

**FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
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**SELECT ISSUES SURROUNDING
COMPETENCY TO STAND TRIAL**

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Introduction

Although inquiries into the mental competence of criminal defendants arise in the context of *criminal* prosecutions, the California Supreme Court has repeatedly deemed competency proceedings to be special proceedings that are *civil* in nature. (*People v. Pokovich* (2006) 39 Cal.4th 1240, 1269; *People v. Stanley* (1995) 10 Cal.4th 764, 807; *People v. Hill* (1967) 67 Cal.2d 105, 114; *People v. Fields* (1965) 62 Cal.2d 538, 540.) Consequently, the process afforded criminal defendants during competency proceedings differs from the process otherwise afforded them by statutory and constitutional criminal law provisions.

These materials will provide an overview of the substantive federal constitutional standard that must inform competency proceedings and the procedures California has implemented to ensure that competency requirement is met.

Because appellate practitioners most often confront competency questions after a client's conviction by trial or plea, these materials will focus on issues that may offer avenues to challenge both conviction and sentence on competency grounds. Common appellate claims in this context involve: the trial court's failure to suspend criminal proceedings when presented with substantial evidence of the defendant's incompetency; the sufficiency of the evidence in support of the trier of fact's finding of competency or incompetency; and the denial or granting of the defendant's request for self-representation. These materials are intended to provide a starting point for researching these and a number of other competency-related issues.

In addition, these materials will touch on competency issues in probation revocation and juvenile delinquency proceedings as well as issues related to civil commitment following a finding of incompetency.

The Federal Constitutional Trial Competency Standard

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from trying or convicting criminal defendants who are not mentally competent. (*Drope v. Missouri* (1975) 420 U.S. 162, 181; *People v. Rogers* (2006) 39 Cal.4th 826, 846.) According to the United States Supreme Court, to be competent, a defendant must have both a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." (*Dusky v. United States* (1960) 362 U.S. 402, 402, internal quotation marks omitted.)

While the United States Supreme Court has not adopted a comprehensive set of

procedural rules that states must implement to protect the federal constitutional competency requirement, “state procedures must be adequate to protect this right. (*Pate v. Robinson* (1966) 383 U.S. 375, 378.) California’s statutory framework setting forth the rules governing competency proceedings during criminal prosecutions is found at Penal Code section 1367 et seq. In accordance with the competency standard first articulated by the United States Supreme Court in *Dusky*, Penal Code section 1367 proscribes trying or punishing a criminal defendant who, “as a result of mental disorder or developmental disability, . . . is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.” (Pen. Code, § 1367, subd. (a).)

Incompetency Distinguished From Insanity

Competence to stand trial is a completely separate concept from the question of the defendant’s state of mind at the time of the commission of the alleged offense(s).

“A plea of not guilty by reason of insanity refers to the defendant’s mental state at the time of the commission of the crime, a mental state which is distinguishable from that which is required of a defendant before he may be allowed to stand trial. [(Citation.)] For example, even if the defendant is suffering from the same mental disturbance with which he was afflicted at the time of the commission of the crime, he may still be competent to stand trial as long as he is able to understand the nature of the proceedings taken against him and is able to assist counsel in presenting a defense. (Pen. Code, § 1367.)” (*People v. Hofferber* (1977) 70 Cal.App.3d 265, 269.)

Evidence of Mental Illness or Developmental Disability Not Per Se Proof Of Incompetence To Stand Trial

Penal Code section 1367 requires evidence of a mental disorder or developmental disability as a predicate for a finding of incompetence to stand trial. (Pen. Code, § 1367.) However, evidence of mental disorder or a developmental disability does not render a criminal defendant incompetent per se. (See e.g. *Atkins v. Virginia* (2002) 536 U.S. 304, 318.)

The mental disorder or developmental disability must be the cause of the defendant’s inability to meet the *Dusky* standard in order for him or her to be found incompetent.

Suspension of Criminal Proceedings

According to the United States Supreme Court, when a criminal defendant “has come forward with substantial evidence of incompetence to stand trial, due process requires that a full competency hearing be held.” (*People v. Stankewitz* (1982) 32 Cal.3d 80, 92, citing

Pate v. Robinson, supra, 383 U.S. 375.) Under California law, “when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of present mental competence of the defendant has been determined.” (Pen. Code, § 1368, subd. (c).)

