No. S272129

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARIO RODRIGUEZ,
Petitioner,

vs.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Parties in Interest.

Sixth District Court of Appeal Case No. H049016,
Superior Court Case No. C1647395 and C1650275,
Hon. Eric S. Geffon

APPLICATION TO FILE AMICI CURIAE BRIEF
and
[PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

Pursuant to California Rules of Court, Rule 8.520, proposed Amici Curiae respectfully request leave to file the accompanying [Proposed] Amici Curiae Brief in Support of Petitioner. Amici curiae will assist the Court in deciding this matter by providing greater clarity about the practical effects of the *Rodriguez* decision and additional perspective about the importance of this case to ensuring the due process rights of individuals deemed incompetent to stand trial in California.

INTERESTS OF AMICUS CURIAE

The **American Civil Liberties Union of Northern California ("ACLU-NC")** is a regional affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonprofit, nonpartisan organization with more than three million members dedicated to the defense and promotion of the guarantees of individual liberty secured by the state and federal Constitutions. Since its founding in 1920, a primary focus of the ACLU has been to protect and preserve the system of free expression that is at the core of our constitutional democracy. The ACLU also strives to create a society free of discrimination against people with disabilities, including mental illness. In particular, the ACLU is committed to ensuring that people with disabilities are no longer overrepresented in jails, prisons, and in the criminal justice system more generally.

ACLU-NC is actively engaged in long-standing litigation and advocacy efforts to protect the rights of individuals who are

deemed incompetent to stand trial and is therefore well positioned to offer additional perspectives in support of Petitioner's arguments. ACLU-NC successfully litigated *Stiavetti v. Clendenin* (2021) 65 Cal.App.5th 691 [review denied (Aug. 25, 2021)], a lawsuit brought to ensure that individuals deemed incompetent to stand trial are not subject to lengthy, unconstitutional delays in treatment. The changes to the commitment period implicated in this case would harm individuals deemed incompetent to stand trial, whose family members are represented by the ACLU-NC in *Stiavetti*. The ACLU-NC thus has a vested interest in this case and in ensuring that individuals committed for competency restoration receive due process and are not subject to prolonged detention.

Disability Rights California (DRC) is California's federally-mandated Protection and Advocacy agency. In this capacity, DRC defends, advances, and strengthens the rights and opportunities of Californians living with disabilities. As such, DRC has an interest in ensuring that the State's legal systems afford required due process to all Californians with mental health disabilities subject to court proceedings, including commitment proceedings. DRC has extensive experience in advocating for the rights of persons subject to commitments to the Department of State Hospitals, including Incompetent to Stand Trial commitments, and was an active participant in the Department of State Hospitals' "Incompetent to Stand Trial Workgroup," which was convened in 2021.

STATEMENT OF AUTHORSHIP AND MONETARY CONTRIBUTION

In accordance with California Rules of Court, Rule 8.520(f)(4)(b), no party or counsel for any party in the pending appeal authored this brief in whole or in part, and no party or counsel for any party in the pending appeal made a monetary contribution intended to fund the brief's preparation or submission. No person or entity other than counsel for the proposed Amici Curiae made a monetary contribution intended to fund the preparation or submission of this brief.

For all of the reasons set forth above, Amici Curiae respectfully request that they be granted leave to file the accompanying amici curiae brief.

August 5, 2022

Respectfully Submitted,

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BRIEF OF AMICI CURIAE

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about whether people committed as Incompetent to Stand Trial ("IST") can be confined indefinitely, regardless of statutory language limiting the period of commitment to two years. A judicial determination is required to find a person IST and suspend criminal proceedings pending the restoration of the individual's competency. However, the Sixth District Court of Appeal in *Rodriguez* held that an independent judicial determination is *not* required to *end* the individual's competency commitment, instead holding that such commitment ends upon the filing of a competency restoration certificate by the Department of State Hospitals ("DSH"), a DSH contractor, or other state or county entity charged with providing competency restoration services. (*Rodriguez v. Superior Court* (2021) 70 Cal.App.5th 628.)

Practically, this improperly tolls the commitment period between the filing of a certificate of restoration and a judicial determination of competency, leaving an IST defendant vulnerable to an indefinite period of confinement. This raises serious due process concerns. The individual is rendered in legal limbo during which they are neither receiving competency restoration services nor participating in court proceedings, which have been suspended on account of the finding of incompetence.

The DSH process for issuing certificates for restoration of competency, or re-evaluating IST defendants and finding them competent, is susceptible to error. Most notably, in response to

the long waitlists for competency restoration programming and the attendant threat of judicial sanction, the State increasingly is conducting remote jail-based re-evaluations of individuals previously deemed IST; and, despite the lack of any intervening competency restoration treatment, certifying the restoration of the individual's competency. An independent judicial determination, where defendant's counsel has an opportunity to be heard and present additional evidence, is both required by the statutory regime and more reliably protects the interests at stake.

