NO. _____
IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 2022

JUAN VALERO, Petitioner

v.

THE STATE OF TEXAS, Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

To the Honorable Supreme Court of the United States of America:

Comes now, Petitioner Juan Valero, by and through his undersigned counsel, and respectfully moves that this Honorable Court grant leave for Petitioner Valero to proceed in forma pauperis, and to file the attached Petition for Writ of Certiorari to the Court of Criminal Appeals for the State of Texas without prepayment of fees:

I.

Petitioner Juan Valero was declared indigent by the District Court of El Paso County, Texas. A copy of that declaration is attached as Appendix IA. Please see the Texas Code of Criminal Procedure, Article 26.04; appointment of counsel for indigent defendants. Appendix IB.

II.

Undersigned and Attorney Carl Adrian DeKoatz were hired by Client's mother to pursue Juan Valero's pretrial bond writ remedies at the Texas District Court level in El Paso County, Texas. The trial court denied relief under Petitioner's bond writ of habeas corpus. Appendix II; CR 191. Above named counsel were not hired to pursue Juan Valero's appellate remedies; nonetheless, counsel agreed to pursue Valero's state appellate remedies without charge based upon the significance of the issue at bar. Counsel have pursued, without charge, Valero's appellate remedies to the Texas Eighth Court of Appeals, and to the Texas Court of Criminal Appeals.

Relief was denied to Petitioner Valero at both state appellate courts. Petitioner Valero has timely exhausted his state court remedies. Petitioner Valero asks this Honorable Court to allow him to proceed before this Honorable Court without his prepaying court costs and filing fees. Juan Valero has been detained at the El Paso County Jail Annex since August 5, 2020. Petitioner Valero has no means, whatsoever, to pursue certiorari without his proceeding in forma pauperis.

WHEREFORE: Petitioner Juan Valero prays that the Honorable Court allow him to proceed in forma pauperis before the Honorable Supreme Court of the United States and without prepayment of fees to pursue Valero's Writ of Certiorari. Petitioner thanks the Honorable Court and wishes the Honorable Court well.

Respectfully submitted,

/S/ Matthew Rex DeKoatz

Matthew Rex DeKoatz, Attorney
For Petitioner Juan Valero

521 Texas Ave., El Paso, TX 79901
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Texas bar I.D. 05722300

CERTIFICATE OF COMPLIANCE

This motion to proceed in forma pauperis contains 385 words printed in a proportionally spaced typeface, Times New Roman, 12.

CERTIFICATE OF DELIVERY

I hereby certify that on the below date, I delivered, via electronic means, a true and correct copy of the above instrument to: (1.) Mr. John Davis, El Paso County District Attorney's Office; and (2.) Stacey Seoul, Prosecuting Attorney for the State of Texas.

/s/ Matthew Rex DeKoatz Date: September 9, 2023

Matthew Rex DeKoatz, Attorney

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Petition for Writ of Certiorari

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QUESTION PRESENTED

I. **DOES ARTICLE 46B.0095(A) OF THE TEXAS CODE OF CRIMINAL PROCEDURE VIOLATE THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?**

II. **IS THE ISSUE IN NUMBER I. ABOVE COGNIZABLE BY WRIT OF CERTIORARI TO THE SUPREME COURT BECAUSE IS IT CAPABLE OF REPETITION YET EVADING REVIEW?**

LIST OF PARTIES

Juan Valero, Petitioner

The State of Texas, Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the Eighth Court of Appeals, which by memorandum, addresses the merits of Petitioner Juan Valero's arguments. That memorandum opinion appears at Appendix IIIA to this petition. It was not designated for publication.

JURISDICTION

The Court of Criminal Appeals decided this case on July 19, 2023. The mandate was issued on August 16, 2023. The Court of Criminal Appeals accepted Petitioner Valero's petition for discretionary review on May 18, 2023. The Court of Criminal Appeals was to decide the merits of Valero's due process contention. The State, to avoid the issue, filed a motion to dismiss on mootness based upon the fact that Valero was finally transferred to the State hospital for competency restoration. Valero opposed this motion based upon the fact that the issue was capable of repetition yet evading review. The Court of Criminal Appeals swiftly granted the State's motion to dismiss, and the Court did not render an opinion on the merits. A copy of that decision appears at Appendix IIIB. A copy of Valero's motion in opposition to the State's motion to dismiss for mootness is found at Appendix IV. The jurisdiction of this Court to review the judgment rendered in this case is invoked pursuant to 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution
Article III, Section 2, Clause 1:

Clause 1 Cases or Controversies
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATUTORY PROVISIONS INVOLVED
28 U. S. C. § 1257 (a)

Under 28 U.S.C. 1257 (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Article 46B.0095(a) of the Code of Criminal Procedure

Article 46B.0095(a) of the Code of Criminal Procedure : a defendant may not ... be committed to a mental hospital or other inpatient or residential facility ... for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried....Tex. Code Crim. Proc. art. 46B.0095(a). Appendix VII.

FEDERAL STATUTE INVOLVED

28 U. S. C. § 1257 (a), above described.

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STATEMENT OF THE CASE

Habeas Trial below in the 384th District Court of El Paso County, Texas.

Petitioner Juan Valero is currently detained by the State of Texas by virtue of a felony indictment in the instant case. CR-8-12. Petitioner Valero was detained at the El Paso County Texas Jail Annex and was so detained since his arrest on August 5, 2020. His most recent commitment to the HHSC State Hospital, for 120-days, is found in the trial court's order of January 25, 2022. CR-180; Appendix V. Valero was finally transferred to the state hospital on June 21, 2023.

At the pretrial state habeas proceeding, before the District Court of El Paso County, Texas, Petitioner Valero established, without dispute, that he was arrested on August 5, 2020, on felony charges and was found to be incompetent to stand trial. The disputed issue was based upon Valero's contention that Valero's detention, while he was awaiting transport to the state hospital, was for an unreasonably excessive period. For that reason, Valero sought habeas relief. Valero's only state remedy was his attempt, via pretrial habeas, to obtain Valero's release based upon his allegation that his extensive confinement awaiting his transport to the state hospital was unlawful and a violation of due process of law. RR6-8-10. The trial court indicated that Valero's position, if accepted, would open the flood gates to litigation. Relief was finally denied by the trial court under Valero's writ. CR-180; Appendix II.

State appellate court history.

On the 13th day of February 2023, the Honorable 8th Court of Appeals affirmed the trial court's judgment denying relief under Valero's pretrial writ of habeas corpus. The Court opined that Valero's pretrial writ claiming a due process violation via bond habeas was not cognizable. The Court further opined that even if the issue were cognizable, Valero was not entitled to relief. Valero timely and respectfully filed his state petition for discretionary review to the Honorable Texas Court of Criminal Appeals. Appendix VI.

Petitioner Valero was granted review (please see above discussion) by the Texas Court of Criminal Appeals, which held in pertinent part:

Appellant is charged with aggravated assault and aggravated robbery. On January 12, 2021, the competency court found Appellant incompetent and committed him for 120 days to restore competency. Appellant filed a pretrial habeas application on May 25, 2021, complaining that he had not yet been transferred to a hospital and requesting immediate release. The rial court denied habeas relief on September 2, 2022. The Court of Appeals affirmed. Ex parte Valero, No. 08-22-00172-CR, LEXIS 901 (Tex. App. – El Paso February 13, 2023, pet. granted). We granted Appellant's petition for discretionary review. The State has now filed a motion to dismiss, noting that Appellant was transferred to Vernon State Hospital on June 21, 2023. Accordingly, we grant the State's motion and dismiss Appellant's petition.

Opinion, Court of Criminal Appeals, Appendix IIIB, July 19, 2023.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Because this is a case of first impression in the state of Texas, there is no Texas authority which directly answers the question at hand. The current Texas statutory scheme allows the State to detain an incompetent defendant up to the amount of time of the maximum penalty of the charged offense, in this case 20 years, to place the incompetent defendant at the state hospital. In the case at bar, the commitment order is for 120 days. Valero was detained while awaiting his transport to the state hospital for nearly 3 years. Petitioner argues that this is a due process violation. Petitioner argues that the only solution is his immediate release to prevent the State of Texas from detaining Valero and other similarly situated incompetent defendants, ordered to receive competency restoration treatment, from unreasonable and excessive detention while they await competency restoration treatment. Appellant argues that the Texas statute at issue, Tex. Code Crim. Proc. art. 46B.0095(a), is unconstitutional under the Due Process Clause of the 14th Amendment to the Constitution of the United States, and should be given review by the Honorable Supreme Court of the United States.

The Texas 8th Court of Appeals, an intermediary court, does not address the real question and the real problem at hand—Texas is taking too long to send incompetent defendants to the state hospital for competency restoration treatment. The length of the wait for transportation to the state hospital for restoration treatment far exceeds the time ordered for treatment at the hospital. This excessive delay problem should be remedied by the Honorable United States Supreme Court. According to Texas law, the length of time that the State may confine Valero in a residential-care facility is governed by Article 46B.0095(a) of the Code of Criminal Procedure : a defendant may not ... be committed to a mental hospital or other inpatient or residential facility ... for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried....Tex. Code Crim. Proc. art. 46B.0095(a). Appendix VI. There is no time limitation in which the State is required to actually send Valero to the state hospital, other than the 20-year maximum punishment range. Valero is charged with a second-degree felony, which carries a 2-to-20-year prison sentence. Texas Penal Code, Sections 29.02 and 12.33.

The Texas Court of Criminal Appeals has not addressed Petitioner Valero's contention that the merits of Valero's due process argument should be addressed because Valero's case is the classic example of capable of repetition yet evading review. Petitioner Valero attempts to persuade the Honorable Supreme Court of the United States that this issue is of significance and moment and is a sign of the times which needs to be addressed and remedied by the Highest Court in the Land.

QUESTION I: DOES ARTICLE 46B.0095(A) OF THE TEXAS CODE OF CRIMINAL PROCEDURE VIOLATE THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

ARGUMENT FOR THE MERITS BY PETITIONER JUAN VALERO

The instant case has been in a state of limbo since Juan Valero's incarceration on August 5, 2020. On June 21, 2023, Valero was finally sent to the state hospital. All in all, the wait was approximately three years. Valero had been found incompetent and ordered committed to the custody of the HHSC State Hospital Texas Division of Mental Retardation and Mental Health, yet Valero languished in state custody for nearly three years while he awaited transport to the hospital. Valero ultimately filed his pretrial bond writ of habeas corpus to challenge his confinement and detention as unlawful under the Due Process Clause of the 14th Amendment to the Federal Constitution. Because of this excessive delay, allowed by current Texas law, Petitioner contends that his confinement is unlawful, and Petitioner challenges Article 46B.0095(a) of the Texas Code of Criminal Procedure as being unconstitutional under the Due Process Clause of the 14th Amendment to the Federal Constitution. Under Texas law, discussed above and below, there is no time limitation from the point a defendant is ordered to be sent to the hospital to the time he is physically transported and placed inside the hospital, other than the time of the maximum punishment for the charged offense. Petitioner is currently detained by the State of Texas under an indictment in the instant case. CR-8-12. Petitioner Valero was detained at the El Paso County Jail Annex and has been detained since his arrest on August 5, 2020, and was not transferred to the State hospital until June 21, 2023-awaiting a competency restoration hospitalization of not-to-exceed 120 days. On its face, this is unjust.

Doctors' Examinations

Valero was initially examined by Dr. Jason Dunham on November 13, 2020. Dr. Dunham provided his report on December 16, 2020. Based on Dr. Dunham's report, the trial court by order committed Valero to the state hospital for 120 days. The court entered that order, without objection, on January 12, 2021. The order of commitment of Valero to be committed to the state hospital was for his competency restoration treatment. While

Valero was awaiting transport to the state hospital, Valero was reexamined by Dr. Cynthia Rivera on September 29, 2021, nearly a year after Dunham's examination on November 13, 2020. Based upon Dr. Rivera's new report, dated October 17, 2021, the trial court ordered, without objection, that Petitioner Valero was competent to stand trial. The new order of the court is dated November 1, 2021.

On December 3, 2021, Dr. Dunham reexamined Valero to determine whether Valero was legally insane at the time of the commission of the alleged offense; however, Dr. Dunham again opined that Valero was not competent to stand trial, and, therefore, Dunham was unable to proceed with a mental status examination reference legal insanity. Dr. Dunham's final report is dated January 7, 2022. Based upon Dunham's new report, the trial court, without objection, entered a new order committing Valero to the state hospital for a period of 120 days for his competency restoration treatment. The date of the trial court's most recent order is January 25, 2022. Appendix V.

When Petitioner Valero was first declared incompetent to stand trial, on January 12, 2021, he was placed on the Texas Clearing House list. On November 21, 2021, when Valero was declared competent, he was removed from that list. When he was again declared incompetent on January 25, 2022, Valero was placed at the end of the list, and his waiting period for his competency restoration transport to the state hospital started all over again. It is important to note that from January 12, 2021, to November 1, 2021, some 10 months, the State of Texas did not transport Valero to the state hospital. The trial court and the 8th court blame Valero for requesting a second competency exam. Valero had been detained so long that a second and third exam were required because of the extensive passage of time by the State of Texas to place Valero at and inside the state hospital. It is suggested that this blame is misplaced. Perhaps the State of Texas needs to build more hospitals. The cost-benefit analysis, hospitals versus jails, is onerous and ponderous.

