IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CIRO CAMACHO, Petitioner vs. SUPERIOR COURT OF MERCED COUNTY, Respondent PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	No.: S 2 7 3 3 9 1 Court of Appeal No. F082798 Merced Co. Case No. 146207

FROM THE JUDGMENT OF THE SUPERIOR COURT OF MERCED COUNTY, THE HONORABLE RONALD W. HANSEN PRESIDING

PETITIONER'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

ISSUES PRESENTED ON REVIEW

1. Does the confinement of an individual facing a civil commitment proceeding for fifteen years without trial violate the constitutional right to a speedy trial and deny due process under the State and Federal Constitutions?
2. When multiple parties each bear some responsibility for the same period of pretrial delay, does *Vermont v. Brillon* (2009) 556 U.S. 81 require delays caused by defense counsel be charged solely to the defendant when defendant's personal access to the courts is restricted?
3. What actions, if any, does Due Process compel trial courts and prosecutors to take to protect the accused's right to a speedy trial?
4. May a court presume that an unwritten waiver of the speedy trial right remains effective indefinitely and permit defense counsel to reassert such a waiver on defendant's behalf for more than 8 years in the absence of the defendant's personal appearance in court?
5. Is petitioner entitled to the dismissal of the pending SVP petition as a matter of right, given that a substantial right has been violated and there is no other plain, speedy, and adequate remedy in the ordinary course of law?

STATEMENT OF CASE AND FACTS

Mr. Camacho's case has been pending in the Merced County Superior Court for just shy of two decades. Due to the passage of time, transcripts for many of the hearings were unavailable. The prosecution prepared a "procedural summary" of the case based on the court file and public historical documents. The parties stipulated to the accuracy of that summary and introduced it as "Exhibit A" in petitioner's motion to dismiss. For ease of reference, petitioner's case is broken down into four separate time periods:

A. Filing to Initial Commitment.[1]

On August 22, 2002, the government filed a petition to commit Mr. Camacho as a sexually violent predator (hereinafter, "SVP") pursuant to California Welfare and Institutions Code §§ 6600 et. seq. Mr. Camacho made his first appearance on August 28, 2002, before the Honorable William Ivey. (Exhibit A ("Ex.A") at p.1) He was represented by Deputy Public Defender Wayne Eisenhart.[2] Deputy District Attorney Carlson appeared for the People. (*Ibid.*) Mr. Camacho entered a denial of the petition and was remanded into custody. On September 24, 2002, the court determined that probable cause existed to believe that Mr. Camacho was an SVP and ordered him transferred to the Department of State Hospitals (hereinafter, "DSH"). (*Ibid.*)

In early 2004, Drs. Shoba Sreenivasan, Ph.D. and Kathleen Longwell, Ph.D. submitted evaluations finding that Mr. Camacho

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[1] August 28, 2002, to January 11, 2005.

[2] Mr. Eisenhart represented petitioner from August 28, 2002, to May 30, 2008.

met the criteria for commitment under Welfare & Institutions Code (hereinafter "Welf.&Inst. Code") § 6600. On January 11, 2005, Mr. Camacho was present in court and waived his right to a jury trial. The parties submitted the case to the Court based on the evaluators' written reports and without taking any testimony. The Court found the petition true and committed Mr. Camacho to DSH for a two-year term pursuant to Welf. & Inst. Code § 6604.[3] (Ex.A at p. 5.)

B. OSC to Appointment of Conflict Counsel.[4]

During this period, 49 hearings were held in petitioner's case. He was present for five of them. Mr. Eisenhart filed a request for an order to show cause and petitioner's case came before the court on April 14, 2006. (Ex. A at p. 5.) At the time Mr. Camacho was residing at the Coalinga State Hospital. On November 6, 2006, Hy Malinek, PsyD prepared a recommitment evaluation noting that Camacho was a medium-low risk for re-offense but found that Mr. Camacho continued to meet criteria for commitment.

Mr. Eisenhart's request for an order to show cause was withdrawn based on the December 18, 2006, filing of a petition to extend Mr. Camacho's commitment. (Ex.A at p. 6.) Mr. Camacho remains pending trial on this petition. On February 8, 2007, Mr. Camacho waived his right to a probable cause hearing on the recommitment petition. (*Id.* at p. 7.)

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[3] That section was amended the following year, deleting the two-year sentence provision, and making commitments pursuant to the SVPA indeterminate.

[4] August 14, 2006, to August 8, 2008.

Deputy Public Defender Vincent Andrade took over petitioner's case on May 30, 2008, then declared a conflict on July 25, 2008. (Ex.A at pps. 9-10.) The court referred Mr. Camacho's case to the conflict panel – who assigned attorney William Davis. Davis accepted appointment on August 8, 2008. Thereafter, four more hearings took place before Mr. Camacho appeared in court on October 10, 2008. (*Id.* at p. 10.)

Also in 2008, Dr. Sreenivasan submitted an updated report finding that Mr. Camacho met the criteria for continued commitment. The report noted that he was participating in sex-offender treatment and making progress. Jack Vongsen, Ph.D. also found Mr. Camacho was progressing in treatment, though he too found that Camacho continued to meet the SVP criteria.

C. William Davis's Representation.[5]

After accepting appointment, Davis appeared with Mr. Camacho in court on October 10, 2008. (Ex.A at p.10.) Between October 10, 2008, and March 11, 2010, there were 28 hearings. (*Id.* at pps. 10-13.) Mr. Camacho was present in court for all but one. The March 11, 2010, appearance, however, would be his last for more than eight years. Between March 11, 2010, and July 5, 2018, Mr. Camacho did not make a single appearance in court, despite his case being on the docket 102 times. (*Id.* at pps. 13-25.)

In 2010, Drs. Vongsen and Sreenivasan both reiterated their previous findings that Camacho met SVP criteria. Each continued to note his progress in sex-offender treatment and his commitment to rehabilitation.

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[5] August 8, 2008, to November 6, 2018.

In 2015, four new reports were filed, including a report from John Hupka, Ph.D. finding that Petitioner did **not** meet criteria for continued commitment. Hupka based his finding on Camacho's substantial progress in treatment and opined that Camacho was amenable to treatment in the community. Drs. Jack Vongsen, Wesley Maram, and Douglas Korpi all opined that Mr. Camacho did continue to meet criteria. In his report, Dr. Maram emphasized petitioner's continued participation in treatment as a protective factor. Dr. Korpi's report found that petitioner was "veering ever so close to no longer meeting criteria." Despite these favorable reports, attorney Davis did not set the matter for trial or other evidentiary hearing in 2015. (Ex.A at pps. 21-22.)