Amici submit this brief in support of the arguments advanced by Petitioner Mario Rodriguez and urge this Court to reverse the decision of the Sixth District. This brief provides background on the IST process in California, and argues that the Sixth District's decision should not stand because (1) the practical effect of the decision is that IST defendants who challenge their certificates of restoration may be confined indefinitely between the filing of the certificate and a judge's ultimate decision on competency; (2) this indefinite detention with a purpose and duration not reasonably related to the restoration of competency violates due process, a problem the Sixth District all but ignored; (3) the statutory scheme compels judicial oversight of the DSH competency determination; (4) the Sixth District's holding grants undue deference to DSH and its contractors, which have a vested interest in expedited findings of competency on account of the current backlog of people awaiting restoration services; and (5) Petitioner Rodriguez's case presents

extreme and unusual procedural limitations caused by the COVID-19 pandemic and should not be the foundation for permanent statewide limitations on due process afforded to IST defendants.

The Sixth District's holding in *Rodriguez* improperly deviated from the First District's holding in *Carr II*, which addressed the same issue and found, instead, that "[t]he filing of the certificate initiates court proceedings to determine whether the defendant's competency has been restored," and does not definitively establish competency on its own. (*People v. Carr* (2021) 59 Cal.App.5th 1136, 1143 ["*Carr II*"].) The Sixth District's holding raises serious due process concerns and should be reversed.

STATEMENT OF THE CASE

Petitioner Mario Rodriguez challenged the State's authority to pursue criminal charges against him where the State exceeded the two-year statutory maximum for competency commitments. (*Rodriguez*, *supra*, 70 Cal.App.5th at p. 640.) The State denied that the statutory maximum had been reached because, at the time Mr. Rodriguez moved to dismiss the charges against him, DSH had certified Mr. Rodriguez' competency and Mr. Rodriguez was awaiting a long-delayed competency trial. (*Id.*) The State reasoned that if the judicial determination ultimately affirmed the DSH competency certification, the date of restoration is tolled back to the date of that certification. (*Id.*)

Mr. Rodriguez was first deemed IST while awaiting trial, and his criminal proceedings were suspended. (*Id.* at p. 636.)

After a period of treatment, DSH certified Mr. Rodriguez's competency. (*Id.* at p. 637.) Mr. Rodriguez did not contest his competency and the trial court promptly deemed him restored and reinstated the criminal proceedings against him. (*Id.*) However, four months later, the trial court suspended his criminal proceedings a second time upon a determination that Mr. Rodriguez had again become incompetent. (*Id.*) Mr. Rodriguez was again transferred for treatment. (*Id.*) Eight months after his second IST determination, DSH again certified Mr. Rodriguez' competency restored. (*Id.* at pp. 637-38.)

This time, Mr. Rodriguez challenged the competency restoration certificate. (*Id.* at p. 638.) However, for reasons largely not attributable to Mr. Rodriguez—mostly COVID-19-related delays, and the delay in transfer of DSH records to the trial court—the trial date to determine his competency was delayed more than a year. (*Id.* at pp. 638-39.)

While still awaiting a trial as to his competency, Mr. Rodriguez moved to dismiss the charges because he had been committed beyond the two-year statutory maximum for competency commitments. (*Id.* at p. 640.) The State contested this assertion, and relied on the certificate of restoration as the proper endpoint for determining the statutory maximum, at least so long as the trial court does not reject the certification. (*Id.*)

BACKGROUND: THE IST PROCESS IN CALIFORNIA

A person cannot be tried or punished while mentally incompetent. (Pen. Code, § 1367, subd. (a).) A judicial determination is required to find a person IST. (Pen. Code, §§

1368, 1369.) If the trial court, a defendant, or their counsel expresses a doubt as to the defendant's competency, the court must suspend criminal proceedings and set a trial to determine whether the defendant is competent, and may not resume criminal proceedings until the person is found competent. (Pen. Code, §§ 1368, 1370, subd. (a)(1).) To assist in determining the defendant's competency, the judge must order at least one independent evaluation by a psychiatrist or psychologist as to the individual's competency. (Pen. Code, § 1369, subd. (a).)

If the court ultimately determines that a criminal defendant is incompetent, it commits them for evaluation and treatment. (Pen. Code, §§ 1367, subd. (a), 1370; *Jackson v. Superior Court* (2017) 4 Cal.5th 96, 100-01.) The State may only confine an IST defendant "for a period reasonable for his or her competence to be restored." (*In re Taitano* (2017) 13 Cal.App.5th 233, 252.) State law limits the period of commitment of an individual for the purpose of determining whether they may be restored to competency to two years, or for no longer than the longest prison term for the most serious charge the defendant faces, whichever is shorter. (*See* Pen. Code, § 1370, subd. (c)(1); *Jackson*, *supra*, 4 Cal.5th at p. 101.)

A treatment facility is required to report periodically to the trial court on an individual's progress. (Pen. Code, § 1370, subd. (b)(1); *Jackson*, *supra*, 4 Cal.5th at p. 101.) A statutorily designated health official must "immediately" provide a competency restoration certificate attesting to the court that an individual has regained competence if they determine that to be

true. (Pen. Code, § 1372, subd. (a)(1).) In California, DSH has "sole discretion to consider and conduct reevaluations for IST defendants committed to and awaiting admission to the department." (Welfare & Inst. Code, § 4335.2, subd. (c).)

