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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

MARIO RODRIGUEZ Petitioner-Defendant v. SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent.	Case No. S272129 Sixth District Case No. H049016
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	Santa Clara County Case Nos. C1650275 and C1647395

PETITIONER'S ANSWER TO THE AMICUS BRIEF BY THE ATTORNEY GENERAL'S OFFICE ON BEHALF OF THE DEPARTMENT OF STATE HOSPITALS AND DEPARTMENT OF DEVELOPMENTAL SERVICES

After Opinion by the Court of Appeal, Sixth Appellate District,
Affirming the Denial of the Motion to Dismiss,
by the Superior Court for Santa Clara County,
the Honorable Eric S. Geffon, Presiding Judge

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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

MARIO RODRIGUEZ Petitioner-Defendant v. SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent.	Case No. S272129 Sixth District Case No. H049016 Santa Clara County Case Nos. C1650275 and C1647395
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	**ANSWERING BRIEF TO THE AMICUS BRIEF**

TO: THE HONORABLE CHIEF JUSTICE, TANI CANTIL-SAKAUYE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

INTRODUCTION

The Department of State Hospitals and Department of Developmental Services (herein the "DSH" and "DDS") recognize that "[t]he purpose of California's IST commitment scheme is to treat and restore defendants to competency in a timely manner so that their criminal proceedings can resume."[1] (Amicus Brief, at p. 24, citing *Stiavetti v. Clendenin* (2021) 65 Cal.App.5th 691, 694.) Yet, Amici fail to brief the growing problems posed by Incompetent to Stand Trial ("IST") commitments, like the 139% increase in the pending placement list from 342 patients in FY 2013-14, as multiplied to 819

[1] The pagination of Amici's brief is not sequential as required by the California Rules of Court, Rule 8.74, subd. (a)(2). For the Court's convenience, petitioner has cited to the PDF page number and not the printed page number.

patients in FY 2017-18.[2] Since then, "(IST) waitlist has increased by 125 percent to 1,951 as of February 28, 2022."[3] "[A]lmost half of the IST patient referrals were unsheltered homeless individuals at the time of their arrest." (*2018 Annual Report*, *supra,* at p. 10.)

There is now a "scenario in California where hospitals, in the face of long IST referral waitlists might feel pressure to expedite treatment of admitted ISTs."[4] Thus, Amici have a "stake in the outcome" of this csae (Amicus Brief, at p. 17), because if the DSH and DDS are unable to meet specified requirements, "the department[s] potentially could be subject to substantial fines or placed under *federal receivership*."[5] Indeed, Amici's arguments "resemble[] a party far more than [they] resemble[] one 'not directly involved' in an action, such as a reporter, demonstrator, or courtroom observer."

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[2] DSH, *2018 Annual Report*, at p. 10, available at: https://www.dsh.ca .gov/ Publications/Reports_and_Data/docs/2018_Annual_Report.pdf, at p. 10 [last accessed August 24, 2022] [herein "*2018 Annual Report*"].

[3] Department of State Hospitals 2022-23 May Revision Proposals and Estimates, at Section A3 (C), p. 4, available at: https://www.dsh. ca.gov/About _Us/docs/DSH_2022-23_May_Revision_Estimate.pdf [last accessed September 7, 2022].

[4] Renner, M., Newark, C., Bartos, B., McCleary, R., & Scurich, N. (2017) *Length of stay for 25,791 California patients found incompetent to stand trial,* Journal of Forensic and Legal Medicine, 51, 22, 26 available at: doi:10.1016/j.jflm.2017.07.006 [last accessed August 24, 2022] [herein "*Length of Stay for ISTs*"].

[5] California Legislative Analyst's Office (2022) *The 2022-23 Budget: Analysis of the Governor's Major Behavioral Health Proposals*, at p. 12; available at: https://lao.ca.gov/reports/ 2022/4569/ Bahavioral-Health -Proposals-030322.pdf [last accessed August 15, 2022] [herein "*The 2022-23 Budget*", emphasis added].

(*People v. Hooper* (2019) 40 Cal.App.5th 685, 693.)

Amici's vested interest is demonstrated by their endorsed "certificate-based reading of the statutes" (Amicus Brief, at pp. 11, 13, 17), which accredits the DSH and DDS alone as "experts" as to whether "treatment has achieved its desired outcome and the defendant has been restored to competence." (*Id.* at p. 12.) To the contrary, this Court has made clear that the certifying "official is not an expert witness and the certificate is not testimonial opinion." (*People v. Rells* (2000) 22 Cal.4th 860, 868.) The ministerial filing of the certificate initiates further proceedings, as statutorily and constitutionally required to return the committed person for proceedings "separate[] and independent[] of any role that either official or certificate may subsequently play." (*Ibid.*) By law and the Constitutions, judges are responsible for ending the commitment period by court order in line with *In re Davis* (1973) 8 Cal.3d 798 and *Jackson v. Indiana* (1972) 406 U.S. 715.

