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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ANTONIO JAIMES,

Defendant and Appellant.

E045215

(Super.Ct.No. CR59141)

OPINION

APPEAL from the Superior Court of Riverside County. James A. Edwards (retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.); Carl E. Davis (retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.); Helios (Joe) Hernandez; J. Thompson Hanks; and Stephen D. Cunnison, Judges.¹ Reversed.

¹ Judges Edwards, Davis, Hernandez, and Hanks ruled on motions for continuance and/or dismissal; Judge Cunnison presided over trial.

Barbara A. Smith, under appointment of the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr., and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Luis Antonio Jaimes appeals from the extension of his Mentally Disordered Offender (MDO) commitment. He argues he was denied due process when his trial, without good cause, was delayed for 344 days after his release date on the petition for continued involuntary treatment.² He further argues he was denied a fair trial when the staff psychiatrist testifying for the prosecution repeatedly violated rulings excluding reference to previous findings of MDO status. We agree with defendant's first contention, and we will reverse on that basis. We therefore need not address defendant's second contention.

² The issue is presently pending before the California Supreme Court. In *People v. Cobb* (2007) 157 Cal.App.4th 393, review granted March 12, 2008, S159410, the court granted review to address the following issues: "(1) Was defendant denied due process and a fair trial by delay in the prosecution of a petition for continued involuntary treatment until 23 days after his release date? (2) Did defendant's pre-parole certification as a mentally disordered offender, who was required to accept treatment as a condition of parole, suffice to justify his continued detention pending trial on a petition for continued involuntary treatment?"

II. FACTS AND PROCEDURAL BACKGROUND

In 1995, defendant received a two-year prison sentence for a conviction of assault with a deadly weapon, a knife, against his sister-in-law (Pen. Code,³ § 245, subd. (a)(1).) In 1996, he was transferred to a state hospital and was found to be an MDO. He has been recommitted annually since 1996.

On November 17, 2006, the Riverside County District Attorney filed a petition under section 2970 for the continued involuntary treatment of defendant. The petition alleged that defendant had previously been convicted of assault with a deadly weapon and had previously been required to be involuntarily treated under sections 2960 through 2968. The petition alleged defendant had a severe mental disorder, which was not in remission and could not be kept in remission without treatment, and by reason of his severe mental disorder, defendant represented a substantial danger of physical harm to others. Defendant's involuntary treatment would expire on February 26, 2007.

Jury trial on the petition began nearly a year later, on February 4, 2008.⁴ Because they are not relevant to the dispositive issue on appeal, we will not recount the details of defendant's trial. On February 7, 2008, the jury found defendant to be an MDO. The trial court ordered the continued involuntary treatment of defendant at Metropolitan State

³ All further statutory references are to the Penal Code unless otherwise indicated.

⁴ The factual and procedural background relating to the delay in trial is set forth in the discussion of defendant's due process challenge to his delayed trial.

Hospital (Metropolitan) and extended that involuntary treatment to February 26, 2008. Defendant filed a notice of appeal from the order.

Meanwhile, on February 19, 2008, the district attorney filed another petition under section 2970 for the continued involuntary treatment of defendant. On March 4, 2008, defendant waived his right to a jury trial on the February 19 petition, and the trial court found defendant was an MDO. The court ordered the continued involuntary treatment of defendant, ordered him transferred from Metropolitan to Patton State Hospital (Patton), and extended the involuntary treatment to February 26, 2009.

Other facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Mootness

The People contend defendant's appeal is moot because the commitment period stemming from the petition at issue has expired. However, even if the appeal was rendered technically moot, we will nonetheless review the appeal on the merits because defendant is subject to recertification as an MDO, and the issue is of recurring importance and is otherwise likely to evade review due to the time constraints of MDO commitments. (*People v. Merfield* (2007) 147 Cal.App.4th 1071, 1074-1075.)

B. Delay of Trial on Petition for Continued Involuntary Commitment

Defendant contends he was denied due process and a fair trial when the prosecution, without good cause, delayed trial on a petition for continued involuntary treatment for 344 days after his release date.

1. Additional Factual Background

At a hearing on January 5, 2007, counsel appearing for defendant's counsel stated that defendant's counsel would be away for the entire month. At the defense request, Judge Edwards scheduled the trial readiness conference for February 9.

On February 9, 2007, defense counsel requested that the court appoint Dr. Michael Kania to do a confidential evaluation and that the matter be continued for a month. Judge Davis granted both requests.

On March 9, 2007, defense counsel stated she had not yet received Dr. Kania's report, and at her request, Judge Edwards continued the matter until March 23.

