did not actually have any suicidal thoughts or depressive symptoms. (JA103.) Dr. Panagoupolous

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concluded: “The patient is not an imminent danger to self or others at this time and does not meet the legal criteria for involuntary admission.” (Id.) Accordingly, he was not admitted for the 72-hour involuntary commitment pursuant to section 5150. Dr. Panagoupolous further noted that Respondent had no past psychological hospitalizations or contacts, and no reported substance abuse issues. (JA100.)

As noted, Respondent has no criminal history, and has been a long-time holder of a permit to carry a concealed weapon (CCW). (JA052, ¶ 7.) Respondent is not prohibited from owning or possessing firearms.

III. PROCEDURAL HISTORY

On August 15, 2019, petitioner Folsom Police Department, City of Folsom filed its PETITION FOR JUDICIAL DETERMINATION RE: RETURN OF FIREARMS pursuant to Welf. & Inst. Code § 8102(c). (JA012.) The petition sought confiscation and destruction of the 25 firearms that had been seized, along with all of the ammunition. (JA018.) The basis of the petition was made on information and belief “that the return of the […] Weapons to Respondent would likely result in harm and endangerment to Respondent and/or other persons.” (JA017-018.) The petition itself was not verified under penalty of perjury. It was supported by declarations of two the responding officers (Decl. of Officer Jonathan Lasater, JA032-035; Decl. of Officer Brian Airoso, JA051-055), who described the circumstances surrounding Respondent’s detention. In addition, the City submitted the declaration of Assistant City Attorney Sari Myers Dierking, who purported to authenticate Respondent’s psychiatric records from Mercy Hospital. (JA092-103.)

Prior to the hearing, the City also served notice of intention to introduce documentary evidence “in lieu of live testimony.” (JA105.) The

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documentary evidence that it primarily sought to introduce was the declaration of Officer Airoso, "in lieu of" his live testimony (id.), and at the same time, Petitioner also filed Officer Airoso's declaration and exhibits separately. (JA051-90.) Similarly, Petitioner served notice of an intention to introduce Officer Lasater's declaration "in lieu of [his] live testimony" (JA107), and also filed that declaration to which no exhibits were attached. (JA032-35.)

Respondent Coleman filed a written opposition to the unverified petition. (JA109-118). He did not contest the basic underlying facts as presented by the petition, but Respondent disagreed with the conclusion that there was any legal basis for the Appellants further to retain his property. Respondent argued that since there was no actual § 5150 hold, that the requirements under Welf. & Inst. Code § 8102 "[were] not triggered." (JA112.) However, Respondent also asserted, in light of the evidence that was being offered with the petition and declarations, that the City could not meet its burden of proof to justify confiscation under section 8102(c), and that the circumstances presented "as explained above and as will be more fully detailed at the hearing could not be more different" than the circumstances presented by *People v. Jason K.* (2010) 188 Cal.App.4th 1545 and *Rupf v. Yan* (2000) 85 Cal.App.4th 411. (JA112-113.)

At the hearing on October 25, 2019, the trial court heard argument, but "did not allow witness testimony," and the matter was taken under submission. (JA120.) The trial court denied the petition on October 31, 2019. (JA120-126.) In its order, the trial court specifically noted the doctor's findings that Respondent had not met the criteria for involuntary admission, and accordingly, Respondent "was not placed on a 5150 hold." (JA121.)

In a subsequent order, the trial court awarded Respondent attorneys' fees in the amount of $3,150 pursuant to Penal Code § 33850. (JA128-131.)

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The trial court agreed to the City's request to stay any order to return the confiscated firearms pending appeal. (JA131.)

IV. STANDARD OF REVIEW

The proper interpretation of a statute, and its application to undisputed facts, is a question of law that is reviewed de novo. *Burnham v. Public Employees' Retirement System* (2012) 208 Cal.App.4th 1576, 1582 (citing *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 722). Further, where, as here, any alleged error is asserted to be without prejudice or harmless to the appellant under a "miscarriage of justice" standard, the court should reverse only when the court, "'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, as modified (Oct. 13, 2004) (citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

V. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DENYING THE PETITION.

