

Protocol for Competence in California Juvenile Justice Proceedings¹

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I. Why a Juvenile Competence Protocol is Needed

In California's adult criminal justice system, a comprehensive statutory scheme governs every aspect of competence proceedings² and ample case law helps to clear up any lingering questions. While California case law holds that children must be competent to stand trial, it also holds that they do not come within the adult statutory scheme.³ And while California Rules of Court, rule 5.645 and case law provide some guidance, current California law fails to address many issues that regularly come up in juvenile cases involving competence issues.

While this situation creates challenges, it also creates opportunities to deal with juvenile incompetence in ways that are developmentally appropriate; that recognize the very different resource issues faced by juvenile systems;⁴ and that avoid well-known pitfalls of the adult system. Courts have the inherent power to create procedures "...where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function."⁵ This protocol is intended as a tool for the development of such procedures in cases where competence may be an issue. It incorporates Supreme Court and California case law, and existing statutory law. Where no specific provisions exist in current law, the protocol offers suggestions or approaches that may be adapted to local practice, resources and interagency relationships. It is offered with the humble recognition that it will be revised and improved by future efforts.

¹ This protocol was prepared by Sue Burrell and Corene Kendrick, Staff Attorneys at the Youth Law Center, San Francisco. It is the culmination of several years of work by the Youth Law Center. After the publication of *Incompetent Youth in California Juvenile Justice*, 19 Stanford Law & Policy Review 198-250 (Sue Burrell, Corene Kendrick, and Brian Blalock, 2008), the Youth Law Center received numerous requests for additional guidance from courts, juvenile defenders and others interested in juvenile competence issues. This protocol has been developed in response to that interest. It was developed with support from the John D. and Catherine T. MacArthur Foundation's Juvenile Indigent Defense Action Network, The California Endowment and the Van Loben Sels Foundation.

Preparation of the protocol has been greatly assisted by the pioneering efforts of the San Diego County Juvenile Court ("Competence Evaluations," last revised Jan. 5, 2009), and references to that protocol are made throughout. It has also been informed through discussions with members of the Judicial Council Task Force for Criminal Justice Collaboration on Mental Health Issues, Subcommittee on Juvenile Issues and Strategies; Sidney Hollar at the Center for Families, Children and the Courts; Youth Law Center interviews with probation staff in 37 counties; and several meetings with juvenile defense counsel and mental health advocates. Finally, we were fortunate to be able to consult with Dr. Thomas Grisso, Kimberly Larson, and Al Grudzinkas of the University of Massachusetts Medical School, Law & Psychiatry Program about clinical questions that arose in the preparation of the protocol.

² California Penal Code sections 1367 through 1376.

³ *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 175-177.

⁴ For example, the adult system may commit incompetent defendants to a range of state hospitals or developmental centers. At the present, there are no state hospitals with adolescent mental health programs and beds at developmental centers are scarce. As the juvenile system develops processes to address the needs of potentially incompetent youth, it must come to grips with the fact that the mental health and developmental disabilities systems are well into deinstitutionalization efforts. Collaboration with those systems will be essential in developing community-based services for this population, as well as individual or small group placements for those youth who require a custodial setting.

⁵ *James H. v. Superior Court*, *supra* note 3, 77 Cal.App.3d at p. 175 (citation omitted).

II. Legal Standard for Juvenile Competence⁶

A minor is incompetent to proceed if he or she lacks:

A sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding; or

A rational as well as factual understanding of the proceedings against him or her.⁷

Incompetence may be the result of a mental disorder, developmental disability,⁸ developmental immaturity,⁹ or other conditions that result in a failure to meet one or both prongs of the constitutional standard above.¹⁰

Also, because the standard relates to the child's ability to participate meaningfully in the court proceedings, it calls for present competence; it is not enough that the he or she could become competent in the future.¹¹

Upon presentation of substantial evidence that the minor is incompetent, the court shall follow the procedures below. Substantial evidence is that which raises a reasonable doubt as to competence.¹²

⁶ The protocol has been drafted using language from the constitutional case law. However, A.B. 2212 (Fuentes) is pending in the 2010 legislative session and, if enacted, it would define juvenile competence as a matter of California statutory law. See http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2201-2250/ab_2212_bill_20100218_introduced.html.

⁷ *Dusky v. United States* (1960) 362 U.S. 304 [The test for competence is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him."] *Drope v. Missouri* (1975) 420 U.S. 162, 171, elaborates on the first prong of the test as requiring that the defendant lacks the capacity "...to consult with counsel, and to assist in preparing his defense..." This two-pronged test appears in California Rules of Court, rule 5.645, subdivision (d) ["...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 and to cooperate with the attorney."]

⁸ The California adult standard, set forth in Penal Code section 1367, subdivision (a), defines incompetence as "a result of mental disorder or developmental disability."

⁹ *Timothy J. v. Superior Court* (2007) 150 Cal. App. 4th 847, 857.

