

SUPERIOR COURT, SANTA CLARA COUNTY, CALIFORNIA

**Juvenile Justice Court**

**JUVENILE COMPETENCY  
MANUAL AND PROTOCOL**

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## **SECTION ONE:**

### **INTRODUCTION AND SCOPE**

#### **Summary**

When a juvenile delinquency judge believes a minor may be incompetent to enter a plea, withstand trial, or be sentenced (because the minor does not understand the court process or cannot effectively communicate with his/her attorney), the court must suspend the proceedings. The proceedings are suspended because it is unjust to subject a person to a court process the person is not competent to understand. There is an eight step process in most competency cases. First, a doubt is raised. Next, the court conducts an initial inquiry process. If the court finds there is “substantial evidence” of doubt regarding the minor being competent, the underlying proceeding (with the juvenile charges) is suspended. The court orders the minor’s competency evaluated by a Pre-Trial Competency Evaluator. Following the court-ordered competency evaluation, the court will seek a stipulation from the parties that the minor is either competent or incompetent. If there is no stipulation, there will be a trial to determine if the minor is competent. Following the potential stipulation or trial, the judge makes a finding regarding the minor’s competent or incompetence. If the minor is deemed competent, the underlying juvenile case is no longer suspended and may proceed. If the judge finds the minor incompetent, regular juvenile proceedings remain suspended. Incompetent minors are provided with a County-run mental health program called the Competency Restoration Program that attempts to obtain/restore the minor’s competency.<sup>1</sup> There will be periodic reviews to see if the minor has attained competency. If the minor attains competency, the underlying proceeding is no longer suspended and the case begins again, where it left off. If the minor does not obtain competency, the underlying proceeding remains suspended until the time limits are reached, or until the underlying proceedings are dismissed (sometime between the suspension of the underlying proceedings and when the time limits are reached).

Throughout this process, if the minor is in need of other intensive mental health treatment, the minor may be provided with that treatment in an out-patient setting, or committed to a facility under the Lanterman-Petris-Short Act (LPS Act) if the minor meets the criteria for civil commitment. The minor may also be subject to a guardianship.

The whole competency process takes anywhere from one day to about three years. The court is obligated to proceed within a reasonable period of time. Ideally, the suspension of underlying proceedings will not exceed 6 months.

#### **Scope**

This Protocol of the Juvenile Justice Court, Superior Court, Santa Clara County, California,<sup>2</sup> provides an overview of procedures for determining a minor’s mental ability to participate in juvenile proceedings, the evaluation of the minor, the competency

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<sup>1</sup> There is no statute or case law that provides for a County-run restoration of competency program. Three Santa Clara County entities – Juvenile Justice Court, Department of Mental Health, and the Probation Department – agreed to create a program for providing such service.

<sup>2</sup> The Delinquency Court of the Superior Court of the State of California, Santa Clara County, was renamed the Juvenile Justice Court in 2009.

hearing process, the attempt to obtain/restore competency, judicial review, and the steps to take when the minor is either found to be competent or not competent.

This Protocol describes the procedure under the following California statutes:

- Welfare & Institutions Code §709 (competency of minors);
- Welfare & Institutions Code §705 (mental health evaluations of juveniles who may suffer from mental disorders);
- Penal Code §§1367 and 1368, et seq. (the process for determining competency in adult court);
- Penal Code §§6550 and 6551 (mental health assessments regarding whether a minor may require civil commitment and mental health treatment under the LPS Act (which is outlined in Welf & Inst Code §§5000–5550));
- California Rules of Court, Rule 5.645 (mental health assessments for competency pursuant to Welf & Inst Code §6550, above); and
- Penal Code §4011.6 (mental health evaluations for minors who are in a Juvenile Hall or a Ranch to determine if a juvenile has a mental disorder that requires treatment or civil commitment under the LPS Act).

Prior to September 2010, courts were required to follow §§705, 6550, 4011.6 and Rule 5.645. These dictated how juvenile incompetency cases should be handled – even though they do not really address incompetency. In summary, they lead to a 72 hour hold for a mental health assessment of the minor for possible mental illness, not for possible incompetency. Welf & Inst Code §709 was enacted in September 2010 in an attempt to address the competency issue in juvenile court. However, §709 does not provide all the answers.<sup>3</sup> Regardless, this Protocol lays out a process that follows a streamlined competency process that does not rely upon §§705, 6550, 4011.6 and Rule 5.645. This Protocol (which was authored prior to the passage of §709) is more in the spirit of §709. This Protocol attempts to deal with competency issues, which are sometimes separate than mental disorder issues. It is hoped that in the near future a juvenile statutory scheme as detailed as the statutory process in adult court (but that will take into consideration the

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<sup>3</sup> The entire text of Welf & Inst Code §709 is at the end of this Protocol in Section Twelve. There are many problems with §709: 1) Arguably, it merely codified existing law. 2) It does not provide a framework for processing competency cases (as exists in the adult statutes). 3) It does not address the special needs of children who suffer from incompetency. 4) It does not address what to do with the existing §§705, 6550, 4011.6 and Rule 5.645. The new §709 did not revoke, let alone mention these laws. Therefore, §§705, 6550, 4011.6 and Rule 5.645 (which dictate how competency cases should be handled – even though they do not really address competency) are still the law in California. 5) The legislative analysis of AB 2212 (from which Section 709 came) states implementation of Section 709 will cause "negligible" budget impact – there is no consideration for the real cost of Competency Restoration Services. 6) Under §709, the competency evaluator can consider a catch-all "or other condition" as a cause of the minor's potential incompetency. This goes beyond the novel factor of "immaturity" of the minor that was added by *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847. However, "or other condition" is not defined. 6) The standard of "substantial probability" is not defined.

special needs of children) will exist within §709, and that §709 will specifically state a 72 hour hold is not needed for possibly incompetent minors.

This Protocol was written by all participants in Juvenile Justice Court over a two year period from 2009 to 2011. The committee members and their offices, listed at the end of the Protocol, are signatories to the streamlined process of this Protocol. In an abundance of caution, and in case an out-of-county attorney does not stipulate to the Protocol process, Section Eleven at the end of this Protocol addresses the possibility that §709 does not replace §§705 and 6550, or Rule 5.645. In Section Eleven, these laws are fully explained. Also, §§705 and 6550, and Rule 5.645 are included in small part throughout this Protocol because they provide valuable procedures for issues that may come up during common competency proceedings.

This Protocol is based on two principals. In the absence of adequate statutes and case law, the court can create a plan that works for minors, or for a particular minor. *James H. v. Superior Court* (1978) 77 Cal.App.3d 169 (“[I]n the absence of any statutory procedure for so doing the juvenile court has the inherent power to determine a minor’s mental competence” and to establish a process for handling such matters). And, second, a juvenile court judge must control all proceedings with a view toward the expeditious determination of not only the jurisdictional facts of the case but also the present condition and future welfare of minors before the court. Welf & Inst Code §680.

### **Legal Overview**

In all cases, if the court, a probation officer, or an attorney has some reason to doubt whether the minor is competent to enter a plea or withstand trial, the issue must be raised at the earliest possible point in the regular juvenile proceeding. Once raised, the judge has an obligation to determine initially if the minor is possibly incompetent. If the court initially determines that a competency hearing is not necessary, the court does not suspend proceedings and the judge does not set a competency hearing.

Judges must exercise proper discretion and must make the initial decision whether to proceed toward a competency hearing or not, and, if there is a competency hearing, whether the minor is competent or not. Oftentimes, the judge has within the courtroom many resources (the lawyers, probation officers, minor, and the minor’s family members) upon which the court may make an initial decision to temporarily suspend proceedings, sometimes without bringing psychological experts into the equation. The judge can also agree or disagree with the attorneys, probations officers, and/or experts.

If the judge declares a doubt regarding the minor’s ability to be competent, proceedings must be temporarily suspended, an expert must be appointed to evaluate the minor’s competency, and the matter must proceed toward a competency trial. If the judge finds the minor competent following the trial, the underlying juvenile proceedings are resumed and the minor enters a plea or is tried on the petition/notice. A minor who is found to be incompetent following a competency hearing will have his/her matter suspended while the court orders the Department of Mental Health Competency Resoration Program to attempt to restore/obtain the minor’s competence. If the minor’s competence is restored/obtained within a short time, the underlying juvenile proceedings resume. If the minor’s competence is not restored/obtained in a short time, the matter is

either continued until such time as competency can be restored/obtained, or the petition/notice can be dismissed.

### **Process Overview**

The next two pages provide an overview to the entire process. It is intended to be an outline of the steps a judge should follow, and to provide the “big picture” before launching into the details of competency proceedings.<sup>4</sup>

[The rest of this page was left intentionally blank so that the following Competency Process Overview fits neatly into two pages for quick reference.]

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<sup>4</sup> This is a streamlined summary intended to provide a quick overview of the entire process in a few pages. This summary captures the most routine competency path, and is not intended as a substitute for the intricacies of this Protocol. All readers must familiarize themselves with the entire Juvenile Competency Protocol of the Santa Clara County Juvenile Justice Court.

# Competency Process Overview

I. A doubt is raised: Determine if *substantial evidence* of doubt regarding potential incompetency exists. (At a minimum ask minor's attorney about competency; review any §1017 reports; talk to parents and probation officers; consider any prior SARC referrals.)

1. If substantial evidence of doubt does not exist, continue with underlying juvenile proceedings.
2. If substantial evidence of doubt does exist:
  - a. State doubt on the record.
  - b. Suspend juvenile proceedings.
  - c. Obtain stipulation to process of this Protocol, and obtain a waiver of the right to 72-hour hold for possible treatment and evaluation afforded by CRC 5.650(d)2). If no waiver, refer to other steps in the Protocol.
  - d. Appoint an independent Pre-Trial Competency Evaluator from the Court's panel.
  - e. Consider custody status of minor (is there any information that would change current status). Use least restrictive setting consistent with detention risk factors re: safety of minor and community.
  - f. Set two future court dates:  
18 calendar days for receipt of evaluator's report in court;  
20 calendar days for Parte Competency Review.
  - g. At Parte Competency Review, the parties can stipulate, submit, or set for a contested trial. If contested trial, set within 15 calendar days.

II. Upon receipt of Pre-Trial Competency Evaluator's opinion, if parties stipulate or submit and/or Court finds minor is competent (short of a trial):

1. Reinstate juvenile proceedings
2. Remind probation that the court intends to grant credits toward maximum time of confinement, if any, at time of Disposition.
3. Consider need for possible psychological evaluation to determine what mental health services the minor may need even though the minor is competent.
4. Consider referrals to SARC, CITA (Juvenile Mental Health Court), LPS, guardianship, etc.

III. If there is a Competency Trial:

1. Minor is presumed competent (presumptive burden on minor to go forward and prove incompetence).
2. Standard: *preponderance of evidence* that the minor is not competent.
3. Any judge can hear the trial; does not need to be the judge who declared doubt.
4. Minor has no independent right to testify; defense counsel can choose not to call the minor as a witness even if the minor wants to testify.

IV. Following Competency Trial, if the court finds minor is competent: go to II, above.

V. Following competency trial, if the court finds minor is incompetent:

1. Suspend proceedings (again).
2. Order a Competency Restoration Program through the Dept of Mental Health.
3. Set a 7 day and 14 day review, followed by Competency Restoration Reviews 30 days, 60 days and 90 days, followed by reviews every 3 months.
4. Set a Final Competency Restoration Review 30 calendar days before the time limit for attainment of restoration. For misdemeanors the limit is: one year from the day the Competency Restoration Program begins; for felonies: three years from the day the Competency Restoration Program begins.
5. Standard: *substantial probability* the minor is likely to attain competency in the foreseeable future.
6. If appropriate, order a Probation MDT for voluntary ancillary services and set a Competency MDT Parte Review within 21 calendar days.

VI. A Certificate of Restoration can be filed by the Department of Mental Health at any time the Competency Restoration Director believes the minor has attained competency.

1. If parties stipulate or submit on Certificate of Restoration, and Court agrees, go to II, above.
2. If a party challenges the Certificate of Restoration, set a Contested Restoration Trial within a reasonable time.

VII. If there is a Contested Restoration Hearing:

1. Minor is presumed competent (presumptive burden on minor to go forward and prove incompetence).
2. Standard: *preponderance of evidence* that the minor is incompetent.
3. Following Restoration trial, if the Court finds minor is competent, go to II, above.
4. If the Court finds minor has not obtained competency, determine if attainment is likely to be achieved in the foreseeable future (remember maximum timelines).  
If yes, return minor to the Restoration Program and set a review.  
If no, see next section.

VIII. If at any point the court does not find a *substantial probability* the minor is likely to attain competency in the foreseeable future, the court may dismiss the case.

1. Before the case is dismissed, the D.A. has right to 10 days notice and a trial to prove there is not *substantial probability* the minor is unlikely to attain competency in the foreseeable future.
2. If the case is dismissed, court jurisdiction ends.
3. The court may consider a civil commitment, etc. (see Protocol).

[End of Overview.]

## **Umbrella Principles of This Protocol**

It is helpful at the outset to identify some terms and principals.

“A judge’s doubt” means two things at different stages in the competency process. The first possible kind of a doubt is when the judge wonders if the minor is possibly incompetent. This triggers the initial investigation. The second possible “judge’s doubt” follows the initial investigation, after which the judge formally announces a doubt based on substantial evidence. This doubt triggers the suspension of the underlying proceedings so that assessment information can be gathered and the matter heads toward a possible contested competency trial. After the trial, the judge has to make a finding whether the minor is competent or not. (This finding is not a doubt standard.)

In this Protocol, the term “restoration of competency” is used generically to refer both to situations where a minor who was never competent attains competency, as well as where a minor who was once competent and loses competency has his/her competency restored.

There are many types of evaluators that may (or may not) assess the minor throughout the competency process. These are distinct categories of evaluators, all of which are identified in more detail in this Protocol. They are:

- “Court-Appointed Psychotherapists” under Evid Code §1017 – court-approved experts from a court panel; their training and qualifications are monitored by the court; appointed by the court at the request of defense counsel to provide an initial confidential report to defense counsel.
- “Experts” under Evid Code §730 – appointed by the court to give the court assistance in determining matters before the court
- “Pre-Trial Competency Evaluators” under Welf & Inst Code §709 – court-approved experts from a court panel; their training and qualifications are monitored by the court; appointed by the court if a doubt is found regarding the minor’s competency and the issue is headed to trial;
- Attorney-retained experts – independent experts that the attorneys may retain to give “second opinions” regarding the minor’s competency.
- State Examiner under Welf & Inst Code §705 – a State Regional Center evaluator whose training and qualifications are monitored by the State of California; referred by the court to the Regional Center for evaluation of possible developmental disabilities of the minor.
- County Evaluator under Welf & Inst Code §705 – a County expert whose training and qualifications are monitored by the County of Santa Clara and the State of California; referred by the court or director of a holding facility for evaluation of whether the minor is gravely disabled or a risk to self or others, and therefore should receive services under the Lanterman-Petris-Short Act (LPS) or guardianship laws.

- “Competency Restoration Counselors” and “Competency Restoration Supervisors” under this Protocol – experts who are employees or independent contractors of the Department of Mental Health; their training and qualifications are monitored by the Department of Mental Health; appointed by the court to provide competency restoration services and assess whether the minor has obtained competency;
- “Restoration Program Independent Evaluators” under this Protocol – court-approved experts from a court panel; their training and qualifications are monitored by the court; appointed by the court after the Competency Restoration Program is underway to provide independent validation of the Department of Mental Health’s conclusions regarding competency.

The qualifications for some of these evaluators are different, although in some cases the qualifications are the same, or are similar. It is possible that one person in the community could be qualified to be an evaluator in more than one category. Even if that person (or persons) has multiple qualifications, one person could only be appointed to perform one of the services sought by the court or parties. This is so because there is a need for independence of evaluations throughout the process. Thus, for one minor the Court-Appointed Psychotherapist cannot later be that minor’s Pre-Trial Competency Evaluator or Restoration Program Independent Evaluator. Once an evaluator has been used once for the minor, that evaluator cannot be used again later in the same competency proceeding. If however, there is a whole new competency proceeding in the future on a separate petition, the fact that a minor was assessed by an evaluator in the past does not preclude that evaluator from performing a future assessment. This determination is within the discretion of the court, which should take into consideration the passage of time as well as principles of fairness and due process.

Except for the attorney-retained experts, each person who evaluates minors in the competency process must be expert juvenile forensic evaluators. They must be certified and periodically trained/updated in the principles of juvenile competency. They must be members in good standing in their licensed professions and they must be on the approved panel of experts the court (and others) maintains. (Details of qualifications can be found within this Protocol.)

In this Protocol, there are citations to both juvenile and adult cases and statutes. This is so because there is scant juvenile law addressing incompetency. In all citations, the sources are identified as either “Adult case/statute” or “Juvenile case/statute.” This is to signify that there may be no juvenile law that addresses an issue, and by analogy, the Protocol is applying adult cases to juvenile situations. This Protocol is sensitive to the fact that children are different than adults. Adult law is employed only when it does no violence to the special needs of children.

The term “72 hour hold” in this Protocol is used generically to mean a treatment and evaluation pursuant to Welf & Inst Code §5150, which is triggered by many statutes, including Welf & Inst Code §6551, Penal Code §4011.6, and California Rules of Court, Rule

5.645. The hold may be less than 72 hours, or it may be more than 72 hours. The hold may lead to services in the minor’s home, or it may lead to services in a facility. The hold is used to assess many things: competency, mental disorders, grave disabilities, mental retardation, etc. Rather than unnecessarily parse these concepts (which would lead to reader confusion), the concept of the Welf & Inst Code §5150 assessment will be called a “72 hour hold.” Where distinctions are important in the detailed subsections, those distinctions will be pointed out. One goal of this Protocol is to avoid a 72 hour hold, if possible. Since the passage of Welf & Inst Code §709 in September 2010, a 72 hour hold is not necessary if the only presenting issue is one of possible incompetency.

During all competency proceedings, minors have the right to an attorney. (Case law below.) Because the policy of the Juvenile Justice Court in Santa Clara County is that each minor is afforded a public attorney at arraignment, all minors have legal representation throughout their entire case, including any possible competency proceedings.

Although informal solutions should be sought and promoted, there shall be no ex parte communications in any competency matter unless there is a stipulation to proceed with limited ex parte communications, such as stipulations in the Court for Individualized Treatment of Adolescents (Juvenile Mental Health Court). Such stipulations will have to be agreed upon on a case by case basis and placed on the record.

A minor who wants to attend court hearings may come to court hearings. However, during the suspension of the petition/notice, the court may hear any matter that is capable of a fair determination without the minor. (Case law below.)

The minor should be evaluated and receive services in the least restrictive setting that is practical. Therefore, the minor’s home should be considered as a first alternative, subject to the court’s concerns about safety for the minor and/or the community. In Santa Clara County, the delinquency court introduced the first Juvenile Mental Health Court in the United States. Since its inception in February 2001, 99 percent of the minors in the mental health court have been effectively treated and maintained in their homes. There is no reason why this same approach cannot apply to minors going through the competency process. Of course, if there is a minor who threatens to kill his mother, the court cannot turn a blind eye to the safety issues this presents.

The Juvenile Justice Court maintains jurisdiction of the minor during all competency proceedings (as opposed to the matter being transferred to civil court). (Case law below.)

**SECTION TWO:**  
**INITIAL INQUIRY AND STEPS BEFORE COMPETENCY PROCEEDINGS BEGIN**

Welf & Inst Code §709(a) states: “During the pendency of any juvenile proceeding, the minor’s counsel or the court may express a doubt as to the minor’s competency.” [Juvenile statute.]

The juvenile court has an obligation to determine if a minor is competent to enter a plea or withstand trial. A person cannot be tried or sentenced while mentally incompetent. Penal Code §1367(a); *Godinez v Moran* (1993) 509 US 389, 396; *Pate v Robinson* (1966) 383 US 375, 378; *People v Hayes* (1999) 21 C4th 1211, 1281. [Adult statute and cases.]

The Court does not automatically begin competency proceedings because someone asks for such proceedings. Before competency proceedings begin in juvenile court, a judge must have an objective belief the minor may be incompetent. If the judge has such a belief, competency proceedings are initiated. If the judge does not have such a belief, competency proceedings are not initiated. This section explains how a judge conducts the initial inquiry to determine if there is substantial evidence to suspend the underlying juvenile proceedings and commence competency proceedings.

### **Competency Defined**

Welf & Inst Code §709(a) states:

“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.” [Juvenile statute.]

The juvenile court “may borrow from [adult] Penal Code §1367 and use as a yardstick the definition of incompetency set forth in that section, i.e., that the minor, by reason of mental disorder or developmental disability, is unable to understand the nature of the proceedings taken against him and assist counsel in the conduct of those proceedings in a rational manner.” *James H. v. Superior Court* (1978) 77 CA3d 169, 176; *In re Patrick H.* (1997) 54 CA4th 1346. [Juvenile cases.]

The standards for determining whether a person is presently competent to enter a plea, stand trial, or be sentenced are as follows:

- The person must be presently capable of understanding the nature and purpose of the proceedings;
- The person must presently comprehend his or her own status and condition in reference to the proceedings; and
- The person must be presently able to assist his or her attorney in conducting a defense. Penal Code §1367(a); *People v Conrad* (1982) 132 CA3d 361, 369. [Adult case].

The "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States* (1960) 362 US 402. [Adult case.]

The same standard is used to determine if a person has the ability to enter a plea or admission. *Godinez v. Moran* (1993) 509 US 389. [Adult case].

The case of *Timothy J.* added a new component to competency in juvenile cases: developmental immaturity. “A minor is mentally incompetent if, as a result of mental disorder, developmental disability, or developmental immaturity, the minor is unable to understand the nature of the present juvenile court proceeding, or to assist counsel in the conduct of a defense in a rational manner.” Pen. Code, §1367(a); *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847. [Adult statute; juvenile case.]

### **Introduction to the Initial Inquiry Process**

Regardless of whether there are misdemeanors or felonies, or whether the subject is a juvenile or an adult, the process starts out the same for all (this process is outlined here, taken from the adult provisions of PC 1367.1 and 1368, unless noted otherwise). Here is a quick summary of the process:

An attorney or the judge questions the minor’s competency.

If there is a doubt in the judge’s mind, the court must state the doubt on the record.

The court asks defense counsel for his/her opinion.

The court asks family members about competency. (Not in the law; benchguides and procedure only.)

The court asks the probation officer(s) about competency. (Not in the law; procedure only.)

The court declares a recess, if necessary.

Based upon what is before the judge, the judge makes an initial determination regarding whether to go forward with regular juvenile proceedings rather than suspending proceedings.

If substantial evidence of minor’s incompetence exists, the court orders the underlying proceedings suspended.

If there is not substantial evidence, the court does not suspend proceedings.

In adult court, the process soon diverges depending on whether the defendant is charged with misdemeanors or felonies.<sup>5</sup> The juvenile court need not concern itself with these distinctions because the juvenile court is not going to follow the code sections that diverge. Pursuant to *James H.* and *In re Patrick H.*, once the definition of competency is

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<sup>5</sup> The misdemeanor process fall under Penal Code §§1367.1 and 1370.01. (Penal Code §1367(b)). The procedure for handling felony cases is governed by Penal Code §1370. The Second District Court of Appeal has declared that adult misdemeanor process, (after the initial inquiry process is completed) as found in Penal Code §1367.1 is unconstitutional, holding that the statute deprives misdemeanor minors of equal protection. The court found no compelling state interest in requiring a misdemeanant, believed to be incompetent because of a mental disorder, to submit to involuntary evaluation and treatment under the Lanterman-Petris-Short Act instead of or prior to a competency determination (as provided for in the adult felony process). *Pederson v Superior Court* (2003) 105 CA4th 931, 939–942. This equal protection issue does not exist in juvenile court because there is no distinction between felonies and misdemeanors.

borrowed from adult statutes, the juvenile court returns to the Welf & Inst Code for juveniles.<sup>6</sup>

The court has an obligation to weigh the evidence. The Initial Inquiry Process is designed as a template for judges to consider. The steps provide a checklist from which a judge can consider which steps are applicable and/or practical. Depending on the issues presented, the history of the minor, existence of information, and other factors, the court may conduct an Initial Inquiry that covers all or some of these steps

All inquiry by the court should be on the record.

## **The Actual Initial Inquiry Process**

### **(1) JUDGE'S INQUIRY**

If the judge is the first to doubt whether the minor is competent to enter a plea or be tried, the judge must raise the issue of competence, and make inquiry before making an initial determination. Penal Code §1368(a). The court should not make findings until the court has completed the initial inquiry, or thereafter. This provision requires the trial judge, on his or her own motion, to inquire into the minor's mental capacity to stand trial whenever evidence presented prior to disposition raises a *bona fide* doubt. The doubt that triggers the trial judge's obligation to order a hearing is not subjective, but rather determined objectively from the record. *People v Stiltner* (1982) 132 CA3d 216, 222. Proceed with the initial inquiry. [Adult statute and case.]

### **(2) DEFENSE COUNSEL'S DOUBT**

If counsel is the person to first doubt whether the minor is competent to enter a plea or be tried, the judge should determine if there is a request for a statutory competency hearing under Welf & Inst. Code §709.<sup>7</sup> If counsel is merely commenting upon the minor's mental state, but not questioning competency or not asking for a competency hearing under §709, there may be no basis for the judge to make initial inquiry or order an assessment or order a competency hearing. If counsel comments upon the competency of a minor, the judge should inquire whether the declarant is requesting a competency hearing pursuant to §709. If counsel is requesting a competency hearing pursuant to §709, the court should *not* set a competency *hearing* merely because there is a request. The request for a hearing only triggers the judge's duty to conduct an initial inquiry whether there is good cause to commence competency proceedings.

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<sup>6</sup> These cases direct the court to follow Welf & Inst Code §705 for the competency process (a 72 hour hold that may lead to a LPS commitment). This Protocol, and the newer Welf & Inst Code §709, do not require a 72 hour hold. However, even under both §§705 and 709, there is neither case law nor statute that directs a juvenile court on how to start the initial inquiry process to determine if a 72 hour hold or a competency restoration program is necessary. Therefore, juvenile courts have historically been borrowing more than the mere "definition" of competency from adult law -- they have also been borrowing the initial inquiry process from the adult statutes (outlined above). This is appropriate because there is no violence to the minor's constitutional rights in doing so, and the framework for the initial adult competency process suits the needs of juvenile court -- to expeditiously and effectively determine if there is a doubt regarding competency.