If a doubt as to the defendant’s competency arises in the mind of the trial judge, the court “shall state that doubt on the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent.” (Pen. Code, § 1368, subd. (a).) According to Penal Code section 1368, subdivision (b), “[i]f counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant’s mental competence is to be determined in a hearing” (Pen. Code, § 1368, subd. (b).)

Even if trial counsel does not express a doubt as to the defendant’s competency, “the court may nevertheless order a hearing.” (Pen. Code, § 1368, subd. (b).) In fact, the court *must* suspend criminal proceedings whenever there is substantial evidence of incompetence before it, regardless of defense counsel’s opinion on the subject. (*People v. Ary* (2004) 118 Cal.App.4th 1016.)

Once presented with substantial evidence of the defendant’s incompetence, to comport with due process, the trial court *must* hold such a hearing. (*People v. Pennington* (1967) 66 Cal.2d, 508, 518; *People v. Stankewitz, supra*, 32 Cal.3d at p. 92.)

Perhaps the most common competency issue appellate practitioners confront is whether there was in fact substantial evidence of incompetence such that the trial court erred in not suspending criminal proceedings (and therefore acted in excess of jurisdiction in conducting a trial that led to conviction or in accepting a guilty or no contest plea).

The United States Supreme Court has opined on a few of the factors trial courts should consider when determining whether to suspend criminal proceedings and hold a competency hearing: “The import of our decision in *Pate v. Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.” (*Drope v. Missouri, supra*, 420 U.S. at p. 180.)

Moreover, the California Supreme Court has held: If a single qualified expert informs the

court, after adequate consultation with the defendant, that the defendant does not meet the requirements for trial competency, then the substantial evidence test is satisfied “no matter how persuasive other evidence - testimony of prosecution witnesses or the court’s own observations of the accused - may be to the contrary.” (*People v. Pennington, supra*, 66 Cal.2d at pp. 518-519.)

Recent appellate cases examining whether the trial court erred in failing to suspend criminal proceedings and order a competency hearing include: *People v. Jenan* (2007) 148 Cal.App.4th 1144 [finding error] and *People v. Rogers, supra*, 39 Cal.4th at pp. 846-850 [finding no error].

The Question of Competency Cannot Be Waived After a Doubt Has Been Declared

As the California Supreme Court has declared: “once a doubt has arisen as to the competence of the defendant to stand trial, the trial court has no jurisdiction to proceed with the case against the defendant without first determining his competence in a [Penal Code] section 1368 hearing, and the matter cannot be waived by defendant or his counsel.” (*People v. Hale* (1988) 44 Cal.3d 531, 541; see also Pen. Code §§ 1368, subd. (c), 1370, subd. (a)(1)(B).)

In *People v. Marks* (1988) 45 Cal.3d 1335, the California Supreme Court held that a trial court’s acquiescence to defense counsel’s request to withdraw his or her doubt as to the defendant’s competency did not amount to a valid judicial finding of competence. According to *Marks*, “the constitutional right to due process, [Penal Code] section 1369, and our holding in *Hale, supra*, [citations], require, at a minimum, that the trial court *expressly and unmistakably state on the record*, either orally or in writing, its determination as to whether the defendant is mentally competent to stand trial” once a doubt has been declared. (*People v. Marks, supra*, 45 Cal.3d at p. 1343, italics in original.)

Upon Suspension of Criminal Proceedings, Trial Courts May Not Entertain *Faretta* Motions for Self-Representation

In most circumstances, a criminal defendant has a federal constitutional right to proceed without counsel. (*Faretta v. California* (1975) 422 U.S. 806 [announcing the right to self-representation]; *Godinez v. Moran* (1993) 509 U.S. 389 [holding that a state may permit self-representation so long as the defendant is competent]; *Indiana v. Edwards* (2008) 554 U.S. ____ [128 S.Ct. 2379] [holding that a state may deny self-representation to a defendant deemed competent to stand trial on the ground that the defendant lacks the mental capacity to conduct his or her trial without the assistance of counsel].)

However, once a doubt is declared as to a criminal defendant's competency and criminal proceedings are suspended, trial courts lack jurisdiction to rule on a defendant's motion for self-representation unless and until the defendant is deemed competent. (*People v. Horton* (1995) 11 Cal.4th 1068, 1108, citing *People v. Marks, supra*, 45 Cal.3d at p. 1340.)