¹⁰ The California adult statutory scheme for incompetence does not apply to juveniles, although it may be used as a guide. (*James H. v. Superior Court*, *supra* note 3, 77 Cal.App.3d at pgs. 173-176.)

¹¹ *In re Ricky S.* (2008) 166 Cal. App.4th 232, 236.

¹² *People v. Stankewitz* (1982) 32 Cal.3d 80, 92; *People v. Pennington* (1967) 66 Cal.2d 508, 516-517.

III. Resolution without Formal Proceedings

A. Consideration of Informal Resolution

In any case where substantial evidence of incompetence is presented, the court and parties shall first consider whether the case may be resolved without formal competence proceedings.¹³

In making this determination, consideration shall be give to whether services may be provided outside the juvenile justice system that would obviate the need for jurisdiction,¹⁴ and whether pursuing formal proceedings, including protracted formal competence proceedings, is in the interest of justice pursuant to California Welfare and Institutions Code section 782.¹⁵ The court and parties shall establish any agreements or protections for confidentiality of information needed to accomplish the goals of this section.

Because the court does not have wardship jurisdiction, informal resolution of the case depends on the willingness and capacity of the child and his or her family to engage in voluntary services. Where the child and family are unwilling or unable to so engage, the case will need to go through formal competence proceedings.

B. Suggested Procedures for Resolution without Formal Proceedings

In weighing the need for formal proceedings, the court may make the following referrals and orders, which may assist in resolution of the case.¹⁶

1. If the minor is detained, refer the case for evaluation of the mental health of the child under Welfare and Institutions Code section 705 and Penal Code

¹³ A number of counties already do this, and there is almost overwhelming support among probation staff for the notion that some potentially incompetent youth “do not belong” in the juvenile justice system. During the interviews on juvenile competence conducted by Youth Law Center in 2007-2008 almost every one of the 37 probation departments interviewed voiced this opinion. These views are consistent with Congressional findings that many children present at the front doors of California juvenile justice because of difficulty accessing mental health services in the community. United States House of Representatives Committee on Government Reform – Minority Staff, Special Investigations Division, *Incarceration of Youth Who are Waiting for Community Mental Health Services in California* (Prepared for Rep. Henry A. Waxman, January 2005), at pgs. 4-5.

¹⁴ The reality is that, in most cases of incompetence, the court is going to have to fashion services for the child and family many months down the road, so it make sense, at least in some cases, to “cut to the chase” and provide the interventions without months of lost opportunity and expense.

¹⁵ Because formal competence proceedings often take several months to play out, even if an incompetent youth later attains competence, the case may be difficult to prosecute. Witnesses may be lost, and the court may be faced with holding a marginally competent child accountable for alleged events he or she can no longer remember. Moreover, because they often require intensive staffing and mental health services, the presence of potentially incompetent youth in juvenile halls strains precious county resources. (Edward Cohen and Jane Pfeifer, *Costs of Incarcerating Youth with Mental Illness: Final Report* (2008), prepared for the Chief Probation Officers of California and the California Mental Health Directors Association, pgs. iv-vi.) Sadly, too, youth who remain detained pending months of competence proceedings are likely to decompensate further. These factors should be considered in determining whether “the interest of justice” is served by formal proceedings in the case.

¹⁶ These are simply suggestions and some may not work in a particular county or there may be legal impediments that the authors are not aware of. Similarly, there may be additional avenues to obtain services that we have not considered. The idea is to use whatever means are available to get the child and family into services that may address the causes of whatever brought the child to the attention of the system.

section 4011.6.¹⁷ If the minor is not detained, seek evaluation under the Lanterman-Petris-Short Act through the efforts of the child's parents or guardian.¹⁸

2. In a county that has adopted a resolution, refer the case for evaluation and services under Welfare and Institutions Code section 710-714.
3. Refer the case to a local interagency team to develop and implement a service plan for the child.¹⁹
4. Enlist the assistance of probation, defense counsel, a local advocacy organization, or other entity²⁰ to help the child or his family to enroll in Medi-Cal and/or SSI, and to obtain needed services.
5. Enlist the assistance of probation, defense counsel, a local advocacy organization, or other entity to obtain evaluation and services through the local regional center.²¹
6. Enlist the assistance of probation, defense counsel, a local advocacy organization, or other entity to obtain evaluation and services through the Individuals with Disabilities Education Act or Section 504.
7. Enlist the assistance of probation, defense counsel, a local advocacy organization, or other entity to obtain other publicly funded services, including mental health services through the Mental Health Services Act.
8. Transfer the case to a juvenile mental health court (in counties that allow pre-adjudication referrals) or other appropriate specialty court. If the child's parent is not available to authorize treatment, order that needed medical or mental health care be provided pursuant to Welfare and Institutions Code section 739.

