SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

STEPHANIE STIAVETTI, et al, Plaintiffs, v. PAMELA AHLIN, et al, Defendants.	No. RG15-779731 ORDER GRANTING IN PART PETITION FOR WRIT OF MANDATE. Date: 3/15/19 Time: 11:00 A.M. Dept.: 21

The petition of Stephanie Stiavetti for a writ of mandate came on for hearing on 3/15/19, in Department 21 of this Court, the Honorable Winifred Y. Smith presiding. After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED: The petition of Stephanie Stiavetti for a writ of mandate is GRANTED IN PART.

SUMMARY

1. Constitutional due process requires that DSH must commence substantive services to restore an IST defendant to competency within 28 days of the transfer of responsibility for an IST defendant to the DSH. For the DSH, the "transfer of

responsibility" date is the date of service of the Penal Code 1370(a)(3) commitment packet. The evidence shows that DSH systematically fails to provide due process.

2. Constitutional due process requires that DDS commence substantive services to restore an IST defendant to competency within 28 days of the transfer of responsibility for an IST defendant to the DDS. For the DDS, for commitments under Penal Code 1370.1(a)(1)(B)(i), the "transfer of responsibility" date is the date of service of the Penal Code 1370.1(a)(2) order directing the IST defendant be confined in a DDS facility or placed on DDS outpatient status. For commitments under Penal Code 1370.1(a)(1)(B)(ii) or (iii), the "transfer of responsibility" date is the date the IST defendant and the Penal Code 1370.1(a)(3) documentation are delivered to a DSH facility.

3. Substantive services are services and medication reasonably designed to promote the defendant's restoration to mental competence. For purposes of this order, the baseline medical services provided by county jails under Penal Code 6030 and 15 CCR 1200 et seq are not substantive services.

4. The DSH or DDS may provide substantive services through a state hospital, treatment facility, outpatient program, jail based competency program, or other facility or program under their supervision.

EVIDENCE AND BRIEFS CONSIDERED.

Respondents filed evidentiary objections on 3/6/18, petitioners filed responses on 3/22/18, and respondents filed objections on 3/22/18. The order of 11/1/18 at 22:18-23 invited the parties to submit focused evidentiary objections to the evidence material to the proposed

order. (*Reid v. Google* (2010) 50 Cal.4th 512, 532-533; *Castillo v. Toll Bros., Inc.* (2011) 197 Cal.App.4th 1172, 1189 and 1211.) Neither party submitted focused evidentiary objections. At the hearing on 12/7/18, respondents asked the court to issue orders on the evidentiary objections, but did not make focused evidentiary objections.

The court has considered Respondents' objections filed 3/6/18 to the Gage report. (Respondent's Supp Brief filed 2/20/19 at 24-25.) The court SUSTAINS the objections to the extent they concern Gage's opinions about whether the DHS and DDS could change their practices or might conduct their business differently. The court OVERRULES the objections to the extent they concern the collection, analysis, and presentation of data.

The court OVERRULES all other evidentiary objections. The evidentiary objections go to weight, not admissibility. The Court has considered all the declarations submitted, as well as the exhibits attached thereto.

The court GRANTS the request of respondents to take judicial notice of the various trial court decisions regarding similar issues. (Respondents RJN Exhs E (Sacramento), F (Contra Costa), G (Orange), H (Yolo), I (San Joaquin).) (Evid Code 452(d).) (Opening at 4:19-28.) (*Brown v. Franchise Tax Bd.* (1987) 197 Cal. App. 3d 300, 306 n6.) "Trial court decisions are not precedents binding on other courts under the principle of stare decisis." (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1148.) The court does not take judicial notice of the truth of the factual findings in the court orders. (*Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 121.) The court considers these unpublished state trial decisions for their persuasive value only.

The court GRANTS the request of respondents to take judicial notice of assembly bills. (RJN filed 11/21/18.) (Evid Code 452(c).)

The court GRANTS the request of respondents to take judicial notice of official rulemaking acts regarding the promulgation of 9 CCR 4700 and 4710-4717. (RJN filed 2/20/19.) (Evid Code 452(c).)

The court grants the application of the Alameda County Public Defender to file an amicus brief. The court considers the brief filed on 1/19/18.

The court grants the application of the NAMILA and MHAS to file an amicus brief. The court considers the brief filed on 3/6/18.

CLAIMS IN THE CASE, BACKGROUND LAW, SUMMARY OF FACTS

CLAIMS IN THE CASE.

This case concerns whether persons found incompetent to stand trial and committed to the DHS or DDS have a constitutional due process requires to substantive services within some time period, whether the DHS and DDS have system wide failures to provide due process, and what remedy is appropriate. The Petition For Writ Of Mandate And Complaint filed on 7/29/15 asserts four causes of action (1) violation of due process under the California Constitution, Article I, section 7; (2) violation of right to speedy trial under the California Constitution, Article I, section 15, (3) violation of due process under the United States Constitution, Amendment 14, and (4) illegal expenditure of taxpayer funds under CCP 526a.

All the claims seek prospective relief, whether by writ of mandate or through an injunction. "Injunctive relief is available to prevent future harm, not to address past harm." (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 873.) (See also *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 464-465.) Although the evidentiary record

is necessarily about past practices, the court's due process analysis considers current statutes, regulations, and case law.

BACKGROUND LAW.

IST defendants fall into two categories: (1) those who are found to be mentally incompetent and are committed to the DSH (Penal Code 1370) and (2) those who are found to be developmentally disabled and committed to the DDS (Penal Code 1370.1).

For the claims against the DHS, the relevant dates for purposes of this case are: (1) the date of the court's IST Order finding a defendant to be IST (Penal Code 1369 and 1370(a)(1)(B)); (2) the date of the court's Evaluation Order directing an evaluation of placement options (Penal Code 1370(a)(2)(A)); (3) the date of the Court's Commitment Order committing an IST defendant to the DSH or to the DDS (Penal Code 1370(a)(2)); (4) the date of the Court's commitment packet providing information to the DSH or DDS (Penal Code 1370(a)(3); 9 CCR 4711, 4712); (5) the date of the DHS placement decision regarding where to place an IST defendant (W&I 7228; 9 CCR 4713); (6) the date of "admission" to the DSH; (7) the date the Sheriff delivers an IST defendant to a DHS facility, and (8) the date that the DSH commences substantive services to restore the IST defendant to competency.

For the claims against the DDS the procession of relevant dates is different, but follows a similar progression. (Penal Code 1370.1.) (See also *In re Williams* (2014) 228 Cal.App.4th 989, 1001 ["Sections 1370 and 1370.1 contain many similarities, and even some virtually identical provisions, but there are some important differences."].)

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BACKGROUND FACTS

Petitioners' expert Gage collected data and calculated days of delay for 2015, 2016, and the first half of 2017. The court relies on the data for the first half of 2017 because it is the most current information and the claims in his case are for prospective injunctive relief. The data is:

	Days trial court commitment to admission at state hospital	Days commitment packet to admission at state hospital	Evidence
DSH (1/1/17-6/30/17)	Mean (average) = 86 Median = 89	Median = 64 Median = 63	PX 43 - Gage Report, Appendix B at B-23, B-31
DDS (1/1/17-6/30/17)	Mean (average) = 53 Median = 52		PX 43 - Gage Report, Appendix B at B-8

(See also Gage Report, Appendix B at B69 and B70 [wait times by county]; Palmer Dec., Exhs 60 and 61 [wait times for individuals].)

Respondents did not challenge to calculation of mean and median wait times in the Gage Report, Appendix B. Respondent witness Krock reviewed Gage Report, Appendix B, and "did not find any irregularities in the way he processed his data." (Krock Dec., para 14.)

Respondents presented evidence that suggests significant wait times, though less than the wait times calculated in the Gage Report, Appendix B. The Maynard Dec. and the Lowder-Blanco Dec. at Exhibits 1, 2, 3, 6, and 8 present data showing that from 2014 through mid-2017 the referrals to the DSH usually ranged from 250-300 per month and that the pending placements gradually increased from approximately 400 in 2014 to approximately 500 in July 2017.

Referrals of 250-300 per month and a relatively constant backlog of approximately 500 placements suggest a consistent delay of approximately 50-60 days before placement.

Petitioners and respondents present evidence that the DSH and DDS systems are facing growing demands. (Pltf Moving at 20:6-24; Oppo at 9-11, 21-24; Warburton Dec., Grabau Dec., Barsom Dec., Maynard Dec., Lowder-Blanco Dec.)) Respondents DSH and DDS present evidence they are working within budgetary constraints, are trying to make improvements, and are improving steadily. (Warburton Dec.) The Contra Costa trial court order dated 8/16/17 found that the DSH was failing to comply with the standing order approved in *Loveton.* (Respondent's RJN filed 3/6/18, Exh F.)

