

SUPERIOR COURT, SANTA CLARA COUNTY, CALIFORNIA

**Juvenile Justice Court**

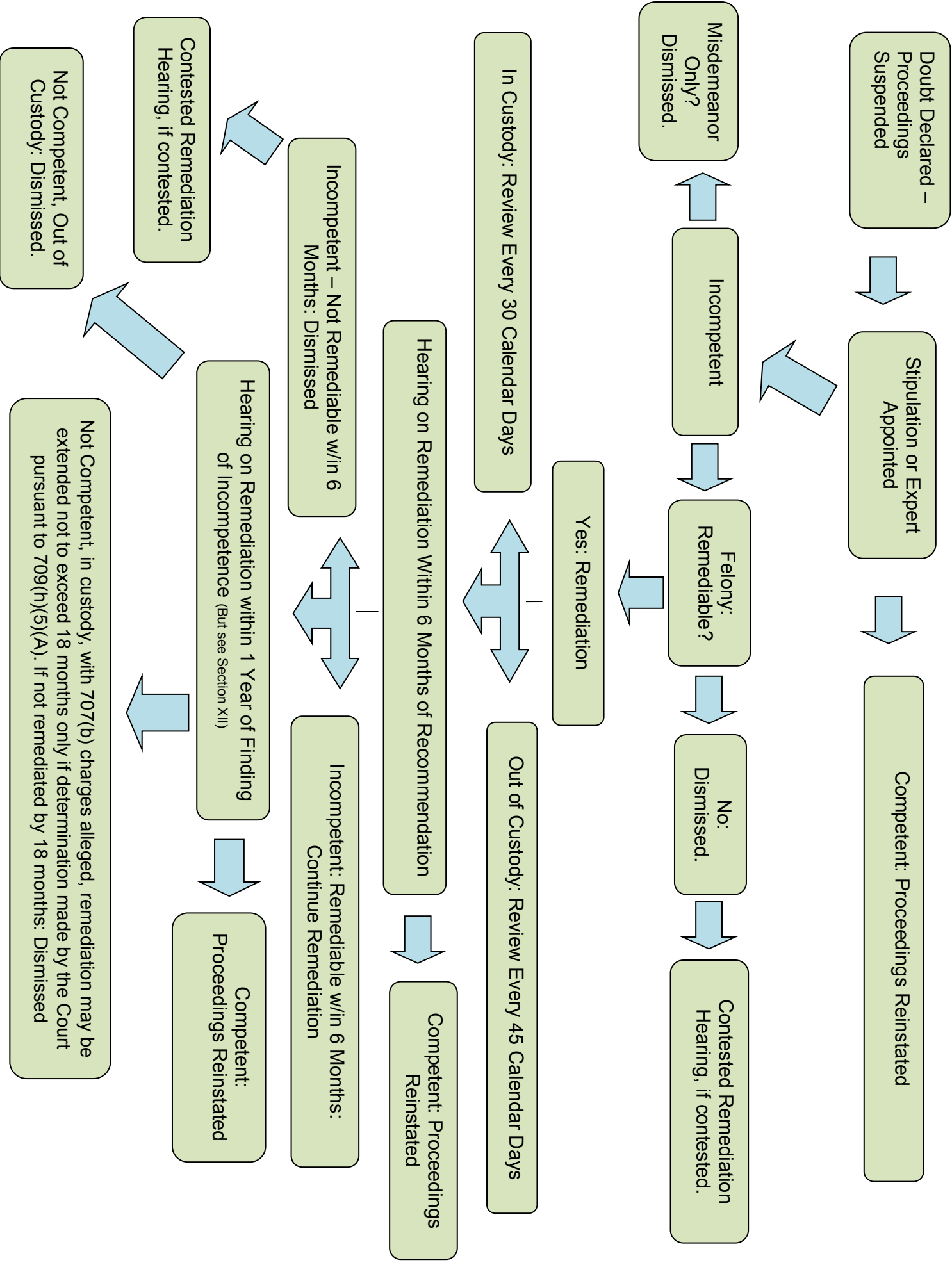
# **JUVENILE COMPETENCY PROTOCOL**

Effective June 15, 2023

\*This protocol supersedes all prior protocols. This protocol implements WIC §709 as amended by AB 1214 for the Santa Clara County Juvenile Justice Court.

