S278262

No. S278262

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

ISHMAEL MICHAEL CARTER,
Defendant and Appellant.

Third Appellate District, Case No. C094949
Yolo County Superior Court, Case No. CRF19987081
The Honorable Daniel M. Wolk, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Did the trial court deprive defendant of effective assistance of counsel by failing to appoint substitute counsel to evaluate and potentially argue defendant's pro. per. motion to dismiss after appointed counsel refused to consider the motion based on an asserted conflict in arguing her own ineffective assistance of counsel?

INTRODUCTION

Prior to the enactment of 2019 legislation, many sexually violent predator (SVP) civil commitment cases would await trial for years—some for over a decade. It was not unheard of for trial courts to continue cases repeatedly in light of the parties' agreement without requiring a showing of good cause. This was often advantageous for defendants, who would participate in sexual offender treatment to increase the chances of a favorable outcome at trial, where the standard for commitment as an SVP focuses on the defendant's current mental condition. The consequent delay, however, meant that many SVP defendants found themselves represented by different attorneys over time.

In 2018, *People v. Superior Court (Vasquez)* (2018) 27 Cal.App.5th 36 held that a 17-year delay in an SVP case violated due process, requiring dismissal. After *Vasquez*, a common legal strategy became for SVP defendants to move to dismiss their cases for a violation of their due process right to a timely trial. This type of motion may criticize both current and prior defense counsel for unjustifiable trial delay. Importantly for purposes of the case now before the Court, such a scenario may pose a conflict

of interest for the current attorney—for instance, when successive attorneys who represented the defendant work for the same public defender's office.

Appellant Ishmael Michael Carter is the subject of SVP commitment proceedings that began in 2007. After his case had been pending for about 12 years, Carter's counsel brought two pro se motions to the attention of the trial court: one seeking to replace his appointed attorney, Allison Zuvela, and one seeking to dismiss his case on timely trial grounds. Carter argued, in essence, that Zuvela and her predecessor, Brett Bandley, both deputy public defenders working in the same office, had not done enough to move his case forward to trial. He also argued that Zuvela should be replaced because she could not properly litigate a motion to dismiss given that the motion would, in part, call into question her own performance.

The trial court addressed Carter's request to replace Zuvela as a motion under *People v. Marsden* (1970) 2 Cal.3d 118. After questioning Zuvela, the court declined to replace her, concluding that she had provided competent representation, including with respect to the progress of the case over time. As for the motion to dismiss, Zuvela said that she could not ethically file one because she had provided effective assistance. The court did not rule on the motion to dismiss, stating that Carter would need to refile the pro se motion with a supporting declaration, which Carter never did. A third public defender represented Carter at trial. Carter claims on appeal that, as a result of the trial court's rulings, he was denied his right to conflict-free counsel.

The trial court properly denied Carter's request to replace Zuvela based on her performance. Whether couched as a direct challenge to her competence or as a claim of self-conflict, the question boiled down to the same thing: whether Zuvela had provided ineffective representation by failing to make adequate efforts to move the case forward to trial. If so, then replacement would have been warranted under *Marsden*, and new counsel could have assessed Carter's proposed motion to dismiss. If not, then there was no "conflict" because the motion to dismiss could not properly have rested on a challenge to Zuvela's performance. The trial court did not abuse its discretion in making an inquiry of Zuvela and denying the request to replace her under the pertinent *Marsden* framework.

An additional question was raised by Carter's motions, however, which the trial court did not address. During the proceedings below, the trial court was made aware of facts suggesting that Zuvela had a potential conflict of interest precluding her from alleging the ineffectiveness of her colleague at the public defender's office, Bandley, who had previously represented Carter. Established law makes clear that when a trial court knows, or should know, that current counsel might have a conflict of interest, the court must conduct an inquiry to determine whether an actual conflict exists. Accordingly, the trial court was required to determine whether Zuvela had an actual conflict such that she could not pursue a motion to dismiss based on her predecessor's conduct. Although the trial court correctly held that Zuvela had not personally provided ineffective

assistance, it did not consider whether a conflict existed as to her challenging the performance of her colleague in a possible motion to dismiss.

In general, questions of conflicts of interest are properly left for trial courts to determine in the first instance, under their authority to act in the furtherance of justice. And although the People do not usually weigh in on conflict issues adjudicated in the trial court, they do have an interest in ensuring that SVP proceedings are fair and that defendants are afforded the effective assistance of counsel. The proper remedy in this case is conditional reversal of the judgment with a limited remand for the trial court to conduct an inquiry to determine whether a conflict of interest existed.

LEGAL BACKGROUND

A. Overview of the SVP Act

The SVP Act, codified at Welfare and Institutions Code section 6600 et seq., authorizes the involuntary civil commitment of an individual who, upon the completion of a prison term, is determined by a trier of fact to meet the criteria for commitment.[1] The criteria for commitment are a conviction for an enumerated sexually violent offense and a diagnosed mental disorder that makes the individual likely to engage in sexually violent criminal behavior. (§ 6600, subds. (a)-(d).)

To initiate SVP proceedings, the Department of Corrections and Rehabilitation must first screen an eligible inmate, generally

[1] All subsequent statutory references are to the Welfare and Institutions Code.

at least six months before his or her scheduled release date. (§ 6601, subd. (a).) The screening is "based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history." (§ 6601, subd. (b).) If the Department of Corrections and Rehabilitation determines that the inmate is "likely" to meet the SVP criteria, it refers the matter to the Department of State Hospitals (DSH) for a "full evaluation." (§ 6601, subd. (b).)

An individual who potentially qualifies for commitment as an SVP is evaluated by two DSH doctors (psychologists or psychiatrists). (§§ 6601, subd. (d), 6604.1.) If both doctors concur that the individual meets the criteria for commitment, DSH forwards a request that the designated representative of the People (usually the district attorney) file a petition for the individual's commitment. (§ 6601, subds. (d) & (i).)

Upon the People's filing of an SVP petition, the superior court is charged with making a timely determination of probable cause that the individual is in fact an SVP. (§ 6602, subd. (a).) If the court finds probable cause, the individual is detained in custody in a secure facility (such as a state hospital) pending trial on the petition. (§§ 6602, subd. (a), 6602.5.)

The Act does not establish a timeline by which a trial on a petition must be held. (See § 6603.) If, before the case proceeds to trial, the attorney petitioning for commitment determines that updated evaluations are necessary to properly try the case, the attorney may request that DSH perform updated evaluations. (§ 6603, subd. (d)(1).) Updated evaluations may be necessary

because, to conclude that the individual meets the criteria for commitment as an SVP, the trier of fact must find that the individual *currently suffers* from a diagnosed mental disorder that makes him likely to commit future sexually violent criminal acts. (§ 6600, subds. (a)(1) & (a)(3); *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1169.)

At a trial on an SVP petition, both the individual on trial and the People have the right to a trial by jury, and the jury's verdict must be unanimous. (§ 6603, subds. (a), (b) & (g).) The burden of proof is on the People to show beyond a reasonable doubt that the individual meets the criteria for commitment. (§ 6604.) If the trial results in a determination that the person is an SVP, then the person is committed to the custody of DSH "for appropriate treatment and confinement in a secure facility designated by the Director of State Hospitals." (§ 6004.) Originally, the Act provided for two-year terms of commitment. (See § 6604, as added by Stats. 1995, ch. 763 (AB 888), § 3.) But, since the passage of Proposition 83 in November 2006, the Act provides for indeterminate terms of commitment. (§ 6604; *In re Butler* (2020) 55 Cal.App.5th 614, 628, fn. 2.)