On March 23, 2007, the prosecutor stated her belief that the hearing was for return of doctors' reports, but defense counsel asserted the hearing was to set a trial date. The prosecutor requested that the matter be continued for a week. Defense counsel objected to any continuance and stated that the matter had already been continued over her objection⁵ and that defendant's commitment had already expired. Judge Davis stated that he had one jury deliberating and had been assigned another criminal case with a jury in attendance. Defense counsel moved to dismiss based upon the denial of a speedy trial. Judge Davis found good cause for a continuance "based upon the condition of the criminal calendar with priority, and the fact that this Court is currently engaged in a criminal jury trial."

⁵ The record does not indicate any earlier defense objection to continuing the matter.

Defense counsel requested that the matter be sent to the master calendar department, but Judge Davis denied that request because “the master criminal calendar is, likewise, backed up trying to get criminal cases out.” Following the noon recess, defense counsel told Judge Davis she was ready and available for trial, and she objected to any further continuance. She argued the trial court abused its discretion in finding good cause for continuing MDO cases on an ongoing basis, and defendant’s fundamental right to liberty was at stake. She requested Judge Davis to either let the master calendar department know the case was beyond the statutory period and that other arrangements must be made, or to send the parties to the master calendar department. The prosecutor stated she was not ready for trial because she had not made arrangements for the doctors to testify. Judge Davis denied a defense motion to dismiss and suggested May 7 for the trial date. Defense counsel stated that was unacceptable because it was over a month away and more than three months behind the statutory framework. The prosecutor stated she did not have her witnesses lined up yet, and Judge Davis set the matter for March 26 for a report on the availability of witnesses.

On March 26, 2007, defense counsel moved to proceed to trial forthwith, objected to any further continuances, and moved to dismiss because the matter was beyond the statutory time for trial. She argued the delay in trial violated defendant’s rights to due process and equal protection. The prosecutor stated she had called Metropolitan to determine when witnesses were available but had not received a return call. She asked that the matter be set for trial in the last two weeks of April so she could subpoena the

doctors. Defense counsel objected to a continuance and argued that the doctors at Metropolitan, as state employees, could be told to go to court on a given day. Judge Davis stated the court was not available because he had a jury deliberating in a felony trial and had another criminal matter ready to go to trial with a jury in attendance. Judge Davis found good cause to continue the matter based on court congestion and set the matter for pretrial on April 27 and for jury trial on April 30. Judge Davis overruled a defense objection to the continuance and denied a motion to dismiss.

On April 27, 2007, defense counsel stated she was ready and available for trial on April 30. Counsel appearing for the prosecutor requested a continuance until May 7 because the prosecutor was in another trial. Defense counsel objected to another continuance. Judge Davis found good cause for a continuance until May 7 because the court had been continuously in trial for the last two months without a day's lapse, "and the same condition exists throughout Riverside County." Defense counsel moved for dismissal, but Judge Davis denied the motion.

On May 7, 2007, defense counsel announced she was ready and available for trial. Counsel appearing for the prosecutor requested a continuance until May 10 because the prosecutor was in trial. Defense counsel objected to the request and moved to dismiss. Judge Hernandez denied both defense motions. Judge Hernandez did not make any specific finding of good cause, but stated, "[T]his is a civil/criminal [hybrid], which doesn't have a statutory speedy trial right. The only right is a constitutional right, due process."

On May 10, 2007, the prosecutor stated she had issued a subpoena duces tecum for medical records and asked that they be released for copying. She stated she “need[ed] the records to figure out which doctor to subpoena.” Judge Hernandez continued the hearing on the motion for jury trial to May 14, over defense objection. Judge Hernandez did not make any finding of good cause, but told defense counsel to put her motion to dismiss in writing.

On May 14, 2007, defense counsel announced that she was ready and available for trial. After hearing other matters, Judge Hernandez learned that defense counsel was no longer available because she was in a trial. The prosecutor informed Judge Hernandez that she had subpoenaed defendant’s medical records the previous week. Judge Hernandez ordered the records to be released and shared with defendant. Judge Hernandez continued the hearing to May 22.⁶

On May 22, 2007, an attorney appearing on defense counsel’s behalf stated that defense counsel was ready but unavailable for trial until May 30 because she was in another trial. Judge Hernandez continued the trial to May 30.

On May 30, 2007, the prosecutor stated she had filed a request for continuance under section 1050. An attorney appearing on defense counsel’s behalf stated that

⁶ We note that many of the trial court’s minute orders reflect that hearings were continued pursuant to stipulation of counsel. However, the reporters’ transcripts of the hearings on those dates reflect no such stipulations; rather, defense counsel continued to object strenuously to any continuances.

defense counsel was engaged in another trial and would not be available until June 1.