On the other hand, should the defendant be found competent after appropriate proceedings and renew his or her request for self-representation, the trial court should address the request in a matter consistent with the standard announced in *Indiana v. Edwards*, where the United States Supreme Court concluded: "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Indiana v. Edwards, supra*, 554 U.S. ____ [128 S.Ct. 2379].)

Trial Courts Must Entertain *Marsden* Motions Even After the Suspension of Criminal Proceedings to Hold a Competency Hearing

Under the Sixth and Fourteenth Amendments to the United States Constitution, a trial court may not deny an indigent criminal defendant's motion to substitute one appointed counsel for another without giving him an opportunity to state the reasons for his request. (*People v. Marsden* (1970) 2 Cal.3d 118.)

In *People v. Solorzano* (2005) 126 Cal.App.4th 1063, the Fifth District Court of Appeal ruled that even after criminal proceedings have been suspended in order to conduct a competency hearing, the federal constitution imposes a mandatory duty to hold a hearing on a criminal defendant's *Marsden* motion before adjudicating the defendant's competency.

Courts Have a Continuing Duty to Suspend Proceedings If a Doubt Arises as to the Defendant's Competency Even After Trial Has Already Started

"Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." (*Drope v. Missouri, supra*, 420 U.S. at p. 181) Should substantial evidence of mental incompetence arise mid-trial, "the correct course [is] to suspend the trial" and conduct the appropriate competency inquiry. (*Ibid.*)

Appointment of Experts

Once a doubt has been declared and a trial on the question of the defendant's mental competence ordered, the court must appoint at least one psychiatrist or licensed psychologist to evaluate the defendant. (Pen. Code, § 1369, subd. (a).) A second expert must be appointed "[i]n any case where the defendant or the defendant's counsel informs the court that the defendant is *not* seeking a finding of mental incompetence." (*Ibid.*, emphasis added; see also *People v. Harris* (1993) 14 Cal.App.4th 984 [where the appellate court held a second expert should have been appointed] and *People v. Robinson* (2007) 151 Cal.App.4th 606 [where the appellate court held that a second expert need not have been appointed].)

In addition to evaluating the defendant's trial competency, the expert(s) must also address the questions of whether the defendant has the capacity to make decisions regarding antipsychotic medication (if such medication is appropriate) and whether the defendant poses a danger to self or others. (Pen. Code, § 1369, subd. (a).)

"If it is suspected the defendant is developmentally disabled, the court shall appoint the director of the regional center for the developmentally disabled established under Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code, or the designee of the director, to examine the defendant." (*Ibid.*) Failure to refer the defendant's case to the director of the regional center is not per se reversible error. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1391, fn. 3 [overruling *People v. Castro* (2000) 78 Cal.App.4th 1402 to the extent the Court of Appeal found this type of error to be reversible per se].)

Trial by Jury

Penal Code section 1369 affords criminal defendants a statutory right to a jury trial on the issue of mental competence. (Pen. Code, § 1369.) California appellate courts have held that the jury trial right does not stem from the state or federal constitution. (*People v. Samuel* (1981) 29 Cal.3d 489; *People v. McPeters* (1992) 2 Cal.4th 1148; *People v. Harris, supra*, 14 Cal.App.4th at p. 991.)

Either the defense or the prosecution may demand a jury trial on the question of the defendant's mental competence. (*People v. Superior Court (McPeters)* (1985) 169 Cal.App.3d 796.)

Defense counsel may waive the right to a jury trial on the competency question, even over the objection of the defendant. (*People v. Masterson* (1994) 8 Cal.4th 965, 972; see also *People v. Samuel, supra*, 29 Cal.3d at p. 495.)

The trial court “need not advise the defendant of [the jury trial] right.” (*People v. Masterson, supra*, Cal.4th at p. 972.)

Prior to the commencement of a jury trial on the question of the defendant’s competence, the parties “are entitled only to the number of peremptory challenges provided for in civil trials, even if the underlying offense is punishable by death or life imprisonment.” (*People v. Stanley* (1995) 10 Cal.4th 764, 807.)

If either party exercises the jury right, “the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict.” (Pen. Code, § 1369, subd. (f).) The model jury instruction for competency trials is found at CALCRIM no. 3451.

The jury must render a unanimous verdict. (Pen. Code, § 1369, subd. (f).)

