IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARIO RODRIGUEZ, Petitioner and Defendant, v. SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent, THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	Case No. S272129

Sixth Appellate District, Case No. H049016
Santa Clara County Superior Court, Case Nos. C1647395, C1650275
The Honorable Eric S. Geffon, Criminal Presiding Judge

APPLICATION OF THE SAN DIEGO COUNTY DISTRICT ATTORNEY FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND AMICUS CURIAE BRIEF, IN SUPPORT OF RESPONDENT AND REAL PARTY IN INTEREST

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

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

The San Diego County District Attorney as amicus curiae respectfully seeks permission to file the attached amicus curiae brief in support of respondent and real party in interest pursuant to rule 8.520 of the California Rules of Court. No party nor counsel for a party in this case authored in whole or in part the proposed amicus curiae brief, nor made any monetary contribution to fund the preparation or submission of the proposed amicus curiae brief. Furthermore, no person or entity, other than amicus and her counsel, has contributed—monetary or otherwise—to the preparation or submission of the attached amicus curiae brief. This application is timely made in accordance with the California Rules of Court, rule 8.520, subdivision (f)(2), in that it is filed within 30 days of the date Petitioner filed his Reply Briefs on the Merits on July 8, 2022.

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The San Diego District Attorney represents the People of the State of California residing within San Diego County. The District Attorney is currently prosecuting over 200 cases in which a defendant has been committed for competency restoration treatment. The law governing the two-year competency restoration clock will greatly impact these cases. When an incompetent defendant has used the two-year statutory period, the District Attorney must attempt to pursue a conservatorship to avoid the dismissal of the case. Some of these cases involve charges of murder, rape, child molest, and other serious allegations. Public safety and justice for

victims are severely placed at risk when the statutory time for competency restoration expires.

The purpose of this brief is to highlight the practical consequences this Court's decision will have on the prosecution of cases in which a defendant undergoes competency restoration treatment. Should the Court hold that a trial court finding, rather than a competency restoration certificate, terminates the commitment period, the justice system will be negatively impacted. The District Attorney respectfully requests the Court accept the accompanying brief for filing in this case.

Dated: August 5, 2022 Respectfully submitted,

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ISSUE PRESENTED

The Court is presented with the following issue: Does an incompetency commitment end when a state hospital files a certificate of restoration to competency or when the trial court finds that defendant has been restored to competency?

INTRODUCTION

This Court should affirm *Rodriguez v. Superior Court* (2021) 70 Cal.App.5th 628, review granted Jan. 5, 2022, S272129 (*Rodriguez*) [the case at bar], and provide guidance to the state courts that an incompetency commitment ends only upon a state hospital filing a certificate of restoration to competency. If this Court holds the alternative, that an incompetency commitment ends when the trial court finds that a defendant has been restored to competency, as was held in *People v. Carr* (2021) 59 Cal.App.5th 1136 (*Carr*), then numerous unintended negative consequences will result.

Reversing *Rodriguez* will truncate and effectively nullify the two-year statutory period of restoration established by the Legislature. Instead of allowing state hospitals two years to restore incompetent defendants, doctors will feel rushed to "restore" defendants to avoid releasing dangerous criminals to the streets because they know some of their allotted two-year time will be applied to the time necessary for court hearings. Rather than use the two-year period to treat defendants, much of the period will be ineffectively eaten up, while parties wait for a court date weeks, months, or years after a hospital's certificate of restoration. In order to avoid the release of dangerous criminals as the restoration clock keeps ticking away, trial courts will rush defense attorneys to prepare for the hearing after restoration, perhaps curtailing defense psychological examinations, and possibly infringing on a defendant's right to effective counsel. Litigiousness in trial courts may escalate, because prosecutors will

be in a hurry to set a hearing and defense attorneys will draw out such hearings so they can properly prepare. Perhaps, less ethical counsel will draw out hearings, filing writs in the higher courts or motions to continue in the trial court, in the hopes that their clients will be released and their cases dismissed. There may be an increase in claims of incompetence, as defense attorneys who have the slightest doubt about their clients' competence foresee a potential route to release and dismissal. As *Carr* shows, appellate litigation can last years, well outlasting the two-year restoration clock.