## COMPETENCY PROCESS OVERVIEW

1. Doubt declared by court or defense counsel
2. Court finds substantial evidence of doubt or proceedings reinstated
3. Competency evaluator appointed
4. Competency readiness
  - a. 30 calendar days after doubt declared if minor detained
  - b. 45 calendar days after doubt if minor out of custody
  - c. Parties stipulate to evaluator's findings or set formal hearing
5. Competency hearing
  - a. Presumption of competence
  - b. Minor has burden of proving incompetence by preponderance of the evidence
  - c. If minor is under 14 years of age at the time of the alleged offense, court must determine capacity (PC 26) prior to competency
  - d. Petition alleges only misdemeanors:
    - i. Minor competent – proceedings reinstated
    - ii. Minor not competent – case dismissed
  - e. Petition contains felony charges:
    - i. Minor competent – proceedings reinstated
    - ii. Minor not competent - set for remediation planning
6. Remediation planning
  - a. Evaluator provides remediation plan WIC 709(b)(3)  
Evaluator shall make recommendations regarding remediation services; behavioral health to implement
  - b. Court sets remediation review and remediation hearing
  - c. Services shall be delivered in least restrictive environment consistent with public safety; court must consider appropriate alternatives to juvenile hall
7. Remediation reviews
  - a. Earliest possible date, but at least:
    - i. Every 30 calendar days if minor is in custody
    - ii. Every 45 calendar days if minor is out of custody
  - b. Prior to remediation hearing, order new competency evaluation
8. Remediation hearing
  - a. 6 months after finding of incompetence
  - b. Burden on party contesting evaluator's findings (preponderance of the evidence)
  - c. Minor competent – proceedings reinstated
  - d. Minor not competent – can minor attain competence within 6 months
    - i. If no, case dismissed
    - ii. If yes, set for remediation reviews (see section 7) and 12-month remediation hearing
9. 12-month remediation hearing
  - a. Burden on party contesting evaluator's findings (preponderance of the evidence)
  - b. Minor competent – proceedings reinstated
  - c. Minor not competent -
    - i. If no, case dismissed
    - ii. If yes, set for remediation reviews (see section 7) and 18-month hearing
10. 18-month hearing (see WIC 709(h)(5)(c)) – See Section XIV (below).



## **I. Introduction**

- A.** This protocol shall apply when it appears that there is a doubt as to a minor's competency to stand trial or to participate in Juvenile Justice proceedings. The protocol is designed to provide an overview of the following: procedures for determining a minor's competency; the evaluation process; the competency hearing process; and the remediation process.
- B.** This protocol is intended to supplement the provisions of Welfare & Institutions Code (WIC) §709, CA Rule of Court 5.645, as well as relevant case law. If a conflict arises between this protocol and statutory or case law, the law controls.

## **II. Consideration of Informal Resolution**

- A.** Formal competency proceedings in some cases may be contrary either to the goals of protecting public safety or rehabilitating the minor. Where substantial evidence exists that a minor may be incompetent to stand trial, the parties may consider resolving the matter without initiating formal competency proceedings.
- B.** The court may consider dismissal of the action pursuant to WIC §782 in cases where the court believes the voluntary participation of the minor and family in Community Based Organizations (CBOs) serves the needs of the minor and protects public safety, and where the court believes the minor is unlikely to attain competence in the foreseeable future.

## **III. Legal Standard for Juvenile Competence**

- A.** A minor is incompetent to participate in Juvenile Justice proceedings 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." WIC §709(a)(2); *Dusky v. United States* (1960) 362 US 402.
- B.** 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. WIC §709(a)(2).

#### **IV. Initiation of Competency Proceedings**

##### **A. Expression of Doubt**

During the pendency of any juvenile proceeding, counsel for the minor or the court may express a doubt as to the minor's competency. WIC §709(a)(3).

Prior to commencing competency proceedings, the court must first find "substantial evidence" that "raises a doubt as to the minor's competency." WIC §709(a)(3); CA Rule of Court 5.645(a)(1). The court should conduct an initial inquiry to determine if substantial evidence exists to suspend the underlying juvenile proceedings. The court may receive information from any source. Evidence is substantial if it raises a reasonable doubt concerning the minor's ability to understand the nature of the juvenile proceedings or to assist in the defense. *People v. Rogers* (2006) 39 Cal.4th 826, 847; *People v. Hayes* (1999) 21 Cal.4th 1211, 1281-1282.

The court may allow defense counsel to present their opinion regarding the minor's competence *in camera* if the court finds there is reason to believe that attorney-client privileged information, or otherwise confidential information, would be inappropriately revealed in open court.

A retroactive determination is not required. The court must only determine the minor's current competency. WIC §709(a).

##### **B. Suspension of the Proceedings**

If the court finds substantial evidence raises a doubt as to the minor's competency, proceedings shall be suspended. WIC §709(a)(3); CA Rule of Court 5.645(a)(1).

During the period when proceedings are suspended, the court shall refer the minor to services designed to help the minor attain competency, unless the court finds that competency cannot be achieved within the foreseeable future. WIC §709(g)(1).

During the suspension of proceedings, the court may rule on motions that do not require the participation of the minor in their preparation. WIC § 709(e).

