No. 11-775

In the Supreme Court of the United States

MICHAEL MANN, *Petitioner,*

v.

CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Does the Sixth Amendment Right to Speedy Trial Attach When a Defendant Has Been Arrested, Charged With a State Criminal Complaint, and Released on Bond, But the Bond is Exonerated a Short Time Later When he is Arrested on Federal Charges?

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STATEMENT OF THE CASE

While attempting to evade a driver's license checkpoint, petitioner drove his truck into another vehicle and almost hit a police officer. After several officers gave chase, petitioner backed his vehicle into a police car and was captured when his truck became stuck. Inside petitioner's vehicle, police found several plastic baggies containing nearly fifty grams of cocaine and two plastic baggies containing a total of 8.9 grams of heroin. Over nine thousand dollars in currency was found in petitioner's truck. Later that night, officers searched petitioner's residence. Approximately twenty seven grams of cocaine and two thousand dollars in were found in one of the bedrooms.

On December 14, 2001, the Orange County District Attorney filed a felony complaint in the superior court, alleging that petitioner committed assault and narcotics offenses and a hit and run offense. At that time, petitioner was arraigned, pleading not guilty, and he made bail, which was set at $100,000.

An amended felony complaint was filed on December 26, 2001, alleging that petitioner committed offenses including possession of heroin for sale; possession of methamphetamine for sale; sale or transportation of cocaine, methamphetamine, and heroin; hit and run with property damage; and assault with a deadly weapon on a peace officer. Petitioner was arraigned on the amended complaint and his bail remained as previously set.

On January 14, 2002, petitioner failed to appear at a scheduled hearing and a warrant was issued and held for February 1, 2002. (1 CT 8.) On February 1,

2002, petitioner did not appear in court because he was in federal custody.[1] The court ordered the bail bond exonerated and the warrant was ordered released. (1 CT 11.)

More than five years later, on June 6, 2007, petitioner, while still in federal custody, sent a demand for trial to the Orange County District Attorney, pursuant to California Penal Code section 1381.5,[2] which was received by the District Attorney

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[1] On or about December 27, 2001, petitioner was arrested by federal authorities for marijuana cultivation. He pleaded guilty and was sentenced to ten years in federal prison. (3 RT 427; 3 CT 650.)

[2] California Penal Code section 1381.5 provides for the right to speedy trial of a person in federal custody for another offense. It states, as follows:

> Whenever a defendant has been convicted of a crime and has entered upon a term of imprisonment therefor in a federal correctional institution located in this state, and at the time of entry upon such term of imprisonment or at any time during such term of imprisonment there is pending in any court of this state any criminal indictment, information, complaint, or any criminal proceeding wherein the defendant remains to be sentenced the district attorney of the county in which such matters are pending, upon receiving from such defendant a request that he be brought to trial or for sentencing, shall promptly inquire of the warden or other head of the federal correctional institution in which such defendant is confined whether and when such defendant can be released for trial or for sentencing. If an assent from

(continued…)

on July 5, 2007. (1 CT 32-36.) On August 13, 2007, the District Attorney sent a request for temporary custody of petitioner to the warden of Taft Federal Correctional Institute. On October 26, 2007, the Lompoc Federal Prison acquiesced to the District Attorney's request for temporary custody of petitioner. (1 CT 40-41.) On November 15, 2007, petitioner was arraigned on the state charges in the Orange County Superior Court. (1 CT 21.)

On February 19, 2008, petitioner's motion to dismiss based on California statutory speedy trial grounds was denied and a preliminary hearing was held. (1 CT 53.) The district attorney filed an information on February 27, 2008, and, following a jury trial, on May 2, 2008, petitioner was found guilty

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(…continued)

> authorized federal authorities for release of the defendant for trial or sentencing is received by the district attorney he shall bring him to trial or sentencing within 90 days after receipt of such assent, unless the federal authorities specify a date of release after 90 days, in which event the district attorney shall bring the prisoner to trial or sentencing at such specified time, or unless the defendant requests, in open court, and receives, or, in open court, consents to, a continuance, in which event he may be brought to trial or sentencing within 90 days from such request or consent.
>
> If a defendant is not brought to trial or for sentencing as provided by this section, the court in which the action is pending shall, on motion or suggestion of the district attorney, or representative of the United States, or the defendant or his counsel, dismiss the action.

of committing the offenses of possession of cocaine for sale, sale or transportation of cocaine, sale or transportation of heroin, possession of heroin, misdemeanor hit and run with property damage, and two counts of aggravated assault on a peace officer. The state trial court sentenced petitioner to state prison for eight years to run consecutive to his federal custody.