DUE PROCESS - STANDARD UNDER UNITED STATES AND CALIFORNIA CONSTITUTIONS (FIRST AND THIRD CAUSES OF ACTION)

The petition asserts separate due process claims under the California Constitution and the United States Constitution. "[T]he rights embodied in and protected by the state Constitution are not invariably identical to the rights contained in the federal Constitution." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 325-326.) That noted, the parties presume, and case law suggests, that the California due process clause is co-extensive with the due process clause of the Fourteenth Amendment. (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 366; *Gray v. Whitmore* (1971) 17 Cal.App.3d 1, 20.)

If a person has been charged with a criminal offense and is found to be IST and then committed to the DSH or DDS solely on account of his incapacity to proceed to trial, then under the Constitution the person may not be "confined more than a reasonable period of time necessary to determine whether there is a substantial likelihood that he will recover that capacity

in the foreseeable future." (*In re Davis* (1973) 8 Cal.3d 798; *Jackson v. Indiana* (1972) 406 U.S. 715, 738.) "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed" and the commitment's purpose is to enable the IST defendant to regain his competence to stand trial. (*Davis,* 8 Cal.3d at 804; *Jackson,* 406 U.S. at 738.)

California enacted Penal Code 1370 in response to *Davis.* (*Jackson v. Superior Court* (2017) 4 Cal.5th 964, 100-102; *Hale v. Superior Court* (1975) 15 Cal.3d 221, 223-225.) Penal Code 1370 stated that a court should order an IST defendant to be committed to a treatment facility and that the IST defendant could not be confined for more than three (now two) years. (Penal Code 1370(c)(1) currently and as recently amended).) (*In re Mille* (2010) 182 Cal.App.4th 635, 642-643.)

Penal Code 1370(a)(1)(B) in its current form directs that:

> If the defendant is found mentally incompetent, the trial or judgment shall be suspended until the person becomes mentally competent. [¶] (i) The court shall order that the mentally incompetent defendant be delivered by the sheriff to a [DSH] facility ... or to any other available public or private treatment facility ... if the facility ... [has been] approved by the community program director that will promote the defendant's *speedy restoration* to mental competence, or placed on outpatient status as specified in Section 1600.

(Emphasis added.) (See also Penal Code 1370.1(a)(1)(B)(i) ["speedy attainment of mental competence"].) Penal Code 1370 and 1370.1 do not, however, address the speed with which an IST defendant must be placed in a state hospital or treatment facility or placed on outpatient status.

The due process issue presented in this case has two parts: (1) identifying the point in time when responsibility for an IST defendant transfers to the DSH or DDS and (2) determining the maximum constitutionally permissible delay between the transfer of responsibility and when the DSH or the DDS commence substantive services reasonably designed to restore the IST defendant to competency.

IDENTIFYING THE DATE OF TRANSFER OF RESPONSIBILITY

At the hearing on 12/7/19, counsel for DSH and DDS made arguments that brought to the court's attention the many interim stages and responsible entities between the date of a trial court's IST order and the date that the DSH or DDS assumes responsibility for an IST defendant.

The court's order of 2/4/19 stated, "The due process rights of an IST defendant to not be confined unless the state is taking action to restore her or him to competency runs from the date of the court's IST Order to the date that the state starts providing substantive services. (*In re Davis* (1973) 8 Cal.3d 798.)" The court's order of 2/4/19 then stated, "The court is not inclined to find that DSH and DDS are responsible for providing services reasonably designed to restore and IST defendant to competency until after the point in the process where the DSH and DDS have responsibility for the IST defendant. On the practical matter of providing a remedy for any due process violation, the court can direct DSH and DDS to change only those policies, procedures, and practices that are within their control." (Order of 2/4/19 at 2:3-15.) The court requested supplemental briefing on this issue.

At the hearing on 3/15/19, Petitioners argued that the maximum permissible period must run from the IST order. Petitioners directed the court to *Trueblood v. Washington State Department of Social and Health Services* (W.D. Wa., 2015) 2015 WL 13664033, in which the

trial court clarified *Trueblood v. Washington State Department of Social and Health Services* (W.D. Wa., 2015) 101 F.Supp.3d 1010 (reversed in part on other grounds 833 F.3d 1037). In the first decision, the federal trial court ordered that the state was required to provide competency evaluations within 7 days of a court order for an evaluation and to commence competency restoration services within 7 days of a court order calling for such services. In the second decision, the court clarified that the 7 day period began to run when the court order is signed and not when it is received. The court stated, "Rather than seeking to extend the amount of time that class members can be incarcerated awaiting services, Defendants should seek to facilitate the development of a system where DSHS receives court orders promptly. In other words, flaws in the system as it currently exists are not persuasive reasons why a better system cannot be developed."

As stated in the Order of 2/4/19, this court can require DHS and DDS to "develop a better system" only to the extent that they have the statutory authority and ability to develop a better system. Penal Code 1370 and 1370.1 set out the roles and responsibilities of the various entities in the IST defendant process. The court cannot require DHS or DDS to assume responsibilities beyond the scope of their statutory authority and responsibility. The responsibility for devising a better overall IST process lies with the legislature.

DEPARTMENT OF STATE HOSPITALS.

For the DSH, the transfer of responsibility date is the date of service of the Penal Code 1370(a)(3) commitment packet. The court's delivery of the commitment packet is in the nature of a condition subsequent to the court's Commitment Order because the Commitment Order does not become effective until service of the commitment packet. In *In re Loveton* (2016) 244

Cal.App.4th 1025, 1036, the trial court ordered the DSH hospital to accept an IST defendant within 60 days of the Commitment Order, but only if the commitment packet was received within 5 days of the Commitment Order. *People v. Brewer* (2015) 235 Cal.App.4th 122, 142, states, "The trial court must hold a new evidentiary hearing to ascertain how much time is reasonable, after the section 1370 packet is prepared and sent to the Department" (See also Respondents RJN Exhs E (Sacramento), F (Contra Costa).)

The transfer of responsibility date is not the date of the court's IST Order, as that determines the defendant is IST but does not commit the defendant to the DSH.

The transfer of responsibility date is not the date of the court's Commitment Order. (Penal Code 1370(a)(5).) The Commitment Order is conditional because it cannot be implemented until the court serves the commitment packet on the DSH. (Penal Code 1370(a)(3)(A)-(I).) The condition is not express in the statute, but "the court's task is to interpret the statute in a manner that is not only consistent with its language, legislative history and purpose, but that is also workable and reasonable in practice." (*Allende v. Department of Cal. Highway Patrol* (2011) 201 Cal.App.4th 1006, 1018.)[1]

The transfer of responsibility date is not the date of the DSH decision to approve an IST defendant's commitment packet. The DSH's new regulations state that the DSH "shall admit an individual judicially committed to the Department as Incompetent to Stand Trial only when a completed commitment packet as specified in section 4711 has been received, reviewed, and approved by the Department." (9 CCR 4716(a).) The DSH argued that under the regulation the

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[1] The court disagrees with the statement in *Atayde v. Napa State Hospital* (E.D. Cal., 2017) 255 F.Supp. 3d 978, 992, that the DSH has custodial duties under the Fourteenth Amendment with respect to IST detainees "which attach at the time the state court commitment order is issued."

DSH does not accept responsibility for an IST defendant until the DSH receives a commitment packet that complies with 9 CCR 4711 and approves the commitment packet. (DSH brief filed 2/20/19.)

The DSH's suggested interpretation and application of 9 CCR 4716 is inconsistent with Penal Code 1370. The court gives substantial deference to 9 CCR 4716(a) because the court defers to regulations promulgated by a state agency under the Administrative Procedure Act. That noted, the DSH's interpretation is inconsistent with Penal Code 1370 because it would permit the DSH to decide when it will accept responsibility for an IST defendant.

When a statute and a regulation are in conflict, the statute prevails. (*Slocum v. State Board of Equalization* (2005) 134 Cal.App.4th 969, 974.) Under the statutory framework, the court holds an IST trial and issues an IST Order (Penal Code 1369), then the court issues a Commitment Order (Penal Code 1370(a)(1)(B)(i)), and then the court serves the commitment packet (Penal Code 1370(a)(3)). Under Penal Code 1370, the court's service of the commitment packet is the last act required before the IST defendant's commitment to the DSH is complete. The DSH cannot by regulation extend the statutory transfer of responsibility date until the date the "commitment packet as specified in section 4711 has been received, reviewed, and approved by the Department."[2]

DEPARTMENT OF DEVELOPMENTAL SERVICES

There are three separate sections for commitments to the DDS.

[2] There is no material distinction between the commitment packet as defined by Penal Code 1370(2)(A) and 1370(3) and the commitment packet as defined by 9 CCR 4711.

First, for commitments under Penal Code 1370.1(a)(1)(B)(i), the "transfer of responsibility document" is the Penal Code 1370.1(a)(2) order directing the IST defendant be confined in a DDS facility or placed on DDS outpatient status. Penal Code 1370.1(a) states that if the court finds a defendant to be IST at the Penal Code 1369 trial, then the court "shall order" the regional center director to conduct a placement evaluation (Penal Code 1370.1(a)(2)), and the court thereafter makes the "order directing that the defendant be confined in a state hospital, developmental center, or other residential facility, or be placed on outpatient status" (Penal Code 1370.1(a)(2)). (*In re Williams* (2014) 228 Cal.App.4th 989, 1002 fn 7.)