After commitment, an SVP is evaluated every year to consider "whether the committed person currently meets the definition of a sexually violent predator and whether conditional release to a less restrictive alternative, pursuant to Section 6608, or an unconditional discharge, pursuant to Section 6605, is in the best interest of the person and conditions can be imposed that would adequately protect the community." (§ 6604.9.) Under

certain circumstances, an SVP may petition the court for either conditional release (§ 6608) or unconditional discharge (§ 6605).

B. The right to a timely trial in SVP cases

Other than to require that the superior court make a timely determination of probable cause (§ 6602, subd. (a)), the Act does not establish a timeline by which a trial on the SVP petition must be held.[2] And since the Act establishes a civil commitment scheme that does not result in criminal punishment, the Sixth Amendment—with its attendant right to a speedy trial—does not attach. (*People v. Allen* (2008) 44 Cal.4th 843, 860-861; see also *People v. Tran* (2021) 62 Cal.App.5th 330, 347; *Butler*, *supra*, 55 Cal.App.5th at p. 637.) But "[b]ecause civil commitment involves a significant deprivation of liberty, a defendant in an SVP proceeding is entitled to due process protections." (*People v. Otto* (2001) 26 Cal.4th 200, 209.) Accordingly, as a matter of due process, an alleged SVP is entitled to a timely trial. (*Tran*, at p. 347; *Butler*, at pp. 637-638; *Vasquez*, *supra*, 27 Cal.App.5th at p. 56.)[3]

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[2] In 2019, the Legislature amended the Act to prospectively ensure that SVP matters proceed to trial in a timely manner. Effective January 1, 2020, Assembly Bill No. 303 added a new subdivision (c) to section 6003, which sets forth in detail new requirements for continuances in SVP cases. (See § 6603, as amended by Stats. 2019, ch. 606 (AB 303), § 1.) As a result, the lengthy delays that occurred in some SVP cases in the years leading up to the 2019 amendments should not be a recurring issue going forward.

[3] In *Camacho v. Superior Court*, review granted May 11, 2022, S273391, this Court is considering the following issue:

Although an SVP defendant is entitled to a timely trial, postponement of the trial often benefits the defendant as a practical matter. In contrast to the emphasis on historical facts in criminal cases, SVP trials focus on the present day. "[T]he key issue in an SVP trial is whether the defendant currently suffers from a mental disorder that makes him a danger to society (see § 6600, subd. (a)(3)), [and] an SVP defendant facing adverse evaluations may prefer to receive further treatment and be reevaluated rather than proceed to trial." (*In re Kerins* (2023) 89 Cal.App.5th 1084, 1111, review granted June 14, 2023, S279933, further action deferred pending consideration and disposition in *Camacho*, S273391.) For these reasons, "pretrial delay will often work to a defendant's advantage." (*Ibid.*) Defense counsel in SVP matters may therefore have "legitimate reasons for requesting continuances in many cases, such as providing more time for [the defendant] to receive further treatment at the state hospital and receive updated evaluations." (*Ibid.*)

C. The right to counsel in SVP cases

Because SVP proceedings are civil, not criminal, in nature, the right to counsel under the Sixth Amendment does not attach. (*Allen*, *supra*, 44 Cal.4th at pp. 860-861; *People v. Orey* (2021) 63 Cal.App.5th 529, 567.) However, the Act provides that an individual named in an SVP commitment petition is entitled to

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Whether an SVP defendant establishes a timely trial violation based on a 15-year delay where, either personally or through counsel, the defendant asked for, agreed to, or acquiesced in all continuances and entered multiple general time waivers. This Court heard oral argument in *Camacho* on June 27, 2023.

the assistance of counsel at the probable cause hearing. (§ 6602, subd. (a).) The Act further provides that, if the court finds probable cause and orders the matter to trial, the individual is entitled to the assistance of counsel with a corresponding right to retain experts. (§ 6603, subd. (a).)

In addition to the statutory right to counsel under the Act, an individual subject to its provisions has a due process right to the effective assistance of counsel. (*Orey*, *supra*, 63 Cal.App.5th at p. 567; *People v. Hill* (2013) 219 Cal.App.4th 646, 652; see also *Otto*, *supra*, 26 Cal.4th at p. 209 ["a defendant in an SVP proceeding is entitled to due process protections"].) Moreover, due process requires that legal representation be free from conflicts of interest. (*Wood v. Georgia* (1981) 450 U.S. 261, 271.) In criminal proceedings, the Sixth Amendment provides parallel protection against "a conflict of interest that adversely affects counsel's performance." (*Mickens v. Taylor* (2002) 535 U.S. 162, 172, fn. 5.)

Broadly, conflicts of interest "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests." (*People v. Bonin* (1989) 47 Cal.3d 808, 835; see Rules Prof. Conduct, rule 1.7(b).) Although most conflicts "arise out of a lawyer's dual representation of co-defendants, the constitutional principle is not narrowly confined to instances of that type. Thus, a conflict may exist whenever counsel is so situated that the caliber of his services may be substantially diluted." (*People v. Hardy* (1992) 2 Cal.4th 86, 135-

136, internal citations and quotation marks omitted.) In other words, an attorney may not assume any role that "would prevent him from devoting his entire energies to his client's interests." (*Anderson v. Eaton* (1930) 211 Cal. 113, 116.) This rule serves to "preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent." (*Ibid.*)

When a "trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter." (*Bonin*, *supra*, 47 Cal.3d at p. 836.) Upon inquiring, the court "may decline to relieve counsel if it determines the risk of a conflict is too remote. In making its determination, the court may rely on the representations of defense counsel that no conflict exists. To obtain relief on appeal, the defendant must establish the existence of an actual conflict that adversely affected counsel's performance." (*People v. Lawley* (2002) 27 Cal.4th 102, 145-146, internal citations omitted.) In other words, "'an actual conflict of interest' mean[s] precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties." (*Mickens*, *supra*, 535 U.S. at p. 171, italics omitted.)

The due process right to effective assistance of counsel also includes the right to make a motion to discharge appointed counsel under the framework of *People v. Marsden*, *supra*, 2 Cal.3d 118. (*Orey*, *supra*, 63 Cal.App.5th at p. 567; *Hill*, *supra*,

219 Cal.App.4th at p. 652.) In *Marsden*, this Court held that when a criminal defendant seeks to discharge his appointed attorney and substitute that attorney with another, "'the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation or that the defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'" (*People v. Memro* (1995) 11 Cal.4th 786, 857, citation indications omitted.)

"A trial court should grant a defendant's *Marsden* motion only when the defendant has made 'a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation.'" (*People v. Hines* (1997) 15 Cal.4th 997, 1025, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 859.) "A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and complete defense. Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.' When a defendant chooses to be represented by professional counsel, that counsel is 'captain of the ship' and can make all but a few fundamental decisions for the defendant." (*People v. Welch* (1999) 20 Cal.4th 701, 728-729, some internal quotation marks and citations omitted.)

STATEMENT OF THE CASE

A. The SVP petition is filed, and Carter waives his right to a timely trial

In May 2007, the Yolo County District Attorney filed a petition to commit Carter as an SVP. (See materials attached to Carter's Mar. 28, 2022, motion to augment the record on appeal.) At the first hearing, the Yolo County Public Defender appeared on Carter's behalf. (SCT 13.)[4] At the next hearing, Chief Deputy Public Defender Allison Zuvela was assigned to the case. (SCT 14.) That same year, the court found probable cause that Carter met the criteria for commitment as an SVP and ordered him into the custody of DSH pending trial. (SCT 17.) Carter waived time for trial to avail himself of the opportunity to receive treatment. (*Ibid.*)

For the first two years after the SVP petition was filed, Zuvela appeared as counsel for Carter. (SCT 14-31.) For the next six years, Deputy Public Defender Brett Bandley appeared on Carter's behalf. (SCT 32-50.) Then Zuvela resumed as defense counsel. (SCT 51.) During that entire time, the matter was continued repeatedly, mostly at defense counsel's request, sometimes jointly, and never over defense objection. (SCT 18-70.)