As defense attorneys have less time to prepare for the trial court hearing following the certificate of restoration, there may be an increase in claims of ineffective assistance of counsel. Defendants have a Sixth Amendment right to effective counsel, including adequately prepared counsel. Defense attorneys often seek to have their clients evaluated by a psychologist after a certificate issues. The arrangement and evaluation take a significant amount of time. Should the trial court rush the parties, the defendant may not be evaluated properly, if at all. Amid the urgency to get defendants restored before the restoration clock expires, mental health treatment itself may be more rushed, depriving defendants of the care they need.

Additionally, as competency commitment time gets used up by court delays, there will be an increase in conservatorships, further taxing courts and state and county resources. Also, the state constitutional rights of crime victims and the People of California will be impinged if the full two-year restoration clock cannot be used for the sole purpose of restoring incompetent defendants to competency. These rights, and justice itself, demand that defendants not be released and cases not be dismissed simply because court delays used up a clock that was intended to be dedicated to competency restoration. Finally, the public safety risk posed by case dismissal and the release of dangerous criminals is reason enough to

support the conclusion that it is the certificate of restoration, not a trial court's finding, that ends the competency commitment.

ARGUMENT

A trial court's approval of the certificate of restoration does not happen instantaneously. As *Carr* shows, delays in trial and appellate courts following the restoration certificate can last weeks, months, and even years—eating into the two-year maximum incompetency commitment period. Doctors already are granted only a brief time to restore defendants to competence; should this Court hold that the two-year restoration clock ends only once a trial court has held a hearing to approve the certificate of restoration, the two-year clock will be effectively a nullity. Instead, the restoration clock will vary from case to case, fluctuating at the mercy of court delays. There will be no uniformity in the application of the law.

Upon the hospital's issuance of a certificate of restoration, a defendant "shall be returned" to the trial court within 10 days. (Pen. Code,[1] § 1372, subd. (a)(3)(C).) If the Legislature had intended the restoration clock to continue until the court's "approval" of the certificate, it would not have created an automatic return of the defendant to the county jail. (See § 1370, subd. (a)(1)(C).) That is because, during the period between the certificate of restoration and the court's "approval" of the certificate, defendants are deemed presumptively *competent* and are housed at the county jail, not a state hospital. (*People v. Rells* (2000) 22 Cal.4th 860 (*Rells*).) And, because they are presumed competent after the hospital's certificate, they are *not* being medically treated for incompetency following the certificate. If the competency treatment stops, so too should the competency clock. For all of the reasons stated herein, the Court should

[1] All further statutory references are to the Penal Code unless otherwise noted.

hold that the certificate of restoration from the state hospital ends the competency restoration clock.

I.

A HOLDING THAT THE COMPETENCY CLOCK CONTINUES TO RUN UNTIL THE TRIAL COURT APPROVES THE CERTIFICATE WILL ENCOURAGE DELAYS

It is not at all uncommon for the time between restoration certification and the court's subsequent "approval" of the certificate to last as long as defendant Carr's two-plus-year interlude. It is typical after certification for defense counsel to have another psychiatrist or psychologist evaluate their client for competence in order to contest the Department of State Hospitals' (DSH) certification. Defense counsel may request weeks or months of continuances so they can adequately prepare to contest the DSH's certification of competence. The complicated nature of competency hearings lends itself to courts' granting of sufficient time to prepare.

Further, if a defendant can escape trial or detention simply by filing enough writ petitions to run out the two-year clock, he will have every reason in the world to do so. If he can malinger in an attempt to be committed to DSH and possibly run out the clock, nothing is stopping him from trying it.