Valero's most recent commitment to the HHSC State Hospital, for a 120-day commitment, is found in the Court's order of January 25, 2022. CR-180; Appendix V. Valero argues that the State of Texas should not be able to detain an incompetent defendant for an unreasonable amount of time for transportation to the hospital—as it has done in the case at bar. Article 46B.0095(a) of the Texas Code of Criminal Procedure does not have any legitimate mechanism to force the State Hospital to accept delivery of the incompetent defendant within a reasonably specific amount of time. There is no time limit when the delivery of Valero to the state hospital is supposed to take place, other than the time of the maximum amount of time for the

charged offense. Defendant argues that this failure to restrict the amount of time between the order of the court committing Defendant to the state hospital and to the time of his actual physical delivery to the State Hospital violates the Federal Constitution, Due Process Clause. Valero argues that there must be specific time constraints imposed via state statute, other than the maximum period of punishment for the charged offense, for the state statute to withstand constitutional muster under the Due Process Clause of the 14th Amendment. Juan Valero is charged with assault on a peace officer, The punishment range for the charged second-degree felony, is up to 20 years of confinement. TPC 22.01(b)(1), TPC 12.42(a). The only limitation to transport Valero to the state hospital is the maximum amount of punishment, in our case, of 20 years. Please see below:

> **Art. 46B.0095. MAXIMUM PERIOD OF COMMITMENT OR PROGRAM PARTICIPATION DETERMINED BY MAXIMUM TERM FOR OFFENSE. (a) A defendant may not, under Subchapter D or E or any other provision of this chapter, be committed to a mental hospital or other inpatient or residential facility or to a jail-based competency restoration program, ordered to participate in an outpatient competency restoration or treatment program, or subjected to any combination of inpatient treatment, outpatient competency restoration or treatment program participation, or jail-based competency restoration under this chapter for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried, except that if the defendant is charged with a misdemeanor and has been ordered only to participate in an outpatient competency restoration or treatment program under Subchapter D or E, the maximum period of restoration is two years.**

For first degree felonies, the maximum is life. TPC 12.32.

Juan Valero argues that 46B.0095(a) TCCP violates the Due Process Clause of the 14th Amendment because Article 46B.0095(a) allows the State up to 20 years to deliver Valero to the State Hospital. Valero cited, to the lower courts, the 9th Circuit case of Trueblood v. Washington State, 15-35462, 9th Circuit, May 6, 2016; RR7-31. Trueblood deals with the problems in the administration of competency law in the State of Washington, as well as in the United States. In Washington State, time limits are set to have the defendant evaluated for competency. In the case at bar, Valero is concerned that the only time limitation, in Texas, and for transportation to the hospital, is the time of the maximum punishment for the crime, in our case, 20 years.

The 8th court does not envision a due process problem. Valero respectfully disagrees.

Under Texas law, 6th Amendment speedy trial is not cognizable via state habeas. See Ex parte Barnett, 424 S.W.3d 809, 811 (Tex.App.-Waco 2014, no pet.). Valero has already asserted his speedy trial rights.

Cites in Clerks Record.

07/13/2021 Motion for Speedy Transportation to Hospital CR58. CR139.
09/09/2021 2nd Motion for Speedy Transportation to Hospital CR61. CR146.
09/09/2021 Motion for Speedy Trial CR65. CR142.
10/07/2021 2nd Motion for Speedy Trial CR78. CR153.

According to Texas law, excessive and unreasonable bond issues, such as raised in the instant case, are cognizable via pretrial writ. Ex parte Hicks, 262 S.W.3d 387, 389 (Tex.App.-Waco 2008, no pet.). Valero has been unable to post his bond because he is indigent and because his bond is excessive. Valero contends that Article 46B.0095(a) violates the Due Process Clause of the 14th Amendment as applied to him and as applied to all others who are similarly situated to him. Juan Valero awaits transport to the State Hospital for competency restoration treatment. The Texas 8th Court of Appeals, in effect, says, let him wait; he has no substantive due process right to be sent to the hospital within a reasonable period. On the contrary, the Federal 5th Circuit Court recognizes a substantive due process right concerning a prisoner's detention. According to Taylor v. Leblanc, 5th Circuit, No. 21-30625, February 14, 2023:

> **The Fourteenth Amendment guarantees that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. § 1. So it should go without saying that the government cannot hold a prisoner without the legal authority to do so, for that would "deprive" a person of his "liberty . . . without due process of law." Id. Consistent with these principles, "[o]ur precedent establishes that a jailer has a duty to ensure that inmates are timely released from prison." Porter v. Epps, 659 F.3d 440, 445 (5th Cir. 2011). "Detention of a prisoner thirty days beyond the expiration of his sentence in the absence of a facially valid court order or warrant constitutes a deprivation of due process." Douthit v. Jones, 619**

F.3d 527, 532 (5th Cir. 1980). See also Crittindon v. LeBlanc, 37 F.4th 177, 188 (5th Cir. 2022) ("[I]t is without question that holding without legal notice a prisoner for a month beyond the expiration of his sentence constitutes a denial of due process.").

Another case also worthy of review, also written by the 5th Circuit Court of Appeals, is Harris v. Clay County, No. 21-60456, 5th Circuit, July 11, 2022. The Harris opinion begins as:

When a defendant is found incompetent to stand trial with no reasonable expectation of restored competency, the state must either civilly commit the defendant or release him. Jackson v. Indiana, 406 U.S. 715, 738 (1972). That simple commit-or-release rule was not followed in this case. Steven Harris was found incompetent to stand trial, and his civil commitment proceeding was dismissed. Yet Harris stayed in jail for six more years. This suit challenges his years-long detention when there was no basis to hold him. We consider whether his jailers are entitled to qualified immunity.

The Court ultimately concluded that the jailers were not entitled to qualified immunity: "As the law has long recognized, "[i]gnorance and alibis by a jailer should not vitiate the rights of a man entitled to his freedom." Whirl, 407 F.2d at 792." Id. at 20.

Harris is a civil case; nonetheless, fundamental principles of due process of law still apply. That is, Valero suggests that the State should not be able to warehouse an incompetent defendant in jail and in a state of limbo without due process restrictions. Valero hopes he does not stay in jail for six more years while he is incompetent and awaiting transport to the state hospital for competency restoration treatment. Valero has already filed speedy trial motions and motions for speedy transport to the hospital. The Texas courts contend that Valero has no due process rights while he awaits transport to the state hospital.

Contrary to the opinion of the Texas courts, in the case of Trueblood, supra, the 9th Circuit finds a due process right regarding an incompetent defendant. The Texas 8th Court takes no heed of Trueblood. According to Trueblood v. Washington State, 9th Circuit, No. 15-35462; March 6, 2016:

I. Due Process Reasonableness Governs the Timing of Competency Evaluations

We begin with the premise that due process analysis governs pretrial detention: "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." Zadvydas v. Davis, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (setting presumptively reasonable time limits on immigration detention); see also Lopez–Valenzuela v. Arpaio, 770 F.3d 772, 777–80 (9th Cir.2014) (en banc) (summarizing case law applying substantive due process to the fundamental liberty interests of pretrial detainees).

This principle was reinforced in Mink, where we held that "[p]retrial detainees, whether or not they have been declared unfit to proceed, have not been convicted of any crime. Therefore, constitutional questions regarding the . circumstances of their confinement are properly addressed under the due process clause of the Fourteenth Amendment." 322 F.3d at 1120. Addressing the circumstance of individuals who had been evaluated and found incompetent, but were awaiting treatment, we held that waiting "in jail for weeks or months violates . due process rights because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals." Id. at 1122.

Mink adopted the framework set out in two Supreme Court cases: Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972) and Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). In Jackson, the Supreme Court articulated a general "rule of reasonableness" limiting the duration of pretrial detention for incompetent defendants and requiring, at a minimum, "that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." 406 U.S. at 733, 738. Thus, "[w]hether the substantive due process rights of incapacitated criminal defendants have been violated must be determined by balancing their liberty interests in freedom from incarceration and in restorative treatment against the legitimate interests of the state." Mink, 322 F.3d at 1121 (citing Youngberg, 457 U.S. at 321).

Although the specifics of the calculus may vary, the framework set out in Jackson, and applied to restorative competency services in Mink, is equally applicable to individuals awaiting competency evaluations. Weighing the parties' respective interests, there must be a "reasonable relation" between the length of time from the

court order to the inception of the competency evaluation.

Essentially for the first time on appeal, DSHS argues that the district court applied the wrong constitutional provision to Trueblood's claims because the more specific Sixth Amendment speedy trial right supersedes substantive due process analysis where plaintiffs challenge delay, rather than the fact or conditions of confinement.[4] We exercise our "limited discretion to consider purely legal arguments raised for the first time on appeal," Lahr v. Nat'l Transp. Safety Bd., 569 F.3d 964, 980 (9th Cir.2009) (citations omitted), in order to put to rest the state's effort to shift the focus of the litigation and because consideration of the legal issue at this stage will not prejudice the class members.

The Sixth Amendment is ill-suited to the claim on appeal. Unlike in Sixth Amendment cases, these class members do not seek relief from prejudicial delays in their criminal prosecutions. Their complaint is that they should receive a timely determination of competency—a go or no-go decision on whether their criminal proceedings will move forward and whether they are eligible for restorative services. Many of them will never be tried or might not be tried until after a lengthy restorative treatment process. Their focus is not the guarantee of a speedy trial.

To determine whether there has been a speedy trial violation, courts balance the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In United States v. Sutcliffe, we excluded delays due to competency issues from both the statutory and constitutional speedy trial analysis in part because "the delays were all either directly caused by Defendant or . were deemed necessary in the interests of justice." 505 F.3d 944, 957 (9th Cir.2007). Our sister circuits are in accord that competency-related delays are not relevant to the speedy trial inquiry. We reject the state's argument that the Sixth Amendment, not the Due Process Clause, provides the framework for Trueblood's claims.

Trueblood, above, at pages 5-6.

The Texas 8th Court does indicate that:

The State sympathized with Petitioner's concern over the current wait times but argued it was not a matter of unnecessary delay; rather, the delay was due to an inadequate number of available beds at the state hospitals. It further argued that Petitioner, who

was a danger to the community, was properly being held pursuant to the court's commitment order under chapter 46B (which Petitioner did not challenge).

Opinion, pages 2-3.

Valero thanks the Court and State for its sympathy; however, it is and was of little consolation.

QUESTION 2: IS THE ISSUE IN NUMBER I. ABOVE COGNIZABLE BY WRIT OF CERTIORARI TO THE SUPREME COURT BECAUSE IS IT CAPABLE OF REPETITION YET EVADING REVIEW?

CAPABLE OF REPETITION YET EVADING REVIEW

The Texas Court of Criminal Appeals has not addressed Petitioner Valero's contention that the merits of Valero's due process argument should be addressed because Valero's case is the classic example of capable of repetition yet evading review. Petitioner Valero attempts to persuade the Honorable Supreme Court of the United States that this issue is of significance and moment and is a sign of the times which needs to be addressed and remedied by the Highest Court in the Land.

The Court of Criminal Appeals decided this case on July 19, 2023. The mandate was issued on August 16, 2023. The Court of Criminal Appeals accepted Petitioner Valero's petition for discretionary review on May 18, 2023. The Court of Criminal Appeals was to decide the merits of Valero's due process contention. The State, to avoid the issue, filed a motion to dismiss on mootness based upon the fact that Valero was finally transferred to the State hospital for competency restoration. Valero opposed this motion based upon the fact that the issue was capable of repetition yet evading review. The Court of Criminal Appeals swiftly granted the State's motion to dismiss, and the Court did not render an opinion on the merits. A copy of that decision appears at Appendix IIIB. A copy of Valero's motion in opposition to the State's motion to dismiss for mootness is found at Appendix IV.

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The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

According to the Cornell Law School, an excellent source for criminal law practitioners, [Cornell Law School: https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/capable-of-repetition-yet-evading-review]:

> **The Supreme Court has generally declined to deem cases moot that present issues or disputes that are "capable of repetition, yet evading review." See, e.g., Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1976 (2016); Turner v. Rogers, 564 U.S. 431, 439–41 (2011); This exception to the mootness doctrine applies "only in exceptional situations" in which (1) "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration;" and (2) "there is a reasonable expectation that the same complaining party will be subject to the same action again." Kingdomware Techs., 136 S. Ct. at 1976 (quoting Spencer, 523 U.S. at 17); United States v. Juvenile Male, 564 U.S. 932, 938 (2011) (per curiam) (quoting Spencer, 523 U.S. at 17). See also, e.g., Sanchez-Gomez, 138 S. Ct. at 1540 (same). According to the Court, if this exception to mootness did not exist, then certain types of time-sensitive controversies would become effectively unreviewable by the courts. See, e.g., Sosna v. Iowa, 419 U.S. 393, 400 (1975) ("[T]he case before us is one in which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion."**
>
> **The classic example of a dispute that is "capable of repetition, yet evading review" is a pregnant woman's constitutional challenge to an abortion regulation. See Roe v. Wade, 410 U.S. 113, 125 (1973) (quoting S. Pac. Terminal Co. v. ICC, 219 U.S.**

> **498, 515 (1911)). Once a woman gives birth, abortion is no longer an option for terminating that particular pregnancy. However, litigation of national political significance can rarely be fully resolved in a mere nine months; "the normal 266-day human gestation period is so short that [a] pregnancy will come to term before" the parties and the court could realistically litigate a constitutional challenge to an abortion statute to its conclusion. Thus, if a challenge to an abortion regulation became moot as soon as the challenger gave birth, "pregnancy litigation seldom w[ould] survive much beyond the trial stage, and appellate review w[ould] be effectively denied." Because the Supreme Court has decided that "[o]ur law should not be that rigid," the Court ruled in its 1973 opinion in Roe v. Wade that "[p]regnancy provides a classic justification for a conclusion of nonmootness." The Roe Court reasoned that, because "[p]regnancy often comes more than once to the same woman, and . . . if man is to survive, it will always be with us," challenges to the constitutionality of abortion statutes usually will not become moot at the conclusion of an individual challenger's pregnancy. Id. (quoting S. Pac. Terminal Co., 219 U.S. at 515). See also Singleton v. Wulff, 428 U.S. 106, 117 (1976) ("A woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is 'capable of repetition yet evading review.'") (quoting Roe, 410 U.S. at 124–25).**

[Cornell Law School: https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/capable-of-repetition-yet-evading-review].