[4] The record on appeal includes two clerk's transcripts both entitled "Supplemental Clerk's Transcript." The People refer to the 73-page Supplemental Clerk's Transcript, certified on April 19, 2022, as "SCT."

B. Carter invokes his right to a timely trial, requests new counsel, and unsuccessfully seeks dismissal of the petition

Twelve-and-a-half years after the petition was filed, the trial court received a memorandum from Zuvela requesting that the court calendar the matter to conduct a *Marsden* hearing. (CT 7.) Zuvela said that she had received a pro se motion from Carter asking her to schedule a hearing. (*Ibid*.) Zuvela attached to her memorandum a copy of the "motion" itself, which was in fact two motions. (CT 8-15.)

In the first motion, Carter asked to dismiss Zuvela and disqualify her office, and he sought appointment of new counsel because, in his second motion, he intended to place at issue the quality of the representation he had received to that point. (CT 8-10.) Carter cited his right to a conflict-free attorney, i.e., one with no connection to the public defender's office or any of the attorneys employed by that office. (CT 7, 10.) He alleged that Zuvela had a conflict because she was a "key percipient" witness. (CT 8-9, citing former Rules Prof. Conduct, rule 5-210.) He also suggested that his counsel had failed to take steps to ensure that the matter proceed to trial in a timely manner. (CT 9.)

In the second motion, Carter moved to dismiss the SVP petition based on an alleged denial of his right to a timely trial. (CT 11-15.) In support thereof, Carter relied most prominently on *Vasquez*, *supra*, 27 Cal.App.5th 36. (CT 11.) He contended that the trial court had neglected "to act proactively to protect [his] right to a timely trial," and "never exercised reasonable

control over" the SVP proceedings. (CT 14, capitalization omitted.)

The trial court subsequently set the matter for a *Marsden* hearing and instructed the clerk to schedule a video conference so that Carter could attend virtually. (CT 16; 1RT 1-4.) Zuvela alerted the court in advance of the *Marsden* hearing:

> The issue from [Carter's] perspective is that there's a few cases out there that say[], hey, I've asked for a speedy trial and I haven't gotten my speedy trial. And so [Carter]'s asking to dismiss on that, on those grounds. And we can address this at the *Marsden* hearing, but there was a philosophy and he was waiving time so he could get in the best place where he could, so we can have a trial and we've kind of set that in motion.

(1RT 2, italics added.)

The *Marsden* hearing ensued in January 2020. (1RT 6-26; CT 17.) Carter appeared via video conference—his first personal appearance in over 12 years. (CT 17; see SCT 17-70.) When asked why he wanted to replace Zuvela as his attorney, Carter answered:

> Well, I've been sitting here for 12 and a half years and there's been multiple delays that was not at my request.
>
> When Ms. Zuvela took over, I informed her of some things going on and she was looking into it, but then we've been—I just—I been requesting trials and I'm still sitting here without my trial.

(1RT 6-7.)

When asked for clarification about whether he was complaining about his current attorney (Zuvela), Carter explained that before Zuvela was "back on [his] case," he had

been represented by Bandley. (1RT 7.) With respect to Bandley, Carter stated:

> [I]t was hard getting a hold of him a lot of times. There have been times when I had to leave messages that it feels like the Public Defender's Office abandoned us because we're not hearing from nobody. And a lot of times when he was supposed—when the trials or my court hearings was delayed, I wouldn't find out until I called in and the secretary was telling me. So I wasn't being informed a lot of times when he was on the case.

(1RT 7-8.)

The trial court questioned Carter about the degree of contact he had with Zuvela. (1RT 7.) Carter expressed general satisfaction in that regard. (1RT 8.) Carter repeated that his main concern was "about the constant delays, and my speedy trial is not being adhered to or things like[] that, but that's the biggest complaint I've had, is the delays." (*Ibid.*)

The court then asked Carter whether Zuvela had explained to him why his trial had been delayed. (1RT 8.) Without answering yes or no, Carter indicated that Zuvela had indeed kept him informed about the reasons for the delays. (*Ibid.*) He asserted, for example, that "[t]he last time I knew why evaluators didn't come up until after the trial date." (*Ibid.*) The court then asked Carter whether he thought there was anything Zuvela should have done differently, aside from his complaint that the case had not yet gone to trial. (1RT 8-9.) Carter responded in the negative. (1RT 9.) He elaborated: "Every time I requested something she's actually pushed to get it done if she could. If there's some kind of delay, when she had the opportunity she

notified me and let me know either by letter or she's called me." (*Ibid.*)

The trial court then turned to Zuvela and asked if she had any comments. (1RT 9.) Zuvela related that, from the time she re-acquired the case from Bandley, she had understood that the agreed-upon strategy was for Carter to complete as much of the sex offender treatment program as possible so that he would have the best chance at trial. (*Ibid.*) She related that it was not until November 2017 that Carter told her that he felt he was ready to go to trial. (1RT 9-11; see also 1RT 12.) She immediately conveyed to the prosecution Carter's desire to proceed with a trial. (1RT 11-12.)

Zuvela then explained why the trial had not happened yet, even though over two years had passed since Carter's invocation of his right to a timely trial. (1RT 10.) The reasons were: (1) the need for updated evaluations by the People's experts, which had taken about a year to obtain; (2) the need to obtain a defense expert to evaluate Carter and prepare a report after the People's experts had both concluded that Carter met the criteria for commitment; and (3) the need for the People's experts to "do a follow-up evaluation based upon [the defense expert]'s report and seeing Mr. Carter if he wants." (1RT 10-11; see also 1RT 12-13.) Zuvela said that, since all the reports had been received, "we just need to get a date that works for the Court, and all three [experts] for a jury trial." (1RT 11.)

Zuvela informed the court that she had spoken to Carter at least once or twice a month, had traveled to the state hospital to

see him about five months earlier, wrote to him frequently, and provided him with stamps so that he could send her materials that he believed would be helpful to his defense. (1RT 11.) She observed that Carter was "very good" at sending her things that she needed. (*Ibid.*)

The trial court then asked Zuvela to relate her experience as an attorney. (1RT 16.) Zuvela stated that she had been an attorney for about 25 years and, for the last two-and-a-half or three years, she had been handling SVP cases. (*Ibid.*) She had conducted over 100 trials, including at least 12 civil commitment trials, one of which was an SVP case. (*Ibid.*)

At that point, the court asked Carter if he wanted to say anything else. (1RT 17.) Carter expressed his general frustration that he had not yet had his day in court. (1RT 17-18.) Carter acknowledged that, for strategic purposes, he had originally agreed to pursue treatment before a trial. (1RT 18.) Carter added that Zuvela "went out and I was given to . . . Mr. Bandley as an attorney and after that I never heard nothing for a long time until [Zuvela] took over the case." (*Ibid.*) Carter then said that, though Zuvela had been trying to "push" his case forward, "it seems like there's more roadblocks coming from this hospital." (*Ibid.*) Zuvela commented that she shared Carter's frustration with DSH in that "they keep changing the [sex offender] treatment. It's my opinion it's so no one can ever graduate, but that's my opinion." (1RT 19.) Zuvela said she was not a necessary witness in the matter, because she had three

witnesses from the state hospital who could testify about how the treatment protocol had changed. (*Ibid.*)

The trial court denied Carter's *Marsden* motion as follows:

> All right. I understand your frustration of your own case moving or not moving and the frustration in the case getting to trial.
>
> From what Ms. Zuvela has told us today, I'm satisfied that she's been diligent[ly] trying to push the case forward. She hasn't necessarily delayed the process. She's promptly communicated with you and described what happened. From my vantage point she has done her job as your lawyer. It doesn't mean in a perfect world this couldn't have happened sooner, but many of the reasons of why it's so slow is not because of what she did or didn't do, it's because of what other people did or didn't do.
>
> The good news is we're ready to set a trial. But aside from that, I cannot find that it's necessary or appropriate to replace her as your lawyer.

