

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF VENTURA
JUVENILE DIVISION**

**STANDING ORDER PERTAINING TO
COMPETENCY TO STAND TRIAL
WELFARE AND INSTITUTIONS CODE SECTION 827**

Welfare and Institutions Code Section 827(a)(Q) shall include
the Court Appointed Competency to Stand Trial Expert in
Welfare and Institutions Code Section 709 proceedings



Honorable Tari L. Cody
Presiding Judge, Juvenile Justice Division
2020

Superior Court of California

COUNTY OF VENTURA

Juvenile Division

**JUVENILE COMPETENCY TO STAND TRIAL
PROTOCOL AND MANUAL**

2020

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**STANDING ORDER PERTAINING TO COMPETENCY TO STAND TRIAL WELFARE
AND INSTITUTIONS CODE SECTION 827**

**JUVENILE COMPETENCY
TO STAND TRIAL
PROTOCOL AND MANUAL**

INFORMAL RESOLUTION OF A POTENTIAL JUVENILE COMPETENCY TO STAND TRIAL ISSUE

Pursuing formal Competency to Stand Trial (“CST”) proceedings in some juvenile cases may not be in the best interests of justice, public safety, and the welfare of the youth as mandated by Welfare and Institutions Code Section 202(d). Pursuant to Welfare and Institutions Code Section 680, in some circumstances, when it is suspected that a youth may not be competent to stand trial, deferring a resolution of the outstanding petition may be a useful alternative to initiating formal competency proceedings. This deferral procedure might allow the youth to benefit from services and interventions which would otherwise be interrupted or unavailable if formal competency proceedings were initiated. After a formal finding of incompetency, the focus must be on remediating the youth to competency or determining the futility of such efforts. Services prior to that stage can be much broader. Once the Court declares a doubt and suspends juvenile proceedings, the issue of CST must be resolved before juvenile proceedings can be reinstated. The doubt cannot be withdrawn.²

There are several informal resolutions that could be tried. The District Attorney and the defense could agree to continue the case to determine if the youth can voluntarily participate in therapeutic based programs available in the community or privately retained. Services offered by programs such as Tri-Counties Regional Center, the Interagency Case Management Committee (“ICMC”), special programming offered through the youth’s school district, or other interventions which would achieve the rehabilitative goals of the juvenile justice system while protecting public safety should be considered.

If the youth is already a 602 ward, a continuance of the arraignment on the current petition or an outright dismissal pursuant to Welfare and Institutions Code Section 782 could also be entertained by the District Attorney and the defense if such dismissal serves the needs of the minor and public safety would not be endangered.

In making this determination, consideration should be given to whether the services being provided outside the juvenile justice system or already in place within the juvenile justice system would obviate the need for jurisdiction on the current petition, and whether pursuing formal competency proceedings, including potentially protracted proceedings, is in the best interests of justice, public safety, and the welfare of the youth.

² *In re John Z.* (2014) 223 Cal.App.4th 1046.

Periodic reviews should be scheduled. If, at any of the reviews it appears that judicial intervention is no longer necessary for public safety, dismissal of the case should be considered pursuant to Welfare and Institutions Code Section 782. If it appears that the youth needs a higher level of intervention, in the interest of public safety, the parties should allow the case to proceed formally.

Although the youth is entitled to be screened for informal probation, pursuant to Welfare and Institutions Code Sections 654 and 654.2, these programs cannot be utilized for this informal resolution process if the youth is truly incompetent because those programs presume the consent of the youth, which cannot be given if the youth is not competent. However, a screening may give more insight and information to the parties and a decision as to how best to proceed can be made at the subsequent screening hearing based on the information contained within the screening report.

FORMAL COMPETENCY TO STAND TRIAL PROCEEDINGS

If the question of the youth's CST cannot be resolved informally, the next step would be for the Court to determine if substantial evidence exists which raises a doubt as to the youth's competency and if so, declare a doubt, if this has not already been done.