Second, for commitments under Penal Code 1370.1(a)(1)(B)(ii), the "transfer of responsibility document" is the date the IST defendant and the Penal Code 1370.1(a)(3) documentation are transferred to the DDS. Penal Code 1370.1(a)(1)(B)(ii) requires the prosecutor to notify the court if a defendant meets certain criteria. The statute then states, "After this notification, and opportunity for hearing, the court shall order that the defendant be delivered by the sheriff to a state hospital or other secure treatment facility for the care and treatment of persons with developmental disabilities unless the court makes specific findings on the record that an alternative placement would provide more appropriate treatment for the defendant and would not pose a danger to the health and safety of others." Penal Code 1370.1(a)(3), however, states "the court shall provide copies of the following documents, which shall be taken with the defendant to the state hospital or other secure treatment facility where the defendant is to be confined." The documents must accompany the IST defendant so transfers of responsibility

under Penal Code 1370.1(a)(1)(B)(ii) are not complete until the defendant and the documents are delivered to a DDS facility.[3]

Third, for commitments under Penal Code 1370.1(a)(1)(B)(iii), the "transfer of responsibility document" is the date the IST defendant and the Penal Code 1370.1(a)(3) documentation are transferred to the DDS. Penal Code 1370.1(a)(1)(B)(iii) states the limited circumstances when it applies and then states, "the court shall order that the defendant be delivered by the sheriff to a state hospital for the care and treatment of persons with developmental disabilities." Penal Code 1370.1(a)(3) requires that documents must accompany the IST defendant so transfers of responsibility under Penal Code 1370.1(a)(1)(B)(iii) are not complete until the defendant and the documents are delivered to a DDS facility.

DETERMINING THE MAXIMUM CONSTITUTIONALLY PERMISSIBLE DELAY

There is substantial California, federal, and out of state case law on the maximum constitutionally permissible delay between an order of commitment and when a state must commence substantive services. Reviewing the case law, the court determines that the constitutionally "reasonable period of time" between transfer of responsibility and commencement of treatment is 28 days in the context of state wide systems.

In the case of *In re Mille* (2010) 182 Cal.App.4th 635, the court applied a prior version of Penal Code 1370. In *Mille*, the court rejected the state's argument that the defendant's treatment at the county jail with antipsychotic medication during the delay was an adequate substitute for

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[3] This is consistent with *In re Williams* (2014) 228 Cal.App.4th 989, which held that DDS may determine that an IST defendant cannot be safely served at Porterville and suggested that DDS may thereby defer accepting the IST defendant for until it has an appropriate placement option. (W&I 6510.5.)

timely transfer to the state hospital. (182 Cal.App.4th at 644-645.) The court found that providing a defendant with antipsychotic medication at the county jail under Penal Code 1369.1 was not the equivalent of treatment in a state hospital where each patient had a treatment team of a psychiatrist, psychologist, nurse, social worker, and psychiatric technician, and received both pharmacological and nonpharmacological treatment. (182 Cal.App.4th at 647-648.) The court stated, "to implement section 1370, a defendant must arrive at [the State Hospital] timely, not on the 84th day following the commitment order. ... [The] habeas petition called to the trial court's attention the 90-day time frame of section 1370, subdivision (b)(1). In view of the statutory time constraint, said habeas petition was meritorious." (182 Cal.App.4th at 650.) *Mille* mentioned the issue of constitutional due process, but only after the statutory analysis and to confirm that the statutory analysis was consistent with the constitution. (182 Cal.App.4th at 650.)

In the case of *In re Williams* (2014) 228 Cal.App.4th 989, the court applied Penal Code 1370.1. The court reviewed the due process limits on the commitment of IST defendants. (228 Cal.App.4th at 1011-1013.) The court held that "While there may be no firm deadline for these things to occur ... the two years that passed between the time the trial court found Williams incompetent and the time it ordered him placed in the county jail for treatment is unreasonable." In ordering a remedy, the court stated, "To afford the trial court an opportunity to find a lawful placement, while ensuring that Williams's current detention in the county jail is not prolonged unnecessarily, we direct the trial court to issue an order, within 45 days of finality of this opinion, placing Williams in a facility that meets the requirements of subdivision (a)(1)(B), and to ensure that such placement occurs forthwith." (228 Cal.App.4th at 1018.)

In the case of *People v. Brewer* (2015) 235 Cal.App.4th 122, the trial court entered an order setting a seven-day deadline for transferring IST defendants to the state hospital and later

modified the order to a 14 day deadline after the commitment packet was available. The Court of Appeal addressed various procedural matters and directed the trial court to hear the State's motion to vacate of modify the order. The Court of Appeal did not address whether the constitution or a statute required the state to transfer IST defendants to the state hospital within a certain time period.

In the case of *In re Loveton* (2016) 244 Cal.App.4th 1025, 1045, the court applied a prior version of Penal Code 1370 on the appeal and applied constitutional due process on the cross-appeal. The trial court "found that 'subjecting the petitioners to prolonged detention in the county jail without any evidence they received treatment to restore their competency' violated their due process rights." (244 Cal.App.4th at 1035.) The trial court issued an injunction directing a single state hospital (DSH-Napa) to accept IST defendants from a single county jail (Contra Costa) within 60 days of an order of commitment. (224 Cal.App.4th at 1036.)

The DSH appealed, arguing that the trial court's order of 60 days was inconsistent with Penal Code 1370 and in excess of jurisdiction because it intruded on the DSH's obligations under Penal Code 1370. (224 Cal.App.4th at 1043-1044.) The Court of Appeal held that the trial court order was consistent with Penal Code 1370 because the Legislature did implicitly impose a 60 day deadline on when IST defendants must be transferred to state hospitals by mandating in Penal Code 1370(b)(1) that the DSH report on each IST defendant's progress within 90 days of commitment. (244 Cal.App.4th at 1043-1044.) The Court of Appeal held that the trial court order was not in excess of its jurisdiction and that the court could define the "outer limit" for procedural due process. (244 Cal.App.4th at 1044-1045.)

Loveton's decision on DSH's appeal did not address constitutional due process because the DSH was not arguing that the constitutional standard was more than 60 days. The *Loveton*

decision discussed the constitutional standard in a section on the legal background captioned "The Law Relating to IST Defendants." (244 Cal.App.4th at 1036-1042.) The analysis of the DSH's appeal in *Loveton* in Sections III, IV, and V of the opinion was, however, based on Penal Code 1370 and the ability of the courts to issue orders to enforce the constitution. (244 Cal.App.4th at 1043-1046.)

The petitioners cross-appealed, arguing "that due process requires that the time limit in the standing order be shortened to 30 days." (244 Cal.App.4th at 1047.) The Court of Appeal affirmed the trial court, stating:

> The [trial] court in this case considered all of the evidence presented, along with the need to balance the interests of both IST defendants and DSH, before issuing a thoughtful, comprehensive statement of decision and accompanying order that set a time limit of 60 days. As previously discussed, the evidence supports the court's finding that a 60-day deadline satisfies IST defendants' due process rights, provides sufficient time for DSH to place each defendant, and allows for timely preparation of the 90-day status report pursuant to section 1370, subdivision (b)(1). Although transferring IST defendants in less than 60 days after commitment should of course remain the goal, the trial court's order realistically places an outside limit on what is statutorily and constitutionally permissible.

The Court of Appeal decision on the cross-appeal did not set out a full due process analysis as did the courts in *Mink, Trueblood, Advocacy Center*, *Terry*, and *Disability Law Center*, discussed below. The *Loveton* discussion does, however, demonstrate that the Court of Appeal considered the issue. (Compare *Maplebear, Inc. v. Busick* (2018) 26 Cal.App.5th 394, 406 ["[i]t is axiomatic that cases are not authority for propositions not considered"].) This court must follow

applicable Court of Appeal decisions. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

Loveton is, however, distinguishable on its facts. Neither the trial court nor the Court of Appeal addressed what due process standard applied statewide or the DHS's statewide practices. *Loveton* states:

> In crafting its order, the trial court examined several competing interests: Contra Costa County IST defendants' due process right to receive treatment within a reasonable period of time; the statutory requirements of section 1370, subdivision (b)(1); and DSH–Napa's interest in providing uniform treatment to all 39 counties. The court then carefully balanced all of these interests, and found that 60 days was the outside limit for ensuring timely admission to DSH–Napa for Contra Costa County IST defendants.

(*Loveton*, 244 Cal.App.4th at 1045.) (See also *Loveton,* 244 Cal.App.4th at 1047.) The Court of Appeal expressly considered that the lack of a statewide standard could lead to counties with standing orders getting priority over counties without such orders. (*Loveton*, 244 Cal.App.4th at 1047, fn 19.) *Loveton* states "We also observe that any solution to the problem of the timeliness of placement of IST defendants at the county level cannot begin to resolve the issue statewide. ... [T]he necessarily piecemeal nature of countywide standing orders in general strongly suggests the ultimate need for a more uniform, statewide solution." (244 Cal.App.4th at 1047 fn 19.)[4]

Petitioners filed this action on 7/29/15, before the *Loveton* decision on 2/11/16, and continued to prosecute the case seeking a statewide writ of mandate and/or injunction.

