

An Appellate Defender's Guide to Mental Competence Issues

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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 consistently deemed competency proceedings to be special proceedings that are *civil* in nature. (See, e.g., *People v. Lawley* (2002) 27 Cal.4th 102, 131.) Consequently, the rights afforded criminal defendants during competency proceedings differ from the statutory and constitutional rights otherwise afforded them during criminal proceedings. At the same time, however, competency issues implicate fundamental liberty interests rooted in due process and equal protection principles. A direct appeal – or habeas corpus petition – can be an invaluable forum for safeguarding these rights.

If a criminal defendant cannot rationally understand the proceedings or assist counsel, due process and state law require that all proceedings must be suspended pending restoration of competency. A person can neither be convicted nor sentenced while mentally incompetent. These materials will provide an overview of California’s competency framework and its constitutional underpinnings – and the many places competency-based reversible error may occur along the way. Even though competency proceedings often involve fewer constitutional protections than the underlying criminal proceedings to which they are related, some of the most important protections afforded defendants in the competency context are jurisdictional in nature. As a result, appellate defense attorneys can raise certain competency issues notwithstanding the absence of a timely objection in the trial court, and those jurisdictional issues may result in reversal without the need to establish prejudice.

Competency issues may emerge before or during trial, triggering obligations of the trial court and defense counsel. They may also call into question the validity of guilty or no contest pleas, a trial court’s ruling on a defendant’s motion for self-representation, and the guarantee of effective assistance of counsel. Other topics to be addressed in these materials include competency issues arising in juvenile delinquency and probation revocation proceedings, what happens after a person has been found mentally incompetent, when antipsychotic medication may – and may not – be involuntarily administered to an incompetent defendant, and how a civil commitment pending restoration to competency must be credited against a subsequent term of incarceration. Recent case law and legislative developments, such as the new mental health diversion statute, will be covered as well.

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 a mental health 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 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 Is 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, subd. (a).) However, evidence of mental disorder or a developmental disability does not, in and of itself, render a criminal defendant incompetent to stand trial or face punishment. (See, e.g., *People v. Ghobrial* (2018) 5 Cal.5th 250, 271.)

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. (*Ibid.* [“The question is whether defendant's mental illness interfered with his ability to understand the nature and purpose of the criminal proceedings or to communicate with his counsel about his defense.”])

Trial Courts Have a Duty to Suspend Criminal Proceedings When Faced with Substantial Evidence of Incompetence

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 in 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).) Despite what seems like unambiguous language in subdivision (b) of Penal Code section 1368, case law establishes that “defense counsel's declaration of doubt about the defendant's competence supports holding an incompetency hearing but isn't sufficient to require one.” (*People v. Hines* (2020) 58 Cal.App.5th 583

[272 Cal.Rptr.3d 619, 636]; see also *People v. Mai* (2013) 57 Cal.4th 986, 1033; *People v. Sattiewhite* (2014) 59 Cal.4th 446, 465.)

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 and hold a competency hearing 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; *People v. Pennington* (1967) 66 Cal.2d, 508, 518; *People v. Stankewitz, supra*, 32 Cal.3d at p. 92.)

The California Supreme Court has held that 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.)

Even where the trial court does not expressly declare a doubt about a defendant's competency, it may be found to have impliedly done so by suspending the criminal proceedings. (*People v. Gonzales* (2019) 34 Cal.App.5th 1081, 1087.)

If a criminal defendant is granted the right to self-representation and advisory counsel is appointed, advisory counsel can declare a doubt as to the defendant's mental competence mid-trial, and such a declaration would constitute evidence of changed circumstances such that proceedings should be suspended to evaluate the defendant's competence. (*In re Sims* (2018) 27 Cal.App.5th 195, 211.)

"Evidence [of a defendant's mental incompetence] is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial." (*People v. Tomas* (1977) 74 Cal.App.3d 75, 89, quoting *De Kaplany v. Enomoto* (9th Cir. 1976) 540 F.2d 975, 979-981, some internal quotation marks omitted.) Moreover, "[t]he function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? [Its] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue.

It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial.” (*Ibid.*; see also *People v. Welch* (1999) 20 Cal.4th 701, 738.)

Some case law refers to substantial evidence of incompetence as a “bona fide” doubt. (See, e.g., *People v. Rogers, supra*, 39 Cal.4th at p. 847 [“Both federal due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial”].)

So Long as a Doubt is Declared Prior to Judgment It Is Timely

A declaration of a doubt as to a defendant’s mental competence is timely so long as it is made “during the pendency of an action and prior to judgment.” (Pen. Code, § 1368, subd. (a).) “The statute allows the judge or defense counsel to raise the issue of competency *at any time* prior to judgment.” (*Miller v. Superior Court* (1978) 81 Cal.App.3d 132, 137, emphasis added [interpreting a former version of Penal Code section 1368 containing similar language], disapproved on other grounds by *Booth v. Superior Court* (1997) 57 Cal.App.4th 91.)

What Constitutes Substantial Evidence of Incompetence?

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.)

There is surprisingly little case law affirmatively describing the minimum mental capabilities a criminal defendant must possess to be deemed competent to stand trial. Most case law focuses on what does not qualify as

substantial evidence of incompetence. For example, the following pronouncement from the California Supreme Court is frequently quoted in appellate decisions

[M]ore is required to raise a doubt than mere bizarre actions ([citation]) or bizarre statements ([citation]) or statements of defense counsel that defendant is incapable of cooperating in his defense ([citation]) or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense ([citation]).

(*People v. Laudermilk* (1967) 67 Cal.2d 272, 285.)

The published cases that have reversed judgments for failure to hold a competency hearing – such as *People v. Pennington* – often describe floridly psychotic delusions and pervasive hallucinations that so obviously impair a defendant's trial competency that they provide little insight into what factors should more generally inform the competency inquiry.

There are, however, a few useful cases that describe a set of basic requirements for finding a defendant competent. These cases can be read for the proposition that when presented with substantial evidence that a defendant lacks one or more of these cognitive abilities, he or she should be found incompetent to stand trial or, at the very least, a sufficient showing has been made to trigger the trial court's duty to suspend proceedings and hold a competency hearing.