On May 17, 2018, the Honorable Douglas Mewhinney (sitting as a visiting judge) ordered that petitioner appear by video conferencing at the next court hearing. (Ex.A at p. 24.) That did not happen, but Mr. Camacho was finally returned to court – via video conferencing – on July 5, 2018, where he took part in an *in-camera* hearing with the court and defense counsel. (*Id.* at p. 25.) It was the first time in 8 years, 3 months, and 25 days that Mr. Camacho had been in front of a judicial officer. Following the *in-camera* hearing, defense counsel set forth his reasons for continuing the case. Based on those reasons, the court found good cause to continue the matter to August 16, 2018. (*Ibid.*) Mr. Camacho did not appear on August 16, nor was he present at the hearing on September 20, 2018, when the prosecution lodged its

first and only objection to a continuance requested by the defense. (*Ibid.*)

On October 4, 2018, petitioner was brought to court in person. He demanded a jury trial. The court scheduled the trial for April 2, 2019. (Ex.A at p. 26.) At a readiness hearing on October 18, Mr. Camacho withdrew his general time waiver and demanded a trial within sixty days. (*Ibid.*) As a result of this demand, the court advanced the trial date from April 2, 2019, to December 11, 2018. (*Ibid.*) Despite having had the case for more than ten years, defense counsel expressed doubts about whether he could be ready to proceed by that date. At a readiness hearing on November 1, the court confirmed the jury trial for December 11. (*Ibid.*)

On November 6, 2018, Petitioner orally moved to dismiss the petition pursuant to *People v. Superior Court* (*Vasquez*) (2018) 27 Cal.App.5th 36. Fitzgerald, Alvarez, and Ciummo[6] (hereinafter "FAC") was appointed to represent Camacho in his *Vasquez* claim. (Ex.A at p. 26.)

D. The Current Phase.[7]

On November 29, 2018, following four additional court dates, during which the Court inquired about the *Vasquez* claim and repeatedly confirmed the jury trial, Mr. Davis declared a conflict of interest. FAC was appointed for all purposes at that time. (Ex.A at p. 27.)

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[6] Formerly known as Ciummo and Associates.
[7] November 6, 2018, to the present day.

On December 6, 2018, Mr. Camacho entered a time waiver to give new counsel the opportunity to prepare his case and to file necessary motions. (Ex.A at p. 27.) Following the appointment of new counsel, Mr. Camacho's case was continued to permit defense counsel to become familiar with the case. Camacho was present via video for these hearings. (*Id.* at p. 28.) On July 18, 2019 the defense requested petitioner's case be set for trial on October 15, 2019. (*Id.* at pps. 28-29.) Petitioner's counsel was in trial on another matter, however, and the case was set for trial on February 13, 2020. (*Id.* at p. 30.) Counsel requested another short delay just before the COVID-19 pandemic took hold shortly after, and all jury trials were halted. On March 11, 2021, petitioner's counsel filed a noticed motion to dismiss based on a violation of his right to a speedy trial and to due process. (*Id.* at p. 31.) On May 7, 2021, Respondent Court denied the motion and confirmed the matter for trial on June 10, 2021. Proceedings are currently stayed pending this Court's ruling.

E. Relevant Statistics.[8]

- Mr. Camacho was only present for 36 of the 193 hearings – or 19%.

- Of Camacho's 36 appearances, 24 took place between October 10, 2008, and March 11, 2010, immediately following William Davis's appointment.

- The People were unrepresented for 15 of the 193 hearings (8%).

[8] Compiled from Exhibit A.

- Mr. Camacho was unrepresented on 31 occasions (16%).

- The minute order notes the identity of the party moving to continue only 29 times (15%). Thus, for 85% of the hearings, the record is unclear as to which party requested the continuance.

- Of the 29 requests where the moving party is noted, 18 (62%) were listed as joint, 9 were made by the defense, and 3 were initiated by the court. (*Id.*)

- Only 5 good cause findings were made by the trial court (>3%).

- Prior to FAC being appointed, neither party filed a single written motion to continue supported by a declaration setting forth good cause as required by Penal Code § 1050.

F. Petitioner's Speedy Trial Motion.

On March 11, 2021, petitioner moved to dismiss the petition based on a violation of his right to a speedy trial and to due process. On May 7, 2021, the trial court denied the motion and confirmed the matter for trial on June 10, 2021. Petitioner timely filed a petition for writ of prohibition/mandate with the Fifth District Court of Appeals on May 19, 2021. The petition was summarily denied on June 3, 2021, but this Court granted a petition for review and transferred the matter back to the Fifth Appellate District with instructions to vacate the summary denial and issue an order to show cause why relief should not be

granted. On January 21, 2022, the Fifth Appellate Division issued its unpublished opinion denying relief.

Relying primarily on *People v. Tran* (2021) 62 Cal.App.5th 330, the court of appeal concluded that, "[o]f the four *Barker* factors, only one – the length of the delay – unequivocally weighs in Camacho's favor" and therefore upheld the trial court's denial of petitioner's motion. (Opinion of the Court of Appeal, filed January 21, 2022, (hereinafter "Slip Opn." at p. 21.) The court reached this conclusion by concluding that, "the delay was at Camacho's request or agreement" (*Id.* at p. 19.), noting the many 'general time waivers' entered by Mr. Davis on Camacho's behalf. Because of *Brillon's* rule that "[a]n assigned counsel's failure to 'move the case forward,' is generally charged to the defendant", the court of appeals concluded that Mr. Camacho was solely responsible for the delays in his case – including the more than 8-year period during which he did not appear in court (*Id.* at p. 20; *see also, Brillon*, *supra*, 556 U.S. at p.92.) This reasoning mirrors that of the trial court which also found that the delays were caused entirely by the petitioner. This Court granted review to resolve the question of how courts are to apply due process principles in SVP cases.

ARGUMENT

This Court should find that petitioner's involuntary 15-year confinement without trial violates the constitutional right to a speedy trial and denies due process under the State and Federal Constitutions. When analyzing petitioner's speedy trial claim, it

is important to keep in mind that "the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial." (*Barker v. Wingo*, (1972) 407 U.S. 514, 529.) While some responsibility for the delay can be properly charged to petitioner, on balance the state is more responsible. Thus, petitioner urges this Court to conclude that the official negligence of the prosecution and trial court resulted in a systemic, institutional failure so grave that it denied petitioner due process.