Judge Hernandez continued trial to June 4 because of defense counsel's unavailability.

On June 4, 2007, an attorney appearing on the prosecutor's behalf stated that the prosecutor was in trial, requested a continuance to June 13, and stated that the case would be reassigned to another deputy district attorney. Defense counsel objected to a continuance. Judge Hernandez stated that the prosecution needed to be ready on June 13 and continued the matter to that date.

On June 13, 2007, an attorney appearing on defense counsel's behalf stated that defense counsel was unavailable until the following day. Judge Hernandez granted a continuance to June 14.

On June 14, 2007, an attorney appearing on defense counsel's behalf stated that defense counsel was unavailable because she was attending a funeral and asked that the matter trail until the next day. Judge Hernandez granted the request.

On June 15, 2007, defense counsel stated she was ready and available for trial. The newly assigned prosecutor stated he had filed a motion for a continuance under section 1050 because witnesses were unavailable. He requested a continuance until July 17. Defense counsel stated she had not received a copy of the motion, and she objected to a continuance. Judge Hernandez continued the matter to June 18 and requested the prosecutor to provide more information about when witnesses would be available.

On June 18, 2007, Judge Hernandez noted that the prosecutor had filed a written motion requesting a continuance based on the availability of the treating staff physician. Defense counsel announced she was ready and available for trial and objected to a continuance. She reminded the court she would be on vacation from July 23 to August 10. Judge Hernandez found good cause for a continuance because Dr. Abrams, who would be a necessary witness,⁷ was going to be on vacation. Judge Hernandez set jury trial for July 11.

On July 11, 2007, the prosecutor stated he had filed a motion to continue the matter to July 17 because of the unavailability of Dr. Abrams. An attorney appearing for defense counsel stated defense counsel would not be available until July 17. Judge Hernandez set jury trial for July 17.

On July 17, 2007, defense counsel moved for a continuance of trial until August 14 to accommodate her previously scheduled vacation. Judge Hernandez granted the motion.

On August 14, 2007, defense counsel stated she was ready and available for trial and objected to further delay. The prosecution had filed another motion for continuance on the grounds he was the trial attorney on another case which needed priority because of material witness availability and because two witnesses in the current matter had not yet responded to their subpoenas. The prosecutor stated he was not ready for trial. Defense

⁷ We note that although the prosecutor represented that Dr. Abrams was a necessary witness, and trial was delayed to accommodate Dr. Abrams's schedule, Dr. Abrams did not in fact testify at trial.

counsel filed an opposition to the motion on the grounds that (1) the prosecutor's other trial involved a defendant who was out of custody, whereas defendant remained confined at Metropolitan; (2) defendant's trial had previously been assigned to a number of other deputy district attorneys, and one of them could be reassigned to defendant's trial even if the currently assigned deputy was unavailable; (3) the prosecution had been dilatory in its attempts to serve witnesses; and (4) given that the petition had been filed nine months earlier, under section 2970, subdivision (a), the matter should have been tried seven months earlier. Judge Hernandez granted the prosecutor's motion for a continuance until August 22.

On August 22, 2007, defense counsel announced she was ready and available for trial, objected to further delay, and renewed her motion to dismiss. The prosecutor announced he was also ready for trial. Because defendant was housed at Metropolitan and had not been transported to court, Judge Hernandez trailed the matter to the following day.

On August 23, 2007, defense counsel stated she was ready but was unavailable for trial because she was in trial on another case. Judge Hernandez set the matter for trial on September 12.

On September 11, 2007, the prosecutor filed a motion to continue the trial to September 19 on the grounds that the prosecutor was assigned to trial in a criminal case to begin on September 12 and that the People had been ready and available when the case was last on calendar and had been continued on the defense's motion.

On September 12, 2007, Judge Hernandez indicated defense counsel had informed the court she was performing jury service. Judge Hernandez continued the matter for one week.

On September 19, 2007, defense counsel announced she was ready and available for trial, objected to further delay, and moved to dismiss the case because defendant's due process rights had been violated. Counsel appearing for the prosecutor stated that the prosecutor was engaged in a criminal trial that would be finished on Monday, and he would prefer a continuance but would be ready to proceed if the matter was sent to a courtroom. The trial court stated, "This is one of those cases that has a . . . constitutional due process right to a speedy trial, but not a statutory one as due to the people charged with crimes for right now. All these cases are just on hold. Looking for a place, you know, which does pop up occasionally." Judge Hernandez set the matter for jury trial on September 24.