Declaring a Doubt

During the pendency of any juvenile proceedings, the youth's counsel, or the Court, may express a doubt as to a youth's CST. Before the Court can actually declare a doubt and suspend juvenile proceedings, it must find and state on the record that "the court finds substantial evidence that raises a doubt as to the minor's competency."³

If a doubt is expressed the Court must conduct a preliminary inquiry into the youth's CST. The Court can consider any reasonable evidence which might indicate the youth's CST. This can include statements from defense counsel, probation, or the youth's parents. Frequently, defense counsel submits a psychological evaluation which has been prepared specifically for this purpose. The question is whether the evidence constitutes "substantial evidence" of a youth's incompetence under Welfare and Institutions Code Section 709. There is no simple formula applicable to all situations. Evidence is substantial if it raises a reasonable doubt concerning the youth's ability to understand the nature of the juvenile proceedings against them, or to assist in their defense.⁴ Substantial evidence is not just any evidence that supports the possible fact but requires evidence that is "reasonable in nature, credible, and of solid value."⁵

³ Welf. & Inst. Code section 709(a).

⁴ *People v. Rogers* (2006) 39 Cal.4th 826, 847.

⁵ *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.

Penal Code Sections 1367-1368 and their attendant cases can provide guidance for legal standards in 709 proceedings.

Pursuant to Welfare and Institutions Code Section 709(a)(2), a youth is incompetent to stand trial if the youth:

“[L]acks 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.”⁶

Incompetency may result from the presence of any condition or conditions, including, but not limited to, mental illness, mental disorder, developmental disability, or developmental immaturity.⁷ Also, because the standard relates to the child’s ability to participate meaningfully in the court proceedings, it calls for present competency; it is not enough that they may become competent in the future.⁸

When the Court Does Not Find Substantial Evidence Exists

If the Court does not find that substantial evidence exists which raises a doubt as to the youth’s competency, the underlying delinquency proceedings will not be suspended.

When the Court Finds Substantial Evidence Exists

When the Court finds that there is substantial evidence of doubt as to the competency of the youth, no matter how persuasive other evidence may be to the contrary, the Court must suspend regular juvenile proceedings and order formal Welfare and Institutions Code Section 709 proceedings.

The Court must enunciate the doubt or lack of doubt as to the youth’s competency on the record. The Court should put on the record the basis for the Court’s finding.

Next, the youth needs to be advised of their rights concerning competency proceedings. This advisement may be done by the attorney or the Court. Although in some cases a youth may not have the capacity to understand their rights, an attempt should be made. Even if the youth does not have the capacity to understand their rights, the Court should continue with the competency proceedings.

⁶ Welf. & Inst. Code Section 709(a)(2).

⁷ Welf. & Inst. Code Section 709(a)(2); see also *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 860.

⁸ Welf. & Inst. Code Section 709(a)(2).

The youth should be advised of the following rights on the record:

1. The right to see and hear the witnesses
2. The right to question the witnesses through the attorney
3. The right to present their own witnesses and evidence
4. The fact that the judge will make the witnesses come to Court if they will not come
5. The right to testify and/or the right to remain silent

The advisement should include a description of the subsequent proceedings depending on the Court's finding, be it reinstating the juvenile case or referring the youth to the Remediation of Competency Program overseen by the Ventura County Probation Agency.

While proceedings are suspended the Court may make orders that it deems appropriate for services that may assist the youth in attaining competency. Further, the Court may rule on motions that do not require the participation of the youth in their preparation. The motions include, but are not limited to:

1. Motions to dismiss
2. Motions regarding a change in the placement of youth
3. Detention hearings
4. Demurrers
5. Motions to join agencies in the juvenile court proceedings that may have failed to meet a legal obligation to provide services to the youth as provided in Welfare and Institutions Code Section 727(b)(1).
6. Motions to suppress evidence under Welfare and Institutions Code Section 700.1.
7. A rehearing on the issue of whether there is a prima facie case that the youth committed a public offense (initially determined at the detention hearing), pursuant to Welfare and Institutions Code Section 637.

SUSPENSION OF JUVENILE PROCEEDINGS JUVENILE COMPETENCY FORENSIC EVALUATION

Upon suspension of the delinquency proceedings, the Court shall order an evidentiary hearing to determine the youth's competency. The Court shall appoint an expert (the "CST Expert") to determine "whether the youth suffers from a mental illness, mental disorder, developmental disability, developmental immaturity, or other condition affecting competency, and if so, whether the minor is incompetent as defined in paragraph (2) of subdivision (a)." ⁹

As provided by Welfare and Institutions Code Section 709(b)(2), the expert shall have expertise in child and adolescent development and forensic evaluation of juveniles for purposes of adjudicating competency, shall be familiar with competency standards and accepted criteria used in evaluating juvenile competency, shall have received training in conducting juvenile competency evaluations, and shall be familiar with competency remediation for the condition or conditions affecting competence in the particular case.