[4] The order of 11/1/18 asked the parties to address whether the legislature or any state agency has proposed or adopted statutes or regulations that would establish a statewide standard. There has been no statutory or regulatory action.

Following *Loveton*, the DSH proposed regulations regarding the admission of IST defendants to DSH hospitals. (9 CCR 4700 et seq.) The Notice of Proposed Rulemaking on 1/13/17 states that the "objective of the proposed [regulations] is to implement, interpret, or make specific state policy regarding Penal Code section 1370, as set forth in the *In re Loveton* decision." (Respondents' RJN, Exh S, page 22.) The public submitted comments. (DSH Final Statement of Reasons, Respondents' RJN, Exh S, pages 6-11.) Comment 2.1 suggested that the regulations include a statement that "all judicially committed individuals will be admitted within 60 days of the commitment.'" (Respondents' RJN, Exh S, page 7.) The DSH responded:

> DSH disagrees with the comment. The requested language is beyond the scope of the proposed regulations, which aim to streamline and make uniform the admissions process of those determined to be Incompetent to Stand Trial to state hospitals. ... *The scope of these proposed regulations does not include a timeline or deadline for a patient's admission.*

(Respondents' RJN, Exh S, page 7 [emphasis added]. See also Comment 3.10 at page 10.) Therefore, although the DSH's proposed regulations were in response to *Loveton*, the DSH expressly stated that they did not address the setting of "a timeline or deadline for a patient's admission."

Federal case law has addressed claims of system wide violations of constitutional due process due to consistent delay in moving IST defendants to state hospitals. California courts "are bound by decisions of the United States Supreme Court interpreting the federal Constitution [but] we are not bound by the decisions of the lower federal courts even on federal questions. However, they are persuasive and entitled to great weight." (*People v. Bradley* (1969) 1 Cal.3d 80, 86.)

In *Oregon Advocacy Center v. Mink* (9th Cir., 2003) 322 F.3d 1101, 1119-1122, the court addressed directly whether undue delay in the transfer of IST defendants to state hospitals was denial of constitutional due process. The evidence was that incapacitated criminal defendants spent on average about one month in county jails before Oregon State Hospitals accepted them for the requisite treatment and that in many cases defendants had to wait two, three or even five months. (322 F.3d at 1106.) The court conducted a due process analysis in which it found: (1) "Incapacitated criminal defendants have liberty interests in freedom from incarceration and in restorative treatment" and (2) that there was no "legitimate state interest in keeping mentally incapacitated criminal defendants locked up in county jails for weeks or months." (322 F.3d at 1121-1122.) The court also observed that the state's "refusal to accept such defendants not only contravenes the legislature's statutory mandate that [the state hospital] provide them with restorative treatment, it also undermines the state's fundamental interest in bringing the accused to trial." (322 F.3d at 1121.) The court held that evidence supported the district court's finding that there was a denial of substantive and procedural due process and that the district court did not abuse its discretion by entering an injunction requiring OSH to admit mentally incapacitated criminal defendants within seven days of a judicial finding of incapacitation.

In *Trueblood v. Washington State Dept. of Social and Health Services* (W.D. Wash., 2015) 101 F.Supp.3d 1010, 1016 (reversed in part on other grounds 833 F.3d 1037), the court addressed directly whether undue delay in the transfer of IST defendants to state hospitals was denial of constitutional due process. The evidence was that incapacitated criminal defendants spent on average 30 or more days before being admitted for treatment. The court evaluated the same due process factors as *Mink* and then concluded:

> A seven-day limit is required by the Constitution because of the gravity of the harms suffered by class members during prolonged incarceration—harms which directly conflict with class members' rights to freedom from incarceration and to the competency services which form the basis of their detention, and also directly conflict with the State's interests in swiftly bringing those accused of crimes to trial and in restoring incompetent criminal defendants to competency so as to try them. Unlike the state psychiatric hospitals, jails cannot provide the environment or type of care required by class members, especially where class members are held in solitary confinement without access to medication, and as a result, jails actively damage class members' mental condition.

(101 F.Supp.3d at 1022.)

In *Advocacy Center for the Elderly and Disabled v. Louisiana Dept. of Health and Hospitals* (E.D. La., 2010) 731 F.Supp.2d 603, the court directly addressed the issue. The evidence was that incapacitated criminal defendants spent "an extended period of time" being incarcerated being admitted for treatment. (731 F.Supp.2d at 605, 610.) The court made a fact finding that the jail based mental health programs were not equivalent to mental health facilities. (731 F.Supp.2d at 611-618.) The court followed the due process analysis in *Mink* as well as that in *Terry ex rel. Terry v. Hill* (E.D. Ark., 2002) 232 F.Supp.2d 934. (731 F.Supp.2d at 621-622.) At the preliminary injunction stage the court ordered that all IST defendants be transferred within twenty-one days.

In *Disability Law Center v. Utah* (D. Utah 2016) 180 F.Supp.3d 998, the court addressed the issue on a motion to dismiss at the pleading stage. The allegations were that twelve IST defendants waited over three months, seven waited over five months, and at least five waited in jail for over six months after a court ordered them transferred for treatment. (180 F.Supp.3d at

1004.) The court considered *Mink, Trueblood, Advocacy Center*, and *Terry*, and found that the complaint stated a claim.

The court can also consider the law of other states. In *Lakey v. Taylor* (Ct. App. Tex., 2014) 435 S.W.3d 309, the Texas Court of Appeal expressly did not address the issue of whether undue delay in the transfer of IST defendants to state hospitals within a specific period of time was denial of constitutional due process. (435 S.W. 3d at 316.) *Lakey* held that under *Jackson* any right to receive competency-restoration treatment arises from the fact that competency-restoration treatment is the state's sole justification for infringing on the detainee's liberty interest in being free from confinement and that an IST defendant has no stand-alone, due-process right to receive competency-restoration treatment. (435 S.W. 3d at 320-321 and fn 9.) *Lakey* then held that the Texas policy of wait-listing incompetent detainees was not unconstitutional on its face. (435 S.W. 3d at 321-322.)

In *Powell v. Maryland Department of Health* (Ct. App., Md., 2017) 455 Md. 520, 168 A.3d 857, the highest court in Maryland, held on a motion to dismiss on the pleadings that the *Jackson* constitutional standard applied, that the complaint failed to state a facial challenge to the Maryland policy, and that the complaint stated an as-applied challenge to the Maryland policy. *Powell* reviewed the case law on whether what constitutes an acceptable delay but drew no conclusions, noting that "In contrast to this case, those courts have generally had the benefit of a detailed record after a trial or evidentiary hearing." (455 Md. at 552.) The court also expressed skepticism of a system wide constitutional standard, stating, "While the due process clause sets some outside constraints, a one-size fits all approach is unlikely to be reasonable." (455 Md. at 552.)

The court's analysis of the due process standard focuses on the "reasonable period of time" that bears "some reasonable relation to the purpose for which the individual is committed." The purpose of the commitment is not to simply relocate an IST defendant to another geographic location or to transfer administrative responsibility for the IST defendant from the county jail to a state entity. The court makes this point because much of the above California, federal, and sister-state case law concerns the dates of admission to state hospitals, not the dates of commencement of substantive services.

Jackson, *Davis*, and the other California, federal, and sister-state case law all confirm that it is a violation of constitutional due process if a person is deprived of liberty for the sole purpose of providing substantive competency-restoration treatment and the person is confined more than a reasonable period of time necessary without receiving such treatment. *Loveton* held that a constitutionally "reasonable period of time" was 60 days in the context of a single county jail and a single state hospital. *Mink, Trueblood,* and *Advocacy Center* strongly suggest that a constitutionally "reasonable period of time" is 28 days or fewer in the context of state wide systems.

DUE PROCESS - FINDING OF LIABILITY - DHS

The petition of Stephanie Stiavetti for a writ of mandate is GRANTED as to liability for the due process claims against the DHS. The court considers liability consistent with the court's analysis of when responsibility transfers to the DHS and conclusion that minimum due process requires DSH to commence substantive services within 28 days.

The DSH for the period 1/1/17-6/30/17 had a mean (average) of 64 and a median of 63 days from commitment packet to admission to a DSH hospital. (PX 43, Gage Report, Appendix B at B-23, B-31.)

The "mean" is the "average" in the commonly used sense where a person adds up all the numbers and then divides by the number of numbers. The "median" is the "middle" value in the list of numbers where half of the numbers are greater and half are lower. (*Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 724 fn 2 [defining terms]; *Billings v. California Coastal Com.* (1980) 103 Cal.App.3d 729, 743 [defining terms].)

The court finds the calculations of days in the Gage Report to be reliable. Respondent witness Krock reviewed Gage Report, Appendix B, and "did not find any irregularities in the way he processed his data." (Krock Dec., para 14.)