(1RT 19-20.)

The court then addressed Carter's second motion, which asked the court to dismiss the SVP petition based on an alleged denial of his right to a timely trial. (1RT 20.) The court said that it had not "thoroughly review[ed]" the motion to dismiss because it had not intended to rule on it at the hearing that day. (1RT 21.)

The court asked Zuvela if she and Carter had discussed "pursuing that motion." (1RT 20.) Zuvela asserted that she did not think she could ethically pursue such a motion on Carter's behalf. (1RT 20-21.) Zuvela explained that to do so would require her to say that she had not been protecting Carter's right

to a timely trial whereas she believed that she had been diligently protecting his interests. (*Ibid.*)

The court advised Carter that he could still pursue his motion to dismiss if he wanted, but Zuvela would not be representing him with respect to the motion. (1RT 21.) The court asked Carter if he wished to pursue the motion on his own behalf. (*Ibid.*) Carter answered, "I can't represent myself to that extent." (1RT 22.) He again cited "the continual delaying" on the part of Bandley "that put [him] in this position where [he] had to push that and get some kind of recognition of what's going on." (*Ibid.*)

The trial court instructed Carter that, if he wanted to pursue a motion to dismiss, he would need to provide "a declaration—a statement by you under oath saying these are the facts and the dates and the events that support this request." (1RT 24.) The court asked Carter if he understood. (*Ibid.*) Carter answered, "Uh-huh, yeah." (*Ibid.*)

The court said that Zuvela could not file the motion on Carter's behalf because "she would have to say she didn't do her job right and she doesn't believe that's true." (1RT 24.) The court reiterated the need for a declaration, asserting that, as Carter's pro se motion stood, "there isn't enough here right now to grant your motion." (1RT 25.) Carter stated that he needed "help in doing that stuff" because he was "not really versed in the law." (*Ibid.*) The court added that, if Carter did write a declaration, he could send it to either his attorney or directly to the court, "and then we'll bring it up again." (*Ibid.*)

Carter never provided a declaration. Accordingly, the court never considered the motion to dismiss.

C. Carter is found to be an SVP following a trial

Nearly two years later, Carter waived his right to a jury trial, and a court trial commenced. (CT 136; 1RT 77-78.)[5] At the trial's conclusion, the court found that Carter met the criteria for commitment as an SVP. (CT 160; 2RT 564-568; see also CT 156.) The court committed Carter for an indeterminate term to the custody of DSH for appropriate treatment and confinement. (CT 160-161; 2RT 568-569; see also CT 156.)

D. A divided Court of Appeal affirms the judgment

The Court of Appeal affirmed the judgment in a published, divided opinion. (Opinion 1-22.) A majority of the Court of Appeal panel held that the trial court properly exercised its discretion in denying Carter's *Marsden* motion. (Opn. 2, 9-15.) The majority rejected as a mischaracterization of the record Carter's argument that "the trial court should have granted [Carter's] *Marsden* motion and replaced Zuvela when she 'stated on the record that she was not pursuing a motion that appeared on its face to potentially have merit because she would have to argue her own incompetence.'" (Opn. 9.) The majority observed that, by the time Zuvela explained that she could not represent Carter in regard to his proposed motion to dismiss, the trial court had already denied the *Marsden* motion—and, in the process, had

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[5] Carter was represented at trial by Supervising Deputy Public Defender Monica Brushia. (See, e.g., CT 136; 1RT 74.)

secured Carter's agreement that Zuvela was not personally at fault for the case having not yet proceeded to trial. (Opn. 9-10.)

The Court of Appeal majority reasoned that Carter's motion to dismiss was "functionally a *Marsden* motion or a quasi-*Marsden* motion, because it created a conflict between the public defender, who did not believe she and the public defender's office had failed to diligently pursue a timely trial on his behalf, and [Carter], who maintained he had been denied a speedy trial while represented by the public defender's office." (Opn. 10.)[6] The majority did not endorse the trial court's invitation to Carter to pursue a motion to dismiss on his own behalf while continuing to be represented by the public defender's office. (Opn. 10-11.) But the majority concluded—consistent with how Carter had presented his claim on appeal—that the motion to dismiss was properly viewed as a *Marsden* motion based on Zuvela's refusal to pursue a motion to dismiss. (Opn. 11.) And the majority reasoned: "By filing a *Marsden* motion with a motion to dismiss, [Carter] attempted to create a conflict of interest by disagreeing with the tactic that the record indicates he had previously assented to. Thus, the trial court had discretion to deny

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[6] The Court of Appeal majority was partially mistaken in its characterization of Zuvela's statements at the *Marsden* hearing. Zuvela did not specifically assert that *her office* had been diligently pursuing a timely trial on Carter's behalf. She spoke only about her own efforts based on her personal knowledge. (1RT 9-24.) At the same time, though, Zuvela did relate her understanding that, from the start, Carter had acceded in a strategy to delay trial to increase the odds for a favorable result at trial. (1RT 9.)

[Carter]'s *Marsden* motion as an impermissible attempt to manufacture a conflict of interest." (Opn. 13, citing *Orey*, *supra*, 63 Cal.App.5th at p. 570, and *People v. Smith* (1993) 6 Cal.4th 684, 696-697 ["a defendant may not force the substitution of counsel by his own conduct that manufactures a conflict"].)

In a concurring and dissenting opinion, Justice Robie concurred in the majority's holding that the trial court had properly denied Carter's *Marsden* motion to relieve Zuvela for all purposes. (Conc. & Dis. Opn. 1.) But Justice Robie disagreed with the majority's conclusion that Carter's proposed motion to dismiss for a violation of his right to a timely trial was the functional equivalent of a *Marsden* motion or a quasi-*Marsden* motion. (*Ibid.*)

Justice Robie observed that "Zuvela said she would not pursue [Carter]'s motion to dismiss because she had an inherent and actual conflict in arguing *her* own ineffective assistance of counsel." (Conc. & Dis. Opn. 11.) But, as noted by Justice Robie, the merits of a potential motion to dismiss turned not only on Zuvela's conduct, but also on the conduct of other actors, including the attorney (Bandley) who had represented Carter prior to Zuvela. (Conc. & Dis. Opn. 12.)[7] He concluded that, under these facts, the trial court erred by failing to inquire into

[7] Carter mentioned Zuvela's potential conflict of interest as it related to Bandley for the first (and only) time in the Court of Appeal in a passing comment in his reply brief, at page 6. Accordingly, in the Court of Appeal, the People did not address this conflict of interest issue.

the potential conflict of interest that might have adversely affected Zuvela's performance. (Conc. & Dis. Opn. 13.)

Justice Robie reasoned that the trial court should have asked Zuvela whether she had a tactical reason for not filing a motion to dismiss. (Conc. & Dis. Opn. 13.) If she had none, and if she continued to assert a conflict of interest as the reason for not pursuing a motion to dismiss, then "the trial court should have appointed substitute counsel to determine whether the motion to dismiss had any merit." (*Ibid.*, citing *Smith*, *supra*, 6 Cal.4th at pp. 692, 695-696.) Justice Robie concluded that the judgment should be conditionally reversed for defense counsel to investigate and evaluate the merits of a motion to dismiss for a timely trial violation. (Conc. & Dis. Opn. 2.)