After the issuance of a competency restoration certificate, the defense may contest the competency determination and the court can approve or reject the certificate of restoration. (*See People v. Murrell* (1987) 196 Cal.App.3d 822, 826; Pen. Code, § 1372, subd. (c)(2).) If the certificate is *not* contested, then the judge may summarily determine that the person's competency has been restored. (*See People v. Rells* (2000) 22 Cal.4th 860, 868; *People v. Mixon* (1990) 225 Cal.App.3d 1471, 1480-82.)

If the defendant or their counsel challenges the competency restoration certificate, they do so subsequent to the return of the individual to the county jail, and without the continuity of competency restoration treatment during the period while the trial concerning their competency is pending. (*See* Pen. Code, §§ 1370, subd. (a)(1)(C), 1372.) The process to challenge a competency restoration certificate may take weeks, months, or as in Mr. Rodriguez' case, over a year.[1] Although the State may only confine an IST defendant "for a period reasonable for his or her

[1] Amici seek leave from this Court to introduce a declaration of investigator Emilia Garcia, attached as Exhibit A, detailing reports from attorneys representing indigent IST defendants of their experiences challenging competency restoration certificates. Amici seek to introduce this declaration because of the relevance and lack of availability of the information absent the declaration. *See, e.g.*, Declaration of Emilia Garcia, Aug. 5, 2022 [*hereinafter* "Garcia Dec."], ¶¶ 12, 14-17 [describing extended delays related to challenges to competency restoration certifications].

competence to be restored," there are no statutory timeframes for a hearing to determine whether an individual's competency has in fact been restored. (*In re Taitano* (2017) 13 Cal.App.5th 233, 252.)

Once the two-year statutory limit is reached, if the person is *not* restored, the case should ordinarily be dismissed, and the person must be released in the interest of justice pursuant to Penal Code section 1385 or, if the person is "gravely disabled" within the meaning of the relevant state law, transferred for civil commitment. (*See* Pen. Code, §§ 1370, subd. (c)(2), (d); 1370.1(a)(5)(A), (d); *Jackson*, *supra*, 4 Cal.5th at p. 102.)

ARGUMENT

I. The Practical Effect of the Sixth District's Decision Is that IST Defendants Who Challenge their Certificates of Restoration May Be Confined Indefinitely Between the Filing of the Certificate of Restoration and a Judge's Ultimate Decision on Competency.

Under the Sixth District's holding, individuals who contest their competency restoration certificates may be detained indefinitely despite the two-year statutory maximum commitment for competency restoration. This cannot be the law.

The Sixth District's holding could substantially extend the amount of time an individual may be committed for purposes of competency. In particular, individuals who contest the state agency's competency determinations would face prolonged and indefinite pre-trial custody. Most of these individuals are in custody for weeks or months waiting for a hearing solely on the validity of their section 1372 restoration certificate. Notably, Mr.

Rodriguez himself waited more than a year for a hearing regarding his certificate of restoration. Under the Sixth District's construction, none of that time would be counted against the two-year period permitted by the statute for an individual to be in custody after having been committed.

The Sixth District considered as significant to its holding that Mr. Rodriguez was "no longer receiving treatment to restore competence" in the period following DSH's issuance of a competency restoration certificate. (*Rodriguez*, *supra*, 70 Cal.App.5th at p. 655.) The Sixth District reasoned that, because Mr. Rodriguez was not receiving competency restoration services after the issuance of a 1372 certificate, this period of time cannot count against the period of time that an individual is committed for the purposes of competency restoration. But this reasoning is flawed.

In enacting a maximum period for competency commitment, the Legislature determined that an individual should not be held in excess of two years for the purposes of competency restoration. Nothing in the language of the statute indicates this limitation only applies to the period when a person is actually receiving treatment. Such a holding would also eliminate from consideration the period of time while an individual is awaiting treatment even where the current average wait time for placement in a state hospital competency restoration program is approximately five months.[2]

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[2] *See Stiavetti v. Clendenin* (Alameda Sup. Ct. June 27, 2022) Case No. RG15779731, Motion to Modify Amended Writ, 23-25.

Furthermore, it is not uncommon for trial courts to reject challenged competency restoration certificates once a court hearing is conducted, with the court finding the individual still incompetent.[3] Indeed, in some cases, given the inadequacies of the re-evaluation, prosecutors have stipulated that an individual remains incompetent despite a 1372 certificate.[4] If found IST at a hearing, IST defendants are then re-committed to be restored to competency, again facing system-wide delays for competency treatment.

To define the term of commitment as only the time where the defendant is actually receiving treatment risks a dramatic extension of the period IST defendants are in custody, considering the current delays in both accessing treatment and setting section 1372 hearings. (*See, e.g.*, *Stiavetti*, *supra*, 65 Cal.App.5th 691; *In re Loveton* (2016) 244 Cal.App.4th 1025; *People v. Kareem A.* (2020) 46 Cal.App.5th 58; *Rodriguez*, *supra*, 70 Cal.App.5th at pp. 638-40.) The Sixth District's holding would thus penalize defendants for both the State's delay in providing

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[3] *See, e.g.*, IST Working Group Meeting Minutes, Sept. 17, 2021, 6, *at* https://www.chhs.ca.gov/wp-content/uploads/2021/10/IST-Working-Group-3-Meeting-Minutes-September-17-2021.pdf (California Public Defenders Association representative affirming that "courts have often contested these determinations of competency").