<sup>7</sup> The equivalent in adult court is a Penal Code §1368 request. Prior to §709, the juvenile process would have been under §705. For details on the differences between §705 and §709, see Section Eleven and Section Twelve (which has the entire text of the statutes).

Even if counsel is not asking for a competency hearing pursuant to §709, the judge may still conduct the initial inquiry and/or order a competency assessment, if the judge finds good cause aside from counsel's belief a hearing is not necessary. Penal Code §1368(b). [Adult statute.] The court has an obligation to make sure a minor is competent, regardless of anyone else's opinion.

Regardless of who raises the issue of competency, the judge must make initial inquiry if there is reason to believe competency may be at issue. Penal Code §1368(a). [Adult statute.] The court should err on the side of conducting an initial inquiry.

### **Evid Code §1017 Psychotherapist Evaluation**

If defense counsel suspects competency may be at issue, counsel may seek, but is not required to seek, an Evid Code §1017 Court-Appointed Psychotherapist to evaluate the minor's competence.<sup>8</sup> As a matter of course, public appointed defense counsel in Santa Clara County will always seek an Evid Code §1017 Court-Appointed Psychotherapist to evaluate the minor's competence before bringing the matter of possible incompetence to the judge.

To obtain an Evid Code §1017 Court-Appointed Psychotherapist evaluation, the defense attorney must petition the court. The petition may be ex parte. The judge will either sign the order or not, depending on the declaration of the attorney. If the evaluation is ordered for the purpose of determining competency, the court's Legal Process Clerk Supervisor must send an instruction letter from the court to the Court-Appointed Psychotherapist.<sup>9</sup>

The Court-Appointed Psychotherapist reports back to the defense counsel directly. The court, District Attorney, and probation do not get copies of the evaluation. If defense counsel believes the Court-Appointed Psychotherapist's opinion benefits the minor, the defense attorney will provide copies to all parties. If defense counsel believes the Court-Appointed Psychotherapist's opinion will not benefit the minor, the defense attorney is not required to provide copies to all parties.

If an Evid Code §1017 evaluation is sought for a different purpose, and the Court-Appointed Psychotherapist opines the minor may lack competency, defense counsel would bring this to the attention of the court.

If an Evid Code §1017 Court-Appointed Psychotherapist opines a minor is incompetent, the threshold for whether the court will have a doubt regarding the minor's competence will likely be met.

The court must consider the opinion of the Court-Appointed Psychotherapist, but the court does not have to agree with the opinion. On the other hand, the court cannot

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<sup>8</sup> If there is already an ongoing suspended underlying case, and the minor is now facing a second petition, this §1017 expert cannot be an evaluator who has already assessed the minor in the current suspended proceedings. See different categories of evaluators, including different qualifications and limitations, in Section One, "Umbrella Principles of This Protocol."

<sup>9</sup> The process and instructions for the Court-Appointed Psychotherapist is contained in a separate protocol of the Juvenile Justice Court. The instructions will be similar to the template instructions as found in the footnote to "Court Instructions to Pre-Trial Competency Evaluator" in Section Three.

reject an opinion without a reason.<sup>10</sup> The standard is whether the court finds “substantial evidence raises a doubt as to the minor’s competency.” Welf & Inst Code §709(a). [Juvenile statute.]

### **Inclusion of Defense Counsel**

If any person (such as a deputy district attorney, probation officer, family member, or probation court officer) believes the minor may be incompetent, that person should relay the belief to defense counsel. If the issue is raised to the court, the judge should relay the information to defense counsel. Defense counsel can then apply the legal standards to the situation and make a determination whether to advise the court of potential incompetency.

Defense counsel is better able to collect information directly from his/her client, and observe the minor in an informal setting, such as an interview room. Defense counsel also needs to make strategic decisions regarding whether they should ask for a continuance, check on the minor’s medications, determine if the minor is in a temporary crisis, etc.

### **Judge Required to Exercise Discretion**

Welf & Inst Code §709(a) makes it clear that the *judge* must first find “substantial evidence” that “raises a doubt as to the minor’s competency” before suspending proceedings. Proceedings are not suspended upon an attorney’s request, or upon an attorney stating the minor is incompetent.

This parallels the adult construct of competency law: Penal Code §1368(b), which states that the court “shall” order a competency hearing “if counsel informs the court that he or she believes minor is or may be mentally incompetent,” appears at first glance to mandate a hearing whenever counsel voices a belief that minor is incompetent. Reading this provision in light of Penal Code §1368(a), however, means the minor is only entitled to a competency hearing if there is “substantial evidence” of doubt about the minor’s mental competence. Counsel’s belief does not by itself rise to the level of substantial evidence. *People v Welch*, (1999) 20 C4th 701, 739, n7 (judge is not required to order competence hearing based merely on counsel’s perception that minor may be incompetent); *People v Claxton* (1982) 129 CA3d 638, 667 (language of Penal Code §1368(b) is not self-initiating; it can only be read as a response to subdivision (a)). When counsel raises the issue of the minor’s competence and requests a hearing, the court should evaluate the request in light of other objective evidence of the minor’s competence. [Juvenile and adult statutes; adult cases.]

### **(3) TALK TO THE DEFENSE ATTORNEY**

Usually, defense counsel is the person declaring a doubt as to a minor’s competency. If the deputy district attorney is the person to declare a doubt regarding a minor’s competency, the court should place on the record the deputy district attorney’s

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<sup>10</sup> The court should afford the minor a court-generated investigation into whether there is a competency issue whenever possible. A bare opinion of a Court-Appointed Psychotherapist, with no evidence to the contrary, likely puts the issue of competency beyond the required court’s substantial evidence of doubt, thus an initial investigation should commence. The judge may find there is enough evidence to suspend proceedings and head toward a trial without an investigation. However, the judge should only bypass the investigation with caution because due process for the People and Probation suggests there be an initial investigation in which they will participate before the court makes its determination.

doubt. Regardless of which attorney declares a doubt, the court must ask minor's defense counsel for his/her opinion about the minor's competency on the record. Penal Code §1368(a). [Adult statute.] The court should ask questions of the attorneys and explore the issue sufficiently to allow the court to assess the situation.

The court should ask defense counsel if there has been any previous evaluations of the minor, including but not limited to Penal Code §1017 evaluations. If a Penal Code §1017 Court-Appointed Psychotherapist previously opined the minor was competent or incompetent, this is important information for the court to obtain. However, the court's doubt must be based on the current status of the minor, not past status of the minor.

Defense counsel's expression of an opinion of minor's mental competence under Penal Code §1368(a) does not violate the attorney-client privilege (Evid Code §954). Although the attorney's opinion of competence may be principally drawn from confidential communications with the client, merely giving the opinion does not reveal any protected information. *People v Bolden* (1979) 99 CA3d 375, 378. The court should avoid breaching any specific attorney-client privilege, but general questions about counsel's observations and conversations with the minor are recommended. [Adult statutes and case.]

Defense counsel is not required to respond to the court's inquiry. The statute merely affords counsel an opportunity to answer. *Tarantino v Superior Court* (1975) 48 CA3d 465, 470. [Adult case.] If defense counsel does not answer, the judge must make the initial determination regarding whether to engage the competency procedures based upon the information that is actually before the court.

The court may, but is not required to, allow defense counsel to present his or her opinion regarding minor's competency *in camera* if the court finds that there is reason to believe that attorney-client privileged information will be inappropriately revealed if the hearing is conducted in open court. Cal Rules of Ct, Rule 4.130(b)(2). [Adult rule.]

The judge cannot simply decide the matter based on an assertion by counsel. The judge must exercise discretion. A minor is entitled to a Penal Code §1368 hearing as a matter of right only if he or she (through the minor's attorney) comes forward with *substantial* evidence of present mental incompetence. *People v Welch* (1999) 20 C4th 701, 737-738. A competency hearing is mandated only if there is *objective* substantial evidence of minor's incompetence, regardless of counsel's *subjective* opinion. The opinion of counsel must include a statement of *specific reasons* supporting that opinion to constitute substantial evidence of incompetence. Cal Rules of Ct, Rule 4.130(b)(2). The decision is an internal determination by the judge. *People v Howard* (1992) 1 C4th 1132, 1164. [Adult statute, cases, and rule.]

After talking with defense counsel, the judge has to determine, at this point, whether to proceed with further initial inquiry of other parties. There may be no reason to go further. The court should err on the side of continuing with the initial inquiry if it may be fruitful because once the spectre of incompetency has been raised, a judge must exercise discretion in how to proceed. If the court decides there is no reason to go further, the judge should state on the record the court's finding that there is not substantial objective evidence to suspend the regular proceedings.

#### **(4) TALKING TO THE MINOR IS NOT NECESSARY**

Talking to the minor is not necessary. If there is an Evid Code §1017 Court-Appointed Psychotherapist opinion indicating the minor may be incompetent, talking to the minor will add little to the court's determination.<sup>11</sup>

A judge should take into consideration the minor's conduct in court, such as erratic behavior, if any.

If there are no parents available, the court may want to ask defense counsel or a probation officer whether the minor is taking anti-psychotic (psychotropic) medication for a mental or emotional disorder. An inquiry about medications may lead to information regarding the minor's past mental health, including the name of a treating physician and whether the unusual courtroom behavior is the result of a failure to take medication.

Any discussions with the minor should be on the record.

#### **(5) TALK TO THE PARENTS ABOUT HISTORY**

The court should ask parents questions that may help the court understand the nature of the minor's issues. All discussions with parents should be on the record. Consider asking the parents:

- Is the minor taking any medicine right now? What is/are the name(s) of the medication(s)? Why is the minor taking the medication?
- Is the minor taking medication or antipsychotic (psychotropic) medication for a mental or emotional issue? Has there been a change in medication? Has the minor performed better/worse on certain medications? Is the minor properly/improperly medicated? Is the minor's courtroom behavior the result of a failure to take medication? Is the behavior transitory?
- Has the minor been diagnosed as suffering from a mental disorder in the past?
- Has the minor ever been hospitalized for an emotional or mental issue? If so, when and where?
- Who is minor's treating physician, psychologist or psychiatrist? Has the minor ever been assessed for emotional or mental disorders? [But the judge should be mindful that a minor being diagnosed with a mental disorder does not mean a minor is incompetent. The judge is merely collecting relevant information.]
- Did minor's behavior arise suddenly, is it long standing, has it been growing worse over time, or have there been intermittent episodes of mental disorder? Does the minor do better in the mornings? Afternoons? Is the episode something that may pass in a day or two?
- Is there anything else you know that would help me with my decision regarding the minor's competency?

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<sup>11</sup> There is no legal prohibition to the judge talking to the minor. The adult practice manual for competency recommends the judge talk with the defendant and indicates there is no 5<sup>th</sup> Amendment right to remain silent. Furthermore, anything the minor says cannot be used against the minor in the underlying case, pursuant to case law and this Protocol. (More information on this can be found below.)

There may be rare cases when the court may want to talk to the minor. For example, when the minor protests his attorney calling him incompetent, or when the minor is self-represented following a *Faretta* hearing.

## **(6) TALK TO THE PROBATION OFFICER**

The judge should consider asking the probation officer(s) on the record about the minor's competence. Third party observations or opinions, such as those of probation officers, are relevant during competency proceedings. *People v Rodrigues* (1994) 8 C4th 1060, 1109. [Adult case.] Consider asking the probation officer(s) about his/her/their initial intake interview, or subsequent contacts with the minor, including but not limited to:

- When you first met with the minor, did you talk about the allegations?
- From the response you received from the minor, did it appear to you that the minor understood what you were saying?
- From the response you received from the minor, did it appear to you that the minor understood the allegations?
- Did you have any concern that the minor did not understand what the allegations were?
- Did you believe the minor understood he/she could either admit or deny the allegations?
- Based upon your interaction with the minor, did the minor appear to have the capacity to communicate with you?
- Since the initial intake interview, have you had subsequent discussions with the minor? At that time, did you have any concern about the minor's competency?
- What was the last time you talked to the minor about the allegations? At that time, did you have any concern about the minor's competency?
- Is there anything else you know that would help me with my decision regarding the minor's competency?

## **(7) CALL A RECESS**

If appropriate, the court may declare a recess on the court's own motion, or if requested by the minor or counsel. Though not necessary, the judge should consider declaring a recess for a reasonably necessary time to permit counsel to confer with the minor and to form an opinion about minor's mental competence. Penal Code §1368(a). [Adult statute.] The judge may ask counsel to take 20 minutes to go over the allegations and/or the waiver form with the minor in a meeting room outside the courtroom, to see if the minor is presently competent.

## **(8) EVIDENCE CODE §730 EXPERT USUALLY NOT NECESSARY**

Evid Code §730 permits a judge to appoint an expert to help the judge with an issue.<sup>12</sup> Before making an initial determination whether to proceed under Welf & Inst Code 709, or whether to proceed with a court-ordered evaluation or competency hearing, a judge may appoint a mental health expert under Evid Code §730 to help determine whether to order a competency hearing at all.<sup>13</sup> [Adult and juvenile statutes.]

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<sup>12</sup> This expert cannot be an evaluator who has already assessed the minor in the current suspended proceedings. See different categories of evaluators, including different qualifications and limitations, in Section One, "Umbrella Principles of This Protocol."

<sup>13</sup> Adult trial courts rarely but sometimes order mental health examinations before deciding whether a full-scale Penal Code §1368 competency hearing is warranted. Evidence Code §730 authorizes the trial court to appoint an expert when it appears that expert evidence is or may be required by the court or a party. If there is a reasonable

As a general rule, an Evid Code §730 expert is not needed in competency cases. This is so because in most cases there will already be an Evid Code §1017 opinion. Also, most judges will be able to make common sense findings based upon a reading of the law and this Protocol. The “doubt” that triggers the possible suspension of proceedings is a judicial determination, not an expert determination. Adding another layer of process may slow the progress of treatment and/or the jurisdictional case. But in some situations the judge may need expert assistance in parsing some mental health issues to determine if competency is even at issue.

If an Evid Code §730 expert is appointed, set a reasonably short deadline for receipt of the expert’s report. A mental health expert appointed by the court should be ordered to provide a report to the court. The court’s Legal Process Clerk Supervisor, who handles the process of Evid Code §730 experts, must provide copies for defense counsel and the prosecutor upon receipt. The purpose of the report is to guide the court in determining whether to order a competency hearing.

### **(9) REGIONAL CENTER ASSESSMENT**

The court can consider whether there has previously been an assessment of competency and/or restoration of competency through the State Regional Center for persons who are developmentally disabled.<sup>14</sup> Collecting past information from the Regional Center may help determine if the minor may be currently incompetent to withstand trial.

### **(10) DETERMINE WHETHER SUBSTANTIAL EVIDENCE OF DOUBT EXISTS**

#### **Legal Standard**

“If the court finds substantial evidence raises a doubt as to the minor’s competency, the proceedings shall be suspended.” Welf & Inst Code §709. [Juvenile statute.]

The substantial evidence of doubt analysis answers only the question of whether a competency hearing is mandatory or discretionary. The hearing must be ordered if there is substantial evidence of doubt of the minor’s incompetence. If the evidence casting doubt on an accused’s present competence is less than substantial, the court has discretion in deciding whether to order a competency hearing. *People v Welch* (1999) 20 C4th 701, 742; *People v Hale* (1988) 44 C3d 531, 540; *People v Pennington* (1967) 66 C2d 508, 518. [Adult cases.]

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possibility, even if it does not rise to the level of substantial evidence, that the minor is unable to understand the proceedings or assist in his or her own defense, the trial court may order a mental health examination before deciding there is no need for a competency hearing. *People v Visciotti* (1992) 2 C4th 1, 35 (granting motion for appointment of an expert under Evid C §730 before consideration by counsel and the court of whether either has a doubt about the defendant’s competence); *People v Campbell* (1987) 193 CA3d 1653, 1663 (trial court did not abuse discretion by failing to order mental health evaluation of a defendant who testified coherently in “stream of consciousness” style). [Adult cases.]

<sup>14</sup> For details on developmental disabilities and the Regional Center process, see within Section Six the subsection titled “State Examination of Developmentally Disabled Minors.”

The judge must make a finding whether substantial evidence of doubt exists to suspend proceedings and continue to a competency trial. Following the completion of a thorough initial inquiry, the court must determine whether substantial evidence of doubt exists to suspend regular juvenile proceedings, and the judge has discretion in deciding whether to order a competency hearing. *People v Welch* (1999) 20 C4th 701, 742. [Adult case.]

### **Retroactive Determination Not Required**

The court must only determine a minor's *current* competency. Code 709(a) conforms to all previous statutes and case law on this issue. It states "A minor is incompetent to proceed if he or she lacks sufficient *present* ability..."

Generally, the law does not provide for a retroactive determination of a minor's competence. The court does not have a duty to determine the question of whether the minor was competent during prior adjudications, or during the arrest in the current case. There is no right to a retroactive look into a person's competency during a trial when the question is tendered by defense counsel at the time of sentencing. *People v Day* (1988) 201 CA3d 112, 120. However, some appellate cases have held that retrospective competency hearings may be appropriate in rare cases when there is sufficient evidence of a person's mental state at the time of a trial (on the criminal charges) on which to base a subsequent competency determination. *People v Ary* (2004) 118 CA4th 1016, 1025–1029 (case remanded to trial court for a determination of whether retrospective hearing should be held; trial court record contained information potentially relevant to a competency hearing, i.e., extensive expert testimony regarding defendant's mental retardation presented at a pretrial hearing on the defendant's competence to waive his Miranda rights and the voluntariness of his confession); *People v Kaplan* (2007) 149 CA4th 372, 387–389 (case remanded to trial court for a determination of whether retrospective hearing should be held; court record contained reports from two psychiatrists addressing the competency of the defendant at the beginning of trial; either or both psychiatrists might be available to explain or elaborate on the observations and conclusions set forth in their reports at a retrospective competency hearing); *People v Robinson* (2007) 151 CA4th 606, 617–618 (case remanded to trial court for a retrospective competency hearing; disputed competency hearing occurred only two years previously; trial record contained both expert's report on defendant's mental competence at that time and statements by defendant from which his mental competence could be assessed). [Adult cases.]

### **What Constitutes Substantial Evidence**

The question of what constitutes substantial evidence of a minor's incompetence under Penal Code §1368 cannot be answered by a simple formula applicable to all situations. *People v Laudermilk* (1967) 67 C2d 272, 283. Evidence is substantial if it raises a reasonable or *bona fide* doubt concerning the minor's ability to understand the nature of the juvenile proceedings against him or her, or to assist in his or her defense. *People v Rogers* (2006) 39 C4th 826, 847; *People v Hayes* (1999) 21 C4th 1211, 1282 (judge properly denied defendant's motion for competency hearing). Substantial evidence is not just any evidence that supports the possible fact. Substantial evidence requires evidence that is "reasonable in nature, credible and of solid value." *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873. [All cases in this section are adult cases.]

A single doctor's report that concludes that the minor is incapable of standing trial, even in the face of other reports to the contrary, is substantial evidence requiring that a Penal Code §1368 proceeding be instituted. *People v Burney* (1981) 115 CA3d 497, 503; *People v Zatko* (1978) 80 CA3d 534, 547–548.

The substantial evidence test is satisfied if a qualified mental health expert who has had sufficient opportunity to examine the accused states under oath with particularity that, in his or her professional opinion, the accused is, because of mental illness, incapable of understanding the purpose or nature of the juvenile proceedings or is incapable of assisting in his or her defense or cooperating with counsel. *People v Pennington* (1967) 66 C2d 508, 519; *People v Tomas* (1977) 74 CA3d 75, 91.

Even though case law speaks to the judge's need to exercise discretion, the court must order a competency hearing, regardless of counsel's or the judge's personal opinion, when substantial evidence of the accused's incompetence has been introduced. Cal Rules of Ct 4.130(b)(1). Substantial evidence of incompetence is sufficient to require a full competency hearing even if the evidence is in conflict. *People v Welch* (1999) 20 C4th 701, 738.

If the court properly exercises its discretion, and denies a competency hearing, the court is unlikely to be challenged or reversed on appeal. If the court orders the competency hearing in a close case and the hearing is actually held, it is highly unlikely to be challenged or reversed on appeal. An erroneous *denial* of a competency hearing (by not initially considering a competency hearing, or by not applying discretion) may lead to reversal of the judgment. Penal Code §1368(b); *People v Hale* (1988) 44 C3d 531, 540.

### **What Does Not Constitute Substantial Evidence**

Courts have held that each of the following factual situations, standing alone, did not present substantial evidence of doubt about minor's mental competence:

- Subject's bizarre actions or statements. *People v Welch* (1999) 20 C4th 701, 742.
- Counsel's statement that subject did not understand the proceedings; psychiatrist's report that subject showed no mental abnormality and was able to cooperate and assist trial counsel. *People v Stewart* (1979) 89 CA3d 992, 995.
- Psychiatrist's testimony that the subject suffered some type of disassociative disorder that probably rose to the level of a multiple personality disorder; no testimony that the subject was likely to disassociate during the trial or that the alleged disorder would interfere with subject's ability to understand the trial process or assist defense counsel. *People v Rogers* (2006) 39 C4th 826, 848–849.
- Evidence of incompetence is not substantial if it raises merely a suspicion of lack of present competence but does not purport to state facts of a present lack of ability, through mental illness, to participate rationally in a trial. *People v Hayes* (1999) 21 C4th 1211, 1281; *People v Medina* (1995) 11 C4th 694, 733.
- Defense counsel's statements that subject was incapable of cooperating in his or her defense. *People v Welch* (1999) 20 C4th 701, 742 (disagreement between defense counsel and subject about which defense to employ did not require court to order competency hearing).

- Mental health report that did not express any opinion on subject's ability to assist in defense, cooperate with counsel, or understand the purpose or nature of the proceedings. *People v Beivelman* (1968) 70 C2d 60, 73 (disapproved on other grounds in 27 C3d at 33). See also *People v Leever* (1985) 173 CA3d 853, 864 (letter paraphrasing doctor's report gave no hint of doctor's opinion of competence).
- The subject was insane at time of the offense, rather than at the time of trial. *People v Burney* (1981) 115 CA3d 497, 503.
- Subject's "paranoid distrust of the judicial system," and statements that defense counsel was in league with the prosecution. *People v Welch* (1999) 20 C4th 701, 739 and 742.
- Cursing and disruptive actions required removal from the courtroom. *People v Medina* (1995) 11 C4th 694, 735.
- Bizarre answers to questions on cross-examination (demonstrated hostility to prosecution and court, but not incompetence to testify). *People v Cooks* (1983) 141 CA3d 224, 324.
- The minor does not know the difference between right and wrong. *In Re: Ricky S.* (2008) 166 Cal. App. 4th 232.
- The minor is insane or "suffers from mental illness." If the court finds insanity, it continues to have regular jurisdiction over the child pursuant to Welf & Inst Code 602. *People v Superior Court (John D.)* (1979) 95 CA3d 380, 396.
- Statements of the subject's family that the subject suffered from migraine headaches and that he had a possible epileptic seizure when he was two or three years old; defense psychiatrist's undetailed opinion that subject suffered from drug dementia, and opinion based on reports from another psychiatrist that had examined subject. *People v Rodrigues* (1994) 8 C4th 1060, 1110.
- Psychiatrist's testimony that high doses of medication had been prescribed for subject, that subject had experienced short-term memory loss on one occasion, and that he may have been suffering from underlying depression. *People v Danielson* (1992) 3 C4th 691, 726, disapproved on other grounds in 25 C4th 1046, 1069 n13 (no evidence that subject was so overmedicated that he could not understand the nature of the proceedings or cooperate with counsel). See also *People v Medina*, 11 C4th 694, 732 (subject's assertion that antipsychotic medicine concealed his incompetence was based on unsupported speculation).
- Mental health expert's testimony that subject was immature, dangerous, psychopathic, or homicidal, or similar diagnosis that includes few references to subject's ability to assist in his or her own defense. *People v Welch* (1999) 20 C4th 701, 742; *People v Hays* (1976) 54 CA3d 755, 760 (psychiatric reports found subject depressed and suffering from mild psychosis but expressed no doubt about subject's mental competence).
- Psychiatrist's testimony that subject appeared to be schizophrenic and delusional, which was based solely on observations of subject's in-court demeanor, and not from any actual examination or testing of subject. *People v Weaver* (2001) 26 C4th 876, 952–954.
- Subject's inappropriate emotional response to a serious trial; statements of stepparents that subject's behavior during trial was strange; earlier diagnosis by a court-appointed psychiatrist that subject had a personality disorder; the fact that subject had suffered head injuries at an unspecified time in the past. *People v Claxton* (1982) 129 CA3d 638, 667 (counsel had declined to put on witnesses, saying his remarks alone were

sufficient under Penal Code §1368(b)). See also *People v Stiltner* (1982) 132 CA3d 216, 222.

- Psychiatrist’s testimony that subject suffered permanent amnesia of the events surrounding the criminal offense. *People v Amador* (1988) 200 CA3d 1449.
- Testimony of two psychiatrists that subject was unable to tolerate stressful situations and that the stress of a trial would make it difficult for him to testify on his own behalf; counsel’s statements that subject could not retain information long enough to prepare his testimony. *People v Frye* (1998) 18 C4th 894, 948–953.
- Subject’s assertion that he was “mentally” absent because his chronic back pain and associated symptoms prevented him from concentrating on the proceedings or communicating with counsel; subject was lucid, coherent, and rational, and the court reasonably accommodated the special needs of the subject. *People v Avila* (2004) 117 CA4th 771, 778–781.

Even though no single factor constitutes substantial evidence, several factors in combination may support a reasonable inference of lack of present mental competency within the meaning of Penal Code §§1367–1368. See *People v Humphrey* (1975) 45 CA3d 32, 38 (evidence supporting reasonable inference of lack of present competence required trial court to order hearing).