These motions include, but are not limited to:

- Motions to dismiss;
- Motions regarding a change in the placement of the minor;
- Detention hearings;
- Demurrers;
- Motions to join agencies in the Juvenile Justice Court

proceedings that may have failed to meet a legal obligation to provide services to the minor. WIC §727(b)(1).

### **C. Appointment of Evaluator**

Unless the parties stipulate to, or submit on the issue of, the minor's lack of competency, the court shall appoint an expert to evaluate the minor and determine whether the minor is incompetent as defined by WIC §709. CA Rule of Court 5.645(a)(2).

#### **1. Appointment Process**

Upon suspension of the proceedings, the court shall appoint an expert from the Juvenile Competency Panel to perform a juvenile competency evaluation. Evidence Code §730; WIC § 709(b)(1); CA Rule of Court 5.645(a)(2).

The Juvenile Competency Panel shall consist of experts in child and adolescent development with the necessary qualifications for appointment under Rule of Court 5.645(b), who have training in forensic evaluation of juveniles and are familiar with the competency standards and accepted criteria used in evaluating competence and in the remediation of incompetency.<sup>1</sup>

The reports of the Juvenile Competency Panel shall be reviewed periodically by court administration for quality assurance and data collection purposes only. The Juvenile Justice Court shall maintain a list of approved Juvenile Competency Panel evaluators.

Appointments will be made from the Juvenile Competency Panel on a rotating basis. Juvenile Competency Panel evaluators will be paid at the current rates adopted by the Santa Clara County Superior Court.

When the court orders a juvenile competency evaluation, the clerk shall contact the next available Juvenile Competency Panel evaluator in the rotation. The court may deviate from following the rotation upon a showing of good cause. The clerk shall contact the evaluator and confirm the evaluator accepts appointment. Upon confirmation, the clerk shall send the appointment letter to the evaluator, which includes the name and contact information of the assigned attorney for the youth. The evaluator is to contact the minor's attorney as mandated by law. Counsel for the minor shall send any relevant information, including special education

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<sup>1</sup> The Juvenile Competency Panel shall also comply with any rules promulgated by the Judicial Council under WIC §709(b)(4).

records and recent psychological testing reports, that they believe will be of assistance in making a juvenile competency determination. Minor's counsel shall make every attempt to obtain and provide any relevant documentation to the evaluator as quickly as possible. If the evaluator is unable to contact the attorney prior to interviewing the minor or preparation of the report, the evaluator is to note efforts made to consult with the attorney in the report.

## **2. Scope of Work**

The juvenile competency evaluator shall conduct the evaluation using tests that are designed to evaluate the minor's functional competency. The Juvenile Adjudicative Competence Interview ("JACI") may be used unless the evaluator believes it is inappropriate. If the evaluator determines that more extensive testing is required, the report shall state the reasons for additional testing and whether the evaluator is qualified to administer the additional tests.

## **3. Language Proficiency**

The evaluator must be proficient in the language preferred by the minor, or, if that is not feasible, the evaluator shall employ the services of a certified interpreter and use assessment tools that are linguistically and culturally appropriate for the minor. WIC § 709(b)(3); CA Rule of Court 5.645(b)(2)(F).

The order appointing the evaluator should specify whether the minor and/or the minor's parents require the services of an interpreter and, if so, in which language.

## **4. Separately Retained Experts**

Defense counsel or the district attorney may retain or seek appointment of their own qualified expert(s) to evaluate the minor and testify at the competency trial. WIC §709(b)(6). Such retained experts should meet the requirements of qualified experts set forth in this protocol.

A qualified expert retained or appointed by the district attorney may not perform a competency evaluation on a minor without an order from the Juvenile Court pursuant to Code of Civil Procedure §2016.010, et seq. WIC §709(b)(6).

If the minor desires to present testimony of a psychiatrist or psychologist of his or her own choosing, the court may not place conditions on the admission of the testimony, such as the minor's cooperation with the court-appointed psychologist. *People v. Mayes* (1988) 202 Cal.App.3d 908.

The expert's reports and qualifications must be disclosed to the opposing party within a reasonable time, but no later than 5 court days prior to the hearing. If disclosure is not made as required, the court may make any order necessary including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of the expert or consideration of the expert's report upon a showing of good cause. If, after disclosure of the report, the opposing party requests a continuance, the court shall grant a reasonable continuance.

If the Court and parties agree, the Court may rely on the report of a retained qualified expert to determine competence without appointing an additional expert for that purpose. (709(b)(1))

The court does not pay for separately retained defense or prosecution experts.

## **V. Method of Evaluation**

### **A. Standards of Practice and Ethical Issues**

As with all evaluations done for the court, competency evaluations should be consistent with best clinical and ethical practices.