[4] *See, e.g.*, Garcia Dec., *supra* note 1, ⁋⁋ 6, 9, 14-21 (providing accounts of rejected competency restoration certificates, with one public defender estimating that at least 50 percent of challenged certificates of restoration in one large county are rejected by the courts).

treatment and any erroneous issuance of a certificate of restoration.

The Sixth District "express[ed] no opinion whether a different analysis would apply if there were evidence that Rodriguez had wrongfully been denied treatment to restore competence or if he were not transported to and from the treatment facility in a timely manner." (*Rodriguez*, *supra*, 70 Cal.App.5th at p. 653 ["on different facts, due process considerations may compel a different result"].) However, there is overwhelming evidence that DSH is *systematically* failing to timely transport and treat IST defendants. (*Stiavetti*, *supra*, 65 Cal.App.5th at p. 695 [DSH and Department of Developmental Services "systematically violated the due process rights of all IST defendants in California" by failing to admit for treatment IST defendants within 28 days].)

II. The Sixth District Disregarded the Serious Due Process Concerns Raised By Its Holding.

The Sixth District summarily rejected concerns that its holding would violate the rights of IST defendants to due process. (*Rodriguez*, *supra*, 70 Cal.App.5th at p. 654.) The due process concerns created by the Sixth District's holding cannot be so readily dismissed.

If this Court upholds the Sixth District's decision, the result will be that any IST defendant who challenges a section 1372 certificate of restoration will be subject to a period of confinement that does not serve a constitutionally permissible purpose, as the person would no longer be committed for

competency restoration, but would still have their criminal proceedings suspended.

Due process requires that the confinement of IST defendants serve a purpose reasonably related to competency restoration and for no longer than reasonably necessary for that purpose. (*Jackson v. Indiana* (1972) 406 U.S. 715, 738 [holding unconstitutional Indiana state law provisions which permitted the indefinite detention of IST defendants]; *In re Davis* (1973) 8 Cal.3d 798, 805 [recognizing the same constitutional defects in then-existing California law concerning competency commitments].) Indefinite confinement, as is the rule and practical effect of the Sixth District's holding, cannot satisfy this constitutional mandate.

In enacting a two-year statutory maximum for competency commitments and other timelines for providing treatment and reporting progress to the court, the Legislature and courts have recognized certain temporal and other safeguards to protect IST defendants from being unjustifiably detained, or forgotten by the system—as due process requires. (*See In re Davis* (1973) 8 Cal.3d 798, 806-07; *In re Polk* (1999) 71 Cal.App.4th 1230, 1235 ["The purpose of the legislation [establishing a three-year temporal limitation] was to bring the procedure for the commitment of mentally incompetent defendants in accord with the decision of the California Supreme Court in *In re Davis*."].) The statutory scheme "guards against the unduly prolonged commitment of a defendant in circumstances when treatment is not provided or competence will not likely be restored and contains an outer limit

for the length of any commitment." (*Carr v. Superior Ct.* (2017) 11 Cal.App.5th 264, 272 ["*Carr I*"].) "Once incompetency is established, the statutory scheme is replete with mandatory reviews to insure a subject will not be warehoused unduly in a mental institution." (*People v. Bye* (1981) 116 Cal.App.3d 569, 576-77 [identifying the maximum statutory term of commitment as one of various safeguards protecting against the warehousing of IST defendants].)

The Sixth District's holding would upend any overriding temporal constraints. Under this holding, the competency restoration certificate would stop the clock limiting how long an individual deemed incompetent may remain in custody, languishing in county jail without criminal proceedings reinstated. The person would be in a state of limbo—neither held for a competency commitment nor held in connection with their criminal case. This cannot withstand constitutional scrutiny.

Trial courts would also have no binding obligation to promptly set hearings to adjudge whether IST defendants have been restored. Meanwhile, IST defendants would be incentivized to accept the competency re-determination, established by the restoration certificate, regardless of their actual competency, because the alternative would be to remain in custody indefinitely challenging the certification. In many cases, a defendant would more quickly be released by stipulating to their restoration, reopening criminal proceedings, and accepting a plea bargain. Encouraging this result where the defendant remains

incompetent, however, is inimical to the fundamental guarantees of due process.

III. The Statutory Scheme Contemplates Judicial Oversight of the Competency Certificate.

Contrary to the assertions of Real Parties in Interest, the statutory scheme for adjudging whether an IST defendant has been restored to competency recognizes judicial oversight is an indispensable part of the process. Section 1372 requires the immediate notification by a state official "to the court" upon the certification that an individual has been restored to competency. (Pen. Code, § 1372, subd. (a)(1).) The individual must then "be returned to the committing court." (Pen. Code, § 1372, subd. (a)(3); *see also* Pen. Code, § 1370, subd. (a)(1)(C).) Following their return, the court must then notify relevant state and county mental health personnel "of the date of any hearing on the defendant's competence and whether or not the defendant was found by the court to have recovered competence." (Pen. Code, § 1372, subd. (c)(1).) The court may make other decisions relating to the criminal process only "[i]f the committing court approves the certificate of restoration to competence." (Pen. Code, § 1372, subd. (d) [concerning, *e.g.*, bail and release decisions].) As the First District recognized in *Carr II*, the Legislature indicated that a different "purpose" was served by the issuance of a competency restoration certificate than by the trial court's holding of a competency hearing. (*Carr II*, *supra*, 59 Cal.App.5th at p. 1145 ["Nor, if the commitment terminates when a health official files a certification of competence, would any plausible purpose be

served in requiring court to approve the certification as expressly contemplated in section 1372, subdivision (d).”].)[5] To excise the oversight of the trial court in determining whether competency has been restored – and, relatedly, in determining when a commitment is completed – is inconsistent with the statutory scheme.