### **When The Court Does Not Find Substantial Evidence Exists**

If the court finds there is no substantial evidence to doubt the minor’s competency, the underlying delinquency proceedings will not be suspended and the court will continue with the underlying delinquency proceedings.

If the minor is in custody, the minor will continue to receive the level of care determined appropriate by the court. If the minor is not in custody, the Probation Department will recommend and the court may order appropriate referrals for mental health treatment, if indicated.

Even if the court finds the minor to be competent, if the court suspects the minor may be a danger to self, a danger to others, or gravely disabled, the court may order a mental health evaluation (if a current one does not exist). The court may also refer the minor to be evaluated under the LPS Act, or be the subject of a guardianship.<sup>15</sup>

Even if the court finds the minor to be competent, if the court suspects the minor may have a developmental disability, the court may refer the minor to the San Andreas Regional Center for an evaluation.<sup>16</sup>

Even if the court finds the minor to be competent, if the minor suffers from a DSM-IV mental disorder(s), the court or attorneys may consider referring the minor to

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<sup>15</sup> For a definition of “gravely disabled,” see “Definitions” section within Section Eleven; Welf. & Inst. Code §§ 705, 6550, *et seq.* For details of the process see Section Eleven.

<sup>16</sup> For details on developmental disabilities and the Regional Center process, see within Section Six the subsection titled “State Examination of Developmentally Disabled Minors.”

the Court for the Individualized Treatment of Adolescents (Juvenile Mental Health Court), which focuses on maintaining the minor at home and treating the mental disorder(s). See separate protocol of the Court for the Individualized Treatment of Adolescents (CITA).

### **When The Court Finds Substantial Evidence Exists**

When substantial evidence appears and a doubt exists about the competence of the minor, no matter how persuasive other evidence may be to the contrary, the court must suspend regular proceedings, order a Welfare & Inst Code §709 competency hearing, and implement the relevant parts of this Protocol.

### **(11) ANNUNCIATE DOUBT OR NON-DOUBT ON RECORD**

If after thorough inquiry, a “substantial evidence doubt” arises in the judge’s mind about the minor’s mental competence during a proceeding before judgment, the judge must state that doubt on the record. Penal Code §1368(a). [Adult statute.] The judge should also state on the record whether the judge does not have a “substantial evidence doubt.” The judge should state:

“The court has conducted the initial inquiry into the matter of the competency of minor \_\_\_\_\_. The court has taken into consideration whether there is substantial evidence that the minor may not be competent. The court [has / does not have] a “substantial evidence doubt” whether the minor possesses present mental competence to understand the juvenile proceedings and to communicate effectively with his/her attorney. The basis for the court’s finding is [choose which apply]:

- The actions of the minor in the courtroom [describe actions];
- Statements of defense counsel [describe];
- Statements of probation officer [describe];
- Statements of the deputy district attorney [describe];
- Statements of the minor [describe];
- Statements of the family members [describe];
- Opinions of the Evid Code §730 expert [describe];
- Opinions of the Penal Code §1170 expert [describe];
- Content of probation reports [describe];
- Content of police reports [describe];
- Other information [describe];
- Lack of substantial evidence in the form of \_\_\_\_\_.

If the court does not have a doubt, continue with the regular juvenile proceedings.<sup>17</sup> If the court does have a doubt, proceed with this Protocol.

### **(12) ADVISE THE MINOR OF HIS/HER RIGHTS**

The minor needs to be advised of his/her rights concerning competency proceedings. Although in some cases a minor may not have the capacity to understand his/her rights, an attempt should be made to advise each minor. If the minor does not

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<sup>17</sup> As is repeated throughout this Protocol, the court should be careful before denying a minor the right to a competency trial when there is substantial evidence of doubt. A judge may exercise his/her discretion, but a judge cannot ignore compelling facts before the judge. Please read this entire Protocol before deciding to return to the underlying juvenile case.

have the capacity to understand his/her rights, the court shall nonetheless continue with the competency proceedings.

The court should inquire if the attorney wants to advise the minor of his/her rights, or if the attorney wants the court to advise the minor.

If the attorney advises the minor.

During the advisement, the following issues should be addressed: explain the process to the minor, including the scope of the initial evaluation; include a definition of psychological testing, a definition of the word “competency,” and the purpose of the competency proceedings (to ensure that the minor understands what is going on); and that the minor will have the same attorney throughout the competency proceedings. The following rights should be covered:

- At the competency trial you have the right to see and hear the witnesses that will testify.
- You have a right to have those witnesses questioned by your attorney.
- You have the right to bring information/evidence to the competency trial.
- You have a right to have your own witnesses testify at the competency trial.
- If your witnesses don’t want to come to court, the judge can make them come and it doesn’t cost you anything to have the judge do this.
- You have the right to tell your story (testify) at the competency trial
- You also have the right to stay quiet and nobody can make you say anything if you don’t want to.

If the court advises the minor.

The attorney for the minor may request the court advise the minor, or the court on its own may decide to provide an explanation to the minor. The following are suggested forms of advisement if the court thinks further explanation is appropriate:

“\_\_\_\_\_ [name of minor] I am wondering whether you understand what is going on here in court [and/or whether you can talk with your attorney in a way that is fair for us to continue with the regular juvenile case] about the allegation that [you stole beer from Safeway.] I will set up a trial about whether you understand what is going on. That trial is called a competency trial.

“Competency is a fancy word that means “a person knows what is going on.” Allegation is a fancy word that means “someone said you [stole beer from Safeway].” It will be a while before we can have the competency trial. First, I am going to have an expert meet with you and tell me what he or she thinks about if you know what it going on.

“Then we may have a competency trial.

“Your attorney, Mr./Ms. \_\_\_\_\_, will still be your attorney in the competency trial.

“At the competency trial, you can listen to all the witnesses who may come to court and say things about whether you understand what is going on.

“By using your attorney, you can ask all of the witnesses whatever questions you may have.

“At this competency trial, you can bring your own information or evidence to court.

“At this competency trial, you can have witnesses come to court even if those witnesses do not want to come to court. If there are witnesses that you want to come to court, I can make those witnesses come to court. It will not cost you any money to make the witnesses come to court.

“During the competency trial, you can get up and tell me your side of the story about whether you understand what is going on about the allegations that [you stole beer from Safeway].

“During the competency trial, if you do not want to say anything, you do not have to say anything about whether you understand what is going on. It will be your choice and your attorney’s choice to decide if you will say anything at the competency trial.”

“At the end of the competency trial, if it turns out you understand what is happening, we will go back to the regular juvenile case about the allegation that you [stole beer from Safeway].

“If it turns out you do not understand what is going on about the allegation that you [stole beer from Safeway], you will go on to other steps. If you do not know what is going on, I will make sure that you get into a competency program that will try to help you understand what is going on. The goal is to make it so you understand what is going on. That is my goal, that is your attorney’s goal, that is Mr. /Ms. \_\_\_\_\_ [deputy district attorney]’s goal, that is your family’s goal, and that should be your goal.

“This competency program to help you understand what is going on in court may take a few months, or it may take up to three years. While you are in this competency program that lasts from a few months to three years, you may be living at home, in Juvenile Hall, or some other place I decide will be the best place for you.” [Note: the statutes refer to “hospitals” and “facilities” but the mention of these words are not necessary for the advisement of rights. The goal is not to scare the minor, but merely to let him/her know what is going on, and to humanely advise the minor of possible worst case scenarios.]

“At the end of the competency program to help you understand what is going on here in court, I will make a decision whether you understand what is going on about the allegations that [you stole beer from Safeway]. If it turns out you understand what is happening, we will go back to the regular juvenile case about the allegation that [you stole beer from Safeway]. I cannot tell you right now what will happen, because none of us knows.”

“If you have any questions, please talk to your attorney and your attorney may answer, or he/she may ask me to answer.”

### **(13) SUSPEND PROCEEDINGS**

Once the court has ordered a competency hearing, the juvenile proceedings must be suspended until a trial on the minor's competency has been concluded and the minor either is found mentally competent or has his or her competency restored. Welfare & Institutions Code §§ 709 and 6551 [juvenile statutes]; Penal Code §§ 1368(c) and 1372; [adult statutes]; Cal Rules of Ct Rule 4.130(c)(1) [juvenile and adult Rule]; *People v Hale* (1988) 44 C3d 531, 540 (court is divested of jurisdiction to proceed pending express determination of competence). [Adult case.] Furthermore, as a general principle, neither the minor nor counsel can waive the question of competence after substantial evidence of incompetence has been presented and the competency hearing has been ordered. *People v Hale* (1988) 44 C3d 531, 541.

The court should say on the record:

“Further proceedings in this case are suspended until the question of the mental competence of \_\_\_\_\_ [name of minor] has been determined. Madame Clerk, please enter “Proceedings Suspended pursuant to Welfare and Institutions Code § 709” in the minute order, and on the “Text” area of all future court calendars, until further order of the court.” *People v Howard* (1992) 1 C4th 1132, 1164. [Adult case.]

Once proceedings are suspended, the court and probation have an obligation to not leave the minor without basic services. For purposes of resource management, the Probation Department will treat a minor whose jurisdiction has been suspended as a minor who is “pre-court and pre-petition,” which entails minimal supervision. Therefore, minimum services can be provided, including but not limited to these when the minor is not in custody:

- Pre-court Community Release Program
- Pre-court Electronic Monitoring Program, where appropriate
- Monitor whether the minor attends court hearings
- Monitor whether the minor keeps necessary appointments
- Monitor whether the minor is attending school
- Monitor whether the minor remains at home, or placement
- Monitor whether the minor is in the Competency Restoration Program
- Ability to detain the minor
- Make sure ancillary services are provided.<sup>18</sup>

### **(14) OBTAIN STIPULATION TO PROCESS**

Review the various options in this Protocol regarding how to proceed with the competency evaluation that will precede the competency trial. Discuss the options with the attorneys. As a general rule, all parties in Juvenile Justice Court will agree to not have a 72 hour hold pursuant to Welf & Inst Code §705 but rather proceed directly to a Juvenile Competency Forensic Evaluation.<sup>19</sup> Because the case of *In re Patrick H.* (1997)

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<sup>18</sup> See ancillary services available under “Multi-Disciplinary Team” in Section Six, below.

<sup>19</sup> Almost every minor in Juvenile Justice Court is represented by a signatory to this Protocol. In the rare instance where an out-of-town private defense counsel appears and is unaware of the law or this Protocol, the judge should provide a copy of this Protocol to

54 Cal.App.4<sup>th</sup> 1346, suggests a 72 hour hold is required, if the court does not order a 72 hour hold, the court should have the parties stipulate to not having a 72 hour hold. Place the stipulation on the record. Incorporate by reference this Juvenile Justice Court Competency Protocol as the reasoning behind the stipulation.

The court does not have to accept the stipulation of the parties if the court believes the stipulation is not in the best interest of the minor and/or community. The court at any time can order a 72 hour hold of the minor for evaluation, regardless of the competency issues presented. But the goal is to avoid a 72 hour hold unless absolutely necessary.<sup>20</sup>

If there is no stipulation, the court will order what the court deems is appropriate absent the stipulation.

### **Judge's Continuing Duty**

The trial judge has a continuing duty to make proper inquiry regarding a minor's competency to stand trial, enter a plea, or to understand the nature of the sentencing procedure. This duty may not be avoided by relying solely on a pretrial decision or pretrial psychiatric reports when, during the trial or prior to sentencing, the judge is presented with a substantial change of circumstances or with new evidence that casts a serious doubt on the validity of the pretrial finding of competence/incompetence. *People v Tomas* (1977) 74 CA3d 75, 91 (evidence of incompetence sufficient to require hearing contained in diagnostic report prepared in connection with sentencing); *People v Zatko* (1978) 80 CA3d 534 (doctor's trial testimony did not present change of circumstances or new evidence casting serious doubt on pretrial finding of present sanity). The court is obligated to initiate new Penal Code §1368 proceedings, however, only if the minor presents substantially new evidence or changed circumstances. *People v Murrell* (1987) 196 CA3d 822, 827. [As stated above, this entire proceeding section cited adult cases and statutes.]

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the attorney and point out the benefits and detriments of the 72 hour hold as found in Section Eleven. If the attorney requests a 72 hour hold, the judge should consider such a request. A writ may delay the process longer than affording the minor an unnecessary 72 hour hold. Giving the minor a 72 hour hold which briefly delays the court from getting to the Competency Restoration Program suggested by this Protocol will probably have little downside, other than the loss of three days and possible long-term hospitalization of the minor that would flow from the 72 hour hold. Welf & Inst §709 probably makes a 72 hour hold unnecessary. Regardless, the prudent path is for the judge to obtain a stipulation to the process of this Protocol and avoid a 72 hour hold.

<sup>20</sup> See Section Eleven.

### **SECTION THREE:** **JUVENILE COMPETENCY FORENSIC EVALUATION**

Welf & Inst Code §709(b) states:

“The court shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor’s competency.”<sup>21</sup>

Therefore, if the court finds “substantial evidence doubt” exists as to a minor’s competency, the underlying delinquency case is suspended, and the matter is heading toward a competency trial, the court must order that a competency evaluation be performed prior to the trial.

#### **Possible Stipulation by the People**

If defense counsel previously sought and acquired an Evid Code §1017 Court-Appointed Psychotherapist opinion that the minor is incompetent, the court may want to inquire of the deputy district attorney if the People want to stipulate to that opinion, and proceed directly to a Competency Trial, or (in the alternative) bypass the Competency Trial and commence Competency Restoration Services. This stipulation may be forthcoming when it is obvious the minor is incompetent. If there is a stipulation, proceed to either Section Five “Competency Trial,” or Section Seven “Program for Restoration of Competency.”

The People are not required to stipulate to incompetency, and if they do not, a Pre-Trial Competency Evaluator must be appointed. If so, proceed with this Section Three.

#### **Ordering the Juvenile Competency Forensic Evaluation**

The court will order the court’s Legal Process Clerk Supervisor to randomly draw one name from the available Pre-Trial Competency Evaluators on the Juvenile Justice Court Pre-Trial Competency Evaluator Panel list in order to perform an evaluation.<sup>22</sup> The

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<sup>21</sup> Welf & Inst Code §709, which became law in September 2010, does not define what “or other condition” means. Arguably, the statute broadens the *basis* for incompetency to “anything.” Also, “impairs” the minor’s competency has never been the standard in any court. Either the minor is competent or incompetent. A judge should focus on the judicial determination required: whether the judge finds the minor is “incompetence to stand trial by a preponderance of the evidence.” See details later in Section Five under the subsection “Presumption of Competence” and “Burden of Proof.”

<sup>22</sup>The Juvenile Justice Court of Santa Clara County has a separate standing order and a court multi-disciplinary committee for maintaining the Juvenile Justice Court Pre-Trial Competency Evaluator Panel list. The committee selects competent evaluators, ensures qualification, sets education and training requirements, and monitors issues that may arise. The panel list shall be kept up to date, and the evaluators must be periodically reviewed and approved by the court. The list is maintained with an eye toward ensuring the evaluators are generally acceptable to all parties involved. In this way, the opinions of the evaluators will be respected and the system of handling competency will work smoothly. Of course, this will not avoid all litigation, but it will avoid unnecessary litigation that is based on pre-conceived distrust of the evaluators. There is also a forensic evaluator application procedure for persons wanting to get on the court’s list of experts.

Pre-Trial Competency Evaluator shall not be the same evaluator as the Evid Code §1017 Court-Appointed Psychotherapist (if a §1017 report was previously ordered for this minor). If there was a prior §1017 psychotherapist(s) the judge must inform the Legal Process Clerk Supervisor to eliminate that evaluator(s) from the list of potential evaluators for the Welf & Inst Code §709(b) Pre-Trial Competency Evaluator needed for this minor’s potential trial.

All participants in Juvenile Justice Court formulated this Juvenile Competency Protocol and agreed to the use of only one Pre-Trial Competency Evaluator. Nonetheless, the court may appoint any number of initial experts the court deems appropriate.<sup>23</sup>

After the receipt of the Pre-Trial Competency Evaluator’s report, the court may reject the report if good cause exists to do so. The court may order a supplemental report from the same Pre-Trial Competency Evaluator, or choose to have a second and/or third Pre-Trial Competency Evaluator render an opinion at any time prior to trial.

### **Calendaring Future Court Hearings**

On the day the court orders a Pre-Trial Competency Evaluation, the matter should be continued on the court’s calendar 18 calendar days out for an “Ex Parte Review - Receipt of Psychological Report.” This is for the attorneys to get copies of the Pre-Trial Competency Evaluator’s report. The minor’s attorney will immediately review this report with the minor.

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Regarding the random selection of the evaluator, this is handled by the Juvenile Court Legal Process Clerk Supervisor, without input from the judge or attorneys.

<sup>23</sup> Regarding the number of expert opinions needed for the trial, Welf & Inst Code §709(b) provides for one evaluator: “an expert.” California Rules of Court, Rule 5.645 (d)(1), states only one evaluator is necessary: “The court may appoint an expert to examine the child to evaluate the child’s capacity to understand the proceedings and to cooperate with the attorney.”

There may be some exceptions in rare cases, subject to the discretion of the court.

Here is a matrix of possibilities in adult court. It is included here for analysis and information purposes. It is not included as a suggestion that the court appoint more than one evaluator:

The adult statutes provide for either one or two court-appointed evaluators. Penal Code §1369(a); CRC 5.645; Tyrone B. v Superior Court (2008) 164 CA4th 227, 231.

If the minor or defense counsel informs the court that the minor is seeking a finding of mental incompetence, the court must appoint at least one psychiatrist or licensed psychologist. The court is only required to appoint one expert. Penal Code §1369(a); Cal Rules of Ct 4.130(d)(1)(A).

If the minor or defense counsel informs the court that the minor is not seeking a finding of mental incompetence, the court must appoint two psychiatrists, licensed psychologists, or a combination of the two. Penal Code §1369(a); Cal Rules of Ct 4.130(d)(1)(B). The court is never required to appoint more than two experts. (Use Notes to 4.130(d)(1), and legislative history.) In this case, the defense and the prosecution may each name one of the psychiatrists or licensed psychologists from the Juvenile Justice Court Competency Evaluator Panel. Penal Code §1369(a); Cal Rules of Ct 4.130(d)(1)(B).

When the minor personally claims that he or she is competent, but defense counsel seeks a finding of incompetence, the court should appoint two experts. *People v Harris* (1993) 14 CA4th 984, 996.

On the day the court orders a Pre-Trial Competency Evaluation, the matter should also be continued on the court's calendar 20 calendar days out for a "Parte Competency Review." This hearing is for the minor to appear in court, and for the attorneys and judge to discuss the Pre-Trial Competency Evaluator's competency report.

The Pre-Trial Competency Evaluator should have the evaluation completed and a report delivered to the court's Legal Process Clerk Supervisor three days prior to the next Parte Competency Review. That would be 17 calendar days from the date of the order appointing the Pre-Trial Competency Evaluator. The Legal Process Clerk Supervisor shall tell the evaluator what his/her deadline is and ask if the evaluator can return a report within that time limit. If the evaluator cannot return an evaluation within the deadline, the Legal Process Clerk Supervisor shall select another Pre-Trial Competency Evaluator at random from the list.

### **Custody of Minor**

If the court orders a Court-Appointed Competency Evaluation using the Juvenile Justice Court Pre-Trial Competency Evaluator Panel, the evaluation can be done either in custody or out of custody. If at the time a doubt is declared the minor was already detained for reasons other than competency (for example: to protect the minor; likelihood of running away; risk to the community), it is likely the minor will remain in custody. If the minor was not previously detained, it is likely the minor will remain out of custody. The minor should not be ordered into custody just to effectuate an evaluation of the minor.

However, the court must consider two things: whether information revealed in the initial competency process may require the minor to be detained because he/she is a risk to self or others; and will the court's order for an assessment be executed if the minor remains out of custody. As a general rule, minors should be placed in the least restrictive setting. Being out of custody is less restrictive than being in custody. But if the minor or his/her family has been uncooperative, they may not follow through with the court's order for an assessment if the minor is left at home. If the probation department is not inclined to file the necessary paperwork to have the minor detained for a new allegation or change of circumstances, the court has the alternative option of ordering the minor into custody for a Welf & Inst Code §709 evaluation (or for a 72 hour hold, assuming the grounds for a 72 hour hold exist).<sup>24</sup> The court can make any reasonable orders necessary to effectuate the competency process. If the minor is out of custody, it is suggested that the court allow a chance for the minor to be evaluated out of custody before considering placing the minor in custody.

Regardless of where the minor is placed, the court should issue an order allowing the probation officer to supervise the minor.

### **Pre-Trial Competency Evaluator Qualifications**

Welf & Inst Code §709(b) states:

"The expert shall have expertise in child and adolescent development, and training in the forensic evaluation of juveniles, and shall be familiar with competency standards and accepted criteria used in

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<sup>24</sup> See Section Eleven.

evaluating competence. The Judicial Council shall develop and adopt rules for the implementation of these requirements.”<sup>25</sup>

In Santa Clara County, the Juvenile Justice Court Forensic Evaluators Oversight Committee sets standards and provides training for Pre-Trial Competency Evaluators.<sup>26</sup>

The qualifications for Pre-Trial Competency Evaluators are similar to the qualifications of the Competency Restoration Counselors.<sup>27</sup>

### **Court Instructions to Pre-Trial Competency Evaluator**

Upon each appointment of a Pre-Trial Competency Evaluator, the Juvenile Court’s Legal Process Clerk Supervisor shall issue appropriate instructions by way of a cover letter to the Pre-Trial Competency Evaluator (even if the evaluator has done numerous competency evaluations for the court in the past).<sup>28</sup>

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<sup>25</sup> The Judicial Council has yet to develop and adopt rules for expert qualifications. When they are developed, they will be incorporated into this Protocol.

<sup>26</sup> The Juvenile Justice Court Forensic Evaluators Oversight Committee maintains appropriate instructions as part of its standards and training oversight responsibilities. This Committee is chaired by the Supervising Judge of the Juvenile Justice Court. The Committee implements California law, prior standing orders of the court, application of this Protocol to the panel of experts, as well as the provisions of Code of Virginia §16.1-356A which Juvenile Justice Court has adopted (except the parts which conflict with California law).

The Legal Process Clerk Supervisor maintains a Juvenile Justice Procedures Manual - Psychiatric Evaluations (JJUS-ORD 3), which includes the management of juvenile competency forensic evaluators and evaluations.

<sup>27</sup> See “Qualifications of Competency Restoration Counselors” in Section Seven.

<sup>28</sup> A template for the instructions is here. This is not necessarily the instructions that will be or have been adopted by the Committee:

“Thank you for accepting the court appointment to evaluate the minor for purposes of determining competency and possible treatment. Your deadline for turning in the report is \_\_\_\_\_ (17 calendar days from the date of the order). Please deliver the report to the Juvenile Court Legal Process Clerk Supervisor no later than 3:30 pm on the deadline day.

Please personally interview the minor and review all available records including, but not limited to, medical, educational, behavioral health, court records, police reports and probation reports concerning the minor and the minor’s case.

Please evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor’s competency. Welf & Inst Code §709.

A minor is incompetent to proceed in delinquency court 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; Pen. Code §1367; Timothy J. v. Superior Court (2007) 150 Cal.App.4th 847.

You should form an opinion regarding whether the minor understands: 1) what the current allegation(s) is/are, 2) that the minor’s attorney is there to represent or help the minor respond to the allegations, 3) the minor can say (testify) the allegations are true or not true, 4) the minor has the right to say nothing, 5) the minor can communicate with the minor’s attorney if the minor wants to, 6) if the minor says the allegations are not true, the judge can hear the one or two sides of the story (have a trial) and the judge decides what happened.

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Competency evaluations for juveniles should be made in light of juvenile, rather than adult norms. You should examine the minor's understanding, taking into consideration the perspective of children in general. For instance, most children do not understand adult language in questions such as "Do you remember when the peace officer interrogated you?" or "Do you recall when you were advised of your Miranda rights?" Your examination and testing must contain language and concepts within a child's range of comprehension.

A juvenile need not be found incompetent just because, under adult standards, the juvenile would be found incompetent to stand trial in a criminal proceeding. However, immaturity may affect a minor's ability to be competent.

You should describe the minor being examined in comparison to average children of the same age. For instance, most children are immature because they lack maturity. This may or may not rise to the level of the "immaturity" as it relates to competency. However, immaturity may affect a minor's ability to be competent. You should take into consideration that the court may be able to provide accommodations to the minor in court to assist in the minor's understanding of the process and communication with the minor's attorney.

There may be no need to discuss the underlying facts of the alleged offense with the minor. You do not necessarily need to determine whether the minor committed the charged crimes. The criterion is whether the minor understands the current charges, not whether he/she committed the alleged crimes. If it helps you in your determination of competency to discuss the underlying facts or to ask the minor if he/she committed the acts, you can do so. If the minor volunteers incriminating statements, you can include them in your assessment and report. Anything the minor tells you cannot be used in the prosecution or defense of the minor. Your report will only be used to assist the judge decide if the minor is presently competent. Copies will be provided to all parties.

A minor who states he has no memory of the offense or a minor who actually suffers from forgetfulness, intoxication at the time of the alleged offense, or amnesia, may still be found competent.

If a minor at the time of the alleged offense and arrest understood the nature of the alleged offense and arrest, that does not necessarily mean the minor currently understands the nature of the court proceedings.

You are entitled to all relevant court, police, Probation, and former evaluator records in order to render your opinion. You do not need to file Welf & Inst Code §§827 or 828 motions to obtain records. All records have been provided to you with this referral. Attached you will find:

- Court order for Juvenile Competency Forensic Evaluation;
- Name of judge and department to which the evaluator will be reporting;
- All former psychiatric and psychological evaluations;
- All behavioral health records;
- Medication information;
- All petitions or notices (with a note indicating which petition/notice is currently at issue regarding competency; past petitions/notices may not be at issue);
- All police reports;
- Relevant educational records, including Individualized Education Plans, applicable;
- Name, phone number, email, and FAX number of the probation officer;
- Name, phone number, and email of defense attorney for the minor;
- Name, phone number and email of the deputy district attorney;
- Location, address and phone number of the minor; and
- Names, addresses, and phone numbers for the parents, guardians, or guardian *ad litem* for the minor.