### **B. Independent Experts**

The evaluators on the Juvenile Competency Panel are appointed by the judges as "at will" independent experts. The policies discussed herein describe the contents and processes involved in generating evaluations only. The opinion rendered in each evaluation is at the discretion of the individual psychologist.

### **C. Criteria for Competency Evaluations**

The juvenile competency evaluator shall:

1. Personally interview the minor;
  - a. If the minor is detained, the interview will take place at juvenile hall or the ranch. If the minor is not detained, the evaluator will schedule an appointment with the minor or the minor's parent or guardian. Absent extraordinary circumstances, the expert must attempt to interview the child face-to-face. If an in-person interview is not possible because the child refuses an interview, the expert must try to observe and make direct contact with the child to attempt to gain clinical observations that may

inform the expert's opinion regarding the child's competency. CA Rule of Court 5.645(c).

2. Review all material and conduct all interviews and testing as set forth in the Checklist for Juvenile Competency Evaluations attached hereto as Appendix 1.
  - a. Review all of the available records provided, including, but not limited to, medical, education, special education, probation, child welfare, mental health, regional center, and court records, and any other relevant information that is available;
3. Consult with the minor's counsel and any other person who has provided information to the court regarding the minor's lack of competency;
  - a. The consultation must include, but is not limited to, asking the child's counsel the following: (1) If the child's counsel raised the question of competency, why the child's counsel doubts that the child is competent; (2) What has the child's counsel observed regarding the child's behavior; and (3) a description of how the child interacts with the child's counsel. (CA Rule of Court 5.645(e)). Note: No waiver of the attorney-client privilege will be deemed to have occurred from the child's counsel report of the child's statements to the expert, and all such statements are subject to the protections in (g)(2) of this CA Rule of Court 5.645.
4. Gather a developmental history of the minor. If any information is unavailable to the expert, the expert shall note in the report the efforts to obtain that information;
  - a. This history must be documented in the report and must include the following:
    - 1) Whether there were complications or drug use during pregnancy that could have caused medical issues for the child;
    - 2) When the child achieved developmental milestones such as talking, walking, and reading;
    - 3) Psychosocial factors such as abuse, neglect, or drug exposure;
    - 4) Adverse childhood experiences, including early disruption in the parent-child relationship;

- 5) Mental health services received during childhood and adolescence;
  - 6) School performance, including an Individualized Education Plan, testing, achievement scores, and retention;
  - 7) Acculturation issues;
  - 8) Biological and neurological factors such as neurological deficits and head trauma; and
  - 9) Medical history including significant diagnoses, hospitalizations, or head trauma.
5. Administer age-appropriate testing specific to the issue of competency unless the facts of the particular case render testing unnecessary or inappropriate;
  6. Be proficient in the language preferred by the minor, or, if that is not feasible, the expert shall employ the services of a certified interpreter and use assessment tools that are linguistically and culturally appropriate for the minor;
  7. Shall opine in a written report whether the minor has the sufficient present ability to consult with the minor's counsel with a reasonable degree of rational understanding and whether the minor has a rational and factual understanding of the proceedings against them. The expert shall also state the basis for these conclusions;
    - a. The report must include the following:
      - 1) A statement identifying the court referring the case, the purpose of the evaluation, and the definition of competency in the state of California.
      - 2) A brief statement of the expert's training and previous experience as it relates to evaluating the competence of a child to stand trial.
      - 3) A statement of the procedure used by the expert, including:
        - (i) A list of all sources of information considered by the expert including those required by section 709(b)(3);
        - (ii) A list of all sources of information the expert tried or wanted to obtain but, for reasons described in the report, could not be obtained;
        - (iii) A detailed summary of the attempts made to meet the child face-to-face and a detailed account of any accommodations made to make direct contact with the child; and
        - (iv) All diagnostic and psychological tests administered, if any.
      - 4) A summary of the developmental history of the child as required by this rule.

- 5) A summary of the evaluation conducted by the expert on the child, including the current diagnosis or diagnoses that meet criteria under the most recent version of the Diagnostic and Statistical Manual of Mental Disorders, when applicable, and a summary of the child's mental or developmental status.
  - 6) A detailed analysis of the competence of the child to stand trial under section 709, including the child's ability or inability to understand the nature of the proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental or developmental impairment.
  - 7) An analysis of whether and how the child's mental or developmental status is related to any deficits in abilities related to competency.
  - 8) If the child has significant deficits in abilities related to competency, an opinion with explanation as to whether treatment is needed to restore or attain competency, the nature of that treatment, its availability, and whether restoration is likely to be accomplished within the statutory time limit.
    - (i) A recommendation, as appropriate, for a placement or type of placement, services, and treatment that would be most appropriate for the child to attain or restore competence. The recommendation must be guided by the principle of section 709 that services must be provided in the least restrictive environment consistent with public safety.
  - 9) If the expert is of the opinion that a referral to a psychiatrist is appropriate, the expert must inform the court of this opinion and recommend that a psychiatrist examine the child.
8. If the expert concludes that the minor lacks competency, the expert shall give their opinion on whether the minor is likely to attain competency in the foreseeable future, and, if so, make recommendations regarding the type of remediation services that would be effective in assisting the minor in attaining competency as described in D below.

