S231315

SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of Albert C., a person
Within the Jurisdiction of the Juvenile Court

THE PEOPLE OF THE STATE OF CALIFORNIA Respondent	
vs.	B256480 Juv. Ct.No.MJ21492 (Los Angeles)
ALBERT C Appellant	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

APPELLANT'S OPENING BRIEF ON THE MERITS

HONORABLE DENISE MCLAUGHLIN-BENNETT, JUDGE PRESIDING

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Albert C.

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STATEMENT OF ISSUES

Pursuant to California Rules of Court, Rule 8.520 subdivision (b)(2)(A), the is following issues are presented for review:

1. Did the juvenile court violate minor's due process rights by detaining him well past the 120-day limit established in the Los Angeles County Superior Court Juvenile Division's "Amended Competency to Stand Trial Protocol" (Protocol), without evidence of progress toward attaining competency?

2. Does a violation of the Protocol establish a presumption of a due process violation?

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the minor was was fifteen years old when a petition was filed against him in the juvenile court under Welfare and Institutions Code section 602. The minor was found incompetent and delinquency proceedings were suspended. Albert was detained in juvenile hall for 294 days for competency training without evidence of progress toward the attainment of competency.

A person charged with a criminal offense and committed on account of incompetency to proceed to trial has a due process right not to be detained for more than the reasonable period of time necessary to determine whether there is a substantial probability of attainment of competency in the foreseeable future.

(*Jackson v. Indiana* (1972) 406 U.S. 715, 738 [32 L. Ed. 2d 435; 92 S. Ct. 1845]; *In re Davis* (1973) 8 Cal. 3d 798, 805.) Even if it is determined that the accused probably soon will be competent to stand trial, any continued detention must be justified by progress toward that goal. (*Jackson v. Indiana, supra,* 406 U.S. at 738; *In re Davis* 8 Cal. 3d at 806.)

Minors have the same due process rights. (*In re R.V.* (2015) 61 Cal. 4th 181, 185.) When a minor is found incompetent to stand trial, delinquency proceedings must be suspended for a reasonable period of time until it can be determined whether there is a substantial probability that the minor will attain competency in the foreseeable future while the court still retains jurisdiction. (Id at 191-192, citing Welf & Inst. Code § 709 subd (c).)

Welfare and Institutions Code section 709 subdivision (c) provides only that proceedings be suspended for a "reasonable" period of time, thereby allowing for an indefinite commitment in violation of the mandate *of Jackson v. Indiana.* For proceedings in the Los Angeles juvenile courts, however, the Amended Competency to Stand Trial Protocol ("the Protocol") [1] adds rules to implement Welfare and Institutions Code section 709 including time limits to prevent the indefinite commitment of minors who are not likely to recover competence or who are not making progress toward competency. (*In re Jesus G.* (2013) 218 Cal. App. 4th 157, 171.) Specifically, the Protocol provides that no

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[1] The Amended Competency to Stand Trial Protocol ("the Protocol") was issued by the Presiding Judge of the Los Angeles juvenile court on January 12, 2012. It sets forth detailed procedures to govern competency proceedings in delinquency proceedings.

minor may be detained in juvenile hall for more than 120 days for the purpose of attaining competency, and then only if there is evidence that competence will likely be attained within that time frame. The Protocol establishes a presumptive violation of due process by implementing a concrete time limit to define the "reasonable " time limit of Welfare and Institutions Code section 709 and in so doing prevents an indefinite and unconstitutional detention. (I*n re Jesus G.* (2013) 218 Cal. App. 4th 157, 174.) In this case, reports submitted to the court by the organization responsible for competency training showed that when the minor had been detained for 120 days, there was no evidence of progress toward competency.

Throughout the time he was detained in juvenile hall, the court repeatedly denied the minor's motions to dismiss the petitions or to release him from custody, even while the competency reports consistently showed that he had not attained competency and was not making progress toward that goal. In detaining the minor in juvenile hall for so long only by reason of his incompetence, and while there was no evidence of progress towards attainment of competency, the juvenile court violated the federal and state constitutional right to due process of law as set forth in *Jackson v. Indiana* and *In re Davis*, supra and also the express time limits of the Protocol.

STATEMENT OF THE CASE AND PROCEDURAL FACTS [2]

In June 2012, when the minor was fourteen, a petition was filed charging him with one count of threatening a public officer in violation of Penal Code section 71. (Clerk's Transcript, "CT" 1).[3] The minor denied the allegation. (CT 6.) At that time, there were five substantiated referrals for neglect or abuse of the minor under Welfare and Institutions Code section 300, and the minor was a dependent of the juvenile court. (CT 17, 34.)

A second petition was filed on February 14, 2013, alleging assault likely to produce great bodily injury (Penal Code section 245 (a)(4)); battery with serious bodily injury (Penal Code section 243 (d)); possession of a firearm by a minor (Penal Code section 29610); and criminal threats (Penal Code section 422 (a).) (CT 51-52)

On February 15, 2013, the court declared a doubt as to the minor's competency and suspended the delinquency proceedings. The court appointed Dr Kambam to perform a competency evaluation and the minor was detained in juvenile hall. (CT 70.) Dr Kambam's report[4] stated that with appropriate mental

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[2] Because the minor ultimately admitted two counts of the allegations against him in a settlement in which the court dismissed the other allegations, there is no testimony about the facts of the allegations he admitted, and those facts are not relevant to the legal issues presented on appeal. Accordingly, there is no separate Statement of Facts in this brief, but a Statement of the Case and Procedural Facts that provides the context for the legal issues on appeal.

[3] The Clerk's Transcript comprises a single volume.

[4] Dr Kambam's report was not in the record before the Court of Appeal. It was part of the record in a habeas corpus petition filed on behalf of minor in that

health services and medication trials, the minor could likely attain competency within 12 months (Reporter's Transcript "RT" vol. I, 22, 87.) [5] At a competency hearing on March 19, 2013, the minor was determined not to be presently competent, delinquency proceedings remained suspended, and the minor remained in juvenile hall. (CT 73.)

The court ordered the Probation Department and the Department of Mental Health (DMH) to evaluate the minor and to submit a joint written report with their recommendations for the minor's treatment and an assessment whether he was likely to regain competence in the foreseeable future. (CT 73.) The probation department filed a report stating that there was no set protocol or procedure for completing the report the court had ordered, and that Probation and the DMH were therefore unable to collaborate to decide what kind of treatment or services would be appropriate for the minor. (CT 74.) The court directed the Probation Department to prepare an Incompetent to Stand Trial

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court in case number B251114. The court took judicial notice of it, as a court record which was an essential component of minor's contentions on appeal. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).) This court may take judicial notice in the same manner.

