In the Supreme Court of the State of California

In re ALBERT C., a Person Coming Under the Juvenile Court Law.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALBERT C.,

Defendant and Appellant.

Case No. S231315

Second Appellate District, Division Five, Case No. B256480
Los Angeles County Superior Court, Case No. MJ21492
The Honorable Denise McLaughlin-Bennett, Judge

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ISSUES FOR REVIEW

This Court limited the issues to be briefed and argued to the following: (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

Defendant and Appellant Albert C. (Albert) became a ward of the dependency court at a young age, after several substantiated allegations of neglect or absence by his mother and grandmother. His first juvenile delinquency petition was filed at age 14, after he allegedly threatened a school security officer. Before that case reached a disposition, Albert fled from his mother's custody. Months later, a second delinquency petition was filed after Albert allegedly strangled his girlfriend until she lost consciousness. At his arraignment for the second petition, Albert's counsel declared a doubt as to Albert's competency to stand trial. This case concerns whether the juvenile court violated Albert's due process rights in the weeks and months that followed, when it suspended the delinquency proceedings and kept Albert in custody at juvenile hall, where he received training aimed at helping him attain competency.

The juvenile court's actions in this case were consistent with the requirements of the Due Process Clause. Recognizing that the trial of a juvenile delinquent who is incompetent would violate due process, the court immediately suspended proceedings at the first suggestion of incompetence and appointed a psychiatrist to examine Albert. That psychiatrist concluded that Albert was presently incompetent but likely to

attain competency within 12 months. The juvenile court then ordered Probation to develop a treatment plan for Albert, which resulted in him receiving regular competency training. The court reviewed periodic reports on the status of that training, conducted regular hearings to reassess Albert's case, and pressed for more information on Albert's progress when it was not forthcoming. The court ultimately found Albert competent and reinstated the delinquency proceedings less than 11 months after the initial finding of incompetence. Throughout these proceedings, the court considered whether it was appropriate to release Albert from custody pending attainment of competency, but concluded that the threat Albert posed to the safety of himself and others if released weighed in favor of keeping him in custody. The court also ordered local agencies to explore the possibility of placing Albert in a less-restrictive group home facility instead of juvenile hall, but that effort proved unsuccessful after several facilities refused to accept Albert due to safety concerns.

These proceedings were not perfect. Although the juvenile court, counsel, and the local agencies involved worked in good faith to protect Albert's rights and help him attain competency, there were delays, miscommunications, and inefficiencies at times during the proceedings. Those circumstances do not, however, establish a violation of the Due Process Clause. Throughout the period of detention, the juvenile court closely monitored the proceedings to ensure that Albert's commitment bore a "reasonable relation to the purpose for which" he was committed. (*Jackson v. Indiana* (1972) 406 U.S. 715, 738 ("*Jackson*").) And it carefully weighed the considerations that this Court has said are relevant to a court's exercise of its "sound discretion in deciding whether, in a particular case, sufficient progress is being made to justify continued commitment pending trial." (*In re Davis* (1973) 8 Cal.3d 798, 807 ("*Davis*").)

Further, there is no basis for this Court to hold that a violation of the 120-day limit on detention in juvenile hall prescribed by the Los Angeles County Juvenile Court's protocol for juvenile competency proceedings creates a rebuttable presumption of a due process violation. The Los Angeles Protocol is a commendable effort to provide guidance to judges, practitioners, and local agencies in this important area of the law, but it does not establish constitutional lines. The 120-day presumption suggested by Albert would squarely conflict with decisions of this Court and the United States Supreme Court, which have recognized that it is not appropriate to prescribe "arbitrary time limits" on the permissible period of commitment pending attainment of competency. (*Jackson*, *supra*, 406 U.S. at p. 738; *Davis*, *supra*, 8 Cal.3d at p. 804.) Moreover, the proposed presumption would not serve any of the interests typically advanced by judicial presumptions, and could interfere with ongoing policymaking efforts in this area. No doubt there is room for improvement in juvenile competency procedures in this State. That, however, does not justify the creation of a novel constitutional presumption. Any concerns about existing procedures should be addressed through policy reforms in the Legislature and at the local level.

STATEMENT OF THE FACTS AND CASE

In June 2012, when Albert was 14 years old, he was charged with one count of violating Penal Code section 71 in a wardship petition under Welfare and Institutions Code section 602. (CT 1.) Albert had allegedly told a school security officer "If you touch me I will fire on you." (CT 14.) Because he had previously been declared a dependent minor under Welfare and Institutions Code section 300, the Probation Department and the Department of Children and Family Services prepared a joint assessment,

which recommended a deferred entry of judgment. (CT 8, 34.)[1] The juvenile court ordered Albert to remain in the custody of his mother. (CT 6.) Before the matter was resolved, however, Albert's mother notified the Probation Department that Albert had left her residence without permission and had been missing for 48 hours. (CT 46.) After receiving that information, the juvenile court issued a warrant for Albert's arrest. (CT 50.) Albert's whereabouts were unknown to the Probation Department and the Department of Children and Family Services for the next six months. (CT 100.)

In February 2013, prosecutors filed a second wardship petition against Albert under Welfare and Institutions Code section 602. (CT 51.) The second petition arose out of an altercation between Albert and his girlfriend in December 2012, while Albert's whereabouts were still unknown to the authorities. (See CT 51, 155-156.) Albert allegedly grabbed his girlfriend by the throat in a locked bedroom and strangled her until she lost consciousness. (CT 155-156.) When she awoke, Albert allegedly pushed her, punched her several times in the rib area, and attempted to pull a gun from his waistband as she left the bedroom. (CT 156.) The petition alleged that Albert had committed four crimes: assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)); battery with serious bodily injury (Pen. Code, § 243, subd. (d)); possession of a firearm by a minor (Pen. Code, § 29610); and criminal threats (Pen. Code, § 422, subd.

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[1] In 2011, after seven years in foster care, the dependency court had returned Albert to placement with his mother. (See 1 RT 3-4; CT 25.) Jurisdiction under Welfare and Institutions Code section 300 continued during the delinquency proceedings. (See 1 RT 1, 265.) In citing the Reporter's Transcript, this brief follows the same citation conventions as Albert's opening brief. (See ABOM 11, fn. 5.)

(a)). (CT 51-52.)[2] The juvenile court found that it was "a matter of immediate and urgent necessity for the protection of [Albert] and the person and property of others that [he] be detained" pending his arraignment, noting that "[c]ontinuance in the home is contrary to the minor's welfare." (1 RT 14.)

At Albert's arraignment on February 15, 2013, his counsel raised concerns about Albert's competency. (1 RT 15.) The juvenile court suspended the delinquency proceedings as to both petitions, appointed a psychiatrist to evaluate Albert, and set the matter for a competency hearing. (1 RT 15-16; CT 70.) Albert remained in juvenile hall pending that assessment. (See CT 70.)

The appointed psychiatrist, Dr. Praveen Kambam, interviewed Albert for 80 minutes on March 12, 2013. (Dr. Praveen Kambam, M.D., letter to Donald Buddle, Deputy Public Defender, Mar. 17, 2013, p. 2 ("Kambam Report").)[3] Dr. Kambam concluded, "with reasonable medical certainty," that Albert lacked "sufficient present ability to consult with counsel and assist in preparing his defense with a reasonable degree of rational understanding," and also lacked "a rational as well as factual understanding of the nature of the charges or proceedings against him," but that there was "substantial probability that [Albert] will attain Competency to Stand Trial in the next 12 months." (*Id.* at pp. 11, 12.) Dr. Kambam diagnosed Albert as suffering from Attention Deficit/Hyperactivity Disorder and Disruptive

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[2] The final count was based on a statement Albert made to his girlfriend ten days after the altercation described above. (CT 156-157.)

[3] By letter of July 21, 2015, to all counsel of record, the Court of Appeal in this matter advised the parties that it "will take judicial notice of Dr. Praveen R. Kambam's report, dated March 17, 2013, which was not included as part of the record on appeal but which was submitted by minor as an exhibit to a companion petition for writ of habeas corpus in *In re A.C.*, B251114. (Evid. Code, §§ 452, subd. (d)(1), 459.)"

Behavior Disorder and concluded that Albert did not have any developmental disability. (*Id.* at p. 10.)

The juvenile court held a competency hearing on March 19, 2013. (1 RT 20; CT 73.) The prosecution did not dispute the findings in Dr. Kambam's report. (1 RT 21.) Based on the court's review of that report, the court found that Albert was "not presently mentally competent," and ordered the Probation Department and the Department of Mental Health to jointly report on their recommendation for Albert's treatment. (CT 73; see 1 RT 21.)

