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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 Juvenile Court. No. MJ21492)

On Appeal from a Judgment of the Los Angeles County Superior Court
The Honorable Denise McLaughlin-Bennett, Judge Presiding

APPLICATION OF THE PACIFIC JUVENILE DEFENDER CENTER, FIRST DISTRICT APPELLATE PROJECT, AND LOS ANGELES COUNTY PUBLIC DEFENDER FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF DEFENDANT AND APPELLANT ALBERT C., AND AMICUS CURIAE BRIEF

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The Pacific Juvenile Defender Center, First District Appellate Project, and Los Angeles County Public Defender, through their attorneys and pursuant to California Rules of Court, rule 8.520(f), respectfully apply for leave to file the following *Amicus Curiae* brief in support of Albert C. As explained in further detail below, *Amici* are recognized authorities on juvenile delinquency issues and present this brief to provide the Court with a comprehensive review of the scientific and professional literature pertinent to the issues before the Court in this matter.

At issue in this case is whether the incarceration of a youth adjudged incompetent to stand trial for almost a year with no evidence for progress toward competence violated a Los Angeles County protocol limiting confinement for remediation to 120 days, and whether that confinement violated his right to due process of law.

The Pacific Juvenile Defender Center (PJDC) is a regional affiliate of the Washington, D.C.-based National Juvenile Defender Center. PJDC works to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. PJDC provides support to more than 700 juvenile trial lawyers, appellate counsel, law school clinical programs, and non-profit law centers to ensure quality representation for children throughout California and around the country. PJDC members represent thousands of youth in juvenile court delinquency cases in California. In this regard, PJDC has long been concerned about juvenile competence.

For nearly a decade, PJDC has been involved in policy discussions, legislation, and court challenges involving adjudicative competence of juveniles. PJDC attorneys include the author of a seminal article, *Incompetent Youth in California Juvenile Justice* (2008) 19 Stan. Law & Policy Rev. 198, exploring gaps in law and policy in relation to juvenile competence, and *Protocol for Competence in California Juvenile Justice Proceedings*. (Youth Law Center (2012), http://www.ylc.org/wp/wp-

content/uploads/Protocol%20with%20Title%20Page.pdf, last visited 9/19/16.)

PJDC was active in the legislative discussions that led to enactment of Welfare and Institutions Code section 709 on juvenile competence, as well as the enactment of California Rules of Court, rule 5.663 setting forth the role and qualifications of experts in juvenile competence cases. PJDC has trained and advised juvenile court judges, juvenile defenders, and other juvenile court professionals on juvenile competence issues at the Administrative Office of the Courts Center for Families, Children and the Law Beyond the Bench Conference, the Juvenile Law Institute (for California juvenile court judges), the National Juvenile Defender Summit, and the annual juvenile conference of the California Public Defender's Association. The Pacific Juvenile Defender Center and First District Appellate Project filed an amicus brief in *In re R.V.* (2015), 61 Cal.4th 181, in which this court decided several issues relating to juvenile competence.

The First District Appellate Project (FDAP) is a non-profit law office, which administers the appointment of counsel program in the First District, pursuant to California Rules of Court, rule 8.300(e). FDAP's mission is to ensure quality representation of indigent appellants in criminal, juvenile delinquency, dependency, and mental health appeals in the First District Court of Appeal. As "contract administrator" in the First District, FDAP (1) administers the appointment process on behalf of the

Court of Appeal, including recommending attorneys for appointments in each case (2) provides other administrative assistance to the Court of Appeal in processing notices of appeal; (3) assists and consults with a panel of approximately 300 attorneys who are appointed to represent indigent appellants in the First District; (4) provides training and resource materials to the panel; and (5) also undertakes the direct representation of some indigent appellants in the First District. Juvenile delinquency appeals represent a substantial portion of the First District cases processed by FDAP and assigned to appointed appellate counsel. The issues of this case have potential implications for juvenile cases in the First District and throughout the state.

The Los Angeles County Public Defender's Office, Juvenile Division represents over 35,000 children in delinquency proceedings each year in delinquency courts throughout the county. The juvenile division includes deputy public defenders, paralegals, investigators, psychiatric social workers, and special units of resource and Department of Juvenile Justice attorneys, reentry advocates, and appellate specialists. Together they collaborate to provide effective, holistic representation of children from the earliest stage of the juvenile delinquency proceedings through post-disposition planning. The Los Angeles County Public Defender Juvenile Division is recognized both statewide and nationally as providing cutting

edge, innovative legal representation to children charged with crimes and is considered a preeminent leader in juvenile delinquency representation.

The Los Angeles County Public Defender has been counsel in *Fare* v. *Michael C.* (1979) 442 U.S. 707; *In re Lance W.* (1985) 37 Cal.3d 873; *In re Jesus G.* (2013) 218 Cal.App.4th 157, and *Luis M.* v. *Superior Court* (2014) 59 Cal.4th among other juvenile cases.

All of the *Amici* organizations work to advance the rights and well-being of children in jeopardy, paying particular attention to the needs and rights of children involved in the juvenile justice system, and placed in juvenile detention, correctional facilities, or adult prisons. *Amici* work to ensure that the treatment of children by these systems is fair, developmentally appropriate, and consistent with the goals and purposes of the juvenile justice system.

Amici are knowledgeable about the relevant law, including the constitutional standard, and the impact of disabilities and immaturity on juvenile adjudicative competence. The collective expertise of *Amici* in juvenile law and adolescent development as well as in federal and California constitutional law will provide a perspective that has not been presented to the court in this matter.

Amici do not intend to duplicate arguments already made, but will present additional legal arguments and authority combined with social

science and adolescent research regarding juvenile competency, remediation, and the harmful consequences of prolonged detention.

For all of the foregoing reasons, *Amici* respectfully request that this Court grant *Amici's* application and accept the enclosed brief for filing and consideration.

Dated: September, 21 2016

Respectfully submitted,

PACIFIC JUVENILE DEFENDER CENTER,
FIRST DISTRICT APPELLATE PROJECT,
LOS ANGELES COUNTY PUBLIC DEFENDER

Susan Burrell

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On Behalf of Attorneys for *Amici Curiae*
for Defendant and Appellant Albert C.

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PROCEDURAL AND FACTUAL HISTORY

Amici curiae hereby adopt the Statement of the Case and Procedural Facts set forth in Appellant's Opening Brief on the Merits (OBM) filed by Counsel for Defendant and Appellant, Albert C., pp. 10-17. For convenience, the following timeline pulls out dates that may be relevant in the court's consideration of the issues herein.

TIMELINE OF HEARINGS AND RULINGS

Date of Court Hearing	Court Rulings and Orders	Total Days Held and Days Held After Finding of Incompetence
February 15, 2013	Doubt as to competence raised; proceedings suspended; Albert detained in juvenile hall since February 13. (CT71, RT 14-16.)[1]	2 days in custody
March 7, 2013	Competence report not ready; case continued. (CT 71, RT 17.)	22 days in custody
March 13, 2013	Competence report not ready; case continued. (CT 72)	28 days in custody
March 19, 2013	Court finds Albert incompetent; orders probation/Dept. of Mental Health report; sets hearing on attainment of competence in the foreseeable future. (CT 73, RT 20-21.)	34 days in custody
April 10, 2013	Probation report says they do not know what to do and requests regional center referral. (CT 74-76.) Court orders another report on treatment and proper setting for Albert. (CT 77.) Defense objects to continued detention. (RT 25-26.)	56 days in custody; 22 days since found incompetent
April 17, 13	Probation report recommends competency training once a week for 20 weeks; case	63 days in custody; 29

[1] Throughout this brief "CT" refers to the Clerk's Transcript, and "RT" refers to the Reporter's Transcript.