Thus, potential outcomes include a spike in malingering in an attempt to be found incompetent and run the clock until they are either released or conserved; an increase in doctors needed to handle more and more competency evaluations; a backlog of trials because in more cases, criminal proceedings will be suspended. An increase in competence trials may also mean a decrease in bed availability at DSH. State hospitals could end up becoming a functional branch for county jails with increased claims

of incompetence rather than a place for treatment as they are intended to be. And county jails could become crowded with overflow from DSH.

Appellate courts may also be flooded with writ petitions, as defendants follow Carr's lead and attempt to run out the restoration clock. The longer a defendant stalls, the likelier prosecution witnesses will become unavailable, as well. A defendant has nothing to lose and everything to gain by requesting continuances or filing multiple writ petitions in the Courts of Appeal and the California Supreme Court challenging DSH certification.

II.

BECAUSE DEFENDANTS ARE DESIGNATED AS COMPETENT AFTER THE CERTIFICATE ISSUES, THE COMPETENCY RESTORATION CLOCK SHOULD STOP RUNNING AT THAT POINT

Section 1372 deems certified defendants to be competent from the point of competency restoration certification. It directs that defendants be transferred from a state hospital to a county jail. Its language indicates the court's next decision is to "approve" the certificate or not. And existing precedent supports that the DSH certificate itself marks a turning point to treat a defendant as having regained competence.

Once a defendant is certified by DSH as competent, he is treated as any other competent defendant. He is, by statute, immediately delivered to the court. At that point, he is transferred to the county jail, and no longer receives services at the state hospital: "The court's order committing an individual to a State Department of State Hospitals facility or other treatment facility pursuant to Section 1370 shall include direction that the sheriff shall redeliver the patient to the court without any further order from the court upon receiving from the state hospital or treatment facility a copy of the certificate of restoration." (§ 1372, subd. (a)(2).)

> The defendant shall be returned to the committing court in the following manner: [¶] A patient who remains confined in a state hospital or other treatment facility shall be redelivered to the sheriff of the county from which the patient was committed. The sheriff shall immediately return the person from the state hospital or other treatment facility to the court for further proceedings. ...[¶] In all cases, the patient shall be returned to the committing court no later than 10 days following the filing of a certificate of restoration. The state shall only pay for 10 hospital days for patients following the filing of a certificate of restoration of competency.

(§ 1372, subds. (a)(3)(A), (a)(3)(C).) The statute mandates a "certified" defendant be delivered to the sheriff and to the court within 10 days. Therefore, a defendant *does not receive services geared toward restoring him to competence* at that point. The competency restoration clock, then, should also stop.

Further, the fact that the statute provides the State must pay only for the 10-day period between certification and return to court supports the notion that upon certification, jurisdiction transfers to the county. The defendant no longer needs services from DSH because he has been restored to competence. He is now treated as any competent defendant in county jail.

Precedent also supports that the competency restoration period ends with the certificate. In *Rells*, *supra*, 22 Cal.4th 860, the court held that, going into a hearing upon a competency restoration certificate, it is implied that the defendant is presumed to be mentally competent; the burden falls to the defendant to prove by a preponderance of the evidence to be incompetent. (*Id.* at pp. 865-866.) The *Rells* court held this presumption applies at the "approval" hearing on the defendant's recovery of mental

competence because a certificate of restoration has already been filed by the specified mental health official. (*Id.* at p. 867.)

If a defendant is presumed competent coming into the "approval" hearing, it follows that the presumption had begun upon issuance of the certificate. And, if the certificate triggers the presumption that the defendant is competent, it follows that the certificate also switches off the competency restoration clock.

Finally, the chosen language of section 1372, subdivision (d) supports that it is the certificate that stops the restoration clock. The statute states it is the court's duty to "approve" the certificate.