On September 24, 2007, the parties announced ready for trial, and Judge Hernandez set the jury trial to trail to the following day.

On September 25, 2007, Judge Hernandez assigned the case to Judge Hanks for all purposes. The same day, defense counsel filed a written objection to the delay and also filed a declaration under Code of Civil Procedure section 170.6 as to Judge Hernandez.

On September 26, 2007, defense counsel filed another written objection to delay in commencement of trial.

On November 16, 2007, defendant filed a notice of appeal from the orders denying him a jury trial on the MDO petition (case No. E044627).⁸ On the court's own motion, we deemed the appeal to be a petition for writ of mandamus. (The writ petition was ultimately dismissed on defense counsel's representation that the issues raised in the petition had become moot.)

On January 4, 2008, a trial date of January 7 was set. On January 7, defense counsel stated she was ready and available for trial and objected to any further continuance, but the prosecutor announced he was not ready. Defense counsel moved to dismiss the petition on the ground "the year contemplated of commitment by the pending petition has already expired." Judge Hanks denied the motion. Judge Hanks stated he would try to find a courtroom for the trial. The court's minute order states that defense counsel was later sent out to trial and was unavailable. On his own motion, Judge Hanks continued the matter to January 16, 2008.

On January 8, 2008, Judge Hanks ordered defendant sent back to Metropolitan so he could continue on his medications and ordered that defendant be retransported to court on January 16.

On January 15, 2008, the prosecutor moved to continue the matter to January 30 because he had not yet received defendant's medical records from and after February 2007 that had been subpoenaed and he was currently assigned to a criminal case that

⁸ We have taken judicial notice of the record in E044627.

would be going to trial. Judge Hanks set an hearing on an order to show cause regarding the subpoenaed documents and continued the matter to January 23.

On January 16, 2008, Judge Hanks stated he had received a section 1050 motion from the prosecutor stating that another felony matter had priority over the current case. The prosecutor also stated that he had expected certain materials from Metropolitan that day, but he had not received them. Defense counsel announced ready and available for trial and objected to further delay. Judge Hanks responded that the record was replete with her objections and suggested that she take a writ to get the matter resolved. Judge Hanks continued the matter for a week, to January 23. Defense counsel requested to be heard on the specifics of the section 1050 motion, but the trial court denied the request.

On January 23, 2008, Judge Hanks ordered defendant's medical records to be released to the prosecutor for copying and granted the prosecutor's motion to continue the matter to January 31.

On January 31, Judge Cunnison stated that there would be no further delay, and the parties would get their courtroom. Defense counsel again moved to dismiss on the ground of extensive delays over defense objections. Judge Cunnison stated that in each instance, the prior judges had made determinations of good cause, and he was "not in a position to be able to look back over and say in a particular instance or in all instances collectively there was not good cause." Judge Cunnison therefore denied the motion. Defendant's trial finally began on February 4, 2008.

2. *Standard of Review*

“A trial court’s finding of ‘good cause,’ if any, is reviewed on appeal for abuse of discretion. [Citations.] If there is no abuse of discretion, the ‘good cause’ finding stands and there is no statutory violation. [Citation.]” (*People v. Tatum* (2008) 161 Cal.App.4th 41, 56 (*Tatum*)). And even if a statutory violation has occurred, “the commitment proceeding is not rendered invalid absent a due process violation. [Citation.]” (*Id.* at p. 57.) Delay of trial beyond the statutory deadlines “is judged using “[t]he due process test utilized under both federal and state speedy trial decisions[, which] involves a balancing of any prejudicial effect of the delay against the justification for the delay” Where there is no prejudice, there is no due process violation, regardless of the reasons (or lack thereof) for the delay. [Citations.]” (*Ibid.*)

3. *Analysis*

a. The statutory framework

Our Supreme Court in *People v. Allen* (2007) 42 Cal.4th 91, 98 (*Allen*), recognized that the Mentally Disordered Prisoners Act (MDPA) (§ 2960 et seq.) incorporates a “delicate balancing” of individual and public interests. Under the MDPA, a defendant may initially be committed to a state mental hospital, among other methods, if a jury finds beyond a reasonable doubt that (1) the defendant has a severe mental disorder that is not in remission and cannot be kept in remission without treatment; (2) the severe mental disorder was a cause of or an aggravating factor in the commission of the underlying crime; (3) the defendant has been in treatment for at least 90 days

within the year before his or her parole release date; and (4) the defendant presents a substantial danger of physical harm to others due to a severe mental disorder. (§§ 2962, subds. (a)-(d), 2966, subd. (c).)