It is unclear whether the Gage report considered only the dates of admission to state hospitals or considered the dates of admission to either state hospitals or to DHS administered Jail Based Competency Treatment "JBCT") programs. Gage was clearly aware of JBCT programs, as he mentioned them in his report. (Gage Report at pages 7, 10-11, 25, and 30.) It is unclear, however, whether Gage included DSH administered JBCT in his Appendix B calculations. The Gage Report, Appendix B, page B-1, in defining "Hospital" states "only state hospitals admitting the IST were included." Respondent witness Lowder-Blanco provided data on the use of JBCT as an alternative to state hospitals and the data shows that in the period 1/1/17-6/30/17 (the most recent in the Gage Report) the JBCT total was 10-15% of the grand total. (Lowder-Blanco Dec., Exh ___ [bottom of table].) Because it was only 10-15% of the data, the inclusion or exclusion of the JBCT data in the Gage Report would not have been

material for purposes of this case even though it would have changed the result of the calculations.

More troubling to the court regarding the reliability of the Gage data is the evidence on the breakdown by county. (Gage Report, Appendix B at B69 and B70 [wait times by county].) Looking at few representative large counties, Santa Clara had 150 inmates, Riverside had 72 inmates, Contra Costa had 68 inmates, and Alameda had 74 inmates, but San Diego had 2 inmates, Sacramento had 1 inmate, and Santa Cruz had 8 inmates. Given the relative size of those counties, this suggests that the underlying data was incomplete for San Diego, Sacramento, and Santa Cruz.

The balance of the data nevertheless demonstrates systemic delays. Focusing on a few of the larger counties, the mean (average) wait times were significant: Santa Clara was 46 days, Riverside was 43 days, Contra Costa was 55 days, and Alameda was 49 days. The maximum wait times shows consistent delays: Santa Clara was 118 days, Riverside was 141 days, Contra Costa was 131 days, and Alameda was 99 days. There were 20 counties where the maximum wait was over 100 days. (Gage Report, Appendix B at B69 and B70.)

The court finds that the DSH has systematically failed to provide due process for IST defendants. The mean (average) of 64 and median of 63 days from commitment packet to admission to a DSH hospital indicate that the DHS did not provide substantive services to half of the IST defendants until over 60 days after the court served the commitment packet.

Even if the court were to accept DHS's assertion that the statewide standard should be the *Loveton* standard of 60 days from the Commitment Order, the DSH is failing to provide due process for over half of the IST defendants. The evidence is that DHS is admitting IST

defendants a mean (average) of 86 and median of 89 days after the Commitment Order. (PX 43 - Gage Report, Appendix B at B-23, B-31.)

DUE PROCESS - FINDING OF LIABILITY - DDS

The petition of Stephanie Stiavetti for a writ of mandate is GRANTED IN PART as to liability for the due process claims against the DDS. The court considers liability consistent with the court's analysis of when responsibility transfers to the DDS.

The DSH for the period 1/1/17-6/30/17 had a mean (average) of 53 and a median of 52 days from trial court order committing IST defendant to the DDS to admission at a DDS facility. (PX 43, Gage Report, Appendix B at B-8.) (See also Palmer Dec, Exh 60 and 61.)

The court finds that the DSH has systematically failed to provide due process for IST defendants who were committed under Penal Code 1370.1(a)(1)(B)(i). For those persons the transfer of responsibility document was the Penal Code 1370.1(a)(2) order directing the IST defendant be confined in DDS facility or placed on DDS outpatient status. The mean (average) of 53 and a median of 52 days from trial court order committing IST defendant to the DDS to admission at a DDS facility indicate that the DHS did not provide substantive services to half of the IST defendants until over 50 days after the court served the commitment order.

Even if the court were to accept DHS's assertion that the statewide standard should be the *Loveton* standard of 60 days from the Commitment Order, the DDS is failing to provide due process. The evidence is that DDS is admitting IST defendants a mean (average) of 52 and median of 52 days after the Commitment Order. (PX 43 - Gage Report, Appendix B at B-8.)

The court finds that plaintiffs have not demonstrated that the DSH has systematically failed to provide due process for IST defendants who were committed under Penal Code

1370.1(a)(1)(B)(ii) or (iii). For those persons the date of the transfer of responsibility was when the IST defendant and the Penal Code 1370.1(a)(3) documentation were delivered to a DDS facility. Plaintiffs have not provided or identified evidence regarding the time between those transfers of responsibility dates to the dates when DDS commenced providing substantive services.

SPEEDY TRIAL - STANDARD AND LIABILITY (SECOND CAUSE OF ACTION)

The petition of Stephanie Stiavetti for a writ of mandate is DENIED as to liability for the speedy trial claims.

The California Constitution, Article I, section 13, provides: "The defendant in a criminal cause has the right to a speedy public trial." (*In re Davis* (1973) 8 Cal.3d 798, 809.) Petitioners assert that the delay between commitment and admission to a medical facility denies IST defendants the right to a speedy trial. (Cpt, para 60-62.)

The California Supreme Court holds that the speedy trial analysis considers four factors: "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." These "are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." (*People v. Williams* (2013) 58 Cal.4th 197, 233.)

Petitioner relies on *Craft v. Superior Court* (2006) 140 Cal.App.4th 1533, 1545, for the proposition that "where there is no commitment and no treatment, the time an incompetent defendant spends in jail is unnecessary and implicates not only due process, but also counts

towards a finding of prolonged incarceration under the state constitutional speedy trial guarantee."

Craft holds that the time between commitment and admission counts for purposes of a speedy trial claim. *Craft* does not, however, suggest that if the State permits more than a reasonable period of time between commitment and admission that the State has denied a criminal defendant her or his right to a speedy trial. As suggested by the federal cases, a maximum constitutionally reasonable period of time between commitment and admission that provides minimal due process can be as few as seven days. In contrast, *People v. Williams* (2013) 58 Cal.4th 197, 233, held that a delay of nearly seven years between arrest and trial did not violate defendant's right to a speedy trial. *Williams* demonstrates that "speedy trial" varies with the facts and circumstances of each trial, as it considers not just the quantitative factor of the number of days to trial but also qualitative factors such as whether the government or the criminal defendant is more to blame for that delay, whether the defendant asserted his right to a speedy trial, and whether the defendant suffered prejudice as a result of the delay. The evidence in this case does not support the speedy trial claim.

TAXPAYER CLAIM – STANDARD AND LIABILITY (FOURTH CAUSE OF ACTION)

The petition of Stephanie Stiavetti for a writ of mandate is GRANTED as to liability for the taxpayer claim for illegal use of public funds.

A claim for illegal expenditure of taxpayer funds under CCP 526a, requires a plaintiff to prove "an illegal or wasteful expenditure of public funds or damage to public property." (*Humane Society of United States v. State Board of Equal.* (2007) 152 Cal.App.4th 349, 355.

Regarding illegal expenditures, if a public activity violates due process, then the expenditures are illegal and a waste of public funds. (*California DUI Lawyers Assn v. Cal Department of Motor Vehicles* (2018) 20 Cal.App.4th 1247, 1259.) The court has found that the State Defendants are violating the due process rights of IST defendants. This supports a taxpayer claim under the illegal standard.

Regarding waste, a plaintiff must demonstrate that the public spending is "completely unnecessary, or useless, or provides no public benefit." (*Chiatello v. City and County of San Francisco* (2010) 189 Cl.App.4th 472, 482.) Petitioners have not met their burden of proving that DSH and the DDS are wasting public funds. Although the record might show administrative inefficiency, it does not support a taxpayer claim of waste.

THE REMEDY – FACTORS FOR CONSIDERATION

Petitioners seek as a remedy that the court issue an injunction (1) requiring DSH to admit all IST defendants within the later of 28 days of receipt of the defendant's order of commitment or 14 days of receipt of the commitment packet and (2) requiring DDS to admit all IST defendant within 28 days of receipt of the defendant's order of commitment. (Notice of motion; Moving at 1:23-27, 23:1-4.)

The court can as part of the remedy define the outer limit of constitutional action. (*In re Head* (1986) 42 Cal.3d 223, 231 fn 7; *Edward W. v. Lamkins* (2002) 99 Cal.App.4th 516, 529 ["mandamus may lie to correct constitutional violations"].) The court can place "an outside limit on what is statutorily and constitutionally permissible." (*Loveton*, 244 Cal.App.4th at 1047.)

The court can provide statewide relief even though each IST defendant could potentially seek an individual writ of habeas corpus if the DSH failed to commence substantive treatment in

a reasonable time. (*Loveton*, 244 Cal.App.4th at 1046.) In addition, "It must be kept in mind ... that we are dealing with persons who have been committed to state hospitals for mental disorders rendering them incompetent to participate in their own defense. It seems clearly inappropriate to place upon such persons the burden of initiating proceedings to secure their freedom." (*Davis*, 8 Cal.3d at 806 fn 6.)

The court has discretion in fashioning a writ of mandate or an injunction. "As a general matter, the nature of the relief warranted in a mandate action is dependent upon the circumstances of the particular case, and a court ... may grant the relief it deems appropriate." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1113.) (See also *People ex rel. Feuer v. Superior Court (Cahuenga's the Spot)* (2015) 234 Cal.App.4th 1360, 1374-1375.)