#### **D. Inclusion of Remediation Plan**

If the evaluator concludes that the minor lacks competency, the evaluator shall give an opinion on whether the minor is likely to attain competence in the foreseeable future, and, if so, make recommendations regarding the type of remediation services that would be effective in assisting the minor attain competence. WIC §709(b)(4); CA Rule of Court 5.645(g)(1)(I), (J). The recommendations should address what specific aspects of the minor's functioning can realistically be remediated and the timeframe therefor.

The evaluator should provide a specific, detailed plan for remediation, including available resources, strategies, interventions, and timelines, and an estimation of the likelihood of success. A Supplemental Report or letter from the evaluator may be required to clarify any issues.

**VI. Receipt of Competency Evaluation**

The juvenile competency evaluator shall submit their report to the court and counsel at least 5 calendar days prior to the date set for the Juvenile Competency Readiness Hearing. If the minor is detained, the Juvenile Competency Readiness Hearing will be scheduled within 30 calendar days of the suspension of proceedings. If the minor is not detained, the hearing will be held within 45 days. WIC § 709(g)(1)

Evaluators should endeavor to complete the evaluation expeditiously to avoid continuances of the proceedings whenever possible and should communicate any anticipated delays to the Court and parties as soon as practicable.

**VII. Juvenile Competency Readiness Hearing**

At the Juvenile Competency Readiness Hearing, the court shall receive the juvenile competency evaluator's report. The parties may stipulate to the results of the competency evaluation, but the court must base its determination of competency, or lack thereof, on reliable evidence. If the parties do not stipulate on the issue of competency, the matter shall be set for a Juvenile Competency Hearing.

**VIII. Juvenile Competency Hearing (JCH)**

The question of the minor's competence shall be determined at an evidentiary hearing unless there is a stipulation or submission by the parties on the findings of the evaluator.

**A. Timing of JCH**

If the minor is in custody, the JCH should be set within 15 court days of the receipt of the competency evaluation, unless there is good cause to extend the time for a short period to accommodate the availability of expert witnesses or to allow for completion of additional evaluations. If the minor is out of custody, a JCH shall be set within thirty (30) calendar days of the receipt of the competency report.

*De facto* good cause exists for a reasonable continuance if an attorney needs further time to prepare for trial or to obtain a second opinion.

## **B. Judicial Officer**

The JCH need not be held before the same judge who declared a doubt as to the minor's competence to stand trial. *People v. Hill* (1967) 62 Cal.2d 105, 113, fn. 2; *People v. Lawley* (2002) 27 Cal.4th 102, 133-134.

## **C. Burden of Proof**

There is a rebuttable presumption that the minor is competent. WIC §709(c). The party asserting the minor's incompetence bears the burden of proof by a preponderance of the evidence. WIC §709; *In Re R.V.* (2015) 61 Cal.4th 181, 193; *Bryan E. v. Superior Court* (2014) 231 Cal.App.4th 385, 392.

## **D. Capacity**

For any minor under age 14 at the time of the alleged offense, prior to the determination of competency, the court shall determine whether the minor had the capacity to commit a crime pursuant to Penal Code §26. The district attorney bears the burden of rebutting the presumption that a minor under the age of 14 is presumed to be incapable of committing a crime by clear and convincing evidence. *In re Joseph H.* (2015) 237 Cal.App.4th 517, 538-540.

## **E. Trial Procedure**

1. Either counsel may offer an opening statement.
2. Defense counsel shall present evidence of the minor's incompetence.
3. District attorney shall present evidence of the minor's competence.
4. Each party may offer rebuttal testimony.
5. Defense counsel makes closing argument, followed by the district attorney.

## **F. Findings**

1. If the minor is found competent, the court shall reinstate the Juvenile Justice proceedings.
2. If the minor is found incompetent and the petition contains only misdemeanor offenses, the court shall dismiss the petition. WIC §709(f).
3. If the minor is found to be incompetent and the petition includes felony offenses, proceedings shall remain suspended and the court shall set a Competency Planning Hearing within 15 calendar days for detained minors or within 30 calendar days for minors who are out of custody.