IV. By Holding that the Commitment Ends at the Filing of the Certificate of Restoration, the Sixth District's Decision Grants Undue Deference to Competency Determinations by DSH and its Contractors, Who Have Vested Interests in Expedited Findings of Competency.

Certificates of restoration may only be filed by DSH, its contractors, or other state or county entities charged with providing competency restoration services. (Pen. Code, § 1372, subd. (a)(1).) Interpreting California law to mean that the filing of a certificate of restoration terminates an IST commitment is

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[5] In rejecting the *Carr II* court's reasoning, the Sixth District stressed that the Supreme Court “has stated that when a certificate of restoration is filed, it ‘has legal force and effect in and of itself,’ and the filing of the certificate triggers a presumption of mental competency under section 1372.” (*Rodriguez*, *supra*, 70 Cal.App.5th at p. 652, *citing People v. Rells* (2000) 22 Cal.4th 860, 868.) But this Court in *Rells* held that the “legal force” of the 1372 certificate was expressly to “*cause[] the defendant to be returned to court* for further proceedings,” not to render a determinative finding as to the individual's competency. (*See Rells*, *supra*, 22 Cal.4th at p. 868 [emphasis added].) Indeed, this Court in *Rells* held that the presumption of competency follows even from the IST defendant's return to court for a mandatory retrial after 18 months of commitment *without* a competency restoration certificate. The Sixth District's reliance on *Rells* to reject the *Carr II* holding is misplaced.

not only incorrect, but also provides undue deference to DSH and its agents, who have an interest in expedited findings of competency in order to address California's current backlog of defendants on the waiting list for competency restoration services.

The State of California has a severe backlog of individuals deemed IST waiting for placement to competency restoration treatment. (*See Stiavetti*, *supra*, 65 Cal.App.5th at pp. 699-701 [State is "systematically" violating the due process rights of IST defendants by delaying access to competency restoration services].) This backlog, and the threat of judicial sanction, has resulted in an increasing number of competency re-evaluations, conducted remotely while individuals are in jail, despite a prior IST determination by a court-appointed psychiatrist or psychologist, and without any intervening treatment.[6] DSH has

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[6] *See, e.g.*, Health & Human Services Agency & Dep't of Finance, Incompetent to Stand Trial Solutions Workgroup, Report of Recommended Solutions, Nov. 2021, 13, *at* https://www.chhs.ca.gov/wp-content/uploads/2021/12/IST_Solutions_Report_Final_v2.pdf. The 2021 Budget Act authorized DSH re-evaluations of competency for individuals on the waitlist for placement in competency restoration programs who have been waiting for more than 60 days. *See* Dep't of State Hospitals, 2021 Budget Act Highlights, 9-10, *at* https://www.dsh.ca.gov/About_Us/docs/DSH_2021-22_Budget_Act_Highlights.pdf; Welfare & Inst. Code, § 4335.2, subd. (b)(1), (b)(2), (b)(3), (c). The 2022 Budget Act, not yet signed and enacted, would allow such re-evaluations to be conducted at any time, without limitation. 2022-23 Budget Trailer Bill, Sec. 53 (amending Welfare & Inst. Code, § 4335.2, subd. (b) ["establish a program to perform reevaluations primarily through telehealth evaluations for felony incompetent to stand trial (IST) individuals in jail who have been waiting for admission to the department"

"sole discretion to consider and conduct reevaluations for IST defendants committed to and awaiting admission to the department," and the re-evaluations are "primarily . . . telehealth." (Welfare & Inst. Code, §§ 4335.2, subd. (b), (c).) The re-evaluation may, but need not, include input from counsel for the defendant. (*Id*.)

The Sixth District's decision below creates a perverse incentive structure. The State faces an intractable backlog in IST defendants awaiting competency restoration, and is on the verge of being in violation of court-ordered deadlines for compliance with a constitutional mandate to quickly transfer IST defendants for treatment. (*Stiavetti*, *supra*, 65 Cal.App.5th at p. 695.) In response, the State has already established expedited processes to re-evaluate people for competency, while they remain on the waitlist and even before accessing any treatment.[7] The Sixth District's holding would allow for the State to make more hospital beds available by issuing certificates of restoration as—even if they are later successfully challenged in court—the mere issuance of the certificates would end the commitment of IST defendants and return them to county jail.

The judicial oversight compelled by the statutory scheme is a necessary guarantee of their accuracy. Independent experts, as well as DSH, have recognized the "extremely poor" quality of the competency evaluations in the State, which may result in both

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with a goal of "reduc[ing] the growing list of IST defendants awaiting placement to a department facility for competency restoration treatment"]).