¹⁷ These statutes are referenced because they may be employed at any point in the proceedings. Unfortunately, Rule 5.645 (and part of section 705) reference statutes that apply *after* wardship. While conceivably a competence issue could come up after wardship is established, it most often surfaces in the pre-adjudication stage. Also, if a child became incompetent later on, the issue would probably be handled through some other process than a competence proceeding – such as a motion under Welfare and Institutions Code sections 778 or 782.

¹⁸ Parents could either apply for involuntary commitment pursuant to Welfare and Institutions Code section 5201, or seek voluntary services.

¹⁹ Some counties already informally refer cases to their interagency teams under Welfare and Institutions Code section 4096, and there may be other interagency teams that could be enlisted to assist in developing service plans and access to services.

²⁰ Practice varies in different counties as to who may be able to provide this kind of assistance. For example, in some counties public defender offices have social workers to help, and in others, the system has teamed up with local advocacy groups that provide special education advocacy. Thus, the protocol suggests a series of possibilities for assuring assistance in access to services.

²¹ Because regional center statutory timelines are quite long, the court may want to direct whoever assists to contact the Clients' Rights Advocate stationed at the local regional center. This person can be immensely helpful in helping to cut through bureaucracy and reducing the time needed for eligibility determinations and development of service plans. For a directory of Disability Rights California, Office of Clients Rights Advocates, see <http://www.disabilityrightsca.org/OCRA/CRALIST3.30.08.htm>.

9. Join as a party an agency that has failed to meet a legal obligation to the child, provided that the juvenile court may not impose duties on the agency beyond those mandated by law.²²
10. Make such orders or create such procedures as are necessary to protect the rights of the child and enable the court to function.²³

C. Resolution of the Case

The court may, with the consent of the parties, conduct progress review hearings and continue the case until the court is satisfied that the situation that brought the child to the attention of the juvenile court has been addressed, or that the matter cannot be addressed by juvenile court intervention. At that time, the court shall dismiss the petition under Welfare and Institutions Code section 782 on the grounds that “the interests of justice and the welfare of the minor require such dismissal,” or “the minor is not in need of treatment and rehabilitation.”

IV. Formal Competence Proceedings

This section sets forth a process for formal competence proceedings.

A. Declaration of Doubt Concerning Competence;

Stay of the Proceedings; Order for Evaluation²⁴

At any time after the filing of a petition alleging that a child has committed a delinquent act or status offense, any party or the court may declare orally or by written motion, a doubt as to the minor’s competence to proceed. Upon substantial evidence of incompetence, the court shall stay the proceedings and order a full competence hearing. Evidence is substantial if it raises a reasonable doubt about the minor’s competence to stand trial.²⁵ When a doubt has been raised as to the minor’s competence, the court shall appoint an expert²⁶ to conduct an evaluation of the child’s competence to proceed.²⁷ The expert shall meet the requirements for “Qualified Experts” set forth in section VIII of this protocol.²⁸

²² This language is taken from Welfare and Institutions Code section 727, subdivision (a), which provides joinder at the disposition phase (for youth who are wards), so it may not technically be a correct use of the statute, but at least anecdotally, some counties do use it at earlier points. Even without section 727, agency representatives could be subpoenaed or in some instances requested to come to court voluntarily to discuss their obligations to youth. This mechanism would be useful in situations in which the child is a regional center client or has been determined eligible for special education services.

²³ *James H. v. Superior Court*, *supra* note 3, 77 Cal.App.3d at pgs. 175-176.

²⁴ As of March 2010, A.B. 2212 (Fuentes), *supra* note 6, is pending in the California Legislature and, if enacted, it would address some of the issues set forth in this section.

²⁵ The substantial evidence requirement is taken from adult cases, including *People v. Stankewitz* (1982) 32 Cal.3d 80, 92; and *People v. Danielson* (1992) 3 Cal.4th 691, 726, *supra* note 12. California Rules of Court, rule 5.645 requires a hearing “[i]f the court finds that there is reason to doubt that a child who is the subject of a petition under section 601 or 602 is capable of understanding the proceedings or of cooperating with the child’s attorney...”

²⁶ California Rules of Court, rule 5.645, subd. (d)(1) provides for the appointment of “an” expert. The San Diego protocol has a process for when the child is not seeking a finding of incompetence: “If the minor or the counsel for the minor informs the court that the minor is not seeking a finding of incompetence, the court shall appoint two qualified experts, of

If the minor is detained, the court shall consider whether the minor may be released or held in non-secure confinement, consistent with the provisions of Welfare and Institutions Code section 636, and shall make appropriate orders regarding custody.

If the minor remains detained, the court shall order that the competence evaluation be completed within ___ days,²⁹ and shall set the competency hearing for the next judicial day³⁰ after the ___ day evaluation period. If the minor is not detained, the court shall order that the evaluation be completed, delivered to the court and made available to the parties within ___ days,³¹ and shall set the competency hearing for the next judicial day³² after the ___ day evaluation period. In either case, the minor's counsel may move the court for a continuance for additional time necessary to prepare for the competency hearing.