As far back as 1961 – one year after the Supreme Court decided *Dusky* – a federal district court offered an eight-part test for competency. The court suggested that “a person, from a consideration of legal standards, should be considered mentally competent to stand trial under criminal procedure” when record evidence demonstrates:

(1) that he has mental capacity to appreciate his presence in relation to time, place and things; (2) that his elementary mental processes are such that he apprehends (i.e. seizes and grasps with what mind he has) that he is in a Court of Justice, charged with a criminal offense; (3) that there is a Judge on the Bench; (4) a Prosecutor present who will try to convict him of a criminal charge; (5) that he has a lawyer (self-employed or Court-

appointed) who will undertake to defend him against that charge; (6) that he will be expected to tell his lawyer the circumstances, to the best of his mental ability, (whether colored or not by mental aberration) the facts surrounding him at the time and place where the law violation is alleged to have been committed; (7) that there is, or will be, a jury present to pass upon evidence adduced as to his guilt or innocence of such charge; and (8) he has memory sufficient to relate those things in his own personal manner[.]

(*Wieter v. Settle* (W.D. Mo. 1961) 193 F.Supp. 318, 321-322.)

Building on *Wieter v. Settle*, a concurring opinion written by the then-Chief Justice of the Supreme Court of Nebraska, suggested eleven additional considerations that should inform the competency determination:

(9) That he has established rapport with his lawyer; (10) That he can follow the testimony reasonably well; (11) That he has the ability to meet stresses without his rationality or judgment breaking down; (12) That he has at least minimal contact with reality; (13) That he has the minimum intelligence necessary to grasp the events taking place; (14) That he can confer coherently with some appreciation of proceedings; (15) That he can both give and receive advice from his attorneys; (16) That he can divulge facts without paranoid distress; (17) That he can decide upon a plea; (18) That he can testify, if necessary; (19) That he can make simple decisions; and (20) That he has a desire for justice rather than undeserved punishment.

(*State v. Guatney* (1980) 207 Neb. 501, 512-513 (conc. opn. of Krivosha, C.J.))

A panel of the Ninth Circuit has astutely observed:

[C]ompetence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense. See *Dusky*, 362 U.S. at 402, 80 S.Ct. 788; see also Note, Incompetency to Stand Trial, 81 Harv. L.Rev. 454, 457-59 (1967). The judge may be lulled into believing that petitioner is competent by the fact that he does not disrupt the proceedings,

yet this passivity itself may mask an incompetence to meaningfully participate in the process.

(*Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089; see also *People v. Johnson* (2018) 21 Cal.App.5th 267, 276 [echoing *Odle v. Woodford*].)

“An orientation as to time and place and some recollection of events is not enough” to be found competent to stand trial. (*People v. Tomas, supra*, 74 Cal.App.3d at p. 88.)

Nor is a defendant’s ability to mechanically repeat, without actually understanding, the roles of the various people in the courtroom a sufficient basis to find a defendant competent to stand trial. (See *People v. Jackson* (2018) 22 Cal.App.5th 374, 395.)

Perhaps the most helpful statement from the United States Supreme Court as to what abilities and level of understanding are necessary for a defendant to be found competent comes from one of Justice Kennedy’s concurring opinions, in which he wrote:

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one’s own behalf or to remain silent without penalty for doing so.

(*Riggins v. Nevada* (1992) 504 U.S. 127, 139-140 (conc. opn. of Kennedy, J.), citing *Drope v. Missouri, supra*, 420 U.S. at pp. 171-172.) This pronouncement has since been adopted in a majority decision of the Supreme Court in *Cooper v. Oklahoma* (1996) 517 U.S. 348, 354.

In 2020, the Eleventh Circuit emphasized that, “[W]ithout competence, a defendant cannot meaningfully exercise his other constitutionally guaranteed rights,’ and ‘trying an incompetent defendant is like trying an absent defendant.” (*United States v. Cometa* (11th Cir. 2020) 966 F.3d 1285, 1291, quoting *United States v. Wingo* (11th Cir. 2015) 789 F.3d 1226, 1235.) These Eleventh Circuit authorities are expressly rooted in *Riggins v. Nevada* and *Cooper v. Oklahoma*.

Whether the Trial Court Erred by Not Declaring a Doubt is Reviewed under the Abuse of Discretion Standard on Appeal

“The decision whether to order a competency hearing rests within the trial court’s discretion, and may be disturbed upon appeal ‘only where a doubt as to [mental competence] may be said to appear as a matter of law or where there is an abuse of discretion.’” (*People v. Mickel* (2016) 2 Cal.5th 181, 195, quoting *People v. Pennington, supra*, 66 Cal.2d at p. 518.) However, “[a] trial court reversibly errs if it fails to hold a competency hearing when one is required under the substantial evidence test.” (*Ibid.*)

It should be remembered that “[t]he abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court’s ruling under review. The trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.” (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, internal footnotes omitted.) When viewed through this lens, in the competency context, the abuse of discretion standard of review is not as insurmountable as it can be in other settings.

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).)

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 *People v. Marks*, “the constitutional right to due process, [Penal Code] section 1369, and our holding in [*People v. Hale*], 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, emphasis 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]; but see *Indiana v. Edwards* (2008) 554 U.S. 164 [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.)

There is no right to self-representation under the California Constitution, nor may a trial court permit self-representation at competency proceedings once criminal proceedings have been suspended. (*People v. Lightsey* (2012) 54 Cal.4th 668, 694.)

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:

[T]he 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. at pp. 177-178.)

Our Supreme Court has since accepted the invitation in *Indiana v. Edwards* to apply a higher standard of mental competence for self-representation. (See *People v. Johnson* (2012) 53 Cal.4th 519.) In doing so, *People v. Johnson* declined to adopt a more specific standard for California and instead held: “the standard that trial courts considering exercising their discretion to deny self-representation should apply is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel.” (*Id.* at p. 530.)

In *People v. Gardner* (2014) 231 Cal.App.4th 945, 960, the reviewing court upheld a trial court’s exercise of the discretion to deny self-representation to a competent defendant based on the trial court findings supported by expert opinion and in-court observation of a defendant’s conduct.

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 or her request. (*People v. Marsden* (1970) 2 Cal.3d 118.) “A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.” (*People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245.)