Following that initial commitment, if the defendant's severe mental disorder is not in remission and cannot be kept in remission, the medical director of the state hospital treating him or her must provide a written evaluation to the district attorney at least 180 days before the defendant's scheduled release date, and the district attorney may then file a petition to continue involuntary treatment for one year. (§ 2970.) Trial on the petition "shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown." (§ 2972, subd. (a).)

The defendant is entitled to a jury trial on the petition, and the trier of fact must find beyond a reasonable doubt that the defendant has a severe mental disorder that is not in remission or cannot be kept in remission without treatment, and as a result of such disorder, presents a substantial danger of physical harm to others. (§ 2972, subds. (a), (c).) Based on such findings, the trial court may order the defendant's continued confinement for one year. (§ 2972, subd. (c).)

Indisputably, section 2972, subdivision (a) was violated in this case: defendant's trial did not begin for 344 days *after* expiration of the previous commitment period, and section 2972, subdivision (a) calls for trial to begin on a recommitment period "no later than 30 calendar days" before the defendant's release date. As defendant acknowledges,

however, the 30-day time limit set forth in section 2972, subdivision (a) is directory, not mandatory. (*Tatum, supra*, 161 Cal.App.4th at pp. 56-57; *People v. Williams* (1999) 77 Cal.App.4th 436, 451, 456.) The directory time limit for trial may be waived or extended for good cause (§ 2972, subd. (a)), and violation of the time limit invalidates an MDO proceeding only if the error results in a due process violation. (*People v. Williams, supra*, at p. 456; *People v. Fernandez* (1999) 70 Cal.App.4th 117, 131 (*Fernandez*).)⁹ A defendant's due process is violated only if the statutory violation was prejudicial to the defendant and good cause for the delay was lacking. (See *Tatum, supra*, at p. 61.) Therefore, we will first determine whether defendant suffered prejudice from the delay.

b. Prejudice

The court in *Zachary v. Superior Court* (1997) 57 Cal.App.4th 1026, recognized that the MDO Act “accommodates procedural due process by requiring the filing of the commitment petition prior to the expiration of the commitment, and *requiring trial to commence 30 days prior to expiration in order to ensure that trial is completed prior to expiration of the commitment.*” (*Id.* at p. 1034, italics added.) “[I]n the context of untimely MDO petitions, the courts have recognized that relevant prejudice will generally take one of two forms: (i) an inability to prepare for trial in the time remaining prior to the offender's release date [citation], or (ii) the involuntary confinement of an offender

⁹ The only mandatory time limit under the MDO statutes is that the district attorney must file a recommitment petition before the MDO's current commitment term ends. (§ 2972, subd. (e); *Allen, supra*, 42 Cal.4th at p. 104 [a petition not filed before that deadline must be dismissed].)

beyond the offender's statutorily authorized release date. [Citation.]" (*Id.* at p. 1036.) In that case, the court held that the defendant had "suffered prejudice, i.e., 24 days of unauthorized confinement in a state mental hospital prior to the filing of the petition for recommitment, followed by continued unauthorized confinement to date." (*Id.* at p. 1036.) In *Allen*, the Supreme Court stated that delay in filing a commitment petition resulting in a violation of the MDO's procedural requirements might be "deemed prejudicial" because the defendant was denied his annual review under the MDO, even if recommitment might have been authorized if the petition had been timely filed. (*Allen, supra*, 42 Cal.4th at p. 105.)

Here, defendant was in involuntary custody for 344 days beyond his release date, and we therefore presume prejudice. (*Zachary v. Superior Court, supra*, 57 Cal.App.4th at p. 1036; *Allen, supra*, 42 Cal.4th at p. 105.) We conclude, therefore, that as a matter of law defendant has suffered prejudice. However, as the court pointed out in *Tatum*, the degree of prejudice varies depending on factors such as the length of the delay. (*Tatum, supra*, 161 Cal.App.4th at pp. 62-63.) And whether such prejudice warrants dismissal depends on "the severity of the prejudice and, on the other side of the due process balance, the justification for the delay." (*Id.* at p. 63.) We next examine whether the delay in bringing defendant to trial on the petition was justified by good cause. (*Id.* at p. 61.)

c. Good cause

In the analogous situation of a defendant's statutory right to a speedy trial under section 1382, the trial court has discretion to determine what constitutes good cause for a continuance. (*People v. Johnson* (1980) 26 Cal.3d 557, 570 (*Johnson*)). Generally, delay caused by the defendant's conduct or for his benefit constitutes good cause, as does delay arising from unforeseen circumstances, such as the unexpected illness or unavailability of counsel or a witness. (*Ibid.*) However, delay attributable to the fault of the prosecution or delay caused by improper court administration does not constitute good cause. (*Ibid.*)

The initial delays, at least until March 23, 2007, and occasional other delays, were at the request of the defense and those delays were therefore supported by good cause. (*Johnson, supra*, 26 Cal.3d at p. 570.)