Currently, the gold standard for evaluating the competence of juveniles is the JACI, the Juvenile Adjudicative Competence Interview, designed by Thomas Grisso. The attorneys should seek appointment of an expert familiar with the JACI if possible. The expert must also meet the criteria set forth in California Rules of Court, rule 5.645, subdivision (d).

The County of Ventura Superior Court shall maintain and keep current the list of qualified experts.

Possible Stipulation by the Petitioner

If defense counsel previously submitted a psychological evaluation by a qualified expert as evidence of the youth's incompetency when defense expressed a doubt, the Court may want to inquire of the petitioner if they are willing to stipulate to that opinion, or submit on the opinion and proceed directly to a competency hearing and commence remediation of competency services.

The petitioner is not required to stipulate to this procedure and if they do not, a CST Expert should be appointed as described above.

At the same time, if the Court has evidence that the youth is developmentally disabled, it shall appoint the director of a regional center for developmentally disabled individuals to evaluate the youth to determine if the youth is eligible for services under the LPS Act. ¹⁰ The director shall provide the Court with a written report informing the court of their determination and the evaluation shall not delay the competency proceedings. ¹¹

⁹ Welf. & Inst. Code Section 709(b)(1); see also California Rules of Court, rule 5.645(d).

¹⁰ Welf. & Inst. Code Section 4500 et seq.

¹¹ Welf. & Inst. Code Section 709(b)(7).

Procedure Upon Appointment of CST Expert:

1. The Court shall initially schedule three hearing dates:
 - a. The day after the appointment for **CONFIRMATION THAT EXPERT HAS ACCEPTED**
 - b. Fifteen (15) judicial days for **RECEIPT OF CST EVALUATION REPORT**
 - c. Seventeen (17) judicial days for **COMPETENCY REVIEW PRETRIAL**. At this hearing the parties will determine if there will be a stipulation, submission, or a contested hearing of the CST issue
 - d. In the event of the expert's inability to accept the appointment, a new appointment shall be made. The time limits shall begin at the point of the new appointment

2. As soon as possible but no later than twenty-four (24) hours after the appointment the judicial assistant shall contact the CST Expert, either by phone, email, or fax, to confirm that the expert is available and can submit a CST evaluation by the ordered receipt date. The judicial assistant shall report to the Court and Counsel the following day.

3. Within two (2) judicial days of the appointment of the expert, Probation shall submit the items listed in 3(a) to the judicial assistant to be included in the court ordered CST packet for transmission to the expert:
 - a. Probation shall be responsible for providing to the judicial assistant:
 1. The police report for the underlying offense and the petition.
 2. Any behavioral health records, previous psychological evaluations, and current medication list which are contained in their file.
 3. The most current existing social study of the youth.
 - b. Either party may submit directly to the expert any materials that they deem relevant such as educational records, other psychological evaluations and follow-up criminal reports pertaining to the current underlying charge. These items should be delivered directly to the expert by each party within three (3) judicial days of acceptance of the appointment.

4. Within three (3) judicial days after confirmation of acceptance of the appointment, the judicial assistant shall prepare and deliver the CST packet to the expert. Along with the documents submitted by Probation, the packet will include:
 - a. The cover letter containing the Court's instructions for the expert, including where to and how to deliver the report, and where and how the youth can be contacted;
 - b. The court order indicating the name of the Judge and courtroom, appointment of the expert, the date the evaluation is to be returned, and that all documents submitted are confidential; and
 - c. The name, phone number, and email address for the defense counsel and deputy district attorney assigned to the youth's case.
5. Other than the Court, the party expressing the doubt should communicate with the expert regarding their concerns about the youth's CST.

No Need for Welfare and Institution Code Section 827 Petition

Court-appointed CST Experts shall be given access to confidential reports listed in this protocol without the need to file a Welfare and Institutions Code Section 827 petition pursuant to standing order of the Superior Court of California, County of Ventura, Juvenile Division (attached).

Location of CST Evaluation Interview

If the youth is detained pending the evaluation, the evaluation shall take place at the Juvenile Facility.

If the youth is not detained, the CST Expert shall schedule the appointment with the youth's parents or guardian and agree upon a location for the interview.

Separately Retained Experts

Defense counsel or the District Attorney may retain their own expert. Any reports obtained by the defense counsel shall be confidential unless the expert is expected to testify at the competency hearing, in which case counsel must provide copies of the report and the expert's resume to opposing counsel. Any expert report pertaining to the youth's CST obtained by the District Attorney must be turned over to the defense.