The court is not persuaded by respondents' argument that the court cannot enter an injunction different from the 60 day limit set in *Loveton*. First, as discussed above, *Loveton* states that it is limited to its facts and does not set a statewide constitutional standard. (*Loveton*, 244 Cal.App.4th at 1047, fn 19.) Second, the court is not persuaded that the legislature has through inaction adopted the 60 day limit in *Loveton*. The legislature would reasonably read *Loveton* as limited to its facts. Furthermore, given the Court of Appeal decisions in *Mille, Williams, Brewer*, and *Loveton* and the various trial court decisions on this issue, the court would expect that the legislature would express state policy through action rather than inaction.

In determining the statewide outside limit for the provision of services to IST defendants, the court follows the constitutional due process analysis set out in *Mink, Trueblood,* and *Advocacy Center*. This is similar to, but distinct from, the constitutional "reasonable period of time" analysis in *Jackson* and *Davis* regarding how long an IST defendant can be held before

trial. This is also distinct from the due process analysis in the *Loveton* cross-appeal that concerned the outside limit for a single county jail and a single DSH hospital.

The court balances several considerations: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212-213.) (See also *Youngberg v. Romeo* (1982) 457 U.S. 307, 321 [cited by *Loveton*, 244 Cal.App.4th at 1044].) The court's analysis tracks *Trueblood*, 101 F.Supp.3d at 1020-1023.

The court considers "the private interest that will be affected by the official action." Individuals have a fundamental liberty interest in being free from incarceration absent a criminal conviction, and there are corresponding constitutional limitations on pretrial detention. (*Lopez–Valenzuela v. Arpaio* (9th Cir.2014) 770 F.3d 772, 777–778, 780–781 (en banc). The private interest is an IST defendant's fundamental right to liberty. (*Craft*, 140 Cal.App.4th at 1544 ["the constitutional premium on personal liberty presumes that all persons, including the mentally impaired, prefer freedom to incarceration"].) Infringements on person liberty are subject to a "strict scrutiny" analysis. (*Pederson v. Superior Court* (2003) 105 Cal.App.4th 931, 940-941.)

A person who has been declared to be IST is in custody but the criminal process has been suspended. (Penal Code 1368(a) and 1369(a).) Because IST defendants have not been convicted of any crime, they are not being incarcerated as punishment. (*Bell v. Wolfish* (1979) 441 U.S.

520, 535 [a pretrial detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.)[5]

Following an IST Order, there must be some rational relation between the nature and duration of confinement and its purpose. (*Jackson v. Indiana* (1972) 406 U.S. 715, 738.)

The DSH and DDS suggest that the date of transfer to their responsibility is not dispositive because all persons in county jails have a right to medical treatment. This argument has no merit. A determination of constitutionally adequate medical treatment is measured not by that which must be provided to the general prison population, but by that which must be provided to those committed for mental incompetency. (*Ohlinger v. Watson* (9th Cir.1981) 652 F.2d 775, 777–78 ["a person committed solely on the basis of his mental incapacity has a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition"].) The treatment generally provided in jails is not designed to "promote the defendant's speedy restoration to mental competence." (Penal Code 1370(a)(1)(B)(i).) (See also Penal Code 1370.1(a)(1)(B)(i) ["speedy attainment of mental competence"].)

The DSH and DDS argue that the date of transfer to their responsibility is not dispositive because IST defendants can receive antipsychotic medication in county jails. (Penal Code 1369.1.) This argument has no merit. In *Mille*, the court held that administration of antipsychotic

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[5] The petition filed 7/29/15, paras 57 and 65, states that the due process claims are limited to those "who have been committed [to the DSH or DDS] *solely* on account of their incapacity to proceed to trial." The state might have a separate and independent reason to incarcerate a person before trial if they are a danger to the public or a flight risk. (*Lakey v. Taylor* (Ct.App. Tex., 2014) 435 S.W.3d 309, 321.)

medication in county jails under Penal Code 1369.1 is not a substitute for transfer of an IST defendant to a DSH facility or program. (182 Cal.App.4th at 645-649.)

The DSH and DDS suggest that the date of transfer to their responsibility is not dispositive because defendants with certain mental disorders are eligible for diversion programs under recent legislation. (Penal Code 1001.35 and 1001.36.) This argument has no merit. A trial court can order pretrial diversion either before or after an order committing an IST defendant to DSH or DDS.

Before issuing an IST Order, a court can find a defendant eligible for diversion based on a finding that the defendant has one of several identified mental disorders (Penal Code 1001.36(b)(1)) and that "the defendant's mental disorder played a significant role in the commission of the charged offense" (Penal Code 1001.36(b)(2)). This is not a finding that the defendant is incompetent to stand trial under Penal Code 1369. The defendant is referred to mental health providers other than DSH and DDS. (Penal Code 1001.36(c)(1)(B).) An IST defendant who is diverted is never transferred to the responsibility of DSH or DDS.

After the IST Order and before the IST defendant is physically transported to a DSH facility, a court can find a defendant eligible for diversion. (Penal Code 1370(a)(1)(B)(iv).) An IST defendant on pretrial diversion is then the responsibility of the county agency administering the diversion. (Penal Code 1001.36(i).) An IST defendant who is diverted after an IST Order is no longer the responsibility of DSH or DDS.

The court has considered whether, or how, Jail Based Competency Treatment ("JBCT") programs affect the analysis. Under SB 85, effective 6/24/15, a trial court could direct that an IST defendant be delivered to a county jail treatment facility. (Penal Code 1370(a)(1); 1370.6.) Under AB 103, effective 7/1/17, the DSH has jurisdiction over "A county jail treatment facility

under contract with the [DSH] to provide competency restoration services." (Penal Code 1370(a); W&I 4100(g).) (Grabau Dec, para 2 ["DSH offers JBCT services to IST defendants"].) The DSH has been increasing the number of JBCT beds at county jails. (Grabau Dec, para 8-11; Maynard Dec., para 13.) The availability and use of DSH administered JBCT programs is material to the speed at which DSH can commence substantive services and would presumably be relevant to DSH's ability to comply with any injunction.

The court has considered whether, or how, conditional release programs ("CONREP") affect the analysis. (Grabau Dec, para 12-19.) Certain IST defendants can be eligible for outpatient treatment. (Penal Code 1370(a)(1)(B)(i), 1370.4. 1600, 1603.) An individual placed on CONREP remains under the supervision of DSH. (Penal Code 1605, 1615.) The availability of CONREP programs would presumably be relevant to DSH's ability to comply with any injunction.

The court considers "the risk of an erroneous deprivation of such interest through the procedures used." If DHS or DDS fail to promptly provide substantive services designed to "promote the defendant's speedy restoration to mental competence," then there is a high risk that an IST defendant is being improperly deprived of her or his liberty.

The court considers "the probable value, if any, of additional or substitute procedural safeguards." A judicially defined constitutional outer limit would be a valuable additional procedural safeguard. *Loveton* suggests that there be a "uniform, statewide" standard. (244 Cal.App.4th at 1047 fn 19.) The courts in *Mink, Trueblood,* and *Advocacy Center* each provided this additional procedural safeguard.

The court considers "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would

entail." DSH and DDS have presented evidence that they have fiscal constraints and are overburdened. Saving money or shifting costs from the state to the counties are not compelling state interests where the state action or inaction is subject to strict scrutiny. (*Pederson v. Superior Court* (2003) 105 Cal.App.4th 931, 941.) "Neither administrative inconvenience nor lack of resources can provide justification for deprivation of constitutional rights." (*In re Grimes* (1989) 208 Cal.App.3d 1175, 1183.)

The court considers the Government's interest in the preparation and transmission of documentation. Petitioners argued through the Gage report that some of the burden is self-imposed unnecessary paperwork. Respondents argue that the documentation is required by statute. (Penal Code 1370(a)(3); Penal Code 1370.1(a)(3); W&I 4418.7, W&I 6510.5.) DSH has also adopted regulations that state what records the DSH needs before admitting an IST defendant. (9 CCR 4712.) Any administrative process requires documentation, but the documentation requirements of the process cannot justify confining a person "more than [the] reasonable period of time necessary." The documentation tail should not wag the constitutional due process dog. (*Traverso v. People ex rel. Dept. of Transportation* (1996) 46 Cal.App.4th 1197, 1210.) That noted, the court is very reluctant to second guess statutes enacted by the legislature and regulations adopted by the DSH regarding what documentation is reasonably required for the safe, effective, and efficient transfer, diagnosis, placement, and treatment of IST defendants. The identification of the transfer of responsibility dates take into account the DHS's and DDS's need for documentation.