ARGUMENTS

I. THE LEGISLATIVE AND CONSTITUTIONAL HISTORY OF PENAL CODE SECTIONS 1370 AND 1372 DEMONSTRATE THE COMMITMENT PERIOD BEGINS AND ENDS BY COURT ODER AS NECESSARY TO PROTECT FUNDAMENTAL RIGHTS AND REDUCE DELAYS IN THE RESTORATION OF COMPETENCE PROCESS.

A. The Modern Problems Posed by the Historical "Deinstitutionalization" of the State Hospitals Can be Corrected by Court Order Over the Commitment Period.

"[I]n the US, the odds of a person with a major mental disorder receiving treatment in a jail or prison instead of a psychiatric hospital was 3.2 to 1."[6] "The literature is clear that jails and prisons are now the primary provider of the nation's mental health care." (*Longitudinal Study of IST Admissions, supra,* at p. 223.) If so, the rights of those persons in need of mental health treatment who are committed pretrial must be protected by court orders, especially if "another system [is to] assume[] this role: state hospitals and other providers charged with restoring individuals to competence." (*Ibid.*)

Amici profess that "[f]or over a century, DSH has been the state agency tasked with providing competency restoration treatment to criminal defendants found incompetent due to a mental health disorder." (Amicus Brief, at p. 14, citation omitted.) Yet, the DSH and DDS curiously fail to address more than 100 years of legislative

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[6] McDermott, B., Warburton, K., & Auletta-Young, C. (2020) *A longitudinal description of incompetent to stand trial admissions to a state hospital,* CNS Spectrums, 25(2), 223, 232, available at: doi:10.1017/S1092852919001342 [last accessed August 24, 2022] [herein "*Longitudinal Study of IST Admissions*"].

and constitutional history divesting their control over the commitment period. (Opening Brief on the Merits, at pp. 21-32.) Instead, the truncated legislative history presented by Amici starts in 2017, which even then demonstrates that the Legislature requires court order over the commitment period due to problems beginning around 1955, when

> there were over five hundred thousand state psychiatric hospital beds. As deinstitutionalization continued, by 1994, only 71,619 beds remained. A recent count indicated that in the first quarter of 2016, slightly less than 38,000 beds remain, an astronomical decline of 96.5% in this 60 year time period.

(*Longitudinal Study of IST Admissions*, *supra*, at p. 230, citations omitted.)

The shift in population tracks the influx of persons into jails and prisons while state (*i.e.,* public) hospitals closed.[7] Indeed, the "majority of these state beds are forensic, meaning that in order to be admitted for treatment, you must commit a crime." (*Longitudinal Study of IST Admissions*, *supra*, at p. 232, citation omitted.) Not coincidentally, these systemic problems impact people of color most

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[7] For instance, there were some 156,000 prisoners in California in 2011. (*Brown v. Plata* (2011) 563 U.S. 493.) However, there were only some 15,230 people incarcerated in 1955. (Langan, P.A., Fundis, J., Greenfeld, L., & Schneider, V. (1988) *Historical statistics on prisoners in state and federal institutions, Year End 1925-86,* NCJ 111098, Washington, DC: United States Department of Justice, Bureau of Justice Statistics. 1-18, available at: https://www.ojp.gov/pdffiles1/Digitization/111098NCJRS.pdf [last accessed September 7, 2022].)

severely.[8] Further studies are also necessary as to gender and identity issues.[9]

Amici do not provide this historical analysis, or describe the demographics of the committed population. Instead, Amici only offer

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[8] Minorities, "specifically Black Americans, are over-represented in the sample as compared to the ethnic distribution in CA. According to the 2017 census estimate, Blacks comprise 5.47% of the CA population. In our sample, almost 29% were Black, a result similar to the incarcerated population (27% Black)." (*Longitudinal Study of IST Admissions*, *supra,* at p. 233, citation omitted.) "Hispanics comprise over 39% of the CA population, they represented only 18.6% of our sample; in contrast, 41% of the incarcerated population is Hispanic." (*Ibid*.) However, this population is likely to grow as "[t]here is abundant evidence that Hispanics are less likely to seek mental health treatment for a variety of reasons, including mistrust and language barriers." (*Id.* at p. 234, citations omitted.) Another study found "that Native-American patients overall had a significantly longer length of stay." (Broderick, C., Azizian, A., & Warburton, K. (2020) *Length of stay for inpatient incompetent to stand trial patients: Importance of clinical and demographic variables,* CNS Spectrums, 25(5), 734, 741, available at: doi:10.1017/S1092852920001273 [last accessed August 24, 2022] [herein "*Importance of Clinical and Demographic Variables*"].)