Over the following months, Albert received competency training and the juvenile court reviewed periodic reports and held regular hearings regarding Albert's status. These proceedings are described in detail in the Court of Appeal's opinion and are summarized briefly here. (See opn. at pp. 4-12.) The Probation Department recommended that Albert participate in weekly competency training sessions provided by an entity named Creative Support US Services. (CT 78.) Albert began his training on May 9, 2013, and received one-and-a-half hour training sessions on a weekly basis. (E.g., CT 106.)[4] Creative Support provided updates on Albert's competency training on July 11, August 1, September 12, and October 10. (CT 106-108, 113-115, 121-122, 128-130.) The reports noted that, despite his ongoing training, Albert had failed competency tests administered to him on May 9, June 19, July 31, September 11, and October 2. (See, e.g., CT 128.) The juvenile court held hearings to consider the status of Albert's case on April 10, May 23, June 20, July 17, August 15, August 26, and September 18. (1 RT 24, 29, 38, 48, 55, 66, 78; CT 77, 97, 102, 109, 116, 117, 124.)

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[4] Albert missed two of the training sessions due to a dental appointment and a court appearance. (CT 99.)

At the July 17, 2013 hearing, and in several of the hearings that followed, Albert's counsel asked the court to terminate its jurisdiction and release Albert from custody, arguing that his continued detention violated *Jackson v. Indiana* (1972) 406 U.S. 715, as well as the protocol for juvenile competency proceedings that was adopted in 2012 by the presiding judge of the Los Angeles County Superior Court Juvenile Division. (1 RT 49-50; see 1 RT 58-60, 71-72, 81-82; *post*, p. 15.) In denying those requests, the court considered the nature of the charged offenses, noting that they were "very serious," occurred while Albert "was AWOL from dependency placement," involved the use of a weapon by Albert, and included "alleged acts of violence inflicted on individuals within the community." (1 RT 52; see also 1 RT 60-61, 69.) The court concluded that there was "good cause to deviate from" the 120-day limit on detention in juvenile hall contained in the protocol. (1 RT 62.) And it determined that Albert should continue receiving competency training in a custodial setting, noting that "it's within the 12-month period as described in Dr. Kambam's report." (1 RT 89.)

The juvenile court also explored the possibility of a less restrictive placement for Albert than juvenile hall. On June 20, the court ordered the Department of Children and Family Services to have Albert "screened for a level 14 facility, since he is under dependency jurisdiction, to determine whether or not there is another means of confinement than the minor's present confinement in juvenile hall." (1 RT 44; see CT 102.)[5] After the Department determined that Albert met the criteria for a level 14 facility (CT 103), the juvenile court conferred with the dependency court judge and

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[5] Level 14 group homes are facilities that "provide intensive psychiatric services to children/youth identified as severely emotionally disturbed." (Los Angeles County, Department of Child and Family Services, Policy 0600-515.11, July 1, 2014 <http://policy.dcfs.lacounty.gov/content/Interagency_Placement_Sc.htm> [as of July 21, 2016].)

issued a joint order in August directing the Department and Probation to coordinate to have Albert placed in a level 14 facility, "that being the least restrictive means of placement." (1 RT 56-57; CT 116.)[6] As of late August, there was a four-to-six-week wait before there would be availability at a level 14 facility. (1 RT 67; see CT 103.) The court noted that if a level 14 placement became available, it would "put this matter back on calendar today and make the necessary orders to place him in level 14." (1 RT 76.) In the ensuing months, however, at least four different level 14 facilities refused to accept Albert due to safety concerns, and Albert remained in juvenile hall. (1 RT 99, 138.)

By October 16, 2013, the court had become concerned that the competency tests administered to Albert may not be "capable of preventing any malingering issues on the part of [the] minor." (1 RT 93.) To address that concern, the court appointed a second psychiatrist, Dr. Haig Kojian, to evaluate Albert's competency in advance of the next hearing, and ordered the official at Creative Support who had signed the reports about Albert to appear for questioning at that hearing. (CT 131; 1 RT 97-98.) On November 1, 2013, after it made that appointment, the court learned that Albert's counsel had instructed Dr. Kojian not to conduct the evaluation

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[6] The court also explored the possibility of housing Albert in a community detention program (CDP) pending his eventual placement in a level 14 facility, but then "learned that there is no relative that the minor can be placed with while on C.D.P." (1 RT 67.) A CDP is a community release program in which youth are "both electronically monitored and supervised by an assigned Deputy Probation Officer, who holds the minor accountable to a pre-approved schedule of sanctioned activities." (Los Angeles County Probation Department, Departmental Overview, March 10, 2016, p. 9 <http://file.lacounty.gov/bos/supdocs/102296.pdf> [as of July 21, 2016].)

due to a conflict. (See 1 RT 114-115.) The court then appointed Dr. Kory Knapke to take his place. (CT 132.)

Dr. Knapke was unable to complete his report before the next hearing on November 12, 2013. (See 1 RT 117.) The witness from Creative Support testified at that hearing, but explained that she was not the one who actually trained Albert. (1 RT 108.) At the close of the November hearing, Albert's counsel asked the court to delay the proceedings until January or February 2014 for "further preparation." (1 RT 123, 127.) The court agreed to the requested continuance, but declined to hold the next hearing any later than January 2014. It noted that it wanted to give Dr. Knapke "enough time to prepare the report" but did not "want so much time to pass that the court does not get that report as soon as possible." (1 RT 127-128.)

On January 13, 2014, the court told the parties that it had reviewed a report from the North Los Angeles County Regional Center and a separate report from Dr. Knapke. (1 RT 130-131.) The Regional Center reported that Albert did not suffer from any developmental disability and scored in the "low average" range on tests of intellect and comprehension. (1 RT 137.) As described by the court, Dr. Knapke's report concluded that Albert "at this time is not competent to stand trial." (1 RT 131.) Dr. Knapke "indicated within that report his belief that [Albert] can attain competency based upon him being given the appropriate information as relates to legal proceedings and what actually takes place during legal proceedings." (*Ibid.*) The court construed Dr. Knapke's report as reflecting "suspicion . . . that [Albert] was not being truthful and forthcoming with some of the questions that were asked." (*Ibid.*)

The court held an attainment of competency hearing on February 4, 2014. (1 RT 154.) It first heard testimony from Nicco Gipson, the trainer at Creative Support who had worked directly with Albert. (1 RT 158.) Among other things, Gipson testified that Albert had begun to retain more

information and to answer more questions correctly on the competency tests. (See 1 RT 167-169, 180-181.) Next, the court heard from Dr. Knapke. Dr. Knapke testified that Albert was not mentally retarded or developmentally disabled and showed no signs of ADHD. (1 RT 202.) When questioned about the competency training Albert was receiving from Creative Support, he observed that "1.5 hours a week . . . in my opinion that's a lot—that's a lot of training." (1 RT 220.) Dr. Knapke said that "the only issue that I had a concern about during my evaluation" was Albert's understanding of basic courtroom proceedings. (1 RT 204.) His concern was based on the reports of prior psychologists and psychiatrists, Albert's poor academic record, and the fact that "during my examination when I asked him" questions about courtroom proceedings, "he responded [']I don't know['] to everything." (1 RT 204.) Dr. Knapke could not rule out the possibility that Albert was "exaggerating his lack of understanding [of] courtroom proceedings," and noted that Albert was not entirely truthful during his interview. (1 RT 205, 202.) In Dr. Knapke's opinion, a similarly situated juvenile with Albert's IQ "should have attained competency by now." (1 RT 205.) And, based on hearing Gipson's testimony in court earlier that day, Dr. Knapke observed that "I think that there is a very high likelihood that [Albert] not only can attain competency, but I think it's pretty probably likely that he does understand basic courtroom proceedings." (1 RT 233.)

At the conclusion of the February 4 hearing, the court found that Albert was competent to stand trial and reinstated the delinquency proceedings. (CT 149; 1 RT 248.) The court concluded "that there is overwhelming evidence to suggest that the minor has been exaggerating his responses, and that's the only reason why he's failed to give an accurate and forthright response to some of the questions that are contained within the [competency test]." (1 RT 248.)

On February 20, Albert admitted count 1 of the first delinquency petition (threatening the school security officer) and count 1 of the second delinquency petition (assault by means likely to produce great bodily injury). (1 RT 262.) On March 18, 2014, the juvenile court declared Albert to be a ward of the court under Welfare and Institutions Code section 602. (CT 188.) The court committed him to the custody and control of the Probation Department, and ordered that he be screened for placement at a level 14 group home facility or the Dorothy Kirby Center in Commerce. (*Ibid.*) The maximum period of confinement was set as four years and eight months. (*Ibid.*) Albert received a predisposition credit of 399 days. (*Ibid.*)

ARGUMENT

I. BACKGROUND ON RELEVANT LAW AND POLICY

A. Due Process Protections

The criminal trial of a defendant who is mentally incompetent violates due process. (E.g., *Medina v. California* (1992) 505 U.S. 437, 453.) That protection extends to minors in juvenile delinquency proceedings under Welfare and Institutions Code section 602. (*In re R.V.* (2015) 61 Cal.4th 181, 185; see also *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 173-175 ("*James H.*").)