[7] See note 5, *supra*, and accompanying text.

incompetent people deemed competent, and the reverse.[8] This can be particularly true where the re-evaluations are jail-based and remote, and without any intervening competency treatment. Public defenders have reported serious procedural deficiencies regarding these re-evaluations, which can suffer from insufficient time, inadequate Internet connection, limited privacy, and severe communication challenges.[9] For instance, in one case, a public defender recounted how an individual was re-evaluated, in a non-confidential jail setting, remotely via tablet with limited Internet connection. Pursuant to this re-evaluation, the individual was deemed competent, even though he had not benefited from any

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[8] Health and Human Services Agency & Dep't of State Hospitals, Incompetent to Stand Trial Solutions Working Group, Work Group 3: Initial County Competency Evaluations, Meeting Minutes (hereinafter, "IST Working Group Meeting Minutes"), Sept. 24, 2021, 3, *at* https://www.chhs.ca.gov/wp-content/uploads/2021/10/IST-Working-Group-3-Meeting-Minutes-September-24-2021.pdf. *See also* IST Working Group Meeting Minutes, Sept. 17, 2021, 3-4, *at* https://www.chhs.ca.gov/wp-content/uploads/2021/10/IST-Working-Group-3-Meeting-Minutes-September-17-2021.pdf; Shelley Hill *et al.*, "Persistent, Poor Quality Competency to Stand Trial Reports: Does Training Matter?," Psychological Services (2022) 19(2), 206-12, *at* https://doi.org/10.1037/ser0000512 [finding that, in a study of 388 California competency evaluations between 2012-13, "CST reports continue to evidence poor quality" which "may result in adversities for both forensic hospitals and patients"].

[9] *See, e.g.*, Garcia Dec., *supra* note 1, ⁋⁋ 5-7, 10-13, 15-21 [describing, *e.g.*, "a case in which a DSH psychologist conducted a re-evaluation" of an IST defendant's competency, "despite the fact that the [IST defendant] had received no restoration services"; the "evaluation was conducted remotely via a tablet," with "weak" Internet connection and in a "non-private hallway" with "people walk[ing] by"].

treatment, had been in jail for months waiting for a hospital bed, and had previously been found incompetent by the court. The individual has now been waiting for several months to challenge this certificate of restoration issued after receiving no treatment at all. If the certificate is rejected by the court, this individual will return to the waitlist, likely waiting upwards of five months longer prior to receiving any treatment.[10]

In further evidence of the pressure created by the backlog of IST defendants waiting in jail for competency restoration treatment, and the risk of systemic due process violations, DSH's medical director has suggested eliminating people from the waitlist if reports provided by the evaluators are of poor quality.[11] The agency's fiscal and political pressures mean it is subject to alternative incentives, further emphasizing the importance of judicial oversight.

Carr II involved an individual who was evaluated in jail and determined competent by a DSH psychiatrist, without ever having received treatment. (*Carr II*, *supra*, 59 Cal.App.5th at p. 1141.) The trial court ultimately rejected the certificate. (*Id.*) The First District had correctly held in that case that the certificate of competency did not end his commitment, as a judicial

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[10] Garcia Dec., *supra* note 1, ¶¶ 10-12.

[11] IST Working Group Meeting Minutes, Oct. 15, 2021, 5, *at* https://www.chhs.ca.gov/wp-content/uploads/2021/11/IST_Working_Group3_Meeting3_Minutes.pdf (noting the "insufficient quality of reports" and the need to "get[] people off the waitlist who should not have been found incompetent in the first place," Dr. Warburton "suggested as one idea that if a poor quality report is submitted, then DSH can decide that the defendant not be added to the waiting list").

determination of restoration was required to do so. (*Id.*) To hold otherwise would mean that DSH was empowered to effectively toll the maximum period of commitment by issuing an incorrect finding of competency.

V. Petitioner Rodriguez's Case Presents Extreme and Unusual Procedural Limitations Caused by the COVID-19 Pandemic and Should Not Be the Foundation for Permanent Statewide Limitations on Due Process Afforded to IST Defendants.

The Sixth District's decision arose from a unique set of circumstances—the unexpected delays in court hearings caused by COVID-19. COVID-19-related court delays resulted in Mr. Rodriguez being in custody for more than two years, including more than a year between the issuance of his competency restoration certificate and the court's setting of a hearing as to whether Mr. Rodriguez had regained competency.[12] The Sixth District's decision would translate this set of circumstances into a system of indefinite detention for IST defendants who challenge a section 1372 competency restoration certificate. The circumstances precipitated by the COVID-19 pandemic should not cement permanent due process violations.

[12] Mr. Rodriguez' hearing was delayed in part because, due to COVID-19, the Santa Clara court suspended "all non-essential functions" and restoration hearings were not included among the listed "essential functions." (*Rodriguez*, *supra*, 70 Cal.App.5th at pp. 638-39.)

CONCLUSION

For the reasons elaborated herein, the Court of Appeal's decision below should be reversed.

August 5, 2022

Respectfully Submitted,

/s/ Emi MacLean

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CERTIFICATION OF WORD COUNT

I certify that the word count for the application and proposed amicus curiae brief, including footnotes and excluding the tables, signature blocks and this certificate, is 5,234 words as determined by Microsoft Word.

Executed on August 5, 2022, at Berkeley, California.