[5] The Reporter's Transcript comprises two volumes, each labeled "Volume 1 of 1". In this brief, volume I refers to the Augmented Reporter's Transcript which includes the hearings on August 8, 2012, February 15, 2013, March 7, 2013, March 19, 2013, April 10, 2013, May 23, 2013, June 20, 2013, July 17, 2013, August 15, 2013, August 26, 2013 September 18, 2013, October 6, 2013, November 12, 2013, January 13, 2014, February 4, 2014, and February 20, 2014. Volume II contains the hearings held on February 20, 2014, March 4, 2014, and March 18. 2014. This designation of the volumes follows the chronology of the proceedings in the juvenile court.

("IST") planning report and to refer the minor to the Regional Center if appropriate. Meanwhile, the minor remained detained in juvenile hall. (CT 77.)

On April 17, 2013, the Probation Department reported that the minor would be referred to an organization named Creative Support for approximately twenty total hours of competency training, to be provided in weekly sessions while the minor was detained in juvenile hall. Creative Support would administer an assessment test at the first session, and would provide a written report to the court upon completion of the training. (CT 78.) Nine days later, Creative Support informed the Probation Department that it could not provide competency training at Sylmar Juvenile Hall where the minor was housed and the court ordered the minor's transfer to Eastlake Juvenile Hall. (CT 92, 93.) Meanwhile delinquency proceedings remained suspended, and the competency hearing was continued to May 23, 2013. (CT 81.)

On May 23, 2013, counsel for the minor renewed her continuing objection to the minor's detention in juvenile hall. She informed the court that although the minor had now been in custody in juvenile hall for four months, he had received only two competency training sessions. She argued that under the Protocol, the case should be dismissed if the minor did not attain competency within sixty days. (RT vol. I, 30- 31.) The court ordered probation to include in its next report an assessment whether the minor could regain competency in the foreseeable future, and continued the competency proceedings to June 20, 2013 over the objection of counsel. (RT vol. I, 35.)

On June 17, 2013, three days before the next scheduled competency hearing, the probation officer reported that Creative Support planned to give the

minor an assessment test on June 19, 2013 and to provide a copy to the officer on the same day. (CT 99.) Probation therefore requested another one month continuance for a progress report on the minor's attainment of competency. (CT 101.) Counsel for the minor argued that the minor could not be detained for competency training if he was not making progress toward attainment. She asked for an attainment of competency hearing to be set as required by the Protocol, and for Dr Kambam to be appointed again to evaluate the minor and to determine whether the probation department had done was it was supposed to do to help him achieve competency. (RT vol. I, 41.) The court denied counsel's requests and continued the competency hearing to July 17, 2013. The court ordered the probation department to prepare a supplemental report addressing the support services provided to the minor, the outcome of the assessment test, and an opinion whether the minor had attained or could attain competency. The minor remained in detention at juvenile hall over counsel's objection. (CT 102, RT vol. I, 51.)

On July 11, 2013, Creative Support sent a report to the Probation Department, indicating that the minor was still incompetent to stand trial. (CT 106 - 108.) The report was submitted to the court but on July 17, 2013, the juvenile court again continued the proceedings to determine whether the minor had made progress in competency training and again denied the minor's motion to be released from detention. (CT 109.) Counsel for the minor repeated her request that the court order the reappointment of Dr Kambam to evaluate whether the services the minor was receiving had helped him in making progress towards competency. The court denied the motion as premature, stating that it was not yet

in receipt of any evidence that there had been a finding about the minor's ability to regain competency. The court stated that counsel could readdress her request for dismissal of the petitions on the next calendared date, August 15, 2013. (RT 51.)The court also denied counsel's motion to dismiss the petitions and to terminate jurisdiction (RT vol. I, 49-50, 52.)

On August 1, 2013, Creative Support reported to the Probation Department that the minor had begun competency training on May 9, 2013 and had received training once a week for one and half hours. He had been tested three times, on May 9, 2013, June 19, 2013, and July 31, 2013, and had failed the test each time. The report included the minor's scores for the tests administered in June and July, and concluded that he was currently incompetent to stand trial. (CT 113-114.)

At the next court hearing, on August 15, 2013, counsel for the minor asked the court to rule that the minor was unlikely to attain competency in the near future. She moved for dismissal of all charges because of the juvenile court's failure to adhere to the Protocol governing juvenile competency proceedings and to the constitutional standard of due process. (RT vol. I, 59 - 60.) The court denied the motions and continued the competency hearings. The minor remained in custody in juvenile hall. (CT 116.) The matter was continued again on August 26, 2013 . The minor was to continue to receive competency training and was to remain detained in juvenile hall. (CT 117.) On September 10, 2013, the counsel for the minor filed a petition for a writ of habeas corpus on the grounds of the minor's illegal detention: he had been in custody more than 120 days, had been tested four times and was not scoring grades that demonstrated competency. (RT vol. I, 81)

On September 12, 2013, Creative Support submitted another report on the minor's competency training, stating that the minor was still incompetent to stand trial. (CT 121.) At the next hearing, on September 18, 2013, the juvenile court continued the matte yet again, pending the minor's referral to the Regional Center. Delinquency proceedings remained suspended, and the minor remained in detention at juvenile hall over the objection of counsel. (CT 124)

In October 10, 2013, Creative Support submitted another report on the minor's competency training, stating that the minor was still incompetent to stand trial. (CT 128-130.) At a hearing on October 16, 2013, the court expressed concern that the report from Creative Services was the same as the previous one, and there was no way to know whether the test was capable of preventing malingering by the minor. (RT vol. I, 93.) The court ordered the appointment of a second expert to evaluate the minor for competency. Counsel for the minor requested that Dr Kambam be appointed because, having conducted the first evaluation, he had a baseline against which to measure any progress. (RT vol. I, 96-97.) The court denied the request on the ground that "his second opinion would not be in all party's [sic] best interest. " (RT vol. I, 98.) Instead, Dr Haig Kojian was appointed as the next expert in line on the panel. (RT vol. I, 98, CT 131.) Counsel for the minor renewed her motions to release the minor and dismiss the petitions, which the court denied and continued the matter to November 12, 2013. (RT vol. I, 96, CT 131.)