The California Supreme Court has held that a competency-based suspension of criminal proceedings does not deprive the trial court of jurisdiction to consider the defendant’s *Marsden* motion. To the contrary, “[w]hile it is true that [Penal Code] section 1368 mandates the suspension of ‘all proceedings in the criminal prosecution’ once the court has ordered a hearing into the mental competence of the defendant [citations], it is equally true that the Sixth Amendment right to effective representation virtually compels a hearing and an order granting a motion for substitution of counsel when ‘there is a sufficient showing that the defendant’s right to the assistance of counsel would be substantially impaired if [the defendant’s] request was denied.’ [Citation.]” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 87-88.) Therefore, “while the trial court may not ‘proceed with the case against the defendant’ before it determines his competence in a [Penal Code] section 1368

hearing ([citation]), it may and indeed *must* promptly consider a motion for substitution of counsel when the right to effective assistance ‘would be substantially impaired’ if his request were ignored.” (*Id.* at p. 88, emphasis in original.)

The Fifth District Court of Appeal has ruled that 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. (*People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1069-1070; see also *People v. Taylor* (2010) 48 Cal.4th 574, 600-601; *People v. Govea* (2009) 175 Cal.App.4th 57, 61.)

Even after a defendant has been found incompetent, a trial court must hold a *Marsden* hearing upon request. (*People v. Harrison* (2001) 92 Cal.App.4th 780, 789.)

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.*)

After Criminal Proceedings Are Suspended, a Preliminary Hearing May Be Held Before or After the Competency Question is Resolved

Penal Code section 1368.1 governs the order in which a preliminary hearing and competency proceedings should be held. Unlike a criminal trial, a preliminary hearing may be held while proceedings are suspended due to a question of mental competence.

For all felony charges, “proceedings to determine mental competence shall be held prior to the filing of an information unless the counsel for the defendant requests a preliminary examination under Section 859b.” (Pen. Code, § 1368.1, subd. (a).) Strategically, in some cases, it may be in the defendant’s

best interest to have a preliminary hearing first, as such a hearing could provide multiple avenues for dismissal of the charges – e.g., insufficient evidence or granting of a Fourth Amendment suppression motion – thereby obviating the need for competency proceedings, which might lead to a prolonged civil commitment before the charges would otherwise be resolved.

For felony charges involving death, great bodily harm, or a serious threat to the physical well-being of another person, “the prosecuting attorney may, at any time before or after a defendant is determined incompetent to stand trial, request a determination of probable cause to believe the defendant committed the offense or offenses alleged in the complaint, solely for the purpose of establishing that the defendant is gravely disabled pursuant to subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008 of the Welfare and Institutions Code, pursuant to procedures approved by the court.” (Pen. Code, § 1368.1, subd. (b).) This procedure is a necessary prerequisite for initiating a Murphy conservatorship, which will be discussed in greater detail below.

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)(1).) 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, 996 [where the appellate court held a second expert should have been appointed]; *People v. Robinson* (2007) 151 Cal.App.4th 606, 618 [where the appellate court held that a second expert need not have been appointed]; *People v. D’Arcy* (2010) 48 Cal.4th 257, 281 [same].)

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)(2).)

“[C]ourts may lawfully use a third expert as a ‘tie breaker’ ([citation]), and may rely upon a report not based on a face-to-face interview when the subject

refuses to meet with the expert ([citation]).” (*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1514.)

“If it is suspected the defendant has a developmental disability, the court shall appoint the director of the regional center established under Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code, or the director’s designee, to examine the defendant to determine whether he or she has a developmental disability.” (Pen. Code, § 1369, subd. (a)(3).) 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.)

The Trial Court Must Appoint Counsel at Competency Proceedings

A trial court must appoint counsel for defendants facing competency proceedings in accordance with Penal Code section 1368, subdivision (a). (*People v. Lightsey, supra*, 54 Cal.4th at pp. 691-692.) The appointment of advisory or standby counsel does not satisfy this obligation. (*Id.* at p. 692.) Failure to appoint counsel for a competency trial is structural error; prejudice need not be established. (*Id.* at p. 702.)

Defense Counsel May Submit on the Expert Reports in Lieu of a Trial

“[A] defense attorney may validly submit a competency determination on the available psychiatric reports.” (*People v. Weaver* (2001) 26 Cal.4th 876, 905 [reaffirming an earlier holding in *People v. McPeters* (1992) 2 Cal.4th 1148, 1169.]

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. Masterson* (1994) 8 Cal.4th 965, 969, citing *People v. Samuel* (1981) 29 Cal.3d 489, 505.)

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, supra*, 8 Cal.4th at p. 972.) The trial court “need not advise the defendant of [the jury trial] right.” (*Ibid.*)

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).)

The Party Seeking a Finding of Incompetence Has the Burden of Proof

The burden of proof is on the party seeking a finding of incompetence. (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459-460.) While this means the burden of proof is on the defendant if the defense seeks a finding of incompetency, “the burden of proof will be on the prosecution when the prosecution is the only party seeking a finding of incompetence.” (*Id.* at p. 459.) “On occasions when neither party seeks a finding of incompetence and instead the trial court assumes the burden of producing evidence of incompetence, . . . the court should not instruct the jury that either party has the burden of proof. Rather the proper approach would be to instruct the jury on the legal standard they are to apply to the evidence before them without allocating the burden of proof to one party or the other.” (*Id.* at pp. 459-460.)

The Full Range of Criminal Procedure Protections Do Not Apply to Competency Proceedings

“The statutory references to a ‘hearing’ (§ 1368, subd. (b)) or a ‘trial’ (§ 1369) simply mean that a determination of competency must be made by the court (or a jury if one is not waived), not, as defendant contends, that there must be ‘a court or jury trial, at which the criminal defendant’s rights of confrontation, cross examination, compulsory process and to present evidence

are honored by the court and counsel.” (*People v. Weaver, supra*, 26 Cal.4th 876, 904.)

This rule is consistent with the California Supreme Court’s determination that, “[a]lthough it arises in the context of a criminal trial, a competency hearing is a special proceeding, governed generally by the rules applicable to civil proceedings.” (*People v. Lawley, supra*, 27 Cal.4th at p. 131.)

The Trier of Fact Must Presume the Defendant Is Competent

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, 869 [“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”]; accord *Medina v. California* (1992) 505 U.S. 437, 452-453.)

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 at 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 on the Criminal Charges After Competency Is Restored

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, supra*, 100 Cal.App.4th at p. 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, supra*, 37 Cal.4th at p. 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?” (Emphasis added.) The Supreme Court answered this question in the negative as well, concluding that such impeachment violates the federal Constitution's Fifth Amendment privilege against self-incrimination.