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EXHIBIT A

DECLARATION OF EMILIA GARCIA

I, Emilia Garcia, declare:

1. I am over the age of eighteen, and I am competent to make this declaration. I provide this declaration based upon my personal knowledge. If called as a witness, I would and could competently testify to the facts stated herein.
2. I am an investigator at the American Civil Liberties Union Foundation of Northern California ("ACLU"). The ACLU is a nonprofit public interest law firm based in San Francisco, California, that provides free legal services to people, including those who are incarcerated.
3. Between June 22 and July 21, 2022, I communicated with public defenders in Contra Costa, Riverside and Santa Clara counties. Each of those attorneys represents or has represented people with criminal charges who have been deemed incompetent to stand trial. Each attorney agreed to share anonymized facts related to clients they have represented in competency proceedings before the Superior Courts of their respective counties. The facts they relayed to me are described herein.
4. I have also communicated with a number of individuals and family members of individuals deemed IST, about their experiences with DSH competency evaluations, competency restoration services, and competency restoration certificates.

Summary of Reports from Public Defenders

5. Numerous public defenders reported that certificates of restoration have been provided after remote interviews, with their clients not in the same location as the person conducting the evaluation and signing the certificate. Public defenders also reported that remote competency evaluations are conducted in non-confidential settings.
6. Numerous public defenders reported that certificates of restoration have been provided after only brief evaluations which do not meaningfully explore an individual's ability to rationally assist in their defense. For instance, one public defender described an evaluation that lasted only an hour and the evaluator determined that the individual, who had received no services, was restored, although a judge later rejected that certificate.
7. Public defenders reported that certificates of restoration were provided for individuals who display only minimal, superficial understanding of their case and court procedures. For example, one attorney described a client who was returned from a regional center as restored, but was unable to answer simple questions about court proceedings because, he explained, the questions were not being asked in the "right order." Another individual, detailed below, was found competent by his evaluator because he was able to repeat the two elements of trial competence and follow the instruction, "close your eyes."

8. Public defenders have reported that jail conditions have in some cases resulted in decompensation even after an individual has undergone competency restoration treatment. For instance, an individual was returned to county jail after receiving restoration services and began refusing to eat, believing that the jail food was poisoned. Another young man with schizoprhrenia was returned to county jail in 2021, having been deemed restored to competency after eight months at a state hospital. There, his physical and mental state rapidly declined. He lost weight, sometimes appeared with bruises and swelling, and became unresponsive during video visits with family members. Less than three months after he was determined to be restored to competency, the young man died by suicide in the county jail where he was being held.
9. Based on my conversations with public defenders, certificates of restoration are regularly challenged and rejected. For example, Maya Nordberg estimated that the Contra Costa Public Defender challenges nearly half of 1372 certificates, and that a large majority of those challenged certificates are ultimately rejected by the court. A Riverside County Public Defender, Monica Nguyen, tracked the outcomes of 1372 certificates issued by Riverside County Jail's jail-based competency restoration program over the past year. Of 11 certificates issued for which data was provided, five were challenged. Two of

those remain pending, two were upheld, and one was rejected.

Individual Accounts

10. Anecdotal evidence suggests serious deficiencies in the process of re-evaluating patients who have not received any restoration treatment and declaring them competent to stand trial. Attorney Maya Nordberg of the Contra Costa Public Defender's Office described a case in which a DSH psychologist conducted a re-evaluation for a client, despite the fact that the client had received no restoration services whatsoever in the months since the court found him competent. This evaluation was conducted remotely via a tablet. However, the Internet connection was weak and, in order to communicate, the client had to stand in a non-private hallway, holding the tablet to his ear, while other people walked by him for the duration of the two-hour evaluation.

11. The circumstances of this evaluation were so poor that the client was told that there would be a second evaluation. This time, the client was forced to stand outside in the outdoor recreation area, surrounded by other inmates' cell windows and where conversations are easily overheard by others. It was very cold outside, but when the client went inside to escape the cold, the Internet connection again failed. The client was then given a blanket and sent back outside to stand in the cold holding the tablet and complete

the evaluation within earshot and in plain view of others. The client later reported feeling intensely uncomfortable answering questions about his mental health in a non-confidential setting, so he provided superficial answers and largely denied his ongoing mental health symptoms.

12. Despite the conditions of the evaluation, and notwithstanding the complete absence of competency restoration treatment, the DSH psychologist concluded that the client was restored to competency. The client contested this finding and is still awaiting a trial on the 1372 certificate of restoration, more than six months after its issuance.

13. On July 20, 2022, I spoke with Gary Rees, the grandfather of a disabled person previously incarcerated in Humboldt County. Mr. Rees described a similarly deficient re-evaluation of his grandson which took place in 2021. I also reviewed the re-evaluation report written by a court-appointed psychiatrist. Although his grandson had received no restoration services beyond medication in the 11 months since the first evaluation finding him to be incompetent, the psychiatrist re-evaluated him for competency. Mr. Rees' grandson is profoundly deaf and relies on an American Sign Language interpreter to communicate. The re-evaluation was conducted via video conference, but does not state the name or license number of the interpreter. The evaluator concluded that the patient was "gravely disabled" due to

lack of insight into his mental illness and inability to obtain and maintain food, clothing and shelter. Despite this finding, the evaluator also concluded that the patient was competent to stand trial. The evidence offered in support of this conclusion was sparse. The psychiatrist stated that the patient was capable of learning new information because he was able to repeat the two components of trial competency. However, his understanding of those prongs was not described. The psychiatrist relied upon the patient's ability to recall three words, read and follow the command "close your eyes," and spell WORLD forward and backward as evidence that he was capable of rationally assisting in his own defense.