Petitioner filed an appeal in the California Court of Appeal, Fourth Appellate District, Division Three. In his appeal, petitioner argued, *inter alia*, that the judgment should be reversed because his right to a speedy trial under the California and federal Constitutions was violated by the delay in bringing him to trial after his arrest on state charges in 2001. On June 7, 2011, the California Court of Appeal affirmed the judgment in an unpublished opinion. (Pet. App. A.) Relevant here, the Court of Appeal concluded that the federal right to a speedy trial did not attach until February 19, 2008, when the preliminary hearing occurred and after which petitioner was held to answer on the offenses charged in the amended felony complaint. (Pet. App. A, at 21-22.) The Court of Appeal found no federal constitutional violation in light of the fact petitioner's trial was completed within three months of that date. (Pet. App. A, at 22.)

The California Supreme Court denied petitioner's petition for discretionary review on September 21, 2011. (Pet. App. B.)

Petitioner filed his certiorari petition with this Court on December 20, 2011. On February 13, 2012, this Court requested respondent file a response to the petition.

REASONS FOR DENYING CERTIORARI

I. REVIEW IS UNNECESSARY BECAUSE CALIFORNIA LAW COMPORTS WITH THIS COURT'S SIXTH AMENDMENT SPEEDY TRIAL JURISPRUDENCE AND BECAUSE PETITIONER DID NOT SUFFER A VIOLATION OF HIS SPEEDY TRIAL RIGHTS IN ANY EVENT

Petitioner contends that this Court should grant certiorari to examine and overrule "California's rule" that the Sixth Amendment right to a speedy trial does not attach to a defendant who is charged by complaint, arrested, and arraigned, but rather "always" requires that he be either indicted or held to answer on an information. (Pet. at 7.) Petitioner's characterization of California law is incorrect. Contrary to petitioner's suggestion, California does not require that a defendant be either "indicted or held to answer on an information" before the federal speedy trial right attaches. Rather, the California Supreme Court has recognized, consistent with this Court's jurisprudence, that "'[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.'" *People v. Martinez*, 22 Cal.4th 750, 755, 94 Cal. Rptr. 2d 381, 996 P.2d 32(2000), cert. denied 531 U.S. 880, citing *United States v. Marion*, 404 U.S. 307, 320 (1971). Here, petitioner, following his arraignment in state court, remained in federal custody, and his state bail was exonerated. As a result, petitioner was not subjected to further restraint by the state during the time period that he was in federal custody. Consequently, the Court of Appeal correctly determined that petitioner's Sixth

Amendment right to a speedy trial did not attach until 2008, when petitioner returned to state court. In any event, even if this ruling was erroneous, petitioner cannot show his speedy trial rights were violated; therefore, this case is a poor vehicle for this Court to grant certiorari to further define and expand its speedy trial jurisprudence.

A. California Law Comports With This Court's Jurisprudence

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial...." A defendant has a federal and state constitutional right to a speedy trial. *Barker v. Wingo,* 407 U.S. 514, 515 (1972); *Doggett v. United States*, 505 U.S. 647, 648-650 (1992); *Martinez*, at 765. The right to a speedy trial protects a criminal defendant against oppressive pretrial incarceration, anxiety, concern, and disruption of his everyday life. *Barker*, 407 U.S. at 532. Under the Federal Constitution, the speedy trial guarantee begins to operate either on the filing of "a formal indictment or information," or when the defendant is subjected to the "actual restraints imposed by arrest and holding to answer a criminal charge . . . ." *Marion,* at 320. In California, the state constitutional right arises upon the filing of a felony complaint. Cal. Const., art. I, § 15; *People v. Lowe,* 40 Cal.4th 937, 942, 154 P.3d 358, 56 Cal. Rptr. 3d 209(2007).