## **G. Re-Hearings**

When a competency hearing has been held, the court is not required to hold a second competency hearing unless it is presented with a substantial change of circumstances, or with new evidence, casting a serious doubt on the validity of the initial competency finding. *People v. Lawley* (2002) 27 Cal.4th 102,136; *People v. Kaplan* (2007) 149 Cal.App.4th 372,383-387. The court may take its personal observations of the minor into account in determining whether there has been a substantial change in the minor's mental state. *People v. Jones* (1991) 53 Cal.3d 1115, 1153.

## **IX. Competency Planning Hearing**

At the Competency Planning Hearing, the court shall order appropriate remediation services for the minor. The court shall set a Competency Remediation Hearing within six (6) months of the referral for remediation services. The court shall review the minor's progress every 30 calendar days if the minor is detained and every 45 calendar days if the minor is out of custody. The need for detention shall remain at issue throughout the remediation process and alternatives to detention shall be explored. The first period of remediation should not exceed six (6) months from the finding of incompetence. If further remediation services are ordered after the initial six (6) months, the total period of remediation shall not exceed one (1) year from the finding of incompetence. WIC § 709(h)(3).

The assigned probation officer will be responsible for coordinating appropriate treatment services with behavioral health and submitting reports to the court.

## **X. Placement of Minor**

Services must be provided in the least restrictive environment consistent with public safety, as determined by the court. A finding of incompetency alone shall not be the basis for secure confinement. WIC §709(g)(1). Many minors can successfully participate in remediation services while living in their homes, attending their regular schools, and participating in their normal activities.

The court has the discretion to place a minor in an out of home placement or in custody. The court should take into consideration the following factors:

- Where the minor will have the best chance of obtaining competence
- Needs of the minor
- Seriousness of the underlying offense(s)
- Public and/or victim(s) safety
- Minor's past performance while out of custody

- Whether the minor will actively engage in remediation services while out of custody.

## **XI. Remediation Review Hearings**

The court shall review remediation services at least every 30 calendar days for in-custody minors and every 45 calendar days for minors not in custody. WIC §709(g).

The assigned probation officer and behavioral health shall submit written reports for the review hearings.

The assigned probation officer shall gather collateral information (such as school, mental health treatment and electronic monitoring updates), and write and distribute reports in advance of each Remediation Review Hearing. If the minor is in custody, the probation officer's report shall include information about the minor's behavior and well-being in custody.

Behavioral health shall provide a report as it relates to participation and progress in the competency remediation program for each Remediation Review Hearing. The report should indicate the degree of progress (no progress, some progress, or ready to be re-evaluated) before each court date. The report shall be provided 2 court days prior to each Remediation Review Hearing. The assigned probation officer shall notify behavioral health of court dates.

If the minor does not participate in remediation services, behavioral health shall immediately notify the assigned probation officer. Probation shall request that the court calendar the case for the next available court date to reevaluate the most effective means of providing remediation services.

Behavioral health shall also provide the court with suitable alternatives for the continued delivery of remediation services upon release from custody. The court must consider appropriate alternatives to juvenile hall confinement, including but not limited to developmental centers, placement through regional centers, short-term residential therapeutic programs, crisis residential programs, civil commitment, foster care, relative placement, other nonsecure placement, or other residential treatment programs. WIC §709(g)(1).

At any time during the remediation process, if behavioral health believes the minor's competence has been obtained or remediated this information shall be included in their progress report to the court. The assigned probation officer shall recommend a re-evaluation of competency.

If the court finds that the minor has attained competence, the Juvenile Justice proceedings shall be reinstated, and the case shall resume at the stage at which it was suspended.

## **XII. Six (6) Month Remediation Hearing**

Within six months of the finding of incompetence, the court shall hold an evidentiary hearing on whether the minor has been remediated or can be remediated in the foreseeable future unless the parties stipulate, or agree, to the recommendation of behavioral health. WIC §709(h)(1).

If the minor disputes the opinion that the minor has attained competency, the minor has the burden of proving that they remain incompetent. The burden of proof is by a preponderance of the evidence.

If the district attorney disputes the recommendation that the minor is unable to be remediated, the district attorney has the burden of proving, by a preponderance of the evidence, that the minor is remediable.

At the 6-Month Remediation Hearing, the court has the following options:

1. Find that the minor has been remediated and reinstate the proceedings.
2. Find that the minor has not yet been remediated but is likely to be remediated within six months. If that is the case, the court shall order the minor to return to the remediation program. However, the total remediation period shall not exceed one year from the finding of incompetence.

Secure confinement may be extended to a maximum of 18-months if the petition contains a WIC §707(b) offense, the Court makes the requisite findings, on the record, pursuant to WIC § 709(h)(5)(A), (B) (C) and confinement “is not solely to find post release services rather than to restore the juvenile to competency” *J.J. v. Superior Court* (2021) 65 Cal.App.5th 222, 242 (See XIV below)

3. If the court finds that the minor will not achieve competency in the foreseeable future, the court shall dismiss the petition.