If the District Attorney has any possible *Brady* material, it must be provided to the

defense as soon as it becomes known. All efforts shall be made by the attorneys to avoid delay in the competency proceedings. Additionally, pursuant to Welfare and Institutions Code Section 702(b)(6), the District Attorney must obtain a court order for any competency evaluation of the youth after petitioning the Court pursuant to the Civil Discovery Act (Title 4 (commencing with Section 2016.010 of Part 4 of the Code of Civil Procedure)).

The Court does not pay for any privately retained expert.

Juvenile Competency Expert Evaluation Requirements

1. Interview the minor and review all available records provided, including, but not limited to, medical, education, special education, probation, child welfare, mental health, regional center, and court records, and any other relevant information that is available.
2. Consult with the minor's counsel and any other person who has provided information to the court regarding the minor's lack of competency.
3. Gather a developmental history of the minor. If any information is unavailable to the expert, they shall note in the report the efforts to obtain that information.
4. Administer age-appropriate testing specific to the issue of competency unless the facts of the particular case render testing unnecessary or inappropriate.
5. Be proficient in the language preferred by the minor, or, if that is not feasible, the expert shall employ the services of a certified interpreter and use assessment tools that are linguistically and culturally appropriate for the minor.
6. In a written report, opine whether the minor has the sufficient present ability to consult with their counsel with a reasonable degree of rational understanding and whether they have a rational and factual understanding of the proceedings against them. State the basis for these conclusions.
7. If the expert concludes that the minor lacks competency, the expert shall give their opinion on whether the minor is likely to attain competency in the foreseeable future.
8. If the minor is likely to attain competency, make recommendations regarding the type of remediation services that would be effective in assisting the minor in attaining competency.

RETURN OF THE COMPETENCY EXPERT REPORT

On the day of the Competency Review Pretrial, three (3) things may occur: (1) the parties may stipulate to the opinion of the expert; (2) the parties may submit on the opinion; or (3) the parties may contest the opinion and set the matter for a contested competency hearing.

1. The parties may **stipulate** to the findings of the expert. A competency determination is still required. The Court should adopt the stipulation on the record and make the appropriate orders based on the stipulation (refer to the RCP or reinstate criminal proceedings). The doubt cannot be withdrawn, nor the hearing waived, even if the parties agree to the outcome.¹²

The competency hearing could be set in a relatively brief time because there would be no evidence or argument for the attorneys to prepare. The Court presumably could hold the competency hearing that day.

2. The parties may **submit** the matter to the Court for a court determination based on the expert's report(s). Basically, the parties would not be taking a position and leaving it up to the Court to decide. The Court must set a competency hearing and make its findings on the record. If the matter is only going to be submitted on the expert's report(s), the competency hearing could be set in a relatively brief time because there would be no evidence or argument for the attorneys to prepare. The Court could hold the competency hearing that day.
3. The parties may **disagree** about the expert's opinion(s). In that case, the Court would set a contested competency hearing. The hearing could proceed by submission on some matters, stipulation on some matters, live testimony, and/or legal argument. The contested trial should be set within fifteen (15) calendar days of the Competency Review Pretrial for detained youth, within thirty (30) days for non-detained youth, subject to an extension for good cause.

¹² *People v. Pennington* (1967) 66 Cal.2d 508, 521; *In Re John Z supra*; *In re R.V.* (2015) 61 Cal.4th 181.

COMPETENCY HEARING

Welfare and Institutions Code Section 709(c) states “The question of the minor’s competency shall be determined at an evidentiary hearing unless there is a stipulation or submission by the parties on the findings of the expert that the minor is incompetent.” Pursuant to Welfare and Institutions Code Section 709(c), with respect to a youth under 14 years of age at the time of the commission of the alleged offense, the Court shall make a determination as to the youth’s capacity to commit a crime pursuant to Penal Code Section 26 prior to deciding the issue of competency.

Regardless of the conclusions or opinions of the Court-appointed CST Expert, the Court that has initiated mental competency proceedings based upon “substantial evidence of doubt” must conduct a hearing on the youth’s competency, unless there is a stipulation to not have such a hearing, and the judge adopts the stipulation.¹³

Timing of Hearing

For a contested competency hearing, the Court must set the hearing within fifteen (15) judicial days from the Competency Review Pretrial, unless there is good cause to extend the time for a short period to accommodate the availability of the expert witness(es) or to allow for completion of any new evaluations. If the expert(s) needs to be available for hearing, scheduling would have to be coordinated. If the youth is out of custody, the Court shall set the hearing within thirty (30) judicial days from the Competency Review Pretrial date.