A Finding of Competency or Incompetency 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 verdict. (*People v. Lawley, supra*, 27 Cal.4th at p. 131.)

For a recent case reversing a competency finding unsupported by substantial evidence, see *People v. Jackson* (2018) 22 Cal.App.5th 374, 395, in which Division Two of the Fourth District Court of Appeal “conclude[d] the evidence that [hospital] staff drilled Jackson in how to answer the most basic questions about the judicial process and he learned to parrot the expected responses after numerous repetitions did not provide substantial evidence Jackson was competent to stand trial.”

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, 376 [“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 California Supreme Court recently reversed a special circumstances murder conviction for failure to hold a second competency hearing. In doing so, the Supreme Court addressed the role of medication in the restoration to competency context. After acknowledging the general rule that “once a defendant has been found competent to stand trial, a trial court may rely on that finding absent a substantial change of circumstances,” the Supreme Court explained that:

[W]hen a formerly incompetent defendant has been restored to competence solely or primarily through administration of medication, evidence that the defendant is no longer taking his medication and is again exhibiting signs of incompetence will generally establish such a change in circumstances and will call for additional, formal investigation before trial may proceed. In the face of such evidence, a trial court’s failure to suspend proceedings violates the constitutional guarantee of due process in criminal trials.

(*People v. Rodas* (2018) 6 Cal.5th 219, 223.)

Subsequently, Division One of the Fourth District Court of Appeal favorably interpreted *People v. Rodas* outside the medication context as follows:

Rodas explains that when a defendant is initially found incompetent to stand trial but is later determined to have regained competence, the assumptions that effectively condition that determination provide a yardstick to measure later proceedings. If in the course of those proceedings the trial court learns of new facts and circumstances inconsistent with the predicate assumptions, it has a duty to declare a doubt regarding the defendant’s current competence and conduct a hearing on the subject. Here, because the trial court did not do so, Tejada is entitled to a new trial.

(*People v. Tejada* (2019) 40 Cal.App.5th 785, 791-792.)

The trial court also erred in not holding a second competency hearing based on changed circumstances in *People v. Easter* (2019) 34 Cal.App.5th 226, 249, where defense counsel’s “description of defendant’s new ‘word salad’ symptom – especially in the context of defendant’s lengthy history of psychiatric issues, the amount of time that had passed since his initial evaluations, and an apparently recent change in his medications that could have accounted for his new psychiatric issues – warranted the suspension of the criminal proceedings and the appointment of a medical professional to evaluate defendant’s competency.”

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 [Penal Code] 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, supra*, 67 Cal.2d at p. 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 for competency to stand trial. Therefore, if a doubt arises as to 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.

Although the competency standard for entering a plea is the same as the one to stand trial, it has been suggested that the “standard [change of plea]

colloquy may prove an inadequate measure of the validity of a plea proffered by a defendant of questionable mental competence.” (*United States v. Masthers* (D.C. Cir. 1976) 539 F.2d 721, 728-729, overruled on another ground by *Godinez v. Moran*, *supra*, 509 U.S. 389, cited favorably by *People v. Jackson*, *supra*, 22 Cal.App.5th at p. 395.)

There Are Two Possible Appellate Remedies for a Trial Court’s Failure to Suspend Proceedings When Presented with Substantial Evidence of Incompetency

When an appellate court determines the trial court erred by not suspending criminal proceedings to hold a competency hearing, there are two possible remedies.

The first and most common remedy is to unconditionally reverse the entire judgment, setting aside all convictions and the sentence. The United States Supreme Court adopted this remedy in seminal cases such as *Pate v. Robinson* and *Drope v. Missouri*. (See *People v. Rodas*, *supra*, 6 Cal.5th at pp. 238-239.)

“But,” as our Supreme Court recently noted, “at some point, some courts began to take a different view, concluding that retrospective competency hearings might in some instances be feasible and appropriate.” (*Id.* at p. 239.) A retrospective competency hearing involves remanding the matter to the trial court “for a hearing to determine whether defendant was in fact competent at the time of his trial.” (*Id.* at p. 238.) Our Supreme Court has yet to embrace this approach – and declined to order a retrospective competency hearing in *People v. Rodas* – but has observed that, “if the remand procedure is in fact permissible, it requires the trial court to ‘first decide whether a retrospective determination is indeed feasible. Feasibility in this context means the availability of sufficient evidence to reliably determine the defendant’s mental competence when tried earlier.’” (*Ibid.*, quoting *People v. Ary* (2011) 51 Cal.4th 510, 520.)

Factors that may be relevant to the feasibility inquiry include: “the passage of time, the availability of contemporaneous medical evidence, any statements by defendant in the trial record, and the availability of individuals who interacted with defendant before and during trial.” (*People v. Rodas*, *supra*, 6 Cal.5th at p. 240, citing *People v. Ary*, *supra*, 51 Cal.4th at p. 520, fn. 3.) “The burden of proof in a retrospective hearing is on the defendant, and feasibility requires finding that such a hearing ‘will provide

defendant a *fair opportunity* to prove incompetence, not merely [that] some evidence exists by which the trier of fact might reach a decision on the subject.” (*People v. Rodas, supra*, 6 Cal.5th at p. 240, emphasis in original, quoting *People v. Lightsey, supra*, 54 Cal.4th at p. 710.)

There have been several recent decisions examining the feasibility of holding a retrospective competency hearing.

In holding that a retrospective competency hearing was not feasible, Division Three of the Fourth District Court of Appeal noted that “[t]he prosecution had the burden of persuasion to show ‘a retrospective competency hearing would provide [Galaviz] a fair opportunity to prove incompetence’ as opposed to showing ‘merely whether some evidence exists by which the trier of fact might reach a decision on the subject.’” (*In re Galaviz* (2018) 23 Cal.App.5th 491, 511, quoting *People v. Lightsey, supra*, 54 Cal.4th at p. 710.)

In 2019, Division Two of the First District Court of Appeal concluded that “where the expert evaluations were performed in July and August 2014 and defense counsel renewed his doubt – and defendant was tried – 13 months later,” “[u]nder these circumstances, a retrospective competency hearing could not place defendant “in a position comparable to the one he would have been placed in prior to the original trial.” (*People v. Easter, supra*, 34 Cal.App.5th at p. 249.)