The various trial courts granted continuances on March 26, April 27, and September 19, 2007, among other dates, because of court congestion. It is well settled that chronic court congestion and overcrowding do not constitute good cause for a continuance. (*Johnson, supra*, 26 Cal.3d at pp. 570-572; *Arreola v. Municipal Court* (1983) 139 Cal.App.3d 108, 113-115; *Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 781-782.) Otherwise, the state's failure to provide adequate court funding would be used to consistently deny criminal defendants their right to a speedy trial. (*Johnson, supra*, at pp. 571-572.) The state has an obligation to provide sufficient resources to dispose of the usual court business promptly; thus, court congestion is not good cause

unless the circumstances are exceptional, such as when unique, nonrecurring events occur that produce an unusual number of cases. (*Ibid.*)

Here, the record shows that the lack of available courtrooms was the result of chronic court congestion, and nothing in the record suggests exceptional circumstances. Indeed, court congestion in Riverside County is chronic and ongoing. (See, e.g., *People v. Cole* (2008) 165 Cal.App.4th Supp. 1, 5-8, 16.) In *People v. Litmon* (2008) 162 Cal.App.4th 383 (*Litmon*), a case addressing recommitment procedures under the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.), the court held that “any chronic, systematic postdeprivation delays in SVP cases that only the government can rectify must be factored against the People. . . . [P]ostdeprivation delays due to the unwillingness or inability of the government to dedicate the resources necessary to ensure a prompt SVPA trial may be unjustifiable. . . . [P]ostdeprivation, pretrial delays in SVPA proceedings cannot be routinely excused by systemic problems, such as understaffed public prosecutor or public defender offices facing heavy caseloads, underdeveloped expert witness pools, or insufficient judges or facilities to handle overcrowded trial dockets.” (*Litmon, supra*, at p. 403, fn. omitted.)

The various trial courts also found good cause to continue defendant’s trial on June 15, June 18, and August 14, 2007, among other dates, because the prosecutor requested time to obtain defendant’s medical records or to secure the attendance of witnesses. Under some circumstances, such purposes could constitute good cause for a continuance. However, the trial court failed to consider the timing of the requests or the

resulting effect on defendant. The petition to extend defendant's MDO commitment had already been pending for months when the prosecutor made the first request for medical records. The trial court did not ask the prosecutor why the records had not been requested or witnesses secured sooner, and the belated requests support an inference that the prosecutor was not ready for trial on any of the earlier court dates and would have requested continuances even if defense counsel had not. Moreover, in granting the prosecutor's requests for continuances for discovery purposes, the trial court did not consider that defendant had already been held for *months* after the expiration of his current MDO commitment. We therefore disagree with the trial court's conclusion that good cause existed for granting the requests for such continuances. "Delay attributable to the fault of the prosecution . . . does not constitute good cause. Neither does delay caused by improper court administration. [Citation.]" (*Johnson, supra*, 26 Cal.3d at p. 570, fn. omitted.)

We conclude that on numerous occasions, the proffered justifications for the delays were inadequate as a matter of law to excuse the delay of defendant's trial, "given the magnitude of the liberty interest at stake, the serious harm to this interest already occasioned by the protracted delay, and the possibility that the interim decisions . . . may have been mistaken." (*Litmon, supra*, 162 Cal.App.4th at p. 405.) Although the *Litmon* court addressed proceedings under the SVPA, the court's reasoning applies fully to delays in MDO recommitment trials.

d. Due process

Having found prejudice and lack of good cause for delays, our final task is to determine whether defendant was deprived of due process. To do so, we measure the severity of the prejudice against the justification for the delays. (*Tatum, supra*, 161 Cal.App.4th at p. 63.)