All documents from Probation, the court, police departments, and previous evaluators are confidential; that they cannot be shared with third parties without a court order; and the records should be maintained or destroyed under standard rules of confidentiality.

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The court requires a written report from you. Your report should include (at a minimum) the following questions repeated in your report [you do not need to re-type the portions in brackets – those are merely guideposts for you in formulating your response], followed by your answer either "yes" or "no" to each question, and then provide a more detailed response for each question.

1. Is the minor currently able to understand the nature of the current proceedings? [Does the minor understand what the general allegations are? (Do not necessarily allow the minor to admit or deny the allegations – the question of competency goes to the minor's understanding of the charges and the court proceedings only.) Does the minor understand that the minor can say the allegations are true; that the minor can say the allegations are a lie; that the minor can say the allegations are wrong; that if the minor says the allegations are not true or wrong, there may be a trial where the judge will decide if the allegations are true?]
2. Does the minor comprehend his or her own status and condition in reference to these proceedings?
3. Is the minor able to assist his/her attorney in the conduct of a defense in a rational manner? [Does the minor understand that his / her attorney works for the minor and will help the minor say the allegations are true, or a lie, or wrong? Can the minor talk with his or her attorney about what someone says the minor did and fight the allegations, if that is what the minor wants to do? (Do not necessarily allow the minor to admit or deny the allegations – the question goes to the minor's understanding only.)]
4. Does the minor have a DSM IV mental disorder that affects competency?
5. Does the minor have a developmental disability that affects competency? ["Developmental disability" means a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. The term includes mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.]<sup>28</sup>
6. Does the minor have a developmental immaturity, or other condition that affects competency?
7. Is the minor competent to admit the allegations and/or stand trial?
8. If the minor is incompetent, is the minor on any medications that are negatively affecting the minor's ability to be competent? If the minor is incompetent, would the minor likely benefit from a/some medication(s) that would allow the minor to be competent? If medications would likely benefit the minor in becoming competent, is it medically appropriate to treat the minor's psychiatric condition with medication? What are the likely or potential side effects of such medication? Is such medication likely to have side effects that would interfere with the minor's ability to understand the nature of the juvenile proceedings or to assist counsel in the conduct of a defense in a reasonable manner? If the minor takes the medications suggested, is there a time frame during which you would expect the minor to respond positively as it relates to competency? Are less intrusive treatments likely to have substantially the same results as this medication? If medications are suggested, does the minor have the capacity to make decisions about such medication? If left untreated with medication, will the minor probably suffer serious harm to his or her physical or mental health?
9. If the minor is incompetent, is the minor likely to benefit from a specialized program that attempts to enable minors to attain/regain competency? Is there likelihood the minor will attain/regain competency in the next three months? Six months? One year? Never?

## Referral to Pre-Trial Competency Evaluator

When the court orders a Pre-Trial Competency Evaluator, the Juvenile Court's Legal Process Clerk Supervisor will prepare a packet for the Court-Appointed Competency Evaluator and deliver it to the evaluator within 5 calendar days. From the court records and file, the Supervisor will place on top of the packet:

- Court instructions for the Pre-Trial Competency Evaluator (cover letter);
- Court order indicating all documents from Probation, the court, police departments, and previous evaluators are confidential; that they cannot be shared with third parties without a court order; and the records should be maintained or destroyed under standard rules of confidentiality;
- Court order for the Pre-Trial Competency Evaluation;
- Name of judge and department to which the evaluator will be reporting;
- Date the court orders the evaluation to be back to Legal Process Clerk Supervisor (17 calendar days from the date the order is signed);

From the probation officer, the Juvenile Court's Legal Process Clerk Supervisor will collect and include in the packet:

- All former psychiatric and psychological evaluations;
- All behavioral health records;
- Medication information;
- All petitions or notices (with a note indicating which petition/notice is currently at issue regarding competency; past petitions/notices may not be at issue);
- All police reports;
- Medication information;
- Relevant educational records, including Individualized Education Plans, if applicable;
- All petitions or notices (with a note indicating which petition/notice is currently at issue regarding competency; past petitions/notices may not be at issue);
- A list of previous referrals to Probation, including Informal Supervision and Six Months without Wardship matters;
- Notice of the minor's potential maximum time of confinement if the current petition will be sustained;
- Current Probation social study of minor, if done;
- Name, phone number, email, and FAX number of the probation officer;
- Name, phone number, and email of defense attorney for the minor;
- Name, phone number and email of the deputy district attorney;

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10. If restoration of competency is attempted, does the evaluator have suggestions for treatment? What conditions, treatment or services does the evaluator suggest for this particular minor in order to attain/regain competency?

11. Is the minor a danger to him/herself or to others, or is gravely disabled? Welf & Inst Code §5008(h)(1)(A). If so, what conditions, treatment or services do you suggest to protect the minor or others?

- Location, address and phone number of the minor; and
- Names, addresses, and phone numbers for the parents, guardians, or guardian *ad litem* for the minor.

**No Need for Welf & Inst Code §827 Motion**

Pre-Trial Competency Evaluators shall be given access to confidential police reports and probation reports. They do not need to file a Welf & Inst Code §827 or §828 motion to obtain records. Welf & Inst Code §827(a)(3)(a) [the court can disseminate information to carry out its duties without the need for a party to file a motion]; Welf & Inst Code §16010(d)(1) [information can be shared with caregivers]; Santa Clara County Juvenile Court Standing Order, 29 Nov 1988 (Edwards); and a stipulation by all members of this Protocol. [Juvenile statutes and standing order.]

**Separately Retained Experts**

Defense counsel or the District Attorney may retain their own expert(s). If they do so, they should arrange to have the assessment done as the same time as the Pre-Trial Competency Evaluator, if possible. This is important so the case is not unnecessarily delayed after the Pre-Trial Competency Evaluator’s report is received by all parties. All assessment reports should be received simultaneously, with the same deadlines (within 17 days). Of course, defense counsel or the District Attorney may not know whether they will need their own experts until after the Pre-Trial Competency Evaluator’s report is rendered.

Any assessment reports obtained by the defense attorney shall be confidential unless the expert may testify during the competency hearing. If the attorneys will possibly use any expert in trial, counsel must provide copies of the expert’s report and resume to opposing counsel well before trial. If the District Attorney has any possible *Brady* material, the deputy district attorney must provide copies to the defense well before trial. All efforts shall be made by the attorneys to avoid delay in the competency proceedings.

If the minor desires to present testimony of a psychiatrist or psychologist of his or her own choosing, the court may not place conditions on the admission of the testimony, such as the minor’s cooperation with the Pre-Trial Competency Evaluator. *People v Mayes* (1988) 202 CA3d 908.

The court does not pay for the defense or prosecution experts.

**SECTION FOUR:  
RETURN OF PRE-TRIAL COMPETENCY EVALUATOR REPORT**

Seventeen calendar days (or earlier) from the date of the order appointing the evaluation, the Pre-Trial Competency Evaluator’s report will be delivered to the court.

The evaluation is delivered to the court’s Legal Process Clerk Supervisor. When the evaluation report is received by the Supervisor, the Supervisor shall file in the minor’s case jacket the original report in a sealed confidential envelope, and forward (or have clerks or the courtroom clerk forward) confidential copies to the Probation Court Officer Supervisor for distribution to: the judge, probation officer, probation court officer for the judge’s courtroom, defense counsel and deputy district attorney. Cal Rules of Ct, Rule 4.130(d)(2).

The report is circulated to the parties via an “Ex Parte Review - Receipt of Psychological Report” which will be on calendar 18 calendar days from the order appointing the Pre-Trial Competency Evaluator. Nothing of substance happens at this hearing. Twenty calendar days from the date of the order appointing the Pre-Trial Competency Evaluator, the parties will get together with the minor during a “Parte Competency Review.”

During the Parte Competency Review, three things can happen: the parties can stipulate to the opinion of the Pre-Trial Competency Evaluator, the parties can submit on the opinion, or the parties can contest the opinion. Here are the three options:

1. The parties can stipulate to the findings of the Pre-Trial Competency Evaluator.

The attorneys can stipulate to, or submit on, facts, opinions, or other evidence. Defense counsel’s decision to submit competency issue based on a stipulated record does not violate a minor’s rights. *People v McPeters* (1992) 2 C4th 1148, 1168. [Adult case.]

The court need not accept the stipulation. If the Pre-Trial Competency Evaluator opines the minor is competent, the parties stipulate to the opinion, and the judge accepts the stipulation, then the court terminates the suspension of underlying juvenile proceedings and returns to the underlying proceedings. Welf & Inst Code §709(d).

If the Pre-Trial Competency Evaluator opines the minor is incompetent, the parties stipulate to the opinion, and the judge accepts the stipulation, then the court would not set a Competency Trial. *People v Weaver* (2001) 26 C4th 876, 903–905; *People v McPeters* (1992) 2 C4th 1148, 1169, (counsel’s waiver of rights attendant to formal hearing does not violate subject’s due process rights). [Adult cases.] Instead, the court would order that the minor receive Competency Restoration services.

Absent a stipulation, canceling the competency trial based upon the minor being competent should be done so with caution. There must be a solid foundation to support that the “substantial evidence” that warranted the need for a competency hearing no longer exists. An erroneous denial of a competency hearing compels reversal of the judgment, because the trial court has no power to proceed with an underlying trial once a doubt arises about a person’s competence. *People v Pennington* (1967) 66 C2d 508, 521. The error is *per se* prejudicial and may not be cured by a retrospective determination of the person’s mental competence during the regular trial. *People v Stankewitz* (1982) 32 Cal.3d 80. [Adult cases.]

If the court does not accept the stipulation of the parties, the court should set a Competency Trial. At the trial, the parties would still stipulate to the Pre-Trial Competency Evaluator’s report, and the court would make whatever findings the court deems appropriate at the hearing. The Competency Trial could be set in a relatively brief time because there would be no evidence or argument for the attorneys to prepare. The court could hear the Competency Trial that day. An uncontested trial must be set within 5 calendar days.

2. The parties can submit the matter to the court for a court determination based on the Pre-Trial Competency Evaluator’s report(s). Basically, the parties would not be taking a position and leaving it up to the court to decide. The court would need to set a formal Competency Trial, or obtain a stipulation from the parties that the court can issue written findings and orders without the need for a formal Competency Trial. In this case,

the judge would take the matter under submission. The judge can issue an oral decision on the record that day, or issue an oral or written decision within 5 calendar days.

If either party wants a trial, or the judge wants a trial, and there are only submissions to the Pre-Trial Competency Evaluator's report, the Competency Trial could be set in a relatively brief time because there would be no evidence or argument for the attorneys to prepare. The court could hear the Competency Trial that day. The submitted trial must be set within 5 calendar days.

3. The parties can disagree about the Pre-Trial Competency Evaluator's opinion. The court would set a contested Competency Trial. The trial could proceed by submission on some matters, stipulation on some matters, live testimony, and/or legal argument. (See "Timing of Trial" section, below.) The contested trial would be set within 15 calendar days, subject to an extension for good cause.

### **Findings**

If the court does not set a Competency Trial, the court should make the necessary findings and orders on the record. Either:

"Based upon the opinion of the Pre-Trial Competency Evaluator and the stipulations/submissions of the parties to that opinion, the court finds the minor is competent. The suspension of the underlying juvenile proceedings is lifted and the regular juvenile proceedings are reinitiated. The matter is set for a \_\_\_\_\_ [Detention/Jurisdiction/Disposition] hearing;" or

"Based upon the opinion of the Pre-Trial Competency Evaluator and the stipulations/submissions of the parties to that opinion, the court finds the minor is incompetent. The underlying juvenile proceedings remain suspended. The court orders the Department of Mental Health to provide Competency Restoration services to the minor. The matter is set for a Competency Restoration Review on \_\_\_\_\_ [seven calendar days] to make sure the Competency Restoration Program is in place. Probation and the Department of Mental Health are both ordered to prepare a written report for the Competency Restoration Review."

Proceed to "Section Six: Steps Following a Finding of Incompetence," below.

### **When the Court Finds the Minor Competent After Receipt of the Pre-Trial Competency Evaluator Competency Report**

If the minor is competent and in-custody, the minor will continue to receive the level of care determined appropriate by the court. If the minor is not in-custody, the Probation Department will recommend and the court may order appropriate referrals for mental health treatment, if indicated.

Even if the court finds the minor to be competent, if the court suspects the minor may be a danger to self, a danger to others, or gravely disabled, the court may order a mental health evaluation (if a current one does not exist).<sup>29</sup> The court may also refer the minor to be committed under the LPS Act, or be the subject of a guardianship.<sup>30</sup>

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<sup>29</sup> For a definition of "gravely disabled," see Definitions section, within Section Eleven.

<sup>30</sup> For these options, see Section Eleven.

If the court suspects the minor may have a developmental disability, or the Pre-Trial Competency Evaluator opines the minor may have a developmental disability, the court may refer the minor to the Regional Center for an evaluation.<sup>31</sup>

If the minor suffers from a DSM-IV mental disorder(s), the court or attorneys may consider referring the minor to the Court for the Individualized Treatment of Adolescents (Juvenile Mental Health Court), which focuses on maintaining the minor at home and treating the mental disorder(s).<sup>32</sup>

## **SECTION FIVE:** **COMPETENCY TRIAL**

Welf & Inst Code §709(b) states “Upon suspension of proceedings, the court shall order that the question of the minor’s competence be determined at a hearing.”

Regardless of the conclusions or opinions of the court-appointed Pre-Trial Competency Evaluator, the court that has initiated mental competency proceedings based upon “substantial evidence of doubt” must conduct a trial on the minor’s competency, unless there is a stipulation to not have such a hearing, and the judge adopts the stipulation. Rules of Court, Rule 4.130(e)(1).<sup>33</sup>

### **Timing of Trial**

By stipulation of the parties, and at the desire of the judge, the court can hear the Competency Trial on the same day as the Parte Competency Review wherein the attorneys discussed the Pre-Trial Competency Evaluator’s report with the court. In such a case, there would be no need for a continuance.

For a contested Competency Trial, the court must set the trial within 15 calendar days from the Parte Competency Review wherein the attorneys discussed the Pre-Trial Competency Evaluator’s report with the court, unless there is good cause to extend the time for a very short period to accommodate the availability of the expert witness(es) or to allow for completion of new evaluations. If the expert(s) needs to be available for trial, scheduling would have to be coordinated.

*De facto* good cause would exist for a reasonable continuance if an attorney needs time to secure his/her own expert to render a second opinion. The court must limit the amount of time for the continuance to avoid delay. If the attorney securing the second opinion does not work with haste, the court may proceed to trial without counsel’s expert(s). Also, the court should be prudent in continuing trial dates any longer than

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<sup>31</sup> For details on developmental disabilities and the Regional Center process, see within Section Six the subsection titled “State Examination of Developmentally Disabled Minors.”

<sup>32</sup> See separate Protocol for the Court for the Individualized Treatment of Adolescents.

<sup>33</sup> The adult model requires a trial. This juvenile Protocol provides for a stipulation and adoption of the stipulation by the judge to not have a trial, when appropriate. Before canceling a competency hearing, read subsections above. Terminating a competency hearing should be done so with caution, and certain findings need to be placed on the record.

absolutely necessary when the minor is in custody (because a quicker trial may lead to shorter custody time for the minor.)

### **Trial Judge**

There is no requirement that the competency hearing be held before the same judge who declared a doubt about the minor's competence to stand trial. *People v Hill* (1967) 67 C2d 105, 113; *People v Lawley* (2002) 27 C4th 102, 133–134. [Adult cases.] Typically, the juvenile judge who handled the regular juvenile case will hear the Contested Competency Hearing. Attorneys cannot challenge the judge assigned to the minor's case because the matter has long been with the judge and such a motion would be untimely. If there is a judicial resources issue, the Supervising Judge of Juvenile Justice Court will decide who will hear the trial.

### **Court Trial**

There is no right to a jury trial to determine competency. *People v Masterson* (1994) 8 C4th 965. [Adult case.]

### **Presumption of Competence; Burden of Proof**

The minor is presumed competent at the start of the competency hearing. Penal Code §1369(f). The burden is on the minor to prove his or her incompetence to stand trial by a preponderance of the evidence. Welf & Inst Code §709; Penal Code §1369(f); Cal Rules of Ct 4.130(e)(2); *Medina v California* (1992) 505 US 437; *People v Medina* (1990) 51 C3d 870, 885 (presumption and burden of proof under Penal Code §1369(f) do not violate due process); *People v Samuel* (1981) 29 C3d 489, 505; CALCRIM 3451. A preponderance of evidence is “that which preponds,” or is more likely than not, or is more than 50 percent true.

However, if the defense puts on no evidence of the minor's incompetence and the prosecution chooses to put on such evidence, the burden of proof falls on the prosecution. Penal Code §1369(b)(2); Cal Rules of Ct 4.130(e)(2); *People v Mixon* (1990) 225 CA3d 1471, 1484 n12 (burden of proof falls on party who challenges presumption). [Juvenile and adult statutes, cases, and Rule of Court.]

When neither the prosecution nor the minor seeks a finding of incompetence, the trial court may take the initiative and assume the burden of producing evidence of incompetence. *People v Skeirik* (1991) 229 CA3d 444, 459. [Adult case.]

### **Presentation of Evidence**

Typical order of presentation:

- Defense counsel goes first because they carry the burden of proof. The minor's attorney offers evidence of the minor's mental incompetence, if the attorney has such evidence, and chooses to do so. Penal Code §1369(b)(1).
- If defense counsel does not offer evidence of incompetence, the prosecutor may do so. Penal Code §1369(b)(2).
- If defense counsel put on evidence of incompetence, the prosecutor next offers evidence of minor's present mental competence. Penal Code §1369(c).

- Each party may offer rebuttal testimony, unless the court, for good reason and in the furtherance of justice, also permits other evidence in support of the original contention. Penal Code §1369(d).
- The prosecution makes its final argument, if any, followed by the defense counsel's final argument, if any. The parties may submit the case without final argument. Penal Code §1369(e). [Adult statutes.]

The common forms of evidence introduced in a competency hearing include:

- Testimony of court-appointed expert juvenile forensic evaluators, including testimony of experts critical of other expert testimony.
- Testimony of additional experts or relevant witnesses called by defense counsel or the prosecutor in addition to the Pre-Trial Competency Evaluators appointed by the court. Cal Rules of Ct 4.130(e)(3).
- Testimony of the defense attorney. (*Note:* Because the minor is presumed competent, the minor may prevent defense counsel from testifying by asserting the attorney-client privilege in the absence of any evidence that the minor is incapable of asserting the privilege. *People v Mickle* (1991) 54 C3d 140, 184.)
- Testimony of lay witnesses about minor's behavior. This would include the testimony of teachers, counselors, school monitors, vice principals, family members, probation officers, Juvenile Hall staff and Ranch staff. Evid Code §800; *People v Medina* (1990) 51 C3d 870, 887 (peace officer's testimony that a defendant was responsive during conversation); *People v Marshall* (1997) 15 C4th 1, 30 (testimony that a defendant acted in rational manner and conversed normally in a lockup facility).
- Nontestimonial behavior of the minor in the courtroom. *People v Prince* (1988) 203 CA3d 848, 856.
- Records of hospitalization or other treatment for minor's mental condition, police reports, school records, and reports from other professional personnel, such as social workers and probation officers. *People v Rodrigues* (1994) 8 C4th 1060, 1109. [Adult cases.]

### **Minor Has No Right to Testify**

If the subject of a competency trial wants to testify, but his/her attorney does not want the person to testify, the subject of the trial has no right to testify. Sometimes defense counsel leaves it up to the minor to decide whether to testify or not, and defense counsel merely puts his/her statement on the record that "it is against advice of counsel for my client to testify, but I leave it up to my client; I am not objecting to his testimony." However, if defense counsel objects to the minor testifying, and asks the court to not allow the minor to testify, the court should not allow the minor to testify. *People v Johnny Lee Bell* (2010) 184 Cal.App.4<sup>th</sup> 1071 [error for court to allow Mr. Bell to testify over defense counsel's objection, but it was harmless error.] [Adult case.]

### **Defense Counsel Can Disagree with Minor**

Defense counsel may present evidence of the minor's incompetence even when the minor desires to be found competent. *People v Stanley* (1995) 10 C4th 764, 804;

*People v Bolden* (1979) 99 CA3d 375, 379 (defense counsel must advocate the position that he or she perceives to be in the minor's best interests even when that interest conflicts with the minor's stated position). In that event, (subject to *People v. Johnny Lee Bell*, above) the court may consider allowing the minor to testify as to his or her own present competence with the permission of defense counsel, unless the court separately determines that the minor is incompetent to give testimony. *People v Harris* (1993) 14 CA4th 984, 993. [Adult cases.]

Such conflict does not establish sufficient grounds to warrant substitution of counsel (*Shephard v Superior Court* (1986) 180 CA3d 23, 33) or the appointment of second counsel to oppose commitment (*People v Jernigan* (2003) 110 CA4th 131, 135–137). [Adult cases.]

### **Minor's Statements in Subsequent Proceedings**

The minor may testify at the Contested Competency Trial. By agreement of the parties to this Protocol, any statements a minor makes during competency hearings can be used against the minor in the underlying juvenile matter, should competency ever be restored.

Neither statements made by a minor to any evaluator, nor any evidence derived from these statements may be used by the prosecution to prove its case-in-chief as to either the minor's guilt. Cal Rules of Ct 4.130(d)(3); *People v Jablonski* (2006) 37 C4th 774, 802–804; *People v Arcega* (1982) 32 C3d 504, 520. Statements made during competency examinations may not be used to impeach the minor if he or she testifies at a regular trial. *People v Pokovich* (2006) 39 C4th 1240, 1246–1253.

This rule of immunity in competency proceedings extends to statements to employees of health facilities charged with restoring the minor's competency under Penal Code §1370. *In re Hernandez* (2006) 143 CA4th 459, 475–476 (defense counsel committed prejudicial error at sanity phase of trial by failing to object to testimony of prosecution's expert witness whose opinion of minor's mental state was based on minor's statements to that expert during interviews and testing conducted while minor was confined to a state hospital under Penal Code §1370(a)(1)(B)(i)). [Adult statute and case.]

### **Court Must Consider Expert Opinion**

The Court must consider the opinion(s) of the trial experts, but the court does not have to agree with the opinion(s). On the other hand, the court cannot reject opinions without a reason. The standard is whether the minor "is incompetent by a preponderance of the evidence." Welf & Inst Code §709(c). [Juvenile statute.]

### **Express Finding After the Trial**

The court must expressly state on the record, either orally or in writing, its determination whether the minor is mentally competent to stand trial, as well as the evidence considered and the reasoning in support of its finding. Cal Rules of Ct 4.130(e)(4)(B); *People v Marks* (1988) 45 C3d 1335, 1343. [Adult cases and Rules of Court.] The court should do the same if the court finds the minor incompetent.

### **Situations Requiring Second Hearing**

When a competency hearing has already been held and the minor has been found competent to stand trial, the court is not required to hold a second competency hearing unless it is presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of the competency finding. *People v Lawley* (2002)

27 C4th 102, 136; *People v Kaplan* (2007) 149 CA4th 372, 383–387 (court erred in not ordering second competency hearing when minor’s mental condition had deteriorated since the first hearing as a result of a significant change in minor’s psychotropic medications). The court may take its personal observations of the minor into account in determining whether there has been significant change in the minor’s mental state. *People v Jones* (1991) 53 C3d 1115, 1153.

## **SECTION SIX: STEPS FOLLOWING POST-TRIAL FINDING**

### **If the Minor is Competent**

Following a competency trial, when a judge finds a minor to be competent, the court should place its finding on the record and return the case to the regular juvenile proceedings. Welf & Inst Code §709(d) states: “If the minor is found to be competent, the court may proceed [with the underlying juvenile case] commensurate with the court’s jurisdiction.”

### **If the Minor is Incompetent**

If the court finds the minor incompetent, the court should place its finding on the record and regular juvenile proceedings will remain suspended. Although proceedings will remain suspended, the attorneys, judge and regular juvenile probation officer will continue with the case.

### **Competency Restoration Plan**

If the court finds the minor incompetent, the court will order the minor to receive Competency Restoration Program services by having the probation officer contact the Competency Restoration Supervisor of the Department of Mental Health who will, in turn, assign a Competency Restoration Counselor to the minor.<sup>34</sup>

### **Placement of Minor**

If a program of competency restoration is ordered, the Court must order the minor placed in the least restrictive environment, taking into consideration these factors:

- Where will the minor have the best chance of obtaining competence?
- What are the needs of the minor?
- How serious is the underlying offense(s)?
- Is there a need to protect the community?

The restoration program may be administered at the minor’s home, Juvenile Hall, at a community placement, or at a hospital. A minor should not be placed in a psychiatric facility solely for the purpose of providing competency restoration services. Restoration services may be provided to a minor in a psychiatric hospital only if the minor meets civil commitment criteria, or if the minor was already in a psychiatric hospital at the time competency restoration services were ordered.

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<sup>34</sup> Details of the Competency Restoration Program are in Section Seven, below.

If the minor is placed in a secured facility, and was not previously placed in a secured facility, the court should state its findings and reasoning on the record.

Regardless of where the minor is placed, the court should issue an order allowing the probation officer to supervise the minor.

### **No Need For New Detention Hearing**

If the minor is placed in a location other than Juvenile Hall or the Ranch for reasons other than to receive competency restoration treatment, and if the minor needs to be transported by Probation to court, and the only feasible way for the minor to make a court appearance is by maintaining the minor in Juvenile Hall, the minor need not have a detention hearing. (For instance, if the minor is placed out of county in a secured facility for behavioral health services and will come back to Santa Clara County for Competency Restoration Reviews.) There is no need for a detention hearing because the minor was previously detained prior to the placement at the service provider's treatment program facility. If, however, the minor fails from the placement, or commits a new offense, or runs away from the placement, the minor should be re-admitted to Juvenile Hall by way of a detention hearing, just as a minor would be admitted to Juvenile Hall for a failed placement. The minor may be subsequently released, depending on the situation.