In *Marion,* this Court explained the purposes of the speedy trial guarantee and, in so doing, referred to the events that trigger this right:

> Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective

> defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer v. North Carolina*, *supra*; see also *Smith v. Hooey*, 393 U.S. 374, 377-378 (1969). So viewed, it is readily understandable that *it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment*.

Marion, at p. 320, italics added.

This Court has address the point at which the Sixth Amendment speedy trial attaches in several post-*Marion* cases. In *Dillingham v. United States,* 423 U.S. 64 (1975), this Court held that the Sixth Amendment speedy trial protection attached when the defendant was arrested and released on bond, even though he was not indicted until 22 months later. Citing the above passage in *Marion*, this Court stated that, "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge." *Id* at 65.

In *United States* v. *Loud Hawk,* 474 U.S. 302 (1987), the government indicted the defendant,

dismissed the indictment, and then reindicted. This Court held that the time during dismissal and reindictment should be excluded from the length of delay considered under the speedy trial clause of the sixth amendment. *Id.* at 311. The Court noted that, during the litigation, the respondents were neither under indictment nor subject to bail and further judicial proceedings would have been necessary to subject respondents to actual restraints. The Court indicated that, in those instances where the defendant is subject to incarceration or bail, the courts would have to engage in a balancing of the restrictions imposed and their effect on the defendant, the necessity for delay, and the length of delay. *Id* at 311, fn. 13. After dismissal of the charges, the Court concluded, "'a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer.'" *Id.*, quoting *United* States *v. MacDonald*, 456 U.S. 1, 9, 7 (1982).

In *Doggett v. United States*, 505 U.S. 647 (1991) the Court held that the Sixth Amendment speedy trial protection attached when the defendant was indicted, even though he was not arrested and was apparently unaware of the indictment until more than eight years later.

Thus, under the federal constitutional rule, the speedy trial guarantee begins to operate either on the filing of a formal indictment or information, or when the defendant is subjected to the "actual restraints" imposed by arrest and holding to answer a criminal charge. A defendant released on bond is subject to actual restraints imposed by an arrest, while a defendant neither under indictment nor subject to bail is not.

California law comports with this Court's Sixth Amendment speedy trial jurisprudence as delineated above. In *Martinez*, the California Supreme Court held that, in a California prosecution, the mere filing of a felony complaint, either with or without the issuance of an arrest warrant, is insufficient to engage the federal Constitution's speedy trial protection. *Martinez* at 756. In that case, the defendant had been arrested by the police for driving under the influence, released, charged in a felony complaint, and then notified by mail that she was required to appear on the arraignment date. When the defendant did not appear, an arrest warrant was issued. About four years later, she was arrested; the preliminary hearing was held; and the information was filed. *Martinez* at 756, 761.

The California Supreme Court recognized that the state and federal speedy trial right attach at different points:

> Under the state Constitution, the filing of a felony complaint is sufficient to trigger the protection of the speedy trial right. [Citations.] Under the federal Constitution, however, the filing of a felony complaint is by itself insufficient to trigger speedy trial protection. [Citation.] The United States Supreme Court has defined the point at which the federal speedy trial right begins to operate: '[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.' (*United States v. Marion*
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> (1971) 404 U.S. 307, 320 [30 L. Ed. 2d 468, 92 S. Ct. 455].)

Martinez at 754-755.

The California Supreme Court rejected the defendant's argument that the federal right, like the state right, attaches upon the filing of a felony complaint, or at least upon the filing of a felony complaint and the issuance of an arrest warrant, holding that "in a California prosecution the filing of a felony complaint, either with or without the issuance of an arrest warrant, is insufficient to engage the federal Constitution's speedy trial protection." *Martinez* at 755. In so holding, the California Supreme Court interpreted the language in this Court's *Marion* decision defining the federal constitutional speedy trial right as arising upon "'arrest and holding to answer.'" Then, after examining this Court's opinions in *Marion*, *Dillingham*, *Loud Hawk*, and *McDonald*, the *Martinez* Court concluded that "it appears that the [federal Constitution's speedy trial] right attaches upon arrest *unless* the defendant is released without restraint or charges are dismissed." *Martinez, at* 761-762. The *Martinez* court further reasoned that, although a felony complaint may appear to be a "formal charge," it is not a document upon which a defendant may be subjected to trial. Relying on its decision in *Serna v. Superior Court*, 40 Cal. 3d 239 (1985), the *Martinez* Court explained the distinction between a felony complaint and an information or indictment:

> A felony complaint, unlike a misdemeanor complaint, does not confer trial jurisdiction. It invokes only the authority of a magistrate, not that of a trial court. ([Pen. Code,] § 806.) . . . The felony complaint functions to bring the defendant before a magistrate for an examination into whether probable cause exists to

> formally charge him with a felony. Only if probable cause exists may an information invoking the trial jurisdiction of the superior court be filed. In addition, the filing of a felony complaint, unlike indictment or accusation by information, does not threaten oppressive pretrial incarceration. The time constraints within which the preliminary hearing must be conducted or the complaint dismissed and the defendant released ([Pen. Code,] § 859b) ensure that the defendant is not subjected to extended anxiety or public opprobrium, and by giving the defendant immediate notice of the charge and opportunity to defend avoid prejudice to the defense. This step, preliminary to formal accusation in the court with jurisdiction over the prosecution of the charge, does not implicate the Sixth Amendment right to speedy trial if our interpretation of *Marion*[, *supra*, 404 U.S. 307] is correct. The misdemeanor complaint, by contrast, is not a preliminary accusation. It is a formal charge, an accusatory pleading giving the court jurisdiction to proceed to trial." (*Serna v. Superior Court, supra*, 40 Cal. 3d 239, 257 , fn. omitted; see also *United States v. MacDonald, supra*, 456 U.S. 1, 10 [102 S. Ct. 1497, 1503] [finding speedy trial right did not attach because "there was no criminal prosecution pending on which [the defendant] could have been tried until the grand jury . . . returned the indictment on which he was tried and convicted"].)

Martinez, at 763-764.

Martuinez concluded that:

> Thus, while we agree with defendant that the label of an accusatory pleading is not determinative, we conclude that pleading does not constitute a "formal charge" for purposes of attaching the federal Constitution's speedy trial right unless the pleading is a formal accusation upon which a defendant may be brought to trial in the court with jurisdiction over prosecution of the offenses alleged. [Citations .] In California state criminal prosecutions, a felony complaint is not such a pleading.

Martinez at 764.

Contrary to petitioner's characterization, the "California rule" does not hold that the federal right to speedy trial attaches only when a defendant is either indicted or held to answer on an information. *Martinez* states that the filing of a felony complaint alone is insufficient to engage in the federal speedy trial protections; however, the federal speedy trial right attaches upon arrest unless the defendant is released without restraint or charges are dismissed. The California Supreme Court's decision in *Martinez* is consistent with this Court's holdings in *Marion* and its progeny. See also *People v. Horning*, 34 Cal. 4th 871, 891, 102 P.3d 228, 22 Cal. Rptr. 3d 305 (2004) [two and half year delay between filing of complaint and arraignment did not violate Federal speedy trial where defendant was arrested and held on other charges in Arizona]; *People v. DePriest*, 42 Cal. 4th 1, 26-27, 163 P.3d 896, 63 Cal. Rptr. 3d 896 (2007) [federal speedy trial did not attach until twenty-two months after complaint filed when defendant was arrested, detained, and tried for crimes committed in Missouri, then released to California authorities]; *People v. Lowe*, 40 Cal. 4th 937, 942,154 P.3d 358, 56 Cal. Rptr. 3d 209 (2007)

[federal speedy trial right "does not come into play until an indictment or an information has been filed or the defendant has been arrested and held to answer."]

Here, petitioner was arrested and arraigned on the complaint. However, petitioner failed to appear at a scheduled hearing and a warrant was issued. At the next scheduled hearing, petitioner did not appear in court because he was in federal custody. The court ordered the bail bond exonerated, and the warrant was ordered released. At that point, similar to the defendant in *Loud Hawk*, petitioner was no longer subject to the "actual restraints imposed by arrest and holding to answer a criminal charge . . . ." *Marion,* at 320.

In sum, contrary to petitioner's assertions, there is no published California case that is contrary to or conflicts with this Court's speedy trial jurisprudence. None of petitioner's claims warrants granting certiorari.