De facto good cause would exist for a reasonable continuance if an attorney needs time to secure their 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 diligently, the Court may proceed to hearing without counsel’s expert(s). Also, the Court should be prudent in continuing hearing dates any longer than necessary when the youth is in custody.

Trial Judge

There is no requirement that the competency hearing be held before the same judge who declared a doubt about the youth’s competency to stand trial.¹⁴

¹³ *In re John Z.* (2014) 223 Cal.App.4th 1046; California Rules of Court, rule 4.130(e) (1).

¹⁴ *People v. Hill* (1967) 67 Cal.2d 105, 113; *People v. Lawley* (2002) 27 Cal.4th 102, 133-134.

Presumption of Competence; Burden of Proof

The youth is presumed competent at the start of the competency hearing. The burden of proof is on the party claiming incompetency to stand trial by a preponderance of the evidence.¹⁵ A preponderance of evidence exists when the evidence shows that it is more likely than not, that the minor is incompetent.

When neither the prosecution nor the youth seeks a finding of incompetency, the trial judge may take the initiative and assume the burden of producing evidence of incompetency.¹⁶

Presentation of Evidence

Typical order of presentation:

1. The party with the burden of proof presents its evidence first; typically, that would be the defense. The youth's attorney offers evidence of the youth's incompetency, if such evidence exists, and chooses to do so.
2. If defense counsel does not offer evidence of incompetency, the District Attorney may do so.¹⁷
3. If defense counsel puts on evidence of incompetency, the District Attorney next offers evidence of youth's present mental competence.
4. 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.¹⁸
5. The party not carrying the burden of proof offers its final argument, if any, followed by the final argument of the party claiming incompetency, if any.

Minor Has No Right to Testify

If the subject of a competency proceeding wants to testify, but their attorney does not want the person to testify, the subject of the proceeding has no right to testify. Sometimes defense counsel leaves it up to the youth to decide whether to testify or not, and defense counsel merely puts their 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 youth testifying, and asks the Court to not allow youth to testify, the Court should not allow the youth to testify.¹⁹

¹⁵ Welf. & Inst. Code Section 709(c); *In re R. V.* (2015) 61 Cal.4th 181.

¹⁶ *People v. Skeirik* (1991) 229 Cal.App.3d 444, 459.

¹⁷ Penal Code Section 1369(b)(2).

¹⁸ Penal Code Section 1369(d).

¹⁹ *People v. Bell* (2010) 181 Cal. App.4th 1071.

Defense Counsel Can Disagree with Youth

Defense counsel may present evidence of the youth's incompetency even when the youth desires to be found competent.²⁰ In that event, (subject to *People v. Bell*), the Court may consider allowing the youth to testify as to their own present competency with the permission of defense counsel, unless the Court separately determines that the youth is incompetent to give testimony.²¹

Such conflict does not establish sufficient grounds to warrant substitution of counsel or the appointment of second counsel to oppose a finding of competency.²²

Court Must Consider Expert's Opinion

The Court must consider the opinion(s) of the competency experts, but the Court does not have to agree with the opinion(s). On the other hand, the Court cannot reject opinions without reason.²³

Youth's Statements in Subsequent Proceedings

Neither statements made by a youth to any expert, nor any evidence derived from these statements may be used by the prosecution to prove its case-in-chief as to the youth's guilt.²⁴ Statements made during competency examinations or hearings may not be used to impeach the youth if they testify at a later hearing.²⁵

This rule of immunity in competency proceedings extends to statements made by employees of health facilities charged with restoring the youth's competency under Penal Code Section 1370.²⁶

²⁰ *People v. Stanley* (1995) 10 Cal.4th 764, 804; *People v. Bolden* (1979) 99 Cal.App.3d 375, 379 (adult cases) (in a competency matter defense counsel must advocate what they perceive to be in the client's best interests even when that interest conflicts with the client's expressed position). Note: in 2016, Welf. & Inst. Code § 634.3(a)(2) was added mandating that appointed counsel in a juvenile delinquency matter provide legal representation based on the client's expressed interests.