In *Jackson v. Indiana* (1972) 406 U.S. 715, the United States Supreme Court held that if a criminal defendant is detained solely on account of incompetence to stand trial, due process forbids the State from detaining him longer "than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." (*Id.* at p. 738.) If "it is determined that the defendant probably soon will be able to stand trial," any "continued commitment must be justified by progress toward that goal." (*Ibid.*)

Recognizing the wide variety of "differing state facilities and procedures," the Court in *Jackson* concluded that it was not "appropriate for us to attempt to prescribe arbitrary time limits" on either the initial period for assessing the defendant's competency or the period of continued detention for helping the defendant attain competency. (*Ibid.*)

This Court adopted the *Jackson* framework in *In re Davis* (1973) 8 Cal.3d 798, accepting "*Jackson*'s premise that due process demands that the duration of commitments to state hospitals must bear some reasonable relation to the purpose which originally justified the commitment." (*Id.* at p. 805.) Like the United States Supreme Court in *Jackson*, this Court did not adopt a particular timeline for assessing competency. It suggested that 90 days will "ordinarily" be "adequate to allow the hospital authorities a reasonable opportunity to report regarding the likelihood of a defendant's recovery," but expressly declined to set any specific or presumptive time limit, leaving that to the trial court's "sound discretion." (See *id.* at p. 806, fn. 5.) Similarly, the Court declined to impose any specific limit on the period of detention for purposes of attaining competency. It instructed that "[t]he trial court necessarily must exercise sound discretion in deciding whether, in a particular case, sufficient progress is being made to justify continued commitment pending trial." (*Id.* at p. 807.) In exercising that discretion, "the trial court should consider, among other things, the nature of the offense charged, the likely penalty or range of punishment for the offense, and the length of time the person has already been confined." (*Ibid.*) The trial court should also require, "within a reasonable time, additional periodic reports regarding the person's progress." (*Ibid.*)

Cases involving juveniles often present issues that differ from those confronted by courts conducting adult competency proceedings. Among other things, "[j]uvenile incompetency is not defined solely 'in terms of mental illness or disability,' but also encompasses developmental

immaturity, because minors' brains are still developing." (*In re John Z.* (2014) 223 Cal.App.4th 1046, 1053; see also *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 860.) A juvenile who is found to be incompetent based on developmental immaturity will typically require different treatment from someone who suffers from a mental illness or disability.

B. Statutory Protections

Prior to *Jackson* and *Davis*, the Penal Code provided for the indefinite suspension of adult criminal proceedings and commitment of a defendant for treatment "until he becomes sane" or until the criminal charges were dismissed. (Stats. 1968, ch. 1374, § 2, p. 2637.) After those cases were decided, the Legislature amended Penal Code section 1370 to provide that adult criminal proceedings could be suspended and the defendant committed for an initial 90-day period of assessment, to be followed by continued commitment and treatment only if that initial assessment "discloses a substantial likelihood that the defendant will regain mental competence in the foreseeable future." (Pen. Code, § 1370, subd. (b)(1); see Stats. 1974, ch. 1511, § 6, p. 3319.) In no event may commitment on the basis of incompetence exceed three years from the date of commitment or the maximum term of imprisonment provided for the most serious offense charged, whichever is shorter. (Pen. Code, § 1370, subd. (c); Stats. 1974, ch. 1511, § 6, p. 3319.) The Legislature left other matters to the discretion of the trial court. (See, e.g., Pen. Code, § 1370, subd. (a)(1)(B) [selection of an alternative placement for treatment].)

Penal Code section 1370 did not address minors in juvenile delinquency proceedings. Acknowledging that there was no statute governing juvenile competency determinations, the Court of Appeal in *James H.* "improvise[d]" procedures based on the statutory procedures for adult criminal defendants. (*James H.*, *supra*, 77 Cal.App.3d at p. 173; see

id. at pp. 176-178.) In 1999, the Judicial Council incorporated many of those procedures into former rule 1498 of the California Rules of Court (current rule 5.645). (See *In re R.V.*, *supra*, 61 Cal.4th at pp. 189-190.)

In 2010, the Legislature enacted a new statute, Welfare and Institutions Code section 709, to govern juvenile competency proceedings. (Stats. 2010, ch. 671 (A.B. 2212).) Section 709 requires the court to suspend juvenile proceedings whenever it finds that "substantial evidence raises a doubt as to the minor's competency." (Welf. & Inst. Code, § 709, subd. (a).) A minor is incompetent for purposes of section 709 if he or she lacks "sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding, of the nature of the charges or proceedings against him or her." (*Ibid.*) Once proceedings are suspended, the court must set a hearing to determine competency and appoint an expert to evaluate the minor. (*Id.*, subd. (b); see *id.*, subd. (c) [the "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"].) Section 709 provides no specific time limit on the period for assessing the minor's competency or on the period that a minor may be detained while he receives training or treatment to attain competency. (See ABOM 20.)[7] Since 2010, the Legislature has considered additional proposals regarding juvenile competency proceedings and enacted two amendments to section 709. (See *post*, pp. 39-40.)

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[7] An early version of the bill creating section 709 contained a six-month limit on suspension of proceedings. (Assem. Bill No. 2212 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010, § 1.) That limit was removed by the Senate. (See Assem. Bill No. 2212 (2009-2010 Reg. Sess.) as amended June 10, 2010, § 1.)

C. Local Protocols

Juvenile courts in several counties have adopted protocols governing juvenile competency proceedings. This case implicates the Los Angeles County Superior Court Juvenile Division's "Amended Competency to Stand Trial Protocol" (the Los Angeles Protocol), adopted in a 2012 memorandum from Presiding Judge Nash.[8] Among other things, the Los Angeles Protocol directs that if a minor is found to be incompetent, and the court determines that there is a substantial probability the minor will attain competency in the foreseeable future, the matter is to be set for an Attainment of Competency Hearing within 60 days, and every 60 days after that until either the minor attains competency or the court determines that further efforts at attainment would not be successful. (Los Angeles Protocol, *supra*, at pp. 6-7.) It states that the minor may only be detained pending attainment of competency "if it is a matter of immediate and urgent necessity for the protection of the minor or reasonably necessary for the protection of the person or property of another," or if "the minor is likely to flee." (*Id.* at p. 6.) It also provides that "[t]he minor may not be held in a juvenile hall to participate in attainment services for more than one hundred and twenty days." (*Id.* at p. 7.)[9] In addition to the Los Angeles Protocol,

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[8] See Presiding Judge Michael Nash, Mem. to All Juvenile Delinquency Court Judicial Officers and All Interested Parties, Entities, and Agencies, Jan. 9, 2012 <http://www.courts.ca.gov/documents/LA-Competency-Protocol.pdf> [as of July 25, 2016].

[9] On June 1, 2015, after the events of this case took place, the 2012 protocol was superseded by a slightly revised protocol. All of the provisions described above appear in the revised protocol. (See Presiding Judge Michael Levanas, Mem. to All Juvenile Delinquency Court Judicial Officers and All Interested Parties, Entities, and Agencies, June 1, 2015 <http://www.lacourt.org/division/juvenile/pdf/CompetencyProtocol.pdf> [as of July 25, 2016].)

juvenile courts in at least five other counties—Alameda, Orange, Sacramento, San Diego, and Santa Clara—have adopted their own protocols, all of which differ from the Los Angeles Protocol in their terms and approach.[10] So far as the State is aware, none of those protocols adopts a 120-day limit on confinement in juvenile hall.

II. ALBERT'S DETENTION SATISFIED THE DUE PROCESS REQUIREMENTS RECOGNIZED IN *JACKSON* AND *DAVIS*

In light of the framework adopted in *Jackson* and *Davis*, Albert's due process challenge requires the Court to consider two distinct questions. The first question is whether Albert's initial detention following the first suggestion of incompetence on February 15, 2013, exceeded the reasonable period of time necessary to determine whether there was a substantial probability that he would attain competency in the foreseeable future. (See *Jackson*, *supra*, 406 U.S. at p. 738). The second question is whether Albert's continued detention between the finding of incompetence in March 2013 and the juvenile court's determination in February 2014 that Albert had attained competency was "justified by progress toward" the attainment of competency. (*Ibid.*) The record establishes that both periods of detention satisfied the requirements of due process.

A. Albert Was Permissibly Detained Pending a Prompt Assessment of His Competency by a Psychiatrist

The juvenile court acted swiftly to protect Albert's "due process right not to be tried while mentally incompetent." (*In re R.V.*, *supra*, 61 Cal.4th at p. 185.) Albert's counsel first suggested that Albert was incompetent

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[10] See generally Competency to Stand Trial: Local Protocols <http://www.courts.ca.gov/cfcc-delinquency.htm> [as of July 25, 2016]; Juvenile Competency Protocol: A Manual for Alameda County (March 1, 2013) <http://www.acbhcs.org/providers/documentation/SOC/AC_Juvenile_Competency_Protocol.pdf> [as of July 25, 2016].

during the arraignment on February 15, 2013. (1 RT 15). Within minutes, the juvenile court suspended the delinquency proceedings as to both petitions, appointed a psychiatrist to evaluate Albert, and set the matter for a competency hearing. (See 1 RT 15-16; CT 70.)