[9] There does not appear to be a comprehensive study on the implications of gender demographics in the committed population, although the DSH previously reported a patient breakdown of "86% male, 14% female." (DSH, *Annual Report 2018*, at p. 14.) Further studies must also go beyond treating the cisgender population as composing 100% of all patients, which fails to recognize that "[t]ransgender adults experience disparities in mental health, disability status, and access to prescription medicine." (Jody Herman, Bianca D.M. Wilson, and Tara Becker (2017) *Demographic and Health Characteristics of Transgender Adults in California,* UCLA School of Law Williams Institute, available at: https://williamsinstitute.law.ucla.edu/publications/demo-health-trans-adults-ca/ [last accessed September 11, 2022].)

that there are presently some 1,500 IST patients at DSH and DDS facilities with an average treatment time of "nearly 270 days before return to court." (Amicus Brief, at p. 14.) There are shorter average lengths of stay reported.[10] All committed persons must be evaluated as individuals. (*Importance of Clinical and Demographic Variables*, *supra*, at pp. 735-736.)

Ending the commitment period by certificate will only add to the delays as persons wait in limbo for court order, which may return them to the back of the waitlist upon finding of not restored to competence. These persons will predominantly suffer in our jails and prisons, where many will decompensate, or will be returned to state facilities where they may never have been restored in the first place.[11] For others, "[o]nce the proceedings have concluded, the patient is

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[10] A length of stay (LOS) study reviewing 25,791 IST defendants reported that "criminal defendants found incompetent to stand trial (IST) rarely approach or exceed statutory maximums or unconstitutional lengths of stay in state psychiatric hospitals." (*Length of Stay for ISTs*, *supra*, at pp. 22-23.) The "mean LOS for all ISTs was 29.94 weeks [or around 210 days]." (*Id.* at p. 24.) Another California IST length of stay study reviewing 20,040 adults found that the median LOS was 105 days and the mean (*i.e.*, average) was 157.4 days. (*Importance of Clinical and Demographic Variables*, *supra*, at pp. 734-742.)

[11] Prior hospitalizations are common, with one study finding that there was an "average of 2.29 (SD = 3.00, range = 0 to 20) psychiatric hospital admissions prior to the current admission for restoration services." (Porter Staats, M., Kivisto, A., Connell, R. (2021) *The role of cognitive functioning in predicting restoration among criminal defendants committed for inpatient restoration of competence to stand trial,* International Journal of Law and Psychiatry, 74, 1, 3, available at: doi:10.1016/j.ijlp.2020.101654 [last accessed September 9, 2022].)

released to the same circumstances that precipitated the arrest, institutionalized, or incarcerated, no better off for the state hospital stay." (*Reasons for Reinstitutionalization, supra,* at p. 249.)

Today, the DSH and DDS cannot timely "provide competency restoration treatment to a substantial majority of criminal defendants deemed incompetent to stand trial (IST) due to a mental health disorder." (Amicus Brief, at p. 11.) "This history demonstrates that existing policy mechanisms alone cannot cure the problem, and we must not allow systematic violations of the due process rights of these vulnerable defendants to continue, while hoping that [Amici's] efforts will eventually improve the situation." (*Stiavatti*, *supra,* 65 Cal.App.5th at p. 731.) Court orders must enforce the statutory framework and uphold constitutional rights, even if there are "unexpected events such as a surge in IST referrals or a global pandemic." (*Id*. at p. 715.)

B. The Departments of State Hospitals and Development Services Do Not Unilaterally Decide When a Person Is Restored to Competence, So these Executive Agents Cannot End the Commitment Period by Filing the Certificate of Restoration.

The DSH and DDS advocate for a complicated interpretation of the commitment period that permits multiple delayed and failed attempts at restoration so long as two years at a state hospital - *exactly* - has not lapsed. (Amicus Brief, at p. 23.) There is no justification for such "tolling" or "termination" of the commitment period by certificate, much like there is no evidence to support Amici's fear that too many people will be "civilly committed to DSH or DDS." (*Ibid.*) Alternative commitments are a necessary part of the

statutory framework. (*Jackson v. Superior Court* (2017) 4 Cal.5th 96, 106.) In any event, the vast majority of referrals to Amici are found restored to competence, as one study documented:

> Of the 837 patients admitted during the study period, 84% (n D 701) were returned to court as competent, 13% (n D 106) were deemed not restorable and were either discharged or conserved as dangerous or gravely disabled, and 4% (n D 30) were either transferred to another facility, were released by the court, died during their hospitalization, or were under a dual commitment.

(McDermott, B., Newman, W., Meyer, J., Scott, C., & Warburton, K. (2017) *The Utility of an Admission Screening Procedure for Patients Committed to a State Hospital as Incompetent to Stand Trial*, International Journal of Forensic Mental Health, 16(4), 281, 284 [herein "*The Utility of an Admission Screening Procedures*" .)