	continued for competency attainment hearing. (CT 78-81.)	days since found incompetent
May 23, 2013	Only 2 competence sessions of 1 ½ hr. each have occurred; probation request another month to assess progress. (CT 94-96.) Defense renews request for release; protocol says case should be dismissed at 60 day point. Probation ordered to determine competence in foreseeable future and whether he can be released. (CT 91, RT 30-31.)	99 days in custody; 65 days since finding of incompetence
June 20, 2013	Albert missed 2 sessions due to dental appointment and court hearing. (CT 99.) Court orders Level 14 group home assessment and report on whether Albert can attain competence in foreseeable future (CT 102, RT43-45.) Defense counsel moves for release. (RT 39-41, 46.) Court refuses defense request for new expert evaluation of competence. (RT 45-46.)	127 days in custody; 93 days since finding of incompetence
July 17, 2013	Creative Support says Albert is still incompetent. (CT 106-108.) Court orders placement in Level 14 placement. (RT 48-49.) Defense counsel says he must be released now; case is beyond 120 days from the IST finding with no signs of progress. (CT 109, RT 50.)	154 days in custody; 120 days since finding of incompetence
August 15, 2013	Creative Support says Albert is still incompetent. (CT 113-115.) Court orders probation to work with Department of Children and Family Services (DCFS) on Level 14 placement and submit supplemental competency report. Denies defense motion to dismiss. Finds good cause to deviate from protocol. (CT 116.)	183 days in custody; 149 days since finding of incompetence
August 26, 2013	Case continued; minor to continue receiving competence training, and probation/DCFS to report on Level 14 placement and possible regional center competence training. (CT 117.)	194 days in custody; 160 days since finding of incompetence
September	Defense Counsel files writ of habeas	209 days in

10, 2013	corpus, No. B25114, Second Appellate District, Division 5 (CT 125-126.)	custody; 175 days since finding of incompetence
September 18, 2013	Creative Support says Albert is not competent. (CT 121-123.) Probation says regional center require eligibility determination before can consider for services. (CT118-120.)	217 days in custody; 183 days since finding of incompetence
October 16, 2013	Creative Support (October 10) says Albert is still incompetent. (CT 128-130.) Probation requests continuance to investigate placement and for regional center interview. Defense counsel's motion for release is denied. (CT 124.) Court orders new expert evaluation and wants Creative Support to explain why all reports look the same. (CT 131.)	245 days in custody; 211 days since finding of incompetence
November 12, 2013	Court hears testimony from Creative Support. Case continued for Dr. Knapke's report. (CT 139.)	272 days in custody; 238 days since finding of incompetence
January 13, 2014	Court receives Dr. Knapke's report finding Albert is still incompetent and probation report saying he does not qualify for regional center services. DCFS says they are having trouble finding a placement. Case continued for competency attainment hearing. (CT 138-139.)	334 days in custody; 300 days since finding of incompetence
January 23, 2014	Court of Appeal denies the writ of habeas corpus (CT 140), 132 days after it was filed.[2]	
February 4, 2014	At attainment of competence hearing, despite no new evaluation, court finds Albert to now be competent. (CT 149-150.)	356 days in custody; 322 days since finding of incompetence

[2] Although California Rules of Court, rule 8.474 requires the Court of Appeal to have procedures to expedite juvenile writs and appeals, it took nearly four-and-a-half months for the Court of Appeal to deny the petition for writ of habeas corpus in this case. (CT 140.)

February 20, 2014	Albert admits some of the alleged offenses per a plea agreement. (CT 176.) Court orders probation to determine whether mental health court is appropriate and to identify an educational rights advocate. (CT 176.)	372 days in custody; 338 days since finding of incompetence
March 4, 2014	Probation asks for more time to investigate mental health court referral and educational rights holder. Court continues the case. (CT 177-180.)	384 days in custody; 350 days since finding of incompetence
March 15, 2014	Disposition hearing. Court denies mental health court referral, but orders placement and evaluation for Dorothy Kirby Center or Level 14 placement. (CT 188.)	395 days in custody; 361 days since finding of incompetence

INTRODUCTION

Welfare and Institutions Code section 709 provides:

> [a] minor is incompetent to proceed 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.

(Welf. & Inst. Code, § 709, subd. (a).)

Upon such a finding, Section 709 specifies:

> ...all proceedings shall remain suspended for a period no longer than is 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).)

Albert C. was found incompetent and then was held in juvenile hall much longer than was "reasonably necessary." Albert's year in custody

violated Section 709, the governing Los Angeles County Superior Court Protocol, and the constitutional guarantee of due process.

ARGUMENT

I. THE JUVENILE COURT VIOLATED ALBERT'S DUE PROCESS RIGHTS BY DETAINING HIM WELL PAST THE 120-DAY LIMIT WITHOUT EVIDENCE OF PROGRESS TOWARD ATTAINING COMPETENCY AS ESTABLISHED IN THE "AMENDED COMPETENCY TO STAND TRIAL PROTOCOL"[3] WHICH GOVERNS LOS ANGELES COUNTY SUPERIOR COURT JUVENILE CASES

A. Because There was no Evidence of Albert's Progress Toward Competence, His Continued Detention in Juvenile Hall Violated Due Process

As a matter of constitutional law, a person may not be tried absent a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and "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].) In *Jackson v. Indiana* (1972) 406 U.S. 715, [92 S.Ct. 1845, 32 L.Ed.2d 435], the United States Supreme Court recognized that an incompetent person may not be held indefinitely for the purpose of attaining competence, and set forth the relevant due process standard:

> ...[A] a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial *cannot be held more than the reasonable period of time necessary to determine whether there is a*

[3] This protocol was dated January 9, 2012, and is hereafter referred to as "Protocol."

> *substantial probability that he will attain that capacity in the foreseeable future*. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release . . . Furthermore, *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*, at p. 738, emphasis added.)

This court adopted the same constitutional standard in *In re Davis* (1973) 8 Cal.3d 798, 801. Welfare and Institutions Code section 709, subdivision (c) contains similar language.[4] At the time Albert was found incompetent, the Protocol set an outside time limit on the permissible period for remediation. The Protocol called for an "Attainment of Competency Hearing" within 60 days, and required the court to dismiss the petition at that point if there was not a finding that the minor will attain competency in the foreseeable future. (Protocol. at p. 6.) Further, the Protocol specifically provided that, "The 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.)

Over a period of nearly a year from the finding of incompetence, Albert's counsel repeatedly objected to the failure of the remediation reports to demonstrate evidence of progress toward remediation, and

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[4] See *ante* p. 5.

consequently, the need to hold Albert in a less restrictive setting.[5] Counsel repeatedly directed the court to the relevant language in Welfare and Institutions Code section 709, and *Jackson v. Indiana,* as well at the Protocol. On this record, Albert's confinement, violated the standards set forth in each of those authorities. We now explore the reasons the delay in this case was so damaging and so utterly unreasonable.

B. After Finding That Secure Confinement in Juvenile Hall Was Not Needed, the Juvenile Court Continued to Detain Albert

Early in the proceedings, the court conceded that Albert did not need to be held in in juvenile hall at all. He was a troubled fifteen year-old dependent of the court, who had been in foster care since he was eight years old as a result of neglect, physical abuse, and emotional abuse. (Los Angeles County Probation Department, "Probation Lite," dated, February 12, 2013, CT 61-62.) He had been the subject of 19 referrals to child protective services, and had been placed in at least seven out-of-home placements in foster care, group homes, or with relatives. (*Ibid.*) Albert had been evaluated as emotionally disturbed and suffering from Attention Deficit Hyperactivity Disorder, and was in special education for that diagnosis. (*Ibid.*) The psychiatrist who evaluated Albert as incompetent to stand trial diagnosed him as having Attention Deficit Hyperactivity

[5] See Timeline of Hearings and Rulings, *ante*, pp. 2-5.

Disorder and Disruptive Behavior Disorder. (Report of Dr. Praveen R. Kambam, dated, March 17, 2013, pp. 2, 5.)