> If the committing court *approves the certificate* of restoration to competence as to a person in custody, the court shall hold a hearing to determine whether the person is entitled to be admitted to bail or released on own recognizance status pending conclusion of the proceedings. If the superior court *approves the certificate* of restoration to competence regarding a person on outpatient status ....

(§ 1372, subd. (d), italics added.) The Legislature could have used a different word from "approve." "Approve" indicates there is already an existing presumption of competence. That presumption began with the certificate. The court's duty is to say yes or no to the DSH certificate; its duty is not to start from scratch. The choice to use the word "approve" indicates the drafters gave great legal weight to the DSH certificate. The implications of section 1372's language and *Rells* are that the clock stops with the certificate.

III.

SERIOUS DETRIMENTAL CONSEQUENCES WILL FLOW FROM HOLDING THAT THE RESTORATION CLOCK CONTINUES TO RUN AFTER THE DSH CERTIFICATE

In addition to the issues outlined above, there are serious consequences for mentally ill defendants, crime victims, and public safety. Defendants will be deprived of the full two years of restoration treatment they may need. Victims' and the People's rights to a speedy resolution will be infringed. The conservatorship process will be inundated. Finally, public safety will be threatened.

A. Holding that the Restoration Clock Continues Past the Certificate Will Deprive Mentally Ill Defendants of Mental Health Treatment

Our criminal justice system rests on the basic tenet that every person is innocent until proven guilty. In order to assure every person's right to defend against charges brought by the state, due process requires a criminal defendant have " 'a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and ... a rational as well as a factual understanding of the proceedings against him.' " (*People v. Rogers* (2006) 39 Cal.4th 826, 846–847, quoting *Dusky v. United States* (1960) 362 U.S. 402, 402, 80 S.Ct. 788.)

Thus, due process requires incompetent defendants be allowed full use of the two years of restoration treatment, as necessary, in a state hospital to recover competence. If this Court holds that the competence restoration clock runs even after a DSH certificate, then the time allotted for restoration treatment will be used for other proceedings, not restoration. Instead, the defendant spends the remainder of the two-year restoration period waiting in county jail until the parties are ready for the "approval" hearing. Should the defendant become incompetent again at a later point in

the proceedings—a common occurrence—he will not have any time left to be treated because the clock would have run out while he sat in county jail.

B. Victims' and the People's State Constitutional Rights Support the Conclusion that the DSH Certificate Stops the Restoration Clock

Crime victims have rights enshrined by the California Constitution, article I, section 28, including the right to "a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings." Not only will victims be retraumatized as the case lingers on the issue of competence; they will watch as defendants try to game the courts, filing frivolous writ actions, motions to continue, and repetitive incompetency claims—manipulating court proceedings to increase their chances of gaining their freedom and evading justice.

The People's due process right to a speedy trial will be also be jeopardized. Both victims and the People will be at the mercy of the defendant's filings, trial court delays, and appellate court extensions. Neither the victims nor the People will have recourse or remedy to speed up the process.

C. When the Restoration Clock Runs Out, Dangerous Criminals Who Don't Qualify for Conservatorship Could be Released

There are different outcomes if a defendant's maximum restoration commitment is reached. Conservatorships are not a blanket solution. Requirements are strict and not all incompetent defendants will qualify. Some dangerous criminals will be released. The People may even have to dismiss the case. The People can refile once but will have then lost their first bite at the apple. And even then, if the case is refiled, there is *no additional restoration time* available if the defendant in the new proceedings is found incompetent again.

That is because, if the defendant is found incompetent in the second prosecution, the defendant may be further committed only for the balance of the time remaining, if any. (*Jackson v. Superior Court* (2017) 4 Cal.5th 96, 106.) Commitment time is aggregated amongst all of the previous commitments for the same charges. (*In re Polk* (1999) 71 Cal.App.4th 1230, 1232.) And there are any number of reasons a mistrial could occur in the second prosecution and close the door to any further prosecution of the defendant, thus setting him free and letting him evade justice. The risk to public safety is extreme, especially when the defendant is someone like Mario Rodriguez (the instant case) who was originally charged with making criminal threats and later charged in a second case with assault with a deadly weapon and personally inflicting great bodily injury, forcible oral copulation, forcible rape, additional criminal threats, and domestic violence; or like Marc Anthony–Toisaan Carr, who was charged with murder with special circumstances, kidnapping, and attempted murder of a peace officer. (*Carr v. Superior Court* (2017) 11 Cal.App.5th 264, 267; *Carr*, *supra*, 59 Cal.App.5th 1136.)