²¹ *People v. Harris* (1993) 14 Cal.App.4th 984, 993 [adult case].

²² *Shephard v. Superior Court* (1986) 180 Cal.App.3d 23, 33; *People v. Jernigan* (2003) 110 Cal.App.4th 131, 135-137 [adult cases].

²³ *In re R.V.* (2015) 61 Cal.4th 181, 216.

²⁴ California Rules of Court, rule 4.130(d) (3); Welfare and Institutions Code Section 709(b)(5), *People v. Jablonski* (2006) 37 Cal.4th 774, 802-804; *People v. Arcega* (1982) 32 Cal.3d 504, 520.

²⁵ *People v. Pokovich* (2006) 39 Cal.4th 1240, 1246-1253.

²⁶ *In re Hernandez* (2006) 143 Cal.App.4th 459, 475-476.

Express Finding after the Hearing

The Court must expressly state on the record, either orally or in writing, its determination whether the youth is competent to stand trial, as well as the evidence considered and the reasoning in support of its finding.²⁷

Situations Requiring Second Hearing

When a competency hearing has already been held and the youth has been found CST, 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.²⁸ The Court may take its personal observations of the youth into account in determining whether there has been a significant change in the youth's level of competency.²⁹

STEPS FOLLOWING POST-TRIAL FINDING

If the Youth is Found Competent

Following a competency trial, when a judge finds a youth to be competent, the Court should place its finding on the record and reinstate juvenile proceedings. Welfare and Institutions Code Section 709(d) states: "If the court finds the minor to be competent, the court shall reinstate proceedings and proceed commensurate with the court's jurisdiction."

If the Youth is Found Incompetent

If the Court finds the youth incompetent, the Court should state its findings on the record and if the petition includes felony offenses, regular juvenile proceedings will remain suspended for a period no longer than reasonably necessary to determine whether there is a substantial probability the youth will attain competency in the foreseeable future, or the court no longer retains jurisdiction and the case must be dismissed. Although felony proceedings will remain suspended, the attorneys, judge, and probation will continue with the case to determine whether the youth can be remediated to competency. If the Court finds the youth incompetent and the petition contains only misdemeanor offenses, the petition shall be dismissed pursuant to Welfare and Institutions Code Section 709(f).

²⁷ California Rules of Court, rule 4.130(e)(4)(B); *People v. Marks* (1988) 45 Cal.3d 1335, 1343 [adult case].

²⁸ *People v. Lawley* (2002) 27 Cal.4th 102, 136; *People v. Kaplan* (2007) 149 Cal.App.4th 372, 383-387.

²⁹ *People v. Jones* (1991) 53 Cal.3d 1115, 1153

Remediation of Competency Program

Once the court has found the youth incompetent, the Court shall refer the youth to the Remediation of Competency Program (RCP) overseen by Probation. The Court shall set a hearing date within 10 judicial days of the finding of incompetency regarding the implementation of, and participation by the youth with their competency remediation case plan. The RCP provider shall prepare a report describing the youth's remediation case plan and the progress made in implementation to this date.

The next remediation of competency review shall be set at least every 30 calendar days from the initial hearing if the youth is in custody, and every 45 calendar days if the youth is out of custody prior to the expiration of the total remediation period specified in 709(h)(3).

Placement of Youth

If the youth is ordered into the RCP and is in custody, the Court shall consider appropriate alternatives to juvenile facility confinement, including but not limited to, all of the following pursuant to Welfare and Institutions Code Section 709(g)(1)(A)-(G):

1. Developmental centers
2. Placement through regional centers
3. Short-term residential therapeutic programs
4. Crisis residential programs
5. Civil commitment
6. Foster care, relative placement, or other nonsecure placement
7. Other residential treatment programs

The Court must order the youth placed in the least restrictive environment, taking into consideration these factors pursuant to Welfare and Institutions Code Section 709(h)(5)(A)(i)-(iv):

1. Where the youth shall have the best chance of obtaining competence;
2. Whether the placement is the least restrictive setting appropriate for the youth;
3. Whether alternatives to secure confinement have been identified and pursued and why alternatives are not available or appropriate; and
4. Whether the placement is necessary for the safety of minors or others.

Pursuant to Welfare and Institutions Code Section 709(h)(5)(B), if the Court determines, upon consideration of the above listed factors, that it is in the best interests of the youth and public safety for the youth to remain in secure confinement, the Court shall state the reasons on the record.