The trial court correctly considered, and rejected, Appellants' argument that they were entitled to permanently confiscate Respondent's property under these circumstances. The trial court also properly relied upon and applied the reasoning of *City of San Diego v. Kevin B.*, *supra*, 118 Cal.App.4th 933.

Welf. & Inst. Code § 8102 authorizes the seizure and possible forfeiture of weapons belonging to persons detained for examination under section 5150 because of their mental condition. *Rupf v. Yan*, *supra*, 85 Cal.App.4th at 416-417; *People v. One Ruger .22-Caliber Pistol* (2000) 84

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Cal.App.4th 310, 312. Section 8102 has both an automatic (and immediate) confiscation provision, set forth in subdivision (a), and a permanent confiscation provision as allowed in subdivision (c). The automatic confiscation provision of subdivision (a) provides in part: "Whenever a person, who has been detained or apprehended for examination of his or her mental condition […], is found to own, have in his or her possession or under his or her control, any firearm whatsoever, or any other deadly weapon, the firearm or other deadly weapon *shall* be confiscated by any law enforcement agency or peace officer, who shall retain custody of the firearm or other deadly weapon." Welf. & Inst. Code § 8102, subdiv. (a) (emphasis added.) At the time the weapons are seized, the agency must notify the person from whom the weapon is seized of the procedure for the return of the confiscated firearms. *Id*., subdiv. (b).

The permanent, discretionary confiscation provision is set forth in subdivision (c), which provides: "Upon the release of a person as described in subdivision (b), the confiscating law enforcement agency shall have 30 days to initiate a petition in the superior court for a hearing to determine whether the return of a firearm or other deadly weapon would be likely to result in endangering the person or others, and to send a notice advising the person of his or her right to a hearing on this issue. […]." The petitioning agency bears the burden of proof on the issue of the danger presented by return of the weapons." *Rupf*, 85 Cal.App.4th at 420, citing § 8102, subd. (c); *One Ruger .22-Caliber Pistol*, *supra*, 84 Cal.App.4th at 314.

Appellants' primary argument here is to take issue with the trial court's reliance upon *Kevin B.* Appellants contend that *Kevin B.* is distinguishable and not applicable because the petitioner in that case had not been detained or evaluated by mental health professionals in the first place. 118 Cal.App.4th at 943. And while those are the correct facts of *Kevin B.*, the trial court here faithfully followed both its holding and the

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practical concerns upon which that holding was based. Specifically, the trial court's order here correctly found that "under section 8102, the authority to confiscate and destroy a person's firearms is tied to the process for that person being involuntarily held in a mental health facility." (JA122, Order at 3:9-10.) The trial court further took careful note of the facts in *Kevin B*. (JA122, Order at 3:24-4:16), and did not overlook, but well understood the fact that the appellant in *Kevin B*. was never found, assessed nor evaluated for a mental health hold under section 5150. (JA123, Order at 4:8-9, 4:17-19.)

The trial court faithfully read and applied *Kevin B.*, both as to its holding and its reasoning. As to its reasoning, the court in *Kevin B.* stated:

> On a practical level, unless the power to confiscate and forfeit weapons is closely tethered to the assessment and evaluation required by section 5151 and 5152, a risk arises that weapons will be taken from law-abiding citizens who in fact are not a danger to themselves or others. Absent assessment and evaluation by trained mental health professionals, the seizure and loss of weapons would depend solely on the necessarily subjective conclusion of law enforcement officers who may or may not have the mental health training and experience otherwise available at a designated mental health facility within the meaning of section 5150. Of particular concern here is the fact that although we completely credit the police officers' report of the statements made by appellant's parents, the police themselves never spoke to or observed appellant. Thus not only did the confiscation and ultimate forfeiture of appellant's weapons occur without any assessment or evaluation of him by mental health professionals, it occurred solely on the basis of secondhand reports of his behavior.

118 Cal.App.4th at 942. *See also*, *Rupf v. Yan*, *supra*, 85 Cal.App.4th at 423 (section 8102 applies only to those who are *justifiably* apprehended or detained to have their mental condition evaluated).