14. Attorney Mairead O'Keefe of the Santa Clara County Public Defender's Office described a client who cycled back and forth from court to a state hospital twice, with the court twice rejecting the certificates of restoration provided by DSH; in one instance, the district attorney also agreed with the public defender that the client was not competent despite the 1372 certificate attesting to his competency.

15. After being found incompetent to stand trial in December of 2018, the client received restoration services at Metropolitan State Hospital between February and July 2019, following which, DSH issued a certificate of restoration. The client was either not competent at the time the certificate was issued or quickly became incompetent

following his return to county jail. Ultimately, the parties stipulated that the client was not restored, with the district attorney agreeing that the client was not competent despite the certificate of restoration. The court then recommitted the client to DSH 190 days after the client returned to court pursuant to the 1372 certificate. The client then waited an additional nine months to be transferred back to Metropolitan State Hospital, resulting in a total of 433 days from the time he was incorrectly deemed restored to the time he was readmitted to the State Hospital.

16. This individual was not yet restored when the two-year maximum commitment period was reached in December 2020, although about a month later the court received a 1372 report stating that he client was "presumptively restored." The Court ultimately dismissed the client's case in March 2020, three months beyond the maximum two-year commitment period.

17. Attorney Monica Nguyen, a public defender in Riverside County, described a client who cycled between jail and DSH multiple times, never being found competent by a court, despite the issuance of certificates of restoration. After his second period of competency restoration treatment, DSH provided a certificate of restoration and transferred him back to county jail. DSH did not take care to ensure that the 1372 certification was added onto the court's calendar or to ensure that the client was brought to court after he

was transferred back to county jail. The client then languished in the county jail for four months, without his attorney knowing of his whereabouts and without a future court date set, because DSH failed to ensure that the matter was calendared. By the time client's counsel located him in the county jail, he had severely decompensated to such a profound degree that he could not be restored within the time remaining on his commitment. The Court subsequently rejected the 1372 certification and found that the individual was not restored. The court later dismissed the matter pursuant to Penal Code section 1385.

18. Another client of Ms. Nguyen's office was admitted to a Jail Based Competency Treatment ("JBCT") program after being found incompetent in April 2021. He waited 155 days to be admitted to the JBCT program in September 2021. After 199 days of treatment, in early April 2022, he was evaluated and issued a certificate of restoration. However, Ms. Nguyen asserted that her client was profoundly incompetent at that time.

19. The public defender's office hired a psychologist to provide a private evaluation; the psychologist confirmed that he was not restored. Considering all of the evidence presented, including the certificate of restoration and the supplemental evaluation, the court rejected the 1372 certification in late May 2022. However, the client has yet to be placed at a DSH facility to receive competency

services, because of the extended DSH waitlist for placement in state hospitals and other competency restoration programs. He has now been incompetent and out of placement for over 115 days, through no fault of his own.

20. A third individual described by Ms. Nguyen was found incompetent to stand trial in Riverside County and was admitted for treatment by Liberty Healthcare Jail Based Competency Program in September 2019. Less than two months later, the JBCT filed a certification of competency asserting that the client was competent. Defense counsel hired a private evaluator, who determined that the client's competency had not been restored, and in February 2020, the parties stipulated that he was not competent. He was subsequently readmitted to the JBCT in March 2020.

21. Meanwhile, the same client was charged with a second case, in which he was also found incompetent and committed to DSH. The JBCT then filed a certificate of competency in the first case, but before it was adjudicated, the client was transferred to Patton State Hospital, where he remained until his discharge in March 2021. In the meantime, however, another certificate of restoration was issued from the JBCT and filed in the second case, even though the client was not in County custody and therefore could not have been receiving treatment at the JBCT. The

client then challenged the 1372 certificates in both cases and prevailed.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Loomis, California this 5th day of August, 2022.

Emilia Garcia

PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On August 5, 2022, I served the attached,

Application to File Amici Curiae Brief, [Proposed] Amici Curiae Brief in Support of Petitioner, and Exhibit A (No. S272129)

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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Continued on next page

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BY MAIL: I mailed a copy of the document identified above by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid.

Clerk of the Court of Appeal, Sixth Appellate District
For: Hon. Allison M. Danner
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Clerk of the Superior Court of California, County of Santa Clara
For: Hon. Eric S. Geffon
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San Jose, CA 95113
Respondent

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

Executed on August 5, 2022 in Fresno, CA.

Sara Cooksey
Declarant

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **RODRIGUEZ v. S.C. (PEOPLE)**
Case Number: **S272129**
Lower Court Case Number: **H049016**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **emaclean@aclunc.org**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	2022.08.05 Amicus Brief of ACLU DRC in Rodriguez v. Santa Clara - FINAL WITH EXHIBIT

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

8/5/2022

Date

/s/Emilou MacLean

Signature

MacLean, Emilou (319071)

Last Name, First Name (PNum)

ACLU of Northern California

Law Firm