The court considers the requirement that DSH prepare a report 90 days after commitment and DDS prepare a report 90 days after admission. (Penal Code 1370(b)(1); Penal Code 1370.1(b)(1).) The 90 day period is not particularly probative because the due process analysis

concerns counting forwards from the time an IST defendant is in custody from the IST order to the commencement of substantive services. In contrast, the 90 day period is useful only for purposes of counting backward from the statutory time for preparing a report. The *Loveton* trial and appellate decisions conducted the due process analysis and then separately noted that it was consistent with the 90 day report requirement. *Loveton* states that the trial court completed the due process analysis and then "further observed" that a 60 day limit would give DSH 30 days to complete its report. (*Loveton*, 244 Cal.App.4th at 1035.) *Loveton* also states. "As previously discussed, the evidence supports the court's finding that a 60-day deadline satisfies IST defendants' due process rights, provides sufficient time for DSH to place each defendant, and allows for timely preparation of the 90-day status report pursuant to section 1370, subdivision (b)(1)." (*Loveton*, 244 Cal.App.4th at 1047.)

The legislature has recently decreased the administrative burden on DSH and DDS by enacting a diversion program, which will divert persons with mental disabilities away from state hospitals. (Penal Code 1001.35.) The legislature also decreased the time an IST defendant can spend in state hospital from three years to two years, which will free up bed space. (Penal Code 1370(c)(1) as recently amended).

The court considers that the State's primary governmental interest in regard to IST defendants is to bring those accused of a crime to trial. "In a criminal case, the people of the State of California have the right to due process of law and to a speedy and public trial." (Cal. Const. Art. 1, § 29.)

Although not in the four factors identified in *Today's Fresh Start*, the court considers legislative timelines. In *Mink*, the court found that the constitutional standard was seven days in part because a previous version of the relevant statutes stated, "Transport shall be completed

within seven days after the court's determination unless doing so would jeopardize the health or safety of the defendant or others." (*Mink*, 322 F.3d at 1122 fn 13.) Similarly, in *Trueblood*, the district court considered the statutory seven-day performance target when it determined the constitutional standard. (*Trueblood*, 822 F.3d at 1040-1041 and 1046 fn 2.) (See also *Powell*, 455 Md. at 554 ["It is notable that in both cases, the courts gave significant weight to the fact that the state legislature had established statutory deadlines or goals for evaluations and provision of services"].)

It is particularly appropriate to look to statutory schemes on the facts of this case because the petitioners are seeking statewide relief for all IST defendants to address system wide due process violations rather than seeking relief for an individual based on individual facts. Although the court decides issues of constitutional due process, the court gives deference to the legislature's good faith judgment that statutory procedures provide due process. (*In re Heather B.* (1992) 9 Cal.App.4th 535, 555 [deference to legislature]; *California Consumer Health Care Council, Inc. v. Department of Managed Health Care* (2008) 161 Cal.App.4th 684, 691-692 [deference to administrative agency].) The court considers three statutory schemes.

First, the court considers the statutes relating directly to committing, admitting, and evaluating IST defendants and the return of IST defendants to the county jails and the criminal justice system after treatment.

1. Penal Code 1370(b)(1)(A) states that after a state hospital "report indicates that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future, the committing court shall order the defendant to be returned to the court … no later than *10 days* following receipt of the report." (Emphasis added.)

2. Penal Code 1372(a)(1) states that if a state hospital "determines that the defendant has regained mental competence, the director or designee shall *immediately* certify that fact to the court." (Emphasis added.)

3. Penal Code 1372(a)(2) and (3)(A) state that when a sheriff receives a certificate of restoration from a state hospital "The sheriff shall *immediately* return the person from the state hospital or other treatment facility to the court for further proceedings." (Emphasis added.)

4. Penal Code 1372(a)(3)(C) states "In all cases, the patient shall be returned to the committing court no later than *10 days* following the filing of a certificate of restoration." (Emphasis added.)

The legislature did not adopt any statutory language to address the front end of the process similar to the language that addresses the back end of the process. To the extent that the state's interest is in bringing those accused of a crime to trial, then the legislative concern with speed at the start of the treatment is presumably the same as the concern with speed at the end of the treatment. A week of delay is a week of delay, whether at the start or end of the treatment.

Second, the court considers pre-trial procedure in criminal matters generally because IST commitment orders are part of criminal cases rather than being part of public health proceedings. The timelines in criminal prosecutions are fairly short. (See *Craft v. Superior Court* (2006) 140 Cal.App.4th 1533, 1543-1544 [measuring time from commitment to admission in state hospital "against the much shorter timeframes established by the Legislature"].) At the inception of a criminal case, a defendant must be arraigned within 48 hours. (Penal Code 825(a)(1).) If the defendant is in custody and the case is a misdemeanor, then the defendant has the right to a trial within 30 calendars days after arraignment. (Penal Code 1382(a)(3).) If the defendant is in

custody and the case is a felony, then the defendant has the right to a preliminary examination within 10 court days after arraignment (Penal Code 1367-1376; Penal Code 859b) and the right to a trial within 60 calendar days after arraignment. (Penal Code 1382(a)(2).) The court considers the phrase "reasonable period of time" in light of the Penal Code pre-trial timelines generally.

Third, the court considers the procedures for involuntary civil commitments. These are relevant because they reflect legislatively determined timelines for the evaluation and treatment of persons who are confined involuntarily due to incompetence.[6] "When a person, as a result of a mental health disorder, is a danger to others, or to himself or herself [then] a county may, upon probable cause, take ... the person into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention." (W&I 5150.) Professional medical staff may certify a hold on the person for an additional 14 days for intensive treatment. (W&I 5250, 5256.6.) Upon the completion of a 14-day period of intensive treatment under W&I 5250, the professional medical staff may certify the person for an additional period of not more than 30 days of intensive treatment. (W&I 5270.15, 5270.35.) At the conclusion of the 30 day period, if the person does not agree to further treatment on voluntary basis then the state must proceed with either a conservatorship petition under W&I 5350 et seq or a petition for post-certification treatment of a dangerous person under W&I 5300 et seq. (W&I 5270.35.)

These statutory schemes suggest that the legislature has determined that it is not reasonable for the state to involuntarily confine a person for more than approximately 10-20 days

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[6] The court considers the W&I 5150 procedure only for guidance regarding timelines. The substantive "standards for commitment and release of persons sought to be civilly committed in this state are significantly different than those prescribed by Penal Code section 1367 et seq., for persons found to be incompetent to stand trial." (*In re Davis* (1973) 8 Cal.3d 798, 805.)

without meeting some substantial threshold. These timelines concern different issues and are statutory rather than Constitutional in nature, but they are relevant to determining the outer limit of constitutional due process.

Although not in the four factors identified in *Today's Fresh Start*, the court considers unintended consequences. The DSH can make more beds available to IST defendants, but it might come at the expense of persons who are occupying beds because they are not guilty by reason of insanity or are mentally disordered offenders. (Pltf Opening at 10:12-15 and 20:21-14.) The DSH could also presumably protect the minimum constitutional rights of incoming IST defendants to prompt admission by providing only the constitutional minimum evaluation and treatment for already admitted IST defendants and thereby having them exit DSH and DDS facilities more quickly.

This trial court echoes the sentiment in *In re Williams* (2014) 228 Cal.App.4th 989, 1018-1019, in *Loveton*, 244 Cal.App.4th at 1048 fn 19, and in the concurring and dissenting opinion of Justice Nicholson in *Brewer*, 235 Cal.App.4th at 154, and urges the legislature and/or the appropriate regulatory body to consider this issue and adopt a statute or regulation. The Court of Appeal decided *Williams* in 2014, decided *Brewer* in 2015 and decided *Loveton* in 2016. The legislature amended Penal Code 1370 in 2017 (AB 103 and SB 684) and in 2018 (AB 1810 and SB 1187), but the amendments have not addressed the issues in Williams, *Brewer,* and *Loveton.* The DSH adopted regulations in response to *Loveton*, but they "do[] not include a timeline or deadline for a patient's admission." (Respondent RJN, Exh U, page 7.)

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REMEDY – CONCLUSION

The Court ORDERS that constitutional due process requires that DSH must commence providing substantive services designed to promote the defendant's speedy restoration to mental competence within 28 days of the transfer of responsibility for an IST defendant. The transfer of responsibility date for the DSH is the date of service of the Penal Code 1370(a)(3) and 9 CCR 4711 commitment packet. The transfer of responsibility date for the DDS for commitments under Penal Code 1370.1(a)(1)(B)(i) is the Penal Code 1370.1(a)(1)(B)(i) order. For commitments under Penal Code 1370.1(a)(1)(B)(ii) or (iii), the transfer of responsibility date is the date when the IST defendant and the Penal Code 1370.1(a)(3) documentation are delivered to a DDS facility.

The court is determining the maximum constitutionally reasonable period of time between commitment and commencement of substantive services to comply with minimum due process. The legislature or an agency may direct the DSH and DDS to commence substantive services in a shorter time period.

The court is required to follow California case law. *Loveton* set a 60 day maximum for a single county jail and a single state hospital and had to consider that the lack of a statewide standard could lead to counties with standing orders getting priority over counties without such orders. (*Loveton*, 244 Cal.App.4th at 1047, fn 19.) *Williams* set a 45 day maximum for an individual's transfer to a DDS facility following remand. Both are distinguishable on their facts because neither addressed the systemwide failures at issue in this case. Both are nevertheless very persuasive because the court presumes that the Court of Appeal would not set a maximum delay for an individual that would exceed the constitutionally permissible systemwide maximum delay.