Presumption of Competence

According to Penal Code section 1369, subdivision (f), “[i]t shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent.” (Pen. Code, § 1369, subd. (f); see also *People v. Rells* (2000) 22 Cal.4th 860 [“The Fourteenth Amendment’s due process clause in fact permits the presumption that the defendant is mentally competent unless he is proved by a preponderance of the evidence to be otherwise”].)

Civil Discovery Rules Apply To Competency Proceedings

Just as the number of peremptory challenges afforded both parties is governed by civil law, the rules of civil discovery have also been held to apply in competency trials. (*Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 490-491.)

Statements from Court-Ordered Competency Evaluations May Not Be Used at Trial

In general, the Fifth Amendment privilege against self-incrimination applies to competency examinations. (*Estelle v. Smith* (1981) 451 U.S. 454.) “In California, the ‘protection . . . afforded by application of the Fifth Amendment is in fact provided by a judicially declared rule of immunity applicable to all persons whose competency to stand trial is determined at a [Penal Code] section 1368 hearing.’” (*People v. Jablonski* (2006) 37 Cal.4th 774, 802, quoting *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 496.) “[B]ecause a defendant may not invoke his right against compelled self-incrimination in a competency examination, ‘neither the statements of [the defendant] to the psychiatrists appointed under [Penal Code] section 1369 nor the fruits of such statements may be used in trial of the issue of [the defendant’s] guilt, under either the plea of not guilty or that of

not guilty by reason of insanity.’” (*People v. Jablonski* (2006) 37 Cal.4th 774, 802, quoting *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 470.) These cases make it clear that the fruits of a competency evaluation may not be offered against a criminal defendant as part of the prosecution’s case-in-chief.

In *People v. Pokovich* (2006) 39 Cal.4th 1240, the California Supreme Court addressed the following question: “May a testifying defendant be impeached at trial with statements made before trial to mental health professionals during a court-ordered examination to determine the defendant’s mental competency to stand trial?” The Supreme Court answered this question in the negative, concluding that such impeachment violates the federal Constitution’s Fifth Amendment privilege against self-incrimination.

A Finding of Competency is Subject to Substantial Evidence Review on Appeal

The trier of fact’s finding that a defendant was competent to stand trial is reviewed for substantial evidence on appeal. (*People v. Samuel, supra*, 29 Cal.3d at p. 505.) On appeal from a finding of competence or incompetence, the reviewing court determines whether substantial evidence, viewed in the light most favorable to the verdict, supports the trial court’s finding. (*People v. Lawley* (2002) 27 Cal.4th 102, 131.)

To Obtain a Second Competency Hearing, There Must Be Evidence of a Substantial Change of Circumstances or New Evidence

“When a competency hearing has already been held and the defendant has been found competent to stand trial . . . a court need not suspend proceedings to conduct 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 that finding.” (*People v. Jones* (1997) 15 Cal.4th 119, 150, internal quotation marks omitted; see also *People v. Kaplan* (2007) 149 Cal.App.4th 372 [“upon the presentation of substantial evidence showing a substantial change of circumstances or new evidence giving rise to a serious doubt about the validity of the original competency finding, regardless of the presence of conflicting evidence, the trial court must hold a subsequent competency hearing”].)

The Defendant Must be Competent in order to Enter a Guilty or No Contest Plea

Because a trial court “has no jurisdiction to proceed with the case against the defendant without first determining his competence in a section 1368 hearing” once a doubt has arisen (*People v. Hale, supra*, 44 Cal.3d at p. 541), the court may not accept a plea of any kind. As one appellate court has noted: “If by reason of mental disturbance he is . . . incompetent to stand trial, the defendant is incapable of entering a knowledgeable plea.” (*People v. Hofferber, supra*, 70 Cal.App.3d at p. 269.)

“A claim that the trial court accepted a guilty plea from a defendant or entered judgment against him without having conducted a hearing on his present sanity despite substantial evidence raising a doubt of his sanity is an allegation of fundamental error. The error is jurisdictional in the sense that the trial court has no power to pronounce judgment in such a case. ([Citation.]) The error goes to the legality of the proceedings because ‘conviction of an accused person while he is legally incompetent violates due process. ([Citation.])’ (*People v. Laudermilk* (1967) 67 Cal.2d 272, 282.)