The ensuing period in which the court awaited a professional assessment of Albert's condition and his ability to attain competency was relatively short. Dr. Kambam, the court-appointed psychiatrist, evaluated Albert on March 12, 2013 and issued his report on March 17. (Kambam Report, *supra*, pp. 1, 2.) That report concluded, "with reasonable medical certainty," that Albert was not presently mentally competent, but "that there is substantial probability that [Albert] will attain Competency to Stand Trial in the next 12 months with the proper mental health services and education." (*Id.* at p. 12.) On March 19—just 32 days after the first suggestion of incompetence—the juvenile court found that Albert was "not presently mentally competent" based on its review of Dr. Kambam's report and the parties' stipulations. (CT 73; 1 RT 20-21.) The court ordered Albert to receive treatment related to attaining competency. (See CT 73.)

This short initial period of detention did not exceed the "reasonable period of time necessary" to determine whether there was a substantial probability that Albert would attain competency in the foreseeable future. (*Jackson*, *supra*, 406 U.S. at p. 738.) Although there are no "'arbitrary time limits'" on the outer bounds of that initial period, this Court has observed that "a 90-day period for the initial observation of a defendant" should generally be adequate to allow medical officials "a reasonable opportunity to report regarding the likelihood of a defendant's recovery." (*Davis*, *supra*, 8 Cal.3d at p. 806, fn. 5.) In this case, Dr. Kambam prepared his report in one-third of that time. Dr. Kambam's conclusion that Albert would likely attain competency within a year provided a constitutionally sufficient basis for the juvenile court's decision, two days later, to continue

to detain Albert for purposes of helping him attain competency. (See *Davis*, *supra*, at p. 801.)

B. Albert's Continued Detention After the Finding of Incompetence Complied with Due Process

In contrast to the brief initial period of detention for evaluating Albert's competency, the period in which Albert was detained for purposes of helping him attain competency was substantially more lengthy. All told, Albert spent 322 days in juvenile hall between the juvenile court's initial determination that he was incompetent and its determination that he had attained competency. The juvenile court confronted several delays during this period, as it sought to ensure that Albert received proper treatment, to obtain information necessary to evaluate his progress, and to address concerns about possible malingering. Some of those delays resulted from miscommunications involving local agencies and service providers; others resulted from continuances requested by the parties, including by Albert's counsel. At the same time, the court's efforts to place Albert in a less-restrictive, "level 14" facility were frustrated by several factors, including a lack of beds at local facilities and the refusal of multiple facilities to accept Albert due to safety concerns.[11] Ideally, juvenile competency proceedings entail an efficient and collaborative effort involving the court, the parties, and local agencies to accurately evaluate the minor and, if necessary, to help him attain competency as swiftly as possible. The proceedings below fell short of that ideal in several respects. As explained below, however, the circumstances here do not establish a due process violation under the framework of *Jackson* and *Davis*.

Davis recommended that if the health professionals who evaluate an incompetent defendant are "optimistic regarding the person's probable

[11] See, e.g., 1 RT 56-57, 79-80, 112; CT 127, 136.

recovery, the court should continue his commitment and require the hospital authorities to furnish, within a reasonable time, additional periodic reports regarding the person's progress." (*Davis*, *supra*, 8 Cal.3d at p. 807.) The juvenile court applied that approach in Albert's case. (See CT 73; 1 RT 21-22.) It required frequent reports on Albert's status, pushed for additional information necessary to confirm whether Albert was actually making progress, and acted within its "sound discretion" in determining that "sufficient progress [was] being made to justify [Albert's] continued commitment pending trial." (*Davis*, *supra*, 8 Cal.3d at p. 807.)

Throughout these proceedings, the juvenile court was mindful of its obligation to ensure that the "nature and duration" of Albert's commitment bore "some reasonable relation to the purpose for which" he was committed, and that his continued detention "be justified by progress toward" attaining competency. (*Jackson*, *supra*, 406 U.S. at p. 738.) The court noted its "compelling duty to assure that competency can be restored . . . and to also assure that the minor receives the services necessary." (1 RT 51.) Elsewhere, the court recognized its "obligation . . . to ensure that the minor receives competency training, particularly given the March 17th, 2013 report of Dr. Kambam, which states in his opinion with reasonable medical certainty there is a substantial probability that the minor will attain competency to stand trial in the next 12 months." (1 RT 74; see 1 RT 89.)

The juvenile court also insisted on periodic reports on Albert's status, as required by *Davis*. *Davis* noted that the frequency of such reports "must rest in the discretion of the trial court," but that "in the ordinary case" they "should be furnished no less often than every six months." (*Davis*, *supra*, 8 Cal.3d at p. 807 & fn. 7.) Here, the court received three status reports from the competency trainer within the first six months of the court's order finding Albert to be incompetent (see CT 106, 113, 121), and additional

reports from the competency trainer, the regional center, and a psychiatrist in the months that followed (see CT 128; 1 RT 130-131).

Moreover, the juvenile court was not a passive recipient of these reports. Rather, the record shows that the juvenile court closely monitored the status of Albert's case to confirm that Albert was progressing towards competency. In April 2013, when Probation informed the court that Albert could not receive competency training services at his present location, the court issued an order within the same day requiring Albert's transfer to a different facility. (CT 92-93.) In July, August, and September of that year, the court received regular updates from Probation and the competency trainer, which reported that Albert was receiving weekly training but had failed several competency assessments. (CT 103-108, 110-115, 118-123.) The court held hearings in each of those months, at which it reviewed the status of the case with the parties and determined that it was appropriate for Albert to continue to receive treatment. (1 RT 51-52, 61-63, 74-75, 85-89.) In October 2013, the court expressed concern that it had "no way of knowing whether or not these tests are capable of preventing any malingering issues." (1 RT 93.) The court immediately took steps to address that concern. It appointed a second psychiatrist to evaluate Albert's competency. (CT 131; 1 RT 97-98.) And it ordered Amy Wilcox, who had signed the reports for Creative Support, to appear at the next hearing for questioning about the details of the competency training. (CT 131; 1 RT 97-98.)[12]

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[12] Albert criticizes the juvenile court for "first voic[ing] a suspicion that the minor might be malingering" in "October 2013, seven months after the minor was found incompetent." (ABOM 25.) The court's concern over malingering was prompted by its observation that the Creative Support reports "essentially say[] the same thing," *i.e.*, that Albert "has scored 1's on all of those tests." (1 RT 93.) (The reports identified a score of 1 to 4 (continued...)

When the juvenile court encountered obstacles preventing it from obtaining precise and timely information about Albert's progress, it attempted to fix the problem. The psychiatrist appointed by the court to evaluate Albert in October 2013 did not conduct an evaluation because Albert's counsel instructed him not to, due to a purported conflict. (1 RT 114.) That communication took place without the awareness of the court, and as soon as the court learned of it, the court promptly appointed a replacement. (1 RT 114-115.) The replacement, Dr. Knapke, evaluated Albert in early November, but was unable to complete his report before the November hearing. (CT 132; 1 RT 117, 209.) Then, at the November hearing, Albert's counsel asked the court to delay the next hearing until January or February 2014 for "further preparation," rather than hold a hearing on Dr. Knapke's report at an earlier date. (1 RT 123, 127.) The court agreed to Albert's requested continuance but declined to delay the proceedings beyond January 2014, noting that it wanted to give Dr. Knapke "enough time to prepare the report" but did not "want so much time to pass that the court does not get that report as soon as possible." (1 RT 128.) The court also had difficulty getting information from Creative Support Services. Wilcox appeared before the court at the November hearing, as ordered, but explained that while she signed the reports regarding Albert's training, she had not actually trained Albert, and "the trainer [Nicco

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(...continued)
on 14 different domains, and advised that a minor should attain a score of at least 3 on all of the domains before being considered competent. (E.g., CT 106-108.)) Given that the court did not receive the first report from Creative Support until mid-July (see CT 103-108), it is understandable that it took several months before the court became aware that multiple monthly reports showed identical results.

Gipson] probably is . . . the one who should have been called to this." (1 RT 108.) The court later ordered Gipson to appear. (CT 139.)