Nothing in this section shall prohibit the prosecuting attorney, or the minor from retaining or seeking the appointment of additional expert witnesses to testify at a competency hearing, provided that, to give an opinion on competence, such experts must meet the requirements for "qualified experts" set forth in this protocol.³³

Statements made to the expert by the minor may not be introduced in the adjudication hearing for any purpose, including impeachment of the minor.³⁴

whom one may be named by the minor or the counsel for the minor, and one may be named by the petitioner." That is similar to the adult process, in which the court appoints one expert, but if the defendant is not seeking a finding of incompetence, appoints two experts – one named by the prosecutor and one named by defense counsel. (California Penal Code section 1369, subd. (a).) That process is not included here, but it could easily be included if it is a situation that regularly arises.

²⁷ California Rules of Court, rule 5.645, subd. (d)(1) provides that the court "may" appoint an expert, but *Tyrone B. v. Superior Court* (2008) 164 Cal.App.4th 227, 231, held that where a doubt as to competence has been raised, it would be an abuse of discretion not to appoint an expert.

²⁸ *In re L.B.* (Cal. Ct. Appeal, Third Dist. No. C061010, filed Mar. 16, 2010) held that in a case where the minor was suspected to have a developmental disability, it was error not to appoint the director of the regional center to perform the competency evaluation. The opinion relies on *People v. Leonard* (2007) 40 Cal.4th 1370, an adult case. In the adult system, this is required by Penal Code section 1369, subd. (a) and Penal Code section 1370.1, subd. (a)(1)(H), but there is no such statutory requirement for juveniles. The case is not final at the time this protocol is being released.

²⁹ San Diego requires evaluations for detained youth within 3 days, but they use a court forensic unit to do evaluations. Other jurisdictions might need a slightly longer evaluation period.

³⁰ San Diego sets the hearing for the next judicial day after the evaluation report is filed.

³¹ San Diego requires evaluations within 10 days for non-detained youth.

³² This is the San Diego requirement.

³³ At present, there is little guidance in the general area of prosecution experts in juvenile competence proceedings. Rule 5.645 is silent, and existing juvenile case law does not discuss the issue. Although the protocol provides for the prosecutor to present expert testimony, comments received in its preparation cautioned us that recently enacted A.B. 1516 (Lieu 2009) does not appear to give the prosecution the right to require the minor to submit to its own evaluation. That legislation amends Penal Code section 1054.3 to require adult and juvenile defendants to submit to evaluation by a prosecution expert if the place a mental state at issue. However, case law holds that section 1054.3 and other Penal Code sections governing discovery do not apply to juveniles (*In re Thomas F.* (2003) 113 Cal.App.4th 1249, 1254), and it is not clear that juvenile competence is within the covered mental states. Juvenile discovery is governed by California Rules of Court, rule 5.546.

³⁴ *People v. Pokovich* (2006) 39 Cal.4th 1240, 1253.

B. Other Pre-Hearing Motions

The court may make orders, at any point in the proceedings in which competence may be an issue, with respect to any matter that is capable of a fair determination without the participation of the minor, including but not limited to the following:

1. A demurrer to the allegations in the petition.³⁵
2. A motion to suppress evidence under Welfare and Institutions Code section 700.1.³⁶
3. A rehearing on the issue of whether there is a prima facie case that the minor committed a public offense (initially determined at the detention hearing), pursuant to Welfare and Institutions Code section 637.³⁷
4. A motion to dismiss the petition under Welfare and Institutions Code section 782 on the grounds that the interests of justice and the welfare of the minor require it, or the minor is not in need of treatment and rehabilitation.

C. Expert Report

The expert shall personally interview the minor and review all available records, including but not limited to medical, education, special education, child welfare, mental health, regional center, and court records. The expert shall evaluate the child with respect to each of the competence abilities set forth in Appendix A of this protocol.³⁸ The expert shall prepare a written report that identifies any specific matters referred for evaluation; identify the sources of information used by the expert, and describe the procedures, techniques, and tests used in the evaluation and the purposes of each. The expert shall answer each of the following questions "yes" or "no" and then provide the basis for each response:

³⁵ Motions to suppress evidence (under the adult equivalent, Penal Code section 1538.5) are specifically permitted in the context of adult competence proceedings pursuant to California Penal Code section 1368.1, subds. (a) and (b).

³⁶ California Penal Code section 1368.1, subds. (a) and (b).