On November 12, 2013, counsel for the minor renewed her motions for release from detention and dismissal of the petitions and the court again denied them. (RT vol. I, 122-123.) The matter was continued to January 13, 2014, pending

a report from Dr. Cory Knapke who was appointed on November 1, 2013 to replace Dr Haig Kojian who had a conflict of interest. (CT 132, 137)

On January 13, 2014, the court received Dr Knapke's report finding the minor incompetent to stand trial on the basis of his developmental immaturity. (CT 139.) At the request of the District Attorney, the court scheduled a further hearing at which both Dr Knapke and a staff person from Creative Support were to be available to testify. (CT 139.) Counsel for the minor filed a habeas petition to stay further proceedings in the juvenile court but the petition was denied. (CT 140) The minor's motion to refer his case to Department 203, the Juvenile Mental Health Court was also denied. (CT 142, 150.)

On February 4, 2014, nearly 10 months after the IST hearing, the court held an attainment of competency hearing at which both Dr Knapke and Nico Gipson testified (CT 150.) Gipson was the minor's competency trainer from Creative Services, and she testified the minor was making a good effort but was consistently unable to pass the tests she administered. (RT vol. I, 150, 174, 180.) Dr Knapke opined that there was no medical reason the minor could not attain competency, but conceded that without a further evaluation, he could not say to a medical certainty that the minor was competent. (RT vol. I, 233.)

The court found that the minor competent and reinstated the juvenile delinquency proceedings. The minor's motion to refer the matter to the Juvenile Mental Health Court was again denied and the minor remained in custody at juvenile hall. (CT 149-150 .) On February 20, 2014, the minor admitted both petitions. The court found both petitions true as to count one and dismissed the

remaining counts pursuant to an agreement. (CT 176.) The minor was detained in juvenile hall pending disposition. (CT 176.)

The probation officer's Supplemental Disposition Report recommended the minor be referred to the Juvenile Mental Health Court. (CT 182, 184.) The minor's dependency counsel recommended that he remain a dependent of the juvenile court and not be declared a ward under Welfare and Institutions Code section 602, or that he be placed under dual supervision. (CT 185, 187.) Despite these recommendations, the juvenile court declared the minor a ward of court under Welfare and Institutions Code section 602, denied the minor's request for referral to the Juvenile Mental Health Court, and placed him in the custody of the probation officer for suitable placement with conditions of probation. (CT 188-189.)

ARGUMENT

I

THE JUVENILE COURT VIOLATED THE MINOR'S RIGHT TO DUE PROCESS OF LAW WHEN IT DETAINED HIM IN JUVENILE HALL FOR COMPETENCY TRAINING FOR 294 DAYS, WELL PAST THE 120 DAY LIMIT ESTABLISHED IN THE PROTOCOL, WITHOUT ANY EVIDENCE OF PROGRESS TOWARD THE ATTAINMENT OF COMPETENCY

A. The Constitutional and Statutory Right to Due Process in Competency Proceedings

Due process principles require trial courts to employ procedures to guard against the trial of an incompetent defendant. (*In re R.V., supra,* 61 Cal. 4th at 188;

citing *People v. Hale* (1988) 44 Cal.3d 531, 539; *People v. Pennington* (1967) 66 Cal.2d 508, 518; and *Pate v. Robinson* (1966) 383 U.S. 375, 377 [15 L. Ed. 2d 815, 86 S. Ct. 836].) The test is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him. (*Dusky v. United States* (1960)362 U.S. 402 [80 S. Ct. 788; 4 L. Ed. 2d 824].) A minor who is the subject of a wardship petition under Welfare and Institutions Code 602 has a due process right not to be adjudicated while mentally incompetent. (*In re R.V., supra,* 61 Cal. 4th at 185.) Although adults may be declared incompetent on the basis only of mental or developmental disability, a juvenile may be incompetent by reason of developmental immaturity. (*Timothy J. v. Superior Court* (2007) 150 Cal. App. 4th 847, 860-862.)

Due process demands that a hearing on competency be held when a court becomes aware of facts giving rise to a doubt as to an accused's competency. (*In re James H.* (1978) 77 Cal.App.3rd 169, 175.) If a defendant is found incompetent and criminal proceedings are suspended, a person detained solely on account of his incompetence may not be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competence in the foreseeable future. (*Jackson v. Indiana, supra,* 406 U.S. at 738; *In re Davis* (1973) 8 Cal. 3d 798, 804, 806.) If it is determined he will not, the state must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. (*Jackson v. Indiana,* supra, 406 U.S. at 738.) Even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment

must be justified by progress toward that goal. (*Jackson v. Indiana, supra,* 406 U.S. at 738; *In re Davis, supra,* 8 Cal. 3d at 804, 806.)

In 2010, the Legislature enacted Welfare and Institutions Code section 709 which sets forth procedures to govern competency matters in delinquency proceedings. It provides in pertinent part that during the pendency of any juvenile proceeding, the minor's counsel or the court may express a doubt as to the minor's competency, and if the court finds there is substantial evidence that raises a doubt as to the minor's competency, the proceedings must be suspended. (Welf & Inst Code §709 subd (a).) The court must appoint an expert to evaluate the minor and conduct a competency hearing. (Welf & Inst Code §709 subd (b).) If the minor is found to be incompetent by a preponderance of the evidence, " all proceedings shall remain suspended for a period of time that is no longer than reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future, or the court no longer retains jurisdiction. " (Welf & Inst Code § 709 subd (c).)

In January 2012, the presiding judge of the Los Angeles Juvenile Court issued the Protocol to implement section 709. The Protocol mirrors the language of Welfare and Institutions Code section 709 and also establishes specific timelines for processing cases in which juvenile proceedings are suspended, timelines designed to prevent the indefinite commitment of minors who are not likely to recover competence. (*In re Jesus G., supra,* 218 Cal. App. 4th at 171.) It sets an outer limit of 120 days beyond which a minor may not be held in a juvenile hall to participate in attainment services for more than one hundred and twenty days."(*In re Jesus G., supra,* 218 Cal.App.4th at 162.) The Protocol does not call for

a cessation of treatment or dismissal of the pending petition at the 120-day mark. Rather, it sets clear boundary beyond which minors may not be detainec to receive competency training. (Protocol, p. 7.) The court in *Jesus G.*, held that because section 709 does not contain a time limitation on the duration of competency services or how long a minor may be detained in juvenile hall, the Protocol's 120-day limitation on the detention period does not contradict or overrule section 709 and is not pre-empted by the statute. (*In re Jesus G., supra,* 218 Cal. App. 4th at 168.) The Protocol implements Welfare and Institutions Code section 709 and "adds additional rules for competency proceedings." (Id. at 168.)[6]

B. The Minor's Lengthy Detention in Juvenile Hall Without Evidence of Progress Toward Attainment of Competency Violated His Right to Due Process under Jackson v. Indiana

In *Jackson v. Indiana,* the court held that indefinite commitment on the ground of incompetency violates the federal constitutional guarantee of due process and established a two-pronged test. First, a commitment must last no longer than is reasonable necessary to determine whether the accused is substantially likely to attain competency in the foreseeable future. Second, even if there is a substantial probability of attainment of competence in the foreseeable

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[6] The court in *Jesus G* also held that a violation of the Protocol is a presumptive violation of due process in as much as it addresses the problem of an indefinite commitment and the necessity of making a prognosis as to the likelihood of attaining competence. (*In re Jesus G., supra,* 218 Cal. App. 4th at 171.) This matter is addressed in Part II, below.

future, an accused may not be detained if there is no evidence of any progress toward remediation. (*Jackson v. Indiana, supra,* 406 U.S. at 738; *In re Davis, supra,* 8 Cal. 3d at 807..) The minor's lengthy detention in juvenile hall met neither of *Jackson's* requirements and violated his right to due process.