Barker v. Wingo, *supra*, establishes that a court weighing a speedy trial claim must weigh four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. The *Matthews v. Eldridge* test requires analysis of the private interest affected by the official action, the risk of an erroneous deprivation of that interest – taking into consideration the procedures used, and the government's interest, including the function involved and administrative burdens that a different or additional process would require.[9]

Existing case law regarding speedy trial claims in the SVP context supports petitioner's contention that the *Barker* and *Matthews* factors weigh in his favor. The lower courts mistakenly reached the opposite conclusion, finding that only the length of the delay weighed in petitioner's favor. There are five major flaws in this reasoning.

First, the lower courts mistakenly read *Vermont v. Brillon* to hold that an SVP petitioner's speedy trial rights may be

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[9] *Matthews v. Eldridge* (1976) 424 U.S. 319.

violated only if there is evidence of a systemic breakdown of the public defender system. Second, the lower courts fail to assign any blame for the delay to the trial court or the prosecutors despite substantial evidence of official negligence, effectively ignoring the instructions provided by this Court in *People v. Williams*.[10] Third, the lower courts ignore long-standing precedent in holding that defense counsel's entry of a "general time waiver" in petitioner's absence is affirmative evidence that petitioner was informed of and consented to the delays, thereby effectively waiving his right to a speedy trial. Fourth, the lower courts fail to consider whether a process which does not require the defendant's periodic physical presence in court satisfies the second prong of *Matthews*. Finally, the lower courts fail to account for the presumed prejudice inherent in a 15-year delay between accusation and trial.

I. The Lower Courts Misapplied *Vermont v. Brillon.*

The rulings of both the trial court and the court of appeal hinge on the principle that, "the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation." (*Brillon*, *supra*, 556 U.S. at pps.90-91.) Based on this agency principle, the lower courts concluded that any delays defense counsel sought or acquiesced to must be charged entirely to petitioner. The court of appeals then cites *Tran* for the proposition that only proof of a systemic breakdown in the public defender system could violate due process and concluded that absent such proof, Mr. Camacho could not prevail. (Slip Opn. at

[10] *People v. Williams* (2013) 58 Cal.4th 197

pps. 19-20.) The interpretation urged by the court of appeals misunderstands *Brillon's* holding, is inconsistent with *Barker*, and results in a rule that is contrary to principles of due process.

A. The *Brillon* Decision.

In *Brillon*, the United States Supreme Court considered a case involving a defendant's claim that his speedy trial rights were violated based on a three-year delay between his arrest on domestic violence and habitual offender charges and his trial on those offenses. (*Brillon, supra* 556 US at p.81.) The Vermont Supreme Court found that "the failure or unwillingness of several of the assigned counsel, over an inordinate period of time, to move the case forward" should be charged against the State when weighing a speedy trial claim. (*Ibid.*)

The United States Supreme Court granted certiorari because, "the Vermont Supreme Court made a fundamental error in its application of *Barker* [by] … attributing to the State delays caused by the failure of several assigned counsel to move [the] case forward." (*Id.* at p. 82.) The decision emphasized that Vermont's interpretation would, "treat[] defendants' speedy trial claims differently based on whether their counsel is privately retained or publicly assigned. (*Ibid.*) The decision also found error in Vermont's failure to place proper weight on the defendant's conduct, finding that Brillon's, "strident, aggressive behavior … impeded [a] prompt trial" and that his, "efforts to force the withdrawal of his first and third attorneys" contributed significantly to the delay.[11] (*Id.* at p. 83.)

[11] There is no claim that petitioner engaged in any such behavior.

The language that "an assigned counsel's failure to move the case forward does not warrant attribution of delay to the State" (*Brillon*, *supra* at p. 82) means only what it says. *Brillon* does not hold that any delays caused by defense counsel must be weighed heavily against the defendant, or that a due process violation can never occur where defense counsel fails to advance the case. Rather, the *Brillon* court focuses squarely on the question of state action. In addition to the plain language of the opinion, (i.e., "the Vermont Supreme Court made a fundamental error [by] … attributing [delay] to the State" (*Brillon, supra*, at p. 82.)), its references to *Coleman v. Thompson* (1991) 501 U.S. 722 [appellate attorney is not a state actor in federal *habeas* action because defendant has no constitutional right to counsel in post-conviction proceedings] and *Polk County v. Dodson* (1981) 454 U.S. 312 [public defenders do not act under color of state law when representing indigent defendants] underscore that focus.

B. A Due Process Violation Need Not be Based on a Systemic Breakdown of the Public Defender System.

The *Brillon* court wrote, "[t]he general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic 'breakdown in the public defender system' could be charged to the State." (*Brillon, supra*, 566 U.S. at p. 94.) The court of appeals seemingly interprets this statement as holding that due process is violated only when such a systemic breakdown occurs. After citing several cases where a breakdown in the public defender system was found, the court of appeals concluded:

> Without a more developed factual record, we cannot make a determination whether the defense delays were justifiable, or 'whether the lack of progress was attributable to each attorney's own inability to properly manage or prioritize his or her caseload, or whether the performance of individual attorneys was indicative or unreasonable resource constraints, misallocated resources, inadequate monitoring or supervision, or other systemic problems. (Slip Opn at p. 20, *quoting, People v. Tran* (2021) 62 Cal.App.5th 330, 352.)

But no such determination is necessary in petitioner's case. The gravamen of petitioner's claim is not that there was a breakdown in the public defender system. Rather, petitioner argues that it is manifestly unfair to place significant weight on the delays sought by his attorneys when he was not present in court to object to them. Petitioner further claims that the state actors acted negligently in failing to secure his appearance and failing to take any action to protect his speedy trial rights. Finally, he contends that this official negligence outweighs any blame chargeable to petitioner as a result of the inaction by his attorneys.

The lower courts' reasoning changes *Brillon's* "systemic breakdown" language from an example of state action into a litmus test for determining whether due process has been violated. But *Brillon* did not hold that only a systemic breakdown in the public defender system could violate due process. Rather, *Brillon* found that such a systemic breakdown, "could be charged to the State." (*Brillon*, *supra*, at p. 83 (emphasis supplied).) In

other words, there are exceptions to *Brillon's* core holding that indigent defense counsel are not state actors. Under certain circumstances, the actions of appointed counsel can be charged to the state. Those circumstances are not limited to systemic breakdowns, as *Brillon* also refers to more generalized, "institutional problems" that may also be held against the state. (*Ibid*.)