From the very beginning of the case, Albert's lawyer sought to have him released to his aunt or to a group home. Fairly quickly, the court agreed that he did not require secure confinement in the juvenile hall,[6] and ordered an evaluation for placement in a Level 14 group home.

"Level 14" refers to the rate classification level for the highest level of group home care in California. (Welf. & Inst. Code, § 11462.)[7] Children must be determined to be seriously emotionally disturbed to be eligible for Level 13 or 14 group home care. (Welf. & Inst. Code, § 11462.01.)[8] Under

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[6] "Juvenile Hall" is California's term for detention centers. These are locked facilities, where youth undergoing juvenile delinquency proceedings may be held pending the adjudication and disposition of their case, and pending implementation of the court's dispositional order. (Welf. & Inst. Code, §§ 206, 207, 737.)

[7] California is in the process of changing its group home structure as a result of A.B. 403 (Stats.2015, c. 773 (A.B.403), § 76, eff. Jan. 1, 2016, operative Jan. 1, 2017.) The group home statutes cited in this brief are the ones in existence prior to the January 1, 2017 effective date of A.B. 403.

[8] Welfare and Institutions Code section 5600.3, subdivision (a), subsection (2) provides:

(2) For the purposes of this part, "seriously emotionally disturbed children or adolescents" means minors under the age of 18 years who have a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, other than a primary substance use disorder or developmental disorder, which results in behavior inappropriate to the child's age according to expected developmental norms. Members of this target population shall meet one or more of the following criteria:
(A) As a result of the mental disorder, the child has substantial impairment in at least two of the following areas: self-care, school functioning, family relationships, or ability to function in the community; and either of the following occur:

California licensing laws, group homes are non-secure. Although exterior premises may be locked, children while in the group home, may not be "locked in any room, building, or facility premises at any time." (22 Cal. Code of Regs., § 84072, subd. (c)(24).) However, Level 14 group homes are exempt from this non-secure requirement as long as the youth voluntarily agrees to treatment at the facility.[9] (See Welf. & Inst. Code, § 6552.) The atmosphere, treatment, and conditions of a Level 14 Group Home are markedly different from juvenile hall. The whole genesis of a Level 14 Group Home is to provide treatment to youth in a therapeutic setting, as opposed to the juvenile hall which is merely a holding place for youth while cases are pending.

The court then repeatedly ordered placement for Albert in the Level 14 Group Home. (RT 48-49, 57, 61-62, 77, 87-88, 92, 95, 112-113, 137, 149, 254.) But when probation and dependency court officials failed to place him, offering a nonstop series of excuses for why things did not

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(i) The child is at risk of removal from home or has already been removed from the home.
(ii) The mental disorder and impairments have been present for more than six months or are likely to continue for more than one year without treatment.
(B) The child displays one of the following: psychotic features, risk of suicide or risk of violence due to a mental disorder.
(C) The child has been assessed pursuant to Article 2 (commencing with Section 56320) of Chapter 4 of Part 30 of Division 4 of Title 2 of the Education Code and determined to have an emotional disturbance, as defined in paragraph (4) of subdivision (c) of Section 300.8 of Title 34 of the Code of Federal Regulations.

[9] Albert C. agreed to be moved to a Level 14 facility. (RT 70.)

happen, the court invariably continued the case, and required him to remain in juvenile hall. (RT 25-26, 30-31, 34-35, 39-41, 44, 48-49, 56-58, 62, 65, 67, 70, 77, 79, 85, 87-89, 92, 95-96, 99, 102, 107, 112-113, 137-138, 150-151.)

The assertions of probation and child welfare officials in this case that the delay was justified by the difficulty of placing Albert are unconvincing. The transcripts in this case reveal a never-ending stream of social workers, county counsel, and probation officers through the courtroom at hearing after hearing. We simply do not accept the ongoing inability of the largest juvenile system in the country to find an acceptable alternative to confinement in the juvenile hall for this emotionally disturbed foster child.[10]

The situation here is reminiscent of *In re Aline D.* (1975) 14 Cal.3d 557, in which this court rejected a California Youth Authority commitment for a girl who had been turned away from a series of placements. In that case, as in Albert's case, the responsible placement coordinator indicated that Los Angeles County had no facilities capable of coping with the minor." (*Id.* at p. 560.) This court noted that, "[t]he unavailability of suitable alternatives, standing alone, does not justify the commitment of a

[10] The delays and excuses seem particularly unjustified in light of the Los Angeles County Probation Department having a sizeable budget of $860 million dollars. https://chronicleofsocialchange.org/featured/persons-of-interest-advocates-eye-reformers-for-top-probation-post-in-la-county/15482

nondelinquent or marginally delinquent child to an institution primarily designed for the incarceration and discipline of serious offenders." (*Aline D.* at 567.) This court found that, instead of committing the child to a facility that was more restrictive than what she needed, if no suitable alternatives were available, the case should be dismissed. (*Id.* at p. 565.)

In fact, Albert's rejection from several group homes barely scratched the surface of the resources available to the authorities in this case. In 2015, there were 333 private agencies running a total of 1,022 licensed facilities in the state for foster youth in the child welfare and juvenile justice systems, as well as for developmentally disabled children. (DeSa, *California Aims to Stop Warehousing Foster Kids in Group Homes*, Mercury News (Nov. 29, 2015).)

It is difficult to believe that Albert was so different from the 1,359 children Los Angeles County had in foster homes; the 4,773 in foster family agency homes, or the 1,005 youth placed in group homes. (KidsData.org, *Foster Care: "Number of Children in Foster Care, by Type of Placement*," available at www.kidsdata.org/topic/23/fostercare-placement/table (last visited 09/15/2016).)

More importantly, group homes are only one of the types of residential facilities that could have worked for Albert. Nothing in the record indicates that probation and child welfare officials ever investigated placing Albert in a residential placement through the special education

system.[11] Nor was there any real investigation of placement with Albert's aunt, with support services, such as Therapeutic Behavioral Services (TBS).[12] The Protocol specifically calls for providing services that may include the "coordination of services from DMH, Regional Center, education agencies and any other entity that has an obligation to provide services to the minor." (Protocol at p. 6.) Regrettably, these avenues were not pursued in Albert's case.

C. Juvenile Court Proceedings are Intended to Provide Expeditious Resolution of the Issues

Respondent concedes that "[t]hese proceedings were not perfect," and that there were "delays, miscommunications, and inefficiencies at times during the proceedings." (Respondent's Answer Brief on the Merits, p. 2) This concession fails to convey either the nonfeasance of the bungling

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[11] The Individuals with Disabilities Education Act (IDEA) authorizes residential care for students with disabilities. (34 C.F.R. § 300.104.) California has extensive provisions for providing such residential placements in non-public schools. (See, *Memorandum from Tom Torlakson, State Superintendent of Public Instruction, to County and District Superintendents, etc., "Assembly Bill 114: Residential Care for Students with Disabilities"* (September 13, 2011), available at http://www.cde.ca.gov/sp/se/ac/rescare.asp.)

[12] Los Angeles County's Therapeutic Behavioral Services (TBS) program serves youth who are in a high level group home or at risk of being placed in one, or who have been hospitalized in the past, or are at risk of hospitalization. TBS is an intensive, individualized, one-to-one behavioral mental health service available to children/youth with serious emotional challenges and their families, who are under 21 years old and have full-scope Medi-Cal. (See http://dmh.lacounty.gov/.)

officials involved in this case, or the impact of the delay on a troubled 15 year-old foster child. The ongoing "delays, miscommunications, and inefficiencies" kept this child in juvenile hall with no therapeutic services for over a year notwithstanding , the Protocol, Welfare and Institutions Code, Section 709, or the United States Constitution.

The Protocol discourages detention beyond 120 days for remediation of competency consistent with the general policy of disfavoring detention of juveniles. Time limits on juvenile hearings and detentions "are to be strictly followed so as to avoid the excessive and unwarranted detention of children." (*In re Daniel M.* (1996) 47 Cal.App.4th 1151, 1156.)