³⁷ *Id.* [called the "probable cause determination" in adult court; "prima facie case" in juvenile court]

³⁸ This protocol directs the qualified expert to evaluate competence, and also to address services to assist the child in attaining competence. This is something that needs to be discussed further, and some of the comments we received suggested the need to keep the two functions separate. The San Diego protocol has an initial evaluation directed only at the competence determination, and then has a second evaluation if incompetence is found. In some ways that provides a cleaner way of handling the issues, and it may be that some experts are better at determining the forensic potential and others are better at developing services plans. However, having two separate evaluations is more expensive and more time consuming (though single evaluations should be compensated at a higher rate.) It would also be possible to require the report to be provided in two parts, so that the court only sees the competence portion when ruling on competence. Either way, this protocol also allows the court to order a second evaluation if the first one does not provide sufficient information for the court's orders.

1. Does the minor have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding?³⁹
2. Does the minor have a rational as well as factual understanding of the proceedings against him or her?
3. Is the minor competent to stand trial and if not, what is the basis for incompetence, including the presence of a developmental disability,⁴⁰ mental retardation,⁴¹ mental illness, developmental immaturity, or other condition(s), and what is the impact of the condition(s) on the minor's competence to stand trial.
4. Is the minor likely to attain⁴² competence in the foreseeable future, and what is the expected time for attaining competence?
5. What specific services, if any, would assist the minor in the attainment competence? What is the ideal treatment, and what is the potential for success of that treatment; what is the length of the services; what other options exist and what are the relative merits or drawbacks of those services; what is the availability of the service options locally or in another acceptable location; can the minor be safely returned home during the services; and what are the qualified expert's recommendations for services?

In addition, if not covered in responses to the preceding questions, the expert should address any of the following questions that apply to the minor's situation:

6. Does the minor have a disability or condition qualifying him or her for special education, 504, or 3632 services (California Government Code sections 7570 through 7588), and if so, has the minor been found eligible for such services? What is the status of any services the minor should have received pursuant to such eligibility?
7. If the minor has a mental disorder or mental illness, is the minor a danger to himself or herself, to others, or "gravely disabled" (under the standard for children

³⁹ The answers to these questions shall be developed in relation to the competence abilities set forth in Appendix A of this protocol. Appendix A includes two closely intertwined sets of criteria for competence evaluations developed and used by national competence experts to determine competence under the *Dusky* constitutional standard. The first was specifically developed for use with juveniles, and the second has been used for many years in adult cases. They are fairly similar, but the set designed for juveniles has additional elements relating to decision making abilities.

⁴⁰ "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. (Welf. & Inst. Code, § 4512.)

⁴¹ Penal Code section 1376, subdivision (a) defines mental retardation as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18."

⁴² While discussions of competence often refer to "restoration" services, this protocol refers instead to services to help the child "attain " competence because many incompetent children have never been competent to begin with.

set forth in Welfare and Institutions Code section 5585.25)⁴³ so as to meet the criteria for involuntary treatment under Welfare and Institutions Code sections 705, or Penal Code section 4011.6?⁴⁴ Does the minor suffer from mental health problems that have previously been recognized and or treated, and what is the status of any such treatment?

8. Does the minor have a developmental disability? Has the minor been found eligible for regional center services? What is the status of any services the minor should have received pursuant to such eligibility?
9. Would the minor qualify for services through the Mental Health Services Act, Medi-Cal or other publicly funded programs? Is the minor currently enrolled in those programs? Does the minor have private health insurance, and if so, through what carrier?
10. What other programs or funding sources are available to assist this minor in the attainment of competence?

D. Court Hearing on Competence

At the hearing on competence, the juvenile court shall consider all relevant evidence on the issue of the minor's present competence to stand trial. The court shall rely on the court ordered evaluation and such other relevant written or testimonial evidence as may be presented. Upon a showing of good cause, the District Attorney or the minor's attorney may contest the report, request a second opinion, or request an evidentiary hearing.⁴⁵

The party raising the issue of competence bears the burden of proving the minor incompetent by a preponderance of the evidence⁴⁶ under the legal standard set forth in section II of this protocol.

If the court determines that the minor is incompetent to proceed, it shall also determine whether there is a substantial probability that the minor is likely to attain competence in the foreseeable future.⁴⁷ "In the foreseeable future" as used in this protocol means within a period not to exceed ___ months from the date of the incompetence determination.⁴⁸

⁴³ Welfare and Institutions Code section 5585.25 provides that "gravely disabled minor" means a minor who, as a result of a mental disorder, is unable to use the elements of life which are essential to health, safety, and development, including food, clothing, and shelter, even though provided to the minor by others. Mental retardation, epilepsy, or other developmental disabilities, alcoholism, other drug abuse, or repeated antisocial behavior do not, by themselves, constitute a mental disorder.

⁴⁴ The sections cited are the juvenile court and criminal law statutes referring juveniles into the Lanterman-Petris-Short Act and civil mental health commitment system.

⁴⁵ This provision appears in the San Diego protocol.

⁴⁶ By statute, the standard for adults in California is preponderance of the evidence. (Penal Code section 1369(f); *Medina v. California* (1992) 505 U.S. 437, 442-453.)

⁴⁷ *Jackson v. Indiana* (1972) 406 U.S. 715, 738; *In re Davis* (1973) 8 Cal.3d 798, 801.