C. *In re Butler's* Interpretation of *Brillon*.

In re Butler (2020) 55 Cal.App.5th 614, has very similar facts to those of petitioner's case. In *Butler*, the First District Court of Appeal considered how it should account for delays that were sought by Butler's counsel. The court observed, "*Barker* itself made clear that the actions of defense counsel are not always attributable to the defendant." (*Id.* at p. 661.) Further, the court recognized that, "while *Brillon* holds generally that 'delay caused by the defendant's counsel is also charged against the defendant,' it does not specify how much weight such delay must be given in the overall *Barker* analysis." (*Ibid*. (citations omitted).) Therefore, the *Butler* court concluded:

> [W]e need not resolve whether there was a systemic breakdown in the public defender's office. The habeas corpus court concluded that it would be fundamentally unfair to hold Butler personally and solely accountable for delays caused by his counsel under such circumstances, and it therefore determined 'reluctantly' that Butler should be assigned some – 'but not all or even most' – of the responsibility for the delay in this case. We agree with the court's reasoning, and

> conclude that even if some of the delay must be charged to Butler as a matter of law, substantial evidence supports the habeas corpus court's determination that the bulk of the delay may be attributed to the actions (and inactions) by the state. (*Ibid.*)

In other words, the *Butler* court concluded that due process may be violated, even if defense counsel caused the delay, provided the state also contributed significantly to the delay and where it would be fundamentally unfair to blame the defendant for the delays sought by his counsel.

D. This Court Should Adopt *Butler's* Formulation.

Petitioner urges the court to adopt *Butler's* sound reasoning and reject the more restrictive interpretation employed by the lower courts. In essence, the lower courts focused entirely on the question of whether the delays sought or acquiesced to by defense counsel can be charged to the state. Those courts correctly applied *Brillon* to say that such delays cannot be attributed to the state. But rather than take the next step to determine the relative weight of those delays as compared with the negligent behavior of the state actors (*see section II*, *infra*), the lower courts conclude that petitioner cannot prevail in the absence of evidence that delays in his case can be attributed to a systemic failure of the public defender system.

In contrast, the *Butler* application recognizes that, "under *Brillon* a portion of the delay [may be] chargeable to defense counsel and thus, under agency principles, to [the defendant]. But [it is not] improper under *Brillon* and *Barker* to give this fact

diminished weight." (*Butler*, *supra* 55 Cal.App.5th at p. 662.) It would, however, be improper to end the inquiry by simply determining that defense counsel sought or acquiesced in most of the delays. The goal of a speedy trial analysis is not to determine whether defense counsel shares in the blame, but "whether the government or the [alleged SVP] [was] more to blame for th[e] delay in the case." (*Id.* at p. 653, *quoting*, *Brillon*, *supra*, 556 U.S. at p. 90 (emphasis supplied).) To make that determination, a thorough analysis of the government's role is required.

II. *Barker* and *Williams* Compel a Thorough Analysis of Government Inaction.

Under the lower court formulation, if any delay is charged to a defendant, he may only prevail in a speedy trial claim if there is proof that, "the prosecution engaged in deliberate delay tactics or acted in bad faith." (Slip Opn. at p. 16.) Such an approach is inconsistent with principles of due process and ignores the decisions in *Barker* and *Williams*.

A. Flexibility is the Key to Due Process Analysis.

In *Barker*, *supra*, the United States Supreme Court analyzed the interaction between due process and the right to a speedy trial. The Court emphasized that the speedy trial right is inherently vague, and that analysis of speedy trial claims must be highly contextual. "Any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." (*Barker*, *supra*, 407 U.S. at p. 521-522.) *Barker* established a four-factor balancing test to determine whether a violation has occurred. Courts must look at, "[l]ength

of delay, the reason for the delay, the defendant's assertion of his right, and prejudice." (*Barker*, *supra*, 407 U.S. at p.530.) The amorphous nature of the right, however, caused the *Barker* court to emphasize flexibility:

> We regard none of the four factors identified above as either a necessary or sufficient condition to finding the deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. (*Id.* at p. 533.)

Rather than engage in "difficult and sensitive balancing," the lower courts discard *Barker's* flexibility for a rigid rule that effectively holds defendants entirely responsible for every delay to which defense counsel fails to object. Not only is this approach inconsistent with the flexibility *Barker* demands, but it also ignores *Barker's* explicitly contrary language on the subject.

B. *Barker* Explicitly Contradicts the Appellate Court.

The lower court's holding is that where delays in an SVP defendant's case are caused by defense counsel, there can be no violation of the speedy trial right absent evidence of a systemic breakdown in the public defender system. Delays initiated by the defense must always be charged to the defendant and must always be assigned great weight, regardless of individual context. In *Barker*, however, the United States Supreme Court wrote that its test,

> allows a trial court to exercise … judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which [defense counsel] acquiesces in long delay without adequately informing [the defendant], or from a situation in which no counsel is appointed." (*Barker*, *supra*, 407 U.S. at p. 533 (emphasis supplied).)

This language creates a clear contrast between the former situation (a knowing failure to object), which would be held strongly against a defendant and the latter situation (a long delay granted without adequately informing the defendant), which would presumably merit less weight. The court of appeals' reasoning turns this example into a distinction without a difference.

Moreover, the *Barker* court later reiterated that it, "[did] not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted *ex parte*." (*Id.* at p. 536.) This language specifically acknowledges the possibility of a due process violation based on delays caused by defense counsel. The lower courts' approach would expressly nullify *Barker* in this respect.

C. Violations of Due Process Need Not be Based on Deliberate Delay or Bad Faith.

In denying petitioner relief, both lower courts failed to engage in any analysis of the role played by the prosecution and the trial courts in causing the delays. These courts were content merely to find that there was no evidence of bad faith and no deliberate effort to delay the proceedings. *Barker* makes it clear that charging a delay to the state requires no such finding. The court wrote, "[c]losely related to the length of the delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." (*Barker*, *supra*, 407 U.S. at p. 531.) If mere negligence must be held against the government in the speedy trial calculus, it does not follow that due process may be violated only in cases involving deliberate delay tactics or bad faith.