In *Godinez v. Moran*, *supra*, 509 U.S. 389, the United States Supreme Court held that the competency standard for pleading guilty is the same as the test of competency to stand trial. Therefore, if a doubt has arisen regarding the defendant’s trial competency, then the court may not accept a guilty or no contest plea from that person until the question of mental competence has been resolved in favor of competence.

Whether a Certificate of Probable Cause is Required To Challenge a Competency Determination on Direct Appeal Following a Guilty or No Contest Plea Depends on the Timing of the Alleged Incompetency

A certificate of probable cause is not required to challenge the failure to suspend proceedings for a determination as to whether the defendant was competent to be sentenced when the doubt arose *after* the entry of a guilty or no contest plea. (*People v. Oglesby* (2008) 158 Cal.App.4th 818.) Presumably, pursuant to the *Oglesby* analysis, a certificate of probable cause is similarly not required when challenging a post-plea finding of competency made after proceedings were suspended, so long as the appellate challenge is directed at the defendant’s competency to be sentenced and not at the plea itself.

On the other hand, the defendant must obtain a certificate of probable cause in order to raise pre-plea competency issues directed at undoing the plea itself. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1100.) Note: the California Supreme Court considered an appellate attack on the plea itself on competency grounds without a certificate of probable cause in *Laudermilk*, but the notice of appeal was filed in that case before the rule requiring certificates of probable cause took effect. (*People v. Laudermilk*, *supra*, 67 Cal.2d at p. 282, fn. 8.)

California’s Statutory Competency Framework Applies to Probation Revocation Proceedings

Although probation revocation proceedings are not generally considered criminal prosecutions (see e.g. *Morrissey v. Brewer* (1972) 408 U.S. 471, 480), where “criminal proceedings had initially been suspended without imposition of sentence, the trial court

lacked power to impose sentence upon the revocation of probation unless appellant was then presently sane.” (*People v. Humphrey* (1975) 45 Cal.App.3d 32, 36.) Thus, the competency framework set forth at Penal Code section 1367 et seq. applies during probation revocation proceedings as well.

Minors May Not Be Adjudged Delinquent Wards If Mentally Incompetent

While no parallel *statutory* provision defines or mandates competency in the context of a juvenile delinquency proceeding, the United States Supreme Court has held that minors have a due process right to the assistance of counsel when a jurisdictional hearing might result in involuntary confinement. (*In re Gault* (1967) 387 U.S. 1, 41; see also *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 173-174.) In addition, the *Gault* Court held that “confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of ‘delinquency’ and an order committing [a minor] to a state institution” (*In re Gault, supra*, 387 U.S. at p. 56.) Moreover, the California Supreme Court has held that defective cross-examination resulting from mental impairment supports a finding of incompetency. (*People v. Pennington* (1967) 66 Cal.2d 508, 516.) Therefore, in order to protect the right to assistance of counsel and the right to confront witnesses, “a juvenile court has the inherent power to determine a minor’s mental competence to understand the nature of the pending proceedings and to assist counsel in a rational manner at that hearing.” (*In re Patrick H.* (1997) 54 Cal.App.4th 1346, 1355, citing *James H. v. Superior Court, supra*, 77 Cal.App.3d at p. 172.)

Patrick H. and *James H.* resorted to the notion of inherent power due to the absence of a statute or statewide Judicial Council rule on the subject. (*In re Patrick H., supra*, 54 Cal.App.4th at p. 1355.) In *James H.*, the Court of Appeal suggested that juvenile courts should turn to either Penal Code section 1367 or *Dusky* for guidance on the appropriate competence standard at delinquency proceedings. (*James H. v. Superior Court, supra*, 77 Cal.App.3d at p. 176.)

But, in 1999, California Rules of Court, rule 1498, was adopted in order to cure the absence of a statute or statewide rule governing competency in juvenile wardship proceedings, as recognized by *Patrick H.* and *James H.* (Advisory Com. com, West’s California Rules of Court (2006 rev. ed.) foll. rule 1498, p. 437.) Rule 1498 has since been renumbered as rule 5.645. Subdivision (d) of the renumbered rule states:

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

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

(2) If the court finds that the child is not capable of understanding the proceedings or of cooperating with the attorney, the court shall proceed under [Welfare and Institutions Code] section 6550 and sections (a)-(c) of this rule.