Petitioner Juan Valero, and others similarly situated, should in no wise be forced to wait nearly three years to be sent to the Texas state hospital for a competency restoration treatment of 120 days. This issue is capable of repetition yet evading review because the Texas appellate process ultimately allows the State too much time to send an incompetent to the hospital for possible competency restoration. If the highest court of the United States does not intervene, the State of Texas will continue to unnecessarily delay the transfer of incompetent defendants, like Juan Valero, without providing sufficient resources (which Texas has) to promptly send them to the state hospital in a timely reasonable manner. The delay in the *Texas Clearing House* system violates due process and is misaligned with fundamental fairness and the rights and humane treatment of the mentally ill.

CONCLUSION:

Petitioner Juan Valero argues that he has a substantive due process right to be promptly sent to the hospital for competency restoration treatment and that the Texas' statutory scheme, Article 46B.0095(a) of the Code of Criminal Procedure, which only restricts this time by the maximum punishment for the crime charged, is unconstitutional under the Due Process Clause of the 14th Amendment. The cost of prompt transportation to the hospital, and the cost of the hospitalization of the mentally ill is surely significant, but this cost is a worthwhile cost and one that the government must bear. The citizenry, who are the government, must bear this cost for the reason of fundamental fairness. In the United States, our housing of the mentally ill in jails, rather than in hospitals, is an epidemic.

We should not revisit the days of Bedlam in the 1800's. For the above reasons, Petitioner Juan Valero respectfully moves that his writ of certiorari be granted. Petitioner thanks the Honorable Court.

PRAYER

Petitioner Juan Valero respectfully asks that a writ of certiorari issue to review the opinion and judgment entered by the Texas Court of Criminal Appeals on July 19, 2023. The mandate was issued by that court on August 16, 2023.

Based on the argument and authority provided above, it is respectfully requested that this Petition for Writ of Certiorari be granted. Petitioner thanks the Honorable Supreme Court of the United States and wishes the Honorable Court well.

Respectfully submitted,
/s/ Matthew DeKoatz

Matthew Rex DeKoatz
Counsel of Record for Petitioner Juan Valero

521 Texas Avenue
El Paso, Texas 79901
Tel. (915) 235-5330
mateodekoatz@yahoo.com

CERTIFICATE OF COMPLIANCE

This writ of certiorari contains 6094 words printed in a proportionally spaced typeface, Times New Roman, 12.

CERTIFICATE OF DELIVERY

I hereby certify that on the below date, I caused to delivered, via electronic means, a true and correct copy of the above instrument to: (1.) Mr. John Davis, (JDavis@epcounty.com) El Paso County District Attorney's Office; and (2.) Stacey Seoul, (information@spa.texas.gov) Prosecuting Attorney for the State of Texas.

/s/ Matthew Rex DeKoatz Date: September 9, 2023.

Matthew Rex DeKoatz, Attorney

Filed 10/6/2020 3:54 PM
NORMA FAVELA BARCELEAU
District Clerk
El Paso County
20200D04591

IN THE 210TH DISTRICT COURT
EL PASO COUNTY, TEXAS

THE STATE OF TEXAS

VS.

JUAN VALERO

DOB: October 18, 1982
OFFENSE: AGG ROBBERY
BOND AMT: 50,000.00

SO:
ARRESTED: 08/04/2020
WARRANT:
CAUSE NO. 20200D04591

ORDER APPOINTING ATTORNEY

Dear Public Defender,

YOU HAVE BEEN APPOINTED TO REPRESENT THE DEFENDANT IN THE ABOVE-STYLED AND NUMBERED CAUSE. THIS APPOINTMENT CONTINUES UNTIL CHARGES ARE DISMISSED, THE DEFENDANT IS ACQUITTED, APPEALS ARE EXHAUSTED TO THE 8TH COURT OF APPEALS, OR IN THE CASE OF A DEATH PENALTY CASE, COMPLETION OF THE DIRECT APPEAL TO THE COURT OF CRIMINAL APPEALS. THE ATTORNEY MAY BE RELIEVED OF THIS APPOINTMENT OR REPLACED BY OTHER COUNSEL ONLY AFTER A FINDING OF GOOD CAUSE IS ENTERED ON THE RECORD (ART. 26.04 (j) (2). YOU ARE NOT RELIEVED OF THIS APPOINTMENT AND CANNOT BE RELIEVED OF THIS DUTY EVEN BY SUBSTITUTION WITHOUT A MOTION AND ORDER SIGNED BY THE COURT (SEE LOCAL RULE 5.03).

ATTACHED IS THE "ATTORNEY VERIFICATION" FORM WHICH MUST BE FILLED OUT, SIGNED BY DEFENDANT AND ATTORNEY AND RETURNED TO THE DEPARTMENT WHICH MADE THE APPOITNMENT:

BY FAX AT (546-2019) OR HAND-DELIVER/MAIL

1. COUNCIL OF JUDGES ADM. 500 E. SAN ANTONIO #101, EL PASO TX 79901(FAX NUMBER 546-2019)
2. THE OFFICE OF COURT ADMINISTRATION, 500 E. SAN ANTONIO #302, EL PASO, TEXAS 79901 (FAX NUMBER 526-2192
3. THE TRIAL COURT

BY THE END OF THE FIRST WORKING DAY FOLLOWING RECEIPT OF THE APPOINTMENT NOTIFICATION.

A TRIAL COURT MAY REPLACEAN ATTORNEY WHO FAILS TO CONTACT THE DEFENDANT NOT LATER THAN THE END OF THE FIRST WORKING DAY AFTER THE DATE ON WHICH THE ATTORNEY IS APPOINTED AND TO INTERVIEW THE DEFENDANT AS SOON AS PRACTICABLE AFTER THE ATTORNEY IS APPOINTED. A MAJORITY OF THE JUDGES (TRYING CRIMINAL CASES) MAY REMOVE AN ATTORNEY WHO INTENTIONALLY OR REPEATEDLY VIOLATES CCP ARTICLE 26.04 (j)(l) FROM THE APPOINTMENT WHEEL. CCP ART. 26.04 (k)

IF THE DEFENDANT IS IN CUSTODY IN THE EL PASO COUNTY DETENTION FACILITY OR THE ANNEX, YOU SHALL MAKE EVERY REASONABLE EFFORT TO CONTACT THE DEFENDANT NOT LATER THAN THE DEFENDANT NOT LATER THAN THE END OF THE FIRST WORKING DAY AFTER THE DATE ON WHICH YOU ARE APPOINTED AND TO INTERVIEW THE DEFENDANT AS SOON AS PRACTICABLE AFTER YOU ARE APPOINTED. WHEN THE CASE IS DISPOSED OR THE DEFENDANT FAILS TO SHOW UP TO COURT, PLEASE FILE THE VOUCHER WITH THE TRIAL COURT WITHIN 45 DAYS. YOU MAY USE ADDITIONAL SHEETS IF NECESSARY. INVESTIGATION AND CERTAIN OTHER EXPENSES MUST HAVE PRIOR COURT APPROVAL. SEE ATTORNEY REIMBURSEMENT GUIDELINES.

SIGNED on this the 6th day of October, 2020

ALYSSA G. PEREZ, JUDGE
210TH JUDICIAL DISTRICT COURT

JAIL: Annex
BONDING COMPANY:
PUBLIC DEFENDER
500 E SAN ANTONIO STE 500
EL PASO TX 79901
915-546-8186

Art. 26.04. PROCEDURES FOR APPOINTING COUNSEL. (a) The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for, charged with, or taking an appeal from a conviction of a misdemeanor punishable by confinement or a felony. The procedures must be consistent with this article and Articles 1.051, 15.17, 15.18, 26.05, and 26.052 and must provide for the priority appointment of a public defender's office as described by Subsection (f). A court shall appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under Subsection (f), (f-1), (h), or (i). The court shall appoint attorneys from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list.

(b) Procedures adopted under Subsection (a) shall:

(1) authorize only the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county, or the judges' designee, to appoint counsel for indigent defendants in the county;

(2) apply to each appointment of counsel made by a judge or the judges' designee in the county;

(3) ensure that each indigent defendant in the county who is charged with a misdemeanor punishable by confinement or with a felony and who appears in court without counsel has an opportunity to confer with appointed counsel before the commencement of judicial proceedings;

(4) require appointments for defendants in capital cases in which the death penalty is sought to comply with any applicable requirements under Articles 11.071 and 26.052;

(5) ensure that each attorney appointed from a public appointment list to represent an indigent defendant perform the attorney's duty owed to the defendant in accordance with the adopted procedures, the requirements of this code, and applicable rules of ethics; and

(6) ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory.

(c) Whenever a court or the courts' designee authorized under Subsection (b) to appoint counsel for indigent defendants in the county determines for purposes of a criminal proceeding that a defendant charged with or appealing a conviction of a felony or a misdemeanor punishable by confinement is indigent or that the interests of justice require representation of a defendant in the proceeding, the court or the courts' designee shall appoint one or more practicing attorneys to represent the defendant in accordance with this subsection and the procedures adopted under Subsection (a). If the court or the courts' designee determines that the defendant does not speak and understand the English language or that the defendant is deaf, the court or the courts' designee shall make an effort to appoint an attorney who is capable of communicating in a language understood by the defendant.

(d) A public appointment list from which an attorney is appointed as required by Subsection (a) shall contain the names of qualified attorneys, each of whom:

(1) applies to be included on the list;

(2) meets the objective qualifications specified by the judges under Subsection (e);

(3) meets any applicable qualifications specified by the Texas Indigent Defense Commission; and

(4) is approved by a majority of the judges who established the appointment list under Subsection (e).

(e) In a county in which a court is required under Subsection (a) to appoint an attorney from a public appointment list:

(1) the judges of the county courts and statutory county courts trying misdemeanor cases in the county, by formal action:

(A) shall:

(i) establish a public appointment list of attorneys qualified to provide representation in the county in misdemeanor cases punishable by confinement; and

(ii) specify the objective qualifications necessary for an attorney to be included on the list; and

(B) may establish, if determined by the judges to be appropriate, more than one appointment list graduated according to the degree of seriousness of the offense, the attorneys' qualifications, and whether representation will be provided in trial court proceedings, appellate proceedings, or both; and

(2) the judges of the district courts trying felony cases in the county, by formal action:

(A) shall:

(i) establish a public appointment list of attorneys qualified to provide representation in felony cases in the county; and

(ii) specify the objective qualifications necessary for an attorney to be included on the list; and

(B) may establish, if determined by the judges to be appropriate, more than one appointment list graduated according to the degree of seriousness of the offense, the attorneys' qualifications, and whether representation will be provided in trial court proceedings, appellate proceedings, or both.

(f) In a county with a public defender's office, the court or the courts' designee shall give priority in appointing that office to represent the defendant in the criminal proceeding, including a proceeding in a capital murder case. However, the court is not required to appoint the public defender's office if:

(1) the court makes a finding of good cause for appointing other counsel, provided that in a capital murder case, the court makes a finding of good cause on the record for appointing that counsel;

(2) the appointment would be contrary to the office's written plan under Article 26.044;

(3) the office is prohibited from accepting the appointment under Article 26.044(j); or

(4) a managed assigned counsel program also exists in the county and an attorney will be appointed under that program.

(f-1) In a county in which a managed assigned counsel program is operated in accordance with Article 26.047, the managed assigned counsel program may appoint counsel to represent the defendant in accordance with the guidelines established for the program.