ARGUMENT

REMAND IS REQUIRED FOR AN ASSESSMENT OF WHETHER CARTER'S COUNSEL HAD A CONFLICT AS TO HER COLLEAGUE IN THE PUBLIC DEFENDER'S OFFICE

Carter contends that the trial court should have appointed new counsel to pursue a motion to dismiss because of Zuvela's "clear conflict of interest"—a conflict that, in turn, disqualified the entire Yolo County Public Defender's Office. (OBM 28.) Properly understood and analyzed, Carter's conflict claim comprises two separate issues: whether Zuvela's own allegedly deficient representation would have supported a motion to dismiss; and whether Zuvela had a conflict insofar as a motion to dismiss could have been based on the ineffectiveness of her colleague at the public defender's office. In either case, new counsel would have been needed, but for different reasons. The

trial court effectually assessed the first issue under the *Marsden* framework and rejected Carter's argument that Zuvela's representation had been deficient. But the court did not assess the second issue, which therefore requires remand.

A. Carter's counsel had no conflict as to herself

As Carter's pro se motion for the appointment of substitute counsel based on a claimed conflict in part placed the quality of Zuvela's own representation directly at issue, the trial court properly addressed that aspect of motion under the *Marsden* framework. (See *People v. Sanchez* (2011) 53 Cal.4th 80, 90 [disapproving appointment of "conflict attorney" to evaluate current counsel's performance under circumstance calling for *Marsden* hearing].) Carter appears to agree that the court properly treated his request as a *Marsden* motion (OBM 18), but he argues that the motion should have been granted on the basis that "Zuvela had a conflict of interest because her allegiance to appellant was impaired by her own interests and because of her status as an employee of the Public Defender's Office" (OBM 20). The trial court, however, properly addressed and rejected Carter's motion to the extent it was based on Zuvela's "own interests." In denying the motion, the court implicitly found that Zuvela had no conflict of interest as to herself because she had not performed deficiently, including in her efforts to move the case to trial. The *Marsden* inquiry thus necessarily resolved Carter's complaint that Zuvela needed to be replaced because she could not argue her own ineffectiveness in a proposed motion to dismiss.

A defendant is entitled to the substitution of appointed counsel "if the record clearly shows that the first appointed attorney is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085, internal quotation marks and citations omitted.) A *Marsden* "inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the future. But the decision must always be based on what has happened in the past." (*Smith*, *supra*, 6 Cal.4th at pp. 694-695.) On appeal, the denial of a *Marsden* motion is reviewed for an abuse of discretion. (*Barnett*, at p. 1085.)

In the *Marsden* hearing below, the focus was exclusively on the representation that Zuvela had provided to Carter. And the trial court properly exercised its discretion in denying the *Marsden* motion as to Zuvela's performance up to that time.[8] It is undisputed that Zuvela promptly sought to schedule a trial when Carter told her, "'I want my trial.'" (1RT 10.) Thus, there were no grounds for Zuvela to file a motion to dismiss based on her own performance, and she had no conflict in declining to file

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[8] The Court of Appeal majority and the concurring and dissenting justice agreed that the trial court properly denied the *Marsden* motion as to Zuvela's performance. (Opn. 10; Conc. & Dis. Opn. 1; see also Opn. 14 [Carter "declares that he does not claim that defense counsel 'needed to be replaced because of overall inadequate representation,' tacitly conceding that [he] failed to show at the *Marsden* hearing that his current counsel, Zuvela, had been ineffective"].)

such a motion. Or, put another way, the *Marsden* inquiry necessarily resolved against Carter any question about Zuvela's performance that might have supported a motion to dismiss and necessitated the appointment of new counsel.

Contrary to Carter's premise (see OBM 7, 20), the *Marsden* proceedings did not touch on the issue of Zuvela's potential conflict of interest as to Bandley. That was a separate issue. (See *post*.) Zuvela's comments were limited to the scope of her own representation of Carter. (1RT 9-24.) She never said she could not file a motion to dismiss because it would implicate her colleague or the public defender's office generally in a claim of ineffective assistance.[9] Zuvela said she was ethically precluded from arguing that she had been ineffective because she believed that she had provided effective assistance. (1RT 21.) She stated that, in her view, "I have done what I need to do" to pursue a timely trial. (*Ibid*.) The trial court therefore resolved only Carter's challenge to Zuvela's representation and did not address any further question about Bandley's representation.

B. Carter's counsel might have had a conflict as to her colleague

When a trial court is aware of facts suggesting that an attorney might have divided loyalties, it must inquire as to whether a conflict of interest exists. Based on the facts and

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[9] Carter is mistaken to contend otherwise. (OBM 7, 20, 30.) Carter makes this conclusory assertion throughout his brief. However, the record—including the page he cites (OBM 7, citing 1RT 21)—does not reflect that Zuvela ever said she would not file a motion to dismiss because it would impugn her colleague or her office.

posture of this case at the time of the *Marsden* hearing, it appears that Zuvela possibly had a conflict as to Bandley's prior representation. The trial court therefore should have inquired whether a conflict precluded Zuvela from pursuing a motion to dismiss based on Bandley's performance. It failed to do so. Because no such inquiry occurred, the present record is insufficient to demonstrate whether an actual conflict existed. The judgment should be conditionally reversed and the matter remanded for the trial court to conduct a conflict inquiry.

1. A trial court must conduct an inquiry when counsel appears to have a conflict

Although an attorney is ethically obligated "to avoid conflicting representations" and promptly advise a court when a conflict arises, "special circumstances" may suggest to a court that a conflict might exist. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 346.) "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel." (*Glasser v. United States* (1942) 315 U.S. 60, 71.) To that end, "[w]hen a trial court knows or should know of a possible conflict of interest between a defendant and defense counsel, the court must inquire into the circumstances and take appropriate action." (*People v. McDermott* (2002) 28 Cal.4th 946, 990.) In other words, when "the *possibility* of a conflict of interest" is "sufficiently apparent," it "impose[s] upon the court a duty to inquire further." (*Wood*, *supra*, 450 U.S. at p. 272.)

Guarding against conflicts of interest furthers the "'essential'" public policy interest "'that the public have absolute confidence in the integrity and impartiality of our system of criminal justice.'" (*People v. Barboza* (1981) 29 Cal.3d 375, 380, quoting *People v. Rhodes* (1974) 12 Cal.3d 180, 185.) Similarly, preserving the public's trust in "the integrity of the bar" is a "paramount concern." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145.) These public policies apply with equal force to the SVP civil commitment process.

In most cases, defense counsel "is in the best position to determine when a conflict exists" and is ethically obligated to advise the court of a conflict. (*Holloway v. Arkansas* (1978) 435 U.S. 475, 485-486.) Even without counsel's declaration of a conflict, though, a trial court must be alert to facts suggesting a possible conflict of interest. (*Bonin*, *supra*, 47 Cal.3d at p. 836.) It is "immaterial how the court learns, or is put on notice," of a possible conflict. (*Ibid.*)

A combination of the factual circumstances, procedural posture of a case, and relevant legal principles serve to alert a court that a conflict might exist. For example, in *Wood*, three defendants were convicted of distributing obscene materials. (*Wood*, *supra*, 450 U.S. at p. 263.) One lawyer represented them. (*Id.* at p. 266.) The trial court knew that the defendants' employer had reneged on its promise to pay their attorney's fees, fines, and penalties. (*Id.* at p. 267.) And the court knew "that it had imposed disproportionately large fines—penalties that

almost certainly were increased because of an assumption that the employer would pay the fines." (*Id.* at p. 272.) As a result of the non-payment, the defendants were unable to pay their fines and penalties, probation was revoked, and they were sentenced to jail. (*Id.* at p. 264.)