Indeed, the United States Supreme Court rejected such a requirement in *Doggett v. United States* (1992) 505 U.S. 647. Recognizing that some pretrial delay is "both inevitable and wholly justifiable," the *Doggett* court discussed the two opposing

poles of prosecution – diligent pursuit on the one hand versus intentional delay on the other – and noted that "official bad faith in causing delay will be weighed heavily against the government." (*Id.* at p. 656.) The court then wrote, "[b]etween diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him." (*Id.* at pps. 656-657.) A requirement of bad faith would create perverse incentives for the government. It would, "both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority." (*Id.* at p. 657.)

D. Trial Courts Must Affirmatively Protect Speedy Trial Rights.

In *People v. Williams*, this Court considered how to approach a speedy trial claim where, "the presumption of prejudice would weigh heavily in defendant's favor *if* the cause of the delay was official negligence." (*Williams*, *supra*, 58 Cal.4th at p. 237 (emphasis in original).) *Williams* determined that the proper approach in such a case was to analyze the conduct of the prosecution, defense, and trial court. (*Id.* at p. 239.)

The *Williams* court found insufficient evidence that official negligence was at fault for the delay. There were "only a handful of the delays for which the prosecution [was] directly responsible

[and] … On the whole … the prosecution, far from trying to delay the trial, sought to try [the] case in a timely manner." (*Williams*, *supra*, at p. 239.) Despite evidence suggesting, "more than the usual challenges facing appointed counsel" were at play for the defense, the court found insufficient evidence of "*systemic* or *institutional* problems [as opposed to] problems with individual attorneys" upon which to base a finding of a systemic breakdown. (*Id.* at p. 249.)

Nevertheless, the *Williams* court pointedly addressed the trial court's role:

> In granting continuances at the request of defense counsel, the trial court understandably sought to ensure adequate preparation and a fair trial. 'What is clear, though' – to borrow apt language from a decision of a sister high court – 'is that the [trial court] accommodated repeated requests to postpone hearings, extend deadlines, and continue the trial based on vague assertions about more time being needed. The record reflects that the court was concerned about [defendant's] right to prepare a defense, but also about the ramifications the delays were having on his right to a speedy trial … But it must be remembered that the primary burden to assure that cases are brought to trial is on the courts and the prosecutors. (Citation) Furthermore, 'society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.' (Citation) Thus, the trial court has an affirmative constitutional obligation to bring the

> defendant to trial in a timely manner. And to that end, it is entirely appropriate for the court to set deadlines and to hold the parties strictly to those deadlines unless a continuance is justified by a concrete showing of good cause for the delay. The trial judge is the captain of the ship; and it goes without saying that the ship will go in circles if the crew is running around on the deck with no firm marching orders." [¶] We do not find the trial court directly responsible for the delay in this case. We caution, however, that trial courts must be vigilant in protecting the interests of the defendant, the prosecution, and the public in having a speedy trial. (*Williams*, *supra*, at p. 521; *quoting*, *State v. Couture* (2010) 240 P.3d 987, 1009-1010 (other citations omitted).)

Clearly any analysis of a due process claim based on a violation of the speedy trial right must go beyond whether there is evidence of bad faith or intentional delay.

E. Official Negligence in Similar Cases.

Other California courts of appeal have addressed the role of negligence by the prosecution and the courts in the context of speedy trial claims by SVP defendants. In *Vasquez*, the court concluded that the trial court's role in a 17-year pretrial delay supported the conclusion that Vasquez's due process right to a timely trial was violated. (*Vasquez*, *supra*, 27 Cal.App.5th at p.74.) The *Vasquez* court described the trial court contributions as follows:

We recognize the trial court did not initiate any of the continuances, instead granting continuances at the request of Vasquez's counsel or by stipulation of counsel. The record shows that many of these continuances were granted for good cause, including, for example, while the attorneys were waiting for new expert evaluations or after the trial court ruled that a new probable cause hearing was required. However, during the first 14 years of Vasquez's confinement, his case was continued over 50 times, either by stipulation of counsel or a request by Vasquez's counsel. The record does not reflect whether the trial court made a finding of good case of these continuances … It does not appear from the record that during the first 14-year period the trial court took meaningful action to set deadlines or otherwise control the proceedings and protect Vasquez's right to a timely trial. While it may be that Vasquez was not seeking a speedy trial because he was facing evaluations supporting his commitment, we cannot tell because Vasquez was not present in court during most of this period. Neither is there a record of any inquiry by the trial court as to why the case was dragging on for so many years. Even where the attorneys stipulate to continue a trial date, the trial court has an obligation to determine whether there is a good cause for the continuance. The trial court also has a responsibility absent a written time waiver to inquire of a defendant whether he or she agrees to the delay. Had the trial court inquired of Vasquez during this 14-year period, we would know whether Vasquez was

> seeking a speedy trial, or was content to let his case be continued so long as the evaluations supported his commitment. (*Id.* at pps. 74-75.)

The *Vasquez* court ultimately stopped short of finding the trial court directly responsible for the delays. Nonetheless, the court cautioned that "trial courts 'must be vigilant in protecting the interests of the defendant, the prosecution, and the public in having a speedy trial.' As the 'captain of the ship,' the trial court cannot passively preside over a case as it moves forward at a snail's pace without a trial date in sight." (*Id.* at p. 81 (citations omitted).)

In *People v. DeCasas*, the Second District found that a 13-year delay after the filing of an SVP petition was sufficient to trigger a *Barker* analysis. (*People v. DeCasas* (2020) 54 Cal.App.5th 785, 810.) Citing *Vasquez*, the *DeCasas* court found that the trial court, "enabled and compounded the delays [in DeCasas's case] by failing to fulfill its duties 'to set deadlines and hold the parties strictly to those deadlines unless a continuance is justified by a concrete showing of good cause for the delay.'" (*Id.* at p. 810, *quoting Vasquez*, *supra*, 27 Cal.App.5th at p. 81.) The court reasoned:

> The court's 'affirmative constitutional obligation' to protect the interests in a speedy trial also counteracts what the People refer to as the public defender's 'perverse incentive to request unreasonable continuances (or encourage its attorneys to do so) in the hopes of inducing a windfall dismissal.' By requiring good cause for continuances,

> removing overburdened deputy public defenders, and exercising the court's inherent authority to order supervisors in the public defender's office 'to appear in court to address' the public defender's staffing decisions, the court can determine whether delays are due to a systemic breakdown within the public defender's office or a strategic misallocation of the public defender's resources. (*Id.* at p. 811; citations omitted).)