Despite these difficulties, the court continued to seek insights into Albert's progress, and ultimately obtained information consistent with progress towards competency. In January 2014, the court received the second psychiatric report, from Dr. Knapke, which concluded that Albert remained incompetent but could attain competency if provided further training. (1 RT 131.) The court interpreted that report as indicating "the doctor's suspicion . . . that the minor was not being truthful and forthcoming with some of the questions that were asked." (*Ibid.*)[13] At the same time, the court received a report from the North Los Angeles County Regional Center finding that Albert scored "within average range" on "tests that were administered by the Regional Center to determine his level of intellect and comprehension." (1 RT 130-131, 137.) The next month, the court heard testimony from Gipson, the competency trainer, indicating that Albert was making progress. For example, Gipson testified that Albert was now correctly answering "a lot of" the questions "that he didn't answer before correctly." (1 RT 193.) At the beginning of the training sessions Albert "would get [the questions] all incorrect," but "then one day I came and he had . . . maybe eight correct." (1 RT 180.)[14] The court also had the

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[13] Dr. Knapke later agreed that he "could not rule out the possibility that [Albert is] exaggerating his lack of understanding of courtroom proceedings." (1 RT 205.)

[14] See also 1 RT 167 [Albert has scored "higher than a one" in certain tests]; 1 RT 168 [Gipson believes that Albert received a four, the highest score, on some domains of the competency test]; *ibid.* [Albert is "able to continue a conversation about the [role of] the public defender"]; 1 RT 169 [Albert has passed some of the domains of the competency test]; 1 RT 181 ["Here lately he's been retaining more information."]; 1 RT 186 [Albert's last submitted test "reflect[s] the type of progress that [he] has

(continued...)

opportunity to track Albert's progress firsthand by observing him during multiple hearings in 2013 and 2014. By the time of the February 2014 competency hearing, the court observed that Albert "seemed to be engaged in [the] hearing, he was not distracted," and "his facial gestures appeared to respond within reason to some of the testimony." (1 RT 248.)

As this Court recognized in *Davis*, a trial court retains "sound discretion in deciding whether, in a particular case, sufficient progress is being made to justify continued commitment pending trial." (*Davis*, *supra*, 8 Cal.3d at p. 807.) In exercising that discretion, "the trial court should consider, among other things, the nature of the offense charged, the likely penalty or range of punishment for the offense, and the length of time the person has already been confined." (*Ibid.*) The juvenile court here ensured that Albert received services to help him attain competency and closely monitored his progress. (See *ante*, pp. 19-22.) It carefully considered the nature of the charged offenses, noting that Albert was charged with "serious crimes of violence" involving the use of a weapon, which he allegedly committed while he "was AWOL from dependency placement." (1 RT 26, 52.) In light of that history, the court reasoned that releasing Albert from custody would not adequately provide "for the safety of the minor and the community at large." (1 RT 62; *see id.* at pp. 43-44, 52, 61-62, 74-76.) In addition, the court considered the length of time that Albert had been confined. It measured that period against the period in which the Dr. Kambam projected that Albert would likely attain competency, noting that the period of confinement was "within the 12-month period as described in

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been making"]; 1 RT 192 [Albert "was answering some questions correctly"]; 1 RT 193 [agreeing with the statement that Albert "is making progress over the material that has been repeated to him"].

Dr. Kambam's report." (1 RT 89; see also *id.* at p. 61.) The court's actions were within the range of discretion described by this Court in *Davis*.

C. Albert's Critique of the Proceedings Below Does Not Establish a Due Process Violation

Albert contends that the juvenile court violated his due process rights (e.g., ABOM 17), but he fails to identify a single case finding a due process violation on similar facts. While some of Albert's arguments may highlight shortcomings in the competency proceedings in his case, none of them establishes that his constitutional rights were violated.

Albert's principal argument is that "there is no evidence in the record that [he] made progress toward attainment of competency." (ABOM 21; see ABOM 7, 9, 17, 20, 25, 29, 31.) That argument is incorrect and it conflicts with Albert's position before the juvenile court, where his counsel acknowledged that "there's been progress." (1 RT 239.) As discussed above, the juvenile court eventually heard testimony about Albert's progress from his competency trainer and a psychiatrist; observed Albert's conduct during hearings; and considered a report from the Regional Center showing that Albert performed within average range on tests of intellect and comprehension. (See *ante*, pp. 22-23.) Before this Court, Albert faults the Court of Appeal for failing to "acknowledge the uncontradicted testimony of the minor's competency trainer [Nicco Gipson] in February 2014, that the minor . . . was still not making progress toward the attainment of competency." (ABOM 24-25.) On the day of Gipson's testimony before the juvenile court, however, Albert's counsel told the court that "what we heard from Creative Support Services, Nicco Gipson, is that there has been progress," adding that Gipson's testimony "shows that some of the competency training is possibly working and [Albert] has attained some domains of the competency training." (1 RT 239; see also

1 RT 167-169, 180-181, 186, 192-193 [Gipson's testimony regarding Albert's progress].)

In support of his argument that there was insufficient evidence of progress to justify his continued commitment, Albert points to the reports from Creative Support showing that he received failing scores on multiple competency assessments. (ABOM 21, 22.) While those results certainly did not constitute evidence of progress, they also did not definitively establish a lack of progress (as Albert now suggests). Nor did the reports address the reasons for the failing scores. The employee who prepared the reports testified that there was no "safeguard or provision within the testing that prevents any possible malingering on the part of a minor," and that it "would be the forensic psychiatrist that would determine that if there were any malingering." (1 RT 107-108.) As the Court of Appeal observed, "Creative Support 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." (Opn. at p. 27.) It was precisely because the reports did not reveal whether Albert was malingering that the juvenile court appointed a second psychiatrist to evaluate him. (1 RT 93.)[15]

Albert also criticizes the period of delay between the juvenile court's determination that he was not competent on March 19, 2013 and the

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[15] Albert suggests that the juvenile court should have dismissed the petitions in August 2013 in light of the reports from Creative Support. (See ABOM 22.) It was within the court's discretion to seek more information about Albert's progress, rather than to dismiss the petitions based on reports that offered "no way of knowing whether or not these tests are capable of preventing any malingering issues." (1 RT 93.) The alternative could have meant immediately releasing a juvenile accused of serious violent acts without any exploration of whether he was deliberately failing the competency assessments. (Cf. 1 RT 60 [juvenile court's statement at August 2013 hearing that "[t]here is still a concern about the safety of the minor, the person and property of others . . ."].)

commencement of his competency training on May 9, 2013. (ABOM 21, 30; see CT 113.) The length of that period—which was prolonged by the need to transfer Albert to a different facility where he could receive services (*ante*, p. 20; CT 92-93)—is regrettable. But courts have held that the similar delays in the receipt of treatment related to competency do not violate the Constitution. In *United States v. Magassouba* (2d Cir. 2008) 544 F.3d 387, 417-418 ("*Magassouba*"), for example, an adult defendant was found to be incompetent but was not transported to a hospital facility for evaluation until more than two months later. The period of inaction "appear[ed] to be the product of inadvertent human error" as well as "various holidays [that] may have presented particular transport challenges." (*Ibid.*) The Second Circuit criticized the government for failing to inform the court of these delays (see *id.* at p. 418, fn. 26), but it concluded that, "[w]hatever" their cause, "these transport delays were not so egregious as to deny Magassouba due process." (*Id.* at p. 418; cf. *In re Loveton* (2016) 244 Cal.App.4th 1025, 1047 [rejecting argument that due process requires a 30-day time limit for adult defendants who have been found mentally incompetent to be admitted to state mental hospital, and noting that the 60-day deadline in the trial court's order "satisfies [incompetent] defendants' due-process rights"].) Of course, courts and local agencies should endeavor to provide necessary treatment to incompetent defendants as swiftly as possible; but the interval in this case between the finding of incompetence and Albert's first training session does not present a problem of constitutional dimension.[16]

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[16] In *Oregon Advocacy Center v. Mink* (9th Cir. 2003) 322 F.3d 1101 ("*Mink*"), the Ninth Circuit upheld an injunction, entered after a bench trial, requiring the Oregon State Hospital to admit mentally incapacitated adult defendants for competency evaluations within seven days of the judicial finding of incapacity to stand trial. The seven-day requirement in *Mink* was (continued...)