In addition, the trial court in *Wood* knew that counsel had not argued for leniency but had instead mounted a "constitutional attack." (*Wood*, *supra*, 450 U.S. at p. 272.) It appeared the employers were using the defendants as a test case for an equal protection claim: "If offenders cannot be jailed for failure to pay fines that are beyond their own means, then this operator of 'adult' establishments may escape the burden of paying the fines imposed on its employees when they are arrested for conducting its business. To obtain such a ruling, however, it was necessary for petitioners to receive fines that were beyond their own means and then risk jail by failing to pay." (*Id.* at p. 267.) The high court held that these facts "convincingly" demonstrated the trial court's duty "to recognize the possibility of a disqualifying conflict of interest." (*Id.* at p. 272.)

There is no one-size-fits-all approach for inquiring into potential conflicts, for they "spring into existence" in a variety of ways. (*Bonin*, *supra*, 47 Cal.3d at p. 835.) Rather, a trial court has the flexibility to decide what course of action is appropriate under the circumstances, based on its authority to conduct proceedings in the furtherance of justice. (Code Civ. Proc., § 128, subd. (a)(5).) For instance, the trial court may hold an evidentiary hearing to examine an attorney and her client. (See

People v. Suff (2014) 58 Cal.4th 1013, 1038 [trial court examined deputy public defender to determine whether measures could be taken short of recusing public defender's office to alleviate a conflict]; *People v. Horton* (1995) 11 Cal.4th 1068, 1107 [counsel represented that, apart from lawsuit filed against them by defendant, they discerned no conflict of interest].) Such a proceeding may be conducted in a closed session, similar to a *Marsden* hearing, if privileged information will be revealed. (Cf. *Suff*, at p. 1040 [approving of a public hearing because it did not require disclosure of privileged information].)

Alternatively, if current counsel has been found to have provided effective representation (apart from a possible conflict), the trial court may appoint independent counsel for the limited purpose of investigating whether a conflict of interest exists and to advise a defendant about that conflict. (*People v. Mai* (2013) 57 Cal.4th 986, 1011.)

In most cases, the People do not take a position in the trial court as to whether defense counsel has a conflict of interest. "In matters involving sensitive questions of selection of counsel for indigent defendants," in criminal and civil commitment proceedings alike, "the district attorney has little to gain and much to lose in allowing himself to become involved in the matter." (*Vangsness v. Superior Court* (1984) 159 Cal.App.3d 1087, 1091-1092.) Overall, the People seek to ensure that defendants receive fair trials—and the effective assistance of counsel promotes fair trials. (See *Wheat v. United States* (1988)

486 U.S. 153, 158 [the right to assistance of counsel ensures fairness in the adversary process].)

2. The trial court failed to inquire about an apparent conflict

This case presents a "clear possibility" of a conflict of interest. (*Wood*, *supra*, 450 U.S. at p. 267.) The trial court should have been aware that Zuvela had a potential conflict of interest as to Bandley in connection with a potential motion to dismiss.

Carter's complaints in his motions and at the hearing were not limited to Zuvela; they were also directed at the public defender's office in general and Bandley in particular. The court knew that Zuvela was not the only deputy public defender to have represented Carter in his SVP case. (1RT 7-9; see also SCT 32-50 [minute orders].) Carter's first motion expressly sought to disqualify the public defender's office. (CT 8-10.) And his claim of an untimely trial was not limited to Zuvela but referred to his "counsel." (CT 9, 11-15; see CT 9 ["Petitioners [*sic*] 14th amendment rights has [*sic*] been violated for [*sic*] the delays by counsel. Petitioners [*sic*] counsel never requested . . . a speedy trial," capitalization omitted].)[10] At the *Marsden* hearing, Carter stated that he had made multiple requests for a trial. (See, e.g., 1RT 6 ["I been [*sic*] requesting trials . . . ."].) And he specifically complained about Bandley's performance related to trial delay. (1RT 7-8.) Thus, Carter's complaints were not limited to Zuvela

[10] The word "counsel" can be used as either the singular or plural form of the term. (*Maniscalco v. Superior Court* (1991) 234 Cal.App.3d 846, 848, fn. 1.)

and included Bandley, alerting the court to a possible conflict. (Cf. *People v. Wilson* (2023) 14 Cal.5th 839 [309 Cal.Rptr.3d 211, 232] [defendant's vague objection about defense counsel gave "no reason for the court to presume it had anything to do with a potential conflict of interest"].)

Indeed, the nature and posture of this case suggested that a conflict of interest between Zuvela and Carter, as to Bandley, might exist. At the time of the *Marsden* hearing, Carter's case had been pending for over 12 years.[11] In SVP cases, a *Vasquez* motion to dismiss based on an untimely trial can be a key defense strategy.[12] Accordingly, Carter's second pro se motion cited legal

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[11] The SVP petition was filed on May 29, 2007. (See materials attached to Carter's Mar. 28, 2022, motion to augment the record on appeal.) The *Marsden* hearing was held on January 15, 2020. (CT 17.)

[12] The defendant in *Vasquez* was detained for over 17 years while awaiting trial on an SVP petition. (*Vasquez*, *supra*, 27 Cal.App.5th at p. 40.) After 16 years, the trial court granted the defendant's motion to relieve the public defender's office and appointed a panel attorney to represent him. (*Id*. at p. 41.) The new attorney filed a motion to dismiss based on a denial of the defendant's due process right to a timely trial. The trial court granted the motion. (*Ibid*.) The Court of Appeal denied the People's subsequently filed petition for writ of mandate. (*Ibid*.) Central to the Court of Appeal's conclusion that the trial court had properly granted the motion to dismiss was the fact that "the extraordinary length of the delay resulted from a systematic breakdown in the public defender system." (*Ibid*., internal quotation marks omitted.) In particular, dramatic staffing cuts in the public defender's office had significantly slowed down the case's progress. (*Id*. at p. 77.) The court held that the trial court had failed the defendant by not considering whether to remove the public defender's office from the case and appoint an attorney with adequate time to prepare the case. (*Ibid*.)

authority for a motion to dismiss based on a timely trial violation. (CT 11-14, citing *Mathews v. Eldridge* (1976) 424 U.S. 319; *Barker v. Wingo* (1972) 407 U.S. 514; *Vasquez*, *supra*, 27 Cal.App.5th at pp. 72, 82; *People v. Landau* (2013) 214 Cal.App.4th 1; *People v. Litmon* (2008) 162 Cal.App.4th 383.) Based on those authorities, the trial court presumably knew that a motion to dismiss for an untimely trial could be based on the performance of Carter's prior attorney who had represented him for six years. (See *People v. Coddington* (2000) 23 Cal.4th 529, 644 [trial court is presumed to know statutory and case law], overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

The trial court, though, limited its consideration to Zuvela's performance. When Zuvela was asked if she had considered filing a motion to dismiss, she responded only as to her inability to file a motion to dismiss based on *her* representation of Carter. (1RT 20-21.) The court did not ask Zuvela about her potential conflict as to Bandley. (1RT 8-9, 11, 15.) The court never asked—and Zuvela did not volunteer—whether she thought that a conflict precluded her from pursuing a motion to dismiss based on Bandley's performance during his tenure as counsel.[13] And

[13] To be clear, nothing in the record establishes that Zuvela should have declared a conflict vis-à-vis Bandley. More specifically, the record does not show that Zuvela was aware of any facts—other than Carter's complaints in his pro se motions—suggesting that Bandley's conduct had resulted in unjustified trial delay. To the contrary, the record suggests Zuvela believed that Bandley's strategy had been for Carter to undergo as much

Zuvela never said she could not pursue a motion to dismiss because it might impugn Bandley or her office. Carter is mistaken to suggest otherwise. (OBM 20.)