A defendant may be conserved under the Lanterman-Petris-Short (LPS) Act only if he is gravely disabled. Not all incompetent defendants are gravely disabled. In an LPS conservatorship, gravely disabled is defined as unable to provide for food, clothing, or shelter as a result of a mental disorder. A person is not gravely disabled within the meaning of Welfare & Institutions Code section 5008, subdivision (h)(1)(A) if he is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties. Although a person may be gravely disabled if left to his own devices, he may be able to function successfully in freedom with support and assistance. (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292.) With an LPS conservatorship, the court retains the discretion and authority to dismiss the criminal case under section 1385.

(§§ 1370, subd. (d), 1370.1, subd. (d).)

A Murphy conservatorship may also exclude some incompetent defendants. The Murphy conservatorship is limited to defendants who are post-indictment, post-preliminary hearing, or post-probable cause determination. Those who have not had a grand jury indictment or preliminary hearing cannot be conserved. Further, the charges must involve death, great bodily injury, or a serious threat to the physical well-being of another. The defendant must be unable to understand the nature and purpose of the proceedings and must be unable to assist counsel in the conduct of his or her defense in a rational manner. The defendant must be someone who currently represents a substantial danger to others by reason of a mental disease, defect, or disorder. (Welf. & Inst. Code, § 5008, subd. (h)(1)(B); *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 176-177.) Conservatorships automatically terminate one year after the appointment of the conservator by the superior court. If the conservator determines that a conservatorship is still required, he may petition the superior court for his reappointment as conservator for a succeeding one-year period. (Welf. & Inst. Code, § 5361; see also *Conservatorship of Jose B* (2020) 50 Cal.App.5th 963, 968.)

When a defendant is returned to court where there is no substantial likelihood of recovery, or when the commitment term is about to be reached, and it appears to the court that the defendant is gravely disabled, the court must order a conservatorship investigation for the defendant. (§§ 1370, subd. (c)(2), 1370.01, subd. (c)(2).) In a perfect world, the hospital sends a non-restorable defendant 90 days before the maximum restoration commitment date expires. (§ 1370, subd. (c)(1).) However, with the delays in transporting incompetent defendants to and from DSH, it is not uncommon to have substantially less than 90 days remaining.

The conservatorship investigation can take weeks to complete. It involves an investigator contacting the defendant's family and friends and creating a history and an analysis. It also typically involves additional psychiatric evaluations. This process can easily take 30-45 days and sometimes even longer to complete. Therefore, conservatorship is not a fail-safe solution when defendants have used up the competency restoration clock.

Instead, this Court should find that the DSH certificate stops the clock. The clock, of course, can resume should the defendant again be found incompetent. Such a holding will allow for uniformity in the application of restoration proceedings. It will allow defendants to receive effective counsel. It will insulate the trial and appellate courts from frivolous filings. It will preserve and protect the rights of defendants, victims, and the People of California. And it will ensure public safety is not jeopardized.

CONCLUSION

For the foregoing reasons, the District Attorney respectfully requests this Court affirm the Court of Appeal's judgment in *Rodriguez*.

Dated: August 5, 2022

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this **AMICUS CURIAE BRIEF**, including footnotes, and excluding tables and this certificate, contains 4,015 words according to the computer program used to prepare it.

LINH LAM
Deputy District Attorney

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S272129**
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/s/Chelsea Ferreira

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San Diego County District Attorney

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