Once "discharged" by the DSH or DDS, the committed person is not simply released "for the purpose of, or provided, competency restoration services and simply awaits the resumption of criminal proceedings." (Amicus Brief, at p. 13.) That person must await (often in jail) to avail themselves of further orders of the court (Penal Code § 1372, subd. (d)),[12] and even after a certificate they can be returned to the custody of the DSH and DDS. (§ 1372, subd. (e).) This time in "legal limbo" must be adopted against the constitutionally "reasonable period" protected by *Jackson*, which has been added upon by a hard-and-fast statutory limitation of two years on commitments that can only be enforced by court order via sections 1370, subdivision (c)(1), and 1372, subdivisions (c) and (d).

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[12] Further statutory references are to the Penal Code unless otherwise noted.

Amici's arguments to the contrary center on the faulty logic that "[i]t is undisputed that the maximum commitment period does not include the time before a court conducts an initial competency hearing. The time between the filing of a certificate of restoration and a section 1372 hearing should be treated the same way." (Amicus Brief, at p. 7.) But *elsewhere*, Amici admit that "the individual shall be admitted to a state hospital according to the date the court committed the individual to the Department."[13] By parity of reasoning, the commitment period must end by court order of restored to competence, or not, because

> [a]lthough *Jackson* [*v. Indiana*] involved a pretrial commitment to a mental health facility for three and one-half years, rather than pretrial detention for several weeks or months in a county jail, the principles enunciated in *Jackson* apply to the case before us.

(*Oregon Advocacy Center v. Mink* (9th Cir. 2003) 322 F.3d 1101, 1122.)

In these regards, the returned person is not "situated similarly to a defendant whose competency is initially questioned under section 1368." (Amicus Brief, at p. 20.) The latter persons are entitled to the appointment of doctors. (§ 1369, subd. (a)(1).) After commitment, but before transport, they can be diverted (§ 1370, subd. (a)(1)(B)(iv)(I)), while those persons awaiting court finding of restored to competence cannot seek diversion or bond. (§ 1372,

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[13] Department of State Hospitals (November 17, 2017) *Final Regulation Order*, at p. 4, available at: https://www.dsh.ca.gov/Publications/docs/Regulations/2017-11-27/IST_1370_FSOR_OAL_11-22-2017.pdf [last accessed August 23, 2022].

subds. (c) and (d).) This "Bermuda Triangle" in the law must come within the commitment period if we are to subject the committed person to involuntarily administered medication, and possibly return to DSH or DDS, but not permit them to personally exercise rights until further finding of restored to competence.

Without addressing these options, or proffering evidence, Amici claim that strict application of the commitment period "would often [leave Amici with] inadequate or no time to provide appropriate competency treatment to a defendant returned to the hospital for additional competency services." (Amicus Brief, at p. 8.) Even under Amici's "stop-clock" approach (as if this was a game of football), the commitment period would not necessarily "expire before a second round of treatment could be completed." (*Ibid.*) All committed persons must be returned to the committing county 90 days before the end of the two year commitment period, as marked by prior court order. (§ 1370, subd. (c)(1).) And, the vast majority of patients never need a full two years for the DSH and the courts to determine that they are restored to competence, or not. (*Importance of Clinical and Demographic Variables*, *supra*, at pp. 735-36.)

Any definiteness in the limitation period is imperiled by the filing of certificates of restoration that toll or end the commitment, instead of court orders that are necessary to determine "whether there is a substantial probability that [the committed person] will attain [] capacity in the foreseeable future.'" (*Jackson v. Indiana, supra,* 406 U.S. at p. 738.) For instance, if there is "inadequate or no time" for services (Amicus Brief, at p. 8), that factor must be considered by judges against whether the committed person

"probably soon will be able to stand trial [because] his continued commitment must be justified by progress toward that goal." (*Jackson v. Indiana, supra,* 406 U.S. at p. 738.) In this manner, court orders end the limitations period so that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." (*Ibid.*)

C. Ending the Commitment Period by Court Order is Consistent with the Legislature's Reliance on the Judiciary to Enforce Penal Code Sections 1370 and 1372.

The practice in Santa Clara County before writ proceedings in this case ended the commitment by court order. (Exhibit A to ACLU Amicus Brief, at p. 6 [describing a case from Santa Clara County involving failure to restore competency within the commitment period].) In response to *Carr II*, the lower court minted new "tolling" provisions for the DSH and DDS without considering the statewide repercussions. (*Rodriguez v. Superior Court* (2021) 70 Cal.App.5th 628, 631.) The Court of Appeal found the lower court was wrong but, for the first time in any published opinion, held that the commitment ended by the filing of the certificate of restoration. (*Ibid.*) Such an outlier is that holding that Amici fail to point to a single proposed solution by the statutorily-mandated IST Solutions Workgroup for ending the commitment period by certificate.[14]