### **Orders and Hearings**

Welf & Inst Code §709(c) provides:

“During this time, the court may make orders that it deems appropriate for services that may assist the minor in attaining competency. Further, the court may rule on motions that do not require the participation of the minor in the preparation of the motions. These motions include, but are not limited to:

- (1) Motions to dismiss.<sup>35</sup>
- (2) Motions by the defense regarding a change in the placement of the minor.
- (3) Detention hearings.
- (4) Demurrers.” [Juvenile statute.]

### **Multi-Disciplinary Team**

Following a competency trial, when a judge finds a minor to be incompetent, the court may order the probation officer to convene a Competency Multi-disciplinary Team (MDT) to prepare a plan for providing ancillary services (regular probation and mental health services that are not designed to restore the minor's competency).<sup>36</sup> The purpose of the MDT is to make sure the minor is provided services that stabilize the minor and takes care of the minor's mental health needs. The minor should not be denied basic health care just because the minor is in the “legal limbo” of competency proceedings.

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<sup>35</sup> See “Considerations Before Dismissal” and “Process for Dismissal” in Section Ten.

<sup>36</sup> The participants in the Juvenile Justice Court recognize that the minor may be pre-jurisdiction at the time the MDT meets and at the time the court may order ancillary probation and mental health services for the minor. However, all stipulate that such services are not only the humane thing to do, but will likely assist the minor to be stabilized and thus lead to a higher chance of obtaining competency.

The MDT shall not set the restoration plan for the minor. The restoration plan shall be implemented by the Department of Mental Health's Competency Restoration Counselor.

The time for convening the MDT shall not exceed 14 calendar days. The court should designate one person to be the lead of the MDT (typically it will be the probation officer). The members of the MDT may include, but not be limited to:

- from the Santa Clara County Department of Mental Health, the Competency Restoration Counselor (a competency restoration expert), a psychiatric social worker, a psychiatrist to assess medications, and /or licensed clinical social worker;
- from the Probation Department, the placement supervisor, the minor's probation officer, a psychiatrist to assess medications, and/or the competency probation supervisor;
- from outside agencies and service providers, any persons deemed necessary by the judge or the MDT lead.
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The MDT lead may invite, but is not required to invite:

- Both defense and prosecuting attorneys;
- Parents and/or guardians of the minor;
- Members of existing inter-agency MDTs as described in Welf & Inst Code §§4096 and 7911.1(d).

The court shall set a Competency MDT Parte Review within 21 calendar days to receive the recommendations of the MDT team. The MDT lead should submit the recommendations of the MDT in the form of a written report for distribution prior to the Competency MDT Parte Review.

**The MDT shall address:**

- Possible psychiatric or developmental barriers that may impede the minor's ability to obtain competency;
- A recommendation for placement of the minor in an appropriate setting to attempt to restore his/her competency;
- A community supervision plan if the minor is placed in a community placement or at home;
- Psychiatric counseling, if appropriate;
- Medication recommendations;
- An evaluation to determine if LPS civil commitment proceedings should be initiated if the minor's competency is not restored/attained;
- A Case Plan to provide appropriate mental health services for the minor's mental health issues (but *not* including competency restoration services which the Competency Restoration Counselor will determine);
- If the minor suffers from developmental disabilities, Probation should provide services to address his developmental disabilities (see "State Examination of Developmentally Disabled Minors" immediately below);
- If appropriate, the minor may be assessed for special education, the Mental Health Services Act, Medi-Cal, SSI benefits, etc.

- The MDT should consider the scope of potential judicial orders when formulating its recommendations. To ensure ancillary services are provided to the minor, the judge may, but is not required to:
  - facilitate coordination and cooperation among government agencies (W&I 727(a));
  - refer the case to an inter-agency team to develop a plan to assure services (W&I 4096);
  - refer the case to the county mental health agency;
  - refer the case for evaluation of the need for hospitalization (W&I 705, PC 4011.6);
  - make any orders that are necessary to protect the rights of the minor and enable the court to function (James v. Superior Court, 77 Cal.App.3d 169);
  - join parties to ensure prompt evaluations and placements (W&I 727).
  - set review hearings.

### **Division of Probation Department Duties From Department of Mental Health Duties**

The minor and all services provided to the minor will be monitored by the probation officer. The probation officer will attempt to obtain the consent of the minor's parent or guardian for all necessary treatment and will assist the treating psychiatrist in obtaining consent for medications. If the probation officer is not able to obtain such consent (for instance, when parents are homeless and cannot be located), the probation officer will apply for a court order allowing treatment and medications. The probation officer is responsible for reporting to the court at each hearing.

The Department of Mental Health will take on the primary responsibility of attempting to obtain/restore the minor's competence. The Department of Mental Health will maintain an effective Competency Restoration Program and administer it to each minor ordered into such program. The Competency Restoration Counselor will report to the court at each competency hearing.

### **Restoration of Competency is the Main Goal**

Standard probation and mental health services shall not interfere with the primary short term goal of attempting to obtain/restore a minor's competence. For instance, although an Individualized Education Plan is important in normal situations, it is not the paramount goal during the period that Probation and Mental Health is attempting to obtain/restore competence. Standard services which are not essential to the minor's competence shall be postponed until after the competency process has been completed. If there is a higher chance of restoring the minor's competency in a relatively short time without standard mental health and rehabilitation services, the minor should receive no such services. If some services will help the minor obtain/restore competency (including educational services), those services must be provided.

Of course, the Juvenile Justice Court has an obligation to ensure that minors in the court's care do not deteriorate mentally, physically or emotionally. Toward that end, services that maintain the minor's health must be provided.

## **Antipsychotic Medication**

There are no provisions for ordering medications as it relates to competency proceedings in juvenile law. However, there are such provisions for adults. In general, the juvenile courts have traditionally adopted the adult laws regarding medications. The following is the adult law that relates to competency and medications:

In addition to evaluating the minor's competence to stand trial, an examining psychiatrist must evaluate whether treatment with antipsychotic medication is medically appropriate for the minor and whether antipsychotic medication is likely to restore the minor to mental competence. Penal Code §1369(a).

If an examining Pre-Trial Competency Evaluator is of the opinion that antipsychotic medication may be medically appropriate for the minor and that the minor should be evaluated by a psychiatrist to determine if antipsychotic medication is medically appropriate, the Pre-Trial Competency Evaluator must inform the court of this opinion and his or her recommendation as to whether a psychiatrist should examine the minor. Penal Code §1369(a).

The examining psychiatrists or licensed psychologists must also address the issues of whether the minor has capacity to make decisions regarding antipsychotic medication and whether the minor is a danger to self or others. If the minor is examined by a psychiatrist and the psychiatrist forms an opinion as to whether treatment with antipsychotic medication is medically appropriate, the psychiatrist must inform the court of his or her opinions as to the likely or potential side effects of the medication, the expected efficacy of the medication, and possible alternative treatments. Penal Code §1369(a).

## **Voluntary Medication Treatment**

If the court finds the minor incompetent, the court may hear and determine whether the minor, with advice of his or her counsel, consents to the administration of antipsychotic medication. If the minor consents, the court order of commitment must include confirmation that antipsychotic medication may be given to the minor as prescribed by a treating psychiatrist pursuant to the minor's consent. Penal Code §1370(a)(2)(B)(i).

## **Involuntary Medication Treatment**

It would be rare for a judge to order a minor to involuntarily take medication. However, it is allowed under the law in narrow circumstances. Involuntary medication treatment is beyond the scope of this Juvenile Competency Protocol. For further information, see the California Administration Office of the Court draft publication on "Psychotropic Medications in Juvenile Court Proceedings;" Penal Code §1370(a)(2)(B)(ii) [adult statute]; *Sell v United States* (2003) 539 US 166 [seminal adult case]; and juvenile law.

## **State Examination of Developmentally Disabled Minors**

If the court suspects the minor is developmentally disabled, there is statutory process that leads to a State mental and physical examination of the minor and ensures the minor receives proper services. Penal Code §1369(a) [adult statute].

“Developmental disability” is defined in Welf & Inst Code §4512(a). There are two tests: The first test is that the person must have one of the following: (1) Mentally retardation, which under DSM IV criteria means an IQ under 70, (2) autism, (3) a seizure disorder, (4) cerebral palsy, or (5) other....[the person functions similar to, or needs the same treatment as, a mentally retarded person]. The second test is the person must have 3 of 7 impaired functions: (1) learning, (2) communication, (3) independent living, (4) self care, (5) mobility, (6) economic self sufficiency, and/or (7) memory.

In order for a person to qualify for these services, the State Regional Center within the geographic location of the court must examine and accept the client.<sup>37</sup> Because regular proceedings have been suspended, there is a question whether the court can order a Regional Center examination. Typically, there will be no objection from the attorneys because such an examination can only help the minor – if the minor qualifies for Regional Center services, the services are provided throughout the lifetime of the client. If there will be a Regional Center examination, there is a benefit to the court ordering the examination early because if the court waits to the end of the court’s competency process and the case is dismissed, the court will lack jurisdiction to order a Regional Center evaluation.<sup>38</sup> A Regional Center examination and possible Regional Center commitment could run parallel to the court’s competency process, but should not interfere with the court’s competency process (which is the primary goal).

Here is the Regional Center process:

The court must appoint the director of the Regional Center to examine the minor for a possible developmental disability or disabilities.

The Regional Center must give priority to evaluations for minors in custody. For a minor who is in custody, Regional Center staff will be allowed to evaluate the minor in Juvenile Hall. For a minor who is not in custody, the minor's parent or guardian is responsible for arranging the evaluation with the Regional Center. If the parent or guardian is unable or unwilling to make the arrangements, the court will order the evaluation and designate the minor's attorney, the probation officer, or a juvenile civil rights attorney from NCYL, LACY or BALA, to facilitate the arrangements.

For the examination of the minor, the court may order the developmentally disabled minor to be confined in a residential facility or state hospital. Typically, the minor would only need to be confined for the examination itself if there is some other reason to confine the minor, such as the minor poses a risk to self or the community. In most cases, minors who need to be in custody for other reasons will already be in custody at this point.

The judge should not ask the director of the Regional Center to examine the minor for competency. Such a competency evaluation is one of the examinations the Regional Center performs. If the court were to order a competency evaluation through the

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<sup>37</sup> Statewide, there are 21 Regional Centers that provide service to developmentally disabled persons. The San Andreas Regional Center, located in Campbell, serves four counties: Santa Clara, Santa Cruz, San Benito, and Monterey.

<sup>38</sup> See “Considerations Before Dismissal” and “Process for Dismissal” in Section Ten.

Regional Center, it could interfere with the court's competency process via the qualified Pre-Trial Competency Evaluator process.<sup>39</sup>

Regardless of the status of the minor before the court, any developmental disability assessment referral by a judge to the Regional Center prompts the Regional Center to always independently assess whether the minor is developmentally disabled (regardless of any court finding or expert opinion in court).

The purpose of this independent assessment is not to second guess the decision of the judge; however, before the Regional Center can provide any service to a client, and before the Regional Center can render an opinion whether restoration of competency is possible, and before the Regional Center can provide restoration of competency services, the Regional Center must make a finding of developmental disability eligibility. It usually takes about three months before the Regional Center reports back on whether the minor is eligible.

When a Regional Center referral is ordered by the court, the court will set a status review hearing to take place within 30 days. (But, typically, it takes 90 days for the

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<sup>39</sup> Regional Center examinations take a long time to complete because Regional Centers are understaffed and overworked. Also, if the Juvenile Justice Court's court ordered evaluator renders a different opinion regarding competency than the Regional Center evaluator, there could be a conflict that would not necessarily benefit the court competency process. Moreover, the avenues for attaining competency through the Regional Center path do not properly serve the minors before the court. Simply put, Regional Centers do not effectively work on the competency issue.

However, if such a Regional Center competency examination were previously done, that would be a factor the court would consider in determining whether the minor is currently competent.

The Regional Center procedures for determining the competency of a person who is developmentally disabled are found at Penal Code §1370.1(a)(1)(H). Although it is not suggested in this Protocol, a court could order the Regional Center to assess the minor for competency and order the Regional Center to attempt to restore competency. If the court refers the minor to the Regional Center for restoration of competency, the judge should include in its referral to the Regional Center three questions: (1) Is the minor eligible for Regional Center services? (2) If yes, can the minor obtain/attain competency within a reasonably foreseeable time? (3) If yes, what services are recommended and what is the expected time frame for restoration/attainment of competency?

If the Regional Center determines the minor is not developmentally disabled they will not provide any services to the minor.

If the Regional Center finds the minor is developmentally disabled, then they can render an opinion whether the minor can attain competency within a reasonable period of time. If the Regional Center opines competency cannot be obtained within a reasonable period of time, competency services will not be provided through the Regional Center. The court should not order the Regional Center to perform a service they have opined will not work.

If the Regional Center opines competency can be obtained within a reasonable period of time, they currently do not directly provide competency restoration services. The Regional Center will contract with an outside entity to provide the competency restoration services (such as the county Mental Health Department restoration services recommended by this Protocol).

Although the case of *In re Patrick H.* (1997) 54 Cal App 4th 1346 [juvenile case] did not specifically address a Regional Center referral, the court warned against prolonged competency approaches [in the adult statutes] such as those that would occur with a Regional Center referral.

Obviously, a study of this Regional Center process leads one to conclude that the Santa Clara County Juvenile Justice Court model for addressing competency issues is preferable.

Regional Center to render an opinion regarding a development disability. The Regional Center director must render an opinion within 120 days.)

The director of the Regional Center for the developmentally disabled (or designee) conducts the developmental disability evaluation of the minor and makes the recommendation for the type of commitment appropriate for the minor, *i.e.* state hospital, developmental center, other residential facility, or placement on outpatient status. Penal Code §1370.1(a)(2).

The commitment procedures in cases involving developmentally disabled persons are outlined in Penal Code §1370.1.

If there is a commitment, the executive director (or designee) of the facility to which the minor is committed must submit a progress report to the court within 90 days and another within 150 days of the commitment order. Penal Code §1370.1(b)(1).

Developmentally disabled minors who are dangerous to themselves or others may be committed to the State Department of Developmental Services under Welf & Inst Code §§6500–6513. Penal Code §1370.1(c)(2).

The minor must receive necessary care and treatment during his or her confinement.

The court may, on recommendation of the Regional Center director, dismiss the charges against the minor if the director concludes that the minor's behavior related to the charged offense has been eliminated during time spent in court-ordered programs.<sup>40</sup> Penal Code §1370.1(d).

If the minor is already a Regional Center client, the Probation Department will submit a plan to work collaboratively with Regional Center staff to obtain appropriate community supports and services.

If the minor is not already a Regional Center client, the Probation Department will work with the minor's family to facilitate the completion of a Regional Center evaluation within the 120 days allowed. If the minor's parent or guardian is unable or unwilling to make the arrangements, the court will order the evaluation but designate the minor's attorney or the Probation Department to facilitate the arrangements.

## **SECTION SEVEN:** **PROGRAM FOR RESTORATION OF COMPETENCY**

If a minor is deemed incompetent by stipulation of the attorneys and adoption of the stipulation by the judge, or by court finding the minor incompetent following a Competency Trial, the court must make orders that will attempt to obtain/restore the minor's competency. Persons have the right to adequate treatment in order to regain competency. *People v Feagley* (1975) 14 Cal.3d 338. [Adult case.]

### **Santa Clara County Competency Restoration Program**

The minor will be ordered to participate in and complete a Competency Restoration Program. Probation shall be ordered to arrange for the minor to participate in the Competency Restoration Program. The Department of Mental Health shall be

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<sup>40</sup> See "Considerations Before Dismissal" and "Process for Dismissal" in Section Ten.

responsible for providing the Competency Restoration Program. The County of Santa Clara provides a standardized Competency Restoration Program which is administered by the Santa Clara County Department of Mental Health.<sup>41</sup>

The Department of Mental Health will have at all times a Competency Restoration Program Director, a Competency Restoration Supervisor (to supervise the Competency Restoration Counselors and the program) and for each minor a Competency Restoration Counselor (who actually works directly with the minor in an attempt to restore competency and reports back to the court at every review hearing).

The Probation Department will have at all times a Probation Competency Supervisor (to supervise the probation officer who will be responsible for submitting reports to the court) and the regular probation officer (who will be responsible for submitting reports to the court).

### **Referral to Competency Restoration Program**

When the court orders the minor into the Competency Restoration Program, the Juvenile Court's Legal Process Clerk Supervisor will prepare a packet for the Department of Mental Health's Competency Restoration Program Director and deliver it to the Director within 5 calendar days. From the court records and file, the Supervisor will place on top of the packet:

- Instructions (cover letter) that states the minor has been found incompetent;
- Court order indicating all documents from Probation, the court, police departments, and previous evaluators are confidential; that they cannot be shared with third parties without a court order; and the records should be maintained or destroyed under standard rules of confidentiality;
- Court order placing the minor in the Competency Restoration Program;
- Name of judge and department to which the Competency Restoration Counselor will be reporting;
- Date and time of the next competency hearing in court (30 calendar days from the commencement of competency restoration services);

From the probation officer, the Juvenile Court's Legal Process Clerk Supervisor will collect and include in the packet:

- Pre-Trial Competency Evaluation;
- All former psychiatric and psychological evaluations;
- All behavioral health records;
- Relevant educational records, including Individualized Education Plans, if applicable;
- Medication information;
- All petitions or notices (with a note indicating which petition/notice is currently at issue regarding competency; past petitions/notices may not be at issue);
- A list of previous referrals to Probation, including Informal Supervision and Six Months without Wardship matters;
- Notice of the minor's potential maximum time of confinement if the current

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<sup>41</sup> The Santa Clara County program is based on the State of Virginia model.

petition will be sustained;

- Current Probation social study of minor, if done;
- All police reports;
- Name, email, phone number and FAX number of probation officer;
- Name, phone number, and email of defense attorney for the minor;
- Name, phone number and email of the deputy district attorney;
- Location, address and phone number of the minor; and
- Names, addresses, phone numbers and emails for the parents, guardians, or guardian *ad litem* for the minor.

### **No Need for Welf & Inst Code §827 Motion**

Competency Restoration Counselors, Competency Restoration Supervisors, and any service providers who attempt to assess the minor or restore competency shall be given access to confidential police reports and probation reports. They do not need to file a Welf & Inst Code §827 or §828 motion to obtain records. Welf & Inst Code §827(a)(3)(a) [the court can disseminate information to carry out its duties without the need for a party to file a motion]; Welf & Inst Code §16010(d)(1) [information can be shared with caregivers]; Santa Clara County Juvenile Court Standing Order, 29 Nov 1988 (Edwards); and a stipulation by all members of this Protocol.

Treating third parties may obtain copies of the reports from the Competency Restoration Counselor or probation officer. Any sharing of probation reports or police reports must adhere to the rules of strict confidentiality. All copies of the reports must have attached to the top of them the cover letter regarding confidentiality.

### **Starting the Competency Restoration Program**

The Competency Restoration Supervisor at the Department of Mental Health shall assign the minor's competency restoration to a Competency Restoration Counselor from the Department of Mental Health.<sup>42</sup> The Competency Restoration Supervisor shall provide all the above materials received from the probation officer to the Competency Restoration Counselor. The Competency Restoration Supervisor shall monitor the case, as prescribed below.

The Competency Restoration Supervisor and the Competency Restoration Counselor shall meet with the minor within 10 calendar days of the court order placing the minor in the Competency Restoration Program. The Supervisor and Counselor will conduct an Admissions Competency Evaluation (ACE) and to create an individualized Competency Restoration Services Plan (CRSP).

### **Implementing the Competency Restoration Program**

Typically, the Competency Restoration Counselor will meet the minor three times within each week to implement the CRSP. The Competency Restoration Counselor shall meet with the minor at least two times within each week.

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<sup>42</sup> This Supervisor and Counselor cannot be an evaluator who has already assessed the minor in the current suspended proceedings. See different categories of evaluators, including different qualifications and limitations, in Section One, "Umbrella Principles of This Protocol."

The Competency Restoration Supervisor will meet with the minor at least each 30 calendar days to evaluate the minor's progress toward competency, to provide on-site supervision to the Competency Restoration Counselor, and to obtain information necessary to complete a monthly supervisory report for the Competency Restoration Program Director. The Supervisor's meetings with the minor should be timed in order to meet the report deadlines for the next court review. For example, if the report from the Competency Restoration Counselor is due in court in 30 days, the Supervisor should be meeting with the minor and Counselor 10 days before the hearing date.

The Counselor and Supervisor will travel to where ever the minor is located. Preferably, the restoration services will be administered in the minor's home. If the minor is placed out of county in a secured facility for behavioral health services, the Competency Restoration Program moves forward and does not stop. The Counselor and Supervisor shall travel out of county, if necessary.

Each minor will receive services from a probation officer, a Competency Restoration Counselor, a Competency Restoration Supervisor and at least one Restoration Program Independent Evaluator.

The Competency Restoration Counselor will provide inter-active, multimedia presentations that include specifically tailored one-on-one verbal interaction, printed material when appropriate to the skill-set of the minor, and interactive animated CD-rom programming designed for the minor's age level, communication skills, disabilities, and primary language. The Counselor will test the minor periodically to determine whether the minor has attained competency. The minor should demonstrate on at least three separate occasions that the minor is competent. At any point when the Competency Restoration Counselor believes the minor consistently:

- Has a rational as well as a factual understanding of the proceedings against the minor, and
- Has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding;

OR

- Unlikely to attain competence within the foreseeable future,

the Competency Restoration Counselor should report this belief to the Competency Restoration Supervisor.<sup>43</sup> The Supervisor will conduct his/her own independent tests on the minor to assess whether the minor is competent or not.

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<sup>43</sup>Under California case law and statutes, it is not required that the minor be oriented as to time and place. It is not required that the minor be able to recall events. For example, intoxication at the time of the alleged crime that leads the minor to not remember the alleged crime (or a claim that the minor does not remember) does not mean the minor is currently incompetent. However, if the minor is so disoriented because of a mental disorder that he/she cannot recall conversations from moment to moment, it is unlikely the minor will be able to effectively mount a defense to the allegations.

If the Competency Restoration Supervisor believes the minor is:

- Has a rational as well as a factual understanding of the proceedings against the minor, and
- Has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding;

OR

- Unlikely to attain competence within the foreseeable future,

the Competency Restoration Supervisor will arrange to have an Independent Juvenile Forensic Evaluator render an independent opinion.

### **Restoration Program Independent Evaluator**

When both the Competency Restoration Counselor and Competency Restoration Supervisor believe the minor to be competent, or in the alternative, unlikely to attain competence within the foreseeable future, a Restoration Program Independent Evaluator shall be appointed.<sup>44</sup> The Competency Restoration Supervisor shall provide all background materials necessary for the Restoration Program Independent Evaluator to render an opinion, but will not influence the Restoration Program Independent Evaluator as to the opinions of the Counselor and Supervisor.

In order to maintain the integrity of the Competency Restoration Program, the role of the Restoration Program Independent Evaluator must be completely separate from anyone providing restoration services to the minor, as well as the probation officer. Also the Restoration Program Independent Evaluator should not be involved with having custody of the minor such as an employee of a residential treatment facility. The Restoration Program Independent Evaluator must be free from any outside influence, potential secondary gain, or any fiduciary or other relationship with a private entity being paid to provide services to the minor.

The Restoration Program Independent Evaluator shall be selected at random from the court's Pre-Trial Competency Evaluator Panel list. The selection shall be made by the Juvenile Court's Legal Process Clerk Supervisor. The Legal Process Clerk Supervisor must send instructions (a cover letter) from the court to the Restoration Program Independent Evaluator.<sup>45</sup>

Preferably, the Restoration Program Independent Evaluator will assess the minor in his/her therapy office, away from the regular surroundings of the minor, and in a different locale than where the minor was assessed by the Counselor and the Supervisor. However, if the minor is in custody or in a placement that does not allow for a change of environment, the independent assessment will be done there.

The strength of this "triple check" system is that it allows for different persons to test the minor in different environments. This rules out familiarity with an evaluator,

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<sup>44</sup> This expert cannot be an evaluator who has already assessed the minor in the current suspended proceedings. See different categories of evaluators, including different qualifications and limitations, in Section One, "Umbrella Principles of This Protocol."

<sup>45</sup> The instructions would be similar to those contained in the footnotes to "Court Instructions to Pre-Trial Competency Evaluator," within Section Three, above.

testing techniques, or the environment as the reason the minor may be demonstrating possible competency.

If all three – the Counselor, Supervisor, and the Restoration Program Independent Evaluator -- opine the minor is competent, the Competency Restoration Supervisor shall notify the Director of the Competency Restoration Program. By way of a written report, the Director will notify the court by filing a Certificate of Restoration. The Director need not wait until the next court hearing to file the Certificate of Restoration.

If all three -- the Counselor, Supervisor and Restoration Program Independent Evaluator -- opine it is unlikely the minor will attain competency in the foreseeable future, the Competency Restoration Supervisor shall notify the Director of the Competency Restoration Program. By way of a written report, the Director will notify the court of this joint opinion.

### **Qualifications of Competency Restoration Counselors**

Competency Restoration Counselors qualified under these guidelines may provide restoration services only under the supervision of a licensed psychiatrist, psychologist, social worker, professional counselor, or marriage and family therapist. The supervising licensed psychiatrist, psychologist, social worker, professional counselor, or marriage and family therapist must be qualified to conduct evaluations for juvenile competency to stand trial pursuant to this Protocol.

Competency Restoration Counselors must successfully complete the *Juvenile Competency Restoration Basic Training* provided by the Juvenile Competency Team. This training requires three days of attendance and successful completion of a comprehensive written examination.

Competency Restoration Counselors must have a minimum of two years of post-baccalaureate experience providing mental health-related services to children and/or adolescents under the supervision of a licensed mental health services provider.

Competency Restoration Counselors must demonstrate the capacity to independently teach juveniles who may have emotional disorders, intellectual disabilities, and/or developmental disabilities.

### **Qualifications of Competency Restoration Supervisors**

Competency Restoration Supervisors must have current licensure as a:

- Clinical Social Worker,
- Clinical Psychologist,
- Professional Counselor,
- Psychiatrist, or
- Marriage and Family Therapist

Plus

Successful completion of the *Juvenile Basic Forensic Evaluation Training*. This training requires six days of attendance and successful completion of a comprehensive written examination. Participants must also draft reports based on evaluations of juvenile adjudicative competence. These reports will be evaluated prior to final approval.