## **XIII. Twelve (12) Month Remediation Hearing**

If remediation services are continued past the 6-Month Remediation Hearing, the court shall set a 12-Month Remediation Hearing and

continue to hold Remediation Review Hearings as discussed in Section XI. If the court finds that the minor has not been remediated at the 12-Month Remediation Hearing, the petition shall be dismissed. WIC § 709(h)(3).

Although WIC 709 establishes a maximum period of one year of remediation, the juvenile court's jurisdiction continues for a reasonable period afterwards for the court to resolve any dispute still existing at the end of that period over whether the minor has attained competency.

#### **XIV. Secure Confinement During Competency Proceedings**

The court shall not continue a minor's detention beyond six (6) months from the finding of incompetence unless it makes findings, on the record, that it is in the best interests of the minor and public safety that the minor remains detained. In making this determination, the court shall consider the following factors under WIC § 709(h)(5)(A):

- i. Where the minor will have the best chance of obtaining competence;
- ii. Whether the placement is the least restrictive setting appropriate for the minor;
- iii. Whether alternatives to secure confinement have been identified and pursued and why alternatives are not available or appropriate; and
- iv. Whether placement is necessary for the safety of the minor or others

The Court may order secure confinement of a minor for up to an additional year, not to exceed 18 months from the finding of incompetency, only if the following apply:

1. The petition contains a WIC § 707(b) offense;
2. The minor is in secure confinement;
3. The court, having considered the factors under WIC § 709(h)(5)(A) listed below, finds that it is in the best interests of the minor and public safety for the minor to remain in secure confinement:
  - a. Where the minor will have the best chance of obtaining competence;
  - b. Whether the placement is the least restrictive setting appropriate for the minor;
  - c. Whether alternatives to secure confinement have been identified and pursued and why alternatives are not available or appropriate; and
  - d. Whether placement is necessary for the safety of the minor or

others.

4. The court states its reasons on the record as to why the court is keeping the youth in secure confinement for 18 months. See WIC § 709(h)(5)(A), (B).
5. The minor cannot be kept in secure confinement solely to find post-release services rather than to restore the juvenile to competency. *J.J. v. Superior Court* (2021) 65 Cal.App.5th 222, 242.

#### **XV. Developmentally Disabled Minors**

If the juvenile competency evaluator believes the minor is developmentally disabled and the minor is not a San Andreas Regional Center (SARC) consumer, the court shall appoint SARC to evaluate the minor. SARC shall determine whether the minor is eligible for SARC services and shall provide the court with a written report informing the court of its determination. The court's appointment of SARC for determination of eligibility for services shall not delay the court's competency determination.

The attorney for the minor shall request that the court include a referral to SARC on the minute order. The assigned probation officer shall serve the court order forthwith on SARC and file a proof of service with the court clerk. The minor's attorney may provide SARC with any information from the minor's file that is necessary for the purposes of obtaining or continuing services through SARC.<sup>2</sup>

For purposes of a SARC referral, developmental disability shall be defined based on the description contained in WIC §4512(a).

An evaluator's opinion that a minor is developmentally disabled does not supersede an independent determination by SARC as to the minor's eligibility for services under the Lanterman-Petris-Short Act (LPS Act). To qualify for these services, SARC must examine and accept the minor.

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

Statements made to the appointed expert during the minor's competency evaluation and statements made by the minor to mental health professionals during remediation proceedings, and any fruits of these statements, shall not be used in any other hearing against the minor in either juvenile or adult court. WIC 709(b)(5).

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<sup>2</sup> See [Santa Clara County Juvenile Standing Order](#) dated 7/29/09 signed by Judge Tondreau.

**APPENDIX 1 – CHECKLIST FOR JUVENILE COMPETENCY  
EVALUATIONS**

The Juvenile Justice Court requests juvenile competency evaluators use this checklist when evaluating a minor for competence under Welfare and Institutions Code 709 and California Rule of Court 5.645.

**1. Personally interview the minor**

If the minor is detained, the interview will take place at juvenile hall or the ranch. If the minor is not detained, the evaluator will schedule an appointment with the minor or the minor's parent or guardian. Absent extraordinary circumstances, the expert must attempt to interview the child face-to-face. If an in-person interview is not possible because the child refuses an interview, the expert must try to observe and make direct contact with the child to attempt to gain clinical observations that may inform the expert's opinion regarding the child's competency. WIC 709(b)(3), CRC 5.645(c).