On the other hand, Division Six of the Second District Court of Appeal concluded a retrospective competency hearing was feasible based on an expert report finding the defendant competent, defense counsel’s purported waiver of the earlier declared doubt, and the defendant’s own words when addressing the court at a *Marsden* hearing. (*People v. Gonzales* (2019) 34 Cal.App.5th 1081, 1088.)

A Full Reversal of the Judgment Is the Proper Remedy after an Appellate Court Finds Insufficient Evidence to Support the Trier of Fact’s Competency Determination

A full and unconditional reversal of the judgment is required if an appellate court concludes the trier of fact’s competency determination lacks substantial evidence. Our Supreme Court has explained:

After the [Penal Code] section 1368 hearing, defendant was brought to trial, convicted of first degree murder, and sentenced

to life imprisonment without possibility of parole. Because the verdict of competence was unsupported by substantial evidence, however, the effect was the same as if defendant had been denied his constitutional right to a proper hearing on the competence issue. (See *Pate v. Robinson*, *supra*, 383 U.S. 375, 385[.] The error is prejudicial per se, and requires that we reverse the judgment of conviction. (*People v. Pennington*, *supra*, 66 Cal.2d 508, 521[.]

(*People v. Samuel*, *supra*, 29 Cal.3d at p. 506.)

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

“The right to appeal following a guilty or no contest plea is controlled by [Penal Code] section 1237.5.” (*People v. McEwan* (2007) 147 Cal.App.4th 173, 177.) “Issues cognizable on an appeal following a guilty plea are limited to issues based on ‘reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings’ resulting in the plea.” (*People v. DeV Vaughn* (1977) 18 Cal.3d 889, 895-896, quoting Pen. Code, § 1237.5.) “[Penal Code] section 1237.5 does not allow the reviewing court to hear the merits of issues going to the validity of the plea unless the defendant has obtained a certificate of probable cause[.]” (*People v. Panizzon* (1996) 13 Cal.4th 68, 75.) “With that said, [Penal Code] section 1237.5 admits of this exception: The defendant may take an appeal without a statement of certificate grounds or a certificate of probable cause if he does so solely on noncertificate grounds, which go to postplea matters not challenging his plea’s validity[.]” (*People v. Mendez* (1999) 19 Cal.4th 1084, 1096.)

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 same 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, supra*, 19 Cal.4th at p. 1100.) Note: the California Supreme Court considered an appellate attack on the plea itself on competency grounds without a certificate of probable cause in *People v. Laudermilk*, but the notice of appeal in that case was filed before the rule requiring certificates of probable cause took effect. (*People v. Laudermilk, supra*, 67 Cal.2d at p. 282, fn. 8.)

Criminal Defendants Found Incompetent to Stand Trial are Usually Committed to the State Hospital for a Maximum of Two Years or Until It Is Apparent the Defendant Is Unlikely to Be Restored to Competency

In *Jackson v. Indiana* (1972) 406 U.S. 715, the United States Supreme Court held that a framework that permitted the state to commit a criminal defendant found incompetent to stand trial indefinitely until competency had been restored violated federal constitutional principles of due process and equal protection. The Supreme Court concluded that “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” (*Jackson v. Indiana, supra*, 406 U.S. at p. 738.) Therefore, the Supreme Court ruled:

[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.

(*Ibid.*)

In response, California, which also authorized indefinite incompetency commitments at that time, amended Penal Code section 1370 in 1974 to comply with *Indiana v. Jackson*. (See *In re Polk* (1999) 71 Cal.App.4th 1230, 1235-1238.) Now, if a criminal defendant is found incompetent to stand trial, criminal proceedings must remain suspended, and the trial court must commit the person to a state hospital, place the person in another type of locked facility, or place the person on outpatient status until he or she regains competency. (Pen. Code, § 1370, subd. (a)(1)(B)(i).)

Under current law, a criminal defendant may not be committed to a state hospital for the sole purpose of restoring competency for more than two years or for a period greater than the maximum term of imprisonment for the underlying offense(s), whichever is less. (Pen. Code, § 1370, subd. (c)(1).)¹ 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. (*Ibid.*)

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 Lanterman-Petris-Short (LPS) Act. (Pen. Code, § 1370, subds. (b)(1)(A) & (c)(2); see also *In re Davis* (1973) 8 Cal.3d 798, 807.)

“Whenever a 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 (Welf. & Inst. Code, § 5350 et seq.)], 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.)

The LPS Act functions as “California’s general civil commitment statute.” (*In re Smith* (2008) 42 Cal.4th 1251, 1267.) There are two definitions of grave disability found in the LPS Act that can trigger renewable one-year conservatorships. Most commonly, a person may be gravely disabled based on “a condition in which a person, as a result of a mental health disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter.” (Welf. & Inst. Code, § 5008, subd. (h)(1)(A).) Anyone in society could find themselves subject to this type of LPS conservatorship. The second definition of gravely disabled – called a Murphy conservatorship after the name of the legislator who sponsored the law – was specifically enacted to create a mechanism for civilly committing individuals found incompetent to

¹ From 1974 to 2018, the maximum term of commitment was three years. (See Stats.2018, c. 1008 (S.B. 1187), § 2, eff. Jan. 1, 2019.)

stand trial who are charged with violent felonies but cannot be restored to competency within the maximum term of commitment specified in Penal Code section 1370. A person is gravely disabled for the purposes of a Murphy conservatorship if he or she “has been found mentally incompetent under Section 1370 of the Penal Code and all of the following facts exist”:

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

(ii) There has been a finding of probable cause on a complaint pursuant to paragraph (2) of subdivision (a) of Section 1368.1 of the Penal Code, a preliminary examination pursuant to Section 859b of the Penal Code, or a grand jury indictment, and the complaint, indictment, or information has not been dismissed.

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

(iv) The person represents a substantial danger of physical harm to others by reason of a mental disease, defect, or disorder.

(Welf. & Inst Code, § 5008, subd. (h)(1)(B).)

Because a Murphy conservatorship cannot be established in the absence of a probable cause finding on a complaint alleging a violent felony, as mentioned above, Penal Code section 1368.1 allows the prosecution to seek such a probable cause determination even after a doubt has been declared and criminal proceedings suspended. (Pen. Code, § 1368.1, subd. (a)(2).)