Due process analysis in MDO cases relies on analogous law under state and federal speedy trial cases. (*Tatum, supra*, 161 Cal.App.4th at p. 61.) As the court explained in *Tatum*, “The constitutional inquiry into the ‘justification for the delay’ necessarily overlaps with the statutory inquiry into ‘good cause.’ If good cause exists, it is less likely that there will be a due process violation; where good cause is lacking, . . . a violation is likely if sufficient prejudice is present. In addition, the ‘[l]ength of delay’ will be a relevant factor in evaluating any proffered justification. [Citation.] For example, negligence may be sufficient cause to excuse a minor delay, but becomes less compelling as a justification for an extensive delay.” (*Ibid.*)

In *People v. Otto* (2001) 26 Cal.4th 200 (*Otto*), the court held that civil commitment—in that case, under the SVPA—involves a significant deprivation of liberty, and a defendant in a proceeding under the SVPA is entitled to due process protections. (*Id.* at p. 209.) ““Once it is determined that due process applies, the question remains what process is due.”” (*Id.* at p. 210, quoting *Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) The court listed four factors relevant to that inquiry: “(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation

of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official. [Citation.]” (*Otto, supra*, at p. 210.)

The first factor under the *Otto* test is the private interest involved. (*Otto, supra*, 26 Cal.4th at p. 210.) In an MDO recommitment proceeding, that interest is the individual’s interest in liberty (see *Jones v. United States* (1983) 463 U.S. 354, 361) and reputation (see *Addington v. Texas* (1979) 441 U.S. 418, 424, 425). The United States Supreme Court has long “recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” (*Addington v. Texas, supra*, at p. 425.) Thus, this factor weighs strongly in defendant’s favor.

The second factor under the *Otto* test is the risk of an erroneous deprivation of the private interest. (*Otto, supra*, 26 Cal.4th at p. 210.) In an MDO recommitment proceeding, the risk is that a person will be held in continued confinement even though he is no longer mentally ill or dangerous. The centerpiece of the People’s argument is that an MDO does not have a due process right to an annual jury trial because the pre-parole certification as an MDO justifies continued confinement pending trial on a re-

commitment petition, and an MDO cannot show actual prejudice from continued confinement after the parole expiration date.

In *Zachary*, the court rejected the People’s argument that “a presumption of continued dangerousness is effected by the district attorney’s mere filing of a petition for commitment under the MDPA.” (*Zachary, supra*, 57 Cal.App.4th at p. 1036.) “To the contrary, the MDPA requires the People to prove beyond a reasonable doubt that the committed person continues to pose a substantial danger of physical harm to others. [Citation.] Were the trial court to balance the alleged danger to the public against the prejudice to the committed person when a petition for extended commitment is belatedly filed, the requirement of conducting the trial prior to the expiration of the commitment would be effectively vitiated.” (*Ibid.*)

The court in *Tatum* similarly rejected the People’s argument that due process is never implicated when an MDO recommitment trial is delayed past the release date. In that case, the People contended that “because (analogizing to the preliminary hearing in a criminal prosecution) there has been—at the time that the prisoner is initially committed as a condition of parole—a preliminary finding by the state’s psychiatrists that the defendant is an MDO, leaving the only question remaining for trial: whether the defendant is *still* an MDO after receiving treatment throughout the parole period.” (*Tatum, supra*, 161 Cal.App.4th at p. 64, fn. omitted.) The court explained that it found “this argument far too sweeping . . . as it implicitly invalidates decades of California case law . . . and renders meaningless the provisions of the MDO Act intended to protect the

offender's liberty interests (e.g., the right to a jury trial). Indeed, if this contention were valid, an offender's trial need not 'commence no later than 30 calendar days prior to the time the person would otherwise have been released' (§ 2972, subd. (a)), but can instead be held whenever the state desires, regardless of the reasons for any delay or resulting prejudice, because the *state's psychiatrists* have already resolved (much of) the issue. . . ." (*Ibid.*) We agree with the analysis of the *Tatum* and *Zachary* courts.

The third factor under the *Otto* test is the government's interest at stake and the corresponding burdens. (*Otto, supra*, 26 Cal.4th at p. 210.) In an MDO proceeding, that interest is the protection of the public from dangerous mentally ill individuals, indisputably an important concern. However, in analyzing this third factor, we also examine the fiscal and administrative burden that protecting the defendant's interests would entail. As noted, in enacting the MDPA, the Legislature engaged in a "delicate balancing" of individual and public interests. (*Allen, supra*, 42 Cal.4th at p. 98.) That balancing contemplates annual trials to determine whether the defendant's commitment may continue. The "burden" on the government is merely to provide adequate judicial resources to enable that determination to be timely made consistent with the statutory scheme. As has long been recognized, the state has an obligation to provide resources to dispose of usual court business promptly. (*Johnson, supra*, 26 Cal.3d at pp. 571-572.)