The trial court also and correctly applied the holding of *Kevin B.*, in concluding, therefore, that "a trial court has no authority to conduct a

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forfeiture hearing under section 8102 unless the respondent was both assessed *and* evaluated during an involuntary hold in a mental health facility under section 5150." (JA123, at lines 17-19, citing *Kevin B.*, 118 Cal.App.4th at 937 (emphasis original.)) The court in *Kevin B.* well understood it was performing a "literal reading" of the statutory scheme, when it concluded that "it is not it is not possible to read these provisions as permitting the forfeiture of firearms or weapons where a person has not received an assessment and evaluation of his or her mental condition." 118 Cal.App.4th at 941. The court continued: "The only authority permitting forfeiture is section 8102, subdivision (c). By its terms section 8102, subdivision (c), only applies to people who have been released as described in section 8102, subdivision (b). Section 8102, subdivision (b), only refers to people who have had weapons confiscated under section 8102, subdivision (a). By its terms section 8102, subdivision (a), permits confiscation of weapons only of persons who have been apprehended or detained under section 5150 or who have been evaluated in some fashion by a mental health professional. As we have noted, a person detained under section 5150 must be both assessed at the time of admission to a mental health facility *and evaluated if admitted*. The requirement of such professional assessment and evaluation is of course logical in light of the fact that law enforcement officers initiating the process are not required to definitively determine whether a person is dangerous, but only whether there is probable cause to believe a person is dangerous." 118 Cal.App.4th at 941 (emphasis added).

Appellants here make the mistake of conflating "assessment" and "evaluation," as if they were simply synonymous. Indeed, their opening brief expressly claims that "Respondent was evaluated by a physician for an 'involuntary hold status assessment' and for 'treatment planning.'" (AOB at 22, citing JA99.) But that is incorrect, and that mistake of

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conflation is fatal to the premise of their appeal. In the context of these statutes, "assessment" and "evaluation" have different meanings. Section 5150.4 defines "assessment" as "the determination of whether a person shall be evaluated and treated pursuant to Section 5150." Welf. & Inst. Code § 5150.4. *See*, *Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 379 ("Sections 5150.4 and 5151 define 'assessment,' require the professional person in charge of a facility or his or her designee to assess an individual in person before admitting that individual to the facility, and specify that an individual admitted under section 5150 may be held for 72 hours"), as modified on denial of reh'g (May 23, 2017). Thus, an "assessment" must take place "*[p]rior to* admitting a person to the facility for treatment and evaluation pursuant to [s]ection 5150[.]" Welf. & Inst. Code § 5151 (emphasis added). And in this case, the medical record clearly shows that Respondent was "assessed" at the time he was released. (JA103, indicating "ASSESSMENT[.]")

An evaluation, therefore, requires actual admission to the facility. "If the facility designated by the county for evaluation and treatment admits the person, it may detain him or her *for evaluation* and treatment for a period not to exceed 72 hours." Welf. & Inst. Code § 5151(emphasis added). And while a peace officer may take an individual into custody for the initial § 5150 assessment, under a probable cause standard, Welf. & Inst. Code §§ 5150, subdivs. (a) and (b), and 5150.05, that police officer is not qualified to make a the statutorily-defined "evaluation" which requires "the judgment of the professional person in charge of the facility designated by the county for evaluation and treatment," or other medical professional. Welf. § Inst. Code § 5150(e); *Julian*, 11 Cal.App.5th at 376. Welf. & Inst. Code § 5008(a) thus and specifically defines "evaluation" as a term consisting of "multidisciplinary professional analyses of a person's medical, psychological, educational, social, financial, and legal conditions

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as may appear to constitute a problem. Persons providing evaluation services shall be properly qualified professionals and may be full-time employees of an agency providing face-to-face, which includes telehealth, evaluation services or may be part-time employees or may be employed on a contractual basis."

To the ultimate point here, any such "evaluation" must occur only *after* the initial assessment results in an actual admission to the facility. Welf. & Inst. Code § 5152 states, in relevant part: "Each person admitted to a facility for 72-hour treatment and evaluation under the provisions of this article *shall receive an evaluation as soon as possible after he or she is admitted* and shall receive whatever treatment and care his or her condition requires for the full period that he or she is held." Welf. & Inst. Code § 5152, subdiv. (a) (emphasis added). Therefore, unless there has been an admission to a facility, there has not been an "evaluation" within the meaning of section 5151.