The court gives substantial weight to the personal interest in not being confined before conviction of a crime and in the absence of a finding that a person is a flight risk or a threat to public safety. Every IST defendant has this constitutional interest.

The court gives substantial weight to the legislative determination that at the end of a DSH or DDS evaluation that an IST defendant be returned to county jail and court proceedings "immediately" and not to exceed 10 days. (Penal Code 1370(b)(1)(A) and 1372(a).) Treatment facilities must be designed to "promote the defendant's speedy restoration to mental competence." (Penal Code 1370(a)(1)(B)(i).) (See also Penal Code 1370.1(a)(1)(B)(i) ["speedy attainment"].) The 28 day constitutional maximum delay is triple the 10 day period suggested by Penal Code 1372. The 28 day constitutionally permissible delay (plus 5 days for service by mail) in providing services is equivalent to the statutory right of a misdemeanor defendant to proceed from arraignment to trial within 30 calendars days. (Penal Code 1382(a)(3).)

The court gives substantial weight to the federal case law that the constitutional maximum number of days between commitment order and admission is seven days (Oregon) (*Mink*), seven days (Washington) (*Trueblood*) and twenty-one days (Louisiana) (*Advocacy Center*). The 28 day period is well above the 7 day constitutional due process maximum periods in *Mink* and *Trueblood*. The court thinks that the constitutional due process analysis in *Mink* and *Trueblood* placed undue emphasis on the legislative determinations that 7 days was the maximum appropriate time period. The constitutional standard is minimum due process, not what the legislature has decided is good policy.

The United States Constitution is the same in all 50 states, so the minimum requirements of constitutional due process should be equivalent in the absence of material factual differences. The court can identify two significant material factual differences between and among states.

First, California has different procedures and requires different documentation than other states. Penal Code 1370(a)(2) requires the court to obtain a placement recommendation before making an order committing an IST defendant to a DSH facility. Penal Code 1370(a)(3) requires that the court provide an IST defendant's informational packet to the DSH and that the packet include medical records. W&I 7228 directs the DSH to review the Penal Code 1370(b)(2) placement recommendation to determine the appropriate placement. The Sacramento trial court order and the Yolo trial court order discuss the procedures and required documentation in their due process analyses. (Respondents RJN Exhs E (Sacramento) and H (Yolo).)[7] This suggests that "a reasonable period of time" might be longer in California because California has procedural and documentation requirements that exceed those in other states.

Second, California has several programs under which the DSH and DDS may provide substantive services to an IST defendant without placing the IST defendant into a state hospital. Placement in a public hospital is only one of many ways to provide substantive services. Under *Jackson* and *Davis*, the continued detention of an IST defendant is justified by the provision of substantive services not by the provision of those services in a certain type of facility or program. This suggests that "a reasonable period of time" might be shorter in California because California has more placement options than are available in other states.

The court is wary about giving too much effect to the California-specific procedural requirements and program options in the analysis of "a reasonable period of time." Petitioners state a claim under the United States and California constitutions. The minimum federal

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[7] Penal Code 1370.1(a)(2) similarly requires the court to obtain a placement recommendation before making an order committing an IST defendant to a DDS facility and Penal Code 1370(a)(5) states that the DDS may recommend an alternative placement.

Constitutional standard is the same in all states and should presumably lead to somewhat consistent results.

The court considers administrative feasibility. Petitioners set out feasible timelines for DSH (Reply at 12-13) and for DDS (Reply at 13-14.) The issue is not, however, what is desirable or feasible but rather what is minimum constitutional due process. The court takes administrative feasibility into account by providing DSH and DDS with a period of time to meet the constitutional deadlines. (*Brown v. Plata* (2011) 563 U.S. 493, 541, 530 [tentative injunction gave state two years, and final injunction gave state two additional years to reduce prison population].)

The court measures the 28 day period from the date of service of service of the document that transfers responsibility for an IST defendant to date DSH places IST defendants in facilities or programs that provide substantive services. Although the state as a whole (trial courts, county jails, county sheriffs, DSH, and DSS) has a collective responsibility to comply with *Jackson* and *Davis* and to provide due process to IST defendants, the claims in this case are directed to DSH and DDS. The court's analysis of the "reasonable period of time" is therefore confined to the time periods over which the DSH and the DDS have control.

The court uses the service date of the document that transfers responsibility to address the concerns of respondents that not all trial courts serve their orders on the date they are entered. The service date is extended based on the means of service. (CCP 12 et seq., CCP 1013 et seq.)

The court does not constrain the discretion of the DSH or the DDS regarding how they might meet the constitutional minimum due process standard. (*Molar v. Gates* (1979) 98 Cal.App.3d 1, 20, 25.) The DSH and DDS may accelerate the transfer of IST defendants to state hospitals, make greater use of diversion programs, JBCT programs, and CONREP outpatient

programs, change documentation requirements, improve administrative procedures, or take other appropriate actions in their discretion.

The court will phase in the requirement that DSH and DDS meet the constitutional due process standard. (*Brown v. Plata* (2011) 563 U.S. 493, 541-542.) The Contra Costa trial court order dated 8/16/17 at page 2 found that in the three years since the *Loveton* decision the DSH had been provided "ample opportunity to plan and undertake steps" but that DSH "was neither diligent nor effective in in achieving the stated goal." (Respondent's RJN filed 3/6/18, Exh F at page 2, last paragraph.)

The current situation is that the DSH has an average of approximately 64 days from commitment packet to admission and DDS as an average of approximately 53 days from commitment order to admission. Those are the averages, so approximately half of the IST defendants currently wait for more than those numbers of days before commencement of substantive services. The court's order concerns the outside limit of due process for all IST defendants, not the mean or median time limits for the aggregate of all IST defendants.

At the hearing on 3/15/19, counsel for DSH and DDS argued that it would be impossible for the state agencies to comply with a court order directing them to within 6 month commence substantive services for all IST defendants within 60 days from the transfer of responsibility date. Counsel asserted that the state budget is fixed for the 2019-2020 fiscal year, that the state entities cannot create beds or hire and train staff in that time frame, and that many counties are not adopting JBCT programs. (Penal Code 1370.6; W&I 4100(g).) The constitution requires due process, but the law also does not require impossibilities. (Civil Code 3531.) That noted, the Court of Appeal issued *Loveton*, 244 Cal.App.4th 1025, on 2/11/16, which means that DHS and

DDS have already been working for three years to ensure that they commence services to IST defendants within 60 days

The court ORDERS:

1. Within 12 months of this order the DSH and the DDS must commence substantive services for all IST defendants within 60 days from the transfer of responsibility date.
2. Within 18 months of this order the DSH and the DDS must commence substantive services for all IST defendants within 45 days from the transfer of responsibility date.
3. Within 24 months of this order the DSH and the DDS must commence substantive services for all IST defendants within 33 days from the transfer of responsibility date.
4. Within 30 months of this order the DSH and the DDS must commence substantive services for all IST defendants within 25 days from the transfer of responsibility date.
5. Within 36 months of this order the DSH and the DDS must commence substantive services for all IST defendants within 28 days from the transfer of responsibility date.

The phrase "all IST defendants" is to be read as "substantially all IST defendants." The DSH and the DDS will not be in violation of the judgment if they show good cause for not admitting a few IST defendants within the required timeframes.

The court ORDERS that DSH and the DDS file status reports to the court two months after each progress point identified above. The status reports must contain:

1. Number of IST defendants for whom the DSH and the DDS have responsibility at the start of the period with breakdown of how many were:
    a. In a state hospital
    b. In a state treatment facility

c. In an outpatient program

d. In a jail based competency program

e. In other identified facilities or programs under DHS or DDS supervision

f. Not yet receiving substantive services.

2. Number of IST defendants for whom the DSH and the DDS have responsibility at the end of the period with the same breakdown as above.

3. Number of new IST defendants for whom the DSH and the DDS have responsibility added during the period.

4. Mean (average) wait time during the period.

5. Median wait time during the period.

6. Minimum wait time during the period.

7. Maximum wait time during the period.

Petitioners must prepare a proposed judgment consistent with this order, submit it to respondents, and submit it to the court. (CRC 3.1312.) The court will then enter judgment, which will permit an appeal. (CRC 8.104.)

At the hearing on 3/15/19, counsel for DHS and DDS asserted that the state entities currently do not collect and maintain the data identified in the status reports ordered by the court. The court encourages the parties to meet and confer about what data the DHS and DDS currently collect, what data can be collected without undue burden, and what data will be most relevant for monitoring compliance with the order and judgment. The parties may, but are not required to, prepare and submit a proposed stipulated amended judgment in the nature of an agreed consent judgment regarding the data and other material in the status reports.

The court retains the authority to make further amendments to the order or any judgment as warranted by the facts. "The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible." (*Brown v. Plata* (2011) 563 U.S. 493, 542.) Either party may file a motion to amend the order or judgment.

Dated: March 22, 2018

Winifred Y. Smith
Judge of the Superior Court