Next, Albert notes that the probation department's remediation plan did not address mental health services, despite Dr. Kambam's observation in his March 2013 report that Albert might benefit from medications and mental health services. (ABOM 21, 29 & fn. 9.) The record in this case does not detail what medications or mental health services, if any, Albert received during his confinement in juvenile hall. (See ABOM 29-30.) In August 2013, a deputy county counsel told the court that Albert was "not taking medication that was ordered," followed by a reference to "risperdal," an antipsychotic medication. (1 RT 69.) Dr. Knapke, who evaluated Albert in November 2013, later testified that Albert was not taking medication but that Albert said "he's been on risperdal in the past." (1 RT 209, 220, 221.) In light of Dr. Kambam's report, it might have been a better practice for the juvenile court to explore on the record whether Albert was receiving appropriate mental health treatment in addition to his competency training. Again, however, that omission does not establish a constitutional violation. The Due Process Clause requires that continued confinement following a finding of incompetence "must bear some reasonable relation to the

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"based in part on the Oregon legislature's choice of that time limit in the now-superseded version of the relevant state statute." (*Id.* at p. 1122, fn. 13; see *In re Loveton*, *supra*, 244 Cal.App.4th at p. 1039, fn. 12 [noting the basis for the seven-day limit in *Mink*]; *People v. Brewer* (2015) 235 Cal.App.4th 122, 145 [same].) The Ninth Circuit recently clarified that a seven-day limit for transfer to a mental facility "imposes a temporal obligation beyond what the Constitution requires," and that such a time limit "does not constitute a bright line after which any delay crosses the constitutional rubicon." (*TrueBlood v. Wash. State Dept. of Social and Health Services* (9th Cir. 2016) 822 F.3d 1037, 1040, 1045.) Moreover, the Ninth Circuit's conclusion in *Mink* that the incapacitated defendants there had suffered due process violations was based on undisputed factual findings not present here. (See *Mink*, *supra*, 322 F.3d at p. 1122; see also *id.* at pp. 1106-1107.)

purpose which originally justified the commitment." (*Davis*, *supra*, 8 Cal.3d at p. 805.) It does not require a court to ensure that the treatment plan for the incompetent defendant mirror the recommendations contained in the initial psychiatric evaluation in every respect.[17]

Albert also contends that academic research into juvenile incompetence bolsters his due process argument. (ABOM 28, 30.) He discusses two studies regarding limited samples of juveniles in Virginia and Florida who received remediation services after a finding of incompetence. (See ABOM 28, 31, discussing Larson and Grisso, Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers (Nov. 2011) p. 76 ("Developing Statutes") <http://modelsforchange.net/publications/330 > [as of July 25, 2016].) But the same report that Albert relies on for its description of these studies warns that the data from the Virginia study "must be interpreted with caution, due to the low base rate of juveniles who were not restorable"; notes that there "is very little research on competency education methods or services for youth who are incompetent to stand trial"; and concludes that existing research is insufficient to determine whether juveniles "require longer or shorter periods of remediation" than adults. (Developing Statutes, *supra*, at pp. 72, 76, fn. 139, 77.) In short, the report establishes that

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[17] Albert also criticizes the juvenile court for allowing competency training to continue beyond the 20 hours of training recommended in the probation officer's initial planning report, arguing that the "training program should therefore have taken no more than 13 weeks" of weekly one-and-a-half-hour sessions. (ABOM 24.) Nothing in the probation officer's report suggested that no additional training would be required after Albert completed the initial 20 hours. (CT 78.) And it is unsurprising that the training period exceeded 13 weeks, given that Dr. Kambam predicted it could take up to 12 *months* for Albert to attain competency. (Kambam Report, *supra*, p. 12.)

research into juvenile competency is in a nascent stage. Such research is not a proper basis for concluding that the juvenile court's actions here—which were based on the particular circumstances of Albert's case, not on any statistical or survey evidence—violated Albert's due process rights.[18]

Finally, Albert asks this Court to construe Welfare and Institutions Code section 709 to incorporate statutory protections governing adult competency proceedings. (ABOM 26-27, citing *In re John Z.*, *supra*, 223 Cal.App.4th 1046.) In particular, Albert focuses on Penal Code section 1370, subdivision (b)(1), which requires a progress report from the medical director of the state hospital or other treatment facility within 90 days of commitment, and directs that the defendant shall be returned to the court for further proceedings if the report "indicates that there is no substantial

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[18] Even if this Court were to consider the studies referenced by Albert, their findings do not support Albert's argument that "it was unreasonable for the juvenile court" to continue to detain him here. (ABOM 29.) The Virginia study concluded that after 180 days of remediation services, 15% of the studied juveniles had not yet attained competency but also had not been determined to be *unable* to attain competency—indicating that, for a substantial fraction of the study participants, continued competency services beyond 180 days may have been warranted. (Developing Statutes, *supra*, p. 76, fn. 139.) Albert describes the Florida study as reporting that after "comprehensive" competency 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 [mental illness] diagnosis did not attain competence." (ABOM 31, discussing Developing Statutes, *supra*, p. 74.) Of course, the corollary is that 70% of those with an intellectual disability diagnosis and 86% of those with a mental illness diagnosis *did* attain competency. (Developing Statutes, *supra*, p. 74.) Albert's prospects for attaining competency may have been even greater, since Dr. Kambam concluded that Albert "does not have a developmental disability," and that his only mental illness diagnoses were Attention-Deficit/Hyperactivity Disorder (ADHD) and Disruptive Behavior Disorder. (Kambam Report, *supra*, p. 10; see also 1 RT 202 [Dr. Knapke's testimony in February 2014 that Albert "is not developmentally disabled" and did not "exhibit[] any signs of ADHD"].)

likelihood that the defendant will regain mental competence in the foreseeable future." (Pen. Code, § 1370, subd. (b)(1)(A).) Albert's argument is misplaced because this case concerns the meaning of the Due Process Clause, not the statutory safeguards governing juvenile (or adult) competency proceedings. Albert's argument that section 709 should be modified to include the procedural protections set out in Penal Code section 1370 would be better made to the Legislature, which has already amended section 709 twice since its enactment in 2010. (See *post*, pp. 39-40.)

The juvenile court, counsel, and the local agencies involved in this case all appear to have worked in good faith to protect Albert's constitutional rights and to provide him with services to help him attain competency. No doubt the proceedings were not perfect, and at times involved miscommunications and periods of delay. Problems of this nature are unfortunate, and the State appreciates that similar problems are also sometimes confronted in other juvenile competency proceedings elsewhere in California. (See generally Burrell et al., *Incompetent Youth in California Juvenile Justice* (2008) 19 Stan. L. & Pol'y Rev. 198, 226.) Such problems may provide a basis for adopting additional policy reforms at the state or local level. They do not, however, establish that the state courts or agencies involved here violated Albert's due process rights.[19]

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[19] As the State argued in its brief below, even if this Court were to hold that Albert's detention prior to attaining competency violated his due process rights, that would not provide a basis for reversing the juvenile court's judgment. After the juvenile court found Albert to be competent, he voluntarily entered into a plea agreement under which he admitted to two crimes. (See 1 RT 259-263; CT 176.) While it is appropriate for this Court to address Albert's due process claim regarding the length of his detention prior to attaining competency because of its prospective public importance (cf. *People v. Morales* (2016) 63 Cal.4th 399, 409), that claim is not a basis for disturbing the juvenile court's judgment regarding counts that he voluntarily admitted after a finding of competency.

III. A VIOLATION OF THE LOS ANGELES PROTOCOL'S 120-DAY TIME LIMIT DOES NOT ESTABLISH A PRESUMPTIVE DUE PROCESS VIOLATION

Albert asks the Court to adopt a rebuttable presumption that the State has violated a minor's due process rights if the minor is detained in juvenile hall for attainment of competency longer than the 120-day limit prescribed by the Los Angeles Protocol.[20] The Los Angeles Protocol, like other protocols adopted by juvenile courts throughout the State, represents a commendable effort to provide local judges and practitioners with guidance about how best to proceed when the competency of a minor is called into question. There is no basis, however, for elevating the 120-day limit (or any other protocol provision) to constitutional stature. Both this Court and the United States Supreme Court have declined to incorporate rigid time limits as part of the *Jackson* framework, recognizing that the period of detention that is constitutionally reasonable will vary depending on the particular circumstances of each case. Moreover, the 120-day presumption proposed by Albert would not serve any of the interests typically invoked to justify adopting a presumption, and could interfere with ongoing policy efforts at the state and local level aimed at improving juvenile competency procedures.

A. The Framework Adopted in *Jackson* and *Davis* Is Not Compatible with a 120-Day Presumption

In *Jackson*, the United States Supreme Court expressly declined to impose specific timelines on competency proceedings. Instead, the Court adopted a flexible standard that focuses on the circumstances of a particular

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[20] Albert occasionally characterizes the protocol as setting an "outer limit of six months detention" (e.g., ABOM 32-33), but elsewhere recognizes that the protocol actually contains a 120-day limit (e.g., ABOM 7, 9, 42).

case. As noted above, an individual committed solely on the basis of incompetency cannot be detained "more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." (*Jackson*, *supra*, 406 U.S. at p. 738.) After that, "continued commitment must be justified by progress toward" attaining competency. (*Ibid.*) The Supreme Court emphasized in *Jackson* that "we do not think it appropriate for us to attempt to prescribe arbitrary time limits" on those periods, noting the substantial variation in local facilities and procedures as well as the lack of evidence on the record before it. (*Ibid.*) Since *Jackson* was decided, courts in other jurisdictions have continued to recognize that "the Constitution itself draws no bright lines signaling when an incompetent defendant's continued detention to restore competency becomes unreasonable." (*Magassouba*, *supra*, 544 F.3d 387 at p. 416; see, e.g., *Abbott A. v. Commonwealth* (Mass. 2010) 933 N.E.2d 936, 949.)