Plus

Successful completion of the *Juvenile Competency Restoration Basic*

*Training.* This training requires three days of attendance and successful completion of a comprehensive written examination. Participants must demonstrate the capacity to teach juveniles.

Or

Equivalent training which includes, at a minimum, each of the following:

- (i) Psycho-legal assessment;
- (ii) Legal standards of competency to stand trial;
- (iii) Child and adolescent psychological development;
- (iv) Child and adolescent psychopathology;
- (v) Risk assessment related to least restrictive setting;
- (vi) Secure vs. non-secure facilities, and continuum of available community resources for juveniles;

Plus

A minimum of two years of graduate or post graduate experience which included the provision of mental health evaluation or treatment services to children or adolescents under the supervision of a licensed mental health services provider.

### **Qualifications of Restoration Program Independent Evaluators**

The qualifications of the Restoration Program Independent Evaluators shall be the same as that for the Pre-Trial Competency Evaluators.<sup>46</sup>

## **SECTION EIGHT:** **PERIODIC COMPETENCY RESTORATION REVIEWS**

Immediately following the minor being ordered into a Competency Restoration Program, periodic “Competency Restoration Review” court hearings will be set to review information provided by the probation officer, the Director of the Competency Restoration Program, the Restoration Program Independent Evaluator, and others regarding the status of the competency restoration progress.

As a general rule, the minor should attend all Competency Restoration Reviews. The minor does not have to be at Competency Restoration Reviews.

### **Schedule Of Competency Restoration Reviews**

#### **Initial Reviews**

Initially, the court should set a “Competency Restoration Review” in 7 calendar days (and re-set every week) until the Competency Restoration Program is in place. This is necessary to make sure the Competency Restoration Program has begun for the minor. Because the minor must have an assigned Competency Restoration Counselor within 10

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<sup>46</sup> The qualifications would be similar to those contained in the footnotes to “Court Instructions to Pre-Trial Competency Evaluator,” within Section Three, above.

calendar days, there should only be a need for a 7 day review and a 14 day review. Nonetheless, the court should set a review every 7 calendar days until the minor is engaged in the Competency Restoration Program.

### **Monthly Reviews**

Once it is confirmed that the minor has been assigned a Competency Restoration Counselor, the court should set Competency Restoration Reviews at 30 calendar days, 60 calendar days, and 90 calendar days.<sup>47</sup> This schedule is to determine if the minor may be a “short term” participant in the Competency Restoration Program.

### **Set a Final Competency Restoration Review at the Outset**

As soon as the minor is engaged in the Competency Restoration Program, the court should calculate the time limit for restoration services (for misdemeanors: one year from the day the Competency Restoration Program begins; for felonies: three years from the day the Competency Restoration Program begins), then subtract one month from the time limit, and set a Final Competency Restoration Review. This will help all parties focus on the deadline, as well as make sure the minor is not receiving restoration services for longer than agreed upon. Moreover, setting the Final Competency Restoration Review one month before the time limit will give all parties 30 days notice of an upcoming possible dismissal of the underlying juvenile case. If the Final Competency Restoration Review is not needed (because the minor attains competency before the deadline, or the minor’s case is dismissed before the deadline) the hearing can be taken off calendar at the time of attainment or dismissal.

### **Three Month Reviews**

If there is no definitive answer following the court’s 90 day Competency Restoration Review, subsequent Competency Restoration Reviews should be set every 3 months. If 90 calendar days have passed since the most recent formal report to the court, the Competency Restoration Supervisor shall arrange for a Restoration Program Independent Evaluator to examine the minor’s current level of competence. The Evaluator will submit a report to the Director of Juvenile Competency Restoration Program. When appropriate, the Director shall arrange for testing of the minor’s intellectual capacities, or for other pertinent psychological or neurological testing.

### **Progress Reports**

The probation officer is responsible for writing reports, collecting reports, and distributing reports in advance of each Competency Restoration Review. Well in advance of each Competency Restoration Review, the probation officer shall notify the Director of the Competency Restoration Program, the Competency Restoration Supervisor and the Competency Restoration Counselor of the next court dates and coordinate with the Competency Restoration Counselor to allow him/her to complete an assessment of the minor one week before each court date.

Three court days prior to each Competency Restoration Review, the Director of the Competency Restoration Program shall provide to the probation officer a written report

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<sup>47</sup> For adults, the law requires a 90 day review. Penal Code §1370(b)(1). The 90 day review for adults is followed by reviews at six-month intervals or until the subject becomes mentally competent. Penal Code §1370(b)(1). This Protocol suggests more frequent reviews for minors.

for the court. The report shall address the minor's progress toward recovery of mental competence, the frequency of meetings with the minor, and what has happened since the last review. If there is a report from a Restoration Program Independent Evaluator, it shall be attached to the Director's report. The probation officer should not write a report commenting on the evaluator's report or opinion(s). The probation officer just needs to distribute the Department of Mental Health's reports.

If there is a psychiatrist and/or physician treating the minor, at each Competency Restoration Review, the probation officer shall write or obtain a written report that describes the minor's progress from the doctor's perspective, and any antipsychotic medication administered to the minor and its effects and side effects, including effects on the minor's behavior that would affect the minor's ability to understand the nature of the juvenile proceedings or to assist counsel in the conduct of a defense in a reasonable manner. Penal Code §1370(a)(2)(B)(v). [Adult statute.]

The probation officer can write a report with Probation's updates and suggestions.

The probation officer shall compile all relevant reports and distribute them to the court and counsel prior to each hearing.

### **Opinion of Expert Regarding the Ability of Minor to Obtain Competency**

At each Competency Restoration Review, the Competency Restoration Counselor must render an opinion regarding whether the minor is competent or likely to obtain competence in the foreseeable future. And, if the attempts at restoration continue on for a long time, the expert must render a final opinion no later than one month before the time limit for dismissal (which would be at the Final Competency Restoration Review that is set 30 days prior to the time limit for restoration services).<sup>48</sup>

The Court must consider the opinion(s) of the Competency Restoration Counselor/Supervisor/Director and/or the Restoration Program Independent Evaluator, but the court does not have to agree with the opinion(s). On the other hand, the court cannot reject opinions without a reason. The standard is "whether there is a substantial probability that the minor will attain competency in the foreseeable future." Welf & Inst Code §709. [Juvenile statute.] The term "substantial probability" is not defined.<sup>49</sup> A workable definition is "a probability that is substantial." So, if there is not a probability

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<sup>48</sup> At the time the minor first entered the Competency Restoration Program, the court would have already set a Final Competency Restoration Review (one month before the time limit). See Set a Final Competency Restoration Review at the Outset, immediately above.

<sup>49</sup> It is not clear what "substantial probability" means. There is no definition in relevant codes or case law.

California OSHA has interpreted it to mean "more likely than not or a likelihood of 51% or more." <http://www.barneyandbarney.com/new-legislation-enables-cal-osha-to-designate-serious-violations-more-easily/>

The California Labor Code, Chapter 4, §6432(c) states: "substantial probability" refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation."

These are not helpful, but the OSHA standard has interpreted the term to be very near the same as "preponderance of the evidence." (OSHA states 51% or more, which is not exactly accurate. A preponderance is anywhere over 50%, including 50.1%.)

that is substantial that the minor can be restored within a foreseeable amount of time, the court cannot continue with restoration services for the minor.<sup>50</sup>

### **Determination of Continued Competency Restoration Services**

At each Competency Restoration Review, the judge will have to decide if a further attempt at competency restoration is warranted. In order for the minor to be removed from the Competency Restoration Program, the judge must specifically find it is *unlikely* the minor will regain competence in the foreseeable future, Penal Code §1370(b)(1). [Adult statute.] Unless the court makes this finding on the record, the minor would remain in the current Competency Restoration Program and, if applicable, the current facility, and/or placement.

If the court finds it unlikely the minor will attain competency in the foreseeable future, the court should place that finding and reasons on the record and proceed to Section Ten, below.

### **Court Orders**

If necessary, the court may make orders regarding the placement of the minor, the Competency Restoration Program, and/or ancillary services to the minor. The judge may order anything in the best interest of the minor, and the court may also order whatever is appropriate to stabilize the minor so that competency may be achieved. Welf & Inst Code §709. [Juvenile statute.] The courts orders may include any of the following:

- facilitate coordination and cooperation among government agencies (Welf & Inst Code §727(a));
- refer the case to an inter-agency team to develop a plan to assure services (Welf & Inst Code §4096);
- refer the case to the county mental health agency;
- refer the case for evaluation of the need for hospitalization (Welf & Inst Code §705, PC §4011.6);
- make any orders that are necessary to protect the rights of the minor and enable the court to function (James v. Superior Court, 77 Cal.App.3d 169);
- appoint an expert to report to the court regarding the success of the minor in obtaining competency and any suggested future treatment;
- join parties to ensure prompt evaluations and placements (Welf & Inst Code §727).
- set review hearings. [Adult and juvenile statutes and case.]

### **Consideration of Possible Changes**

At each Competency Restoration Review, the probation officer and/or the Competency Restoration Counselor/Supervisor/Director may recommend changing any aspect of the restoration services being offered the minor. The court may consider and possibly order these suggested changes. The court may consider changing the facility, placement, psychiatrist, psychologist, treatment, or medication in order to increase the chance the minor will obtain competence. Where appropriate, the minor may be offered any other relevant information and counseling to assist him/her in understanding the regular juvenile proceedings and communicating with defense counsel. The court may consider returning the matter to the MDT for a group discussion about possible

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<sup>50</sup> Before terminating Competency Restoration Services, read this entire Protocol.

recommended changes. The court may make any further orders necessary for the protection of the minor and the community.

### **Consideration of Less Restrictive Placement**

At each Competency Restoration Review, the probation officer may consider (and possibly recommend), and/or the court may decide whether the minor should be placed in a less restrictive placement. A major component of competency restoration is to make sure the minor is in a place where competency can be restored.

Many minors can be successfully restored to competency while they are living in their homes, attending their regular schools, and participating in their normal activities. Community-based wraparound services may assist in the minor's progress in attaining competency. The minor may be placed at home with supervision on the Community Release Program or Electronic Monitoring Program.

In some cases, a very structured environment is more conducive to restoration of competency. But not every minor is the same. And not every home situation is the same. The goal is to have the minor in the least restrictive environment that will allow for restoration of competency. Placement may be at home, or if there is a concern about the minor's safety or the safety of the community, placement may be at Juvenile Hall, or somewhere else.

Regardless of where the minor is placed, the court should issue an order allowing the probation officer to supervise the minor.

### **Consideration of Detaining the Minor**

At each Competency Restoration Review, if the minor is not in-custody, the probation officer must consider (and possibly recommend), and/or the court will decide whether "it is a matter of immediate and urgent necessity for the protection of the minor or reasonably necessary for the protection of the person or property of another that he or she be detained or that the minor is likely to flee to avoid the jurisdiction of the court, and that continuance in the home is contrary to the child's welfare." Welf & Inst Code §636. [Juvenile statute.] If the minor is detained, the court must put detention findings and Title IV-E findings on the record.

### **Psychotropic Medications**

If competency experts opine the minor is likely to benefit from medications that may restore the minor's competency, this option should be considered.<sup>51</sup>

### **New Offenses**

Where the minor is alleged to have committed a new offense or violation of probation, the probation officer should not avoid filing a new notice or petition merely because there is a pending competency process. Probation should proceed as if there were no competency process underway. Probation should not wait until the next scheduled court hearing. Probation can immediately bring the minor into custody which would trigger a detention hearing the next day. Probation can also choose to leave the minor out-of-custody and set an immediate hearing. The handling of new alleged offenses is within the discretion of the Department of Probation.

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<sup>51</sup> See "Voluntary Medication Treatment" and "Involuntary Medication Treatment" in Section Three.

The probation officer should discuss the new allegation(s) with the minor to determine if the minor understands the nature of the charge(s), whether the minor understands the court process, and whether the minor can communicate effectively regarding the alleged incident. The probation officer's opinion regarding the minor's current competence should be included in any new notice or petition.

The minor is presumed competent. The minor's attorney would have to petition the court for a review of the minor's current competency. Starting anew by applying this Protocol to the new petition/notice, the court must make findings. If there is substantial evidence the minor may be incompetent, the new case will be suspended and the court will order the new petition suspended and the minor's treatment for the new alleged offense to be added to the pending attempt to restore competency.

If the court determines there is not substantial evidence the minor is incompetent, the new case will not be suspended and the court will proceed with the new underlying juvenile proceedings. The issue of the minor's competence on the previously suspended petition/notice will remain as is, until the court makes a finding regarding competence on that matter.

Of course, a determination by the court on the new case can significantly affect the competency issue on the formerly suspended case because the standard for competency is "current" status of the minor. If the minor is competent on the new case, it is a factor to be considered on the pending competency issue.

### **If Minor is a Danger to Others**

Where the minor is alleged to have committed an offense involving physical violence or danger to others, the court may direct the filing in any other court of a petition for the commitment of a mentally retarded individual to the State Department of Developmental Services, assuming the statutes apply. Welf. & Inst. Code, §§6500 et seq., 6512, 6551; Cal. Rules of Court, rule 5.645.

### **Conservatorship**

If the minor is gravely disabled, the court may refer the minor to the Public Conservator for the filing of a petition for conservatorship.<sup>52</sup>

## **SECTION NINE: IF COMPETENCY IS ACHIEVED**

### **Certificate of Restoration**

At any time during the Competency Restoration Program, when the Competency Restoration Counselor and the Competency Restoration Supervisor believe the minor's competence has been obtained/restored, the Supervisor shall notify the Director of the Competency Restoration Program. The Director shall immediately forward a Certificate of Restoration along with a report to the probation officer. The probation officer shall deliver copies of the Certification of Competence and report to the court, defense attorney and deputy district attorney. The Director of the Competency Restoration Program should not wait until the next scheduled Competency Restoration Review. On the filing of a certificate of restoration of competence, the courtroom clerk shall notify the judge

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<sup>52</sup> For Conservatorship and a definition of "gravely disabled," see Section Eleven.

and then call the parties to set a hearing. The minor shall be returned to court for the hearing.

Absent an attorney's request for a hearing, the court may summarily approve the Certification of Competence. *People v. Mixon* (1990) 225 CA3d 1471, 1480 (Penal Code §1372(c) and (d) imply approval authority without a hearing). [Adult case and statute.] Although the case law and statute places the burden on the attorneys to seek a hearing, the better practice is for the court to set a hearing so things do not "slip through the cracks."

### **Return to Regular Juvenile Proceeding**

If the court finds that the minor has regained mental competence, the juvenile proceedings must be promptly resumed at the stage at which they were suspended. [Adult provisions at Penal Code §§1370(a)(1)(A), 1370.01(a)(1); *People v. Simpson* (1973) 30 CA3d 177, 106 CR 254 (unnecessary delay in resumption of proceedings may abridge speedy trial right).]

### **Court Must Set the Case for Jurisdiction or Disposition**

During the hearing when the minor's regular juvenile case "begins again" the determination of competency will likely be during a Competency Parte Review. Therefore the Court must set a subsequent Jurisdiction, Pre-Trial, or Disposition hearing.

### **Statutory Time Limitations Begin Again**

When a minor regains competence and the juvenile proceedings are reinstated, the time limits for a speedy trial and/or speedy disposition begin afresh, beginning on the day the regular juvenile proceedings are reinstated. Do not subtract the days that were pending before the minor's regular juvenile proceedings were suspended. Penal Code §1382(a)(2) and (3); Cal Rules of Ct 4.130(c)(2) and (c)(3)(B). [Adult provisions.]

### **Credit for Precommitment Confinement**

When the minor gets to the Disposition Hearing in the underlying delinquency case, the minor will be afforded precommitment credits toward any maximum time of confinement.<sup>53</sup> Credits can be granted only for the days the minor spent in Juvenile Hall, a locked Ranch, or the California Division of Corrections and Rehabilitation Juvenile Justice Center. Days the minor spent in any other alternative placement(s) for Competency Restoration Services do not count toward credits.

However, even if the court gives credits to the minor, and the minor has served a period of confinement equal to the maximum time of commitment, the minor may be subject to extended civil commitment proceedings under the LPS Act if he or she is considered dangerous to self or others, or for other reasons. *In re Banks* (1979) 88 CA3d 864, 871. [Adult case.]

A minor cannot earn Penal Code §4019 ("good time") conduct and participation credits against the current or subsequent term.

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<sup>53</sup> Adult provision: In calculating the maximum period of commitment, credit must be given for any time served in precommitment confinement attributable to the same criminal prosecution. *In re Banks* (1979) 88 CA3d 864 (precommitment confinement of defendant unable to make bail).

### **Contested Restoration Hearing**

After the Certification of Restoration is received by the court and parties, there is no specified right to a contested restoration hearing (to challenge the certification) in either juvenile or adult court. However, due process suggests a Contested Restoration Hearing should be made available to a minor if a minor wants one.<sup>54</sup> The Office of the District Attorney likewise has the opportunity to contest a Certificate of Restoration by requesting a Contested Restoration Hearing.

The minor is presumed competent at the hearing. *People v Rells* (2000) 22 C4th 860, 867.

### **Burden of Proof**

Once the minor requests a hearing to challenge the certification, the minor has the burden of proving by a preponderance of the evidence that the minor has not regained competence. *People v Rells* (2000) 22 C4th 860, 868. However, the prosecution may present evidence that the minor has not regained competence if the defense declines to do so. In this case, the burden of proof falls on the prosecution. *People v Rells* (2000) 22 C4th at 868 (burden falls on party who challenges presumption). [Adult case.]

## **SECTION TEN:**

### **IF IT IS UNLIKELY THE MINOR WILL ACHIEVE COMPETENCY IN THE FORESEEABLE FUTURE**

If there is substantial probability that the minor will not attain competency in the foreseeable future, the Competency Restoration Program should end; the underlying delinquency charge(s), notice and/or petition should be dismissed; the court should terminate jurisdiction of the minor's case.<sup>55</sup>

#### **Duration Before Dismissal of Juvenile Charge(s)**

In September 2010, Welf & Inst Code §709 was enacted. Section 709 sets broad time limitations in competency cases. It states:

“all proceedings shall remain suspended for a period of time that is no longer than reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future, or the court no longer retains jurisdiction.”<sup>56</sup> [Juvenile statute.]

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<sup>54</sup> In adult court, there is no law that allows for such a hearing. Regardless, a judge may allow for one. Although Penal Code §1372 does not provide for a hearing in which the minor may challenge the certification of competence, references in Penal Code §1372 to a hearing indicate a possible legislative intent that such a hearing may be afforded. *People v Murrell* (1987) 196 CA3d 822, 826.

<sup>55</sup> See “Considerations Before Dismissal” and “Process for Dismissal” in Section Ten.

<sup>56</sup> See the footnote in Section One relating to the problems of §709.

Therefore, under the statute, the court can determine what constitutes a reasonable amount of time. And the proceedings can remain suspended until the court no longer retains jurisdiction, which would be the maximum time of possible confinement for the minor.<sup>57</sup> This maximum time of possible confinement may extend well beyond one year for misdemeanors and three years for felonies dictated by this Protocol. Prior to September 2010, the signatories to this Protocol agreed to a one year time limit for misdemeanors and a three year time limit for felonies. Following the enactment of Welf & Inst Code §709, the signatories to this Protocol understand this statutory longer period, yet agree to implement the one year / three year limits instead. This Protocol calls for the one year / three year limits because it envisions that the issue of competency restoration should and will be determined well before the maximum period of possible confinement is reached. For example, if a minor has a maximum period of possible confinement of 12 years, it is patently unjust to have an incompetent minor under the suspended jurisdiction of the court for 12 years, when the issue of whether the minor can obtain/attain competency should be determined within the first few months to three years. If the minor is incompetent, the minor should not be in court.

The time limit before dismissal shall be no later than the following: for misdemeanors, one year from the day the Competency Restoration Program begins; for felonies, three years from the day the Competency Restoration Program begins.<sup>58</sup>

By stipulation of the parties, or upon good cause found by the judge, the court can extend the time limits for a brief time. (See “Considerations Before Dismissal” immediately below.) If there is an extension of the deadline, such extension should neither be for the purpose of further Competency Restoration services nor possible prosecution of the minor on the underlying charges. A brief extension should be for the purpose of “bridging services” before the court loses jurisdiction to order services for the minor. However, the court should not abuse its discretion by extending the time limits for longer than necessary or by proceeding too slowly.

### **Considerations Before Dismissal**

If there is no reason to have a minor’s case before the court, the case should be dismissed.<sup>59</sup> Before terminating jurisdiction, where there are possible and appropriate alternative forums, the Court shall consider whether the minor will be adequately served and whether the safety of the community will be adequately addressed by the dismissal and/or civil commitment.

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<sup>57</sup> This Protocol does not follow the “maximum time of possible confinement” as the time limit. Please read the reasons in this Section Ten.

<sup>58</sup> In California, for adults, the maximum period of commitment is three years from the date of the court’s commitment order, or the maximum term of imprisonment provided by law for the most serious offense charged in the information, indictment, or misdemeanor complaint, whichever is shorter. [Adult provision at Penal Code §1370(c)(1).] The three-year limit refers to the aggregate of all commitments for incompetency on the same charges, not to each commitment after a finding of incompetence. *In re Polk* (1999) 71 CA4th 1230, 1238 [Adult case.]

<sup>59</sup> Welf & Inst Code §709 does not direct the court to dismiss the underlying delinquency case or terminate jurisdiction, but it is assumed this is the only appropriate action if there is no longer a reason to suspend proceedings.

The court should consider:

- Possible danger the minor presents to him/herself or the community
- A short time to bridge the minor's return to the community/home and make sure appropriate mental health services are in place;
- Conservatorship, with an assessment that needs to be completed before dismissal;
- Civil Commitment, with an assessment that needs to be completed before dismissal;
- Disability services pursuant to Government Code Title 1, Division 7, Chapter 26.5, with an assessment that needs to be completed before dismissal;
- Referral to other agencies;

A minor should not just be “dropped” from the services provided by the minor’s attorney, appointed civil rights attorneys, the court, Probation Department, and the Department of Mental Health if doing so would do injury to the minor or community. A minor who suffers from mental illness and leaves court without appropriate services has a greater chance of returning to court on new offenses, and has a greater chance of being incarcerated.

In adult court, cases are not dismissed when it is found the defendant is unlikely to attain competency in the foreseeable future. Rather, after the defendant has reached the maximum time of possible confinement and it is unlikely the defendant will attain competency in the foreseeable future, the court orders the county public conservator to initiate “Murphy guardianship” proceedings. The underlying case is not dismissed, but rather remains suspended. Penal Code §§1370(c)(2), 1370(b)(1); Welf & Inst Code §5008(h)(1)(B); A Murphy guardianship is named after the case of *Conservatorship of Murphy* (1982) 134 Cal.App.3<sup>rd</sup> 15. [Adult statutes and case.]

### **Process for Dismissal**

If any party moves to dismiss the underlying delinquency case, or if the judge independently is considering dismissal, the District Attorney must be given 10 calendar days notice so that the District Attorney may consider requesting a hearing on the matter of dismissal and file an appropriate request for a hearing. The District Attorney will be afforded 10 days to make a decision, and can ask for a setting on the tenth day. The hearing, if requested, must be held within a reasonable time. The court should take into consideration possible expert witness availability, etc. The court cannot dismiss the case until after the hearing, should the District Attorney request one. At any time during the 10 day notice period, the District Attorney can waive the 10 day notice rule and stipulate to, or submit on, dismissal.

If the case is dismissed, the court should consider the initiation of civil commitment proceedings, if appropriate.<sup>60</sup>

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<sup>60</sup> See Section Eleven, below. Adult provisions at Penal Code §1370.01(a)(5), (e) and §1370(c)(2), (e); *In re Davis* (1973) 8 C3d 798, 804.

If the case is dismissed and there is no reason to have the minor civilly committed, the minor must be released from custody, if the minor is in-custody. Jurisdiction over the minor ends, unless there are other juvenile matters before the court.

The Office of the District Attorney can re-file the charges at any time following the dismissal.

### **Finding of Continued Incompetency**

If the court finds there is substantial probability that the minor will not attain competency in the foreseeable future, the court should place that finding on the record before dismissing the case, ordering a conservatorship, or ordering a civil commitment.<sup>61</sup>

### **Conservatorship Proceedings**

Whenever the minor is returned to the committing court after competency has not been restored, and it appears to the court that the minor is “gravely disabled” as defined in Welf & Inst Code §5008(h)(1)(A), the court must order the conservatorship investigator of the county to initiate conservatorship proceedings for the minor under the LPS Act of Welf & Inst Code §§5350–5371. California Rules of Court, Rule 5.645(b)(2)(A) [Juvenile Rule]; *People v. Karriker* (2007) 149 CA4th 763, 782–783 [Adult case].<sup>62</sup>

### **Commitment of Developmentally Disabled Minors**

If the court suspects the minor is developmentally disabled, the court may order the State Regional Center to examine the minor to determine services that can be provided and possible placements for the minor that serve the minor’s best interest. This examination should be done before the court loses jurisdiction, so the court should consider this option well in advance of any deadline that would cause the court to lose jurisdiction. However, if the deadline for the end of suspending the proceedings is upon the court, the court would have to continue the matter for 90 days to receive the report of the Regional Center director. If the evaluation is not done, the minor will not qualify for services that could last for the lifetime of the client.<sup>63</sup>

## **SECTION ELEVEN: MINORS WHO SUFFER FROM MENTAL DISORDERS**

### **Introduction to Section Eleven**

Incompetency and mental illness are distinct concepts, have separate criteria, and must be kept separate in the minds of professionals in the court process. A minor can be incompetent and not suffer from mental illness. A minor can be competent and suffer from mental illness. A minor can be incompetent and also suffer from mental illness. Incompetency and mental illness often go hand in hand.

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<sup>61</sup> *Id.*

<sup>62</sup> For a definition of “gravely disabled,” see Definitions section, within Section Eleven.

<sup>63</sup> For details on developmental disabilities and the Regional Center process, see within Section Six the subsection titled “State Examination of Developmentally Disabled Minors.”