1. There Is No Evidence in the Record that the Minor Made Progress toward Attainment of Competency.

The minor was found incompetent to stand trial on March 19, 2013. Dr Kambam's report found the minor presently incompetent but opined that he could likely attain competence in the next 12 months if given appropriate medication trials and mental health services as well as repetitive competency training. The probation department's remediation plan for the minor consisted of a total of 20 hours of competency training to be provided in weekly sessions lasting one and a half hours each while the minor was in custody in juvenile hall. The plan made no provision for mental health services or medication trials, and competency training did not even commence until May, 9 2013, nearly two months after the finding of incompetency. All the competency reports subsequently submitted to the court showed the minor was making no progress toward attainment of competency.

The first report was dated July 11, 2013. It stated that competency training started on May 19, 2013, that the minor had been tested twice, most recently on June 19, 2013 and that he had failed the test both times. The Competency Assessment Instrument ("CAI") used to test the minor included fourteen "domains", each scored from 1 to 4, with 1 being the lowest. The minor scored 1 in all fourteen domains on both test dates. The report stated "it is recommended

that any individual attain a score of at least 3 (Borderline Competent) on all 14 CAI domains before he can be considered trial competent. Albert did not score a 3 in any of the domains, therefore he is not competent to stand trial. " (CT 106, 108.) The report did not expressly state whether the minor was making progress towards competency at that point, but his lack of progress may properly be inferred from the fact that his test results were constant over two months.

A report submitted by Creative Support on August 1, 2013 stated that the minor had been tested three times with the CAI, most recently on July 31, 2013 and that he again scored only a 1 in all fourteen domains. The report repeated that it was recommended that an individual attain a score of at least 3 on all 14 domains before he may be considered trial competent. Because the minor did not score a 3 in any of the domains, he was not therefore competent to stand trial. (CT 113-115.)

Despite the test results consistently showing that the minor was not competent and was not making progress, the court denied the minor's August 2013 motion to dismiss, and continued the competency proceedings to September 18, 2013 for "further progress on the competency services that the minor is now receiving. " (RT vol. I, 61, 62-63.)) In September 2013, the court again denied a motion to dismiss and continued the matter, although there was still no evidence the minor was making progress and the minor had already been detained for 155 days for competency training. (RT vol. I, 89.) A report submitted to the court in October 2013, again demonstrated that the minor was continuing to score only 1s and was still incompetent to stand trial (RT vol. I, 93.) Counsel again moved to dismiss, but the juvenile court observed that the reports submitted by Creative

Services were the same from month to month, and voiced a suspicion the minor might be malingering. Dr Kambam had found no evidence of malingering in his initial evaluation and the minor's competency trainer later testified that the minor consistently made a good effort.

In November 12, 2013, the court appointed Dr Cory Knapke to do competency evaluation. (RT vol. I, 105.) The minor was continuing to score only 1s on the CAI. (RT vol. I, 107.) In January 2014, the court received Dr Knapke's report indicating that the minor was not competent to stand trial. (RT vol. I, 130 - 131.) The court again denied the minor's motion to dismiss and continued the matter for a competency hearing in February 2014 at which it found the minor competent to stand trial and reinstated delinquency proceedings. ((RT vol. I, 245 -248) [7]

Between March 2013 and February 2014, the juvenile court received no reports indicating the minor was making progress toward attaining competency. Under *Jackson v. Indiana* and *In re Davis*, any continuing commitment had to be justified by a showing of progress, which was lacking here. (*Jackson v. Indiana, supra*, 406 U.S. at 738; *In re Davis, supra*, 8 Cal. 3d at 807.) In finding no due process violation in detaining the minor without evidence of any progress toward competency, the Court of Appeal asserted that the reports did not assist the court in determining whether the minor was making progress. (*In re Albert C.* (2015) 241

[7] The minor challenged the juvenile court's finding of competency in the Court of Appeal and presented the issue to this court in his Petition for Review

Cal. App. 4th 1436, 1460.)[8] According to the Court of Appeal, while the juvenile court monitored the services and minor's progress on a regular basis, the reports "essentially reported raw data; minor's answers to the questions presented were accepted without consideration of whether he was making an honest effort or malingering." (Ibid.)The Court of Appeal did not acknowledge that the raw data in the reports consistently showed no evidence of any progress to competency, nor did it explain why, if the court was monitoring the reports on a regular basis, it was reasonable for the juvenile court to wait until October 16, 2013 to question the nature of the reports it had been reviewing, by which time the minor had been detained for 183 days.

The Probation Department's IST plan for the minor stated he would receive a total of 20 hours of competency training through weekly sessions lasting one-and- a- half hours. Training commenced on May 9, 2013 after which the minor received the planned weekly sessions. (CT 113-114.) The training program should therefore have taken no more than 13 weeks, but there is nothing in the record to show that the juvenile court recognized that time frame nor questioned why there had been no progress when the 13 weeks had elapsed. The Court of Appeal did not acknowledge that the program specified in the IST plan should have been complete and therefore requiring review at around the 13 week mark. Finally, the Court of Appeal did not acknowledge the uncontradicted testimony of the minor's competency trainer in February 2014, that the minor was making a

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[8]The Court of Appeal's opinion was republished upon grant of review and is cited here only for the purpose of responding to the court's analysis and holdings.

sustained good effort but was still not making progress toward the attainment of competency.