Thus, returning to *Kevin B.*, after making its observation that the power to confiscate and forfeit weapons "is closely tethered to the assessment and evaluation required by section 5151 and 5152," the court concluded: "Given the literal language of the applicable statutes and the risk of erroneous confiscation and forfeiture, it suffices to conclude that in permitting confiscation and forfeiture of weapons, the Legislature intended that no permanent deprivation occur in the absence of the assessment required by section 5151 *and, upon admission to a mental health facility, the evaluation required by section 5150*." 118 Cal.App.4th at 942 (emphasis added.) That evaluation, as stated, must be performed by a qualified professional, pursuant to §§ 5150(e) and 5008(a). And the evaluation under section 5151 itself is predicated upon admission to a facility, pursuant to § 5152.

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In harmonizing these various provisions, therefore, even if the facts under *Kevin B*. may distinguishable because the appellant in that case had neither been assessed *nor* evaluated, the trial court here correctly applied both the holding of that case in requiring *both*, and in following faithfully the practical concerns underlying its rationale. Here, since Respondent was never admitted, he was never "evaluated," within the meaning of sections 5151 and 5152(a), and therefore, the trial court correctly followed *Kevin B.* in finding that § 8102(c) did not apply.

B. ANY ASSERTED ERROR WAS HARMLESS.

Any error by the trial court in "not allow[ing] witness testimony" (JA120) was harmless, since such refusal did not operate to Appellants' prejudice. There is no evidence in the record that the trial court did not consider the two officer declarations that were offered and filed "in lieu of" their live testimony; and in any event, that testimony was insufficient to carry Appellants' burden.

"Even violation of a 'mandatory' duty does not always make reversal and remand 'automatic.'" *Guardianship of Christian G.* (2011) 195 Cal.App.4th 581, 607 (citing *In re Manzy W.* (1997) 14 Cal.4th 1199, 1204–1207 & fn. 2.) "[A] lack of literal compliance with a mandatory [statutory] duty may be harmless error, so long as the record affirmatively reflects that the protections intended to be afforded to private parties through the exercise of that duty has been otherwise provided." *Christian G.*, 195 Cal.App.4th at 608 (citing *Manzy W.*, 14 Cal.4th at 1209). Otherwise, "[b]efore any judgment can be reversed for ordinary error, it must appear that the error complained of "has resulted in a miscarriage of justice." *In re Cristian I.* (2014) 224 Cal.App.4th 1088, 1098 (citing Cal. Const., art. VI, § 13). *See also*, *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107

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("for over 100 years, the California Constitution has also expressly precluded reversal absent prejudice.") "Reversal is justified 'only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" *In re Cristian I.*, *supra*, 224 Cal.App.4th at 1098–1099 (citing *People v. Watson*, *supra*, 46 Cal.2d at 836); Cal. Evid. Code § 354 ("A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice[.]")

In the present case, Appellants offered the declarations of Folsom Police Officers Airoso and Lasater in support of their petition to the trial court. (JA032-35; JA051-55.) Officer Airoso's declaration attached as exhibits the police report, CAD reports of the stop, a consent to search form, the application for assessment, and photographs of the firearms seized. (JA057-90.) Appellants also submitted a declaration authenticating the medical records from Mercy Hospital, which were also attached in full as an exhibit. (JA092-103.)

No part of the evidence offered would have supported a finding that Appellants had met their burden to show that the firearms "would be likely to result in endangering the person or others" under section 8102(c). Officer Airoso's declaration only offered that "based upon [his] training and experience, [his] observation of the events, and [his] interaction with Respondent […]," that it was his "professional opinion that the Respondent posed a significant danger to himself and/or others *on July 16, 2019*." (JA054, ¶ 13, emphasis added.) Yet, Officer Airoso offered no opinion – qualified or otherwise – as to Respondent's state of mind as of October 23,

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2019, or the alleged danger that return of the seized firearms presented over three months later. And, the sum of Officer Airoso's "training and experience" amounted to five years as a police officer with the City of Folsom Police Department. (JA051, ¶ 2.)