⁴⁸ The outside time limit (and whether to have one) obviously needs discussion. San Diego has the post-restoration hearing at 8 weeks, but allows extensions. A suggested six month limit would give the opportunity for three 8 week segments. The adult system allows one year for misdemeanors and three years for felonies, but those time frames and

If the court needs additional information to make its order, or either party requests it, the court may order an additional evaluation by a qualified expert, specify the questions to be answered, require that the evaluation be completed within ___ days, and set the continued hearing for no more than ___ days of the initial hearing on incompetence.⁴⁹

V. If the Court Finds that the Minor is Competent

If the court determines, by a preponderance of the evidence, that the minor is competent, the court shall lift the stay of the proceedings, and the case shall, from this point forward, proceed in accordance with the timelines prescribed by statute.

The court may, nonetheless, make any referral or order needed to assure that the minor receives appropriate evaluation and services pending resolution of the petition, and may take any of the actions set forth in section III.B.

VI. If the Court finds that the Minor is Incompetent But May Attain Competence in the Foreseeable Future

If the court determines, by a preponderance of the evidence, that the minor is incompetent to proceed, but that there is a substantial probability that the minor will attain competence in the foreseeable future, the proceedings shall remain suspended and the court shall order a program of services directed at the attainment of competence based on the expert report or other relevant testimony. Further, the court shall assign a probation officer,⁵⁰ interagency committee defense counsel, or other designee to begin immediate coordination of services for the attainment of competence. The court may order the responsible person or entity to do specific things, including but not limited to seeking evaluation for eligibility for particular programs or services, or arranging for those services to be provided.

A. If the Minor has a Developmental Disability

When the minor suffers from a developmental disability and the court orders a regional center referral, the assigned probation officer, interagency committee, defense counsel, or other designee shall take all necessary steps to accelerate the completion of the regional center evaluation and obtain services for the minor. If the minor is already a regional center client, the probation officer, interagency committee defense counsel, or other designee shall submit a plan to work collaboratively with regional center staff to obtain appropriate community supports and services from the earliest possible moment.⁵¹ The

the differentiation between felonies and misdemeanors seem inapposite when we are talking about incompetent children. This may be an area where further advice from mental health professionals would be helpful.

⁴⁹ The San Diego protocol requires the evaluation to be prepared within 10 days and the continued hearing to be held within three weeks of the initial hearing.

⁵⁰ San Diego places the responsibility in the probation officer. We have written the protocol more broadly to reflect differences among the counties in who generally takes on this kind of responsibility. Again, some counties have public defender social workers or placement specialists, and some counties work with non-profit organizations to arrange services and perform case management. The provisions on responsibility for development and coordination of services for incompetent children can be adapted to local conditions, or left broad to permit flexibility in individual cases.

⁵¹ Again, Clients Rights Advocates can be very helpful in this process. See, *supra* note 21 for contact information.

court may set 15 day status review hearings and, where needed, compel the attendance of agency officials, to assure prompt evaluation, development of a service plan, and provision of services arranged through the regional center.

B. If the Minor Has a Mental Disorder or Mental Illness

When the minor has a mental disorder or mental illness, and the minor is detained, the court may order referral for evaluation of eligibility for involuntary treatment under the Lanterman-Petris-Short Act (LPS), pursuant to Welfare and Institutions Code sections 705 and Penal Code section 4011.6.⁵² Such a referral should be made only where LPS treatment would assist in the attainment of competence.

If the minor does not meet the criteria for involuntary commitment or is not detained, but is willing to accept voluntary services, the assigned probation officer, interagency committee, defense counsel, or other designee shall take all necessary steps to arrange and assure that such services are promptly provided.⁵³

The court may set 15 day status review hearings and, where needed, use the joinder provisions of section 727, subdivision (a) or compel the attendance of agency officials, to assure prompt evaluation, development of a service plan, and provision of services to minors who meet LPS criteria.

⁵² This is one of the areas where there are gaps and problems with existing law. First, Welfare and Institutions Code section 705 and California rules of Court, rule 5.645 both allow the court to refer incompetent youth into the LPS statutory provisions at Welfare and Institutions Code section 6550 et seq. This use of section 705 was ratified by the court in *James H. v. Superior Court*, *supra* note 3, 77 Cal.App.3d at pg. 177.

Referring incompetent youth into 6550 makes no practical sense because it applies to children who are wards of the court, and the vast majority of incompetent children are not wards because the proceedings have been suspended prior to adjudication. There is a partial way around this, because section 705 also refers children for LPS evaluation through Penal Code section 4011.6, which in turn requires that the person be detained, but not that they be a ward.