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[14] See Incompetent to Stand Trial Solutions Workgroup (November 2021) *Report of Recommended Solutions*, at pp. 32-62, available at: https://www.chhs.ca.gov/wp-content/uploads/2021/12/IST_Solutions_Report_Final_v2.pdf [last accessed August 28, 2022] [herein "*IST Solutions Workgroup Report*"]. In 2021, via passage of Assembly Bill 133 (Stats. 2021, ch. 143) and in order to alleviate the IST crisis

Amici also fail to prove that as a "statutory and practical, real-world matter, the commitment for restoration-of competency treatment ends once the treating Department files a certificate of restoration." (Amicus Brief, at p. 20.) Indeed, the DSH and DDS do not address the opinion of the Medical Director for Atascadero State Hospital in this case, who confirmed that further medication is needed "for [petitioner's] own personal benefit and to enable him to be certified under Section 1372 of the Penal Code." (Attachment A to Motion for Judicial Notice.) Amici also fail to repudiate the opinion of the Medical Director of Atascadero some 20 years ago, who found that Kevin Polk's competency could not be restored and upheld the then "three-year limit as applying to all commitment in the aggregate relating to the same charges." (*In re Polk* (1999) 71 Cal.App.4th 1230, 393.)

Instead, the DSH and DDS accredit their "certificates of restoration [that] are typically filed after a hospital team's extensive observation and treatment of an IST defendant over a period of weeks or months." (Amicus Brief, at p. 12.) These certificates supposedly issue after "using a competency assessment instrument." (*Id.* at p. 9,

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within the DSH and DDS, the Legislature "charged the California Health & Human Services Agency (CalHHS) and the Department of State Hospitals (DSH) to convene an Incompetent to Stand Trial Solutions (IST) Workgroup [] to identify actionable solutions that address the increasing number of individuals with serious mental illness who become justice-involved and deemed Incompetent to Stand Trial (IST) on felony charges." (*Id*. at p. 3.) The IST Solutions Workgroup submitted its recommendations "for short-term, medium-term, and long-term solutions that provide timely access to treatment for individuals found IST on felony charges." (*Ibid*.)

fn. 9.) The lack of validation for the Competency Assessment Instrument and the Revised Competency Assessment Instrument used by the DSH and DDS is well-documented. (AAPL (2018 Supp.) *Practice Resource for the Forensic Psychiatrist Evaluation of Competency to Stand Trial*, at p. S42.) And, one study reported a claimed malingering rate as high has 41.8% of patients, but only in 14.9% of those cases was there "employed a structured assessment of feigning." (*Longitudinal Study of IST Admissions*, *supra*, at p. 224.)

The failure of the DSH and DDS to effectively utilize empirical testing has contributed to the delays posed by repeat patients.[15] To reduce wait times, the DSH and DDS need not meddle with the commitment period, when validated testing and data collection for repeat patients has "the advantage of being designed for the purpose of measuring constructs related to legal competency, unlike the instruments used to diagnose mental disorders." (*Length of Stay for ISTs*, *supra,* at p. 23.) Indeed, since the early 1990s, the length of stay could be predicted by data analysis along "various scales of the Computer-Assisted Determination of Competency to Proceed instrument (CADCOMP)," but this instrument has not been consistently used by the DSH and DDS, much like the "Repeatable Battery for the Assessment of Neuropsychological Status (RBANS)[, which is] a very strong predictor of LOS." (*Ibid.*)

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[15] In one study, "[t]he majority of patients reported at least one prior inpatient psychiatric admission (n D 502, 71%) although many reported no prior psychiatric history, either inpatient or outpatient (n D 126, 18%)." (*The Utility of an Admission Screening Procedures, supra,* at p. 284.)

Nor is the rosy glow of restoration services painted by Amici born out by evidence that "the Department immerses the defendant in group and individualized sessions that provide information on the various aspects of court proceedings."[16] (Amicus Brief, at p. 15, fn. 5.) Anecdotally, the cases described by the ACLU bring to life how many "individualized" sessions are of questionable legal and scientific value. (See ACLU Amicus Brief, at pp. 24-25.) And, there is "an increasing number of competency re-evaluations, conducted remotely while individuals are in jail, despite a prior IST determination by a court-appointed psychiatrist or psychologist, and without any intervening treatment." (*Id.* at p. 23.) All of which demonstrates that ending the commitment period by court order is statutorily and constitutionally necessary to ensure that a committed person has "sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding—and . . . a rational as well as a factual understanding of the proceedings against him." (*People v. Rogers* (2006) 39 Cal.4th 826, 846-847, citations omitted.)

D. Requiring Court Orders to End the Commitment Does not Undermine, but Upholds, the Restoration Process and Fundamental Rights.