To summarize, from the time competency training commenced in May 2013, two months after the minor was found incompetent, to the attainment hearing in February 2014, there was no evidence the minor was making any progress towards attainment of competency. The juvenile court was first made aware of his the lack of progress in July 2013, approximately four months after the minor was found incompetent and two months after he received his first training session. Every subsequent report recorded the same lack of progress and it was not until October 2013, seven months after the minor was found incompetent, that the juvenile court first voiced a suspicion that the minor might be malingering. Then, instead of making a timely determination of competency, the courtdetained the minor until February 2014, resulting in his being in custody for 294 days, solely on the ground of his incompetency. The court's repeated denials of the minor's motions to dismiss directly contravened the mandate of *Jackson* that even in a case where there is a likelihood an accused will attain competency, he may not be held unless there is evidence he is making progress toward that goal. (See *Jackson v. Indiana*, supra, 406 U.S. at 738.)

2. The Court of Appeal Erred in Finding No Violation of the Minor's Right to Due Process

In holding that the minor's lengthy detention in juvenile hall did not violate his right to due process, the Court of Appeal held that "[u]nlike the defendant in *Jackson*, who suffered from multiple disabilities and was unlikely to ever attain competence, minor's incompetence was founded on emotional

immaturity, which according to Dr. Kambam, could be remedied within 12 months " and that under those circumstances, "12 months to attain competency was constitutionally reasonable. " (*In re Albert C., supra,* 241 Cal. App. 4th at 1459-1460.)

As noted above, section 709 does not provide any guidance as to the period of time that is "no longer than reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future. "(Welf & Inst Code § 709 subd (c).) In criminal proceedings, by contrast , Penal Code section 1370 requires that in the case of a defendant committed for incompetence, an initial report on progress toward competency and the likelihood of restoration must be submitted to the court within 90 days. Only if the report discloses discloses a substantial likelihood the defendant will regain mental competence in the foreseeable future, may he be further detained rather than returned to the committing court. (Pen. Code § 1370 subd (b)(1).) In *In re Davis,* this court held that in the case of an adult committed for incompetency under Penal Code section 1370, "ordinarily " a 90-day period for the initial observation of the defendant should be adequate to allow the hospital authorities a reasonable opportunity to report regarding the likelihood of a defendant's recovery. (*In re Davis,* supra, 8 Cal. 3d at 806, fn. 5; see *also In re Newmann* (1976) 65 Cal. App. 3d 57, 64 [rejecting the Attorney General's contention that the stated 90-day period was insufficient to evaluate for mental retardation under Pen. Code § 1370.1 subd (b)(1).) When proceedings are suspended under section 709, it should be interpreted to require a detained minor have at least the same protection as an

adult committed under Penal Code section 1386. (See *In re John Z* (2014) 223 Cal. App. 4th 1046, 1057.)

In *John Z*, the question was whether, once a doubt as to competency was formally declared under Welfare and Institutions Code section 709, the juvenile court had jurisdiction to withdraw its order suspending proceedings without holding a formal hearing. (*In re John Z., supra,* 223 Cal. App 4th at 1049.) The court noted that section 709 makes no provision for a court to withdraw its order suspending proceedings for a competency determination, and it could find no cases that dealt with whether, or under what circumstances, a juvenile court has the discretion to withdraw orders made pursuant to section 709, subdivisions (a) and (b). The court noted that prior to the enactment of section 709 in 2010, "the protective reach of Penal Code section 1368 extend[ed] to section 602 proceedings in juvenile court." (*In re John Z.*, supra, 223 Cal. App. 4th at 1055, citing *In re Ramon M.* (1978) 22 Cal.3d 419, 430, fn. 14, superseded by statute on another ground as stated in *People v. Phillips* (2000) 83 Cal.App.4th 170, 173.) The court in *John Z* found therefore that cases concerning due process requirements when determining competency in the adult criminal context were instructive. (*In re John Z.*, supra, 223 Cal. App. 4th at 1054.) Noting cases that held that a formal hearing must be held in adult proceedings under 1368, the court held " We discern no reason why the demands of due process would allow a court to be any less rigorous in juvenile proceedings than ... in adult proceedings. (*In re John Z*, supra, 223 Cal. App. 4th at 1057.)

The same sensitivity to the protection of the rights of a minor should apply in competency matters. Indeed, the legislature enacted Welfare and Institutions

Code section 709 precisely to address the problem that in the absence of a juvenile statute on competency to stand trial, adult competency statutes did not address the nuanced application of 'developmental immaturity' outlined in case law relevant to determination of competency in juveniles. " (Assembly Committee on Public Safety, April 13, 2010 hearing on AB 2212 as amended April 8, 2010, Bill Analysis, p 3.)

Recent research on juvenile incompetence confirms that for most juveniles a period shorter than 90 days is sufficient either to attain competency or to determine that a minor will not attain competency. Preliminary data from a study in Virginia showed that the majority of juveniles were either restored to competence or found to be incapable of attaining competence within 3 to 4 months. (Larson, K. And Grisso T., *"Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers "* National Youth Screening and Assessment Project (November 2011) p. 76.) The study involved 520 youth. The results showed that, after services were provided for between 91 and 120 days, 52 percent of youth were remediated and 16 percent were determined to be unable to attain competence. After services had been provided between 121 and 150 days, the cumulative number of juveniles who had either been remediated or determined to be unrestorable was 78 percent. In that additional 30 days of service provision, an additional 7 percent of juveniles were remediated and 3 percent found unremediable. If services were provided up to 180 days, an additional 2 percent of youth were found to be unable to attain competence and an additional 5 percent were remediated . (Ibid.)

In light of the 90 day evaluation period in Penal Code section 1370 and most particularly in light of research indicating that if juvenile competency is to be attained at all, it will in most cases be attained within three to four months, it was unreasonable for the juvenile court to detain the minor for 294 days when the results of successive tests indicated he was not making progress toward incompetency. The Court of Appeal was incorrect in concluding the period was reasonable and did not violate the minor's right to due process.

Nor is a different conclusion warranted on the ground that the minor was continuing to receive competency training and it was within the 12-month period for attaining competency referenced in Dr. Kambam's original report. (*In re Albert C.*, *supra*, 241 Cal. App 4th at 1459.) As noted above, Dr Kambam's opinion that the minor could be expected to attain competency within 12 months was conditioned on the minor's receiving medication trials and mental health services to improve executive functioning, as well as repetitive education of competency-related concepts.[9] There is nothing in the record to show that the

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[9] Dr. Kambam stated:"It is my opinion, with reasonable medical certainty, that there is a substantial probability that the minor will attain Competency [***11] to Stand Trial in the next 12 months. While the minor is significantly impaired in his ability to retain information, reason, and make decisions, he has not had any medication trials with medications (such as ADHD medications) that improve executive functioning and reduce inattentive and hyperactivity-impulsivity symptoms. With mental health services to intervene in this area, and with repetitive education of competency-related concepts, he would likely significantly improve his understanding of these concepts." (*In re Albert C., supra*, 241 Cal. App. 4th at 1445.)

minor received any of the medication trials or mental health services that Dr Kambam saw as integral to the attainment of competency.