This section Eleven serves two purposes: it handles what the court should do with potentially mentally ill minors during the court's competency process, and what the court should do with potentially mentally ill minors after the court's competency process ends (either because the minor is found to be competent or unlikely to attain competency within the foreseeable future).

Also, prior to the enactment of Welf & Inst Code §709 in September 2010, the laws that related to juvenile incompetency under Welf & Inst Code §705 basically routed possibly incompetent minors through a "mental disorder" path rather than an "incompetency" path.<sup>64</sup> The newer Welf & Inst Code §709 is designed to remedy this

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<sup>64</sup> There are many problems with the juvenile competency statutes outlined in Welf & Inst Code §705. The problems are so significant that prior to the passage of Welf & Inst Code §709, the participants in Juvenile Justice Court all agreed to avoid the statutory procedure of §705 whenever possible. Here are the flaws of §705 and its underlying statutes:

These statutes were never intended to deal with incompetent minors. These statutes were designed to determine if a minor is gravely disabled, or a harm to self or others, or in need of "further treatment" for any mental disability. This is not the same standard for determining if the minor is competent. The standard for competency is whether the minor "understands the juvenile proceedings or whether the minor can effectively communicate with counsel."

*In Re Patrick H.*, 54 Cal.App.4<sup>th</sup> 1346, 1357 states the juvenile court faced with a competency issue shall only order the juvenile scheme provided for in Welf & Inst Code §705 which leads to a 72 hour hold and assessment. *In Re Patrick H.* states the juvenile court shall not have the minor assessed pursuant to the adult scheme of Penal Code §1369 which leads to a 90 day commitment and evaluation process. However, in most cases the 72 hour hold dictated by Welf & Inst Code §705 only answers the questions "Does the minor suffer from a DSM-IV mental disorder?" and "Is the minor a danger to self or others?" and "Does the minor require further treatment?" It does not answer the question "Is the minor competent to withstand trial?" Following a 72 hour hold, a minor is returned to the court for a potential competency trial regardless of what the 72 hour assessment revealed. And a competency evaluation will still need to be ordered. Therefore, in most cases, a 72 hour hold will be fruitless and, therefore, unnecessary toward the determination of competency.

There is a risk that if defense counsel raises the issue of competency, the minor may be committed for a long time under the LPS Act because the 72 hour hold exposes the minor to a potential long term commitment regardless of whether or not the minor is competent. Under the provisions of Welf & Inst Code §705, a minor could be found to be gravely disabled or a harm to self or others, yet be *competent*, and still have the proceedings suspended when the minor is committed to a hospital. It should be noted that a minor potentially is always subject to an LPS Act commitment regardless of whether someone declared a doubt, whether the court found a "substantial evidence doubt" exists, or whether the minor is ultimately found competent or not. However, a good defense attorney will weigh the risks and benefits of declaring a doubt regarding competency because the chances of a minor being committed under the LPS Act increases upon declaring a doubt.

Moreover, these statutes were intended for persons who have not been recently evaluated. If a minor has been recently evaluated (as many minors in Juvenile Hall have been), the court will already know which mental disorders exist under DSM-IV, if any. The only question left is "Does this mental disorder affect the minor's competency?" It is likely that a 72 hour hold will not reveal any new information.

Another problem is the state hospitals that previously treated LPS patients are now closed, placing the responsibility on county facilities and local agencies. In Santa Clara County, Valley Medical Center is assigned to conduct 72 hour holds for mental issues. However, Valley Medical Center is not equipped to treat the minors who come to the medical facility for assessment. It has become more difficult to appropriately place minors who suffer from serious mental illness under the LPS Act.

flaw. However, Welf & Inst Code §709 does not specify that the prior laws are no longer to be followed. It is assumed that the intent of §709 was to entirely replace §705. Nonetheless, attorneys can argue that some or all of the provisions under §705 still are law in California. And the newer §709 does not address every issue that was covered by previous §705 law.

Because of this, Section Eleven affords attorneys the opportunity to enter a knowing waiver of legal rights on behalf of their minor clients when they agree to follow this Protocol. Both before and after the enactment of §709, signatories of this Protocol agreed to not automatically expose possibly incompetent minors to 72 hour holds. As a general rule, the parties will stipulate that a 72 hour hold is not necessary, and will proceed directly to an evaluation by a Pre-Trial Competency Evaluator.<sup>65</sup>

Section Eleven not only provides a description of the law prior to September 2010 (in case §709 does not entirely replace §705), but also provides a framework for dealing with some issues that existed both before and after September 2010: what does the court do when a minor needs services for being both possibly incompetent and mentally ill? The minor could receive both competency and mental illness services simultaneously.

If the court finds the minor is competent anywhere along the competency path and ends competency restoration services, the minor may thereafter need services for mental illness. This Section Eleven explains the options available.

Finally, at any time, the director of a holding facility may arrange, or a judge may independently order, a 72 hour assessment of a minor (regardless of competency issues or whether jurisdiction was ever suspended).

The following information will guide the court and counsel on the issue of mental disorders.

### **Welf & Inst Code §705**

The statutory scheme for juveniles who are mentally disordered is found within Welf & Inst Code §705:

“Procedure where minor mentally disordered. [Note: some texts title this section “Holding minor in psychopathic ward of county hospital.”]

Whenever the court, before or during the hearing on the petition, is of the opinion that the minor is mentally disordered or if the court is in doubt concerning the mental health of any such person, the court may proceed as provided in §6550 of this code or §4011.6 of the Penal Code.”

The juvenile competency case of *Patrick H.* states that as between §6550 or §4011.6, the court should proceed under “whichever is appropriate.”<sup>66</sup> *In re Patrick H.* (1997) 54 CA4th 1346; *In re Mary T.*, 176 Cal.App.3d at p. 43; *In re James H.*, 77 Cal.App.3d 169, 177. No case explains how to determine which path is appropriate.

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<sup>65</sup> See “Court-Appointed Competency Evaluation” in Section Three, above.

<sup>66</sup> One case states these two provisions (Welf & I C 6550 and Pen C 4011.6) should be considered complementary because they both lead to a possible LPS commitment. *In re Robert B.* (1995) 39 CA4th 1816, 1823. Although they may be viewed as complementary, there are significant distinctions.

### **Determining which is appropriate**

The differences between Welf & Inst Code §6550 and Penal Code §4011.6 are described here, as well as the California Rules of Court, Rule 5.645.<sup>67</sup> The following subsections merely highlight the differences of the code sections and the definitions associated with them. These next subsections are only intended to help the reader understand the differences. Following these subsections, the Protocol addresses actual application of these statutes and practical guidelines for which path to take. If the court orders a 72 hour hold, the path toward the 72 hour hold will generally be Welf & Inst Code §6550 rather than Penal Code §4011.6. (See Application sections, below.)

### **Provisions of Penal Code §4011.6:**

This statute provides for a “very quick look” into an in custody minor’s condition, with the minor always coming back to court within 72 hours.

- Applies to any person (minor or adult) who may be “mentally disordered.”
- For minors, only applies to in-custody minors in Juvenile Hall or the Ranch.
- Does not apply to out-of-custody minors.
- If the minor may be “mentally disordered,” he or she may be taken to Valley Medical Center for a Welf & Inst Code §5150 hold and 72-hour treatment and evaluation.
- Either a judge or the head of the Juvenile Hall / Ranch can transfer the minor to Valley Medical Center without a court order; but must notify all parties in writing after the transfer.
- Time passed at Valley Medical Center shall count as part of the minor's sentence.
- The minor may be concurrently subject to commitment under the Lanterman-Petris-Short Act.
- Time may or may not be tolled for speedy hearing rights, depending on court findings.
- There is no provision for an extension of the commitment time beyond 72 hours.

### **Provisions of Welf & Inst Code §6550:**

This statute provides for a “quick look” at minors (whether in-custody or out-of-custody), followed by potential longer treatment of 14 days, if needed.

- Applies to minors only; does not apply to adults.
- Applies to minors who may be “mentally disordered” or “mentally retarded.”
- Applies whether the minor is in-custody or not.
- Requires a court order to have the minor placed at Valley Medical Center and evaluated.
- Provides for a Welf & Inst Code §5150 hold and 72-hour evaluation.
- If the minor is not affected with any mental disorder requiring intensive treatment or mental retardation then the minor is returned to court within 72 hours for continuation of regular juvenile proceedings.
- The minor may be held for more than 72 hours.

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<sup>67</sup> The complete text of the statutes and Rule are found in Section Twelve, below.

- If the minor is in need of intensive treatment for a mental disorder, he/she may be certified by the facility for not more than 14 days of involuntary intensive treatment.<sup>68</sup>
- If the minor is mentally retarded he/she can be committed to a state hospital.
- Proceedings are stayed.
- The juvenile court loses jurisdiction during treatment; time is tolled; there is no provision for days in treatment to count toward the minor's maximum commitment time.

### **Provisions of California Rules of Court, Rule 5.645:**

This Rule of Court provides specifically for a competency process (the two statutes above do not) that parallels (closely but not entirely) the provisions of Welf & Inst Code §6550, et seq., which is one of the two routes required for competency process under the statutory provisions of Welf & Inst Code §705.

This Rule appears to be an attempt (prior to Welf & Inst Code §709) by the Court to blend the statutory requirement of a 72 hour hold pursuant to Welf & Inst Code §6550 with the need to have a competency evaluation outside of the 72 hour hold. However, this Rule has the competency evaluation first, followed by a 72 hour hold only if the minor is found to be incompetent. The 72 hour hold, however, will not help to restore the minor's competency, but rather have the minor possibly committed under the LPS Act. Regardless of the order in which the 72 hour hold and the competency evaluation takes place, the *In Re Patrick H.* case stated the court should follow Welf & Inst Code §705, which this Rule is not. *In Re Patrick H.* requires a 72 hour hold first, and not a competency evaluation.

Also, under this Rule, the end result for competency purposes is flawed: if a minor is deemed incompetent by a court-appointed Pre-Trial Competency Evaluator, the minor must then be placed in a 72 hour hold and evaluated for an LPS Act commitment; if the minor is deemed to not need additional or intensive mental health services (or is not mentally retarded) pursuant to the LPS Act, the minor is returned to court for the regular juvenile proceedings to continue; but the minor is still incompetent – competency has not been achieved/restored during the 72 hour hold. On the other hand, if the minor is deemed to need additional or intensive services (or is mentally retarded) the minor will be committed under the LPS Act and there will be no restoration of competency.

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<sup>68</sup> According to this statute, "The jurisdiction of the juvenile court over the minor shall be suspended during such time as ... under remand for 90 days for intensive treatment or commitment ordered by such court." (Fifth paragraph). Likewise, Rule of Court 5.645(c)(3) provides: "The jurisdiction of the juvenile court must be suspended while the child is...under remand for 90 days for intensive treatment or commitment ordered by that court." *In re Patrick H.* (1997) 54 Cal.App.4<sup>th</sup> 1346, prevented the juvenile court from applying the 90 day provisions of adult law in Penal Code §1368, et seq. This Welf & Inst Code 6550 "90 days" is different. Welf & Inst Code 6550 is designed specifically for minors, and *Patrick H.* ruled 6550 should be used for minors. Also, apparently, one cannot get to the "90 day treatment" unless one goes through the "longer" certification process of the 72 hour hold provided for in Welf & Inst Code §6550. So there is no violation of initially restraining a minor for too long, as warned against by *Patrick H.* Strangely, none of the literature, case law, or treatises mention this "90 days" of Welf & Inst Code §6550 treatment.

- Applies only to minors.
- If the court finds there is reason to doubt a minor is capable of understanding the proceedings or of cooperating with the minor’s attorney, the court must stay the proceedings and conduct a hearing regarding the child’s competence.
- The court may appoint an expert to evaluate the minor’s capacity.
- If the court finds the minor is capable of understanding the proceedings and of cooperating with the attorney, the court must return to regular juvenile proceedings.
- If the court finds that the child is not capable of understanding the proceedings or of cooperating with the attorney, the court must proceed under W & I §6550 and (a)–(c) of this rule (inserted here for easy reference):

Section (a)–(c):

- Applies to minors who are “mentally disabled” or may be “mentally ill” (as opposed to the statutory “mentally retarded” of Welf & Inst Code §6550.)
- If mentally disabled or may be mentally ill, the court may stay the proceedings and order the child taken to a facility for a 72-hour hold, treatment and evaluation.
- If the minor is not in need of intensive treatment, the child must be returned to the juvenile court within 72-hours and the court must proceed with regular juvenile proceedings.
- If the minor is in need of intensive treatment for a mental disorder, the child may be certified for not more than 14 days of involuntary intensive treatment; the juvenile proceedings remain stayed.
- A conservator can be appointed for the minor if further treatment is needed for the mental disorder, or if the minor is gravely disabled (LPS commitment). (For a definition of “gravely disabled,” see Definitions section, immediately below.)
- If mentally retarded, the court can order placement in a state hospital; juvenile court jurisdiction is suspended while the civil court handles the LPS commitment.
- If the minor is not mentally retarded, the minor is returned to the juvenile court within the 72-hour period, and the court returns to regular juvenile proceedings.
- Proceedings are stayed.
- There is no provision for granting credits for days in treatment toward the minor’s maximum commitment time.

### **The Juvenile Statutory Steps**

Once the judge declares a doubt regarding the minor’s competence, and chooses to order a 72 hour hold/assessment/treatment under the Lanterman-Petris-Short Act (LPS Act), the court should no longer continue with the adult statutory scheme, but instead turn to the provision of Welf & Inst Code §705.<sup>69</sup> *In re Patrick H.* (1997) 54 Cal.App.4<sup>th</sup> 1346, at 1357, 1359; *In re Michael E.* (1975) 15 Cal.3d 183; *In re Michael D.* (1977) 70 Cal.App.3d 522; *In re L.L.* (1974) 39 Cal.App.3d 205; Welf & Inst Code §705; Rule of Court 5.645. The court should not commit the minor to a 90 day mental facility evaluation. *In re Patrick H.* (1997) 54 Cal.App.4<sup>th</sup> 1346, 1357 and 1359.

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<sup>69</sup> Again, the 72 hour hold and assessment scheme for possible incompetence under Welf & Inst Code §705 predates Welf & Inst Code §709 which does not call for a 72 hour hold and assessment.

## **Custody of Minor**

If the court orders a 72 hour hold, the assessment and treatment must, by necessity, be done in custody. If the minor was already in custody, the evaluation should still be done within 72 hours, and the minor will likely remain in custody thereafter for reasons other than the 72 hour hold. If the minor was out of custody at the time of the 72 hour hold order, the minor must be put into custody. If there is no other reason to have the minor in custody except the 72 hour hold, the court should not keep the minor in custody for more than 72 hours on the initial LPS evaluation. To determine what the minor's custody status will be after the 72 hours, there are detailed steps below.

## **Definitions**

One of the issues that is problematic for psychological assessors is the various and sometimes vague definitions of these statutes as improperly intermixed by the assessors (and some courts): “mentally disordered,” “mentally retarded,” “mentally disabled,” “mentally ill,” and “gravely disabled.” Moreover, many offenders are “mentally disordered” or “mentally retarded” or “mentally disabled” or “mentally ill” or “gravely disabled,” yet the minors can be competent. The only significance to the mental disorder issue as it relates to competency is if the minor is incompetent because of the mental condition.

“Mentally Disordered” is not defined. This is generally interpreted to refer to a diagnosis listed in the Diagnostic and Statistical Manual of Mental Disorders. *People v. Triplett* (1983) 144 Cal. App. 3d 283.<sup>70</sup>

“Mentally ill” and “mentally disabled” are not defined. They are probably the same as “mentally disordered.”

“Mentally retarded” is not defined in the code. It is generically defined as “a developmental disability that first appears in children under the age of 18. It is defined as an intellectual functioning level (as measured by standard tests for intelligence quotient) that is well below average and significant limitations in daily living skills (adaptive functioning). Retarded individuals have IQ scores ranging from 35-55. Severely retarded individuals have IQ scores of 20-40. Profoundly retarded individuals have IQ scores under 20-25.”

“Gravely disabled,” for a minor, generally means a child who, if the necessities of life are supplied directly the child, is unable to provide for his/her food, clothing, and/or shelter or to make appropriate use of them—for example, a psychotic adolescent who refuses to eat because he/she believes his/her parents are poisoning him.<sup>71</sup>

“Gravely disabled” is defined in Welfare & Inst Code §5008 (The LPS Act):

Gravely disabled means either of the following:

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<sup>70</sup> [http://en.wikipedia.org/wiki/5150\\_\(Involuntary\\_psychiatric\\_hold\)](http://en.wikipedia.org/wiki/5150_(Involuntary_psychiatric_hold)); Some jurisdictions, such as Sweden, have required a criminal offender to be “severely mentally disordered” in order to come within the realm of “incompetent.” This is to rule out persons who commit crimes and happen to also have a mental disorder such as depression or ADHD. <http://diss.kib.ki.se/2005/91-7140-377-9/thesis.pdf> .

<sup>71</sup> [http://en.wikipedia.org/wiki/5150\\_\(Involuntary\\_psychiatric\\_hold\)](http://en.wikipedia.org/wiki/5150_(Involuntary_psychiatric_hold))

“(A) A condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter.

(B) A condition in which a person, has been found mentally incompetent under Section 1370 of the Penal Code and all of the following facts exist:

(i) The indictment or information pending against the defendant at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person.

(ii) The indictment or information has not been dismissed.

(iii) As a result of mental disorder, the person is unable to understand the nature and purpose of the proceedings taken against him or her and to assist counsel in the conduct of his or her defense in a rational manner.

(2) For purposes of Article 3 (commencing with Section 5225) and Article 4 (commencing with Section 5250), of Chapter 2, and for the purposes of Chapter 3 (commencing with Section 5350), "gravely disabled" means a condition in which a person, as a result of impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter.

(3) The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone.”

### **More on Grave Disability**

Even though the statutory definition of grave disability appears limited to three categories: inability to provide for food, clothing or shelter, case law has expanded grave disability to include:

Need for food:

Cannot distinguish between food and non food

Endangers health by gross negligence in needed diet and nutrition

Begging or stealing food

Eating out of refuse or garbage cans

Ordering meals at restaurants without having funds

Demonstrates excessive and consistent food preferences or aversions which endanger health (except for genuine religious reasons)

Having spoiled food in refrigerator or no food for a lengthy period of time in the house;

Need for clothing:

Engaging in public nudity or "unthinking" exhibitionism

Engaging in bizarre style of dressing that does or would be apt to lead to social difficulties (if not used by social group or personal preferences)

Wearing filthy or soiled clothes with lack of recognition of personal hygiene problem

Wearing disheveled clothes for prolonged period of time (for no apparent reason);

Need for shelter:

Leading a nomadic existence with an inability to establish stable community living, including living in the streets or other public places

Unable to locate housing and make the appropriate arrangements with an inability to ask for or accept assistance in doing so  
Unable to manage his or her household in such a way as to avoid clear dangers to health (Presence in household of filthy conditions) fire hazards that the person cannot correct, vermin infestations, and lack of bathing and toilet facilities  
Resists leaving residence even if evicted or the residence is sold  
Hoarding nonsensical items while misplacing necessary items.<sup>72</sup>

However, "bizarre or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting a conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival. Only then does the interest of the state override her individual liberty interests." *Conservatorship of Smith* (1986) 187 Cal.App.3d 903. [Adult case.]

### **Implementing Penal Code §4011.6**

For the details of Penal Code §4011.6, see the subsection "Provision of Penal Code §4011.6," above; or see the entire statute in the Section Twelve, below. If Penal Code §4011.6 may apply to the minor before the court, read this section of the Protocol.

Penal Code §4011.6 is for courts to take a "very quick look" at a minor with *unknown potential* mental illness. In many competency cases, the 72 hour hold pursuant to Penal Code §4011.6 can be bypassed. It is a weaker version than the other route of Welfare & Inst Code §6550 – both in the scope of which minors are eligible for acceptance into this treatment route, and with regards to flexibility of services provided. Welfare & Inst Code §6550 is typically for situations where the court *knows* there is a mental health issue and the minor needs treatment. Rule of Court 5.645, which relates specifically to what judges should do when faced with competency issues, suggests the Welfare & Inst Code §6550 route, not the Penal Code §4011.6 route. Of the two routes, the Penal Code §4011.6 is less onerous on the minor because of the absolute time limit of 72 hours at Valley Medical Center.

If the court believes it is more likely the minor is incompetent and will require competency restoration services, the court should bypass the 72 hour hold route and continue directly to an Expert Juvenile Competency Forensic Evaluation. This is the most direct, effective, and efficient path to restoring competency. The Expert Juvenile Competency Forensic Evaluation will not only provide the equivalent of a 72 hour hold (to determine DSM-IV mental illness) but also answer the question of competency. If the court believes the minor may require treatment or hospitalization for a mental disorder, the court should apply Welfare & Inst Code §6550 (to lead to a possible LPS commitment or treatment at Juvenile Hall, a non-custodial placement, or at the minor's home). [See section on "Implementing Welfare & Inst Code §6550" below.] If the court is unsure, the court should apply Welfare & Inst Code §6550 followed by an Expert Juvenile Competency Forensic Evaluation.

Nonetheless, if the court believes the minor is mentally incompetent to stand trial and that very short-term psychiatric treatment may resolve any potential problems, the

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[http://www.gatewaypsychiatric.com/SFGH%20BEEC%20Course%20Material/grave\\_disability.htm](http://www.gatewaypsychiatric.com/SFGH%20BEEC%20Course%20Material/grave_disability.htm)

court may order this limited Penal Code §4011.6 72 hour hold. This may come up in situations such as these:

- Where there is a history of the minor gaining competence during a 72 hour period;
- Where an expert or family member believes the minor will respond to a very brief amount of treatment, and the court believes it to be appropriate;
- Where the incompetency is a “close call” or “*de minimus*,” the 72 hour hold and treatment may restore minor’s competence and preclude the necessity of an extended competency process and Contested Competency Trial. (But be mindful that under Welf & Inst Code §709, whenever competency is at issue, a psychological assessment for competency is required – so the court may order both a 72 hour hold and a competency assessment simultaneously.)
- Where the minor’s mental health issues are more than a mere inability to understand court proceedings but rather the minor’s mental health issues likely give cause to have the minor committed for further treatment (for example the minor is a risk to self or others.)
- Where the minor or his/her family have been uncooperative and it is unlikely the minor will be assessed if left in the home; the only practical way of assessing the minor is while in custody.

The court can refer the minor to a 72 hour hold under Penal Code §4011.6 at any time when the statute is applicable, regardless of whether the minor is competent, incompetent, or whether the competency has even been questioned.

### **Ordering the 72 Hour Hold Pursuant to Penal Code §4011.6**

If the minor is in-custody, the court will order the probation department to implement the 72 hour procedure and have the minor transferred to Valley Medical Center. The court must specify to the probation officer, the head of Juvenile Hall, and the assessor at Valley Medical Center, whether the court is ordering the hold and assessment pursuant to either Penal Code §4011.6 or Welf & Inst Code §6550. (And if the court is ordering a simultaneous competency assessment under Welf & Inst Code §709, the order and instructions to the Pre-Trial Competency Evaluator should so state.) The court will order the minor returned to court three calendar days from the date of the commitment order. [Adult and juvenile statutes.]

If the minor is out-of-custody, the court will order the minor detained in Juvenile Hall, and then follow the steps in the above paragraph.

The minor would be transferred to Valley Medical Center for evaluation and treatment as a voluntary or involuntary patient. Penal Code §§4011.6, 4011.8. The minor does not have the right to refuse assessment or standard treatment, but the minor has the right to refuse some extreme treatment such as surgery or convulsive therapy (shock treatment). Welf & Inst Code §5325, *et seq.*

If the minor is referred to Valley Medical Center pursuant to Penal Code §4011.6, the judge must order the minor to be returned to court at conclusion of the evaluation and treatment. Welf & Inst Code §5151. The court must inform the facility in writing of the reason(s) that minor is being taken there. The writing must be confidential. Penal Code §4011.6 (first paragraph). The court must immediately notify and serve a copy of the commitment order on the defense attorney, prosecuting attorney, and the director of the Santa Clara County Department of Mental Health. Penal Code §4011.6 (second paragraph). The mental health director (or designee) may examine the minor before transfer to the 72-hour facility. Penal Code §4011.6 (first paragraph).

The commitment on a Penal Code §4011.6 referral does not preclude the juvenile proceedings from continuing during treatment, unless the person in charge of Valley Medical Center determines that arraignment or trial would be detrimental to his or her well-being. Penal Code §4011.6 (seventh paragraph). The court should continue with the regular juvenile proceedings on the date set for return of minor.

The duration of the commitment on a Penal Code §4011.6 referral will be governed by the LPS Act, depending on minor's mental condition. (See "LPS Act/5150 Hold," below.) [Adult and juvenile statutes.]

### **Conversion to Voluntary Inpatient Status**

A minor who has been transferred to an inpatient facility under Penal Code §4011.6 may convert to voluntary inpatient status without obtaining the consent of the court, the person in charge of the jail, or the local mental health director. At the beginning of that conversion, the person in charge of the facility must transmit a report to the judge, counsel for the minor, prosecuting attorney, and local mental health director (or designee). Penal Code §4011.6 (fourth paragraph). [Adult and juvenile statute.]

### **LPS Reports**

The Valley Medical Center must transmit a confidential report to the judge who made the referral and to the director of the Department of Mental Health (or designee) concerning the condition of the minor. Penal Code §4011.6 (third paragraph). A new report must be transmitted at the end of each period of confinement provided for in the applicable Welfare and Institutions Code provisions. A new report is also required on conversion of the minor to voluntary status and on the filing of temporary letters of conservatorship. Penal Code §4011.6 (third paragraph). [Adult and juvenile statute.]

### **Effect of Penal Code §4011.6 72 Hour Hold on Sentence**

If the minor is detained in, or remanded to, a facility under the LPS Act provisions, pursuant to Penal Code §4011.6, the time passed in the facility must be counted as part of the minor's sentence. Penal Code §4011.6 (fifth paragraph). When the minor is detained or remanded, the person in charge of the Juvenile Hall must advise the professional person in charge of the facility of the expiration date of the minor's sentence. If the minor is to be released from the facility before the expiration date, the professional person in charge must notify the local mental health director (or designee), counsel for the minor, the prosecuting attorney, and the person in charge of the jail, who must send for, take, and receive the minor back into the jail. Penal Code §4011.6 (fifth paragraph).