(g) A countywide alternative program for appointing counsel for indigent defendants in criminal cases is established by a formal action in which two-thirds of the judges of the courts designated under this subsection vote to establish the alternative program. An alternative program for appointing counsel in misdemeanor and felony cases may be established in the manner provided by this subsection by the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county. An alternative program for appointing counsel in misdemeanor cases may be established in the manner provided by this subsection by the judges of the county courts and statutory county courts trying criminal cases in the county. An alternative program for appointing counsel in felony cases may be established in the manner provided by this subsection by the judges of the district courts trying criminal cases in the county. In a county in which an alternative program is established:

(1) the alternative program may:

(A) use a single method for appointing counsel or a combination of methods; and

(B) use a multicounty appointment list using a system of rotation; and

(2) the procedures adopted under Subsection (a) must ensure that:

(A) attorneys appointed using the alternative program to represent defendants in misdemeanor cases punishable by confinement:

(i) meet specified objective qualifications for that representation, which may be graduated according to the degree of seriousness of the offense and whether representation will be provided in trial court proceedings, appellate proceedings, or both; and

(ii) are approved by a majority of the judges of the county courts and statutory county courts trying misdemeanor cases in the county;

(B) attorneys appointed using the alternative program to represent defendants in felony cases:

(i) meet specified objective qualifications for that representation, which may be graduated according to the degree of seriousness of the offense and whether representation will be provided in trial court proceedings, appellate proceedings, or both; and

(ii) are approved by a majority of the judges of the district courts trying felony cases in the county;

(C) appointments for defendants in capital cases in which the death penalty is sought comply with the requirements of Article 26.052; and

(D) appointments are reasonably and impartially allocated among qualified attorneys.

(h) Subject to Subsection (f), in a county in which an alternative program for appointing counsel is established as provided by Subsection (g) and is approved by the presiding judge of the administrative judicial region, a court or the courts' designee may appoint an attorney to represent an indigent defendant by using the alternative program. In establishing an alternative program under Subsection (g), the

judges of the courts establishing the program may not, without the approval of the commissioners court, obligate the county by contract or by the creation of new positions that cause an increase in expenditure of county funds.

(i) Subject to Subsection (f), a court or the courts' designee required under Subsection (c) to appoint an attorney to represent a defendant accused or convicted of a felony may appoint an attorney from any county located in the court's administrative judicial region.

(j) An attorney appointed under this article shall:

(1) make every reasonable effort to contact the defendant not later than the end of the first working day after the date on which the attorney is appointed and to interview the defendant as soon as practicable after the attorney is appointed;

(2) represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel for the defendant after a finding of good cause is entered on the record;

(3) with respect to a defendant not represented by other counsel, before withdrawing as counsel for the defendant after a trial or the entry of a plea of guilty:

(A) advise the defendant of the defendant's right to file a motion for new trial and a notice of appeal;

(B) if the defendant wishes to pursue either or both remedies described by Paragraph (A), assist the defendant in requesting the prompt appointment of replacement counsel; and

(C) if replacement counsel is not appointed promptly and the defendant wishes to pursue an appeal, file a timely notice of appeal; and

(4) not later than October 15 of each year and on a form prescribed by the Texas Indigent Defense Commission, submit to the county information, for the preceding fiscal year, that describes the percentage of the attorney's practice time that

was dedicated to work based on appointments accepted in the county under this article and Title 3, Family Code.

(k) A court may replace an attorney who violates Subsection (j)(1) with other counsel. A majority of the judges of the county courts and statutory county courts or the district courts, as appropriate, trying criminal cases in the county may remove from consideration for appointment an attorney who intentionally or repeatedly violates Subsection (j)(1).

(l) Procedures adopted under Subsection (a) must include procedures and financial standards for determining whether a defendant is indigent. The procedures and standards shall apply to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail.

(m) In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

(n) A defendant who requests a determination of indigency and appointment of counsel shall:

(1) complete under oath a questionnaire concerning his financial resources;

(2) respond under oath to an examination regarding his financial resources by the judge or magistrate responsible for determining whether the defendant is indigent; or

(3) complete the questionnaire and respond to examination by the judge or magistrate.

(o) Before making a determination of whether a defendant is indigent, the court shall request the defendant to sign under oath a statement substantially in the following form:

"On this _____ day of _____, 20 ___, I have been advised by the (name of the court) Court of my right to representation by counsel in connection with the charge pending against me. I am without means to employ counsel of my own choosing and I hereby request the court to appoint counsel for me. (signature of the defendant)"

(p) A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. If there is a material change in financial circumstances after a determination of indigency or nonindigency is made, the defendant, the defendant's counsel, or the attorney representing the state may move for reconsideration of the determination.

(q) A written or oral statement elicited under this article or evidence derived from the statement may not be used for any purpose, except to determine the defendant's indigency or to impeach the direct testimony of the defendant. This subsection does not prohibit prosecution of the defendant under Chapter 37, Penal Code.

(r) A court may not threaten to arrest or incarcerate a person solely because the person requests the assistance of counsel.

Acts 1965, 59th Leg., p. 317, ch. 722, Sec. 1, eff. Jan. 1, 1966. Amended by Acts 1987, 70th Leg., ch. 979, Sec. 2, eff. Sept. 1, 1987.

Filed 9/2/2022 4:51 PM
NORMA FAVELA BARCELEAU
District Clerk
El Paso County
20200D05272

IN THE 384th DISTRICT COURT
EL PASO COUNTY, TEXAS

EX PARTE *

*

* CAUSE NO. 20200D05272

JUAN VALERO *

On this 2 day of September, 2022, came to be considered an evidentiary hearing pursuant to the Court's issuance of a Writ of Habeas Corpus. Subsequent to evidentiary hearing on said date, and the evidence and argument presented by Applicant and the State of Texas, and their counsel, the Court makes the following order:

(1) Applicant, JUAN VALERO is restrained of his liberty by the State of Texas pursuant to an indictment and warrant of arrest in the instant cause.

_____(2) The Court hereby GRANTS the requested relief by Applicant, and JUAN VALERO is ordered released from custody.

OR

✓(2) The Court does hereby DENY the requested relief by Applicant with objection duly noted for the record.

Signed this 2nd day of September, 2022.

_____
THE HONORABLE JUDGE OF SAID COURT

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

EX PARTE: JUAN VALERO	§	No. 08-22-00172-CR
	§	Appeal from the
	§	384th Judicial District Court
	§	of El Paso County, Texas
	§	(TC# 20200D05272)

MEMORANDUM OPINION

Appellant, Juan Valero, appeals the trial court's denial of his pretrial habeas application. In a single issue, Appellant contends his continued detention while awaiting competency restoration treatment is unconstitutional under the Fourteenth Amendment's Due Process Clause. We affirm.

BACKGROUND

The underlying facts are not in dispute. In September 2020, Appellant was indicted for two counts of aggravated assault on a public servant and one count of aggravated robbery. Appellant was arrested on August 5, 2020 and has remained in custody since. Some two months after his arrest, Appellant filed a motion requesting a competency psychiatric evaluation under chapter 46B on the Texas Code of Criminal Procedure. On December 16, 2020, following his forensic

psychological evaluation of him, Dr. Jason Dunham filed a report opining Appellant was incompetent to stand trial. Thereafter, on January 12, 2021, the competency court entered an order finding Appellant was incompetent to stand trial and committing him to the "HHSC State Hospital Forensic Admissions Clearinghouse or any other appropriate facility" for a period of 120 days, to commence upon Appellant's admission into the state facility and for the specific purpose of restoring his competency. On May 25, 2021, Appellant filed a habeas-writ application, alleging his confinement under the trial court's commitment order had become unlawful because he had yet to be transferred to a state facility. The writ application demanded Appellant's immediate release. At the first hearing on the writ, held on June 9, 2021, the trial court heard arguments from the parties and took judicial notice of the district clerk's file in the underlying causes. At the time, Appellant was number twenty-two on the waitlist and was refusing the psychotropic medications being offered to him at the county jail.[1] Recognizing that state hospitals do "phenomenal" work, even "chang[ing] people," writ counsel urged the trial court to order the state hospital to admit Appellant immediately and thus stop the "torment" of the delusions cause by his mental illness. In short, while he acknowledged the impact the pandemic surely had on wait times for detainees awaiting competency restoration treatment, writ counsel argued the waiting period for Appellant's transfer had violated the "unnecessary delay"[2] mandate of the state's competency statutes, such that his confinement was now unlawful.

The State sympathized with Appellant's concern over the current wait times but argued it was not a matter of unnecessary delay; rather, the delay was due to an inadequate number of

[1] Appellant did not dispute Dr. Dunham's opinion that he would regain competency if properly treated.

[2] Writ counsel did not cite any particular authority for requirement of such "unnecessary delay." We note that this language appears in article 46B.091, governing a county's jail-based competency restoration program. *See* TEX. CODE CRIM PROC. art. 46B.091(i)(2)(A), (j-1).

available beds at the state hospitals. It further argued that Appellant, who was a danger to the community, was properly being held pursuant to the court's commitment order under chapter 46B (which Appellant did not challenge).

After expressing its own frustration with the inadequacy of available resource and the legislature's failure to address this often-recurring issue—pandemic or not—the trial court explained it could not release Appellant unless he began taking his medication. At writ counsel's request, the trial court deferred ruling on the writ and entertained further argument and evidence over the course of various subsequent hearings.

At the next hearing, held on August 4, 2021, writ counsel reiterated his claim that Appellant was being unlawfully detained. Relevant to this appeal, writ counsel maintained that, barring his immediate transfer to a state hospital for competency restoration treatment, the Due Process Clause required the trial court to either release Appellant on his own recognizance or dismiss the indictments pending against him. Appellant was still number twenty-two on the waitlist and continued to refuse his medication at the county jail. It was undisputed, however, that due to the violent nature of the charges pending against him, as well as that of his criminal history, Appellant could only be transferred to Vernon hospital, a secure facility. There being no statutory mechanism by which to expedite Appellant's transfer, the trial court indicated it could neither order Appellant's release nor command that he be bumped to the front of the line for those awaiting treatment. Still, the trial court advised writ counsel he could continue to re-urge his writ claim until he made a final ruling.

The following month, the trial court again heard the writ application. The trial court urged Appellant to take his medication, as he was still refusing treatment at the county jail. At that time, upon writ counsel's request, the trial court ordered that Appellant be re-examined for competency.

Dr. Cynthia Rivera found Appellant competent to stand trial, and in late October 2021, Appellant was transferred back to the referring court. But when he was later re-examined by Dr. Dunham for the purposes of pursuing an insanity defense, Appellant was once more found to be incompetent to stand trial,[3] and his case was again transferred to the competency court. On January 25, 2022, based on Dr. Dunham's report, the competency court entered a second 120-day commitment order to the "HHSC State Hospital Forensic Admissions Clearinghouse or any other appropriate facility" for competency restoration treatment. As a result, Appellant—who had risen to number four on the waitlist before being re-examined by Dr. Rivera at writ counsel's request—was placed at the back of the line to await transfer to Vernon.

At the next two hearings, held on May 5, 2022, and August 24, 2022, respectively, writ counsel reiterated his claim that the delay in transferring Appellant to Vernon rendered his continued detention unlawful under the Due Process Clause of the Fourteenth Amendment, such that he should be immediately either transferred or released. Between May and August 2022, Appellant progressed from number forty-two on the waitlist to number thirty-nine.[4]

Ultimately, because Appellant did not qualify for outpatient competency restoration treatment , and because writ counsel (despite being offered the opportunity to do so) did not otherwise present to the trial court a plan suitable for ensuring Appellant's compliance with psychiatric treatment if released on his own recognizance (thus helping to ensure his and the community's safety), the trial court denied the writ application. This appeal followed.

---

[3] Again, Dr. Dunham opined Appellant would regain competency if properly treated, which opinion Appellant does not dispute.

[4] While no testimony regarding the status of Appellant's transfer was presented at any of the hearings, the parties and the trial court agreed on their respective representations about Appellant's status on the waitlist throughout the proceedings. Because the parties do not dispute the facts, we accept them as true.

DISCUSSION

Standard of review and applicable law

We generally review a trial court's pretrial habeas ruling for an abuse of discretion. *Ex parte Wheeler*, 203 S.W.3d 317, 326 (Tex. Crim. App. 2006). However, when the question is one of application of law to the facts, we review the trial court's ruling de novo. *See Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999) (en banc).

It is well settled that due process does not allow an incompetent defendant to be put to trial. *See* Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) ("We have repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" (quoting Medina v. California, 505 U.S. 437, 453 (1992))); Turner v. State, 422 S.W.3d 676, 688-89 (Tex. Crim. App. 2013). "The Legislature has codified this due-process requirement by setting forth a substantive and procedural framework for making competency determinations to ensure that legally incompetent criminal defendants do not stand trial." *Boyett. State*, 545 S.W.3d 556, 563 (Tex. Crim. App. 2018) (citing TEX. CODE CRIM PROC. arts. 46B.003-005). Once found incompetent to stand trial, a defendant may be either committed to a mental-health facility for examination and competency restoration treatment or, if eligible, released on bail for participation in such treatment on an outpatient basis. *See* TEX. CODE CRIM PROC. art. 46B.071. But when, as here, the defendant is charged with a "violent" felony, the court must commit him to a facility designated by the Health and Human Services Commission for a period not to exceed 120 days. *See id.* arts. 17.032(11); 46B.001(2); 46B.073(b)(2), (c). The court must then place the defendant in the custody of the sheriff for transportation to the competency restoration facility. *Id.* art. 46B.075.

Appellant's pretrial writ claim is not cognizable

In his sole issue, Appellant contends the trial court erred in denying his habeas application because the continued delay in transferring him to a state hospital violates his due-process rights. The State argues, inter alia, that Appellant's claim is not cognizable as presented in a pretrial writ. We agree.