Requiring court orders to end the commitment period has no bearing on whether the DSH and DDS "restrict[] available space for

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[16] See, e.g., *People v. Jackson* (2018) 22 Cal.App.5th 374, 395 ["We conclude the evidence that Patton staff drilled Jackson in how to answer the most basic questions about the judicial process and he learned to parrot the expected responses after numerous repetitions did not provide substantial evidence Jackson was competent to stand trial."].)

other IST defendants needing competency treatment." (Amicus Brief, at p. 23, citation omitted.) Nor will the bed space problem be solved by transporting people from hospitals to jails and prisons - or back and forth - merely because DSH has failed to comply with recommendations that there be "50 inpatient psychiatric beds per 100 000 population. . . . [But] in California that number is 17 per 100 000." (*Reasons for Reinstitutionalization, supra,* at p. 249, citations omitted.) "California alone has added over 400 state hospital beds and approximately 300 treatment beds in local jails in response to the crisis in the last 5 years. [However, t]he effort to avoid the stigma of psychiatric hospitalization may in fact be exacerbating the trend of long-term institutionalization." (*Ibid.*)

Ending the commitment period by court order will not "impair[,] and in some circumstances eliminat[e], amici's ability to treat re-committed IST defendants." (Amicus Brief, at pp. 13-14.) "In truth, criminal defendants found incompetent to stand trial (IST) rarely approach or exceed statutory maximums or unconstitutional lengths of stay in state psychiatric hospitals." (*Length of Stay for ISTs*, *supra,* at pp. 22-23, citation omitted.) Longer commitments are associated with the diagnosis of "disorders associated with psychotic symptoms *e.g.,* schizophrenic disorders, schizoaffective disorders and psychotic disorders[,]" as well as "disorders associated with low cognitive functioning[.]" (*Id.* at p. 23.) The DSH and DDS could prepare for such delays in select cases with recent funding to "both (1) expand bed capacity in state hospitals and (2) contract with counties to provide competency restoration treatment to felony ISTs who do not require the higher level of care that state hospitals

provide."[17] (*The 2022-23 Budget*, at p. 11.)

Nothing about requiring a court order to end the commitment period contributes to these problems by "undermin[ing] the central purpose of the IST scheme in so many individual cases." (Opinion, at p. 18.) The ACLU and CPDA explain how these central purposes are currently undermined by "serious procedural deficiencies regarding these re-evaluations, which can suffer from insufficient time, inadequate Internet connection, limited privacy, and severe communication challenges." (ACLU Amicus Brief, at p. 25, footnote omitted.) The *human crisis* presented requires court orders to address "the complex long-term biopsychosocial needs of individuals living with serious mental illness." (*Reasons for Reinstitutionalization, supra,* p. 249.)

Indeed, "[p]rogram reviews over recent years show few instances where criminal justice and mental health outcomes were considered in tandem; however, this must change through appropriate cross-sector collaboration that also integrates community reentry, conditional release, and other community

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[17] "In the 2021-22 budget, DSH was appropriated $255 million to create new sub-acute capacity across the state to serve felony IST patients; $32.8 million to expand the CBR program by 552 beds (300 in LA, of which 200 activated in spring 2021, and 252 across the rest of the state); $47.6 million to expand the DSH Felony Mental Health Diversion (Diversion) program (see pp. 17-18 for a detailed description of this program); $13.1 million to expand the department's Jail Based Competency Treatment program expansion and; $9.7 million to establish a Forensic Assertive Community Treatment (FACT) program in CONREP to serve higher acuity patients, such as ISTs, in the community." (*IST Solutions Workgroup Report*, *supra,* at pp. 12-13.)

supervision entities."[18] Only through court orders that bring together such collaboration can we treat the committed person through a scientifically validated,

> trauma-informed perspective [that] offers insight for care providers (and individuals) seeking to understand acts of aggression, self-injury, high risk medical refusals, impulsivity, substance abuse, medication nonadherence, rule-breaking, and heightened reactivity to perceived disrespect, shaming, coercion, and power differentials.

(*From Trauma-Blind to Trauma-Informed*, *supra,* at p. 1.)

State court orders adjudicating the rights of the incompetent within the statutory limits set by the Legislature serves trauma-informed purposes while reducing delays, much like the prison population was reduced in line with *Plata, supra,* 563 U.S. 493. The burdens imposed upon the lower courts will thereby be alleviated by requiring certificates that adequately and accurately evaluate patients within the maximum amount of time for court finding of restored to competence. (See, e.g., *People v. Carr* ("*Carr II*") (2021) 59 Cal.App.5th 1136.) More critically, court orders within the commitment period build into the framework a more robust and attentive treatment for all committed persons, which respects "the core of the liberty protected by the Due Process Clause[.]" (*Foucha v. Louisiana* (1992) 504 U.S. 71, 80, citation omitted.)

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[18] Helga Thordarson and Tiffany Rector (January 2020) *From trauma-blind to trauma-informed: re-thinking criminalization and the role of trauma in persons with serious mental illness,* CNS Spectrums (2020), 1–7, available at: doi:10.1017/S1092852920001169 [last accessed August 26, 2022] [herein "*From Trauma-Blind to Trauma-Informed*"].