California statutory law implements the policy. Once a minor is detained, the prosecution must file a petition to declare the minor a ward within 48 hours, excluding nonjudicial days, or the minor must be released. (Welf. & Inst. Code § 631, subd. (a).) This means that if a minor is arrested in the early morning hours, the prosecution must file a petition before the end of the next business day. The court in *In re Tan T.* (1997) 55 Cal.App.4th 1398, 1403-1404, held that the juvenile court erred in failing to release a youth who was held for 56 hours – eight hours beyond the 48-hour limit for the filing of a petition.

This Court emphasized in *In re Robin M.* (1978) 21 Cal.3d 337, that the 48 hour period for filing a juvenile court petition under Section 631 begins at the time of arrest, and not at the time the probation officer

receives the young person at juvenile hall. (*Robin M.* at p. 343, fn.11.) In other words, courts count the hours in determining whether over-detention of juveniles has occurred.

After a petition is filed, probation must bring the minor to court for a detention hearing either on the same day as filing, and for certain charges no later than the end of the next business day, or the minor must be released. (Welf. & Inst. Code § 632, subds. (a) & (c); *In re Angel M.* (1997) 58 Cal.App.4th 1498, 1506.) The difficulty of finding a placement is not a proper reason for delay. Thus, at a detention hearing, the court may not detain a minor who is a dependent under the supervision of the Department of Children and Family Services simply because the minor's social worker is unavailable, or is unable to locate a placement. (*In re Bianca S.* (2015) 241 Cal.App.4th 1272, 1275.)

Even in adult court, with its much longer timelines for competence cases, this amount of delay and the failure to place Albert in a treatment facility would have been unacceptable. Adults held for much less time than Albert have successfully challenged being kept in jails instead of being transferred to a hospital for restoration.

In *In re Mille* (2010) 182 Cal.App.4th 635, the Court of Appeal granted a writ of habeas corpus in a case involving an 84-day delay in transferring an adult to the state hospital. Because Penal Code section 1370, subdivision (b)(1) required a report on whether the person could

attain competence within 90 days, the appellate court urged that transporting him to the hospital on day 84 deprived him of the opportunity to make progress toward competence and to have a proper evaluation of whether he was restored to competence. (*Mille*, at p. 645.)

Moreover, the appellate court also found that the trial court should have granted the defendant's initial writ of habeas corpus at day 30. (*Mille,* at p. 639.) Based on *Jackson* and *Davis,* the court found that an incompetent person, "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [mental competence] in the foreseeable future." (*Mille,* at p. 649, citing *Jackson*, *supra*, 406 U.S. at p. 738, and *Davis*, *supra*, 8 Cal.3d at p. 801.)

More recently, in *People* v. *Brewer* (2015) 235 Cal.App.4th 122, 135, the Court of Appeal discussed a local court order requiring that incompetent adult defendants be transferred to the hospital within 14 days of commitment for restoration. Although the appellate court ultimately did not uphold that order because of intervening changes in the law (*Id.* at pp. 141-143), it recognized the court's power prior to those changes in the law to set a deadline enforcing the statutory imperative under Penal Code section 1370 for a meaningful progress report within 90 days of the commitment order. That could only happen if the defendant were actually

transferred to the state hospital within a reasonable period of time. (*Id.* at p. 137.)

Even more recently, in *In re Loveton* (2016) 244 Cal.App.4th 1025, 1031, six adult detainees challenged delays of between 61 and 86 days between the time they were found incompetent and the time they were transferred to a hospital for restoration services. The Court of Appeal upheld a trial court ruling that 60 days was the outside limit for transferring incompetent adults to the state hospital. The appellate court agreed with the trial court's finding that a 60–day deadline satisfied the defendants' due process rights, provided sufficient time to place each defendant, and allowed for timely preparation of the 90–day status report pursuant to Penal Code section 1370, subdivision (b)(1). (*Id.* at p. 532.)

In this case, at time of the court hearing held 65 days after Albert was found incompetent, there had been only two 90 minute remediation sessions. (RT 31, 40-41.) In an update shortly thereafter, it was reported that Albert had missed two weeks of sessions, even though he was in probation custody. (Probation Officer's Report (June 17, 2013), p. 1, CT 99.) Despite repeated objection by defense counsel, the proceedings were allowed to inch along for many more months despite the absence of a clear finding on the probability of remediation, or evidence of progress toward remediation.

In the year Albert was in custody, he never did complete the full 20 weeks of remediation services proffered by probation, and never received medication trials or mental health services directed at incompetence. Given the intention of juvenile court law to provide expeditious proceedings, and the unjustifiable failure to provide remediation in this case, the delay in Albert's case with the ensuing result of him being continually detained in juvenile hall, violated basic principles of due process.

D. Albert Was Denied Due Process by Being Detained Without Mental Health Services or Medication Trials Directed at Remediation

The original psychological evaluation by Dr. Kambam urged that there was a substantial probability that Albert would be able to attain competence within a year *if* he were given mental, health services, medication trials and remediation services. (Report of Dr. Praveen R. Kambam, supra, at p. 12.) Respondent makes much of this statement as a way to justify Albert's detention for close to a year. However, Dr. Kambam's statement is irrelevant to the issues herein. First, it was made in his competence evaluation, long before the actual proceedings to determine the probability of Albert attaining competence. The Protocol calls for a completely separate planning process for services, with periodic evaluations of their efficacy, and whether the person is likely to attain competence in the foreseeable future, beginning within 60 days of the finding of incompetence (Protocol at pp. 5-6.) Neither the process nor the

timelines were followed in Albert's case. And second, even if Dr. Kambam's statement is deserving of attention, it was premised on Albert receiving mental health services and medication trials, as well as remediation services. The services Albert received fell far short of what Dr. Kambam recommended. The meager services Albert received were unlikely ever to produce competence.

In the year he remained detained after the finding of incompetence, the only services Albert received were weekly sessions in which he received "up to" 90 minutes of going over court concepts and vocabulary, followed by a quiz. In other words, of the 10,080 minutes in a week – about .008% of his time was spent in remediation services. Even those services did not always occur. (CT 99.)

Then there was the question of quality. The person who administered the competence worksheets to Albert on a weekly basis, Ms. Nicco Gipson, was neither a clinician nor a teacher. She had "some college," but did not graduate, and had only "brief" training at a developmental center that she remembered only remotely. (RT 159.) She said she was familiar with the *Dusky* standard, but could not articulate it in court. (RT 177.)

Once a week, Ms. Gipson would go through the Creative Support Competency Manual with Albert, covering 14 domains, including court personnel, arrest process, court vocabulary, and understanding charges. (RT

161-162.) After Ms. Gipson went over the domains of competence with Albert, she would administer mini-tests on each one, and would score them. (RT 162-163). Her sole way of knowing whether he "got it" was whether he passed the written test. (RT 164-165.) She would then take the scored tests to her supervisor who would write the evaluation of competence without seeing Albert. (RT 169, 179-180, 185.) Beyond being able to discern whether Albert could memorize certain words or concepts, Ms. Gipson had no qualifications at all to determine whether he understood the concepts or could apply them to his own situation. In any event, Albert never scored sufficiently high on the tests to be found competent. (RT 197.)

Accepted professional standards for remediation call for the services to be provided by a qualified person, and for the intensity of services to be much greater than they were here, and for other needs of the client to be addressed as needed. (Warren, et al., *Developing a Forensic Service Delivery System for Juveniles Adjudicated Incompetent to Stand Trial,* International Journal of Forensic Mental Health (2009) Vol. 8, Iss. 4, at 249, 251.) The Virginia Juvenile Competency Program,[13] generally viewed as the best of the juvenile programs, requires remediation counselors to have at least a B.A. degree and experience working with children and adolescents. The program features a consistent and enduring relationship with an experienced and well-trained restoration counselor, the provision of

[13] See http://www.virginiajuvenilecompetencyrestoration.com/

intensive case management designed to address all barriers to competence, and the use of age-appropriate, competence-specific educational interventions. Counselors are trained at the University of Virginia, and meet with clients multiple times per week. (Warren, et al., *Developing a Forensic Service Delivery System for Juveniles Adjudicated Incompetent to Stand Trial,* International Journal of Forensic Mental Health, *supra* pp. 258-259.) This is very different from what Albert received.