In addition, the trial court did not ask Zuvela or Carter whether Carter had ever told Bandley he was ready to go to trial or if Carter had agreed to the continuances—questions that would have yielded key facts to uncover a lurking conflict. This is because a "failure to assert the right will make it difficult for a defendant to prove that he was denied" a timely trial. (*Barker*, *supra*, 407 U.S. at pp. 531-532; see *Landau*, *supra*, 214 Cal.App.4th at p. 37 ["A potential civil committee may not seek to continue his trial over and over again and then be heard to complain the court violated due process by granting his requests"].) Moreover, the totality of how Carter responded to the delay is indicative of whether he actually wanted a timely trial. (*People v. Williams* (2013) 58 Cal.4th 197, 238.) So, if Carter never invoked his right to a timely trial in the six years that Bandley represented him, it is unlikely that there were grounds to file a motion to dismiss based on Bandley's conduct, and Zuvela would have had no conflict of interest.[14] Given the

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sex offender treatment as possible prior to trial (1RT 9), which would have justified delaying trial.

[14] Granted, a motion to dismiss for an untimely trial could also be based on delay attributable to the trial court or the prosecution. (*Kerins*, *supra*, 89 Cal.App.5th at pp. 1104-1107.) But, here, Carter has never alleged that Zuvela provided ineffective assistance for failing to pursue a motion to dismiss based on actions of the trial court or the prosecution.

lack of inquiry, though, the real possibility of a conflict remained unresolved.

If there were grounds to pursue dismissal based on Bandley's deficient performance, Zuvela would not have been able to investigate and file such a motion. The court had appointed the Yolo County Public Defender to represent Carter. (SCT 7.) "The officeholder of the public defender, not an individual deputy, is the official attorney of record." (*Vasquez*, *supra*, 27 Cal.App.5th at p. 80, citing *People v. Jones* (2004) 33 Cal.4th 234, 237, fn. 1, *People v. Sapp* (2003) 31 Cal.4th 240, 256.) As deputies, Zuvela and Bandley appeared and exercised duties on behalf of the public defender. (Gov. Code, §§ 7, 1194, 24100.) Furthermore, "[w]here two deputies represent conflicting interests in the same case, it is the same as one public defender representing both interests." (59 Ops.Cal.Atty.Gen. 27 (1976); see *People ex rel. Dept. of Corporations*, *supra*, 20 Cal.4th at p. 1139 ["When a conflict of interest requires an attorney's disqualification from a matter, the disqualification normally extends vicariously to the attorney's entire law firm"]; see also *Commonwealth v. Ciptak* (Pa. 1995) 665 A.2d 1161, 1161 ["As a general rule, a public defender may not argue the ineffectiveness of another member of the same public defender's office since . . . counsel, in essence, is deemed to have asserted a claim of his or her own ineffectiveness"].) A deputy public defender may also have a conflict of interest in "litigat[ing] a colleague's ineffectiveness as having a direct interest in that colleague's reputation, and in the reputation of the organization to which

both belong." (Johnson, *Not for Love or Money: Appointing a Public Defender to Litigate a Claim of Ineffective Assistance Involving Another Public Defender* (2008) 78 Miss. L.J. 69, 76.) Accordingly, if the trial court had been made aware that an actual conflict existed between Carter and a deputy public defender, the public defender's office's appointment would have needed to be terminated and new counsel appointed.

In his opening brief on the merits, Carter frames the issue in terms of Zuvela having a conflict as a potential witness in a hearing on a motion to dismiss. (OBM 20.) His first pro se motion in the trial court viewed the issue through the same lens (1 CT 8-9), and he never contended that Zuvela's loyalties were divided between Carter and Bandley. Thus, when the trial court asked about counsel's conflict as a potential witness, Carter and Zuvela focused on whether she would be required to testify about the delay stemming from Carter's pursuit of treatment and obtaining records from DSH. (1RT 18-19.) Zuvela did not volunteer whether she knew many of the details about Bandley's earlier representation of Carter. So there was little suggesting that she was a potential witness. There were, however, facts suggesting that she could not move to dismiss by alleging that Bandley, her colleague, had been ineffective. Whether the potential conflict is framed as one of divided loyalties or as Zuvela being a potential witness, though, the result is the same. The facts triggered the court's duty to inquire as to the existence of an actual conflict.

Carter contends that the record establishes that an actual conflict existed and, thus, the trial court was required to disqualify the public defender's office and appoint substitute counsel. (OBM 8, 23.) The People disagree. Because only a potential conflict was apparent, the trial court was required to conduct an inquiry. An inquiry could have included examining Bandley or further questioning Zuvela and Carter, or both.

Another option would have been for the trial court, without discharging the public defender, to appoint independent counsel for the limited purpose of determining whether a conflict existed. (*Mai*, *supra*, 57 Cal.4th at p. 1011; see Code Civ. Proc., § 128, subd. (a)(5) [courts have inherent power "[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding"].)[15] Appointing counsel for that limited purpose would have resolved the conflict issue.

While the circumstances of this case do not fall neatly within any of the various scenarios that this Court has previously addressed, the Court's precedent vests trial courts with the discretion to appoint counsel for a limited purpose. For instance, *Mai*, *supra*, 57 Cal.4th 986 involved a "complex" scenario of related state and federal prosecutions that suggested the existence of a conflict of interest. (*Id.* at pp. 1002-1004.) Perceiving a possible conflict, and without relieving counsel of record, the trial court appointed independent counsel "to review

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[15] Carter agrees that this Court's precedent permits the limited appointment of counsel generally. (OBM 27-29.)

applicable materials and render an opinion on the conflict issue." (*Id.* at p. 1004.) On automatic appeal, this Court approved the procedure. (*Id.* at pp. 1010-1011.) The Court held that the defendant's waiver of his right to conflict-free counsel was valid, partly based on the trial court's appointment of "independent counsel to investigate and advise defendant" about the potential conflict. (*Ibid.*)

Similarly, *People v. Parker* (2022) 13 Cal.5th 1, involved the appointment of independent counsel. There, the defendant submitted a hand-written motion for a new trial based on ineffective assistance. (*Id.* at pp. 27, 84.) He did not seek substitution of counsel. (*Id.* at p. 84.) Without relieving the public defender, the trial court appointed independent counsel to investigate whether the defendant's claim was meritorious. (*Id.* at pp. 27, 84.) The attorney found that the claim lacked merit, and the court denied the motion. (*Id.* at p. 27.) On automatic appeal, this Court held that the trial court did not abuse its discretion in appointing counsel for a limited purpose. (*Id.* at p. 86.) The Court explained that, "if a defendant makes a showing during a *Marsden* hearing that the right to counsel was substantially impaired, 'substitute counsel must be appointed as attorney of record for all purposes.'" (*Id.* at p. 86.)[16]

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[16] In so holding, the Court distinguished its earlier decision in *People v. Sanchez*, *supra*, 53 Cal.4th 80. In that case, defense counsel alerted the trial court that his client wanted to "explore" withdrawing his guilty plea. (*Id.* at p. 85.) In response, and without holding a *Marsden* hearing, the trial court appointed "conflict counsel for the sole purpose of looking into the motion to

Here, Carter requested substitution of counsel, and the trial court held a *Marsden* hearing. At that hearing, the trial court concluded that there were no grounds to relieve Zuvela. (1RT 19-20.) In her words, substitution of counsel was not required because there had been no showing that Carter's "right to counsel had been substantially impaired" by Zuvela's performance. (*Parker*, *supra*, 13 Cal.5th at p. 86.) The lingering question, however, was whether she had a conflict in pursuing a motion to dismiss based on Bandley's performance. That issue would have been resolved by the trial court conducting an inquiry and further questioning Zuvela and Carter, examining Bandley, or appointing counsel for the limited purpose of determining whether a conflict existed. Indeed, "justice is expedited when the issue of counsel's effectiveness can be resolved promptly at the trial level." (*Smith*, *supra*, 6 Cal.4th at p. 695.)