The fourth and final factor under the *Otto* test is the individual's dignitary interest in being informed of the nature, grounds, and consequences of the action and in being able then to present his side of the story before a responsible government official. (*Otto*,

supra, 26 Cal.4th at p. 210.) Although due process is a flexible concept, “[t]he primary purpose of procedural due process is to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner.” (*Edward W. v. Lamkins* (2002) 99 Cal.App.4th 516, 532; italics added.) Although section 2972, subdivision (b) does not require, in every case, that trial on a recommitment petition begin at least 30 days before the end of a prior commitment period, delaying trial for nearly a year *past* that date indisputably deprives the defendant of a hearing at a meaningful time.

In *Zachary*, the court found a due process violation when the recommitment petition was filed 24 days after the scheduled release date. (*Zachary, supra*, 57 Cal.App.4th at pp. 1029, 1037.) The court interpreted the MDPA’s provisions as requiring the prosecutor to file a recommitment petition “sufficiently in advance of the release date to guarantee the completion of trial on the petition before the discharge of parole or other scheduled release date.” (*Id.* at p. 1031.) Applying a due process analysis,¹⁰ the court held that because the defendant was unable to prepare for a pre-release date trial because of the late-filed petition, he had suffered prejudice in his continued, unauthorized confinement. (*Id.* at pp. 1036-1037; see also *People v. Hill* (1982) 134 Cal.App.3d 1055, 1060 [holding that the dismissal of an involuntary commitment petition was required because “it was realistically quite impossible in the

¹⁰ Subsequent to *Allen*, the same result would now be reached on the ground that the recommitment petition was invalid, in that it was filed after the commitment period had expired. (*Allen, supra*, 42 Cal.4th at p. 105.)

brief time that remained” before the commitment expired “to bring the matter to even the most hurried conclusion with any semblance of due process”].)

The People rely on other cases in which courts found no violation of due process; however, those cases are distinguishable on their facts. In *Fernandez*, the court found no actual prejudice, and therefore no violation of due process, when the recommitment petition was filed late, but trial nonetheless began seven days before the scheduled release date. (*Fernandez, supra*, 70 Cal.App.4th at pp. 121, 133-134.) In *People v. Kirkland* (1994) 24 Cal.App.4th 891, 913 (*Kirkland*), the court similarly found no prejudice, and therefore no due process violation, when the recommitment petition was filed late, and trial on the recommitment petition did not begin until six days before the defendant’s release date, but trial was nonetheless completed before the scheduled release date, and the defendant had an adequate time to prepare for trial. Thus, neither *Fernandez* nor *Kirkland* provides any support for permitting trial to be delayed for nearly a year after the defendant’s scheduled release date.

In *Kirkland*, the court explained that the primary purpose of the 30-day requirement of section 2972 was not to enhance the defendant’s ability to prepare for trial, but “to ensure that the trial can be concluded before the defendant is due to be released.” (*Kirkland, supra*, 24 Cal.App.4th at p. 913.) The court continued, “Partly, this benefits the defendant: the defendant need not remain confined beyond the release date pending the end of trial. [Citation.] Partly, it benefits the public: trial can be completed before a severe mentally disordered prisoner who poses a substantial danger of physical

harm to others *must be released*. [Citations.]” (*Ibid.*, italics added.) Thus, in our view, the *Kirkland* court’s reasoning is actually more helpful to defendant’s position than to that of the People.

In another case on which the People rely, *People v. Noble* (2002) 100 Cal.App.4th 184, the prosecutor filed the recommitment petition less than 30 days before the defendant’s scheduled release date, and trial began on the petition 27 days after the release date. (*Id.* at pp. 187-188.) The court rejected the defendant’s claim that the delay in trial violated his due process rights and found the defendant had suffered no actual prejudice from the “relatively brief delay.” (*Id.* at p. 188.) In the present case, in contrast, the delay was not “relatively brief” but comprised nearly the entire one-year term for which defendant could have been recommitted.

Defendant was entitled to a timely resolution of his MDO status. Because the numerous continuances in this case were not based on good cause, and the unjustified delays resulted in prejudice to defendant, we conclude that the trial court erred in granting continuances and in denying defendant’s motions to dismiss the petition.

We note, as the court did in *Allen*, that our conclusion does not necessarily mean defendant will be released; if he is still in need of mental health treatment, defendant may

be evaluated under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.) for continued involuntary treatment. (See *Allen, supra*, 42 Cal.4th at pp. 105-108.)

IV. DISPOSITION

The order continuing defendant's involuntary treatment as an MDO is reversed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MILLER

J.