Moreover, competence consists of much more than memorizing vocabulary words and concepts. Albert was found incompetent on the prong of the *Dusky* test calling for him to have a rational as well as factual understanding of the proceedings against him or her. The following factors are relevant to competence on that prong:

- Ability to understand and appreciate the charges and their seriousness.
- Ability to understand possible dispositional consequences of guilty, not guilty and not guilty by reason of insanity.
- Ability to realistically appraise the likely outcomes.
- Ability to understand, without significant distortion, the roles of the participants in the trial process (e.g., judge, defense attorney, prosecutor, witnesses, jury).
- Ability to understand the process and potential consequences of pleading and plea bargaining.
- Ability to grasp the general sequence of pretrial events.

(Grisso, *Clinical Evaluations For Juveniles' Competence To Stand Trial: A Guide For Legal Professionals* (2005) at pp. 91-92, hereafter "*Clinical Evaluations*".)

Although Ms. Gipson was a fine person to read the work sheets with Albert, she had absolutely no qualifications to teach him or assess his learning beyond rote memorization. The "rational understanding" required by the *Dusky* test is a higher order ability than factual understanding because it requires that an individual have the capacity to apply information to his or her own case, rather than simply memorizing facts. It is often called "appreciation," referring to the person's ability to appreciate the relevance of information to his or her own circumstances. To know something does not necessarily mean that one can apply it. (Grisso, *Clinical Evaluations*, at p. 92.)

Of course, the prospects for remediation also depend on the causes of incompetence, and juvenile incompetence is often linked to Attention-Deficit/Hyperactivity Disorder, depression, anxiety and trauma – conditions quite similar to those exhibited by Albert. Also, developmental immaturity may play an independent or contributing role. (Viljoen & Grisso, *Prospects for Remediating Juvenile Adjudicative Competence*, (2007) 13 Psychology, Public Policy, and Law 87, 90-92, hereafter "*Prospects for Remediating*".)

In fact, the limited research on juveniles suggests that remediation based on memorization does not work. (*Prospects for Remediating,* at p. 93.) Thus, while youth may be able to show an immediate benefit from brief teaching, it is unclear whether they adequately retain the information they are taught. The capacity for factual understanding includes the

capacity to retain understanding of information across time so as to apply the information later, not merely understanding the information at the moment it is taught." (*Id.* at p. 94.)

Immaturity also plays a role in the prospects for remediation. A young person's developmental immaturity may sometimes manifest as confrontational and oppositional behavior. (*Prospects for Remediating*, at pp. 98-99.) And finally, "Preliminary evidence suggests that adolescent defendants with symptoms of Attention-Deficit/Hyperactivity Disorder may be more likely than other adolescent defendants to have problems, particularly in their ability to communicate with and assist counsel (*Id.* at pp. 90-91.) There is no clear path for remediation of those youth.

Given the fact that Albert's incompetence was related to his emotional disturbance and Attention Hyperactivity Disorder, and Dr. Kambam's recommendation that he receive medication trials and mental health services, the decision to "remediate him" using vocabulary lessons from a written manual, administered by a kindly, but inadequately trained person, was ill-conceived and surely contributed to his lack of progress over many months, and exacerbated the due process violation.

E. Protracted Detention in a Juvenile Hall Exacts Lasting Harm on Young People

There is good reason to be concerned about holding a child in juvenile hall for remediation for any period at all. If Albert were an adult,

he would have been transferred to a hospital for remediation services pursuant to an extensive statutory scheme. (Pen. Code, § 1370 et seq.) In juvenile court, however, there is no statutorily prescribed path for competence remediation. Welfare and Institutions Code section 709, subdivision (c), provides only that after finding a minor incompetent, "the court may make orders that it deems appropriate for services...that may assist the minor in attaining competency."

Further, unlike the situation in adult court, the state has consciously moved to close its inpatient programs for children and adolescents.[14] As a result, even though many other kinds of residential options could be utilized for placement of children who cannot receive remediation in the community, juvenile halls have become an unfortunate default holding place for incompetent youth.

Juvenile halls were created to serve as detention centers (Welf. & Inst. Code, § 850), not as treatment facilities. Most have limited mental

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[14] Gold and Romney, *Children's Mental Ward May Be Closed*, Los Angeles Times (Aug. 2, 2007). Apart from the lack of state hospital beds for adolescents, the California Hospital Association reports that 46 (79%) of California counties have no child/adolescent inpatient beds either. (See California Hospital Association, *California's Acute Psychiatric Bed Loss*, updated Sept. 27, 2015, available at http://www.calhospital.org/sites/main/files/file-attachments/6_-_psychbeddata.pdf., hereafter "*CHA Report.*") Further, Los Angeles, with a population of more than 10 million people, has only 243 child/adolescent beds. (*CHA Report* at p. 4.) The data does not break out how many beds are there specifically for adolescents, but it is safe to assume that the number is substantially less than that. (*Id.* at p. 10.)

health services, and struggle with children who have behavioral problems. A study of California juvenile halls found that incarceration may actually exacerbate mental health issues, especially when detention is for a protracted period. (Cohen and Pfeifer, *Costs of Incarcerating Youth with Mental Illness*, for the Chief Probation Officers of California and California Mental Health Directors Association (2008) at p. 15.)[15]

Detention is not benign. Youth subjected to even brief periods of incarceration face serious long term consequences. They are less likely to graduate from high school. (Justice Policy Institute, *Sticker Shock: Calculating the Full Price Tag for Youth Incarceration*(2014) at pp. 28-32; Cavendish, *Academic Achievement During Commitment and Post Release Education Outcomes of Juvenile Justice Involved Youth With and Without Disabilities* (2013) 91 J. Emotional & Behavioral Disorders 41, 41-52.)

It affects their future employment and earnings. (Aizer & Doyle, *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges*, National Bureau of Economic Research (2013) pp. 5-8, 18-21; Holman & Ziedenberg, *The Dangers of Detention; The Impact of Incarcerating Youth in Detention and Other Secure Facilities,* (2006) Justice Policy Institute, pp. 8-9.)

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[15] Found at http://www.cdcr.ca.gov/comio/docs/costs_of_incarcerating_youth_with_mental_illness.pdf

It increases the probability of future criminal system involvement. (Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, (2011) The Annie E. Casey Foundation[16], pp. 9-12.) It destabilizes the person's life and increases the likelihood of future incarceration. (Lowenkamp, Van Nostrand, & Holsinger, *The Hidden Costs of Pretrial Detention,* Arnold Foundation (2013)[17] pp. 11, 19.) Incarcerating youth together who have been getting into trouble (as is the case in juvenile halls) has negative consequences for rehabilitation. (Gifford-Smith, et al., *Peer Influence in Children and Adolescents: Crossing the Bridge from Developmental to Intervention Science*, 33 Journal of Abnormal Child Psychology (2005) pp.255-265; Dishion & Tipsord, *Peer Contagion in Child and Adolescent Social and Emotional Development*, 62 Annual Review of Psychology (2011) pp. 189-214.)

Moreover, detention interferes with young people's ability to do the things needed for healthy development, such as having strong supportive relationships with parents or parent figures, engaging in pro-social activities, and involvement in activities that require autonomous decision-making and promote critical thinking. (See generally, National Academies

[16] http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf

[17] http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf

of Science, *Reforming Juvenile Justice: A Development Approach: Law and Justice Report Brief* (November 2012) at p. 2[18].)