When an incompetent criminal defendant reaches the maximum term of commitment and is released from custody or placed under a conservatorship, the criminal charges are not automatically dismissed. However, at all times during an incompetency commitment or related conservatorship, “the criminal action remains subject to dismissal pursuant to [Penal Code] [s]ection 1385.” (Pen. Code, § 1370, subd. (d).)

When a defendant is returned to the committing court because he or she has reached the maximum term of commitment or a determination has been made there is no substantial likelihood of regaining competence, and the person does not qualify for an LPS Act conservatorship, the court may not hold a new competency hearing. (*In re Taitano* (2017) 13 Cal.App.5th 233.)

Different commitment frameworks are in place for defendants found incompetent to face misdemeanor charges (Pen. Code, § 1370.01) and defendants found incompetent to stand trial as a result of a developmental disability (Pen. Code, § 1370.1).

Mental Health Diversion (Pen. Code, § 1000.36)

Enacted in 2018, Penal Code section 1000.36 authorizes trial courts to grant pretrial diversion to a defendant suffering from a mental disorder when the person's mental disorder was a significant factor in the commission of certain charged offenses and a qualified mental health expert opines the person's condition would respond to mental health treatment.

The statute applies to defendants found incompetent to stand trial by providing that when “[t]he defendant consents to diversion and waives the defendant’s right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment pursuant to clause (iv) of subparagraph (B) of paragraph (1) of subdivision (a) of Section 1370 and, as a result of the defendant’s mental incompetence, cannot consent to diversion or give a knowing and intelligent waiver of the defendant’s right to a speedy trial.” (Pen. Code, § 1001.36, subd. (b)(1)(D).)

If a defendant already found incompetent to stand trial is eligible for mental health diversion under Penal Code section 1000.36, it would seem that a colorable argument could be made that a trial court also has the authority to grant diversion under the statute while criminal proceedings are suspended to address the question of mental competence.

“Upon the dismissal of charges at the conclusion of the period of diversion, pursuant to subdivision (e) of Section 1001.36, a defendant shall no longer be deemed incompetent to stand trial pursuant to this section.” (Pen. Code, § 1370, subd. (a)(1)(B)(vi).)

Precommitment Credits Do Not Count Toward the Maximum Term of a Competency Commitment

In most cases, time spent in county jail before a defendant is found incompetent and committed to the state hospital is not credited against the maximum term of commitment to the state hospital. Where a defendant is charged with crimes for which the maximum term of imprisonment exceeds the maximum term of commitment to the state hospital, a defendant is not entitled to have his or her precommitment credits deducted from his or her maximum term of commitment. (*People v. G.H.* (2014) 230 Cal.App.4th 1548, 1559; accord *People v. Reynolds* (2011) 196 Cal.App.4th 801.)

However, where a defendant is charged with crimes for which the maximum term of imprisonment *does not* exceed the maximum term of commitment to the state hospital, a defendant has an equal protection and due process right to have his or her precommitment credits deducted from his or her maximum term of commitment. (*In re Banks* (1979) 88 Cal.App.3d 864, 867.) Were this not the case, such defendants could end up serving more time in custody than the maximum punishment authorized by statute simply by virtue of having been found incompetent to stand trial. Now that the maximum term of commitment for a felony is two years, and all completed felonies carry the possibility of at least three years in prison, this equal protection right likely only applies to misdemeanors and some attempted felonies that carry maximum terms of imprisonment of two years or less.

Jail-Based Competency Treatment (JBCT) Programs

The Department of State Hospitals created a JBCT pilot program in San Bernardino County in 2011 whereby defendants found incompetent to stand trial are treated in special units located in county jails rather than at the state hospital. The purpose of this program is to alleviate the backlog of incompetent defendants waiting for a state hospital bed. Many other counties throughout the state now have JBCT programs.

Of note for our clients, under a recent legislative amendment (Stats.2018, c. 1008 (S.B. 1187), § 4, eff. Jan. 1, 2019), incompetent defendants treated at JBCT programs are entitled to custody *and* conduct credits against a subsequent jail or prison term (Pen. Code, § 1375.5, subd. (c)), while incompetent defendants committed to the state hospital receive only custody credits. This distinction invites an equal protection challenge.

Remedies Are Available for Delays in Transporting Incompetent Defendants to the State Hospital

The establishment of JBCT programs has not eliminated the lengthy delays some incompetent defendants experience before finally being transported to the state hospital for treatment. As one appellate court recently observed:

Over a decade ago, the number of [incompetent to stand trial (IST)] defendants in California outgrew the number of beds [Department of State Hospitals (DSH)] had available to treat them. IST defendants began waiting an increasing amount of time in county jails before being transferred to a state hospital. Given these snowballing wait times, courts began adding admission deadlines to their commitment orders to protect IST defendants' constitutional and statutory rights as set forth in *Jackson v. Indiana*, *In re Davis*, and [Penal Code] section 1367 et seq. (See, e.g., *People v. Brewer* (2015) 235 Cal.App.4th 122[.]) Those admission deadlines ranged from as short as 14 days to as long as 60 days from the issuance of the commitment order. (Compare *id.* at p. 134[] to *In re Loveton* (2016) 244 Cal.App.4th 1025, 1044[.]) DSH nevertheless continued not to admit IST defendants in a timely manner, leaving them to languish in county jail.

(*People v. Kareem A.* (2020) 46 Cal.App.5th 58, 63-64.)

Appellate courts have since issued several published opinions approving the granting of habeas corpus petitions seeking immediate transfer once certain deadlines (ranging from 30 to 60 days) have elapsed. (See *In re Mille* (2010) 182 Cal.App.4th 635; *People v. Brewer*, *supra*, 235 Cal.App.4th 122; *In re Loveton*, *supra*, 244 Cal.App.4th 1025.) To reach their respective holdings, these decisions generally relied on the requirement that state hospitals are required to “make a written report to the court . . . concerning the defendant’s progress toward recovery of mental competence” within 90 days from the commitment order. (Pen. Code, § 1370, subd. (b)(1).) Delayed transfers frustrate the motivations behind this provision, namely the constitutional requirement that a person found incompetent “cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.” (*Jackson v. Indiana*, *supra*, 406 U.S. at p. 738.)

Not only have appellate courts approved the granting of habeas relief in this context, but, so, too, have they affirmed the imposition of monetary sanctions against the Department of State Hospitals for the failure to deliver incompetent defendants to the state hospital within applicable time limits. (*People v. Kareem A.*, *supra*, 46 Cal.App.5th 58; *People v. Hooper* (2019) 40 Cal.App.5th 685.)