When this Court adopted the *Jackson* framework in *Davis*, it observed that the trial court "must exercise sound discretion" in applying the "'rule of reasonableness'" to the facts of a particular case. (*Davis*, *supra*, 8 Cal.3d at pp. 804, 807.) *Davis* listed several case-specific factors that the trial court should consider "[t]o guide its discretion," including the nature of the offense, the likely penalty, and the length of time that the individual has been confined so far. (*Id.* at p. 807.) Like the United States Supreme Court, this Court declined to articulate any specific time limit on the provision of remediation services toward the attainment of competency. (See *id.* at p. 806, fn. 5, citing *Jackson*, *supra*, 406 U.S. at p. 738.) *Davis* did offer some guidance as to what would be an "adequate" period for initial observation and it suggested a suitable schedule for periodic progress reports "in the ordinary case." (See *id.* at p. 806, fn. 5; *id.* at p. 807, fn. 7.)

But this Court emphasized that, ultimately, "the matter must rest in the discretion of the trial court." (*Id.* at p. 807, fn. 7.)

The flexible approach adopted in *Jackson* and *Davis* is consistent with general due process principles. Due process, "'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' [Citation.]" (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334.) Rather, "the precise dictates of due process are flexible and vary according to context." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 212.) Substantive due process, as well, has been characterized as a "flexib[le]" doctrine (*McDonald v. City of Chicago* (2010) 561 U.S. 742, 871 (dis. opn. of Stevens, J.)), one that offers wide latitude to the States so long as they do not infringe on a liberty interest that is "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty'" (*Washington v. Glucksberg* (1997) 521 U.S. 702, 721). A presumption that the State has violated the Due Process Clause whenever an incompetent juvenile is detained for longer than the 120-day limit in the Los Angeles Protocol would be in considerable tension with these principles.[21]

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[21] Although courts occasionally adopt presumptions to guide the analysis of constitutional claims (see generally *post*, pp. 35-38), it is uncommon to find such rules in due process jurisprudence. The rare cases where courts have adopted presumptions or similar rules in the due process context rest on considerations markedly different from those present here. (See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425 [relying on judicial experience and "a long legislative history, dating back over 700 years" to conclude that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"]; see also *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1182 [describing *State Farm* as creating "a type of presumption"].)

Indeed, the State is aware of only one case—in the 40 years since *Jackson* was decided—suggesting that it might be appropriate to incorporate a presumption into the *Jackson* framework. That decision, *In re Jesus G.* (2013) 218 Cal.App.4th 157, contained just two paragraphs briefly addressing this subject:

> After reaching the conclusion that the Protocol was violated both as to timelines for court hearings and orders and as to the length of Jesus's detention, we now discuss whether Jesus's due process rights were necessarily violated as well.
>
> The Protocol complies with constitutional requirements. As a result, a violation of the Protocol is presumptively a violation of constitutional rights. However, that presumption is rebuttable based on the facts of a given case. In light of Jesus's release, and the subsequently scheduled hearing, we need not determine whether the circumstances of this case are sufficient to rebut the presumption.

(*Id.* at p. 174.) The court did not cite any authority in support of the proposition that a protocol violation was "presumptively" also a constitutional violation; and the fact that compliance with a local rule or guideline will ensure compliance with constitutional requirements does not normally imply that any deviation from that rule presumptively violates the Constitution.[22] Moreover, as the Court of Appeal recognized in this case, *Jesus G.* ignores the fact that "*Jackson* expressly declined to define a reasonable period of time, recognizing that flexibility is necessary in this area." (Opn. at p. 29; cf. *Magassouba*, *supra*, 544 F.3d at p. 417 ["it is difficult to identify the precise time at which an incompetent defendant's continued detention becomes presumptively unreasonable"].) The

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[22] See generally *NLRB v. Noel Canning* (2014) 134 S.Ct. 2550, 2603 (dis. opn. of Scalia, J.) [explaining that "the fallacy of the inverse" is "the incorrect assumption that if P implies Q, then not-P implies not-Q"].

presumption embraced by *Jesus G.* is directly at odds with the flexible approach adopted in *Jackson* and *Davis*.

B. Cases Outside of the Due Process Context Provide No Support for Adopting a Presumption Here

It is not necessary to look beyond *Jackson* and *Davis* to reject the presumption sought by Albert. But even if this Court were inclined to consider examples of cases recognizing judicial presumptions in other contexts, those examples do not support adopting a presumption here.

The most common justification for creating a presumption is that long experience has shown one cause or outcome to be significantly more likely than another given a particular set of circumstances. As one treatise explains, "[m]ost presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it." (2 McCormick on Evidence (7th ed. 2013) § 343, p. 682.) Here, the nature of the due process right at issue, which turns on an array of case-specific considerations that are likely to vary substantially from one juvenile to another (see, e.g., *Davis*, *supra*, 8 Cal.3d at p. 807), does not lend itself to any such probabilistic prediction. And there is no clear basis in judicial experience for concluding that 120 days is the point at which the detention of a minor who is receiving competency training becomes so likely to violate his due process rights that it is sensible for courts to assume a violation.[23] Indeed, Albert does not identify a single case holding that a detention of an incompetent minor of comparable duration violated due process.

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[23] The Los Angeles Protocol itself does not purport to rest on any assessment that confinement of an incompetent minor for 120 days typically offends the Constitution.

Nor does academic literature provide any empirical basis for predicting that such a detention is likely unconstitutional. The studies discussed by Albert focused on how long it took certain types of minors in Florida and Virginia to attain competency. (See *ante*, p. 29, fn. 18.) That inquiry is distinct from the relevant question here: whether minors who have not yet attained competency after 120 days of custodial treatment are so likely to have exhibited insufficient progress that it is safe to assume their continued detention would violate the due process right described in *Jackson* and *Davis*. In any event, the very report on which Albert relies ultimately concludes that existing research is insufficient to make any confident predictions on this subject: "Currently we do not have a body of empirical evidence sufficient to guide us in determining whether youth in general, or specific types of youth, may require longer or shorter period of remediation." (Developing Statutes, *supra*, at p. 77.) In light of "the absence of such data," that report suggests "that there is no reason to diverge from a state's criminal court provisions [for adults] when developing remediation periods for juveniles." (*Ibid.*) Many of those adult remediation periods, which the report finds acceptable for minors, are far longer than the 120-day limit proposed by Albert. (See Developing Statutes, *supra*, at p. 75 [noting that "[m]any states have set a specific time limit (e.g., 6 months, 1 year, 2 years—varying from one state to another)"].)

Presumptions may also reflect a judicial or legislative determination that one side has greater access to relevant evidence than the other, but that justification does not support Albert's argument. In *People v. Medina* (1990) 51 Cal.3d 870, for example, this Court rejected a challenge to a statutory presumption of competence in adult criminal proceedings, which placed the burden of proving incompetence on a criminal defendant. The Court explained that "one might reasonably expect that the defendant and his counsel would have better access than the People to the facts relevant to

the court's competency inquiry." (*Id.* at p. 885; see also *In re R.V.*, *supra*, 61 Cal.4th at p. 185 [construing Welfare and Institutions Code section 709 to include an implied presumption of competency, and allocating the burden of proof to the party claiming incompetency]).[24] Here, the primary inquiry is whether the juvenile is making progress toward attainment of competency. The juvenile and his counsel are likely to have greater access to the relevant facts regarding that inquiry, which will turn in substantial part on the juvenile's "ability to consult with counsel," his capacity to "assist in preparing his . . . defense," and his understanding "of the nature of the charges or proceedings against him." (Welf. & Inst. Code § 709, subd. (a).) But Albert's proposed rule would place the onus for rebutting the presumptive constitutional violation on the State—the party with *less* access to the pertinent facts. What is more, placing the burden on the State to prove that a juvenile is making progress toward competency would create incentives that could cause juveniles to be less cooperative in their training sessions and during psychiatric assessments.[25]

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[24] Cf. *Gomez v. Toledo* (1980) 446 U.S. 635, 640-641 [burden to plead a qualified immunity defense is properly allocated to defendants because the existence of a subjective belief "will frequently turn on factors which a plaintiff cannot reasonably be expected to know"].

[25] Justice O'Connor raised a similar concern in her opinion concurring in the Supreme Court's decision in *Medina v. California*, which affirmed the decision of this Court discussed above: "The main concern of the prosecution, of course, is that a defendant will feign incompetence in order to avoid trial. If the burden of proving competence rests on the government, a defendant will have less incentive to cooperate in psychiatric investigations, because an inconclusive examination will benefit the defense, not the prosecution. A defendant may also be less cooperative in making available friends or family who might have information about the defendant's mental state." (*Medina v. California*, *supra*, 505 U.S. at p. 455 (conc. opn. of O'Connor, J.).)