At the time of Albert's detention, the Los Angeles County juvenile halls had only recently been released from lengthy Department of Justice supervision for inadequate conditions, including mental health services, medication practices, staffing levels, and use of physical force, restraints, and pepper spray. (Letter from Ralph Boyd, Assistant Attorney General, to Yvonne B. Burke, Chair, Los Angeles County Board of Supervisors re Los Angeles County Juvenile Halls (Apr. 9, 2003).)[19]

Because of concern that the halls were not continuing to implement the reforms that had allowed them to be released from Department of Justice scrutiny, the Los Angeles County Auditor-Controller continued to monitor compliance. A County audit, right around the time Albert was detained found that the juvenile hall staff sometimes abandoned minors who required "enhanced supervision," pepper sprayed minors despite risks to their health, and that there was inadequate supervision of use of force, including soft restraints, chemical restraints, or physical interventions. (Villacorte, *Audit Finds Continuing Problems at LA County Juvenile Halls*,

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18 http://sites.nationalacademies.org/cs/groups/dbassesite/documents/webpage/dbasse_080960.pdf

19 See http://www.prearesourcecenter.org/sites/default/files/library/losangelescountyjuvenilehalls.pdf

Los Angeles Daily News (Dec. 24, 2013).)[20] Even in the best of circumstances, being held in a juvenile hall is inappropriate for the purpose of remediating youth who are incompetent to stand trial. In the Los Angeles County facilities, it was especially improper.

Being held in such a facility clearly affected Albert. At one hearing he asked if he could be held in "the box" (RT 27), apparently referring to solitary confinement. At another hearing, he asked if he could be transferred to the Omega Unit (RT 85), a place normally reserved for dependent children under the jurisdiction of the Department of Children and Family Services (child welfare). There were many references in the transcript to his difficulties in juvenile hall, at some point resulting in his being placed the Special Housing Unit (effectively "the box," CT 84). Ms. Gipson, the competence trainer, said that when Albert seemed stressed at juvenile hall, it was very hard for him to focus. (RT 182-183.)

Ironically, after the court found Albert competent, the probation officer's report urged that he receive outpatient mental health assessment, psychiatric consultation for medication, individual, group and family

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[20] Nor have Los Angeles juvenile halls emerged from concerns over abusive treatment of juveniles even now. Earlier this year, the Board of Supervisors took the unusual step of restricting the use of solitary confinement in the halls, and responded to allegations of the beating of a child by staff in April, as well as the choking of a child by staff in July. (Sewell, *Youth's Choking by Juvenile Hall Staffer Prompted Call to Police, Commissioner Says,* Los Angeles Times (July 28, 2016).)

counseling, medication monitoring, anger management treatment, and a functional behavioral assessment. (CT 166.)

F. The Delay and the Failure to Provide Adequate Services Ensured That Albert Would Not Make Progress Toward Remediation

It is hardly surprising that Albert did not progress toward remediation. He was essentially warehoused for a year with no therapeutic services or treatment. Although Dr. Kambam's initial report suggested that Albert could be competent in a year, that opinion was based on Albert's receiving remediation services targeted at his disabilities. Probation failed to provide those services. The one service probation did provide – the worksheet sessions—were not provided by a skilled mental health professional and were not sufficiently frequent to make a difference for a young person with Albert's disabilities.

Also, probation inexplicably continued to press for a regional center evaluation when it was clear in their own reports from the beginning (CT 58), that Albert did not have a developmental disability. Probation believed that this would be a way to obtain remediation services in the community if Albert were released from custody, but it is almost inconceivable that probation was not aware that regional centers only serve people who qualify because of a developmental disability. This obvious dead end took many months to play out.

There is nothing in the record to indicate that Albert received mental health services directed at assisting him toward competence.[21] There is no indication that he was seen in connection with medication trials. There is not even an indication that he received special education services directed at some of the same issues that caused him to be incompetent – Attention Deficit Hyperactivity Disorder and emotional disturbance.[22]

G. It Was Unreasonable for the Trial Court to Find "Overwhelming Evidence" of Competence on This Record

The ultimate disservice to Albert was that after the tremendous delays and harm caused by detaining him in juvenile hall, the trial court found him competent without a reasonable basis in the record. Dr. Kory Knapke's report, prepared in November, 2013, for the attainment of competence hearing, concluded that Albert was still incompetent to stand trial. (RT 231.) In court, on February 4, 2014, Dr. Knapke also testified

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[21] During the year he spent in juvenile hall beginning in February 2013, Albert had only 5 contacts with mental health services, but not in connection with competence remediation. A Mental Health Worksheet describes him variously as having Anxiety Disorder, Mood Disorder and Attention Deficit Hyperactivity Disorder. ((Los Angeles County Department of Mental Health Juvenile Court Mental Health Services, "Mental Health Worksheet," (Feb. 13, 2014), CT 172-173.)

[22] Treatment options for ADHD include behavior therapy, medication, skills training, counseling, and school supports and accommodations. These interventions can be tailored to the patient's and family needs and help the patient control symptoms, cope with the disorder, improve overall psychological well-being and manage social relationships. (*Understanding ADHD,* National Resource Center on ADHD, available at http://www.chadd.org/Understanding-ADHD/About-ADHD/Coexisting-Conditions.aspx#sthash.jf2FiHWc.dpuf (last visited 9/15/16).)

that while he thought Albert could cooperate with his attorney, he had concerns about the other prong of competence – whether he understood the nature of the proceedings. (RT 204.) In his testimony, Dr. Knapke said that this concern was based on the fact that Albert he was "doing extremely poorly in school, constantly failing all of his classes, was unable to keep up academically and was special education." (RT 204.) Also, other psychologists and psychiatrists had evaluated him and felt that he had problems with his thinking, and with his ability to reiterate basic courtroom proceedings. (RT 204.) Dr. Knapke testified that Albert could not give the names of any pleas, could not differentiate between the adversarial roles of the district attorney versus a public defender, could not explain what a judge does in the courtroom, and was unable to explain anything about courtroom proceedings. (RT 204.) In addition, because of his lack of education, primarily due to his disruptive behaviors in the past, Albert was unable to learn appropriately, and his academic skills and understanding fell behind that of his peers. (RT 204.) In the evaluation, Dr. Knapke testified, Albert seemed childlike and unsophisticated; he did not seem to "have a handle on some basic core information." (RT 213-214.) At the same time, he thought Albert put forth a good effort in the evaluation. (RT 225-226.)

Although Dr. Knapke's oral testimony at the hearing included statements that he "couldn't rule out" the possibility that Albert was

exaggerating his lack of understanding (RT 205, 213); that there was no psychiatric reason Albert could not attain competency (RT 205-206); that Albert was evasive in talking about his past (RT 202-203), as well as the offense and whether he had a girlfriend (RT 208-210, 222-224); and that Albert seemed to be making progress, Dr. Knapke also said that he would need to re-evaluate Albert to be sure: "*I cannot say at this point in time whether he has a better understanding of courtroom proceedings now compared to when I examined him at the beginning of November, because I have not examined him since then.*" (RT 232-233.) Thus, while Dr. Knapke thought that that Albert could attain competency and that it was "pretty probably likely" that he understood basic courtroom proceedings, he could not "say that with a high degree of medical certainly" because he had not re-examined Albert. (RT 233.)

On this record, the trial court found "overwhelming evidence of competence" and reinstituted the proceedings. (RT 248.) In so ruling, the court explained its view that Albert had been exaggerating his responses – repetitively saying "I don't know," that there was no other explanation, given that there was no evidence of mental retardation, developmental disability, mental illness, and no reason the minor could not have attained competency. The court noted, too, that during the proceedings Albert seemed engaged in the hearing, was not distracted, and his facial gestures appeared to respond within reason to testimony. (RT 248.)