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

People v. Rells, *supra*, 22 Cal.4th 860 provides a good overview of the procedures to determine if an incompetent criminal defendant has been restored to competency. For a defendant committed to the state hospital, if at any time during the 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[.]” (Pen. Code, § 1372, subd. (a)(1).) 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, despite the previous finding of incompetence, the presumption of competence applies at such a proceeding as well. (*People v. Rells*, *supra*, 22 Cal.4th at pp. 866-868.)

If, after a hearing, the defendant's competence is deemed restored, criminal proceedings are then reinstated.

In *People v. Jackson*, *supra*, 22 Cal.App.5th at p. 395, in holding the trial court improperly found the defendant had been restored to competency, Division Two of the Fourth District Court of Appeal “conclude[d] the evidence that [hospital] staff drilled Jackson in how to answer the most basic questions about the judicial process and he learned to parrot the expected responses after numerous repetitions did not provide substantial evidence Jackson was competent to stand trial.”

The state hospital has the authority to file a certificate of restoration even before a criminal defendant found incompetent to stand trial has been delivered to the state hospital. (*Carr v. Superior Court* (2017) 11 Cal.App.5th 264, 272.)

Because it is the trial court that ultimately determines whether a criminal defendant has been restored to competency – and not the health official that

filed the certificate of restoration – “the filing of a certificate of competency [does] not terminate the defendant’s commitment so as to prevent the [statutory] maximum commitment term from accruing.” (*People v. Carr* (Jan. 19, 2021, A158637) ___ Cal.App.5th ___ [2021 WL 165097].)

Conduct Credits Generally May Not Be Earned Toward a State Prison Sentence for Time Spent Civilly Committed as Incompetent at the State Hospital

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 against the sentence for time spent at the state hospital. (*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 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, 683, quoting *People v. Waterman, supra*, 42 Cal.3d 565.)

As noted above, however, under a recent legislative amendment, incompetent defendants treated at JBCT programs are entitled to custody and conduct credits against a subsequent jail or prison term. (Pen. Code, § 1375.5, subd. (c).) This distinction invites an equal protection challenge.

There is one scenario in which an appellate court has held that a person under an incompetency commitment at the state hospital has an equal protection right to conduct credits. When the state hospital concludes the defendant has been restored to competency but delays issuing the certificate of competence, thereby depriving the defendant of days in jail where conduct credits would have been earned, the person has an equal protection right to “conduct credits that would have been earned had he been returned [to] the county jail if a timely restoration certificate had been issued.” (*People v. Bryant* (2009) 174 Cal.App.4th 175, 184.)

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 the person to the state hospital is appealable as a final judgment in a special proceeding. (*People v. Fields* (1965) 62 Cal.2d 538, 542.) It is,

however, premature for the defendant to appeal the incompetency finding prior to the issuance of an ensuing commitment order.

No Right to *Wende* Review on Appeal from Incompetency Commitment

When appointed appellate counsel files a brief that sets forth a summary of the proceedings and facts with citations to the transcript but raises no specific issues, the Court of Appeal must conduct a review of the entire record to determine whether the record reveals any issues that would, if resolved favorably to the appellant, result in reversal or modification of the judgment. (*People v. Wende* (1979) 25 Cal.3d 436, 441-442.)

Because an appeal from an incompetency commitment is not considered the first appeal of right from a criminal conviction, it has been held the Court of Appeal is not required to conduct an independent review of the record or issue an opinion if appointed appellate counsel files a brief that does not raise any issues. (*People v. Blanchard* (2019) 43 Cal.App.5th 1020, 1025.) Instead, the procedures set forth in *Conservatorship of Ben C.* (2007) 40 Cal.4th 529 – including affording the appellant the right to file a pro per supplemental brief – apply. (*Ibid.*)

This holding is consistent with other decisions finding no right to *Wende* review in the civil commitment context. (See, e.g., *People v. Martinez* (2016) 246 Cal.App.4th 1226; *People v. Kisling* (2015) 239 Cal.App.4th 288; *People v. Dobson* (2008) 161 Cal.App.4th 1422; *People v. Taylor* (2008) 160 Cal.App.4th 304.)

Should an appellate lawyer wish to challenge the reasoning of *People v. Blanchard*, the argument might go something like this:

While an appeal from an incompetency commitment is not a criminal defendant's first appeal of right from a conviction and sentence, it is the defendant's first of appeal of right while criminal charges are still pending, and the incompetency commitment, though nominally civil, is inextricably intertwined with the ongoing criminal proceedings. An unlawful incompetency finding can have a substantial impact on the suspended criminal proceedings. A suspension, by its very nature, delays resolution of the criminal charges, which can implicate the defendant's statutory and constitutional right to a speedy trial as

well as the right to present a meaningful defense, as a commitment lasting years could adversely impact the future availability and/or reliability of integral defense witnesses at trial. Furthermore, time already served under an incompetency commitment could also factor into a defendant's subsequent decision whether to enter a guilty or no contest plea rather than proceed to trial. These considerations materially distinguish an incompetency commitment from other types of civil commitment for which there is no right to an independent *Wende* review.

Yes, the author of these materials is responsible for the decision in *People v. Blanchard*.

A Finding of Competency is Not Independently Appealable but May Be Reviewed upon Entry of a Final Judgment in the Underlying Criminal Case

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.*)

Incompetent Criminal Defendants May Be Subject to the Involuntary Administration of Antipsychotic 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 the 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 v. United States 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. (*Sell v. United States, supra*, 539 U.S. at pp. 181-183.)

With respect to dangerousness, “the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest.” (*Washington v. Harper* (1990) 494 U.S. 210, 227.) This reasoning would also apply to a person under an incompetency commitment. Additionally, if the individual lacks the capacity to refuse or consent to antipsychotic medication, due process is satisfied so long as the prosecution establishes that such treatment is “medically appropriate and, considering less intrusive alternatives, essential for the sake of [the defendant’s] own safety or the safety of others.” (*Riggins v. Nevada, supra*, 504 U.S. at p. 135.)

In response to *Sell v. United States*, 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)(i)(III).)

In addition, the Legislature codified *Sell v. United States*’ 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)(ii).)

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; *People v. Christiana* (2010) 190 Cal.App.4th 1040; *People v. Coleman* (2012) 208 Cal.App.4th 627, 630; *People v. Lameed* (2016) 247 Cal.App.4th 381.