The *DeCasas* court concluded, "[f]or purposes of the *Barker* analysis, to the extent the court's failure to fulfill its obligation as a protector of the right to a speedy trial caused the delay, that delay is attributable to the state. (*Ibid.*, *citing Vasquez*, *supra* 27 Cal.App.5th at p. 81; *People v. Landau* (2013) 214 Cal.App.4th 1, 41.)

In *Butler*, *supra*, the court addressed a nearly 13-year delay following the filing of an SVP petition. The court found the delay "constituted a significant deprivation of liberty and was sufficient to trigger a *Barker* analysis." (*Butler*, *supra*, 55 Cal.App.5th at p. 648.) In determining that the state bore substantial responsibility for the delays, the court took note of findings that, "[d]uring the 13 years this case was pending … the People never objected, on the record, to a single continuance. The People never asked, on the record, that the court find good cause for any continuance. The People never declared on the record, that they were ready for trial." (*Id.* at p. 653.) The court then observed:

> [t]he People's due process obligation in an SVPA proceeding requires that it diligently prosecute the case. This may entail stating on the record that it is prepared to go to trial, taking affirmative steps to set a trial date, promptly requesting clinical evaluations and records, and securing the attendance of witnesses in a timely manner. Continuance requests, whether by defense counsel or the prosecution, should be supported by an affirmative showing of good cause, and where such a showing is lacking, an objection to the request may be warranted. Where the prosecution encounters repeated continuances of a setting hearing or trial date, or other dilatory tactics, diligent prosecution of an SVP petition may necessitate objecting to the delays, insisting upon trial deadlines, and making the trial court aware of the length of time since the filing of the SVP petition or other pertinent details from the record. The prosecution may even find it necessary to seek the removal of appointed counsel, the appointment of new or additional counsel, or other measures to ensure that an alleged SVP defendant is brought to trial at a meaningful time and in a meaningful manner. (*Id.* at p. 655.)

The *Butler* court charged portions of the delay to the state due both to the prosecution's own actions as well as its "mere acquiescence" to defense counsel's requests. (*Id.* at p. 656.) It also concluded that the trial court shared responsibility for the delay, noting:

> [the trial court] allowed all three trial dates … to be vacated without any showing of good cause and permitted the matter to be continued on 25 other occasions without ever finding good cause on the record ... There is no evidence the court ever required an on-the-record showing or finding of good cause before granting a continuance … Butler's matter was on calendar 66 times during the pendency of the case, but Butler only appeared in court six times … [and] there was no evidence the trial court ever asked counsel whether Butler objected to the continuances or wanted a trial and except for the *Marsden* hearing, there is no evidence the court ever ordered Butler to be transported to court to ascertain his wishes. (*In re Butler*, *supra*, 55 Cal.App.5th at p. 659.)

The court found that, "to fulfill its constitutional obligation to bring a defendant to trial in a timely manner, the trial court must closely monitor the progress in the case and conduct the necessary inquiries into the status of the proceedings" and noted that such steps are difficult to take "if the alleged SVP defendant is never present in court and if his counsel is never asked what his client actually wants." (*Id.* at p. 661.)

F. Official Negligence in Petitioner's Case.

Apart from noting the lack of bad faith or intentionally dilatory conduct on the part of the prosecution, the lower courts made no effort to analyze the role played by either the prosecutor or the trial court in causing the delays – implicitly finding that the state played no role whatsoever in delaying petitioner's trial.

As shown above, this approach is in error. In accordance with *Barker* and *Williams*, relatively innocuous circumstances, such as an overcrowded court docket, must be attributed to the state. In petitioner's case, there is substantial evidence of negligence on the part of both the prosecution and the trial court.

1. The Prosecution.

In petitioner's case, the prosecution was far from zealous in its efforts. In addition to acquiescing, without apparent objection, to numerous defense requests to continue, the prosecution delayed in ordering updated reports and failed on multiple occasions to arrange video conferences or to secure petitioner's attendance at court. Of the numerous requests for continuances made in petitioner's case, the record reflects that the government objected only a single time.

None of the prosecutors involved in petitioner's case took the kind of affirmative steps recommended by *Butler* such as insisting on setting trial dates, objecting to requests to continue that were unsupported by an affirmative showing of good cause, or seeking the removal of appointed counsel. Given this neglect, the state "can hardly complain too loudly, for persistent neglect in conducting a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it." (*Doggett*, *supra*, 505 U.S. 647 at p. 657.) After filing its petition, the prosecution made virtually no effort to proceed on the SVP petition. This lack of diligence by the prosecution must be held against the state in petitioner's case.

2. The Trial Court.

Due to the lack of transcripts, there is no official record of exactly what was said at many of the hearings.[12] It is clear, however, that the trial court failed to take control of the case. Between 2006 and 2018 more than 175 hearings took place, without a single deadline being set or enforced. None of the many requests to continue were supported by a written declaration and the court made very few findings of good cause. Indeed, just like in *Williams*, "the [trial court] accommodated repeated requests to postpone hearings, extend deadlines, and continue the trial based on vague assertions about more time being needed." (*Williams*, *supra*, 58 Cal.4th at p.251.) It is apparent that the trial court merely "acquiesced in the leisurely manner in which this matter was approached by the parties." (*Orozco v. Superior Court* (2004) 117 Cal.App.4th 170, 179.) This acquiescence constitutes the type of official negligence that must be weighed against the state.

An objective review of the record provides ample evidence that the state bears a portion of responsibility for the delay in bringing petitioner's case to trial. Therefore, logic compels a return to the "purely legal" question posed by the court in *Butler*: "whether, when multiple parties each bear some responsibility for the same period of delay, *Brillon* requires that the delay be charged solely to the defense." (*Butler*, *supra*, 55 Cal.App.5tgh at p. 661.) Petitioner respectfully urges the court to adopt *Butler's* finding that such a reading is "unnecessarily narrow." (*Ibid.*)

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[12] Both parties agreed that Exhibit A, a summary prepared by the prosecutor, was a fair representation of the record.

G. *Tran* Distinguished.

The court of appeals relied heavily on *Tran*, *supra*, in denying petitioner's claim. *Tran*, however, is inapposite because it did not address claims that official negligence played a role in the delays. The question in *Tran* was whether "the delays caused by [Tran's] attorneys … were the result of a systemic breakdown in the public defender system." (*Tran*, *supra*, 62 Cal.App.5th at p. 350.) In support of this claim Tran, "identifie[d] specific acts by his appointed counsel … includ[ing]: failing to take steps to ensure an earlier probable cause hearing; not timely reassigning the case when [his attorney's] retirement was imminent; requesting continuances to research and prepare motions that were never filed; and not timely obtaining the reporter's transcripts of [his] first trial." (*Ibid.*) The court found this evidence was insufficient to determine that a systemic breakdown occurred and therefore attributed "all delays caused by defense counsel" to Tran. (*Id.* at p. 352.)