Albert's primary argument in support of his proposed 120-day presumption is that it would advance public policy goals. (ABOM 38.) He asserts that the presumption would protect the minor's rights while "accommodating the court's interest in restoring a minor to adjudicative competency" and "serv[ing] the interests of judicial economy." (ABOM 38, 39.) But those assertions are unsupported. There is no basis on this record for inferring that any policy benefits of this presumption would necessarily outweigh the drawbacks. In particular, the presumption could substantially reduce the flexibility presently accorded to juvenile courts to address the particular circumstances and needs of each juvenile after a doubt is raised as to competency.[26] The superior approach for pursuing the policy goals invoked by Albert is a legislative process, which can take account of competing policy considerations at the state level, or the development of additional juvenile court or agency protocols, which can be sensitive to local needs and dynamics. (See *post*, pp. 39-40.) That approach might well result in procedures that are more protective of juveniles than the Constitution requires, such as the 120-day limit in the Los Angeles Protocol. But the existence of room for further policy improvement does not establish the need for a constitutional presumption.

Albert also argues that *County of Riverside v. McLaughlin* (1991) 500 U.S. 44 ("*McLaughlin*"), provides support for adopting a 120-day presumption. (ABOM 36-37.) He is mistaken. In *McLaughlin*, the

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[26] Albert criticizes the juvenile court below for deviating from the Los Angeles Protocol, asserting that it "repeatedly ignored and violated" the protocol. (AOB 35.) The trial court considered the protocol, including its 120-day provision, but noted that it did not carry the force of statutory law and concluded that there was "good cause to deviate from [the] protocol" based on the circumstances of this case, including the court's obligation to "provid[e] for the safety of the minor and the community at large." (1 RT 62; see CT 116.)

Supreme Court held that the Fourth Amendment requires a probable cause determination within 48 hours of a warrantless arrest; after 48 hours, the burden shifts to the government to justify continued detention based on emergency or other extraordinary circumstances. (*McLaughlin*, *supra*, at p. 56.) *McLaughlin* was a Fourth Amendment case—an area of the law in which the Supreme Court has repeatedly emphasized "the virtue of providing '"'clear and unequivocal guidelines' to the law enforcement profession."' [Citations.]" (*California v. Acevedo* (1991) 500 U.S. 565, 577.) This case, in contrast, deals with an area of the law in which that Court has concluded that it is not "appropriate . . . to attempt to prescribe arbitrary time limits." (*Jackson*, *supra*, 406 U.S. at p. 738.) In addition, the bright-line rule in *McLaughlin* emerged only after extensive judicial experience establishing that the more flexible standard it replaced "simply ha[d] not provided sufficient guidance." (*McLaughlin*, *supra*, at p. 56, discussing *Gerstein v. Pugh* (1975) 420 U.S. 103.)[27] There is no similar basis here for concluding that the existing *Jackson* framework has proven unworkable in practice.

C. The Presumption Requested by Albert Could Interfere with Policy Reforms

As noted above, there is already an active policymaking process regarding juvenile competency proceedings in California. The Legislature enacted section 709 of the Welfare and Institutions Code six years ago. (Stats. 2010, ch. 671, § 1.) It enacted two separate amendments to that statute the following year. (Stats. 2011, ch. 37, § 3 [adding specific provisions regarding minors with developmental disabilities]; Stats. 2011,

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[27] See *McLaughlin*, *supra*, 500 U.S. at p. 56 [noting that the *Gerstein* standard "has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations"].

ch. 471, § 4 [similar].) The Legislature is considering another amendment as of this writing. (A.B. 2695, as amended Apr. 19, 2016.) Among other things, that legislation would limit the period of remediation to "two years, or a period of time equal to the maximum term of detention for the most serious charge on the petition, whichever is shorter, on a petition that contains a felony offense." (*Ibid.*) The legislation would also require courts to "review remediation services at least every 30 calendar days for minors in custody" and would require the juvenile court in every county to "develop a written protocol describing the competency process and a program to ensure that minors who are found incompetent receive appropriate remediation services." (*Ibid.*)

At the same time, the juvenile courts in several counties throughout the State have already developed juvenile competency protocols tailored to local conditions in those counties. Those protocols address a variety of difficult issues, and they vary substantially in their terms. For example, the Orange County protocol requires recurrent attainment of competency hearings every 60 calendar days from the date a minor is found to be incompetent, while the Alameda County protocol requires review every three months.[28] The State is not aware of any protocol other than the Los Angeles Protocol that contains the 120-day limit on detention in juvenile hall relied on by Albert in this case.[29]

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[28] See Orange County Juvenile Court, Competency Protocol (approved by Presiding Judge Douglas Hatchimonji, July 11, 2011), § H.4.b <http://www.courts.ca.gov/documents/Orange_Protocol.pdf > [as of July 25, 2016]; Juvenile Competency Protocol: A Manual for Alameda County (March 1, 2013), p. 19 <http://www.acbhcs.org/providers/documentation/SOC/AC_Juvenile_Competency_Protocol.pdf> [as of July 25, 2016].

[29] The San Diego protocol directs that a minor may not be held in a custodial "competence restoration program" for more than eight weeks

(continued...)

The judicially adopted constitutional presumption advocated by Albert would short-circuit this ongoing policymaking process. It would constitutionalize a single provision from one county's protocol in a way that would affect juvenile competency proceedings in every county in the State. It could also influence future legislation and protocols in this area. If this Court adopted Albert's proposed presumption, those laws and rules would likely be calibrated to avoid triggering the 120-day presumption. That could come at the expense of fashioning procedures that make the most sense as a matter of policy and fit within the flexible constraints of the existing due process framework, based on input from relevant stakeholders. To be sure, the 120-day limit in the Los Angeles Protocol may be an appropriate policy for purposes of administering juvenile competency proceedings in Los Angeles County. Its author, Presiding Judge Nash, was uniquely situated to make that assessment. But that is no reason to enshrine any such limit, even presumptively, in the federal or state Constitution.

To the extent *Jesus G.* suggests that *any* violation of a local protocol regarding juvenile competency creates a presumptive due process violation (see *Jesus G.*, *supra*, 218 Cal.App.4th at p. 174), that rule would be even more problematic. Under that rule, the due process claim of a minor in one

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(...continued)
unless "it is deemed necessary by the court for the safety of the minor and/or the community." (Protocol for Competence Evaluations (April 1, 2011 revision), § VII.B.1 <http://www.courts.ca.gov/documents/SanDiego709.pdf> [as of July 25, 2016].) The Santa Clara protocol contains a limit on the total period in which proceedings may remain suspended for purposes of attaining competency. It adopts the three-year maximum for felonies and a one-year maximum for misdemeanors that is found in Penal Code sections 1370 and 1370.01. (Santa Cara Juvenile Justice Court, Juvenile Competency Manual and Protocol, p. 65 < http://www.courts.ca.gov/documents/SantaClara709.pdf > [as of July 25, 2016].)

county would be adjudicated differently from the claim of a similarly situated minor in another county. This case is illustrative. Under the rule suggested by *Jesus G.*, the fact of Albert's detention beyond 120 days would create a presumptive due process violation in Los Angeles County. But it would not create a presumptive violation in a county that lacked a protocol, or in a county that has adopted a protocol with different terms.[30] That kind of patchwork system cannot be reconciled with the need for consistent adjudication of constitutional claims across different cases and geographic regions.[31]

This case may underscore the need for further work at the state and local level to ensure that juvenile competency proceedings are conducted in a fair, efficient, and effective manner. Protocols adopted by local juvenile courts, like the one at issue here, can play a critical role in that effort. But that important policymaking and implementation process does not justify adopting the novel constitutional presumption proposed in this case.

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[30] The San Diego protocol, for example, directs that a minor may spend more than eight weeks in a "custodial competence restoration program . . . only if it is deemed necessary by the court for the safety of the minor and/or the community." (Protocol for Competence Evaluations (April 1, 2011 revision), § VII.B.1 <http://www.courts.ca.gov/documents/SanDiego709.pdf> [as of June 28, 2016].) On the facts of Albert's case, there would be no violation of the San Diego protocol—and, hence, no presumptive due process violation under the rule in *Jesus G.*—because the juvenile court found "good cause" to continue to detain Albert based on considerations about "the safety of the minor and the community at large." (1 RT 62.)

[31] There is also wide variation in juvenile competency procedures across the States. (See, e.g., Developing Statutes, *supra*, at p. 1.) If, as *Jesus G.* suggests, a violation of any valid protocol or statute on juvenile competence presumptively violates the federal Constitution, this patchwork would extend nationwide.

CONCLUSION

The Court of Appeal's judgment should be affirmed.

Dated: July 27, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Answer Brief on the Merits uses a 13 point Times New Roman font and contains 13,375 words.

Dated: July 27, 2016

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***In re Albert C. a Person Coming Under the Juvenile Court Law.***
No.: **S231315**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 27, 2016, 2016, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 27, 2016, at San Francisco, California.

Elza Moreira
Declarant

Signature