Likewise, Officer Lasater's declaration primarily detailed the traffic stop, the basis for the detention, and like Officer Arioso, he identically opined: "[b]ased upon my training and experience, my observation of the events, and my interaction with Respondent […] it is my professional opinion that the Respondent posed a significant danger to himself and/or others at the time of our encounter on July 16, 2019." (JA034, ¶ 12.) Officer Lasater purported to have 25 years of experience as a police officer (JA032, ¶ 2), but did not otherwise lay any foundation in order to present a medical or psychological evaluation of Respondent, either on that day or on the day of the hearing, as the hearing took place over three months after their one encounter.

Appellants offered no medical testimony or evidence, aside from the medical records from Mercy Hospital (JA095-103), which only confirmed that "[t]he patient is not an imminent danger to self or others at this time and does not meet the legal criteria for involuntary admission[,]" directly contradicting the opinion of the officers. (JA103). Appellants offered no other testimony whatsoever as to Respondent's then-current state of mind, or even any averments as to how or why return of the firearms "would be likely to result in endangering the person or others" under § 8102(c).

Furthermore, Appellants also and specifically provided notice that they were seeking admission of the officer declarations when they served notices of intention to introduce documentary evidence (including the exhibits attached to Officer Airoso's declaration) *in lieu of* their live testimony, (JA105, 107), and submitted those declarations and exhibits in advance of the hearing. By doing so, Appellants were waiving any right to

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offer any opinion testimony – qualified or otherwise – as to Respondent's then-current state of mind because they had expressly signaled their intention not to do so. Moreover, by offering these declarations in lieu of live testimony, they were inherently representing to the trial court that they did not intend to offer any other testimony by the officers that was not contained within the corners of those declarations.

In sum, none of the evidence that Appellants offered to the trial court, in lieu of live testimony, could have sustained a finding that return of the firearms would likely result in endangering him or others. And there is no evidence that the trial court failed to consider Appellants' filed and submitted evidence as an offer of proof, under Evid. Code § 354(a). Here, "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court" by way of Appellants' submission of the evidence, and their notice that they intended to offer these declarations and exhibits in lieu of live testimony. More to the point, the trial court adopted and assumed substantially all of the offered facts in support of the Appellants' evidence in reciting the factual and procedural background that prefaced its order. (JA120-121.) Indeed, the trial court did permit legal argument thereon, which was not reported, but only did not allow live witness testimony, before taking the matter under submission. (JA120 at lines 17-18.)

Any claimed error in the trial court's refusal to conduct a live, testimonial hearing was therefore harmless, since the evidence that Appellants had offered – and submitted in lieu of live testimony – did not support in any meaningful way, the conclusion that return of the firearms "would be likely to result in endangering the person or others" under Welf. & Inst. Code § 8102(c).

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C. ACCEPTING APPELLANTS' ARGUMENT WOULD LEAD TO AN UNCONSTITUTIONALLY ANOMALOUS BURDEN AND STANDARD OF PROOF.

As asserted, the evidence that Appellants offered in support of their petition to permanently confiscate the property of Respondent, and that of his wife (see, JA014; JA024; JA035, ¶ 16), was plainly insufficient to justify their forfeiture. But if Appellants were permitted to proceed on the grounds that § 8102 does not require actual *admission* to a facility, notwithstanding *Kevin B.*, it would simply amount to a second-bite opportunity to retain Respondent's firearms on a remarkably low burden. The practical result would be that a police agency which is obligated to seize firearms on a mere probable cause basis (§ 5150.05), may seek to retain them even if there was never any determination that the person was actually a danger to himself or to others, and on the barest supposition that one *might* do harm in the future. This result would be unconstitutional because it would allow for forfeiture on a constitutionally thin basis.

Section 8102 is, practically speaking, a retroactive forfeiture statute. In the first place, it *requires* law enforcement to seize firearms on a low standard, and then once in their possession, permits law enforcement to keep them. "Statutes imposing forfeitures are not favored and are to be strictly construed in favor of the persons against whom they are sought to be imposed." *Baca v. Minier* (1991) 229 Cal.App.3d 1253, 1265 (citing *People v. One 1937 Lincoln etc. Sedan* (1945) 26 Cal.2d 736, 738, and *People v. $6,500 U.S. Currency* (1990) 215 Cal.App.3d 1542, 1547.) Traditionally, in forfeiture proceedings in California, the relevant statutes required the government to prove illicit or illegal use of property, either beyond a reasonable doubt or by clear and convincing evidence, depending upon the nature of the property involved. *People v. Superior Court (Plascencia)* (2002) 103 Cal.App.4th 409, 432; *People v. $9,632.50 U.S.*

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Currency (1998) 64 Cal.App.4th 163, 169 n4. *See also*, *Leonard v. Texas* (2017) 137 S.Ct. 847, 849 (in civil forfeiture proceedings, "there is some evidence that the government was historically required to prove its case beyond a reasonable doubt") (Thomas, J., respecting the denial of certiorari).