In *Tran,* once blame for the delay was assigned to the defendant, the inquiry was over because both the prosecution and the trial court made diligent efforts to move the case along. For example, the *Tran* prosecutor repeatedly expressed his concern about delaying the case in light of defendant's "multiple demands to speed up the proceedings." (*See, Tran, supra* 62 Cal.App.5th at p. 338.) The prosecutor also made repeated comments about the length of the proceedings and the fact that "absolutely nothing [was] happening." (*Id.* at p. 340.) Later, the prosecutor objected to any further continuance, effectively forcing the case to trial. (*Id.*

at p. 342.) The contrast between the prosecutor's approach in *Tran* and the lackadaisical attitude displayed by the prosecutors in petitioner's case is stark.

The trial court also took an active role in *Tran*. When the assigned public defender took ill, the trial court suggested a different public defender could be assigned. (*See Tran, supra* 62 Cal.App.5th at p. 335.) At several junctures, the court urged defense counsel to meet with the client. (*Id.* at pps. 336-337, 339.) The trial court repeatedly urged counsel to speed the case up. (*Id.* at pps. 337-344.)[13] Addressing a situation when defense counsel did not personally appear, the *Tran* trial court stated:

> This is really problematic … [defense counsel] needs to be on his cases. I cannot intelligently address requests to put cases over if I don't have counsel here. This case has been dragging out. Since December, he's been trying to get transcripts. And I have no idea what the progress of that is. (*Tran, supra* at p. 343.)

The trial court repeatedly discussed the importance of balancing the defendant's right to a speedy trial against the need for prepared and effective counsel and ultimately forced the matter

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[13] *See* 62 Cal.App5th at p. 337 ["cases need to be moving toward trial more quickly."]; p. 338 ["I would like to get this case moving."], [wanted 'something actually happening.'], [defense counsel 'had been on the case for over a year.]; p. 340 [told defense counsel to make the case a high priority]; p. 343 [telling defense counsel 'to proactively move the case forward.']; p. 344 [expressing concern over fact case had not been reassigned], [putting trial counsel 'on notice' to be prepared 'sooner rather than later']

to trial. (*Id.* at p. 345).

Thus, with respect to the core issues at play in petitioner's case, *Tran* offers very little guidance. Mr. Tran's complaint involved the performance of his own attorneys. Petitioner's claim, by contrast, is that there was an institutional failure by all three parties (the court, prosecutor, and defense counsel) which allowed his case to be continued *ad infinitum* while he was involuntarily confined and unable to express his opinion or lodge an objection. The two cases are not at all similar to one another and the court of appeals reliance on *Tran* is therefore misplaced.

III. Petitioner's 'General Time Waiver' is not Evidence of Affirmative Consent to Every Delay.

Implicit in the lower court rulings is the conclusion that petitioner's entry of a 'general time waiver' on December 23, 2008, constituted affirmative consent to every continuance between that date and July 5, 2018. The lower courts reach this conclusion despite lacking a written waiver or other indication that petitioner intended to waive his right to be present in court. The conclusion that the entry of a 'general time waiver' is tantamount to an indefinite waiver of the speedy trial right is clearly erroneous and ignores long-standing precedent concerning the waiver of fundamental rights.

It is unclear exactly what was contemplated by the entry of a 'general time waiver' in the context of an SVP trial. In California's jurisprudence, a 'general time waiver' typically refers to waivers of the various time requirements imposed by Penal Code §§ 859b and 1382. (*See, People v. Superior Court* (*Arnold*)

(2021) 59 Cal.App.5th 923, 927 and *Baustert v. Superior Court* (2005) 129 Cal.App.4th 1269, 1275-1276, respectively.) Thus, the entry of a 'general time waiver' normally has the effect of waiving clearly defined statutory timelines.

In contrast to the well-delineated rules governing the time periods in criminal prosecutions, "the SVPA does not delineate a timeframe in which an alleged SVP's trial must be conducted once the court has determined the petition is supported by probable cause." (*Landau*, *supra*, 214 Cal.App.4th at p.4.) As such, the lower court interpretation of the record construes petitioner's 'general time waiver' not as a waiver of a statutorily created right, but as a complete waiver of the fundamental constitutional right to a speedy trial. This Court should not permit a finding that petitioner's fundamental rights were so easily waived.

Waiver is defined as the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst* (1938) 304 U.S. 458, 464. The question of whether there has been an effective waiver of a particular right, "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (*Ibid.*) As the United States Supreme Court observed, "[p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused … intelligently and understandingly [waived the right]. Anything less is not waiver." (*Carnley v. Cochran* (1962) 369 U.S. 506,

516).[14]

There has been no showing that petitioner intended to forever waive his right to a speedy trial when he consented to a 'general time waiver' on December 23, 2008. There is no evidence that petitioner was advised that this waiver would permit counsel to continue his case indefinitely in his absence. Nor is there any reason to construe petitioner's 'general time waiver' to include a waiver of the right to be personally present in court.

Given that petitioner was absent from the court proceedings, it is fundamentally unfair to conclude that he affirmatively agreed to the multiple delays of his case simply because he agreed to a delay on a handful of previous occasions. "The trial court … has a responsibility absent a written time waiver to inquire of a defendant whether he or she agrees to [a] delay." (*Vasquez*, *supra*, 27 Cal.App.5th at p.75.) The trial court never made any such inquiry. That failure must be held against the state in the *Barker* analysis.

IV. Petitioner's Extended Absence From Court Denied Him Due Process.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (*Armstrong v. Manzo* (1965) 380 U.S. 545, 552 (citation omitted).) This requirement was violated by the trial court when it permitted defense counsel to continually waive petitioner's presence for more than 8 years. In so doing, the trial

[14] *See also*, *Aetna Ins. Co. v. Kennedy* (1937) 301 U.S. 389, 393 [courts should not presume acquiescence in the loss of fundamental rights].

court prevented petitioner from having an opportunity to be heard concerning the delays sought by his attorney. Due process is offended by any process which would permit such a deprivation.