When a litigant's success on a pretrial writ claim would not deprive the trial court of jurisdiction or require his immediate release, the claim is not cognizable in a habeas writ. *Ex parte Ingram*, 533 S.W.3d 887, 892 (Tex. Crim. App. 2017) ("Except when double jeopardy is involved, pretrial habeas is not available when the question presented, even if resolved in the defendant's favor, would not result in immediate release."); *Ex parte Thompson*, No. 10-22-00162-CR, 2022 WL 5239730, at *3 (Tex. App.—Waco Oct. 5, 2022, no pet.) (mem. op., not designated for publication); *Ex parte McVade*, Nos. 03-17-00207-CR, 03-17-00208-CR, 03-17-00209-CR, 2017 WL 4348151, at *3 (Tex. App.—Austin Sept. 28, 2017, no pet.) (mem. op., not designated for publication). "Applying judicial restraint, a substantive due process analysis begins with a careful description of the asserted right[,] as the courts are required to exercise the utmost care whenever asked to 'break new ground in this field.'" *Ex parte Thompson*, 2022 WL 5239730 at *3 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). And while Appellant contends he is entitled to immediate release because his due-process rights have been violated, "[no] section of Chapter 46B, create[s] a substantive right that impacts [Appellant's] liberty interests." *See id.* at *4; *see also* TEX. CODE CRIM PROC. art. 46B.012 (providing that non-compliance with chapter does not entitle defendant to dismissal of the charges).

In essence, Appellant attempts to assert a fundamental right to immediate or speedy transfer to a mental-health facility. Alternatively, what he seeks is the enforcement and implementation of

the trial court's commitment order, albeit a speedier one. But "[n]o such fundamental right exists in the United States Constitution, nor has the United States Supreme Court identified such a fundamental right." *See Ex parte Thompson*, 2022 WL 5239730 at *4. Appellant points us to no legal authority to support this attempted assertion of a fundamental right, and he otherwise presents no challenge to the trial court's commitment order, the trial court's compliance with the applicable statutory procedures, or the statutory provisions under which he was detained for competency restoration in the first place. *See id.* at *1, 4 (where, as here, appellant did not challenge validity of competency commitment order, instead asserting a due-process violation from the delay in commencement of competency restoration treatment, appellant's pretrial writ claim is not cognizable because he does not have a fundamental due-process right to being transferred to a mental-health facility within a "reasonable" time); *see also Ex parte McVade*, 2017 WL 4348151 at *3-5 (appellant's pretrial writ claim was not cognizable where he did not challenge the validity of the court's commitment order or the statutory procedures for competency restoration commitment and treatment, in effect seeking enforcement of the commitment order by requesting immediate transfer to Vernon hospital or else be immediately released).

Thus, because Appellant fails to identify a substantive due-process right that has been violated by his continued detention or show he is entitled to immediate release, he does not present a cognizable pretrial writ claim.

Even if cognizable, Appellant fails to show his due-process rights have been violated

Even if Appellant's pretrial writ claim were cognizable, he has failed to demonstrate a violation of his due-process rights. Appellant specifically contends chapter 46B is unconstitutional as it applies to him because it allows the State to hold him "indefinitely." But any assertion that Appellant is being held "indefinitely" is not supported by this record, which shows that between

the time of the first writ hearing in June 2021 and Appellant's transfer back to the referring court in October 2021, Appellant progressed from number twenty-two to number four on the waitlist. As noted by the trial court, further delay in Appellant's progression on the waitlist was caused by the intervening finding of competency, which resulted from writ counsel's request for a second evaluation. When Appellant was again found incompetent to stand trial in January 2022, he had to be returned to the back of the line. Nonetheless, it is undisputed that between the final two hearings in May and August of 2022, Appellant had gone from number forty-two to number thirty-nine on the waitlist.[5]

Nor do the cases cited in Appellant's brief advance his claim. Appellant generally cites to *Trueblood v. Washington State Dept. of Social and Health Servs.*, 822 F.3d 1037 (9th Cir. 2016), but he does so only to state that "[i]n Washington State, time limits are set to have the Defendant evaluated for competency." Appellant does not explain how this statement supports his claim that the *post*-evaluation waiting period for transfer to a state facility for competency restoration services in this case is unconstitutional.[6] *See Wells v. State*, No. 08-09-00110-CR, 2010 WL 3009306, at *3 (Tex. App.—El Paso July 30, 2010, pet. ref'd) (not designated for publication) ("Merely setting out a general legal principle with supporting case law is not sufficient to adequately brief a point of error. Rather, Appellant bears the burden of providing a supporting argument, analyzing the cases cited[,] and applying those cases to the facts at hand."). Appellant then cites to *Harris v. Clay*

[5] There is no indication in the record of how long the waitlist was when Appellant was placed on it a second time.

[6] In *Trueblood*, the Ninth Circuit reversed the district court's permanent injunction requiring the Washington Department of Social and Health Services to provide both competency evaluation and restoration services within seven days. *Trueblood,* 822 F.3d at 1040, 1046. Noting that the interests of "pre- and post-evaluation class members" were distinct in nature, that "federal courts have often looked to a state's own policies for guidance" in determining what constitutes a reasonable time for evaluations, and that the district court's injunction failed to consider the legislature's intervening imposition of a fourteen-day deadline for conducting competency evaluations, the Court held that Due Process does not compel the state to conduct in-jail competency evaluations within seven days. *See Trueblood*, 822 F.3d at 1044-45.

County, 47 F.4th 271, 272 (5th Cir. 2022), for the proposition that the state must either civilly commit an incompetent defendant or otherwise release him. Appellant's reliance on *Harris*'s commit-or-release rule is misplaced. Citing to *Jackson v. Indiana* 406 U.S. 715, 738 (1972), the *Harris* Court held that the defendant's six-year-long, continued detention violated due process where there was *no reasonable expectation* of restored competency. *See Harris*, 47 F.4th at 279. Such is not the case before us. Appellant does not dispute Dr. Dunham's opinion that, with the proper competency treatment, he will regain his competency; indeed, the impetus for the writ application was writ counsel's desire to get Appellant treated and his competency restored.

Appellant provides no "analysis, discussion, or argument in support of the cases he cites, explaining how they apply to the facts [of this] case," *Wells*, 2010 WL 3009306 at *3, nor does he otherwise explain how the legal authority provided supports a finding of a due-process violation.

Thus, even if Appellant's claim were cognizable in a pretrial writ, Appellant has failed to demonstrate on appeal that the trial court's denial of the requested relief violated Appellant's due-process rights. For this additional reason, we overrule Appellant's sole issue on appeal.

CONCLUSION

Having overruled Appellant's sole point of error, we affirm.[7]

YVONNE T. RODRIGUEZ, Chief Justice

February 13, 2023

[7] The trial court certified Appellant's right to appeal in this case, but the certification does not bear Appellant's signature indicating that he was informed of his rights to appeal and to file a pro se petition for discretionary review with the Texas Court of Criminal Appeals. *See* TEX. R. APP. P. 25.2(d). The certification is defective and has not been corrected by Appellant's attorney or the trial court. To remedy this defect, this Court ORDERS Appellant's attorney, pursuant to TEX. R. APP. P. 48.4, to send Appellant a copy of this opinion and this Court's judgment, to notify Appellant of his right to file a pro se petition for discretionary review, and to inform Appellant of the applicable deadlines. *See* TEX. R. APP. P. 48.4; 68. Appellant's attorney is further ORDERED to comply with all of the requirements of TEX. R. APP. P. 48.4.

Before Rodriguez, C.J., Soto, J., and Marion, C.J. (Ret.)
Marion, C.J. (Ret.) (Sitting by Assignment)

(Do Not Publish)

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

PD-0123-23

EX PARTE JUAN VALERO, Appellant

ON DISCRETIONARY REVIEW
FROM THE EIGHTH COURT OF APPEALS
EL PASO COUNTY

Per curiam.

O P I N I O N

Appellant is charged with aggravated assault and aggravated robbery. On January 12, 2021, the competency court found Appellant incompetent and committed him for 120 days to restore competency. Appellant filed a pretrial habeas application on May 25, 2021, complaining that he had not yet been transferred to a hospital and requesting immediate release. The trial court denied habeas relief on September 2, 2022. The Court of Appeals affirmed. *Ex parte Valero*, No. 08-22-00172-CR, LEXIS 901 (Tex. App. – El Paso February 13, 2023, pet. granted). We granted Appellant's petition for discretionary review.

The State has now filed a motion to dismiss, noting that Appellant was transferred to Vernon State Hospital on June 21, 2023. Accordingly, we grant the State's motion and dismiss Appellant's petition.

FILED: July 19, 2023

DO NOT PUBLISH

PD-0123-23
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/2/2023 11:50 AM
Accepted 7/5/2023 10:36 AM
DEANA WILLIAMSON
CLERK

NO. PD-0123-23

FILED
COURT OF CRIMINAL APPEALS
7/5/2023
DEANA WILLIAMSON, CLERK

IN THE
COURT OF CRIMINAL APPEALS

EX PARTE JUAN VALERO

PETITIONER JUAN VALERO'S REPLY TO THE STATE'S MOTION TO DISMISS

To the Honorable Justices of the Texas Court of Criminal Appeals:

Comes now Petitioner Juan Valero and respectfully files this his reply to the State's motion to dismiss this case. In support of same, Petitioner Juan Valero shows:

The State seeks to dismiss the instant appeal on grounds that the controversy is now moot. Petitioner Valero disagrees.

Petitioner Valero challenges Article 46B.0095 of the Texas Code of Criminal Procedure as violative of due process of law; this issue remains extant before the Honorable Court and continues to be ripe for controversy.

The State has taken nearly three years to send Valero to the State Hospital. Because of the State's delay, only attributable to the State, the State now contends that the instant controversy is moot. In short, the State does not have clean hands, and this issue is of moment in Texas jurisprudence, not only for Juan Valero, but for all others similarly situated to Juan Valero. Further, this case is the classic example of ***capable of repetition yet evading review***. The Court should, in the interest of justice, continue to hear this case. Otherwise, the State reaps the benefit of its own dilatory action and inaction.

Valero also challenges and objects to the State's alleged proof in support of its motion. The State attaches purported evidence to its motion and requests the Court to consider this as evidence. This is not allowed. Without an abatement of this case, the State cannot recreate, add to, or subtract from the existing record. In short, the State's purported affidavit is not legally competent evidence.

Further, it is significant that the State sought and was granted an extension to file the State's brief on PDR, yet, instead of filing a brief, the State is busy, busy, busy preparing and filing a motion to dismiss rather than filing a reply brief. The State's additional delay is patent, and the State's objective appears to be delay and run out the clock—and render the issue moot. It would appear that the State would have an interest in sending incompetent defendants to the State hospital for speedy treatment. Based on the State's motion to dismiss, this sure does not appear to be the case.

Prayer for Relief: Wherefore, Petitioner Juan Valero prays that the Honorable Court of Criminal Appeals DENY in all things the State's motion to dismiss the instant case.

Respectfully Submitted,

For Petitioner Juan Valero,

____/S/_Mateo DeKoatz_____
Mateo DeKoatz
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ACKNOWLEDGMENT OF SERVICE AND WORD COUNT
Undersigned counsel hereby acknowledges that:

through the Court's electronic filing system, a separate copy of the above reply was served on Mr. John Davis, jdavis@epcounty.com, Assistant District Attorney, for the El Paso County District Attorney; and,

CERTIFICATE OF COMPLIANCE
This Motion contains 512 words printed in a proportionally spaced typeface, Times New Roman, 14.

/s/ Mateo DeKoatz
M. DeKoatz, Attorney
Date: July 2, 2023.

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Matthew DeKoatz
Bar No. 05722300
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Envelope ID: 77163462
Filing Code Description: Other Document
Filing Description: REPLY TO STATE'S MOTION TO DISMISS
Status as of 7/5/2023 10:36 AM CST

Associated Case Party: JUAN VALERO

Name	BarNumber	Email	TimestampSubmitted	Status
MATTHEW DEKOATZ		mateodekoatz@yahoo.com	7/2/2023 11:50:48 AM	SENT

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
384TH COMPETENCY COURT

THE STATE OF TEXAS §

JUAN VALERO CAUSE NO. 20200D04591

ORDER FOR COMMITMENT

On this date the above referenced cause was brought before the court for consideration of the defendant's competency to stand trial, a jury was not requested by either party and neither party opposed a finding of incompetency. The Defendant is charged with AGG ROBBERY. The court enters the following finding and orders pursuant to the Code of Criminal Procedure, Articles 46B.005, 46B.054, 46B.073(c), 46B.075:

THAT THE DEFENDANT IS INCOMPETENT TO STAND TRIAL.

It is the Order of this Court that the Defendant JUAN VALERO shall be committed to the HHSC State Hospital Forensic Admissions Clearinghouse or any other appropriate facility **for 120 DAYS** for further examination and treatment toward the specific objective of attaining competency to stand trial.

This order is effective the date this order is signed. The 120 days will commence upon the date the defendant is admitted to the State Facility. This order remains valid.

It is further ordered that the Sheriff of El Paso County, Texas transport the Defendant at the earliest opportunity to the so ordered facility.

Signed this 25 day of JANUARY, 2022.