**2. Review all material and conduct all interviews and testing.**

Review all of the available records provided, including, but not limited to, medical, education, special education, probation, child welfare, mental health, regional center, and court records, and any other relevant information that is available. WIC 709(b)(3), CRC 5.645(d).

**3. Consult with the minor's counsel, and other persons having information.**

Consult with the minor's counsel and any other person, including probation officer, who has provided information to the court regarding the minor's lack of competency. WIC 709(b)(3).

The consultation with minor's counsel must include, but is not limited to:

- (a) If the child's counsel raised the question of competency, why the child's counsel doubts that the child is competent;
- (b) What has the child's counsel observed regarding the child's behavior; and
- (c) a description of how the child interacts with the child's counsel. WIC 709(b)(3), CRC 5.645(e).

Note: No waiver of the attorney-client privilege will be deemed to have occurred from the child's counsel report of the child's statements to the expert, and all such statements are subject to the protections in (g)(2) of this CA Rule of Court 5.645. WIC 709(b)(5), CRC 5.645(e)(2).

**4. Gather a developmental history of the minor.**

If any information is unavailable to the expert, the expert shall note in the report the efforts to obtain that information.

This history must be documented in the report and must include the following:

- (a) Whether there were complications or drug use during pregnancy that could have caused medical issues for the child;
- (b) When the child achieved developmental milestones such as talking, walking, and reading;
- (c) Psychosocial factors such as abuse, neglect, or drug exposure;
- (d) Adverse childhood experiences, including early disruption in the parent-child relationship;
- (e) Mental health services received during childhood and adolescence;
- (f) School performance, including an Individualized Education Plan, testing, achievement scores, and retention;
- (g) Acculturation issues;
- (h) Biological and neurological factors such as neurological deficits and head trauma; and
- (i) Medical history including significant diagnoses, hospitalizations, or head trauma. WIC 709(b)(3), CRC 5.645(f).

**5. Administer age-appropriate testing.**

Administer age-appropriate testing specific to the issue of competency unless the facts of the particular case render testing unnecessary or inappropriate. WIC 709(b)(3).

**6. Be proficient in the language preferred by the minor.**

Be proficient in the language preferred by the minor. or, if that is not feasible, the expert shall employ the services of a certified interpreter and use assessment tools that are linguistically and culturally appropriate for the minor. WIC 709(b)(3), CRC 5.645(b)(2) (F).

**7. Prepare a written report.**

Opine in a written report whether the minor has the sufficient present ability to consult

with the minor's counsel with a reasonable degree of rational understanding and whether the minor has a rational and factual understanding of the proceedings against them. WIC 709(b)(3).

The expert shall state the basis for these conclusions. WIC 709(b)(3).

The written report must include the following per CRC 5.645(g):

1. A statement identifying the court referring the case, the purpose of the evaluation, and the definition of competency in the state of California;
2. A brief statement of the expert's training and previous experience as it relates to evaluating the competence of a child to stand trial;
3. A statement of the procedure used by the expert, including: (i) A list of all sources of information considered by the expert including those required by section 709(b)(3); (ii) A list of all sources of information the expert tried or wanted to obtain but, for reasons described in the report, could not be obtained; (iii) A detailed summary of the attempts made to meet the child face-to-face and a detailed account of any accommodations made to make direct contact with the child; and (iv) All diagnostic and psychological tests administered, if any;
4. A summary of the developmental history of the child as required by this rule;
5. A summary of the evaluation conducted by the expert on the child, including the current diagnosis or diagnoses that meet criteria under the most recent version of the Diagnostic and Statistical Manual of Mental Disorders, when applicable, and a summary of the child's mental or developmental status;
6. A detailed analysis of the competence of the child to stand trial under section 709, including the child's ability or inability to understand the nature of the proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental or developmental impairment;
7. An analysis of whether and how the child's mental or developmental status is related to any deficits in abilities related to competency;
8. If the child has significant deficits in abilities related to competency, an opinion with explanation as to whether treatment is needed to restore or attain competency, the nature of that treatment, its availability, and whether restoration is likely to be accomplished within the statutory time limit;
9. A recommendation, as appropriate, for a placement or type of placement, services, and treatment that would be most appropriate for the child to attain or restore competence. The recommendation must be guided by the principle of section 709 that services must be provided in the least restrictive environment

consistent with public safety; and

10. If the expert is of the opinion that a referral to a psychiatrist is appropriate, the expert must inform the court of this opinion and recommend that a psychiatrist examine the child. CRC 5.645(g).

**8. Recommend Remediation Services**

If the expert concludes that the minor lacks competency, the expert shall give their opinion on whether the minor is likely to attain competency in the foreseeable future, and, if so, make recommendations regarding the type of remediation services that would be effective in assisting the minor in attaining competency. WIC 709(b)(3); CRC 5.645(g)(1)(I).