II. THE CERTIFYING DOCTOR IS NOT NECESSARILY AN EXPERT, AND THE CERTIFICATE IS NOT TESTIMONIAL, SO THE MINISTERIAL FILING IS SEPARATE AND INDEPENDENT OF ANY ROLE THAT EITHER OFFICIAL OR THE CERTIFICATE MAY PLAY AT THE RESTORATION OF COMPETENCE HEARING.

The DSH and DDS argue that this Court has "[a]cknowled[ed] amici's expert role, [by holding] that a certificate of restoration is entitled to a presumption of correctness and shifts the burden to a defendant challenging certification to prove incompetence." (Amicus Brief, at pp. 12-13, citing *Rells, supra,* 22 Cal.4th at pp. 867-869.) Read in full, however, "this presumption should be understood to be applicable at a hearing on the defendant's recovery of mental competence, where it conforms in fact with the certificate of restoration filed by the specified mental health official." (*Id.* at p. 867.) This Court thereby maintained the Legislature's intent to both prevent the undue confinement of incompetent defendants who cannot be returned to competence (§§ 1370, subd. (c)(1)) and "promote the . . . speedy restoration to mental competence" of those who can. (§ 1370, subd. (a)(1)).

Nor did this Court accredit the expertise of the DSH and DDS by recognizing that the statutory framework historically views the certificate of restoration as having "legal force and effect in and of itself." (Amicus Brief, at p. 18, quoting *Rells, supra*, 22 Cal.4th at p. 868.) The "legal force and effect," to which Amici partially quotes, was expressly to "cause[] the defendant to be returned to court for further proceedings," not to make the certificate determinative as to an individual's competency. (*Id.* at p. 868.) This Court was clear that

"further proceedings" were necessary to address the rebuttable presumption that the committed person had been restored to competency. (*Ibid.*)

The custody credit cases cited by Amici fail to demonstrate that "[i]f a pre-commitment defendant is ultimately found incompetent and committed to a state hospital, the maximum commitment period does not include the time before a court conducts a competency hearing." (Amicus Brief, at pp. 20-21, citing *People v. G.H.* (2014) 230 Cal.App.4th 1548, 1557-1561.) Amici also distort the meaning of the cases relied upon, like *Polk*, *supra*, 71 Cal.App.4th 1230, while failing to recognized that *G.H.* addresed a credit scheme since abrogated by the Legislature. Nor was there a decision as to the commitment period in *People v. Reynolds* (2011) 196 Cal.App.4th 801, 808-809, which addressed a prior version of the law prohibiting application of conduct credits while committed. Rather than following these cases, the Court should reject Amici's efforts to rely on "dictum" for "a legally unsupported principle, [not] consistent with our later jurisprudence, and conform to the plain language of the statute." (*People v. Correa* (2012) 54 Cal.4th 331, 344; see also *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65.)

Omitted by Amici is that the committed person must be returned to the committing county for further hearings *as constitutionally required*, for which the certificate merely serves a ministerial purpose. (*Sturgis v. Goldsmith* (9th Cir. 1986) 796 F.2d 1103.) Any later "presumption" in court is applicable only to the *judicial determination* of restored to competence, or not, whether at an initial trial on competency, the mandatory retrial for persons

committed for 18 months at the time of *Rells*, or a competency restoration hearing "where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent." (*Medina v. California* (1992) 505 U.S. 437, 449.) But, if delays to restoration continue to violate statutory and constitutional rights, the judicial fiction of a presumption should shift from one-party to the other based on

> 'factors' including the 'knowledge of the parties concerning the particular fact' implicated therein, the 'availability of the evidence to the parties,' the 'most desirable result in terms of public policy in the absence of proof of the particular fact,' and the 'probability of the existence or nonexistence of the fact.'

(*Rells*, *supra*, 22 Cal.4th at p. 872 n. 4, citation omitted.)

This analysis does not change if the Legislature allegedly "codified the *Rells* assignment of post-certification burden in the context of certificates of restoration issued after a DSH pre-admission reevaluation conducted pursuant to Welfare and Institution Code section 4335.2." (Amicus Brief, at p. 19, citing § 1370, subd. (a)(1)(H)(ii).) A court order after hearing is required because of "an earlier finding by the court or a jury of mental in competence [as] balanced by the fact that the hearing itself is triggered by the later filing by a specified mental health official of a certificate of restoration to mental competence." (*Rells, supra,* 22 Cal.4th at p. 867, citation omitted; see also *People v. Mixon* (1990) 225 Cal.App.3d 1471). Court orders end the commitment as necessary to "observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial

[that] deprives him of his due process right to a fair trial." (*Medina, supra,* 505 U.S. at p. 449, citation omitted.)

III. THE COMMITMENT PERIOD MUST END BY COURT ORDER TO BEAR REASONABLE RELATION TO THE EVALUATIVE AND RESTORATIVE PURPOSES FOR SUSPENDING FUNDAMENTAL RIGHTS PRETRIAL FOR RESTORATION OF COMPETENCE.