JUDGE PATRICK M. GARCIA

ATTORNEY FOR THE STATE

ATTORNEY FOR THE DEFENSE

PD-0123-23
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/4/2023 3:01 PM
Accepted 3/6/2023 8:39 AM
DEANA WILLIAMSON
CLERK

NO. PD-0123-23

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JUAN VALERO, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from El Paso County
No. 08-22-00172-CR
Appeal in Cause No. 20200D05272

* * * * *

PETITION FOR DISCRETIONARY REVIEW
Oral Argument not requested.

* * * * *

MATTHEW REX DEKOATZ
For Petitioner, Juan Valero:
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Amendment Due Process Clause to the Federal Constitution, because of the lack of reasonable time restriction from time of the order committing the incompetent to the State Hospital to the time in which the incompetent is actually at the hospital.

4. The Court of Appeals has decided an important question of State Law that has not been settled in the State of Texas—whether Art. 46B.0095 of the Texas Code of Criminal Procedure is violative of 14th Amendment Due Process Clause because of the lack of reasonable time restriction from the time of the order committing the incompetent to the State Hospital to the actual time the incompetent is at the hospital.

IDENTITY OF TRIAL COURT, INTERESTED PARTIES AND COUNSEL

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IDENTITY OF TRIAL COURT:

JUDGE AT HABEAS PROCEEDINGS BELOW:
The Honorable Patrick Garcia
Judge 384th District Court
El Paso County, Texas
500 East San Antonio, 9th Floor

INDEX OF AUTHORITIES

CASES

OTHER STATUTES AND AUTHORITIES

NO. PD-0123-23

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JUAN VALERO, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from El Paso County
No. 08-22-00172-CR
Appeal in Cause No. 20200D05272

DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the Petitioner Juan Valero, Defendant and Appellant below, by and through his undersigned counsel, in the above-styled and numbered cause, and respectfully urges the Court to grant discretionary review in this case, pursuant to the Rules of Court.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully does not request oral argument.

PRELIMINARY STATEMENT OF THE CASE

The instant case has been in a state of limbo since Juan Valero's incarceration of August 5, 2020. Through today's date, Valero has not been sent to the hospital, and Valero is still confined in the El Paso County Jail Annex. Valero has been found incompetent and ordered committed to the custody of the HHSC State Hospital Texas Division of Mental Retardation and Mental Health, yet Valero is still in custody at the El Paso County Jail Annex. Valero ultimately filed his writ to challenge his detention as unlawful under the Due Process Clause of the 14th amendment to the Federal Constitution. The Court opined that Valero's pretrial writ claiming a due process violation, via bond habeas, was not cognizable, and, if cognizable, no Due Process right was violated:

The 8th Court states:

> In essence, Appellant attempts to assert a fundamental right to immediate or speedy transfer to a mental-health facility. Alternatively, what he seeks is the enforcement and implementation of the trial court's commitment order, albeit a speedier one. But "[n]o such fundamental right exists in the United States Constitution, nor has the United States Supreme Court identified such a fundamental right." See Ex parte Thompson, 2022 WL 5239730 at *4. Opinion, page 6 and 7.
>
> Thus, even if Appellant's claim were cognizable in a pretrial writ, Appellant has failed to demonstrate on appeal that the trial court's denial of the requested relief violated Appellant's due-process rights. Opinion, page 9.

Ex parte Thompson states:

> We determine, as a threshold matter, whether the issues raised in the habeas petition should be addressed prior to determining whether the merits of the claim should be resolved. Ellis, 309 S.W.3d at 79; Barnett, 424 S.W.3d at 810. **Generally, a claim is cognizable in a pretrial habeas petition if the granting of such a petition would deprive the trial court of the power to proceed and result in the habeas petitioner's immediate release, such as if the courts determine that the statute under which a defendant is being held is unconstitutional.** Ex parte Smith, 185 S.W.3d 887, 892 (Tex. Crim. App. 2006); Barnett, 424 S.W.3d at 810. Pretrial habeas relief is reserved for those cases which, if resolved in the petitioner's favor, must result in the petitioner's immediate release. Ex parte Walsh, 530 S.W.3d 774, 778 (Tex. App.-Fort Worth, 2017, no pet.) (emphasis added). Ex parte Thompson, 2022 WL 5239730 at *4.

A copy of the lower court's opinion is attached as Appendix 1.

STATEMENT OF PROCEDURAL HISTORY

On the 13th day of February, 2023, the Honorable 8th Court of Appeals affirmed the trial court's judgment denying relief under Valero's pretrial writ of habeas corpus. The Court opined that Valero's pretrial writ claiming a due process violation via bond habeas was not cognizable. The Court further opined that even if the issue were cognizable, Valero was not entitled to relief. Valero timely and respectfully files this petition for discretionary review.

GROUNDS PRESENTED FOR REVIEW

1. By holding that before a pretrial facial challenge to the constitutionality of a statute is cognizable, a favorable resolution of the challenge must result in immediate release on *all* charges in the indictment, the Eighth Court of Appeals has decided an important question of state law that has not been, but should be, settled by this Court. Ex parte Couch, PD-0422-22, pending before the Court of Criminal Appeals. PDR accepted on September 22, 2022.
   This same issue is also before this Court in a pending Petition for Discretionary Review following a decision with similar reasoning by the Tenth Court of Appeals. See Ex parte Hammons, 646 S.W.3d 929 (Tex. App.—Waco, pet. filed), No. PD-0322-22 (Tex. Crim. App. July 21, 2022).

2. Additionally, by requiring favorable resolution of a pretrial-habeas facial constitutional challenge to result in immediate release on all charges, the opinion below conflicts with this Court's decisions in Ex parte Meyer, 73 S.W.3d 264 (Tex. Crim. App. 2002); Ex parte Crisp 66 S.W.2d 944 (Tex. Crim. App. 1983); Ex parte Watkins, 73 S.W.3d 264 (Tex. Crim. App. 2002); Ex parte Ellis, 309 S.W.3d 71 (Tex. Crim. App. 1994); and Ex parte Perry, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016).

3. The Court of Appeals has decided an important question of Federal Constitutional Law that has not been settled in the State of Texas, whether there is a cognizable due process violation, under the Due Process Clause of the 14th Amendment to the Federal Constitution, because of the lack of reasonable time restriction from the time of the order committing the incompetent to the State Hospital to the time in which the incompetent is actually at the hospital.

4. The Court of Appeals has decided an important question of State Law that has not been settled in the State of Texas—whether Art. 46B.0095 of the Texas Code of Criminal Procedure is violative of the 14th Amendment Due Process because of the lack of reasonable time restriction from the time of the order committing the incompetent to the State Hospital to the actual time the incompetent is at the hospital.

ARGUMENT

INTRODUCTION:

Because this is a case of first impression, there is no Texas authority which directly answers the question at hand. The current Texas Statutory scheme allows the State to detain an incompetent defendant up to the time of the maximum penalty of the charged offense, in this case 20 years, to get the incompetent to the hospital. In the case at bar, the commitment order is for 120 days. Valero has been detained awaiting transport to the hospital for nearly 2 years. Petitioner argues that this is a due process violation and that the only solution is his immediate release. Petitioner argues that the statute, Tex. Code Crim. Proc. art. 46B.0095(a), is unconstitutional, and should be given review by this Court under Ex parte Thompson (cited by the 8th Court), and under Ex parte Couch and under Ex parte Hammons, cited above and below. The 8th Court does not address the real question and the real problem—Texas is taking too long to send incompetents to the hospital for competency restoration. The length of the wait for transportation to restoration treatment is well-longer than the time ordered for treatment at/in the hospital. This delay is not Juan Valero's fault; it is the fault of the State of Texas. In this writer's view, this problem needs to be remedied by PDR and by the Supervisory Authority of the Court of Criminal Appeals. According to Texas law, the length of time that the State may confine Valero in a

residential-care facility is governed by Article 46B.0095(a) of the Code of Criminal Procedure : a defendant may not ... be committed to a mental hospital or other inpatient or residential facility ... for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried....Tex. Code Crim. Proc. art. 46B.0095(a)…Note: there is no time limitation in which the State is required to actually send Valero to the hospital, other than the 20 year maximum punishment range. Valero is charged with a second-degree felony, which carries a 2-to-20-year prison sentence. Texas Penal Code, Sections 29.02 and 12.33.

The instant case has been in a state of limbo since Juan Valero's incarceration of August 5, 2020. Through today's date, Valero has not been sent to the hospital and Valero is still confined in the El Paso County Jail Annex. Valero has been found incompetent and ordered committed to the custody of the HHSC State Hospital Texas Division of Mental Retardation and Mental Health, yet Valero is still in custody at the El Paso County Jail Annex. Valero ultimately filed his writ in order to challenge his detention as unlawful under the Due Process Clause of the 14th Amendment to the Federal Constitution. Because of this excessive delay, allowed by current Texas law, Petitioner contends that his confinement is unlawful, and Petitioner challenges Article 46B.0095(a) of the Texas Code of Criminal Procedure as being unconstitutional under the Due Process Clause of the 14th Amendment to the Federal Constitution. Under Texas law, discussed below, there is virtually no

time limitation from the point a defendant is ordered to be sent to the hospital to the time he is actually physically inside the hospital.

Petitioner is currently detained under an indictment in the instant case. CR-8-12. Mr. Valero is detained at the El Paso County Annex and has been so detained since his arrest of August 5, 2020. His most recent commitment to the HHSC State Hospital for a period of 120-days is found in the Court's order of January 25, 2022. CR-180. Valero has not yet been delivered to that hospital. Valero argues that the State of Texas cannot detain an incompetent defendant for an unreasonable amount of time for transportation to the hospital—as it has done in the case at bar. Article 46B.0095(a) of the Texas Code of Criminal Procedure does not have any legitimate mechanism to force the State Hospital to accept delivery of the incompetent defendant within a reasonably specific amount of time. Delivery is supposed to take place as soon as practicable. Defendant argues that this failure to restrict the amount of time between the date of the order and the date of physical delivery to the State Hospital violates the 14th Amendment to the Federal Constitution, Due Process Clause. Valero argues that there must be specific time constraints imposed by the State in order to withstand constitutional muster. Juan Valero is charged with assault on a peace officer. The punishment range for the charged second-degree felony is up to 20 years of confinement. TPC 22.01(b)(1), TPC 12.42(a). The only time

limitation on transport is the maximum amount of punishment, in our case, 20 years. Please see below.

> Art. 46B.0095. MAXIMUM PERIOD OF COMMITMENT OR PROGRAM PARTICIPATION DETERMINED BY MAXIMUM TERM FOR OFFENSE. (a) A defendant may not, under Subchapter D or E or any other provision of this chapter, be committed to a mental hospital or other inpatient or residential facility or to a jail-based competency restoration program, ordered to participate in an outpatient competency restoration or treatment program, or subjected to any combination of inpatient treatment, outpatient competency restoration or treatment program participation, or jail-based competency restoration under this chapter for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried, except that if the defendant is charged with a misdemeanor and has been ordered only to participate in an outpatient competency restoration or treatment program under Subchapter D or E, the maximum period of restoration is two years.

For first degree felonies, the maximum is life. TPC 12.32.

Juan Valero argues that 46B.0095(a) TCCP violates the Due Process Clause of the 14th Amendment because this law allows the State up to 20 years to deliver Valero to the State Hospital. Valero cited, to the 8th Court, Trueblood v. Washington State, 15-35462, 9th Circuit, May 6, 2016; RR7-31. Trueblood deals with the problems in the administration of competency law in the State of Washington, as well as in the United States. In Washington State, time limits are set to have the defendant evaluated for competency. In the case at bar, Valero is concerned that the

only time limitation, in Texas, and for transportation to the hospital, is the time of the maximum punishment for the crime, in our case, 20 years. The 8th court does not see a due process problem. Valero respectfully disagrees.

Another case of moment and written by the 5th Circuit Court of Appeals is: Harris v. Clay County, No. 21-60456, 5th Circuit, July 11, 2022. The Harris opinion begins:

> Before Smith, Costa, and Wilson, *Circuit Judges*.
> Gregg Costa, *Circuit Judge*:
>
> When a defendant is found incompetent to stand trial with no reasonable expectation of restored competency, the state must either civilly commit the defendant or release him. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). That simple commit-or-release rule was not followed in this case. Steven Harris was found incompetent to stand trial, and his civil commitment proceeding was dismissed. **Yet Harris stayed in jail for six more years.** This suit challenges his years-long detention when there was no basis to hold him. We consider whether his jailers are entitled to qualified immunity.

The Court ultimately concluded that the jailers were not entitled to qualified immunity:

> As the law has long recognized, "[i]gnorance and alibis by a jailer should not vitiate the rights of a man entitled to his freedom." *Whirl*, 407 F.2d at 792.
>
> Id. at 20.

Harris is, a civil case; nonetheless, fundamental principles still apply; that is, when someone is incompetent, the State cannot warehouse that individual in jail and in a state of limbo without due process restrictions. Valero hopes he does not stay in jail for six more years while he is incompetent and awaiting transport to the State Hospital for competency restoration.

Valero has already filed speedy trial motions and motions for speedy transport to the hospital:

Cites in Clerks Record.

07/13/2021 Motion for Speedy Transportation to Hospital CR58. CR139.
09/09/2021 2nd Motion for Speedy Transportation to Hospital CR61. CR146.
09/09/2021 Motion for Speedy Trial CR65. CR142.
10/07/2021 2nd Motion for Speedy Trial CR78. CR153.