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

(Cal. Rules of Court, rule 5.645(d).)

Under this framework, the juvenile court must suspend proceedings if there is reason to doubt the minor's competency and then conduct a hearing on that issue. (*Ibid.*) The competency standard articulated in rule 5.645, which turns on the minor's capacity to understand the proceedings and cooperate with counsel, bears great similarity to the standard announced in *Dusky* and codified in Penal Code section 1367. (See *Dusky v. United States, supra*, 362 U.S. at p. 402; see also Pen. Code, § 1367.) After conducting a hearing pursuant to rule 5.645, if the court concludes that the minor is competent, the wardship proceedings resume. (Cal. Rules of Court, rule 5.645(d)(3).) If, on the other hand, the court determines that the minor is not competent, then the court "shall" initiate judicial commitment proceedings in lieu of wardship proceedings. (Cal. Rules of Court, rule 5.645(d)(2).)

Although the competency standard set forth in rule 5.645 largely mirrors the standard announced in Penal Code section 1367, one Court of Appeal has acknowledged an important distinction between the competency standard applicable in juvenile delinquency proceedings and the one applicable in criminal proceedings. Unlike Penal Code section 1367, which defines competency by reference to a "mental disorder or developmental disability" (Pen. Code, § 1367), rule 5.645 does not contain a similar reference (Cal. Rules of Court, rule 5.645.) The Third District Court of Appeal recently held that in light of this distinction juvenile courts presiding over delinquency proceedings need not find a mental disorder or developmental disability to deem a minor incompetent to face delinquency proceedings. (*Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 857.) Minors, the Court of Appeal concluded, could be found incompetent based on a condition that results simply from developmental immaturity. (*Id.* at p. 859-860.)

The Third District Court of Appeal has also concluded that the competency right found in the federal constitution and rule 5.645 attaches at hearings to determine a minor's fitness for juvenile court held pursuant to Welfare and Institutions Code section 707, subdivision (b). (*Tyrone B. v. Superior Court* (2008) 164 Cal.App.4th 227.) The juvenile court further erred in *Tyrone B.* by failing to appoint an expert to evaluate the minor's competency in accordance with rule 5.645(d). (*Ibid.*)

The Third District Court of Appeal has also made it clear that "the question is not can the minor become competent in the future with assistance; rather the question is whether he is presently competent" (*In re Ricky S.* (2008) 166 Cal.App.4th 232.)

Criminal Defendants Found Incompetent to Stand Trial are Committed to the State Hospital

If a criminal defendant is found incompetent to stand trial, criminal proceedings must remain suspended, and the trial court must commit the individual to a state hospital until he or she regains competency. (Pen. Code, § 1370, subd. (a)(1)(B)(I).) However, a criminal defendant may not be committed to a state hospital for the sole purpose of restoring competency for more than three years or for a period greater than the maximum term of confinement for the underlying offense(s), whichever is less. (Pen. Code, § 1370, subd. (c)(1)(A).) At the end of the applicable maximum term of commitment, if the defendant has not been restored to competency, he or she must be returned to the original committing court. (Pen. Code, § 1370, subd. (c)(1)(A).)

If either the maximum commitment term has expired, or the medical director of the state hospital determines "there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future," the trial court must either release the defendant or initiate appropriate alternative commitment proceedings under the LPS Act. (Pen. Code, § 1370, subd. (b)(1); see also *In re Davis* (1973) 8 Cal.3d 798, 807.)

"Whenever any defendant is returned to the court" because the medical director of the state hospital has determined there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future "and it appears to the court that the defendant is gravely disabled, as defined in [the LPS Act], the court shall order the conservatorship investigator of the county of commitment of the defendant to initiate conservatorship proceedings for the defendant pursuant to [the LPS Act]." (Pen. Code, § 1370, subd. (c)(2); see also *People v. Karriker* (2007) 149 Cal.App.4th 763.)

Criminal Proceedings Are Reinstated When The Defendant's Competency Has Been Restored

Rells provides a good overview of the procedures to determine whether an incompetent criminal defendant has been restored to competency. (*People v. Rells, supra*, 22 Cal.4th at pp. 866-867.) If the defendant remains under an incompetency commitment for 18 months, the person must be brought back to the trial court for a new competency hearing held in accordance with Penal Code section 1369. (Pen. Code, § 1370, subd. (b)(2).) Despite the previous finding of incompetence, the presumption of competence continues to operate. (*People v. Rells, supra*, 22 Cal.4th at p. 866.)