Amici cites to the cases of Mario Rodriguez and Marc Carr for the principle that "competency hearings under section 1372 following a certificate of restoration are often delayed, sometimes for a significant length of time." (Amicus Brief, at p. 22.) Two examples is not proof of an event occurring *often*, particularly where *Medina v. Superior Court* (2021) 65 Cal.App.5th 1197 is not even addressed by Amici after they failed to transport and treat Jose Medina *in toto*. (Amicus Brief, at pp. 1-27.) Nor do the procedural histories in *Rodriguez* and *Carr II* illustrate that "most delays in section 1372 proceedings occur at the request of the defendant, and as a practical matter the defendant generally exercises a large degree of control over the timing of the section 1372 hearing." (Amicus Brief, at pp. 21-22.)

In *Carr II, supra,* 59 Cal.App.5th 1136, the delay was due to the DSH's failure to timely evaluate the defendant before submitting a "sham diagnosis" that ultimately proved unfounded upon judicial review. In *Rodriguez*, *supra,* 70 Cal.App.5th 628, no hearing could be held for more than eight months when the courtroom was closed to competency proceedings. Petitioner Rodriguez was thereby denied the right to a judicial determination within the statutory and constitutional commitment period as required to honor that

"commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (*Foucha, supra,* 504 U.S. at p. 80, citation omitted.)

Delay and repeated efforts to treatment, much less restoration of competence is not limited to these two cases, nor the State of California for that matter.[19] (See *United States v. Donnelly* (2022) 41 F.4th 1102 [addressing delay in federal court in restoration proceedings].) The problems posed cannot be solved by sanctioning "no-law zones" that permit people in need of mental health treatment to be held indefinitely pretrial - whether in jails or hospitals - without bond, diversion, or ability to proceed without court order of restored to competence. Nor does an interpretation of sections 1370 and 1372 that permits the committed person to languish following filing of a certificate bear "reasonable relation to the evaluative and restorative purposes for which courts commit those individuals." (*Mink*, *supra,* 322 F.3d at p. 1122.) To the contrary, the commitment period must begin and end by court order, our "primary authority for defining and enforcing the criminal law." (*United States v. Lopez* (1995) 514 U.S. 549, 561 n. 3, citations omitted.)

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[19] Nationally, "70.8% of jurisdictions reported having a waitlist to admit IST patient and 38.8% reported having faced litigation due to length of time on the waitlist." (*Reasons for Reinstitutionalization*, *supra*, at pp. 247-248.)

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the commitment period ends by court order, not certificate of restoration.

DATED: September 16, 2022 Respectfully Submitted,

/s/ B.C. McComas

BRIAN C. McCOMAS

CERTIFICATE OF COMPLIANCE

Pursuant to the California Rules of Court, Rules 8.520(c), I hereby certify that the attached memorandum for points and authorities is written in Century725 BT in 13 point font and contains 5,963 words.

DATED: September 16, 2022 Respectfully Submitted,

/s/ B.C. McComas

BRIAN C. McCOMAS

PROOF OF SERVICE

I, Brian C. McComas, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the above referenced action. My place of employment and business address is PMB 1605, 77 Van Ness Ave., Ste. 101, San Francisco, CA 94102.

On September 16, 2022, I served the attached **PETITIONER ANSWERING BRIEF TO AMICUS BRIEF SUBMITTED BY THE ATTORNEY GENERAL'S OFFICE ON BEHALF OF THE DEPARTMENT OF STATE HOSPITALS AND DEPARTMENT OF DEVELOPMENTAL SERVICES** by placing a true copy thereof in an envelope addressed to the person named below at the address shown, and by sealing and depositing said envelope in the United States Mail in San Francisco, California, with postage thereon fully prepaid or by electronic filing:

Mario Rodriguez PFN: DRC910 Elmwood Jail 701 S Abel St., Milpitas, CA 95035	Daniel M. Mayfield Attorney At Law Carpenter and Mayfield 730 N. First Street San Jose, CA 95112

On September 16, 2022, I served the attached **ANSWERING BRIEF TO AMICUS BRIEF SUBMITTED BY THE ATTORNEY GENERAL'S OFFICE ON BEHALF OF THE DEPARTMENT OF STATE HOSPITALS AND DEPARTMENT OF DEVELOPMENTAL SERVICES** by transmitting a PDF version of this document by electronic mailing to each of the following:

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I declare under penalty of perjury that the foregoing is true and correct. Signed on September 16, 2022 at San Francisco, California.

/s/ B.C. McComas

____

BRIAN C. McCOMAS

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 9/16/2022 by Ines Calanoc, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S272129**
Lower Court Case Number: **H049016**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/16/2022

Date

/s/Brian McComas

Signature

McComas, Brian (273161)

Last Name, First Name (PNum)

Law Office of B.C. McComas

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