### **Effect of Penal Code §4011.6 72 Hour Hold on Statutory Time Limitations**

During the minor's detention in a mental health facility under the LPS Act provisions based on a Penal Code §4011.6 referral, time continues to run for arraignment or trial unless (1) the minor has waived time, (2) the person in charge of the facility determines under Penal Code §4011.6 that arraignment or trial would be detrimental to the minor's well-being, or (3) good cause to the contrary is shown under Penal Code §1382. Penal Code §§1382, 4011.6 (seventh paragraph); *People v Vass* (1987) 196 CA3d Supp 13, 18. The minor's danger to himself or herself or to others, or grave disability, are not by themselves sufficient reasons to delay arraignment or trial. 196 CA3d Supp at 17. [Adult case, and Penal Code §1382 is an adult statute. Penal Code §4011.6 relates to both adults and children.]

### **Initiation of Conservatorship Proceedings**

Conservatorship proceedings may be initiated for any gravely disabled minor transferred to a facility under Penal Code §4011.6 on recommendation of the appropriate facility director to the county conservatorship investigator for the minor's county of residence or for the county in which the facility is located. The initiation of conservatorship proceedings or the existence of a conservatorship does not affect any pending juvenile proceedings. Welf & Inst Code §§5008(h) (defining grave disability), 5352.5. [Adult and juvenile statutes.]

Any hearings required in the conservatorship proceedings must be held in the superior court in the county that ordered the commitment. Penal Code §1370.01(c)(2). [Adult statute.] The court must provide a copy of the order directing the initiation of conservatorship proceedings to the county mental health director (or designee) and must notify the director (or designee) of the outcome of the proceedings. Penal Code §1370.01(c)(2). [Adult statute.] The initiation of conservatorship proceedings or the existence of a conservatorship does not affect any pending juvenile proceedings. Welf & Inst Code §5352.5; California Rules of Court, Rule 5.645(b)(2)(A). [Juvenile Rule.]

### **Implementing Welfare & Inst Code §6550 (and Rule of Court 5.645)**

For the details of Welf & Inst Code §6550 and Rule of Court 5.645, see the subsection "Provision of Welf & Inst Code §6550" and "Provisions of Rule of Court 5.645," above. The entire statute and Rule are in Section Twelve, below. If Welf & Inst Code §6550 (and the almost identical Rule of Court 5.645) may apply to the minor before the court, read this section of the Protocol.

Welfare & Inst Code §6550 is typically for situations where the court knows there is a mental health issue and the minor needs treatment. Rule of Court 5.645, which relates specifically to what judges should do when faced with competency issues, suggests the Welfare & Inst Code §6550 route, not the Penal Code §4011.6 route. Therefore, among the two routes dictated by Penal Code §705, the Welfare & Inst Code §6550 is more appropriate to competency. Under Welf & Inst Code §6550, the minor can be held for 72 hours or 14 days (or 90 days), depending on the circumstances. All three time elements require judicial review and court orders.

- If the court believes it is more likely the minor is incompetent and will require competency restoration services, the court should bypass the 72 hour hold route and continue directly to an Expert Juvenile Competency Forensic Evaluation. This is the most direct, effective, and efficient path to restoring competency. The Expert Juvenile Competency Forensic Evaluation will not only provide the equivalent of a 72 hour hold (to determine DSM-IV mental illness) but also answer the question of competency. If the court believes the minor may require treatment or hospitalization for a mental disorder, the court should apply Welfare & Inst Code §6550 (to lead to a possible LPS commitment). If the court is unsure, the court should apply Welfare & Inst Code §6550. (But be mindful that under Welf & Inst Code §709, whenever competency is at issue, a psychological assessment for competency is required – so the court may order both a 72 hour hold and a competency assessment simultaneously.)

If the court believes the minor is mentally incompetent to stand trial and that somewhat short-term psychiatric treatment may resolve any potential problems, the court may order this 72 hour hold (which may lead to a longer hold). This may come up in situations such as these:

- Where there is a history of the minor gaining competence during 14 days of treatment;
- Where an expert or family member believes the minor will respond to 72 hour or 14 day treatment;
- The minor is refusing medication that, if taken, would stabilize the minor (and the 72 hour hold would likely lead to an involuntary commitment). This path should be taken only in rare situations.<sup>73</sup>
- The maximum time for confinement of the minor is so short (1 month) that having a full blown court-appointed assessment, followed by a possible Contested Competency Trial, followed by a possible extensive competency restoration program, would be imprudent.
- Where the 72 hour or 14 day hold and treatment may restore minor's competence and preclude the necessity of an extended competency process and Contested Competency Trial.
- Where the minor's mental health issues are more than a mere inability to understand court proceedings but rather the minor's mental health issues likely give cause to have the minor committed for further treatment (for example the minor is a risk to self or others.)
- Where the minor or his/her family have been uncooperative and it is unlikely the minor will be assessed if left in the home; the only practical way of assessing the minor is while in custody.

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<sup>73</sup> See "Voluntary Medication Treatment" and "Involuntary Medication Treatment" in Section Three.

The court can refer the minor to a 72 hour hold under Welf & Inst Code §6550 at any time when the statute is applicable, regardless of whether the minor is competent, incompetent, or whether the competency has even been questioned.

The minor would be transferred to Valley Medical Center for evaluation and treatment as a voluntary or involuntary patient. The minor does not have the right to refuse assessment or standard treatment, but the minor has the right to refuse some extreme treatment such as surgery or convulsive therapy (shock treatment). Welf & Inst Code §5325, *et seq.* If the minor is referred to Valley Medical Center pursuant to Welf & Inst Code §6550, the judge must order the minor to be returned to court at conclusion of the evaluation and treatment. Welf & Inst Code §6550.

### **Ordering the 72 Hour Hold Pursuant to Welfare & Inst Code §6550**

If the minor is in-custody, and the court is in doubt whether the minor is mentally disordered or mentally retarded, the court will order the Probation Department to implement the 72 hour procedure and have the minor transferred to Valley Medical Center. The court will specify to probation, the head of Juvenile Hall, and the assessor at Valley Medical Center whether the court is ordering the hold and assessment pursuant to either Penal Code §4011.6 or Welf & Inst Code §6550. (And if the court is ordering a simultaneous competency assessment under Welf & Inst Code §709, the order and instructions to the Pre-Trial Competency Evaluator should so state.) The court will order the minor returned to court three calendar days from the date of the commitment order. [Adult and juvenile statutes.]

If the minor is out-of-custody, the court will order the minor detained in Juvenile Hall, and then follow the steps in the above paragraph.

When the minor returns to court in 72 hours, the head of Valley Medical Center shall submit a written report to the court concerning the results of the evaluation of the minor's mental condition. If the head of Valley Medical Center finds the person is, as a result of mental disorder, in need of intensive treatment, the minor may be certified for not more than 14 days of involuntary intensive treatment.

If the head of Valley Medical Center finds that the minor is mentally retarded, the juvenile court may direct the filing in civil court a petition for the commitment of a minor as a mentally retarded person to the State Department of Developmental Services for placement in a state hospital. In such case, the juvenile court shall transmit to civil court a copy of the report of the head of Valley Medical Center.

If the head of Valley Medical reports to the juvenile court that the minor is not affected with any mental disorder requiring intensive treatment or mental retardation, the head of Valley Medical Center shall return the minor to the juvenile court on or before the expiration of the 72-hour period and the court shall proceed with the regular juvenile case.

The jurisdiction of the juvenile court over the minor shall be suspended during such time as the minor is in the civil court or under remand for 90 days for intensive treatment or commitment ordered by such court.

The duration of the commitment on a Welf & Inst Code §6550 referral will be governed by the LPS Act, depending on minor’s mental condition. (See “LPS Act/5150 Hold,” immediately below.)

### **The LPS Act / 5150 Hold**

Penal Code §4011.6 and Welfare & Inst Code §6550 trigger the LPS Act Welfare & Inst Code §5150 that governs the disposition of a minor who comes into the civil commitment system as the result of the court’s referral. The length of the commitment, and thus the minor’s availability to return to court, will depend on the minor’s mental condition, as evaluated at intervals specified by the LPS Act. The applicable provisions of Part 1, Division 5 of the Welfare and Institutions Code are as follows:

- |             |   |
|-------------|---|
| 5150–5157   | Detention of mentally disordered persons for evaluation and treatment (72 hours)                        |
| 5250–5259.3 | Certification of detained persons for intensive treatment (14 days; total of 17 days)                   |
| 5260–5268   | Additional intensive treatment of suicidal persons (additional 14 days, total of 31 days)               |
| 5270.15     | Additional intensive treatment for still gravely disabled persons (30 days; total of 47 days)           |
| 5275–5278   | Right to judicial review when person is detained for intensive treatment                                |
| 5300–5309   | Post certification procedures for imminently dangerous persons (additional 180 days; total of 197 days) |
| 5325–5337   | Legal and civil rights of persons involuntarily detained  |
| 5350–5371   | Conservatorship for gravely disabled persons  |

### **Return of the 72 Hour Mental Disorder Report**

If the 72 hour hold psychiatric report indicates the minor suffers from a mental disorder and needs more treatment or requires an LPS commitment or conservatorship, the judge will likely order those things. The matter will be continued to a later date to accommodate the time-frame of the treatment/commitment/conservatorship. The competency hearing will be postponed.

If the 72 hour hold psychiatric report indicates the minor suffers from a mental disorder and does not require more treatment and does not require an LPS commitment and does not require a conservatorship, the judge will likely not order those things. The matter should continue toward the competency hearing.

If the parties do not stipulate to the 72 hour hold psychiatric report that states there are no mental disorders (which is not the standard for “competency”), or if one of the parties believe there is a need for a competency hearing regardless of the report, the judge should set a competency hearing. (The court does not actually have to set a competency

hearing at this point. The court can wait a few weeks until the Pre-Trial Competency Evaluator completes the evaluation and returns to court with a report.)

Even if the parties stipulate to the opinions within the 72 hour hold report, the judge may not accept the stipulation. In such a case, the matter will proceed to a competency hearing. (The court does not actually have to set a competency hearing at this point. The court can wait a few weeks until the Pre-Trial Competency Evaluator completes the evaluation and returns to court with a report.)

### **When the Court Finds the Minor Competent After Receipt of the 72 Hour Hold Report**

The minor may have never had a mental disorder that would cause him/her to be incompetent, or the minor may have had his/her competency restored during the 72 hour (or 14 day) hold. If the 72 hour hold report indicates the minor does not have a mental illness and there is no issue of incompetence, and the attorneys agree with the assessment, and the court agrees with the assessment, the court may be able to reinstate the regular delinquency proceedings and proceed with the case. There would be no need for a competency hearing. Canceling the competency hearing should be done so with caution. There must be a solid foundation to support that the “substantial evidence” that warranted the need for a competency hearing no longer exists. An erroneous denial of a competency hearing compels reversal of the judgment, because the trial court has no power to proceed with a regular trial once a doubt arises about a person’s competence. *People v Pennington* (1967) 66 C2d 508, 521. The error is *per se* prejudicial and may not be cured by a retrospective determination of the person’s mental competence during the regular trial. *People v Stankewitz* (1982) 32 C3d 80. [Adult cases.]

If the minor is in custody, the minor will continue to receive the level of care determined appropriate by the court. If the minor is not in custody, the Probation Department will recommend and the court will order appropriate referrals for mental health treatment, if indicated.

Even if the court finds the minor to be competent, if the court suspects that the minor may be a danger to self, a danger to others, or gravely disabled the court may order a mental health evaluation. The court may also refer the minor to be committed under the LPS Act, or be the subject of a guardianship. (See sections, above.)

If the court suspects the minor may have a developmental disability, or the Pre-Trial Competency Evaluator opines the minor may have a developmental disability, the court may refer the minor to the State Regional Center for an evaluation.<sup>74</sup>

If the minor suffers from a DSM-IV mental disorder(s), the court or attorneys may consider referring the minor to the Court for the Individualized Treatment of Adolescents (Juvenile Mental Health Court), which focuses on maintaining the minor at home and treating the mental disorder(s). See separate protocol of the Court for the Individualized Treatment of Adolescents (CITA).

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<sup>74</sup> For details on developmental disabilities and the Regional Center process, see within Section Six the subsection titled “State Examination of Developmentally Disabled Minors.”

## **When the Court Believes the Minor May Be Incompetent After Receipt of the 72 Hour Hold Report**

Upon receipt of the 72 hour hold report, if the court believes the minor may be incompetent, the court must proceed toward a competency hearing. The court must set up a Juvenile Competency Forensic Evaluation prior to the competency hearing.

### **SECTION TWELVE: ENTIRE CODE SECTIONS**

Below is the full text of pertinent code sections:

#### **Welfare & Institutions Code §709**

"709. (a) During the pendency of any juvenile proceeding, the minor's counsel or the court may express a doubt as to the minor's competency. 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. If the court finds substantial evidence raises a doubt as to the minor's competency, the proceedings shall be suspended.

(b) Upon suspension of proceedings, the court shall order that the question of the minor's competence be determined at a hearing. The court shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency. The expert shall have expertise in child and adolescent development, and training in the forensic evaluation of juveniles, and shall be familiar with competency standards and accepted criteria used in evaluating competence. The Judicial Council shall develop and adopt rules for the implementation of these requirements.

(c) If the minor is found to be incompetent by a preponderance of the evidence, all proceedings shall remain suspended for a period of time that is no longer than reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future, or the court no longer retains jurisdiction. During this time, the court may make orders that it deems appropriate for services that may assist the minor in attaining competency. Further, the court may rule on motions that do not require the participation of the minor in the preparation of the motions. These motions include, but are not limited to:

- (1) Motions to dismiss.
- (2) Motions by the defense regarding a change in the placement of the minor.
- (3) Detention hearings.
- (4) Demurrers.

(d) If the minor is found to be competent, the court may proceed commensurate with the court's jurisdiction.

(e) This section applies to a minor who is alleged to come within the jurisdiction of the court pursuant to Section 601 or 602."

### **Welfare & Institutions Code §705**

#### **Procedure where minor mentally disordered**

[Note: some texts title this section "Holding minor in psychopathic ward of county hospital."]

"Whenever the court, before or during the hearing on the petition, is of the opinion that the minor is mentally disordered or if the court is in doubt concerning the mental health of any such person, the court may proceed as provided in Section 6550 of this code or Section 4011.6 of the Penal Code."

### **Welfare & Institutions Code §6550**

#### **Minors subject to jurisdiction of juvenile court**

If the juvenile court, after finding that the minor is a person described by §§300, 601, or 602, is in doubt concerning the state of mental health or the mental condition of the person, the court may continue the hearing and proceed pursuant to this article. [Below.]

### **Welfare & Institutions Code §6551.**

**Evaluation; Certification of mentally disordered person for involuntary treatment; Commitment of mentally retarded minor; Return to juvenile court; Expense reimbursement; Suspension of juvenile court jurisdiction.** [Note: some texts title this section "Commitment to county facility."]

"If the court is in doubt as to whether the person is mentally disordered or mentally retarded, the court shall order the person to be taken to a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation. Thereupon, Article 1 (commencing with Section 5150) of Chapter 2 of Part 1 of Division 5 applies, except that the professional person in charge of the facility shall make a written report to the court concerning the results of the evaluation of the person's mental condition. If the professional person in charge of the facility finds the person is, as a result of mental disorder, in need of intensive treatment, the person may be certified for not more than 14 days of involuntary intensive treatment if the conditions set forth in subdivision (c) of Section 5250 and subdivision (b) of Section 5260 are complied with. Thereupon, Article 4 (commencing with Section 5250) of Chapter 2 of Part 1 of Division 5 shall apply to the person. The person may be detained pursuant to Article 4.5 (commencing with Section 5260), or Article 4.7 (commencing with Section 5270.10), or Article 6 (commencing with Section 5300) of Part 1 of Division 5 if that article applies.

If the professional person in charge of the facility finds that the person is mentally retarded, the juvenile court may direct the filing in any other court of a petition for the commitment of a minor as a mentally retarded person to the State Department of Developmental Services for placement in a state hospital. In such case, the juvenile court shall transmit to the court in which the petition is filed a copy of the report of the professional person in charge of the facility in which the minor was placed for observation. The court in which the petition for commitment is filed may accept the report of the professional person in lieu of the appointment, or subpoenaing, and testimony of other expert witnesses appointed by the court, if the laws applicable to such commitment proceedings provide for the appointment by court

of medical or other expert witnesses or may consider the report as evidence in addition to the testimony of medical or other expert witnesses.

If the professional person in charge of the facility for 72-hour evaluation and treatment reports to the juvenile court that the minor is not affected with any mental disorder requiring intensive treatment or mental retardation, the professional person in charge of the facility shall return the minor to the juvenile court on or before the expiration of the 72-hour period and the court shall proceed with the case in accordance with the Juvenile Court Law.

Any expenditure for the evaluation or intensive treatment of a minor under this section shall be considered an expenditure made under Part 2 (commencing with Section 5600) of Division 5 and shall be reimbursed by the state as are other local expenditures pursuant to that part.

The jurisdiction of the juvenile court over the minor shall be suspended during such time as the minor is subject to the jurisdiction of the court in which the petition for post certification treatment of an imminently dangerous person or the petition for commitment of a mentally retarded person is filed or under remand for 90 days for intensive treatment or commitment ordered by such court."

### **Penal Code §4011.6.**

#### **Mentally disordered prisoners; Treatment and evaluation; Notification of transfer; Report on condition...**

"In any case in which it appears to the person in charge of a county jail, city jail, or juvenile detention facility, or to any judge of a court in the county in which the jail or juvenile detention facility is located, that a person in custody in that jail or juvenile detention facility may be mentally disordered, he or she may cause the prisoner to be taken to a facility for 72-hour treatment and evaluation pursuant to Section 5150 of the Welfare and Institutions Code and he or she shall inform the facility in writing, which shall be confidential, of the reasons that the person is being taken to the facility. The local mental health director or his or her designee may examine the prisoner prior to transfer to a facility for treatment and evaluation. Upon transfer to a facility, Article 1 (commencing with Section 5150), Article 4 (commencing with Section 5250), Article 4.5 (commencing with Section 5260), Article 5 (commencing with Section 5275), Article 6 (commencing with Section 5300), and Article 7 (commencing with Section 5325) of Chapter 2 and Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code shall apply to the prisoner.

Where the court causes the prisoner to be transferred to a 72-hour facility, the court shall forthwith notify the local mental health director or his or her designee, the prosecuting attorney, and counsel for the prisoner in the criminal or juvenile proceedings about that transfer. Where the person in charge of the jail or juvenile detention facility causes the transfer of the prisoner to a 72-hour facility the person shall immediately notify the local mental health director or his or her designee and each court within the county where the prisoner has a pending proceeding about the transfer. Upon notification by the person in charge of the jail or juvenile detention facility the court shall forthwith notify counsel for the prisoner and the prosecuting attorney in the criminal or juvenile proceedings about that transfer.

If a prisoner is detained in, or remanded to, a facility pursuant to those articles of the Welfare

and Institutions Code, the facility shall transmit a report, which shall be confidential, to the person in charge of the jail or juvenile detention facility or judge of the court who caused the prisoner to be taken to the facility and to the local mental health director or his or her designee, concerning the condition of the prisoner. A new report shall be transmitted at the end of each period of confinement provided for in those articles, upon conversion to voluntary status, and upon filing of temporary letters of conservatorship.

A prisoner who has been transferred to an inpatient facility pursuant to this section may convert to voluntary inpatient status without obtaining the consent of the court, the person in charge of the jail or juvenile detention facility, or the local mental health director. At the beginning of that conversion to voluntary status, the person in charge of the facility shall transmit a report to the person in charge of the jail or juvenile detention facility or judge of the court who caused the prisoner to be taken to the facility, counsel for the prisoner, prosecuting attorney, and local mental health director or his or her designee.

If the prisoner is detained in, or remanded to, a facility pursuant to those articles of the Welfare and Institutions Code, the time passed in the facility shall count as part of the prisoner's sentence. When the prisoner is detained in, or remanded to, the facility, the person in charge of the jail or juvenile detention facility shall advise the professional person in charge of the facility of the expiration date of the prisoner's sentence. If the prisoner is to be released from the facility before the expiration date, the professional person in charge shall notify the local mental health director or his or her designee, counsel for the prisoner, the prosecuting attorney, and the person in charge of the jail or juvenile detention facility, who shall send for, take, and receive the prisoner back into the jail or juvenile detention facility.

A defendant, either charged with or convicted of a criminal offense, or a minor alleged to be within the jurisdiction of the juvenile court, may be concurrently subject to the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code).

If a prisoner is detained in a facility pursuant to those articles of the Welfare and Institutions Code and if the person in charge of the facility determines that arraignment or trial would be detrimental to the well-being of the prisoner, the time spent in the facility shall not be computed in any statutory time requirements for arraignment or trial in any pending criminal or juvenile proceedings. Otherwise, this section shall not affect any statutory time requirements for arraignment or trial in any pending criminal or juvenile proceedings.

For purposes of this section, the term "juvenile detention facility" includes any state, county, or private home or institution in which wards or dependent children of the juvenile court or persons awaiting a hearing before the juvenile court are detained."

### **California Rules of Court, Rule 5.645.**

**Mental health or condition of child; court procedures** [Note: this closely but not entirely parallels the provisions of Welf & Inst Code 6550, et seq., which is one of the two routes required under Welf & Inst Code 705.]

**(a) Doubt concerning the mental health of a child (§§357, 705, 6550, 6551)**

Whenever the court believes that the child who is the subject of a petition filed under section 300, 601, or 602 is mentally disabled or may be mentally ill, the court may stay the proceedings and order the child taken to a facility designated by the court and

approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation. The professional in charge of the facility must submit a written evaluation of the child to the court.

**(b) Findings regarding a mental disorder (§6551)**

Article 1 of chapter 2 of part 1 of division 5 (commencing with section 5150) applies.

(1) If the professional reports that the child is not in need of intensive treatment, the child must be returned to the juvenile court on or before the expiration of the 72-hour period, and the court must proceed with the case under section 300, 601, or 602.

(2) If the professional in charge of the facility finds that the child is in need of intensive treatment for a mental disorder, the child may be certified for not more than 14 days of involuntary intensive treatment according to the conditions of §§5250(c) and 5260(b).

The stay of the juvenile court proceedings must remain in effect during this time.

(A) During or at the end of the 14 days of involuntary intensive treatment, a certification may be sought for additional treatment under sections commencing with 5270.10 or for the initiation of proceedings to have a conservator appointed for the child under sections commencing with 5350. The juvenile court may retain jurisdiction over the child during proceedings under sections 5270.10 et seq. and 5350 et seq.

(B) For a child subject to a petition under section 602, if the child is found to be gravely disabled under sections 5300 et seq., a conservator is appointed under those sections, and the professional in charge of the child's treatment or of the treatment facility determines that proceedings under section 602 would be detrimental to the child, the juvenile court must suspend jurisdiction while the conservatorship remains in effect. The suspension of jurisdiction may end when the conservatorship is terminated, and the original 602 matter may be calendared for further proceedings.

*(Subd (b) amended effective January 1, 2007.)*

**(c) Findings regarding mental retardation (§6551)**

Article 1 of chapter 2 of part 1 of division 5 (commencing with §5150) applies.

(1) If the professional finds that the child is mentally retarded and recommends commitment to a state hospital, the court may direct the filing in the appropriate court of a petition for commitment of a child as a mentally retarded person to the State Department of Developmental Services for placement in a state hospital.

(2) If the professional finds that the child is not mentally retarded, the child must be returned to the juvenile court on or before the expiration of the 72-hour period, and the court must proceed with the case *under* section 300, 601, or 602.

(3) The jurisdiction of the juvenile court must be suspended while the child is subject to the jurisdiction of the appropriate court under a petition for commitment of a mentally retarded person, or under remand for 90 days for intensive treatment or commitment ordered by that court.

*(Subd (c) amended effective January 1, 2009; previously amended effective January 1, 2007.)*

**(d) Doubt as to capacity to cooperate with counsel (§§601, 602; Pen. Code, §1367)**

If the court finds that there is reason to doubt that a child who is the subject of a petition filed under section 601 or 602 is capable of understanding the proceedings or of cooperating with the child's attorney, the court must stay the proceedings and conduct a hearing regarding the child's competence.

(1) The court may appoint an expert to examine the child to evaluate the child's capacity to understand the proceedings and to cooperate with the attorney.

(2) If the court finds that the child is not capable of understanding the proceedings or of cooperating with the attorney, the court must proceed under section 6550 and (a)–(c) of this rule.

(3) If the court finds that the child is capable of understanding the proceedings and of cooperating with the attorney, the court must proceed with the case.

## **COMPETENCY PROTOCOL COMMITTEE**

**Chair** Judge Paul Bernal, Presiding Judge of the Court for Individualized Treatment of Adolescents (Juvenile Mental Health Court), Juvenile Justice Court, Santa Clara County, California.

pbernal@scscourt.org

### **Competency Legal Committee**

Superior Court: Juvenile Court Supervising Judge Patrick Tondreau.

Office of the Public Defender: Public Defender Mary Greenwood, Supervising Attorney Andrea Flint, Supervising Attorney Molly O’Neal.

Alternate Defenders Office: Alternate Defender David Epps; Deputy Attorney Kevin Rudich.

Independent Defenders Office: Attorney Karen Steiber; Attorney Deanna Burneikas.

Office of the District Attorney: Assistant District Attorney David Howe; Supervising Attorney Lance Daugherty, Supervising Attorney Lisa Schon, Supervising Attorney Chris Arriola, Deputy Attorney Aaron West (adult mental health calendar).

County Counsel: Deputy Attorney Nancy Clark (representing Probation), Deputy Attorney Greta Hansen (representing the Department of Mental Health).

### **Probation Committee**

Manager Michael Clarke

Manager Karen Avila

Supervisor Michele Fernandez

### **Mental Health Committee**

Larry Soto

State of Virginia Competency representatives Janet Warren and Jeanette DuVal

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