Another problem is that LPS is the involuntary treatment system for mental disorders, and has no necessary relationship to competence to stand trial. Since a finding of incompetence suspends the proceedings so that the person may receive services directed at the attainment of competence, this raises the question whether it is legally permissible for the juvenile court to refer children for LPS evaluation in connection with competence proceedings under the authority of section 705 and Penal Code section 4011.6? [This question does not arise in the adult system because incompetent adults come within statutory provisions that specifically address the issue of involuntary treatment for competence restoration (e.g., Penal Code sections 1370, subd. (a)(1)(A), and 1370.01, subd. (a)(1)). There is no similar statutory authority that applies to juveniles.]

The arguments in favor of such referral are that sections 705 and 4011.6 allow it, and that even though the commitment is not for the purpose of addressing competence, if the child otherwise meets LPS commitment criteria, the treatment may coincidentally help in the attainment of competence. For example, stabilization on psychotropic medications might be directed at treated the underlying mental disorder, but also would have a significant impact on competence. The contrary view, expressed in comments we received during the preparation of this protocol, urges that *James H.* and section 705 are unconstitutional in allowing incompetent juveniles to be referred for involuntary evaluation for LPS, based on *Pederson v. Superior Court* (2003) 105 Cal.App.4th 931. That case held that requiring adult misdemeanants to submit to involuntary LPS evaluations *prior* to a competence determination was unconstitutional. *Pederson* involved a challenge to Penal Code section 1370.1, which at the time required LPS evaluation at the point a doubt as to competence was declared in misdemeanor cases. That seems to be a different situation than the more selective use of LPS evaluation being suggested here, but it is fair to say that this is uncharted territory and along with many other juvenile competence issues, referral for LPS evaluation may be tested in the courts.

⁵³ Whoever is responsible may need to assure access to care through Medi-Cal enrollment and assisting the child and family to set up appointments. In some situations, services through special education, the regional center, or mechanisms suggested in section III.B may also assist in the attainment of competence.

C. When the Minor's Incompetence Stems from Other Conditions

When the minor's incompetence results from conditions that do not qualify him or her for services through the regional center or the involuntary commitment system, the assigned probation officer or other designated entity shall take all necessary steps ordered by the court to assure that the minor receives services for the attainment of competence. These may include, but are not limited to services through the special education, Mental Health Services Act, or Medi-Cal systems.

D. Least Restrictive Environment

Any competence attainment services must be provided in the least restrictive appropriate environment. If the minor is in custody, the court shall decide whether the minor may be safely released pursuant to Welfare and Institutions Code section 636. The child may be placed at home, or if a custodial setting is needed, in a mental health facility, a placement for individuals with developmental disabilities, or other suitable placement.⁵⁴

E. Attainment of Competence Hearing

1. Time for Hearing

The court shall set the case for a follow up Attainment of Competence Hearing to take place within ___ days of the date of the court's order for services to assist the minor in attaining attain competence.⁵⁵ If the case was continued for a second evaluation and continued Competence Hearing, the follow up Attainment of Competence hearing shall be set within ___ days of the continued hearing.⁵⁶

2. Qualified Expert Report on Attainment of Competence; Probation Report

At the time the court sets a date for the follow-up Attainment of Competence Hearing it shall appoint a qualified expert to assess the minor's competence at the conclusion of the services to assist the minor in the attainment of competence. The qualified expert shall confer with service providers, review any reports or records prepared in conjunction with the treatment, and evaluate the minor's competence using the criteria set forth in Appendix A.⁵⁷ The report shall be delivered to the court and made available to the parties at least ___ days prior to the court hearing.

⁵⁴ This may require additional discussion. San Diego allows the child to be held in juvenile hall, on home supervision or electronic surveillance. However, the mental health community and others would object to holding an incompetent child in a juvenile detention center. An incompetent adult would be immediately transferred to a mental health setting or setting for people with developmental disabilities, and there has been litigation around the country on delays in moving adults from jails to mental health facilities.

⁵⁵ San Diego limits restoration to 8 weeks with the possibility of extension for the safety of the minor or the community.

⁵⁶ San Diego requires this hearing to be within 5 weeks to assure that the follow up hearing occurs within 8 weeks of the original finding of incompetence.

⁵⁷ San Diego has two reports at this point. One is by the team that provided "restoration services, detailing the treatment and the other is by the expert, evaluating competence. For efficiency, we have combined the two reports, with the idea that the expert will be reviewing the treatment records anyway, in connection with rendering an opinion on competence and whether additional services would be valuable in the attainment of competence.

3. Attainment of Competence Hearing

At the Attainment of Competence Hearing the court will determine whether the minor is competent or remains incompetent. In ruling on competence, the court may rely on the report of the qualified expert, and such other relevant written or testimonial evidence as may be presented. The District Attorney or the minor's attorney may contest the report, request a second opinion, or request an evidentiary hearing.

If the minor is found competent, the court will reinstate the delinquency proceedings and proceed with the case. If the minor is found incompetent, the court may order continued services for the attainment of competence or an alternative plan. The court may also take any of the actions set forth in Section III.B of this protocol.