A. Right to be Personally Present in Court.

"A criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments to the Federal constitution." (*People v. Lucero* (2000) 23 Cal.4th 692, 716.) While there is no right to be present at every single hearing (*see*, *People v. Price* (1991) 1 Cal.4th 324, 407), a defendant has the right to be present if his presence, "bears a reasonable and substantial relation to his full opportunity to defend against the charges." (*People v. Freeman* (1994) 8 Cal.4th 450, 511.) Thus, "when the presence of the defendant will be useful or of benefit to him and his counsel, the lack of his presence becomes a denial of due process of law." (*In re Dennis* (1959) 51 Cal.2d 666, 673.)

B. *Matthews v. Eldridge*.

In *Matthews v. Eldridge*, the United States Supreme Court engaged in a three-factor analysis to determine whether a speedy trial violation violates due process. Under *Matthews*, courts must examine (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure would require. (*Matthews*, *supra*, 424 U.S.

319, 335.)

Analysis of the first and third *Matthews* factors are the same in every SVP case. "With respect to the first factor – the private interest at stake – it is clear that forced civil confinement for mental health treatment constitutes 'a massive curtailment of liberty,' requiring due process protection. As to the third factor, the government undeniably has a, 'compelling protective interest in the confinement and treatment of persons who have already been convicted of violent sex offenses, and who, as the result of current mental disorders that make it difficult or impossible to control their violent sexual impulses, represent a *substantial danger* of committing similar new crimes." (*See, Butler, supra,* 55 Cal.App.5th at p. 663 (citations omitted) (emphasis in original).)

The second factor to consider under a *Matthews* analysis is "the fairness and reliability of the existing … procedures, and the probable value, if any, of additional procedural safeguards." (*Matthews, supra*, 424 U.S. 319, 343.) "The risk of erroneous deprivation under the second *Matthews* factor … increases with the length of the delay." (*Butler*, *supra*, 55 Cal.App.5th at p. 663.) The risk of an <u>erroneous</u> deprivation of the speedy trial right obviously increases each time a continuance is granted in the defendant's absence because the defendant lacks an opportunity to correct any error. A rule ensuring that SVP defendants have access to the court has self-evident value in reducing the risk of an erroneous deprivation because defendants would have the opportunity to be heard.

C. The Second *Matthews* Factor Applied.

By failing to enact any procedural safeguards to ensure that Mr. Camacho consented to the repeated delays in his case, the process employed by the trial court was not fair or reliable and, therefore, does not pass muster under *Matthews*. While there is no decision directly addressing the right to be personally present at an SVP proceeding, petitioner urges this Court to conclude that due process is violated where a defendant is denied the ability to be personally present in court for 8 years.

While the SVPA imposes no deadlines for trial, due process should require – at a minimum – that an appropriate written waiver be filed or that the petitioner be present in court with the opportunity to be heard. Video conferencing eliminates any potential concern over costs of transportation from DSH or obtaining secure housing. This simple procedural guardrail can be put in place at little or no expense to the government and will prevent situations like petitioner's from occurring in the future.

V. Presumed Prejudice.

"*Barker* … expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." (*Moore v. Arizona* (1973) 414 U.S. 24, 26.) Rather, courts "generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter identify." (*Doggett*, *supra*, 505 U.S. at p. 655.) Because of this difficulty in identifying specific prejudice, "the weight … assign[ed] to official negligence compounds over time as the

presumption of evidentiary prejudice grows." (*Id.* at p. 656.) As such, the degree to which courts should tolerate such negligence, "varies inversely with its protractedness." (*Ibid.*)

In petitioner's case, the official negligence is extremely protracted. Nothing meaningful happened from the time petitioner's matter was placed back on the court's docket in 2006 until May 17, 2018, when the Honorable Douglas Mewhinney ordered petitioner to appear in court. During those 12 years, there was no discernable progress made in petitioner's case.

In 2012, the trial court lost track of the procedural posture of the petition, shifting from trial setting to pre-probable cause status. By 2015, one doctor had found that petitioner no longer met criteria and another opined that he was "ever so close", yet no trial date was set for another three years when petitioner finally demanded it.

The lower courts conclude that any prejudice in petitioner's case was mitigated by the intervening probable cause determination and the various expert evaluations opining that petitioner continued to meet criteria for confinement as an SVP. But as the *Butler* court observed, "while a probable cause determination may justify some level of postdeprivation detention, the procedures undergirding this requirement cannot substitute for a finding, beyond a reasonable doubt, that the statutory elements under the SVPA have been met." (*Butler*, *supra*, 55 Cal.App.5th at p. 664; *see also*, *People v. Superior Court* (*Couthren*) (2019) 41 Cal.App.5th 1001, 1009 [probable cause determination is not a determination of the merits and no

substitute for an SVP trial.].) Petitioner urges this Court to adopt *Butler's* reasoning and determine that the prejudice inherent in the decades long delays outweighs the government interest in keeping him confined without trial.

CONCLUSION

The notion that a person may be involuntarily confined for more than eight years without being brought before a judge shocks the conscience. While there may be reasons that some SVP defendants endorse lengthy delays, official conduct that simply assumes consent to more than 15 years of delay does nothing to affirmatively protect the right to a speedy trial. Unless this court steps in, trial courts and prosecutors will have no incentive to do anything but sit on their hands.

Moreover, there is no reason why SVP defendants should be treated differently from individuals pending trial in criminal cases. Individuals confined at DSH should be permitted to observe court and be given the opportunity to affirmatively consent to continuances or note their objections in the same manner that other criminal defendants do. Given that video conferencing is widely available and demonstrably effective, there is no rational basis for the state to argue otherwise.

Petitioner's lawyers continued his case more than 175 times despite the petitioner being absent from court. The prosecutor neither said nor did anything demonstrating a desire to prosecute the commitment petition. And the trial court took no action to protect petitioner's rights to be present in court or to be afforded a speedy trial. Official negligence of this magnitude

simply cannot, in good conscience, be called due process. Petitioner respectfully urges this court to grant relief and order the petition dismissed.

Dated: 7/14/2022

Respectfully submitted,

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WORD COUNT CERTIFICATION

I hereby certify, under penalty of perjury, that the attached opening brief on the merits contains 10,080 words (excluding cover page, tables, and this certification), as determined by the computer program used to prepare this document.

Dated: 7/14/2022

Respectfully submitted,

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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Case Number: **S273391**
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