But in comparison, the laws justifying the confiscation and forfeiture of firearms – when the process may at least be *initiated* upon a mere probable cause standard – appear to require a much lower level of proof. In *People v. One Ruger .22-Caliber Pistol*, *supra*, 84 Cal.App.4th 310, the Second Appellate District upheld the constitutionality of Welf. & Inst. Code § 8102 against a challenge that the law violated due process principles in requiring the respondent to take affirmative action to prevent the forfeiture. The opinion in *One Ruger .22-Caliber Pistol* noted that prior constitutional shortcomings of that statutory provision were supposedly cured by the Legislature by requiring law enforcement to initiate forfeiture proceedings, and in providing notice and burden of proof requirements. 84 Cal.App.4th at 314. And in *People v. Mary H.* (2016) 5 Cal.App.5th 246, the Fifth Appellate District upheld the constitutionality of Welf. & Inst. Code § 8103(f)(6), which provides for a preponderance of the evidence standard where the government seeks to maintain a five-year prohibition on the possession of firearms after an involuntary commitment under § 5150.

As noted, a person who is actually subject to a § 5150 admission because he or she presents some indicia of danger to themselves or to others faces two automatic forfeitures: (1) their firearms are automatically seized, on a probable cause standard, under Welf. & Inst. Code § 8102(a); and (2) they are subject to an automatic five-year prohibition on the ownership of firearms under § 8103(f), by which they must petition to reobtain their right to possess firearms under § 8103(f)(5). This latter and complete prohibition on the possession of all firearms essentially amounts

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to a de facto forfeiture of those firearms that were taken at the outset of the detention. And all of this, again, is premised upon some putative basis for having *admitted* the person to a facility for evaluation in the first place.

But what of the situation where a person is released without actually having been admitted? As a failsafe, if a police agency *truly* believes that a person is a danger, either to themselves or to others, it may immediately apply to and petition a court for a "Gun Violence Restraining Order" under Pen. Code § 18100 et seq., for either temporary or other injunctive relief that would prevent the respondent from having possession of firearms or ammunition for a period of one year. Pen. Code § 18170. That provision is governed by factors under which the petition must be considered, including whether *the subject* himself poses a significant danger of causing injury to himself or to others, and whether a gun violence restraining order is necessary as less restrictive alternatives have been tried, but are not effective. Pen. Code § 18175(b). Additional factors set forth in Pen. Code § 18155(b)(1) must also be considered. Ultimately, the petitioning agency bears the burden on these issues by clear and convincing evidence. Pen. Code § 18175(b).

However, to follow Appellants' argument here to its logical conclusion here, all of these stringent due process provisions can simply be bypassed, and the police are able to avail themselves of yet another failsafe when a person is not even admitted for evaluation pursuant to section 5150, nor found to be a danger to himself or to others, on the grounds that section 8102 merely requires a person to have been detained by the police, and without offering any qualified medical opinion, contained in the records or otherwise, to justify a permanent forfeiture. But when a person is *not* admitted for evaluation because they are found *not* to be a danger to themselves or to others, and the police decide they simply wish to keep the firearms anyway, this simply amounts to shopping for a second opinion.

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That result, and in particular the low burden of proof that is required to be overcome for an individual to re-acquire his or her lawfully-held firearms that had arguably been erroneously taken in the first place, is constitutionally suspect.