This situation is oddly reminiscent of what happened in *In re R.V.* (2015) 61 Cal.4th 181, in which this court considered whether "the weight and character of the evidence" was such that the juvenile court could not reasonably reject a finding of incompetence. (*Id.* at p. 211.) In that case, too, the trial court had suspected malingering, but there was no reasonable basis to support it. (*Id.* at pp. 212-213.) As in *R.V.*, the weight and the character of the evidence in this case was such that the court could not reasonably conclude that Albert was now competent. The record was replete with evidence that Albert had a long history of special education, treatment for Attention Deficit Hyperactivity Disorder (ADHD), and severe behavioral issues stemming from abuse that caused him difficulty in understanding the court proceedings and retaining information about the court process. The competence trainer and the most recent evaluator had opined that Albert was still incompetent.

Moreover, Albert's behavior was completely consistent with the disabilities that rendered him incompetent. The National Resource Center on ADHD web site explains that individuals with ADHD may also have difficulties with maintaining attention, executive function and working memory. (National Resource Center on ADHD, *About ADHD*, available at http://www.chadd.org/Understanding-ADHD/About-ADHD.aspx.)[23]

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[23] The Centers for Disease Control web site on ADHD provides the DSM-V criteria for an ADHD diagnosis characterized by inattention - Inattention:

Executive function is the brain's ability to prioritize and manage thoughts and actions. It permits individuals to consider the long-term consequences of their actions and guide their behavior across time more effectively. Individuals who have issues with executive functioning may have difficulties completing tasks or may forget important things. (National Resource Center on ADHD, *Executive Function*, available at http://www.chadd.org/Understanding-ADHD/About-ADHD/Executive-Function.aspx.)

About 40 percent of individuals with ADHD have oppositional defiant disorder (ODD). ODD involves a pattern of arguing; losing one's

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Six or more symptoms of inattention for children up to age 16, or five or more for adolescents 17 and older and adults; symptoms of inattention have been present for at least 6 months, and they are inappropriate for developmental level:

- Often fails to give close attention to details or makes careless mistakes in schoolwork, at work, or with other activities.
- Often has trouble holding attention on tasks or play activities.
- Often does not seem to listen when spoken to directly.
- Often does not follow through on instructions and fails to finish schoolwork, chores, or duties in the workplace (e.g., loses focus, side-tracked).
- Often has trouble organizing tasks and activities.
- Often avoids, dislikes, or is reluctant to do tasks that require mental effort over a long period of time (such as schoolwork or homework).
- Often loses things necessary for tasks and activities (e.g. school materials, pencils, books, tools, wallets, keys, paperwork, eyeglasses, mobile telephones).
- Is often easily distracted
- Is often forgetful in daily activities.

(Centers for Disease Control and Prevention, "Attention-Deficit/Hyperactivity Disorder (ADHD)," available at https://www.cdc.gov/ncbddd/adhd/diagnosis.html.)

temper; refusing to follow rules; blaming others; deliberately annoying others; and being angry, resentful, spiteful and vindictive – characteristics that sound very similar to what the record tells us about Albert. (National Resource Center on ADHD, *Coexisting Conditions*, available at http://www.chadd.org/Understanding-ADHD/About-ADHD/Coexisting-Conditions.aspx (last visited 09/15/2016).)

It was surely more likely that Albert's ongoing inability to remember things and to progress in the memorization of court concepts in the 14 domains of competence was related to his disabilities and the inadequacy of the services, than to malingering. Instead, the trial court unreasonably spun Dr. Knapke's statements of possibility and courtroom observations into "overwhelming evidence of competence."

However, the record does not support a finding that Albert was competent. What it does support is a finding that he was wrongly incarcerated for a year, and was denied the very services that may have helped him to attain competence. Albert was deprived of due process under the standards in *Jackson*, Welfare and Institutions Code section 709, and the Protocol.

II. VIOLATION OF THE LOS ANGELES COUNTY PROTOCOL ESTABLISHED THE PRESUMPTION OF A DUE PROCESS VIOLATION

The Protocol was enacted as a way for Los Angeles County Juvenile Court to implement Welfare and Institutions Code section 709. The

Protocol spells out the procedure for handling competency cases and provides that, "[t]he minor may not be held in a juvenile to participate in attainment services for more than one hundred and twenty days." (Protocol at p. 7.)

A. The Protocol Has Been Upheld as Valid in *Jesus G.*; and Violation of the Protocol is a Presumptive Violation of Due Process

The validity of the Protocol was upheld in *In re Jesus G.* (2013) 218 Cal.App.4th 157, shortly after the Protocol took effect. In that case, the juvenile court had found Jesus incompetent to stand trial. Subsequently, he was detained for a period exceeding the Protocol's 120-day limit, without receiving competency attainment services. The minor filed a petition for writ of habeas corpus, alleging a violation of due process and the Protocol. After the Court of Appeal denied the petition, this court issued an order directing the Second Appellate District, Division 7, to vacate the denial and issue an order to show cause why Jesus' prolonged detention without the provision of services was not in violation of the Los Angeles County Superior Court Juvenile Division Protocol. (*Id.* at p. 159.)

On remand, the Court of Appeal reviewed the procedures in the Protocol to be followed if a detained minor is found incompetent. (*Jesus G.* at p. 161.) Those procedures called for a planning hearing within 15 days, with a report and recommendation whether the minor will attain competence within the foreseeable future. (*Ibid.*) The Court of Appeal

noted that the Protocol also called for services to begin "immediately" after that hearing, and for the minor to be held in the "least restrictive environment." (*Jesus G.* at pp. 162, 166.)

The writ of habeas corpus in *Jesus G.* addressed a detention of approximately three months between the finding of incompetence (*Jesus G.* at pp. 163-164), and the planning hearing. (*Id.* at pp. 165-166.). At that time, Jesus had been detained for nearly a year. (*Id.* at p. 166.) Those times were similar to the ones involved in this case. Although Jesus had been released by the time the Court of Appeal reconsidered the writ, the court considered this a current and ongoing problem needing a decision, and upheld the validity of the Protocol. (*Id.* at p. 167.)

The *Jesus G.* court rejected arguments that the 120-day limitation on the detention period contradicts Welfare and Institutions Code section 709. It noted that the Protocol mirrors Section 709, subdivision (c), specifying that proceedings must 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." (*Jesus G.* at p. 168.)

The *Jesus G.* Court describes the Protocol as an effort by the Los Angeles County Juvenile Courts to "establish a procedure that incorporates Section 709, *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, and California Rules of Court, rule 5.645." (*Jesus G.* at pp. 170-171.) It

noted, too, that the Protocol implements timelines that are designed to prevent against an indefinite commitment, and that it requires the provision of services to attain competency. (*Id.* at p. 171.)

The *Jesus G.* opinion concluded that the Protocol is consistent with the constitutional due process requirements 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." (*Jesus G.* at p. 171.) The Protocol "implements timelines which are designed to prevent an indefinite commitment and to provide for release of minors who are not likely to recover competence. It also requires provision of services to attain competency." (*Ibid.*)

In *Jesus G.* much of the delay was a result of equivocation by the evaluator as to whether the minor could attain competency as he matured in age. (*Jesus G.* at p. 171.) Because of that and because probation and the Department of Mental Health failed to make specific recommendations about what could be done to help Jesus, the court never made a finding that he could attain competency and never ordered specific attainment services. (*Id.* at p. 172.) As in this case, the probation officials in *Jesus G.* claimed that there were no placements or programs that would meet his needs. (*Id.* at p. 173.) The Court of Appeal concluded that the Protocol was violated because it required immediate coordination of services and that services

needed to be provided within a specific period of time, even if no program was already established. (*Id.* at p. 174.)