If at any time during the defendant's incompetency commitment "the medical director of the state hospital . . . determines that the defendant has regained mental competence, the director shall immediately certify that fact to the court by filing a certificate of restoration with the court by certified mail" (Pen. Code, § 1372, subd. (a).) Penal Code section 1372 does not specify what type of hearing is to be held upon receipt of such a certificate, but the California Supreme Court has determined that the presumption of competence applies at such a proceeding as well. (*People v. Rells, supra*, 22 Cal.4th at pp. 867-868.)

If, under either circumstance, the defendant's competence is deemed restored, criminal proceedings are then reinstated.

No Conduct Credits Toward State Prison Sentence For Time Spent Civilly Committed as Incompetent

When a criminal defendant's competence has been restored and he or she is sentenced to state prison, the defendant is entitled to actual custody credits but not conduct credits. (*People v. Waterman* (1986) 42 Cal.3d 565; see also *People v. Callahan* (2006) 144 Cal.App.4th 678.) Appellate courts have reasoned that credits for good behavior are inconsistent with the therapeutic goals of treating a defendant so that his competency can be restored, a goal that would be hindered if "mere institutional good behavior and participation automatically reduced the therapy period." (*People v. Callahan, supra*, 144 Cal.App.4th 678, citing *People v. Waterman, supra*, 42 Cal.3d 565.)

An Order Committing a Defendant to the State Hospital as Incompetent to Stand Trial is an Appealable Order

An order adjudicating a criminal defendant incompetent to stand trial and committing him to the state hospital is appealable as a final judgment in a special proceeding. (*People v. Fields, supra*, 62 Cal.2d at p. 542.) It is, however, premature for the defendant to appeal the incompetency finding prior to the issuance of an ensuing commitment order.

A Finding of Competency is Not Appealable But May Be Reviewed Upon Judgment of Conviction

A criminal defendant may not appeal the trier of fact's determination that the person is competent to stand trial. (*People v. Fields, supra*, 62 Cal.2d at pp. 541-542.) "In such circumstances the court will proceed with the trial of the criminal charge (Pen Code, § 1370), and the determination of the issue of sanity may be reviewed on appeal from a judgment of conviction as in the case of any other intermediate order." (*Ibid.*)

Forced Medication

In *Sell v. United States* (2003) 539 U.S. 166, the United States Supreme Court held that federal due process principles require the following four findings prior to authorizing the involuntary administration of antipsychotic medication for sole purpose of rendering a criminal defendant competent to stand trial: (1) important governmental interests are at stake; (2) administration of the drugs is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense; (3) any alternative, less intrusive treatments are unlikely to achieve substantially the same results; and (4) administration of the drugs is medically appropriate, i.e., in the patient's best medical interest in light of his medical condition.

Sell also cautioned against ordering the involuntary administration of antipsychotic medications to render a defendant competent to stand trial without first considering alternative grounds, such as dangerousness or an incapacity on the part of the defendant to make competent decisions regarding medical treatment.

In response to *Sell*, the California Legislature amended Penal Code section 1370 to permit the involuntary administration of antipsychotic medication on trial competency grounds only if: "The people have charged the defendant with a serious crime against the person or property; involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial; the medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner; less intrusive treatments are unlikely to have substantially the same results; and antipsychotic medication is in the patient's best medical interest in light of his or her medical condition." (Pen. Code, § 1370, subd. (a)(2)(B)(ii)(III).)

In addition, the Legislature codified *Sell*'s preference for basing forced medication orders on grounds other than rendering an individual competent to stand trial, such as dangerousness or incapacity to make decisions regarding antipsychotic medications.

(Pen. Code, § 1370, subd. (a)(2)(B)(iii).)

Forced medication orders in the competency context have been reviewed in the following cases: *People v. O'Dell* (2005) 126 Cal.App.4th 562; *Carter v. Superior Court* (2006) 141 Cal.App.4th 992; and *People v. McDuffie* (2006) 144 Cal.App.4th 880.

An order authorizing the involuntary administration of antipsychotic medication pursuant to Penal Code section is appealable by virtue of Penal Code section 1370, subdivision (a)(2)(B)(v), and Code of Civil Procedure section 904.1.