As another reason to reject the minor's due process claim, the Court of Appeal also held that " the length of detention in this case was the product of the minor's determination to avoid a finding of competency, as evidenced by his repeated answer of 'I don't know' to basic questions despite months of training, an average IQ, and no mental disease or defect. " (Id at 1460.) But there is nothing in the record to support the Court of Appeal's conclusion that the length of detention was the product of the minor's manipulation. First, when the minor had already been in custody for four months, he had received only two competency training sessions. (RT vol. I, 30- 31.) The delay in providing the necessary services was not the minor's fault. Second, Nico Gipson, the competency trainer who worked with the minor for eight months testified that he was cooperative and made a good effort, that he was attentive during their sessions and that he participated and volunteered information. Because the minor was participating and trying to learn, their sessions often lasted the full hour and a half that was scheduled. (RT vol. I, 176, 180.)

Furthermore, research on juvenile competence shows that even factual understanding, which focuses only on basic knowledge of legal proceedings, has been found difficult to sufficiently improve (See Viljoen, L. And Grisso, T., *Prospects for Remediating Juveniles' Adjudicative Incompetence,* Psychology, Public Policy, and Law, Vol. 13, No. 2, 84-114, at 107 (2007).) Not all youth will attain competency even with proper training. One of the most long-standing juvenile competence remediation programs is in Florida, where restoration services are

provided at a secure juvenile forensic facility. In addition to psychiatric, psychological, and medical evaluations and services, youth attend a 50-minute competency training class five days a week. The curriculum is flexible, but employs methods such as lectures, videos, games and mock trials. Youth also receive individual counseling once a week, and forensic psychologists evaluate each youth on a monthly basis to determine whether the youth is ready to return to court for a competency. Even with so comprehensive a program of services and training that lasted on average between 155 and 185 days, 30% of youth with an intellectual disability and 14% of those with a diagnosis did not attain competence. (Larson and Grisso, supra, p 82.) In sum, there are reasons other than manipulation to explain why the minor did not make progress toward competency.

Due process requires that the nature and duration of commitment for incompetency "bear some reasonable relation to the purpose for which the individual is committed." (*Jackson v. Indiana,* supra, 406 U.S. at 738; *People v. Superior Court (Lopez)* (2005) 125 Cal. App. 4th 1558, 1565.) The purpose here was to provide the minor with competency training. Competency training sessions did not even commence until the minor had been detained in juvenile hall for two months and then consisted only of one session a week of one and a half hours. Despite making a good effort, the minor made no demonstrable progress toward competency, and his lack of progress was documented in reports to the juvenile court. The court detained the minor for 183 days before questioning the reports that demonstrated his lack of progress. The minor's detention was unreasonable

and violated his right to due process under the standard set forth by the United State Supreme Court in *Jackson v. Indiana* and this Court in *In re Davis*.

II

A VIOLATION OF THE PROTOCOL'S 102 DAY LIMIT ESTABLISHES A REBUTTABLE PRESUMPTION OF A DUE PROCESS VIOLATION BECAUSE DETAINING A MINOR FOR MORE THAN 120 DAYS FOR COMPETENCY TRAINING WITHOUT EVIDENCE OF PROGRESS IS UNREASONABLE WITHIN THE MEANING OF *JACKSON V. INDIANA* AND *IN RE DAVIS*

A. Introduction

In Part I of the argument, the minor discussed the reasons why the fact of his lengthy detention in juvenile hall for competency training without evidence of progress toward attainment of competency was unreasonable and thus violated the due process right of defined in *Jackson v. Indiana* and *In re Davis. Jackson* left it to the states to determine a standard of reasonableness, but Welfare and Institutions Code section does specify what constitutes a reasonable period of time during which a minor may be detained while delinquency proceedings are suspended because of his incompetence. Accordingly, the unreasonableness of the minor's detention without progress towards competency rests not upon the violation of a specific statutory time frame but upon the facts of his case, viewed within the context of the analogous criminal statute and what is reliably known about the time frame within which juvenile will likely achieve competency. Both point to the conclusion that detention for more than six months to determine whether there is a substantial likelihood that a minor will regain competence in the foreseeable future is unreasonable. The outer limit of six months detention for

a minor to attain competency is reflected in the Protocol. The court's holding in *In re Jesus G.* that a violation of the Protocol's guidelines constitutes a rebuttable presumption of due process should therefore be affirmed. (*See In re Jesus G., supra,* 318 Cal. App. 4th at 171.)

B. The Protocol Implements Welfare and Institutions Code section 709

The Protocol was an effort by the Los Angeles County juvenile courts to establish a procedure to implement Welfare and Institutions Code section 709. It mirrors much of the language contained in the Welfare and Institutions Code but it adds language that does not conflict with that statute. Welfare and Institutions Code section 709 does not contain a time limitation on the duration of competency services nor how long a minor may be detained in juvenile hall. (*In re Jesus G., supra,* 218 Cal. App. 4th at 168.) Nor does section 709 establish any provisions for periodic review of a minor's progress toward competency and whether after the initial finding of incompetence there is a substantial likelihood of that competence might be attained in the foreseeable future. Although the language of *Jackson* does not expressly impose a duty of judicial oversight, such a duty is implicit. By its decision to commit an accused for treatment to restore competence, the committing court becomes responsible for monitoring the progress of that treatment which serves as the sole legal justification for continued confinement. (*Morris, G., and Maloy, J. Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants,* 27 U.C. Davis L. Rev. 1, 10-11 (Fall 1993.) The Protocol provides guidelines to implement section 709 and address the length of time a minor might reasonably be detained to determine whether he has attained competency or is substantially likely to do so in the foreseeable

future. It addresses the problem of an indefinite commitment and the necessity of making a prognosis as to the likelihood of attaining competence. (*In re Jesus G.*, supra, 218 Cal. App. 4th at 170-171.)

As a local policy, the Protocol is not pre-empted because because it is not inconsistent with state legislation or statewide court rules. It does not duplicate, contradict, or enter an area fully occupied by general law, either expressly or by legislative implication (See *Hogoboom v. Superior Court* (1996) 51 Cal.App.4th 653, 657-658.) The Protocol does not duplicate or contradict Welfare and Institutions Code section 709. The Protocol restricts the period of time a minor may be held in juvenile hall while receiving attainment of competency services to 120 days. In contrast, Welfare and Institutions Code section 709, subdivision (c), addresses the length of time proceedings may be suspended due to a finding of incompetency to stand trial. The Legislature determined that this length of time should not be restricted to six months as originally proposed, but rather, it should be "no longer than reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future . . . . (Welf. & Inst. Code, § 709, subd. (c).) Welfare and Institutions Code section 709 does not address how long a minor may be detained in juvenile hall while receiving attainment of competency services. As such, the Protocol is neither coextensive nor inimical to the statute.