Speedy trial is not cognizable via habeas. See Ex parte Barnett, 424 S.W.3d 809, 811 (Tex.App.-Waco 2014, no pet.). Bond matters, as in the instant case, are cognizable via pretrial writ. Ex parte Hicks, 262 S.W.3d 387, 389 (Tex.App.-Waco 2008, no pet.). Valero has been unable to post his bond as excessive. Valero contends that Article 46B.0095(a) violates the Due Process Clause of the 14th Amendment as applied to him and as to all others who are similarly situated to him.

Juan Valero awaits transport to Vernon State Hospital for competency

restoration. The 8th court, in effect, says, let him wait; he has no substantive due process right to be sent to the hospital within a reasonable period. On the contrary, the Federal 5th Circuit Court recognizes a substantive due process right concerning a prisoner's detention. According to Taylor v. Leblanc, 5th Circuit, No. 21-30625, February 14, 2023:

> The Fourteenth Amendment guarantees that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. § 1. So it should go without saying that the government cannot hold a prisoner without the legal authority to do so, for that would "deprive" a person of his "liberty . . . without due process of law." Id. Consistent with these principles, "[o]ur precedent establishes that a jailer has a duty to ensure that inmates are timely released from prison." Porter v. Epps, 659 F.3d 440, 445 (5th Cir. 2011). "Detention of a prisoner thirty days beyond the expiration of his sentence in the absence of a facially valid court order or warrant constitutes a deprivation of due process." Douthit v. Jones, 619 F.3d 527, 532 (5th Cir. 1980). See also Crittindon v. LeBlanc, 37 F.4th 177, 188 (5th Cir. 2022) ("[I]t is without question that holding without legal notice a prisoner for a month beyond the expiration of his sentence constitutes a denial of due process.").

In the case of Trueblood, supra, the 9th Circuit finds a due process right regarding an incompetent defendant. The 8th Court takes no heed of Trueblood. According to Trueblood v. Washington State, 9th Circuit, No. 15-35462; March 6, 2016:

I. Due Process Reasonableness Governs the Timing of Competency Evaluations

We begin with the premise that due process analysis governs pretrial detention: "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." Zadvydas v. Davis, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (setting presumptively reasonable time limits on immigration detention); see also Lopez–Valenzuela v. Arpaio, 770 F.3d 772, 777–80 (9th Cir.2014) (en banc) (summarizing case law applying substantive due process to the fundamental liberty interests of pretrial detainees).

This principle was reinforced in Mink, where we held that "[p]retrial detainees, whether or not they have been declared unfit to proceed, have not been convicted of any crime. Therefore, constitutional questions regarding the . circumstances of their confinement are properly addressed under the due process clause of the Fourteenth Amendment." 322 F.3d at 1120. Addressing the circumstance of individuals who had been evaluated and found incompetent, but were awaiting treatment, we held that waiting "in jail for weeks or months violates . due process rights because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals." Id. at 1122.

Mink adopted the framework set out in two Supreme Court cases: Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972) and Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). In Jackson, the Supreme Court articulated a general "rule of reasonableness" limiting the duration of pretrial detention for incompetent defendants and requiring, at a minimum, "that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." 406 U.S. at 733, 738. Thus, "[w]hether the substantive due process rights of incapacitated criminal defendants have been violated must be determined by balancing their liberty interests in freedom from incarceration and in restorative treatment against the legitimate interests of the state." Mink, 322 F.3d at 1121 (citing Youngberg, 457 U.S. at 321).

Although the specifics of the calculus may vary, the framework set out in Jackson, and applied to restorative competency services in Mink, is equally applicable to individuals awaiting competency evaluations. Weighing the parties' respective interests, there must be a "reasonable relation" between the length of time from the court order to the inception of the competency evaluation.

Essentially for the first time on appeal, DSHS argues that the district court applied the wrong constitutional provision to Trueblood's claims because the more specific Sixth Amendment speedy trial right supercedes substantive due process analysis where plaintiffs challenge delay, rather than the fact or conditions of confinement.[4] We exercise our "limited discretion to consider purely legal arguments raised for the first time on appeal," Lahr v. Nat'l Transp. Safety Bd., 569 F.3d 964, 980 (9th Cir.2009) (citations omitted), in order to put to rest the state's effort to shift the focus of the litigation and because consideration of the legal issue at this stage will not prejudice the class members.

The Sixth Amendment is ill-suited to the claim on appeal. Unlike in Sixth Amendment cases, these class members do not seek relief from prejudicial delays in their criminal prosecutions. Their complaint is that they should receive a timely determination of competency—a go or no-go decision on whether their criminal proceedings will move forward and whether they are eligible for restorative services. Many of them will never be tried, or might not be tried until after a lengthy restorative treatment process. Their focus is not the guarantee of a speedy trial.

To determine whether there has been a speedy trial violation, courts balance the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In United States v. Sutcliffe, we excluded delays due to competency issues from both the statutory and constitutional speedy trial analysis in part because "the delays were all either directly caused by Defendant or . were deemed necessary in the interests of justice." 505 F.3d 944, 957 (9th Cir.2007). Our sister circuits are in accord that competency-related delays are not relevant to the speedy trial inquiry.[5] We reject the state's argument that the Sixth Amendment, not the Due Process Clause, provides the framework for Trueblood's claims.

Trueblood, above, at pages 5-6.

The 8th Court does indicate:

> The State sympathized with Appellant's concern over the current wait times but argued it was not a matter of unnecessary delay; rather, the delay was due to an inadequate number of available beds at the state hospitals. It further argued that Appellant, who was a danger to the community, was properly being held pursuant to the court's commitment order under chapter 46B (which Appellant did not challenge).

Opinion, pages 2-3.

Valero thanks the State for its sympathy; however, Valero just wants to get to the state hospital. Please note that the Court of Criminal Appeals has, on October 19, 2022, just granted PDR in Ex parte Couch, PD-0422-22, on the following basis:

> By holding that before a pretrial facial challenge to the constitutionality of a statute is cognizable, a favorable resolution of the challenge must result in immediate release on *all* charges in the indictment, the Second Court of Appeals has decided an important question of state law that has not been, but should be, settled by this Court. This same issue is also before this Court in a pending Petition for Discretionary Review following a decision with similar reasoning by the Tenth Court of Appeals. See Ex parte Hammons, 646 S.W.3d 929 (Tex. App.—Waco, pet. filed), No. PD-0322-22 (Tex. Crim. App. July 21, 2022). Additionally, by requiring favorable resolution of a pretrial-habeas facial constitutional challenge to result in immediate release on all charges, the opinion below conflicts with this Court's decisions in Ex parte Meyer, 73 S.W.3d 264 (Tex. Crim. App. 2002); Ex parte Crisp 66

> S.W.2d 944 (Tex. Crim. App. 1983); Ex parte Watkins, 73 S.W.3d 264 (Tex. Crim. App. 2002); Ex parte Ellis, 309 S.W.3d 71 (Tex. Crim. App. 1994); and Ex parte Perry, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016). Standard for Review. Review is de novo.

Appellant Couch's Petition, page 8-9.

Although the El Paso Court of Appeals readily dismisses the proposition that a criminal defendant under indictment and detention may make a constitutional attack via pretrial habeas, this same issue is now precisely before the Honorable Court of Criminal Appeals--whether that constitutional issue is cognizable is now an important question before the Honorable Court of Criminal Appeals. See Ex parte Couch and Ex parte Hammons, above.

CONCLUSION

Petitioner Juan Valero argues that he has a substantive due process right to be speedily sent to the hospital for competency restoration treatment and that Texas' statutory scheme, Article 46B.0095(a) of the Code of Criminal Procedure, which only restricts this time by the maximum punishment for the crime charged, is unconstitutional under the Due Process clause of the 14th Amendment. For the above reasons, Petitioner Juan Valero respectfully moves that his petition for discretionary review be granted. Petitioner thanks the Honorable Court of Criminal Appeals and

wishes the Honorable Court well.

PRAYER FOR RELIEF

For all the above reasons, Petitioner Juan Valero respectfully prays that the Honorable Court of Criminal Appeals grant his petition for discretionary review.

Respectfully submitted,

For Petitioner, Juan Valero

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CERTIFICATE OF COMPLIANCE

This PDR contains 3,946 words printed in a proportionally spaced typeface, Times New Roman, 14.

ACKNOWLEDGMENT OF SERVICE

Undersigned counsel hereby acknowledges that, through the Court's electronic filing system, a separate copy of the above PDR was served on Mr. William Hicks, District Attorney for El Paso County, Texas, by serving Ms. Lillian Stroud, Chief of the Appellate Division.

/s/ Matthew DeKoatz
Matthew DeKoatz, Attorney
Date: March 4, 2023

APPENDIX

(Opinion by the Court of Appeals-attached.)

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

EX PARTE: JUAN VALERO	§	No. 08-22-00172-CR
	§	Appeal from the
	§	384th Judicial District Court
	§	of El Paso County, Texas
	§	(TC# 20200D05272)

MEMORANDUM OPINION

Appellant, Juan Valero, appeals the trial court's denial of his pretrial habeas application. In a single issue, Appellant contends his continued detention while awaiting competency restoration treatment is unconstitutional under the Fourteenth Amendment's Due Process Clause. We affirm.

BACKGROUND

The underlying facts are not in dispute. In September 2020, Appellant was indicted for two counts of aggravated assault on a public servant and one count of aggravated robbery. Appellant was arrested on August 5, 2020 and has remained in custody since. Some two months after his arrest, Appellant filed a motion requesting a competency psychiatric evaluation under chapter 46B on the Texas Code of Criminal Procedure. On December 16, 2020, following his forensic

psychological evaluation of him, Dr. Jason Dunham filed a report opining Appellant was incompetent to stand trial. Thereafter, on January 12, 2021, the competency court entered an order finding Appellant was incompetent to stand trial and committing him to the "HHSC State Hospital Forensic Admissions Clearinghouse or any other appropriate facility" for a period of 120 days, to commence upon Appellant's admission into the state facility and for the specific purpose of restoring his competency. On May 25, 2021, Appellant filed a habeas-writ application, alleging his confinement under the trial court's commitment order had become unlawful because he had yet to be transferred to a state facility. The writ application demanded Appellant's immediate release. At the first hearing on the writ, held on June 9, 2021, the trial court heard arguments from the parties and took judicial notice of the district clerk's file in the underlying causes. At the time, Appellant was number twenty-two on the waitlist and was refusing the psychotropic medications being offered to him at the county jail.[1] Recognizing that state hospitals do "phenomenal" work, even "chang[ing] people," writ counsel urged the trial court to order the state hospital to admit Appellant immediately and thus stop the "torment" of the delusions cause by his mental illness. In short, while he acknowledged the impact the pandemic surely had on wait times for detainees awaiting competency restoration treatment, writ counsel argued the waiting period for Appellant's transfer had violated the "unnecessary delay"[2] mandate of the state's competency statutes, such that his confinement was now unlawful.

The State sympathized with Appellant's concern over the current wait times but argued it was not a matter of unnecessary delay; rather, the delay was due to an inadequate number of

[1] Appellant did not dispute Dr. Dunham's opinion that he would regain competency if properly treated.

[2] Writ counsel did not cite any particular authority for requirement of such "unnecessary delay." We note that this language appears in article 46B.091, governing a county's jail-based competency restoration program. *See* TEX. CODE CRIM PROC. art. 46B.091(i)(2)(A), (j-1).

available beds at the state hospitals. It further argued that Appellant, who was a danger to the community, was properly being held pursuant to the court's commitment order under chapter 46B (which Appellant did not challenge).

After expressing its own frustration with the inadequacy of available resource and the legislature's failure to address this often-recurring issue—pandemic or not—the trial court explained it could not release Appellant unless he began taking his medication. At writ counsel's request, the trial court deferred ruling on the writ and entertained further argument and evidence over the course of various subsequent hearings.

At the next hearing, held on August 4, 2021, writ counsel reiterated his claim that Appellant was being unlawfully detained. Relevant to this appeal, writ counsel maintained that, barring his immediate transfer to a state hospital for competency restoration treatment, the Due Process Clause required the trial court to either release Appellant on his own recognizance or dismiss the indictments pending against him. Appellant was still number twenty-two on the waitlist and continued to refuse his medication at the county jail. It was undisputed, however, that due to the violent nature of the charges pending against him, as well as that of his criminal history, Appellant could only be transferred to Vernon hospital, a secure facility. There being no statutory mechanism by which to expedite Appellant's transfer, the trial court indicated it could neither order Appellant's release nor command that he be bumped to the front of the line for those awaiting treatment. Still, the trial court advised writ counsel he could continue to re-urge his writ claim until he made a final ruling.

The following month, the trial court again heard the writ application. The trial court urged Appellant to take his medication, as he was still refusing treatment at the county jail. At that time, upon writ counsel's request, the trial court ordered that Appellant be re-examined for competency.

Dr. Cynthia Rivera found Appellant competent to stand trial, and in late October 2021, Appellant was transferred back to the referring court. But when he was later re-examined by Dr. Dunham for the purposes of pursuing an insanity defense, Appellant was once more found to be incompetent to stand trial,[3] and his case was again transferred to the competency court. On January 25, 2022, based on Dr. Dunham's report, the competency court entered a second 120-day commitment order to the "HHSC State Hospital Forensic Admissions Clearinghouse or any other appropriate facility" for competency restoration treatment. As a result, Appellant—who had risen to number four on the waitlist before being re-examined by Dr. Rivera at writ counsel's request—was placed at the back of the line to await transfer to Vernon.