While it is true that *People v. Jason K.*, *supra*, 188 Cal.App.4th 1545 squarely addressed this argument in the context of Welf. & Inst. Code § 8103 (in which the court described § 8102 as its "counterpart," 188 Cal.App.4th at 1558), that decision was premised upon the assumption that a person had actually been hospitalized after a finding that they had presented a danger to themselves or to others. *Id*. at 1557-58; see also, *People v. Mary H.*, *supra*, 5 Cal.App.5th at 259-60 (section 8103(f)(6) employs a constitutional standard of proof.) What distinguishes these cases from the present case is that Appellants here seek to use yet another tool in their bag of forfeitures available to them, but this time, on the assumption that no § 5150 hold was even required in the first place. And thus, it would stand out as a highly incongruous result where the stringent burdens of proof justifying firearm forfeitures and prohibitions that are actually premised upon an underlying § 5150 hold would apply, but that they could simply be bypassed by merely offering two police officer declarations, lacking any foundation in mental health training whatsoever, and where there was no actual showing of how return of the firearms "would be likely to result in endangering the person or others" under Welf. & Inst. Code § 8102(c).

Simply put, there is no "but we really want to keep them" exception to the statutory scheme, which would then allow the police to second-guess the considered medical opinions of the doctors who actually assessed an individual, and where they did not actually admit them for a § 5150 hold. One might well understand that the police are prone to erring on the side of caution in such circumstances that might justify an initial detention, but

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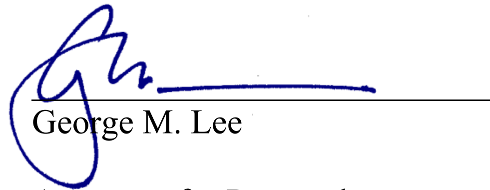
when the outcome after the exercise of that caution resolves squarely in favor of a person who simply made a single, careless, sarcastic yet very human comment, as the Respondent did here, a police agency's simply wanting to keep a person's property for no articulable reason is simply not enough.

VI. CONCLUSION

For the foregoing reasons, the trial court's judgment denying the petition should be affirmed.

Dated: August 17, 2020

SEILER EPSTEIN LLP



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WORD COUNT CERTIFICATION

The undersigned counsel for Respondent herein certifies, pursuant to the requirements of California Rule of Court 8.204(c)(1), that according to the word processing program used to create this brief, the foregoing brief, not including the cover, table of contents, table of authorities, the signature block, and this certificate, contains 6,905 words.

Dated: August 17, 2020

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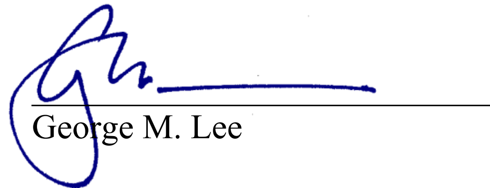

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CERTIFICATE OF SERVICE

I declare that I am over the age of eighteen years and that I am not a party to the above action. My business address is 275 Battery Street, Suite 1600, San Francisco, California 94111. On the date set forth below, I served the foregoing **RESPONDENT'S BRIEF** on the parties in this action in the following manner:

☐ **By First Class Mail:** I placed each document listed above in sealed envelope(s), addressed to the recipient(s) set forth below, with pre-paid postage affixed thereto, and deposited said envelope(s) in a recognized place of deposit for collection and delivery by first class United States Mail.

☐ **By Personal Service:** I personally served each document listed above on the recipient(s) set forth below.

☐ **By Courier/Messenger:** I placed each document listed above in a sealed envelope(s), addressed to the recipient(s) set forth below, and arranged personal delivery of the same through a messenger/courier service, for delivery to be accomplished on this date.

☐ **By Overnight Express:** I placed each document listed above in a sealed envelope(s), addressed to the recipient(s) set forth below, and deposited said envelope(s) with an overnight courier service, for delivery to be accomplished the next business day.

☐ **By Email:** I caused true and correct copies of the above document(s) to be sent via email to the addressee(s) on this date.

☑ **By TrueFiling:** I served the foregoing document(s) by transmitting a .pdf version of the document to the parties listed in the TrueFiling electronic service list as case participants.

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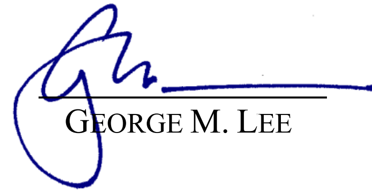
I declare under penalty of perjury that the foregoing is true and correct. Executed August 17, 2020, at San Francisco, California.



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