Under the Protocol, when a minor who is deemed incompetent is detained in juvenile hall, the court must set an Incompetent to Stand Trial (IST) planning hearing within fifteen days, and must provide a plan and implement services to help him attain competency. The case must be set for an Attainment of

Competency hearing within sixty days. (Protocol, pp. 5-6.) At the Attainment of Competency hearing, the court has three options. If it finds that there is not a substantial probability that the minor will attain competency in the foreseeable future it must dismiss the petition; if the court believes that minor has attained competency it must reinstate the juvenile proceedings; and if the court finds that further efforts at attainment would be successful, it may order these services be provided for another sixty days. (Protocol, pp. 5-6.) A minor may not be held in juvenile hall to participate in attainment services for more than one hundred and twenty days. (Protocol, p. 7.) The record in the minor's case shows unequivocally that the juvenile court repeatedly ignored and violated the Protocol's guidelines .

C. The Protocol's Timelines for the Detention of a Minor While Proceedings Are Suspended under Section 709 Provide a Necessary and Reasonable Rebuttable Presumption of a Due Process Violation

The court in *Jesus G.* court held that the guidelines in the Protocol "are in line with constitutional requirements of due process as set forth in Jackson and Davis inasmuch as they address the problem of an indefinite commitment and the necessity of making a prognosis as to the likelihood of attaining competence." (*In re Jesus G.*, supra, 218 Cal. App. 4th at 171.) The court held therefore that a violation of the Protocol is presumptively a violation of constitutional rights, but that the presumption is rebuttable based on the facts of a given case. (Id at 174.) In holding that the minor's detention in juvenile hall beyond the Protocol's limit of 120 days did not violate his right to due process, the Court of Appeal in this case disagreed with the conclusion that a violation of the Protocol is presumptively a violation of constitutional rights. (*In re Albert C.*, supra, 241 Cal.

App. 4th at 1460-1461) It held that the Protocol is not entitled to the force of law; the 120-day limit on detention does not define due process; and by setting a maximum period of confinement, the Protocol conflicts with *Jackson* and section 709, both of which provide for a reasonable period of time to determine attainment of competency rather than a fixed number of days. *(In re Albert C., supra,* 241 Cal. App. 4th at 1460-1461.)

The court's conclusion is wrong: the Protocol does not conflict with *Jackson* and Welfare and Institutions Code section 709, it implements them. The reason the court in *Jackson* did not prescribe a time limit for what constitutes a reasonable period of commitment was that it felt it inappropriate to do so, in light of the differences among the states with regard to facilities and procedures, as well as the lack of evidence in the record of the case before it. (*Jackson v. Indiana,* supra, 406 U.S. at 738- 739.) Because it made clear, however, that commitment for treatment could not be indefinite, *Jackson* necessarily requires states and the federal government to have rules or guidelines that both limit the time an accused may be held to attain competency and that provide for dismissal of charges if competency is not restored within that time period. The Protocol provides such guidelines for compliance with the constitutional mandate.

In holding that the Protocol's were of no legal effect, the Court of Appeal stressed the need for flexibility, but as the United States Supreme Court has observed, " flexibility has its limits" and it "is not a blank check. " (*County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 55, 111 S. Ct. 1661; 114 L. Ed. 2d 49 (*McLaughlin*).) Sometimes, therefore, courts must constrain flexibility to protect rights guaranteed by the United States constitution. (Id at 56.)

In *Gerstein v. Pugh,,* the United States Supreme Court held unconstitutional Florida's procedures under which persons without a warrant could remain in police custody for 30 days or more without a judicial determination of probable cause. (*McLaughlin, supra,* 500 U.S. at 125, citing *Gerstein v. Pugh* (1975) 420 U.S. 103; 95 S. Ct. 854; 43 L. Ed. 2d 54.) In the interest of flexibility, the court left it to the individual states to integrate "prompt " probable cause determinations into their differing systems of pretrial procedures. (Id at 123-124.) In *McLaughlin,* however, recognizing that flexibility has its limits the court determined granted certiorari to articulate more clearly the boundaries of what was permissible under the Fourth Amendment (*McLaughlin* supra, 500 U.S. at 56.) The court stated:

> " Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds. Taking into account the competing interests articulated in *Gerstein,* we believe that a jurisdiction that provides judicial determinations of probable cause within 48hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein.* For this reason, such jurisdictions will be immune from systemic challenges. "

(*McLaughlin* supra, 500 U.S. at 56.)

In announcing this rule, the court observed that where an arrested individual did not receive a probable cause determination within 48 hours, the burden would shift to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. (Id at 57.) Thus, the court accommodated the requirement of flexibility by means of a rebuttable presumption. The reason it did so was because a vague standard of promptness

had not provided sufficient guidance, and had led to a flurry of systemic challenges to city and county practices. (Id at 56.)

A rebuttable presumption leaves in place the flexibility recognized as a important by the Court of Appeal in this case A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. " (Evid Code § 600 subd (a).) It is not evidence. (Ibid.) A rebuttable presumption affecting the burden of proof, such as the onesin *McLaughlin*, supra, is "a presumption established to implement some public policy other than to facilitate other than to facilitate the determination of the particular action in which the presumption is applied." (Evid Code § 605.) In *McLaughlin*, the public policy was the requirement of reconciling the appropriate needs of local authorities for some flexibility in their procedures with the constitutional rights of an arrested to a limit on the time he or she might be held in police custody before a judicial determination of probable cause. (Id. at 55.) Here, a rebuttable presumption that the detention of a minor for more than 120 days solely to attain competence violates due process implements the public policy of accommodating the court's interest in restoring a minor to adjudicative competency, with the minor's right to the prompt provision of competency services and his liberty rights not to be detained indefinitely or for a longer period than is reasonably necessary for him to attain competency or to be determined to be unable to do so.

In *McLaughlin*, the court made clear that there would be instances when an individual might constitutionally be held in policy custody for more than 48 hours without a judicial determination of probable cause. In evaluating whether the

delay in a particular case was unreasonable, the Supreme Court noted that courts must allow "a substantial degree of flexibility" but the burden would be on the police to show good cause for the delay. (*McLaughlin* supra, 500 U.S. at 57.) So too, here, the presumption established in *In re Jesus G.* allows for "substantial flexibility " in determining whether the length of detention in a particular case was reasonable, but it shifts the burden to the District Attorney to show why the length of detention was constitutionally reasonable within the meaning of *Jackson v. Indiana.* Also, as in *McLaughlin,* the rebuttable presumption not only accommodates the interests of both parties, it also serves the interest of judicial economy in providing a constitutional benchmark.