The *Jesus G.* court concluded that the Protocol "complies with constitutional requirements, and that, "As a result, a violation of the Protocol is presumptively a violation of constitutional rights." (*Jesus G.* at p. 174.) However, said the *Jesus G.* court, the presumption is rebuttable based on the facts of a given case. The court declined a decision on whether the presumption was rebutted in that case because Jesus had by then been released and another hearing had been scheduled. (*Ibid.*)

Albert's counsel repeatedly objected to Albert's continued detention based on *Jesus G.* and *Jackson.* (RT 62, 81-82, 96, 122.) The trial court never specifically addressed its reasons for departing from the holding or reasoning of *Jesus G.* Instead, the court focused on the fact that Albert's alleged offenses involved violence, and Dr. Kambam's statement that he would probably be able to attain competence within 12 months. But again, that statement was made as part of an initial competence evaluation, and not as part of the formal process for determining whether competence was likely to be attained in the foreseeable future. (RT 85-89.) It was also premised on Albert's actually receiving meaningful remediation services, which did not occur.

Subsequently, the Court of Appeal in this case refused to follow *Jesus G.* The court based its decision on the ground that it conflicts with

Jackson, where the Supreme Court refused to set a definite time limit for confinement pending competency proceedings, and with Section 709, subdivision (c)'s command that "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." (Slip opn. at 29.)

In *Jackson*, however, the court declined to set time limits because of "differing state facilities and procedures." (*Jackson v. Indiana*, *supra*, 406 U.S. 715, 738, n. 25.) In contrast, the Protocol only applies in Los Angeles County Juvenile Court proceedings. There is no unfairness in applying a uniform detention limit to children who are all under the same county's jurisdiction, housed in the same facilities, with access to the same services, and subject to the same procedures. The Protocol addresses two primary concerns under *Jackson*, the "provision of services to attain competency," and the "necessity of making a prognosis as to the likelihood of attaining competence." (*In re Jesus G.*, *supra*, 218 Cal.App.4th 157, 171.) The Protocol is an attempt to bring some consistency and order amongst the Los Angeles Superior Courts and to limit the "reasonable time" that juveniles can be incarcerated for remediation.

Jesus G. does not hold that every violation of the Protocol's 120-day limit is an automatic violation of due process. (*Jesus G.*, at p. 168.) Exceeding the 120-day limit creates the *presumption* of a violation, but the

presumption is rebuttable "based on the facts of a given case." (*Id.* at p. 174.) The Protocol does not eliminate a trial court's discretion to continue a minor's detention beyond 120 days where there is "good cause." (*Ibid.*)

The year Albert spent in custody with wholly inadequate services toward remediation clearly violated the Protocol, and "a violation of the Protocol is presumptively a violation of constitutional rights." (*Jesus G.*, at p. 174.) There was no "good cause" to support a finding that the presumptive due process violation was rebutted in this case.

B. The Protocol is Consistent with Other Judicial Attempts to Limit Detention in Competency Proceedings

Reviewing courts have often upheld local judicial policies and orders. The court in *Jesus G.* compared the Protocol to the local rule upheld in *Los Angeles County Dept. of Children and Family Services v. Superior Court* (1996) 51 Cal.App.4th 1257. (*Jesus G.*, at p. 168.) That local rule required Los Angeles County dependency courts to appoint independent counsel to represent minors, instead of County Counsel.

Local judicial policies and orders have also been upheld in situations specifically addressing the problem of defendants being incarcerated without treatment, after being found incompetent to stand trial. In *People v. Brewer* (2015) 235 Cal.App.4th 122, the trial court had issued a standing order requiring the Sacramento County Sheriff to transport all defendants who were found incompetent to the Napa State Hospital within seven days

after the finding of incompetence. The court later amended the order to extend the deadline to fourteen days. The State Department of Hospitals challenged the order, contending that a fixed deadline contradicted the "reasonable period of time" standard for such commitments under *In re Mille* (2010) 182 Cal.App.4th 635, and improperly added a deadline not contained in Penal Code section 1370.

The *Brewer* court rejected these arguments: "Setting a deadline--establishing the outer limit of a reasonable time--does not violate the separation of powers doctrine. A court acts within its constitutional core function and does not violate the separation of powers doctrine when it interprets and applies existing laws and carries out the legislative purposes of statutes. That is all the transfer deadline does." (*People v. Brewer*, *supra*, 235 Cal.App.4th 122, 137.)

More recently, the Department of State Hospitals challenged a local judicial time limit in *In re Loveton* (2016) 244 Cal.App.4th 1025. The Superior Court in Contra Costa County had imposed a 60-day deadline for admission to Napa State Hospital for all adult defendants who had been found incompetent to stand trial. As in *Mille*, the Court of Appeal rejected these arguments, and upheld the order: "While it would be preferable for this issue to be resolved on a statewide basis--which could be most expeditiously accomplished by the other two branches of government--we cannot ignore the due process rights of Contra Costa County IST

defendants at issue in this case, while simply hoping that DSH will admit them, and all IST defendants, in a more timely manner." (*Loveton*, at 1045.)

In appellant's case, as in *Brewer* and *Loveton*, a local court has established specific time limits to provide services to individuals who have been found incompetent, even though the controlling law only requires that treatment commence within a "reasonable time." In *Brewer* and *Loveton*, the courts established time limits in response to repeated lengthy delays in the acceptance of inmates at Napa State Hospital.

The Protocol's requirements should be upheld, because without them, there is little incentive for the Los Angeles County Probation Department to honor the due process rights of incarcerated children who have been found incompetent. Although the delay and lack of services in this case occurred even with the Protocol in effect, we are hopeful that this court's opinion will provide an unequivocal validation of the Protocol. The reasoning of *Jesus G.* is sound, and there was no good reason to depart from it in this case.

C. The Timelines in the Protocol are Consistent with Juvenile Law Policy Disfavoring Detention of Juveniles

The Protocol discourages detention beyond 120 days for attainment of competency, consistent with the general policy disfavoring detention under juvenile law. As noted previously in Section I, subsection "C" of this

brief, time limits on juvenile hearings and detentions are to be strictly followed so as to avoid the excessive and unwarranted detention of children. (*In re Daniel M., supra,* 47 Cal.App.4th 1151, 1156.)

The 120-day period for remediation contained in the Protocol is also in line with existing research. An evaluation of 563 youth in the Virginia Juvenile Competency Program found that, "...most youth who can be restored will be restored within a three- to four-month period – if they are provided with the interventions that are age appropriate and offered by skilled juvenile competency restoration counselors." (Warren, et al., "*Developing a Forensic Service Delivery System for Juveniles Adjudicated Incompetent to Stand Trial*" 8 International Journal of Forensic Mental Health (2009) Vol. 8, Iss. 4, 245, 259.)

Moreover, in limiting the time allowable for remediation in juvenile hall to 120 days, the Protocol acknowledges that it is not an appropriate place for extended confinement of incompetent youth. As we have observed, although the court need not decide the issue in this case, there are good reasons not to permit detention for remediation in juvenile halls at all.

CONCLUSION

Because of the delays in getting him services, the inadequacy of the services, the failure to dismiss the case when there was no evidence of progress for many months, and the failure to hold him in a therapeutic

setting, the Los Angeles County juvenile court system utterly failed Albert C.; and deprived him of due process of law.

Moreover, the failure to comply with the Protocol compounded the error, therefore the trial court's failure to dismiss the petitions (CT 71), and release Albert C. were improper.

Dated: September 22, 2016

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF WORD COUNT COMPLIANCE

I certify that pursuant to California Rule of Court, Rule 8.520(c), that the text in the attached brief of *Amici Curiae* does not exceed 10,800 words, including footnotes, as calculated by Microsoft Word.

Dated: September 22, 2016

Susan Burrell

SUSAN L. BURRELL
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DECLARATION OF PROOF OF SERVICE

I, the undersigned, declare I am over eighteen years of age, and not a party to the within cause; my business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012;

That on September 23, 2016, I served the within Amicus Curiae (Re: Albert C./Case No. 231315/2nd Appellate Dist., Division Five, Case No. B256480/LA County Juvenile Court No. MJ21492), on each of the person(s) named below by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 23, 2016 at Los Angeles, California.

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