If, at the end of ___ months from the initial finding of incompetence, the minor has not attained competence, the court shall find that the minor is not likely to attain competence in the foreseeable future.⁵⁸

VII. If the Court finds that the Minor is Incompetent and Unlikely to Attain Competence in the Foreseeable Future

If, at any point in the proceedings, the court finds that the minor is incompetent and unlikely to attain competence in the foreseeable future, the court shall dismiss the juvenile court petition and terminate the court's jurisdiction.

VIII. Qualified Experts

As used in this protocol, "qualified expert" means a licensed psychologist or licensed psychiatrist⁵⁹ who:

- A. Has expertise in child and adolescent psychiatry or psychology, and training in the forensic evaluation of juveniles;
- B. Is familiar with the competency standards contained in this protocol and accepted criteria used in evaluating competence (Appendix A); and
- C. Is familiar with the treatment, training, and programs for the attainment of competence available to children in California.⁶⁰

⁵⁸ Again, the outside time limits, if drawn, should relate to a realistic time within which youth may be expected to attain competence. In a previous draft protocol we set the time at six months. This was based on preliminary discussions with Dr. Grisso and his team that if a child had not attained competence within six months, he or she would be unlikely do so in the foreseeable future. This is an area deserving of follow up to determine whether a six month time period for attainment is supported in research and of course, this is a matter for policy discussion.

⁵⁹ Comments received during the preparation of this protocol varied wildly on minimum professional credentials. Some urged that the standards should be higher, including Board Certification, and others thought it would be hard to meet even the standards included herein because of a shortage of clinicians serving children. We have tried to steer a middle path reflecting the minimum requirements for professionals performing juvenile competence evaluations, but local jurisdictions should make the standards as high as realistically possible.

⁶⁰ These qualifications are patterned on Maryland's juvenile competence statutes.

Appendix A: Criteria for Competence Evaluation

The qualified expert shall evaluate the minor's competence with respect to each of the following abilities:⁶¹

The Juvenile Court Trial and Its Consequences

1. Nature and Seriousness of Offense
2. Nature and Purpose of the Juvenile Court Trial
3. Possible Pleas
4. Guilt and Punishment/Penalties

Roles of the Participants

5. Role of the Prosecutor
6. Role of the Juvenile Defense Lawyer
7. Role of the Probation Officer
8. Role of the Juvenile Court Judge

Assisting Counsel and Decision Making

9. Assisting the Defense Lawyer
10. Plea Bargains/Agreements
11. Reasoning and Decision Making
 - a. Deciding about having a defense lawyer
 - b. Deciding how to assist your lawyer
 - c. Deciding how to plead
 - d. Deciding about a plea bargain

Participating at a Juvenile Court Hearing

12. Participating at a Juvenile Court Hearing
 - a. Ability to Attend (to events in the hearing)
 - b. Ability to Maintain Self-Control (during the hearing)
 - c. Ability to Testify (at a hearing)

⁶¹ These "Competency Abilities" were designed for use in evaluations of children and adolescents. *Evaluating Juveniles' Adjudicative Competence: A Guide for Clinical Practice* (Thomas Grisso, Professional Resource Press 2005), pg. 75. They are used in connection with the "Juvenile Adjudicative Competence Interview" (JACI), in the same publication.

For reference, the preceding set of competence abilities was derived one of the frequently used sets of abilities clinicians use to evaluate competence in relation to the *Dusky* standard, and it may still be useful in conjunction with evaluating particular competence abilities.⁶²

Understanding of Charges and Potential Consequence

1. Ability to understand and appreciate the charges and their seriousness.
2. Ability to understand possible dispositional consequences of guilty, not guilty and not guilty by reason of insanity.
3. Ability to realistically appraise the likely outcomes.

Understanding of the trial process

4. Ability to understand, without significant distortion, the roles of the participants in the trial process (e.g., judge, defense attorney, prosecutor, witnesses, jury).
5. Ability to understand the process and potential consequences of pleading and plea bargaining.
6. Ability to grasp the general sequence of pretrial events.

Capacity to Participate with Attorney in a Defense

7. Ability to adequately trust or work collaboratively with attorney.
8. Ability to disclose to attorney reasonably coherent description of facts pertaining to charges, as perceived by defendant.
9. Ability to reason about available options by weighing their consequences, without significant distortion.
10. Ability to realistically challenge prosecution witnesses and monitor trial events.

Potential for Courtroom Participation

11. Ability to testify coherently, if testimony is needed.
12. Ability to control own behavior during trial proceedings.
13. Ability to manage the stress of trial.

⁶² Thomas Grisso, *Forensic Evaluation of Juveniles* (Professional Resource Press 1998), pgs. 91-92. This set of abilities was originally developed by L. McGarry, *Competency to Stand Trial and Mental Illness* (Publication No. ADM 77-103), Rockville, Md., Department of Health Education and Welfare.

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