An order authorizing the involuntary administration of antipsychotic medication pursuant to Penal Code section is appealable as order made after judgment affecting the substantial rights of the party (Pen. Code, § 1237 subd. (b)). (*People v. Christiana, supra*, 190 Cal.App.4th at p. 195; see also Pen. Code, § 1370, subd. (a)(2)(B)(vi).)

An appellate court reviews the trial court's order authorizing the involuntary administration of antipsychotic medication to an incompetent defendant for substantial evidence. (*People v. O'Dell, supra*, 126 Cal.App.4th at p. 570.)

The Competency Requirement Applies to Probation, Parole, Mandatory Supervision, and Postrelease Community Supervision Revocation Proceedings

Although probation revocation proceedings are not generally considered criminal prosecutions (see, e.g., *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782), case law has long established that 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.)

In 2014, the Legislature codified this rule and extended the competency requirement to parole, mandatory supervision, and postrelease community supervision (PRCS) revocation proceedings as well. (See Stats.2014, c. 759 (S.B. 1412), § 1, eff. Jan. 1, 2015.) Penal Code section 1368 now expressly applies to individuals facing revocation proceedings under any of these four types of supervision.

When it comes to the competency trial contemplated by Penal Code section 1369, individuals facing revocation proceedings are treated differently from criminal defendants in one key respect. “Only a court trial is required to determine competency in a proceeding for a violation of probation, mandatory supervision, postrelease community supervision, or parole.” (Pen. Code, §

1369, subd. (g).) This differential treatment is unsurprising given the absence of a jury trial right at revocation proceedings.

In addition, Penal Code section 1370, which sets forth the commitment procedures that govern after a criminal defendant has been found incompetent, now applies to individuals found incompetent during probation or mandatory supervision revocation proceedings as well. S.B. 1412 also added Penal Code section 1370.02, which sets forth the commitment procedures that apply to individuals found incompetent during parole or PRCS revocation proceedings.

Of note, when an individual on PRCS is found incompetent, the revocation petition must be dismissed, and the trial court may take specified actions “using the least restrictive option to meet the mental health needs of the defendant[.]” (Pen. Code, § 1370.02, subd. (b).) The same rule applies to individual parolees not on parole for murder or certain sex offenses. For parolees on parole for murder or certain sex offenses, efforts must be made to restore the person to competency. (Pen. Code, § 1370.02, subd. (c)(1).)

Minors May Not Be Adjudged Delinquent Wards if Mentally Incompetent

Until recently, there was no parallel statutory framework for addressing questions of mental competence in the juvenile delinquency context. Instead, appellate courts turned to the notion of inherent judicial power to prescribe a competency scheme for minors facing charges in juvenile court. (See, e.g., *James H. v. Superior Court* (1978) 77 Cal.App.3d 169 and *In re Patrick H.* (1997) 54 Cal.App.4th 1346.) In 1999, the Judicial Council added provisions to the California Rules of Court in order to cure the absence of a statute or statewide rule governing competency in juvenile wardship proceedings. (See Cal. Rules of Court, rule 5.645.) For a full overview of this history, see *In re R.V.* (2015) 61 Cal.4th 181, 189-190.

Finally, in 2010, the Legislature enacted Welfare and Institutions Code section 709, “codifying some of the standards and procedures that had been established in the rules of court, and modifying or adding others consistently with the holdings in [certain appellate] decisions[.]” (*In re R.V.*, *supra*, 61 Cal.4th at pp. 190-191; see also Stats.2010, c. 671 (A.B. 2212), § 1.)

In 2018, the Legislature repealed Welfare and Institution Code section 709 and replaced it with a new competency framework – found in a new version of

Welfare and Institutions Code section 709 – for the juvenile delinquency scheme. (See Stats.2018, c. 991 (A.B. 1214), § 2, eff. Jan. 1, 2019.)

While the competency standard articulated in Welfare and Institutions Code section 709 bears important similarities to the standard applicable in the adult criminal context, there are critical differences. Most notably, proceedings must be suspended even if the basis for a minor’s incompetency is not a mental illness. The relevant statutory provision reads:

A minor is incompetent for purposes of this section if the minor lacks sufficient present ability to consult with counsel and assist in preparing the minor’s 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 them. *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.*

(Welf. & Inst. Code, § 709, subd. (a)(2), emphasis added.)

The statute sets forth in detail the procedures for appointment of experts and a hearing on the mental competence question. (Welf. & Inst. Code, § 709, subds. (b) & (c).) As with adults, “It shall be presumed that the minor is mentally competent, unless it is proven by a preponderance of the evidence that the minor is mentally incompetent.” (Welf. & Inst. Code, § 709, subd. (c).) In construing the prior version of Welfare and Institutions Code section 709, the California Supreme Court upheld this presumption and allocation of the burden of proof. (See *In re R.V.*, *supra*, 61 Cal.4th at pp. 188-198.) *In re R.V.* also concluded that an appellate court should apply the substantial evidence standard when reviewing a challenge to the sufficiency of the evidence supporting the juvenile court’s competency determination. (*Id.* at pp. 198-203.)

For a minor facing only misdemeanor charges, if he or she is found incompetent, the wardship petition must be dismissed. (Welf. & Inst. Code, § 709, subd. (f).) For a minor facing felony charges, if he or she is found incompetent, secure confinement aimed at restoring competency may last no more than six months, unless the minor is charged with an offense included in Welfare and Institutions Code section 707, subdivision (b), in which case the minor may be confined in a secure facility for up to 18 months pending

restoration of competency. (Welf. & Inst. Code, § 709, subds. (h)(5)(A) & (h)(5)(c).)

Individuals Facing Civil Commitment Proceedings Do Not Have a Due Process Right to Be Tried Only if Competent

In *Moore v. Superior Court* (2010) 50 Cal.4th 802, 808, the California Supreme Court held that “due process does not prevent the trial and commitment of [sexually violent predators] while mentally incompetent.”

In *People v. Angeletakis* (1992) 5 Cal.App.4th 963, 970, Division Three of the Fourth District Court of Appeal similarly concluded “due process does not include the right to be mentally competent during a [not guilty by reason of insanity] commitment extension hearing.” The Supreme Court suggested, without expressly holding, that *People v. Angeletakis* may have been correctly decided in *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 828-829.