B. Even if Petitioner's Speedy Trial Rights Attached, He Still Suffered No Constitutional Violation

Furthermore, this case presents a poor vehicle for this Court to reexamine its speedy trial jurisprudence because, even if the Court of Appeal erroneously determined that petitioner's federal speedy trial rights did not attach until after the information was filed in 2008, petitioner's speedy trial claim is without merit. To determine whether federal speedy-trial rights were violated, courts apply a balancing test involving four factors: length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Barker,* at 530. In *Barker*, this Court explained:

> The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.... [¶] The length of the delay is to some extent a triggering mechanism.... [¶] Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons.... [¶][T]he third factor [is] the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned.... We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. [¶] A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system....

Barker, at 530-532.

Under the federal constitutional speedy trial right, the defendant is afforded the benefit of a presumption of prejudice when there is a lengthy delay. "[T]he presumption that pretrial delay has prejudiced the accused intensifies over time. . . . [¶] . . . [¶] . . . [E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." *Doggett*, at 652, 655. However, lengthy delay does

not alone establish a speedy trial violation; rather, the delay must be balanced with the three other criteria. *Id.* at pp. 655-656.

Here, while the delay from petitioner's arrest in December 2001 until his trial in May 2008 was admittedly lengthy, the other *Barker* factors strongly militate against petitioner's argument that his federal constitutional right to a speedy trial was violated. After his arrest and incarceration in federal prison, petitioner waited more than five years to send his demand for trial, pursuant to California Penal Code section 1381.5, to the Orange County District Attorney. At that point, he was promptly brought to trial. Thus, the reason for the delay and petitioner's failure to timely assert his rights weigh against him.

Moreover, petitioner did not suffer prejudice from the delay. Petitioner did not suffer oppressive pretrial incarceration – he was incarcerated in federal prison following his guilty plea to his federal charges. Furthermore, petitioner's defense was not impaired by the delay in bringing him to trial. On this point, the California Court of Appeal thoroughly analyzed petitioner's claims of prejudice in rejecting petitioner's state speedy trial claim, which attached at the time the complaint was filed in December 2001. The Court of Appeal stated as follows:

> Defendant argues he suffered the following "categories of prejudice" as a result of the delay in prosecution of the charged offenses: (1) the blood sample was destroyed and thus unavailable for further testing; (2) the audio and video tape of defendant's interview with Furtado went missing or was destroyed; and (3) certain witnesses' memories have faded.
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> Defendant did not establish how the destruction of his sample of blood in 2004 prejudiced his defense. The blood sample

tested positive for the presence of cocaine, opiates, and "methamphetamine and/or related compounds." (He was acquitted of the only offense involving methamphetamine.) Defendant testified that at the time of the charged offenses, he was under the influence of cocaine and heroin as he had used cocaine at 2:00 that afternoon. Defendant does not challenge the methodology employed in the testing of the blood sample, and does not challenge the results. Instead, he argues further testing could have been done to more precisely identify which drugs were in defendant's system on December 12, 2001. Defendant fails to explain how that evidence would have assisted him in defending against the charged offenses.

As to the audio and video tape of defendant's interview with Furtado on December 12, 2001, as discussed ante, the record does not show when the tape was lost or destroyed. It might have been immediately destroyed by reusing the tape to record a different interview. There is no evidence the loss of that tape was attributable to the delay in bringing this case to trial. Furthermore, the contents of the tape are unknown; the record does not show that anyone ever reviewed the tape's contents or quality, and whether it might have benefited the defense is speculative at best. Testimony was provided that defendant did not appear to be under the influence at the time of the charged offenses. On the other hand, testimony showed that an individual under the influence of both cocaine and heroin might not appear to be under the influence of anything given the masking effect that combination of drugs can have as to the symptoms of intoxication. Furthermore, the jury was informed that defendant's

blood indeed tested positive for narcotics. Thus, even if the tape contained footage of defendant appearing to be under the influence of narcotics by, for example, slurring his speech, such evidence would be cumulative of the evidence already produced on this point. (See *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 506 [holding the defendant not prejudiced by delay because loss of memory regarding details of break-ins were "not of crucial significance since he ha[d] admitted that they occurred" and "his primary defense relate[d] to his intent at the time the crimes were committed"].)