The guidelines that provide for an initial detention of no more than 60 days for a determination whether competency has been or will likely be attained, and then for another period of 60 days only upon a showing that further efforts at attainment would be successful, comport with the research on juvenile competency discussed in Part I, above. Data from the long-established Virginia program shows that the majority of juveniles were either restored to competence or found to be incapable of attaining competence within 3 to 4 months. (Larson and Grisso, *supra,* p.76.) Virginia's program was initiated in 1999 and is state-funded with a contract to the University of Virginia. It is a community-based program designed to assist juveniles in attaining adjudicative competence whenever possible. Juvenile competency restoration services are provided in the least restrictive setting in which the court allows the juvenile to reside and restoration counselors travel to where the youth is located , whether it be the child's home, a foster home, a hospital or a detention facility. Many of the

counselors have a background in special education, social work, or psychology. All have specialized training in forensic issues and expertise in child mental health and meet with juveniles an average of three times per week for one and half hours per session. (Id at 72.) Results from the Florida program were similar. (Id at 82.)

As noted in Part I, before the enactment of Welfare and Institutions Code section 709, "the protective reach of Penal Code section 1368 " extended to section 602 proceedings in juvenile court (*In re John Z.*, supra, 223 Cal. App. 4th at 1055.) In California, after a person is deemed incompetent under Penal Code section 1368, a report indicating whether there has been progress toward restoration of competency and whether there is a likelihood competency would be restored in the foreseeable future, must be submitted to the court within 90 days of commitment. (Pen. Code § 1370 (subd (b)(1). In the minor's case, 90 days after the IST planning hearing , there was no evidence of progress toward attainment of competency and no reports there was a substantial likelihood he would attain competency in the foreseeable future.

Moreover, in enacting section 709, the legislature recognized that " despite the Penal Code procedures for determining competency in juvenile proceedings, a determination of juvenile competency lives only in case law and the Rules of Court. (Assembly Committee on Public Safety, April 13, 2010 hearing on AB2212 as amended April 8, 2010, Bill Analysis, p.3) Because the criminal statutes failed to address the "nuanced application" of developmental immaturity, codification of a juvenile statute for competency to stand trial was s necessary " to address a

void in the statute that unambiguously provides guidance on the rule of law for competency in delinquency proceedings. " (Ibid.)

Section 709 addresses the suspension of delinquency proceedings generally; it does not differentiate between detained and no-detained minors. The rebbutabble presumption that detention of a minor for competency training should last no more than 120 days does not conflict with the statute but puts the meat on the bones of the *Jackson* mandate. It accommodates the interests of all parties, protects the minor's important liberty interest and promotes judicial economy by providing a constitutional benchmark.

In *In re Jesus G.*, the court did not decide whether the presumption of a constitutional violation was rebutted. (*In re Jesus G.*, supra, 218 Cal. App. 4th at 171. In this case, as discussed in Part I above, the facts compel the conclusion that the minor's length detention violated *Jackson v. Indiana,* because at no time was there evidence he was making progress toward competency nor was there a timely determination whether there was a substantial likelihood he would attain it. Thus, on the facts of the minor's case, the violation of his right to due process is shown even without a presumption of a constitutional violation.

But the facts also show that his detention routinely violated the Protocol's guidelines. The minor was detained in juvenile hall for 294 days after he was found incompetent. The juvenile court failed to set an Attainment of Competency hearing within sixty days of the Incompetent to Stand Trial Planning Hearing as required by the Protocol and therefore failed to make any of the required determinations in a timely fashion. Over the objections of counsel, the court repeatedly continued the competency hearings without any evidence that the

minor was making progress towards attainment of competency. When the minor had spent one hundred and twenty days in juvenile hall receiving competency training without achieving competency, the court wrongfully denied the minor's motion to dismiss the petitions against him.

The circumstances of this case reveal the serious and pressing need for a rebuttable presumption that detention for more than 120 days is a violation of due progress. As in *McLaughlin*, supra, it is important to provide some degree of certainty so that courts "may establish procedures with confidence that they fall within constitutional bounds. " (See *McLaughlin*, supra, 500 U.S. at 56.) At the same time, a rebuttable presumption also retains the courts' flexibility to determine in individual cases what is a "reasonably necessary" period of detention for the attainment of competency and therefore permits the juvenile court to exercise its "sound discretion " in deciding whether sufficient progress is being made to justify the continued detention of juvenile while delinquency proceedings are suspended. (See *In re Davis*, supra, 8 Cal.3d at 807.)

CONCLUSION

For all the reasons stated herein, the minor asks this court to find that the juvenile court violated his rights under the Fourteenth Amendment to due process of law when it detained him for 294 days while delinquency proceedings were suspended and when there was no evidence of his making progress towars competency. The minor also asks this court to find that his detention beyond the 120 day limit of the Los Angeles Amended Competecny to Stand Trial Protocol constituted a rebuttable violation of his right to due process that cannot be

rebutted on the facts of this case. Accordingly, the minor respectfully asks that the Court of Appeal's opinion affirming the juvenile court's decisions be reversed.

Respectfully submitted

Laini Millar Melnick

Attorney for minor/petitioner, Albert C.

Certificate of Word Count

I hereby certify that the number of words in the Petitioner's Opening Brief on the Merits is 11, 010. This certification is made in reliance upon the word count of the computer program used to prepare the brief.

Signed: Laini Millar Melnick

Dated: June 6, 2016

PROOF OF SERVICE BY MAIL

Re: Albert C, Court Of Appeal Case: S231315, Superior Court Case: MJ21492

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On June 8, 2016, I served a copy of the attached Opening Brief on the Merits (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 8th day of June, 2016.

Phil Lane
(Name of Declarant)

(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Albert C, Court Of Appeal Case: S231315, Superior Court Case: MJ21492

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On June 8, 2016 a PDF version of the Opening Brief on the Merits (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated and/or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

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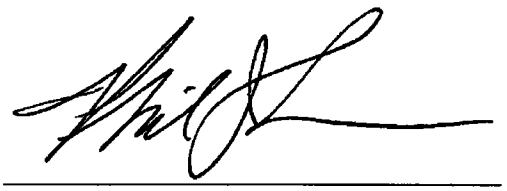
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 8th day of June, 2016 at 16:44 Pacific Time hour.



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