Pursuant to Welfare and Institutions Code Sections 709(h)(5)(A) and (C), secure confinement of the youth shall not extend beyond six (6) months from the finding of incompetence unless the petition involves a Welfare and Institutions Code Section 707(b) offense where the Court considers whether it is necessary and in the best interests of the youth and public safety to order secure confinement of a youth for up to an additional year, not to exceed eighteen (18) months from the finding of incompetence.

Remediation of Competency is the Main Goal

Standard probation and mental health services shall not interfere with the primary short-term goal of attempting to remediate a youth's competence. For instance, although an Individualized Education Plan (IEP) is important in normal situations, it is not the paramount goal during the period that remediation of competency is being attempted. Standard services which are not essential to the youth's competency shall be postponed until after the competency process has been completed. If, however, some services will help the youth remediate to competency, including educational services, those services should be maintained.

The Juvenile Court has an obligation to ensure that youths in the Court's care do not deteriorate mentally, physically, or emotionally. Toward that end, services that maintain the youth's health must be provided.

State Examination of Developmentally Disabled Youths

If the Court suspects the youth is developmentally disabled, there is an existing statutory process that leads to a State mental and physical examination of the youth and ensures the youth receives proper services.

"Developmental disability" is defined in Welfare and Institutions Code Section 4512(a) and Title 7 of the California Code of Regulations, Section 54000(a), as a disability that is attributable to intellectual disability (an IQ of approximately 70 or below under DSM IV

criteria), cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability.

A person with a developmental disability is eligible for initial intake at a regional center, diagnostic and counseling services, and a determination regarding the need for assessment. (7 CCR Section 54010(a).) A person with a developmental disability that is also a “substantial disability” is also eligible for ongoing regional center services. (7 CCR Section 54010(b).) “Substantial disability” means a condition resulting in a major impairment of cognitive or social functioning sufficient to require planning and services, combined with significant functional limitations in three or more of the following areas: receptive and expressive language, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (7 CCR Section 54001(a).)

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. 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 youth. If the youth qualifies for Regional Center services and the youth chooses to participate, the services are provided throughout the lifetime of the client. A referral to the Regional Center for examination and possible placement should run parallel to the Court’s competency process as any delay could result in the Court losing jurisdiction to make the referral. Any referral and examination should not interfere with the Court’s remediation to competency process which is the primary goal.

Opinion of Evaluator Regarding the Ability of Youth to Remediate to Competency

At each competency review hearing, the RCP provider should render an opinion regarding whether the youth is competent or is likely to remediate to competency in the foreseeable future and any recommendations regarding further psychological or educational testing. This opinion should be rendered in writing.

However, if the recommendation is that remediation services should terminate, either because the youth has been remediated to competency or because the youth will not remediate to competency in the foreseeable future, the opinion and its basis must be rendered in writing.

Determination of Continued Remediation of Competency Services

At each competency review, the Court must decide if a further attempt at remediation to competency is warranted. RCP services will continue only for so long as the Court finds that there is a substantial probability the youth will remediate to competency in the foreseeable future or the Court no longer retains jurisdiction per Welfare and Institutions Code Section 709(h). (See discussion regarding **Jurisdiction**, below.)

Jurisdiction

During the pendency of RCP proceedings, the statute of limitations is tolled by operation of law pursuant to Penal Code Section 803(b).

In the event of a dismissal based on the provisions of Welfare and Institutions Code Section 709, either because the Court cannot find the youth will remediate to competency within the foreseeable future or the Court no longer retains jurisdiction due to the expiration of the time limits specified above, the applicable statute of limitations for the underlying charge will commence running again the day subsequent to the dismissal and shall be calculated in accordance with Part 2, Title 3, Chapter 2, Section 799 et seq., of the California Penal Code.

New Offenses

The youth is presumed competent. When the youth is alleged to have committed a new offense or violation of probation, the probation officer should not postpone 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 and Probation should not wait until the next scheduled court hearing to refer new cases to the District Attorney and/or file a Notice of Charges. Probation may also immediately admit the youth into custody which would trigger a detention hearing. Probation may also allow the youth to remain out-of-custody but set an immediate hearing. The handling of new alleged offenses is within the discretion of the Probation Agency.

The youth's attorney would then petition the Court for a review of the youth's current competency. Starting anew by applying this Protocol to the new petition/notice, the Court must make appropriate findings. If there is substantial evidence the youth may be incompetent, the Court will order the new petition suspended and the youth's treatment for the new alleged offense to be added to the pending attempt to remediate to competency.