Defendant's opening brief cites a number of examples of trial witnesses testifying that they could not remember or be certain about particular facts or circumstances they were asked about on the stand. Defendant contends that testimony shows he was prejudiced as a result of the trial delay. Although it is true that prejudice might be shown by witnesses' fading memories attributable to the passage of time, the alleged lost evidence must make a difference in the defense of the case or result in the denial of a fair trial. (*Scherling v. Superior Court, supra*, 22 Cal.3d at p. 506.)

Defendant cites the following testimony in support of his contention he was prejudiced as a result of witnesses' faded memories about the events underlying the charged offenses.

1. Lovchik testified (a) as far as he could recall, the diagram shown to him by counsel was consistent with where the vehicles were when he drove down the street on December 12, 2001; (b) he probably stopped his motorcycle just north of the collision; (c) he did not remember if

there were other sirens activated when he arrived at the scene; (d) he did not recall formulating an opinion whether defendant appeared under the influence at that time; (e) when he heard the officers tell defendant to shut off the truck, he did not remember whether the other officers had their weapons drawn or what Lovchik was doing; (f) when Lovchik reached into defendant's truck to turn off the ignition, he did not recall defendant trying to stop him, which officer was restraining defendant, or whether anyone covered defendant's mouth; (g) Lovchik did not remember whether he was touching defendant when he was removed from the truck or whether anyone struck defendant with a weapon; (h) he was not certain whether the soda can and the baggie fell out of the truck at the time defendant was taken from the truck; and (i) he did not know how long he remained on the scene.

2. Tamara Banks testified (a) she did not recall whether she found a pager in defendant's truck; (b) she did not remember how much of the substance she suspected was methamphetamine was found in the truck; and (c) she did not believe any pay/owe sheets were retrieved, but did not recall.

3. D.T. testified he did not remember the person in the pickup truck or whether a lot of cars were parked on either side of the street the day of the charged offenses. He did not remember how defendant was removed from the truck, whether he saw any officers hit defendant, or how long it took for the paramedics to arrive. He remembered the police were shouting for a while, but he did not remember what they were saying. Vilchis testified she did not remember a collision or whether the police

> officers demanded that defendant get out of the truck. She did not remember seeing damage to the police car or telling an officer the truck had backed out of the driveway and struck the police car.
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> 4. Bretta testified he did not remember who the third chase officer was that day. McConnell testified that he and two other officers searched defendant's residence on the day of the incident and he believed they found cocaine at the same time. He vaguely recalled it being located "on a dresser or something." He also did not remember to whom the cashier's check he found was made out and could only guess how much a gram of heroin cost in 2001. Worrall did not recall whether he did paperwork regarding asset forfeiture or the approximate amount of cash found at defendant's residence.
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> 5. Furtado did not remember if he saw defendant at the scene or whether he saw defendant or Odom before defendant was taken to the hospital. Furtado did not remember if he seized any bindles from defendant's truck. Odom remembered from his report that defendant felt pain following the collision, but not from his memory. Odom did not remember whether defendant was handcuffed at the hospital.
>
> We have carefully considered each of these items. Even assuming the above identified witnesses' loss of memory on those points is fairly attributable to the delay in bringing defendant to trial in this case, what they did not remember at trial was not material for the trier of fact to resolve the issues under the circumstances of this case.

(Pet. App. A at 23-27.)

Consequently, for the same reasons there was no state law violation, even if the Court of Appeal erred in determining the point at which petitioner's federal speedy trial right attached, petitioner cannot show those rights were, in fact, violated.

In sum, contrary to petitioner's claim, California law is consistent with this Court's Sixth Amendment speedy trial jurisprudence and there is no conflict in the law. Moreover, even if the California Court of Appeal's determination of the point at which petitioner's federal speedy trial rights attached was erroneous, petitioner cannot show he was entitled to dismissal under the *Barker* factors. Therefore, this case presents a poor vehicle for this Court to further examine Sixth Amendment speedy trial jurisprudence because a decision from the Court on this issue would not affect the final outcome in this matter.

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CONCLUSION

The petition for writ of certiorari should be denied.

Dated: March 12, 2012

Respectfully submitted

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