3. The judgment should be conditionally reversed, and the matter remanded for a conflict inquiry

The trial court was aware of facts suggesting a potential conflict of interest and should have conducted an inquiry into the matter. This question remains: What is the appropriate remedy?

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withdraw his plea." (*Ibid*.) On appeal, this Court "disapproved of the procedure adopted by the trial court in this case, namely, the appointment of a substitute or 'conflict' attorney solely to evaluate whether a criminal defendant has a legal ground on which to move to withdraw the plea on the basis of the current counsel's incompetence." (*Id.* at p. 90.) Instead, this Court held, the trial court should have held a hearing on the defendant's "informal *Marsden* motion." (*Id.* at p. 92.)

Carter contends that the judgment must be reversed in full. (OBM 29-31.) Alternatively, he argues that the judgment should be conditionally reversed with a limited remand. (OBM 31.) The latter remedy is the correct procedure.

When facts suggest that defense counsel may have had divided loyalties, a potential due process violation is apparent, and the case must be remanded for further inquiry concerning the possible violation. (*Wood*, *supra*, 450 U.S. at p. 273.) "When the trial court fails to inquire into an apparent conflict of interest and fails to resolve the question whether there is an actual conflict, it leaves behind a record which is inadequate for a determination whether there was an actual conflict which adversely affected counsel's representation of the defendant." (*Bonin*, *supra*, 47 Cal.3d at p. 861 (conc. opn. of Broussard, J.); see also *State v. Powell* (Iowa 2004) 684 N.W.2d 235, 241 [when "record only shows the possibility of a conflict," conditional remand is proper remedy to conduct a conflict inquiry]; 3 LaFave et al., Criminal Procedure (4th ed. Nov. 2022) Replacement of Appointed Counsel, § 11.4(b) [when "trial court failed to hold an inquiry (or held an inadequate inquiry [into a conflict]), the proper appellate court response on review following conviction is to remand for a hearing as to whether cause did exist"].)

In comparison, the failure to conduct an inquiry into a potential conflict requires full reversal only if the defendant shows that an actual conflict of interest existed, and that the conflict adversely affected counsel's performance. (*People v. Jones* (1991) 53 Cal.3d 1115, 1137.) A defendant must

demonstrate that prejudice resulted from a conflict of interest. (*Wilson*, *supra*, 309 Cal.Rptr.3d at p. 232; see *People v. Ng* (2022) 13 Cal.5th 448, 530 ["defendant must establish an actual conflict, deficient performance, and prejudice"].) In other words, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." (*Cuyler*, *supra*, 446 U.S. at p. 350.)[17]

The record in this case suggests only a potential conflict of interest. The trial court did not conduct an inquiry into Zuvela's possible conflict as to Bandley. Thus, there is no showing that Zuvela's loyalties were actually divided and that a division adversely affected her performance. Because this Court cannot determine whether an actual conflict existed based on the present record, the matter must be remanded for a conflict inquiry. (*Wood*, *supra*, 450 U.S. at p. 273; see *People v. Rices* (2017) 4 Cal.5th 49, 64 [trial court's inadequate inquiry into potential conflict does not require full reversal absent adverse effect on counsel's performance].) Viewed another way, full

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[17] Viewed broadly, a Sixth Amendment claim based on a conflict of interest is analyzed under *Strickland v. Washington* (1984) 466 U.S. 668. (*Wilson*, *supra*, 309 Cal.Rptr.3d at pp. 231-232.) Although an SVP defendant's right to counsel is derived from statute and the due process clause, not the Sixth Amendment, courts in California and other states apply the *Strickland* standard to claims of ineffective assistance of counsel in SVP cases. (See, e.g., *Kerins*, *supra*, 89 Cal.App.5th at p. 1110; *People v. Medina* (2009) 171 Cal.App.4th 805, 819; *Matter of Chapman* (S.C. 2017) 796 S.E.2d 843, 849-850; *In re Ontiberos* (Kan. 2012) 287 P.3d 855, 867 [collecting cases].)

reversal is not appropriate because the record does not show that Zuvela's decision not to pursue a motion to dismiss based on Bandley's performance was "attributable to a conflict of interest." (*People v. Perez* (2018) 4 Cal.5th 421, 437.) And, more importantly, even if the record did show that Zuvela had an actual conflict regarding the motion, Carter has failed to show that the conflict adversely affected his case.

Conjecture about a conflict does not justify a full reversal. As Carter acknowledges (OBM 18), Zuvela's statements were limited to her inability to file a motion alleging her own ineffectiveness. (1RT 20-21.) The extant ambiguity about a potential conflict triggered the court's duty to inquire. Carter overstates matters by asserting that he "was represented by an attorney hobbled by a disabling conflict of interest." (OBM 8; see OBM 24, fn. 2, 29 [same].) Presently, there is simply no evidence to support such a claim, and he merely states his conclusion without any factual support for it. (See fn. 9, *ante*.) He is, then, "unable to show on the appellate record that any potential conflict of interest actually materialized." (*Mai*, *supra*, 57 Cal.4th at p. 1013.) "'Speculative contentions of conflict of interest'" are insufficient to justify a full reversal. (*People v. Christian* (1996) 41 Cal.App.4th 986, 1001-1002; see also *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 310 [in analyzing conflict-of-interest claim, court rejected contentions "reflect[ing] pure speculation, unsupported by anything in the record"].)

Full reversal at this stage would be premature for another reason as well: The record does not show that the potential

conflict resulted in any prejudice. On remand, the trial court will decide whether Zuvela had divided loyalties that adversely affected her decision not to pursue a motion to dismiss based on Bandley's conduct. (*Wood*, *supra*, 450 U.S. at p. 273.) Even assuming that Zuvela had an actual conflict pertaining to that motion, whether it adversely affected the outcome of the proceedings is a separate issue not presently before this Court. Rather, to obtain full reversal on appeal, Carter would have to show that the case would have been dismissed but for Zuvela's conflict or that the conflict infected successor counsel Brushia's performance at trial nearly two years later. (*Jones*, *supra*, 53 Cal.3d at p. 1137.) Reversal is not automatic (*Bonin*, *supra*, 47 Cal.3d at p. 842), and Carter must demonstrate prejudice as to the SVP verdict specifically (*Mickens*, *supra*, 535 U.S. at p. 172; see *Bonin*, at p. 843 [reversal unwarranted because there was no conceivable way that the alleged conflict had an adverse effect on trial counsel's performance]). In particular, Carter would have to show that "a lawyer who did not have the same conflict would have made different choices as well as whether counsel's choices were the product of tactical reasons rather than the alleged conflict of interest." (*Wilson*, *supra*, 309 Cal.Rptr.3d at p. 232.) Because no such showing has been made on the present record, conditional reversal is the appropriate remedy.

CONCLUSION

The judgment of the Court of Appeal should be conditionally reversed and the matter remanded for an inquiry into the potential conflict of interest.

Respectfully submitted,

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August 10, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13-point Century Schoolbook font and contains **11,565** words.

ROB BONTA
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/s/ Clara M. Levers

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August 10, 2023

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No.: S278262

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 10, 2023, at Sacramento, California.

K. White	*/s/ K. White*
Declarant	Signature

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