At the next two hearings, held on May 5, 2022, and August 24, 2022, respectively, writ counsel reiterated his claim that the delay in transferring Appellant to Vernon rendered his continued detention unlawful under the Due Process Clause of the Fourteenth Amendment, such that he should be immediately either transferred or released. Between May and August 2022, Appellant progressed from number forty-two on the waitlist to number thirty-nine.[4]

Ultimately, because Appellant did not qualify for outpatient competency restoration treatment , and because writ counsel (despite being offered the opportunity to do so) did not otherwise present to the trial court a plan suitable for ensuring Appellant's compliance with psychiatric treatment if released on his own recognizance (thus helping to ensure his and the community's safety), the trial court denied the writ application. This appeal followed.

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[3] Again, Dr. Dunham opined Appellant would regain competency if properly treated, which opinion Appellant does not dispute.

[4] While no testimony regarding the status of Appellant's transfer was presented at any of the hearings, the parties and the trial court agreed on their respective representations about Appellant's status on the waitlist throughout the proceedings. Because the parties do not dispute the facts, we accept them as true.

DISCUSSION

Standard of review and applicable law

We generally review a trial court's pretrial habeas ruling for an abuse of discretion. *Ex parte Wheeler*, 203 S.W.3d 317, 326 (Tex. Crim. App. 2006). However, when the question is one of application of law to the facts, we review the trial court's ruling de novo. *See Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999) (en banc).

It is well settled that due process does not allow an incompetent defendant to be put to trial. *See* Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) ("We have repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" (quoting Medina v. California, 505 U.S. 437, 453 (1992))); Turner v. State, 422 S.W.3d 676, 688-89 (Tex. Crim. App. 2013). "The Legislature has codified this due-process requirement by setting forth a substantive and procedural framework for making competency determinations to ensure that legally incompetent criminal defendants do not stand trial." *Boyett. State*, 545 S.W.3d 556, 563 (Tex. Crim. App. 2018) (citing TEX. CODE CRIM PROC. arts. 46B.003-005). Once found incompetent to stand trial, a defendant may be either committed to a mental-health facility for examination and competency restoration treatment or, if eligible, released on bail for participation in such treatment on an outpatient basis. *See* TEX. CODE CRIM PROC. art. 46B.071. But when, as here, the defendant is charged with a "violent" felony, the court must commit him to a facility designated by the Health and Human Services Commission for a period not to exceed 120 days. *See id.* arts. 17.032(11); 46B.001(2); 46B.073(b)(2), (c). The court must then place the defendant in the custody of the sheriff for transportation to the competency restoration facility. *Id.* art. 46B.075.

Appellant's pretrial writ claim is not cognizable

In his sole issue, Appellant contends the trial court erred in denying his habeas application because the continued delay in transferring him to a state hospital violates his due-process rights. The State argues, inter alia, that Appellant's claim is not cognizable as presented in a pretrial writ. We agree.

When a litigant's success on a pretrial writ claim would not deprive the trial court of jurisdiction or require his immediate release, the claim is not cognizable in a habeas writ. *Ex parte Ingram*, 533 S.W.3d 887, 892 (Tex. Crim. App. 2017) ("Except when double jeopardy is involved, pretrial habeas is not available when the question presented, even if resolved in the defendant's favor, would not result in immediate release."); *Ex parte Thompson*, No. 10-22-00162-CR, 2022 WL 5239730, at *3 (Tex. App.—Waco Oct. 5, 2022, no pet.) (mem. op., not designated for publication); *Ex parte McVade*, Nos. 03-17-00207-CR, 03-17-00208-CR, 03-17-00209-CR, 2017 WL 4348151, at *3 (Tex. App.—Austin Sept. 28, 2017, no pet.) (mem. op., not designated for publication). "Applying judicial restraint, a substantive due process analysis begins with a careful description of the asserted right[,] as the courts are required to exercise the utmost care whenever asked to 'break new ground in this field.'" *Ex parte Thompson*, 2022 WL 5239730 at *3 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). And while Appellant contends he is entitled to immediate release because his due-process rights have been violated, "[no] section of Chapter 46B, create[s] a substantive right that impacts [Appellant's] liberty interests." *See id.* at *4; *see also* TEX. CODE CRIM PROC. art. 46B.012 (providing that non-compliance with chapter does not entitle defendant to dismissal of the charges).

In essence, Appellant attempts to assert a fundamental right to immediate or speedy transfer to a mental-health facility. Alternatively, what he seeks is the enforcement and implementation of

the trial court's commitment order, albeit a speedier one. But "[n]o such fundamental right exists in the United States Constitution, nor has the United States Supreme Court identified such a fundamental right." *See Ex parte Thompson*, 2022 WL 5239730 at *4. Appellant points us to no legal authority to support this attempted assertion of a fundamental right, and he otherwise presents no challenge to the trial court's commitment order, the trial court's compliance with the applicable statutory procedures, or the statutory provisions under which he was detained for competency restoration in the first place. *See id.* at *1, 4 (where, as here, appellant did not challenge validity of competency commitment order, instead asserting a due-process violation from the delay in commencement of competency restoration treatment, appellant's pretrial writ claim is not cognizable because he does not have a fundamental due-process right to being transferred to a mental-health facility within a "reasonable" time); *see also Ex parte McVade*, 2017 WL 4348151 at *3-5 (appellant's pretrial writ claim was not cognizable where he did not challenge the validity of the court's commitment order or the statutory procedures for competency restoration commitment and treatment, in effect seeking enforcement of the commitment order by requesting immediate transfer to Vernon hospital or else be immediately released).

Thus, because Appellant fails to identify a substantive due-process right that has been violated by his continued detention or show he is entitled to immediate release, he does not present a cognizable pretrial writ claim.

Even if cognizable, Appellant fails to show his due-process rights have been violated

Even if Appellant's pretrial writ claim were cognizable, he has failed to demonstrate a violation of his due-process rights. Appellant specifically contends chapter 46B is unconstitutional as it applies to him because it allows the State to hold him "indefinitely." But any assertion that Appellant is being held "indefinitely" is not supported by this record, which shows that between

the time of the first writ hearing in June 2021 and Appellant's transfer back to the referring court in October 2021, Appellant progressed from number twenty-two to number four on the waitlist. As noted by the trial court, further delay in Appellant's progression on the waitlist was caused by the intervening finding of competency, which resulted from writ counsel's request for a second evaluation. When Appellant was again found incompetent to stand trial in January 2022, he had to be returned to the back of the line. Nonetheless, it is undisputed that between the final two hearings in May and August of 2022, Appellant had gone from number forty-two to number thirty-nine on the waitlist.[5]

Nor do the cases cited in Appellant's brief advance his claim. Appellant generally cites to *Trueblood v. Washington State Dept. of Social and Health Servs.*, 822 F.3d 1037 (9th Cir. 2016), but he does so only to state that "[i]n Washington State, time limits are set to have the Defendant evaluated for competency." Appellant does not explain how this statement supports his claim that the *post*-evaluation waiting period for transfer to a state facility for competency restoration services in this case is unconstitutional.[6] *See Wells v. State*, No. 08-09-00110-CR, 2010 WL 3009306, at *3 (Tex. App.—El Paso July 30, 2010, pet. ref'd) (not designated for publication) ("Merely setting out a general legal principle with supporting case law is not sufficient to adequately brief a point of error. Rather, Appellant bears the burden of providing a supporting argument, analyzing the cases cited[,] and applying those cases to the facts at hand."). Appellant then cites to *Harris v. Clay*

[5] There is no indication in the record of how long the waitlist was when Appellant was placed on it a second time.

[6] In *Trueblood*, the Ninth Circuit reversed the district court's permanent injunction requiring the Washington Department of Social and Health Services to provide both competency evaluation and restoration services within seven days. *Trueblood,* 822 F.3d at 1040, 1046. Noting that the interests of "pre- and post-evaluation class members" were distinct in nature, that "federal courts have often looked to a state's own policies for guidance" in determining what constitutes a reasonable time for evaluations, and that the district court's injunction failed to consider the legislature's intervening imposition of a fourteen-day deadline for conducting competency evaluations, the Court held that Due Process does not compel the state to conduct in-jail competency evaluations within seven days. *See Trueblood*, 822 F.3d at 1044-45.

County, 47 F.4th 271, 272 (5th Cir. 2022), for the proposition that the state must either civilly commit an incompetent defendant or otherwise release him. Appellant's reliance on *Harris*'s commit-or-release rule is misplaced. Citing to *Jackson v. Indiana* 406 U.S. 715, 738 (1972), the *Harris* Court held that the defendant's six-year-long, continued detention violated due process where there was *no reasonable expectation* of restored competency. *See Harris*, 47 F.4th at 279. Such is not the case before us. Appellant does not dispute Dr. Dunham's opinion that, with the proper competency treatment, he will regain his competency; indeed, the impetus for the writ application was writ counsel's desire to get Appellant treated and his competency restored.

Appellant provides no "analysis, discussion, or argument in support of the cases he cites, explaining how they apply to the facts [of this] case," *Wells*, 2010 WL 3009306 at *3, nor does he otherwise explain how the legal authority provided supports a finding of a due-process violation.

Thus, even if Appellant's claim were cognizable in a pretrial writ, Appellant has failed to demonstrate on appeal that the trial court's denial of the requested relief violated Appellant's due-process rights. For this additional reason, we overrule Appellant's sole issue on appeal.

CONCLUSION

Having overruled Appellant's sole point of error, we affirm.[7]

YVONNE T. RODRIGUEZ, Chief Justice

February 13, 2023

[7] The trial court certified Appellant's right to appeal in this case, but the certification does not bear Appellant's signature indicating that he was informed of his rights to appeal and to file a pro se petition for discretionary review with the Texas Court of Criminal Appeals. *See* TEX. R. APP. P. 25.2(d). The certification is defective and has not been corrected by Appellant's attorney or the trial court. To remedy this defect, this Court ORDERS Appellant's attorney, pursuant to TEX. R. APP. P. 48.4, to send Appellant a copy of this opinion and this Court's judgment, to notify Appellant of his right to file a pro se petition for discretionary review, and to inform Appellant of the applicable deadlines. *See* TEX. R. APP. P. 48.4; 68. Appellant's attorney is further ORDERED to comply with all of the requirements of TEX. R. APP. P. 48.4.

Before Rodriguez, C.J., Soto, J., and Marion, C.J. (Ret.)
Marion, C.J. (Ret.) (Sitting by Assignment)

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Associated Case Party: Juan Valero

Name	BarNumber	Email	TimestampSubmitted	Status
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Art. 46B.0095. MAXIMUM PERIOD OF COMMITMENT OR PROGRAM PARTICIPATION DETERMINED BY MAXIMUM TERM FOR OFFENSE. (a) A defendant may not, under Subchapter D or E or any other provision of this chapter, be committed to a mental hospital or other inpatient or residential facility or to a jail-based competency restoration program, ordered to participate in an outpatient competency restoration or treatment program, or subjected to any combination of inpatient treatment, outpatient competency restoration or treatment program participation, or jail-based competency restoration under this chapter for a cumulative period that exceeds the maximum term provided by law for the offense for which the defendant was to be tried, except that if the defendant is charged with a misdemeanor and has been ordered only to participate in an outpatient competency restoration or treatment program under Subchapter D or E, the maximum period of restoration is two years.

(b) On expiration of the maximum restoration period under Subsection (a), the mental hospital, facility, or program provider identified in the most recent order of commitment or order of outpatient competency restoration or treatment program participation under this chapter shall assess the defendant to determine if civil proceedings under Subtitle C or D, Title 7, Health and Safety Code, are appropriate. The defendant may be confined for an additional period in a mental hospital or other facility or may be ordered to participate for an additional period in an outpatient treatment program, as appropriate, only pursuant to civil proceedings conducted under Subtitle C or D, Title 7, Health and Safety Code, by a court with probate jurisdiction.

(c) The cumulative period described by Subsection (a):

(1) begins on the date the initial order of commitment or initial order for outpatient competency restoration or treatment program participation is entered under this chapter; and

(2) in addition to any inpatient or outpatient competency restoration periods or program participation periods

described by Subsection (a), includes any time that, following the entry of an order described by Subdivision (1), the defendant is confined in a correctional facility, as defined by Section 1.07, Penal Code, or is otherwise in the custody of the sheriff during or while awaiting, as applicable:

(A) the defendant's transfer to:

(i) a mental hospital or other inpatient or residential facility; or

(ii) a jail-based competency restoration program;

(B) the defendant's release on bail to participate in an outpatient competency restoration or treatment program; or

(C) a criminal trial following any temporary restoration of the defendant's competency to stand trial.

(d) The court shall credit to the cumulative period described by Subsection (a) any time that a defendant, following arrest for the offense for which the defendant was to be tried, is confined in a correctional facility, as defined by Section 1.07, Penal Code, before the initial order of commitment or initial order for outpatient competency restoration or treatment program participation is entered under this chapter.

(e) In addition to the time credit awarded under Subsection (d), the court may credit to the cumulative period described by Subsection (a) any good conduct time the defendant may have been granted under Article 42.032 in relation to the defendant's confinement as described by Subsection (d).