If the Court determines there is not substantial evidence the youth is incompetent, the new case will not be suspended, and the Court will proceed with the new underlying juvenile proceedings. The issue of the youth's competency on the previously suspended petition/notice will remain as is, until the Court makes a finding regarding competency on the 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 the "present" status of the youth. If the youth is competent on the new case, it is a factor to be considered on the pending competency issue.

OUTCOME OF REMEDIATION OF COMPETENCY PLAN

Remediation to Competency Procedures

The total time for remediation shall not exceed one (1) year from the finding of incompetency and secure confinement shall not exceed the limits set in Welfare and Institutions Code Section 707(h)(5)(A).

Within six (6) months after the initial remediation of competency review date, the court shall hold an evidentiary hearing on whether the youth is remediated or able to be remediated unless the youth, through counsel and the District Attorney stipulate to or agree with the recommendation of the Remediation of Competency provider. If the recommendation is that the youth is competent and if the youth disputes the recommendation, the burden is on the youth to prove by a preponderance of the evidence that they remain incompetent. If the recommendation is that the youth is unable to be remediated and the District Attorney disputes the recommendation, the District Attorney has the burden to prove by a preponderance of the evidence that the youth can be remediated. If the Court finds that the youth has been remediated, the court shall reinstate the proceedings. If the Court finds that the youth has not yet been remediated but is likely to be remediated within six (6) months, the Court shall order the youth to return to the RCP.

If the Court finds that the youth will not remediate to competency within the time periods provided in Section 709(h), the Court must dismiss the case.

The decision to make such a motion would most likely present itself when the youth's lack of remediation to competency is based on developmental immaturity and/or concerns for public safety due to the seriousness of the alleged conduct.

Pursuant to Welfare and Institutions Code Section 709(h)(4), all the various persons and agencies with information about the youth may be invited by the Court to the dismissal hearing to discuss any services that may be available to the youth after jurisdiction is terminated.

Statutory Time Limitations Begin Again

When a youth has been remediated to competence and juvenile proceedings are reinstated, the time limit for a speedy trial and/or speedy disposition begin afresh, beginning on the day regular juvenile proceedings are reinstated. The days that accrued before the youth's regular juvenile proceedings were suspended are not subtracted from the applicable time limits.³¹

Credit for Pre-commitment Confinement

At the disposition hearing in the underlying delinquency case, the youth will be afforded pre-commitment credits toward any maximum time for confinement. Credits should be granted only for days the youth spent in the Ventura County juvenile facility, in Ventura County jail, a locked medical or mental facility, or the California Department of

Corrections and Rehabilitation, Division of Juvenile Facilities. Days the youth spent in any other alternative placement(s) for remediation of competency services are not eligible for credits.

However, even if the Court gives credits to the youth, or the youth has served a period of confinement equal to the maximum time of commitment, the youth may be subject to extended civil commitment proceedings under the LPS Act if they are considered dangerous to self or others, or for the other reasons encompassed in the Act.³²

Refiling the Dismissed Charge

Any charge dismissed by the Court based upon a failure to remediate to competency within the jurisdiction limitation (see Jurisdiction) may be refiled within the statute of limitations as defined in Penal Code Section 799 et seq. if it appears to the District Attorney that the youth is now competent. Subject to Welfare and Institutions Code Section 709(b)(5), although the youth will be presumed competent at the time of the refiling of charges, all of the previous reports and records of the competency proceedings pursuant to this protocol would be available for potential admission in any subsequent competency proceeding.

³¹ Penal Code Section 1382(a)(2)-(3); California Rules of Court, rules 4.130(c)(2) and 4.130(c)(3)(b). [adult provisions]

³² *In re Banks* (1979) 88 Cal.App.3d 864, 871. [adult case]

RESOURCES

Orange County Superior Court
Juvenile Competency Protocol 2019

Santa Clara County Superior Court
DRAFT: Juvenile Competency Protocol 2019

Los Angeles County Superior Court
Juvenile Division Competency to Stand Trial Protocol, Effective Date: March 1, 2019

Youth Law Center
Protocol for Competence in California Juvenile Justice Proceedings 2012

California Judicial Council Invitation to Comment 2015
Leg 15-04: Proposed Legislation to amend Welfare and Institution Code Section 709
Proposed effective date January 1, 2017